Sportsmen's Heritage and Recreational Enhancement (SHARE) Act of 2017

Testimony of Stephen P. Halbrook, Ph.D.[1]
Attorney at Law, Fairfax, VA

Hearing on H.R. 3668 (Rep. Jeff Duncan)
Subcommittee on Federal Lands
Committee on Natural Resources
U.S. House of Representatives

September 12, 2017

Introduction

I appear here today as an attorney who has done extensive litigation in the federal courts on three of the much-needed reforms of H.R. 3668, the SHARE Act: (1) federal preemption for the interstate transport of firearms to allow law-abiding persons to travel to and from places where they lawfully possess firearms; (2) hearing protection for firearm owners that would remove sound suppressors from the National Firearms Act while punishing criminal possession and misuse in the Gun Control Act; and (3) reclassification of firearms based on lawful purpose instead of a slippery "sporting" criteria made up by government agencies.

I have written extensively on Second Amendment issues, and represented a majority of the members of the U.S. Senate and House in the seminal Supreme Court case of *District of Columbia v. Heller*, 554 U.S. 570 (2008). The reforms that I will address will enhance protection of Second Amendment guarantees and will not adversely affect law enforcement interests.

Interstate Transport of Firearms

Let's start with Title XI of the bill, concerning the interstate transport of firearms (p. 46). It extends federal preemption by clarifying the right not to be arrested and allowing civil rights actions against states and localities that arrest travelers in entire disregard for existing federal law. The Firearm Owners' Protection Act of 1986 enacted 18 U.S.C. § 926A, which "entitles" a law-abiding person to transport an inaccessible, unloaded firearm between one place where lawful to another place where lawful, notwithstanding the law of the State or locality in between.

Section 926A was intended to preempt enforcement of the draconian laws of a handful of States against hapless travelers who were just passing through. New York, for instance, makes it a felony merely to possess a handgun, having a license is an affirmative defense, and non-

[1] Argued *Printz v. U.S.*, 521 U.S. 898 (1997), and other Supreme Court cases on the Gun Control Act. Author of *Firearms Law Deskbook*, *The Founders' Second Amendment*, *Securing Civil Rights*, and *Gun Control in the Third Reich*. Senior Fellow, The Independent Institute. Ph.D. Florida State University; J.D. Georgetown University Law Center. See www.stephenhalbrook.com.

residents are ineligible for a license. Despite the federal enactment, such arrests have continued to be made routinely.

The issue came to a head in *Torraco v. Port Authority of N.Y. & N.J.*, 615 F.3d 129 (2nd Cir. 2010), which I litigated. In compliance with § 926A, Attorney John Torraco transported a handgun from his home in New Jersey to LaGuardia Airport, intending to check it through to his Florida residence. Pursuant to TSA regulations, he declared the unloaded firearm for carriage in checked baggage. In almost all States, that would have been completely normal. But this was New York, where airlines are required to call the police when a person declares a firearm in checked baggage.

Officers rushed to the scene and told Mr. Torraco he would be under arrest unless he had a New York firearm license. When Torraco showed them a copy of § 926A and the TSA regulation, the police responded: "This is New York, federal law doesn't apply here." He was arrested and jailed. When he returned for court, the charge was dismissed based on § 926A.

Torraco filed a civil rights action for damages and to enjoin the Port Authority policy of routinely arresting persons who comply with federal law. The U.S. Court of Appeals for the Second Circuit refused to recognize any civil cause of action for violation of § 926A and upheld dismissal of the suit. Supposedly the police aren't equipped to tell if a traveler is in compliance with the laws of potentially fifty States. Yet almost no States make it a crime merely to possess and transport an inaccessible firearm. The court held that the police may make an arrest without any probable cause to believe that the person is *not* in compliance with § 926A. That turns the rule upside down.

A similar result occurred following a passenger arrest at Newark Airport. Gregg C. Revell sought to make a connecting flight at Newark Airport while traveling from Utah to Pennsylvania. His flight was cancelled, requiring him to stay in a hotel in New Jersey with his baggage, which included the firearm in locked baggage. When he declared his firearm in checked baggage for his rescheduled flight the next morning, he was handcuffed and then jailed for several days. The Third Circuit held that he was not entitled to civil relief because he supposedly had access to his firearm when he stayed at the hotel. *Revell v. Port Authority of New York, New Jersey*, 598 F.3d 128 (3rd Cir. 2010).

