

VTFSC INITIAL Testimony
House Judiciary Committee
H.610 - January 15, 2020

My name is Chris Bradley, I am the President of the Vermont Federation of Sportsman's Clubs, and I thank the Committee for an opportunity to speak today.

In an effort to seek common ground, I would like to think that all of us here might agree that people have an unalienable right to self-defense, and that right has an extremely high priority. If we cannot agree on that, then I must suggest that there is a need to refresh our understanding of the Vermont Constitution, and there is a further need to review the Representative's oath of office which states that Representatives will not do "*...any act or thing whatever, that shall have a tendency to lessen or abridge their rights and privileges, as declared by the Constitution of this state...*".

Where we may likely disagree with the notion "*That the people have a right to bear arms for the defence of themselves...*", is the manner and method that defense is secured.

For many people, and because we live in a relatively safe society, they see no need to educate themselves on the available means of defense, let alone attain that means. For many of these people, the thought of firearm ownership is almost beyond comprehension; the thought of squeezing a trigger even once is abhorrent; and they are content to put the safety of themselves, their family and their property completely in the hands of others. That is their choice and that is their Right.

I would hope that all of us recognize that evil people exist, that sick people exist, that every day bad things happen to completely innocent people, that there is no question that these events may involve all sorts of weapons of many types.

While there are those that will turn a blind eye towards the fact that violent people exist and then choose to make no arrangements whatsoever to obtain what is arguably the best means of defense - a firearm - our Constitution allows people like me to not have to live in fear by allowing us to take responsibility for their own defense by having, and becoming proficient with, firearms.

As you may know, and for the Federation it is an incredible thing for all of us to be proud of: Vermont is consistently one of the safest states in the Nation in regards to Violent Crime, and we currently have the distinction of being the second safest state in the nation according to FBI statistics. Why is it that states like Maine, Vermont and New Hampshire enjoy such low levels of violent crime and have very similar firearm laws, in comparison to other North Eastern States which have adopted very different firearm laws? What could explain that other than some rather drastically different approaches to Public Safety?

When we ask ourselves that question, we believe that the answer is because honest and law-abiding citizens have the ability to arm themselves, to the point of allowing both open and concealed carry, and because good people have firearms, bad people are far, far more leery of attempting to engage in crime. This just makes sense, at least to us.

If we look at every other state in this country that has enacted draconian firearm legislation that impinges on the right of self-defense in an attempt to promote Public Safety, we do not see low rates of violent crime, we see the exact opposite.

Laws, no matter how well-intentioned, that have the effect of removing firearms from good citizens when there is no valid reason for them not to possess them, have dire results for Public Safety.

To put it succinctly, we see firearms, and the right to own them, as a Necessary Good. There are however some people, perhaps even in this room, that view them as an unnecessary evil, and they wish for nothing less than a complete and total disarmament of honest and law-abiding citizens.

From Fair Haven, we learned a hard lesson, with that lesson being that you cannot remove someone's rights simply because we **think** they **might** do something bad or evil. This is because we have a rule of law called "Due Process", with Due Process being a law that applies equally to all of us; it is a law that separates our country from others.

Any proposed law that steps on, infringes, or has "*...a tendency to lesson or abridge (their) rights and privileges...*", must be considered very carefully, with the weight of any decision that impacts the loss of those rights, even obliquely, heavily favoring the rights of the individual; unless concrete facts and evidence, not conjecture or hyperbole, demand that those rights be taken away. It's really that simple, especially now that Vermont has ERPO/Red Flag laws that address those outlier situations.

Section 1

This section of Vermont Statutes was changed, after much acrimonious debate, and went into effect on passage in 2018 with the passage of S.55 which then became Act 94. Since the provisions of that law have been in place, we are not aware of any data or statistics to evaluate its effectiveness. Now, this committee has drafted a new piece of legislation, H. 610, expanding the reach of this recently passed law with no evidence that it is necessary.

If I may be allowed, I would like to ask the Committee some questions, as both Chair Grad and Ranking-Member LaLonde are co-sponsors of this bill.

May I be allowed to ask four questions?

1. Can the Sponsors tell me precisely how many of these Default Proceeds occur in Vermont, for at least the last year or previous year, if not a series of years, so that we can all know the scope of the problem that this section of the bill attempts to address?
2. In researching the need for this bill, has the Committee or its sponsors sought input from, invited to speak, or spoken to, any FFLs?
3. In researching this bill, were issues raised about the constitutionality of removing property from individuals without Due Process?
4. In researching this bill, has the Committee or its sponsors sought input from, invited to speak, or spoken to, the BATFE?

