Gun Owners of Vermont Written Testimony – H.230

Good morning, ladies and gentlemen of the House Judiciary Committee, my name is Eric Davis, and I am the President of Gun Owners of Vermont, an all-volunteer, non-profit advocacy group dedicated to the preservation of the right to keep and bear arms. I would like to thank the committee for the opportunity to speak today on Bill H.230

We've been eagerly awaiting our chance to weigh in on this subject, unfortunately we didn't get the opportunity when this bill was still in its place of origin - the Committee on Healthcare. We were originally hoping that it would receive a bit more discussion in regard to being a practical vehicle to reduce suicides as we have a few thoughts of our own on the matter. Unfortunately, judging by the speed with which it was introduced and passed out of committee with little deliberation, it appears that the decision had already been made before we even saw the text of the bill. I'm hoping that is not the case here today and that this committee will give the process the time and respect it deserves given the implications of the proposals in question.

Since we've been informed that this committee will be considering only the constitutionality of the legislation and with a renewed and narrower focus in light of the new standards of scrutiny imposed by the recent Supreme Court decision *NYSRPA v. Bruen,* we figured it best to start off with a brief overview of that standard.

Pre *Bruen,* it was common practice for the courts to apply what was known as an interest balancing test in deciding the constitutionality of firearms regulations. Under this method, the courts would consider the importance of the state's interest in a challenged regulation against the degree to which the challenged regulation burdened the right to keep and bear arms. *Bruen* changed all this.

When the Supreme Court handed down its decision last year, they announced within, an entirely new two-step test "rooted in the Second Amendment's text as informed by history." At step one, *Bruen* instructs the lower courts, when examining firearm regulation, to ask whether "the Second Amendment's plain text covers an individual's conduct." If it does, "The Constitution presumptively protects that conduct." At that point, the court must turn to the second step, where the burden falls on the government to "justify its regulation by demonstrating that [the challenged regulation] is consistent with the Nation's historical tradition of firearm regulation" i.e. the tradition in existence "when the bill of rights was adopted in 1791." If the government fails to carry this burden, then the challenged regulation is unconstitutional.

To evaluate the historical context of the right to keep and bear arms and what exactly was meant by that when the founders of this country wrote our highest laws we must first go back to the beginning before the American Revolution to gain a proper perspective.

I have attached a separate list of 28 different quotes (there are many, many more but I have included what we believe to be the most relevant – the "best of the best" if you will) from major players in the American Revolution, dating to the late 18th century – the time period during which the constitution was conceived and ratified. For the sake of brevity I will forgo reciting them all here in this testimony save a select few.

In his "Thoughts on Defensive War" (1775) Thomas Paine sought to persuade religious pacifists to arm themselves and join the citizen's militia in the struggle for independence against the British empire. He employed the following reasoning:

"The supposed quietude of a good man allures the ruffian; while on the other hand, arms like laws discourage and keep the invader and the plunderer in awe, and preserve order in the world as well as property. The balance of power is the scale of peace."

Paine, who was one of the premier thinkers of this era, and whose works might have directly contributed more to the American plight for independence than any other person of that time, illustrates what might be the most important consequence of an armed populace and that is *deterrence.* Arms in direct possession of the common man has long been the greatest deterrent of aggression from bad actors and tyrants alike, and the founders understood this.

Many states at the time, including Vermont, adopted stronger wording in their own constitutions due to fears that the proposed wording of the Second Amendment was too vague and lacked specificity, hence our own Article 16: *"the people have a right to bear arms for the defence of themselves and the State."*

Massachusetts, which has ironically seen an unfortunate aggregation of bad gun control laws over the last few decades, provided in their declaration of rights, circa 1780, that *"the people have a right to keep and bear arms for the common defence."* The phrase "common defence" precluded any construction that arms could be used only for individual self-defense, but not for common defense against government despotism. Both private and general defense had already been recognized in Article 1 of the declaration, which included among the unalienable rights those of *"defending lives and liberties:…. and protecting property…."* Even so, because Massachusetts had suffered the impact of British disarmament more than the other colonies, some objected to the clause as too narrow.

The town of Williamsburg proposed the following alteration:

> *"Upon reading the 17th Article in the Bill of Rights. Voted that these words their Own be inserted which makes it read thus; that the people have a right to keep and bear Arms for their own and common defence.*
>
> *Our reasons gentlemen for making this Addition Are these. 1st that we esteem it an essential privilege to keep and bear Arms in Our houses for Our Own Defense and while we Continue [to be] honest and lawful subjects of Government we Ought Never be deprived of them.*
>
> *Reas. 2 That the legislature in some future period may Confine all the fire Arms to some publick Magazine and thereby deprive the people of the benefit of the use of them."*

We intentionally include this piece of historical text for consideration by the committee due to the fact that it specifically outlines the concerns of people at the time that a future government might attempt to pass laws requiring citizens to lock up their guns such as the one being considered here today.

In the years leading up to the ratification of the constitution, these people wrote extensively about their fear that in the future, interpretation of the right to keep and bear arms might be metastasized into some watered-down and functionally neutered half-right that allows no practical application for its original intended purpose: to protect the individual citizen and the collective body of people from ALL forms of malevolence and aggression.

There are many other historical examples which support the idea that to keep and bear arms was considered an inalienable right at the time of our country's founding, indeed they are far too many to list here. But what is clear is that there was near unanimous consensus up until the 20th century that government was not allowed to interfere with this right.

Nowhere can we find any historical text which indicates that they might have given even a hint of legitimacy to the idea that free people must keep their arms locked, rendered inoperable, or separate from ammunition whereas they would be utterly useless when it came time to use them in defense of oneself and country. Nor can we find text that supports the practice of removing firearms from individuals upon complaint of a family or household member and without due process of law. Nor can we find any indication that anyone of the era would have supported an arbitrary "waiting period" of any length before acquiring arms for any purpose. It would seem unreasonable to speculate that this sort of

idea might even be up for discussion among the founders of a country who wrote extensively that every able-bodied man should be armed and ready to defend life and liberty at all times.