The travesty of justice occurring above has happened to countless travelers not only in the airport context, but also along the highways. Have a broken down auto and admit that you have a gun, and you're headed for jail in certain jurisdictions. This continues to take place on a daily basis. Title XI of the bill will rectify this affront to the right to travel and the Second Amendment by explicitly immunizing law-abiding travelers from arrest and recognizing a civil action for violation.

Hearing Protection for Gun Owners

Imagine a world in which motor vehicles, lawn mowers, and heavy equipment had no mufflers, or where it's a felony to have a sound suppressor for such equipment unless it is registered with the government. That's the situation that has existed with gun owners since

enactment of the National Firearms Act (NFA) in 1934. Title XV of the bill would correct that by removing firearm mufflers – aka "silencers," a misnomer because they only reduce noise – from the NFA and continuing to treat them as firearms subject to the extensive regulatory scheme in Title I of the Gun Control Act.

Firearm mufflers were invented in the early 20th century and were sold as a device to protect hearing, reduce recoil, and diminish disturbance to one's neighbors. The original NFA bill in 1934 would have included handguns and mufflers only for handguns, but not for rifles. During passage, handguns were removed from the bill and mufflers for all firearms were then added, without explanation. In the extensive House hearings, not one word was said about silencers being used in crime. I have analyzed this history at length in my article "Firearm Sound Moderators: Issues of Criminalization and the Second Amendment," 46:1 *Cumberland Law Review* 33 (2016).[2]

Other than in Hollywood's fantasy world, silencers have rarely been used in crime. The only comprehensive study, Paul A. Clark, "Criminal Use of Firearm Silencers," *Western Criminology Review* 53 (2007), concluded: "The data indicates that use of silenced firearms in crime is a rare occurrence, and is a minor problem."

The lack of criminal misuse of suppressors cannot be attributed to the NFA's threat of a ten-year sentence for an unregistered firearm. A criminal not dissuaded by a potential life sentence or the death penalty for murder would hardly be frightened by a conviction for an unregistered firearm.

That is why suppressors are freely available, even over the counter or by mail order, in many European countries. None other than the U.K. Home Office encourages use of silencers as follows:

> Sound moderators are often used for shooting game, deer, or vermin. . . . They are appropriate for reducing hearing damage to the shooter, or to reduce noise nuisance, for example, for deer control in urban parks, or close to residential properties, or to reduce recoil of the rifle. "Good reason" to possess a rifle for shooting game, vermin or deer should normally imply "good reason" to possess a sound moderator.[3]

In removing silencers from the NFA, Title XV would no longer require that they be registered and that they may be transferred only on payment of a $200 transfer tax and approval by ATF, which may take as much as six months to a year.

Title XV keeps silencers in Title I of the Gun Control Act, meaning that they are regulated in the same manner as actual firearms. Manufacturers must mark them with serial

---

[2] http://stephenhalbrook.com/law_review_articles/firearm_sound_mod.pdf.

[3] Home Office, *Guide on Firearms Licensing Law* 119 (2015). https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/417199/Guidance_on_Firearms_Licensing_Law_v13.pdf.

numbers, records reflect how they are distributed, and licensed firearm dealers may sell them only after screening by the FBI's National Instant Criminal Background Check System (NICS).[4] A felon in possession of a firearm, including a silencer, is subject to ten years imprisonment, and use of a firearm equipped with a silencer in a federal crime of violence or drug trafficking requires imposition of a mandatory minimum of thirty years incarceration.[5]

The bill would also revise and clarify the definition of a silencer. Current law defines a silencer as (1) a device for muffling the report of a firearm, (2) a combination of parts designed and intended to assemble a silencer, and (3) "any part intended only for use" in fabrication or assembly of a silencer.[6] This last definition is unworkable and unnecessary, as it is not limited to a major part and includes internal parts that may have all kinds of uses. I litigated a case in which the First Circuit, in a confusing opinion, held that a muzzle brake – a device that reduces recoil – is "intended only" for use as a silencer even though it *increased* sound, would require additional major parts to make a silencer, and was intended to have dual uses.[7]

The bill would correct that by changing the definition to include "any device for silencing, muffling, or diminishing the report of a portable firearm, including the 'keystone part' of such a device." The term "keystone part" means "an externally visible part" of a silencer, without which it cannot be assembled. The keystone part will bear the serial number, similar to how a firearm frame or receiver has the serial number.