In referring to a document that was previously presented by a representative of a National anti-firearm group who lives out-of-state, which was the National Instant Criminal Background Check System (NICS) 2018 Operations Report, I point out the obvious. This report was created by the Criminal Justice Information Services Division of the Federal Bureau of Investigation usually referred to as the FBI. NICS *IS* the FBI.

When NICS was created, it was envisioned to be an immediate response system, hence the use of the word "Instant" in NICS' name. As a spur to insure the FBI remained motivated to quickly process an approval/denial response, NICS was required to provide a response within 3 full business days. If the process was not successful in delivering an answer within those three days, and since denying an individual's right to bear arms was of grave concern, the sale was allowed to proceed and is referred to as a "Default Proceed" – at the FFL's discretion.

I'd like to stress that last point: An FFL is never required to sell a firearm to anyone, even if the buyer does pass a background check. Besides that, there is no FFL that we are aware of that is unscrupulous in selling firearms. The last thing that any one of them wants is to have something bad happen with a firearm they sell, and they operate in a business environment that is incredibly complex in regards to Federal Law. These are very cautious and wary people.

And just to be clear, it's not really three days. A firearm transaction begins with the buyer filling out a Federal Form 4473. Using the information provided on the form, the FFL will either make a call or use an electronic e-check system to request a response from NICS on the status of the buyer, I.E. is the buyer a prohibited person. The day the 4473 is filled out however is not "day 1", it's day 0. The next business day is day 1, followed by two additional business days, with the firearm then being transferable on the 4th day AFTER the full 3 days has elapsed. A person who attempts to buy on a Friday cannot actually pick up that firearm until the following Thursday, unless NICS returns an approval within that time.

As another point of information here, the U.S. Attorney General's Office, which oversees the FBI, has required that NICS have a 90% Immediate Determination Rate (IDR), and for the period from 2015-2018, that goal was attained only once in 2015. This was a primary reason that the "Fix NICS Act" was passed by Congress

in 2017, an act that would better insure the accuracy of the various NICS databases, and that project is underway now.

From the NICS report, we learn that there were 4,240 firearm transactions that were believed to have been transferred due to Default Proceed that *may* have been transferred to Prohibited Persons. Just as a matter of record: Those 4,240 transactions were 0.0162% of the 26,181,936 total transactions handled.

Let us be clear on what really occurs when a call is made to NICS. As soon as NICS receives the call of a pending transfer, NICS begins to investigate the individual based on the records stored in the NICS databases, of which there are 3 main repositories. If the response from NICS indicates no problem(s) with the individual's criminal history, then the transfer can proceed, and approximately 90% of the time that answer is achieved in less than 3 minutes. The FBI will continue to investigate for a total period of 90 days, well after the Default Proceed *MAY* have occurred - still at the FFL's discretion.

Let me repeat that. For situations where NICS is not able to return an immediate result due to record problems, the FBI continues to investigate the person's background for 3 months, with the FBI being recognized as one of the premier law enforcement agencies in the world.

What is proposed to occur with Section 1 of H.610 is nothing less than the State of Vermont interjecting itself into what MUST be seen as an ACTIVE and ONGOING FBI investigation. The FBI is on the case, the FBI will get a final result, and if that final result is a Denial: The FBI turns that information over to the BATFE. The BATFE takes this matter extremely seriously - it's their job to do that - and they then immediately go out and separate the firearm from the Prohibited person. When that occurs, the ATF can then presumably charge the offender under Federal Law, either for lying on the Federal Form 4473, and/or charge them with being a Prohibited Person in possession of a firearm.

As a matter of record, there never was a "Charleston Loophole". Much like the term "Gun Show Loophole", a term designed to make one think that there was some huge oversight in law that needs correction, the continued use of which

perpetuates the incorrect assumption, the situation that occurred in Charleston was NOT a loophole. The system worked exactly how it was supposed to.