During the period of history extending from the ratification of the Constitution up to the Civil War, the act of keeping and bearing arms was treated as a virtually unquestioned right of every American citizen. The Second Amendment recognized that this right was not an issue for partisan politics and the courts consistently upheld this. The only exception to this rule appeared in the context of slavery. Specifically in order to disarm slaves and black freedmen alike, certain courts originated the view that the Second Amendment was limited to citizens rather than to all people and that it somehow did not apply to the states.

Many modern-day African Americans and people of color rightly hold a great amount of disdain for the historical figure of Chief Justice Roger Taney who issued the majority opinion in the infamous Supreme Court case *Dred Scott.* I certainly do not blame them; I would harbor great feelings of resentment myself had a court arbitrarily decided I was not a person. The *Dred Scott* decision is one of the greatest stains on the history of our country (so much so that we fought an entire Civil War over it) but I bring it up here because one of the most important parts of it is also the most overlooked.

In the 1857 decision, just 52 years after *Marbury v Madison* declared that "all laws repugnant to the Constitution are void", Justice Taney inadvertently gave Blacks and all other Americans their due when he argued that if members of the African race were considered citizens, *"…it would give them the full liberty of speech…; [the right] to hold public meetings on political affairs, and to keep and carry weapons wherever they want."*

This shows that even though people of that time period still held the repugnant view that it was acceptable to restrict a person's rights based on skin color, the right to keep and bear arms -as a general issue- was not something that was up for discussion. Years later in the landmark Supreme Court decision *DC v Heller* Justice Scalia noted extensively in his majority opinion the historical examples of how antislavery advocates routinely invoked the right to bear arms for self-defense and how early gun control laws were used primarily to disarm people of color in the post-Civil War south.

Setting the racist roots of gun control aside and fast-forwarding into modern times we began to see a change in the way the courts evaluated the issue, specifically by adopting the aforementioned "interest balancing tests" when considering the constitutionality of firearms restrictions. Though we are unsure of the origins of this practice, it seems that the *Heller* decision dealt the first major blow to this sort of reasoning in a case which specifically ruled that laws denying access to firearms within one's home are unconstitutional.

In his opinion, Scalia writes:

> *"We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is* really worth *insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad…*
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> *…In sum, we hold that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense."*

If this decision weren't enough to persuade the committee members today that this bill does not pass muster, we might move along to *Bruen* which states:

> "*The constitutional right to bear arms in public for self-defense is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.' McDonald, 561 U. S., at 780 (plurality opinion). We know of no other constitutional right that an individual may exercise only after demonstrating to government officers some special need. That is not how the First Amendment works when it comes to unpopular speech or the free exercise of religion. It is not how the Sixth Amendment works when it comes to a defendant's right to confront the witnesses against him. And it is not how the Second Amendment works when it comes to public carry for self-defense..."*

Now, while this section of the decision deals specifically with a law that differs from the proposals in question here today, we would draw the committee's attention to the wording that "we know of no other constitutional right that an individual may exercise only after [fulfilling an arbitrary obligation designed to deprive them of that right]"

Considering this wording, combined with the standard of scrutiny and the historical context in which the right to keep and bear arms is properly understood, we can't imagine how any court acting under these precedents and guidelines could possibly uphold things like waiting periods, ERPOs or mandatory lock up requirements as constitutional. Advancing these policies that would almost certainly be considered "repugnant to the constitution" by our highest court, would be a violation of the legislative oath of office, regardless of the stated purpose of the bill.

This is not just Gun Owners of Vermont, The Vermont Federation of Sportsmen's Clubs, Vermont Traditions Coalition, The National Rifle Association, or any other gun rights lobbying organizations saying this. It is the Supreme Court of The United States.

In closing, I would like to deviate slightly from our discussion on constitutionality and talk briefly about pragmatism. It should be known that just because we emphatically oppose restrictions on firearms as a means of reducing things like murder and suicide, that does not mean that we are opposed to ALL attempts by government at reducing things like murder and suicide.

We value the right to keep and bear arms as a natural corollary of the human right of self-defense, and we do so because we value life as precious and sacrosanct, and we believe that the duty of preserving that life is first our own and not something to be farmed out to the state.

We would humbly submit that the rise in things like violence and suicide is a biproduct of the irresponsibility and nihilism that has been slowly poisoning our society for years. The attitude that we must turn to government, rather than ourselves to solve these issues exacerbates the problem.

The proper role of government is to preserve rights and rights are correctly understood in the negative connotation, i.e., one has rights AGAINST LAW. When government takes it upon themselves to be a babysitter, and solve our problems for us, it perpetuates an entitled mindset among citizens. When government advances legislation punishing the many for the acts of the few, it fosters a culture of irresponsibility, where we hold everyone but ourselves accountable for everything bad that happens.

Education and voluntary personal change are the path forward, not heavy-handed legislation. Lawmakers can help assist us in a return to civility by increasing access to and encouraging things like mental health treatment and actual gun safety training (not the kind of gun safety implied in the term that has been highjacked by those who want to ban everything and spread harmful propaganda – but actual gun safety training where one learns the proper way to safely handle a firearm.)

We would happily support voluntary and non-coercive programs to further the goal safety and harm reduction in our communities and we look forward to the day when we get to work with our legislators in that capacity.

As the saying goes: "real change comes from within."

Thank you for the opportunity to share our thoughts with you today and we look forward to further discussions.

In Liberty,
Eric Davis
President, Gun Owners of Vermont.