Currently, it is lawful to possess silencers in 42 states and lawful to hunt with them in 40 states. There are 902,805 silencers registered with ATF, a number that has grown by leaps and bounds.[8] Despite that, the severe NFA restrictions keep suppressors out of the reach of the average gun owner.

"Exposure to noise greater than 140 dB [decibels] can permanently damage hearing," according to Dr. Michael Stewart, Professor of Audiology, Central Michigan University. "Almost all firearms create noise that is over the 140-dB level."[9] However, "studies have shown

---

[4] 18 U.S.C. § 922(t).

[5] 18 U.S.C. §§ 922(g), 924(a)(2), 924(c)(1)(B)(ii).

[6] 18 U.S.C. § 921(a)(24).

[7] *Sig Sauer, Inc. v. Jones*, 826 F.3d 598 (1st Cir. 2016). That decision conflicts with an earlier decision holding that an item is not a silencer just because it might, but need not, be adapted for such use. *United States v. Crooker*, 608 F.3d 94 (1st Cir. 2010).

[8] U.S. Dept. of Justice, ATF, *Firearms Commerce in the United States: Annual Statistical Update 2016*, at 15. https://www.atf.gov/resource-center/docs/2016-firearms-commerce-united-states/download.

[9] "A small .22-caliber rifle can produce noise around 140 dB, while big-bore rifles and pistols can produce sound over 175 dB." "Recreational Firearm Noise Exposure," http://www.asha.org/public/hearing/Recreational-Firearm-Noise-Exposure/.

that only about half of shooters wear hearing protection all the time when target practicing. Hunters are even less likely to wear hearing protection because they say they cannot hear approaching game or other noises."[10]

The bill would help remedy that. No reason exists why one should be forced to damage one's hearing to hunt, target shoot, or exercise one's Second Amendment rights. Taking suppressors out of the NFA while leaving them in Title I of the Gun Control Act would protect law enforcement interests while at the same time allowing law-abiding gun owners to protect their health better and to reduce noise pollution.

Lawful Purpose Instead of "Sporting" Purpose

Title XVI would enact needed reforms to ensure protection of the right to have arms for lawful purposes and to eliminate restrictions on firearms based on whether they are "sporting," a vague term that should not be left to a government agency to determine arbitrarily. Currently a "sporting" test is used in regard to what firearms may be imported or assembled, in the definitions of armor piercing ammunition and destructive devices, and in relation to the purposes for which a firearm may be temporarily loaned to a person from another State.

Armor piercing ammunition. Under current law, the Attorney General (who acts through ATF) has rather limitless power to say whether popular ammunition designed for use in rifles is highly-restrictive "armor piercing ammunition. This authority to reclassify rifle ammunition as "armor piercing ammunition" would be eliminated by changing the definitions to include (1) a projectile or projectile core which is designed and intended by the manufacturer or importer for use (instead of which "may be used") in a handgun and which is constructed entirely of certain metals, and (2) a full jacketed projectile larger than .22 caliber designed and intended "by the manufacturer or importer" for use in a handgun and whose jacket has a weight of more than 25 percent of the total weight of the projectile. 18 U.S.C. § 921(a)(17)(B).

Additional exclusions from the definition would be "a projectile which is primarily intended by the manufacturer or importer to be used in a rifle or shotgun," and "a handgun projectile that is designed and intended by the manufacturer or importer to be used for hunting, recreational, or competitive shooting (instead of one that "the Attorney General finds is primarily intended to be used for sporting purposes"). § 921(a)(17)(C).

Import and assembly. The bill would ensure that non-NFA firearms may be imported for lawful purposes, and eliminate the power to ban imports of firearms that are arbitrarily determined not to be "sporting." The Second Amendment is not limited to "sporting purposes" as determined by a government agency, and firearms that are lawful to make domestically should be lawful to import.