I'm sorry to have to stress this point, but I must do so because it is my understanding that one of the sponsors of the bill was under the impression that the perpetrator received his firearm due to Default Proceed when the perpetrator was a Prohibited Person. In the case of the sick shooter in Charleston, an Immediate Result from NICS was not possible due to the fact that the perpetrator had a drug arrest in his records. The drug arrest however was apparently not a felony arrest, and by Federal Law, and as odd as it may sound: The fact that an individual illegally possess drugs does not automatically mean that they are an illegal user of drugs; remembering that being an illegal user of drugs would be a legitimate reason to deny the transfer. The fact of the matter is that, even with that drug arrest record, the final result of the FBI investigation was that the background check DID NOT RESULT IN A DENIAL, and as a result, PER FEDERAL LAW HE WAS ALLOWED TO PURCHASE so no ATF referral was necessary. It was a sale that was allowed to proceed because the FBI could not find anything in that individual's record that would have precluded him from purchasing and possessing a firearm, even after intensive investigation. This simple fact however did not stop the media and others to evangelize this story of yet another "loophole", or have others completely misunderstand what really happened.

If a person with a record attempts to buy a firearm, and despite the need for improvement in NICS accuracy which is being addressed by the Fix NICS Act of 2017, NICS works to prevent illegal firearm transfers. In those rare cases where the record is not clear, the FBI actively pursues the case. If indeed Vermont passes this section into law, then the FBI may have less of an incentive to complete the investigation, an investigation which could reveal that the person SHOULD NOT be denied, or conversely that a prohibited person really did attempt to buy a firearm, such that they would then be immediately pursued by the BATFE and then be prosecuted by a Federal Prosecutor, in Federal Court, and then possibly serve time in a Federal prison.

Federal law, due to the weighty consideration of stepping on a person's rights, errs on the side of the Right while vigorously looking for anything wrong. This bill

apparently wishes to reverse that by erring on the side of stepping on a person's Right, and assumes that this is proper.

We strongly oppose this section of the Bill.

Section 2

This section of H. 610 would remove all discretion that a court has in determining, based on the evidence before it, that an individual should be separated from their firearms in all cases because someone has filed a complaint and RFA has been issued. Removing that discretion from the courts clearly steps all over the inherent right of Due Process, and has the effect of forcing an individual to have to relinquish their rights when there may be no evidence that violence is a likely result. Not only does it impugn the integrity, wisdom and considered opinion of the court, it has the effect of insuring that individuals who are in no danger whatsoever of committing some sort of offense with a firearm have their rights stripped away on the mere suspicion that they **might** do something.

Further, should the RFA require the defendant to relocate themselves somewhere else, per (3)(A)(ii) they are prohibited from staying at any residence where firearms are present, even if that residence is the defendant's parents, grandparents, children or siblings, with absolutely no consideration for the fact that the firearms may all be stored in a locked safe. Should we write a law that says that the victim cannot be in a residence that has firearms in it because that firearm **might** be used against them?

At some point in the development of this legislation, someone in Legislative Council must have raised the constitutional questions surrounding an individual's right to bear arms and defend themselves and their family. We fully understand that sometimes rights given by Federal and State Constitutions come in conflict but to arbitrarily dismiss the rights of one party over another is constitutionally unsound and dangerous. Just what advice did this committee receive on the constitutionality of this proposed provision?

According to the Vermont Judiciary - Annual Statistical Report for 2018, we see that there were 3,380 RFA filings in 2018, which was an increase of 8% over the filings in 2017.

If there were an exceptionally high number of these 3,380 cases which resulted in firearm violence, then we might, possibly, be more inclined to accept Section 2 as a pure Public Safety measure, but we don't.

On Page 2 of the 2018 Domestic Violence Fatality Review Commission Report, we see that there were 17 Homicides in Vermont in 2017. We further see that 11 of those deaths were "Domestic Violence-related" as determined by the Domestic Violence Fatality Review Commission. 3 of those 11 deaths involved the use of a firearm. Also on that page is the statement that only one of those 11 deaths had an RFA in effect at the time, but it does NOT tell us whether or not that 1 death with an active RFA occurred with a firearm, as opposed to a Sharp Object Impact / Stabbing, or Strangulation, or Neglect of Care, or Blunt force which accounted for 73% of the DV-related deaths.

"Worst" case: If that 1 DV-related death with an active RFA **WAS NOT** related to the use of a firearm and this law was in effect for 2017, then all 3,125 citizens, **100% of them**, would have had their unalienable right of self-defense stripped away without any Due Process whatsoever.

"Best" case: If that 1 DV-related death with the active RFA **WAS** related to the use of a firearm and this law was in effect for 2017, then 3,124 citizens, only 99.968% of them, would have had their unalienable right of self-defense stripped away without any Due Process whatsoever.

Are we really going to punish 99.968 to 100% of RFA defendants and remove their rights, simply because they MIGHT do something? How can that be remotely acceptable in relation to a legislator's constitutional duty to not lessen or abridge a person's rights and privileges?

In (B)(iii), we see that a court **may** issue a warrant for seizure of firearms if the court finds reasonable cause under 3 conditions. In looking at that in an analytical and logical fashion, we ask ourselves, why wasn't the court allowed to use its discretion, based on the same criteria, when it considered the RFA?

Beyond that, in (B)(iii) we see that the "well-being" of the victim is to be considered as a criteria to seize firearms from the defendant, but we see no definition for that term. We do not claim to fully understand all the nuances of DV, and we certainly can understand that such things may be hugely traumatic for the victim. A victims' "well-being" however can be affected by any number of things, including their age, their health, their financial situation, whether or not

they suffer from depression - any number of things. How is a court expected to determine the "well-being" of the victim, beyond understanding that there is an apparent need for an RFA? Will they need a mental health evaluation to make this determination?

Regarding (D), in prior testimony before this committee law enforcement has made it clear it does not have the capacity for storage of firearms in their facilities, they are stretched beyond limits, and they do not have the budget to send or build the appropriate storage facilities. Now aware of what law enforcement has stated in (D), we see that a law enforcement agency has immunity for damage or deterioration of firearms that are relinquished, as long as this did not occur as a result of recklessness, gross negligence or intentional misconduct. Simply stated, LE are admitting that damage will most certainly occur if they have store these firearms in inappropriate facilities. Further, the language completely ignores the fact that firearms attachments , such as scopes, the value of which can easily exceed the value of the firearm itself, and is far more fragile and susceptible to damage. This provision places enforcement in an impossible position and completely disregards the valuable property of the affected individual. Again: The individuals property rights are being ignored.

In (4), we confess to being a bit confused. Under(3)(A)(i), the court ordered that the defendant must relinquish all his firearms. Under (4), which occurs at the final Hearing, the defendant gets questioned as to whether or not he or she possess or controls any firearms, apparently even after the defendant had to relinquish all his firearms, and even when a warrant may have been issued to physically seize his firearms. If the court's final order allowed the defendant to re-possess his firearms, then what is the need to require that the court SHALL ask this required question? And what occurs if the defendant answers Yes?

In (h)(2) we see that the plaintiff must specify the type of firearms, but we would suspect that most of the answers would be somewhat vague and of little potential help, for example: "He / She has two pistols, three rifles and a shotgun", but not be cognizant of manufacturer, caliber, or other characteristics.

As a final thought on this section, we have a serious concern of the effect on the defendant in situations where firearms relinquishment was not previously needed

or required but now is. We believe that being hit with an RFA and its effects are hard enough for a person to deal with, and on top of that we now want to additionally strip that person of his rights, even in situations where that severe an action is not warranted? Might this make a bad situation even worse?

We strongly oppose this section of the bill.

Section 3

Under (4) (A) (i) the court no longer will have discretion as to whether or not a person needs to relinquish all the firearms in their possession, ownership or control or which another person possess, owns or controls on the defendants behalf. This decision should be left to the court to decide, and should not be carte blanche. The court is in the best position to understand what needs to be done, and we believe they already have demonstrated this ability.

As the suggested changes to 1104 appear to be identical to the sections of 1103 outlined in the above discussion, we provide the same concerns for the corresponding sections.

We strongly oppose this section of the bill.

Section 4

This section applies penalties to violations that occur in sections 2 and 3.

As it stands, we oppose this section of the bill.

Section 5

No objection.

Section 6-10

Given the dynamics that can occur in many families, we have grave concerns about allowing a family member or household member to initiate an ERPO without Law Enforcement involvement, which should be easily and readily accessible to either a family member or household member.

Unsettledness in a family is not a new concept, and we believe that many of these situations can become extremely bitter and nasty. As originally envisioned, some level of investigation would occur by LE prior to an ERPO request being referred to the State's Attorney or the Office of Attorney General. While we understand the urgency which may require an ERPO, LE involvement should be the first step, not only to provide immediate attention to the situation, but also to provide a solid footing for any subsequent action. LE is readily available, it is responsive as best as can be expected given their duties, and this should be a necessary step.

We strongly oppose these sections of the bill.

Section 11

No objection.

Section 12

No objection.