It is currently a felony "to assemble from imported parts any semiautomatic rifle or any shotgun which is identical to any rifle or shotgun prohibited from importation . . . as not being particularly suitable for or readily adaptable to sporting purposes . . . ." 18 U.S.C. § 922(r). How many "imported parts," all or just a certain number decided by ATF? How is anyone to know

[10] *Id*.

what firearms ATF considers "sporting," which is unpublished and changes with the wind? The bill would repeal this provision.

A member of the Armed Forces may not import a firearm, and a firearm may not be shipped to such member abroad, unless ATF determines it to be sporting. § 925(a)(3), (4). The bill would change to criteria to be whether the firearm is intended for the member's lawful personal use.

Current law prohibits import of a firearm (including a frame, receiver, or barrel) unless ATF decides that it "is generally recognized as particularly suitable for or readily adaptable to sporting purposes, excluding surplus military firearms." § 925(d)(3). When this passed in 1968, ATF's predecessor agency decided that semiautomatic rifles generally, including models based on cosmetic military patterns, passed the sporting test as they were used in competitions, target shooting, and hunting. In 1989, under orders from the Administration, ATF reclassified them overnight as no longer "sporting" and as being "assault weapons" instead.

The importers complied with ATF's newly-minted "sporting" criteria by eliminating the objectionable features. Suddenly, in 1996, that was no longer "sporting," and strict compliance with the rules was somehow "circumvention" of the rules. I litigated this issue in *Springfield, Inc. v. Buckles*, 292 F.3d 813 (D.C. Cir. 2002), which basically decided that a government agency – not the sporting community – may decide which competitions and which firearms are "sporting" and which are not, and can change its mind as often as it wishes.

The bill would eliminate the arbitrary "sporting" test and would authorize a firearm to be imported as long as it is not a machinegun or other "firearm" as defined in the National Firearms Act. The same firearms that are lawful to make in the U.S. would be lawful to import.

Destructive device. The bill would protect shotguns from arbitrary classification as "destructive devices." Current law defines "destructive device" as a weapon that is over .50 caliber except a shotgun that ATF decides is "generally recognized as particularly suitable for sporting purposes." 26 U.S.C. § 5845(f)(2); 18 U.S.C. § 921(a)(4)(B). The bill would change this to "generally recognized as suitable for lawful purposes."

The need for the above reforms may be illustrated in another case I litigated, *Gilbert Equipment Co., Inc. v. Higgins*, 709 F. Supp. 1071 (S.D. Ala. 1989), *aff'd*, 894 F.2d 412 (11th Cir. 1990) (*mem.*). Since enactment of the sporting test in 1968, ATF consistently approved the import of 12 gauge semiautomatic shotguns with barrels at least 18" in length, which were thus not NFA firearms. An importer sought to import the USA-12 shotgun, which was very well made and suitable for hunting and other lawful purposes. ATF denied the import based on reasons like it was heavier than other shotguns and it employed a detachable magazine, which actually made it safer to unload.

When the courts upheld the denial of the import permit, ATF advised that the shotgun could be manufactured in the U.S. So it was manufactured in the U.S. for a few years until suddenly ATF decided that the shotgun was actually a "destructive device" and could be made and possessed only under the stringent requirements of the National Firearms Act. ATF Ruling

94-1.[11] Owners who did not register the shotguns were then considered to be committing a felony under the NFA.

Temporary transfer. It is a felony for a person to transfer a firearm to a person who resides in another State, except for "the loan or rental of a firearm to any person for temporary use for lawful sporting purposes. 18 U.S.C. § 922(a)(5)(B), (a)(9), & (b)(3)(B). The bill would delete the word "sporting," leaving the provision to allow temporary use "for lawful purposes." What is "lawful" is objective, while what is "sporting" is subject to the whim of enforcement agencies and prosecutors. This amendment would remove a term that is void for vagueness.

In short, Title XVI would remove restrictions based on an amorphous "sporting" test which has been subject to arbitrary political winds and which has no foundation in the Second Amendment. For classification of rifle ammunition, import of firearms, what is a "destructive device," and temporary use of a firearm between persons from different States, the focus should be on what is "lawful," not on what a government agency considers "sporting," which may change overnight.

[11] https://www.atf.gov/file/55416/download.