



May 11, 2020

Bob Ferguson
Attorney General of Washington
PO Box 40100
Olympia, WA 98504-0100

Re: Shoehorning Gun Control Into COVID-19 Response

Dear Attorney General Ferguson,

Hello again. I write you today on behalf of Firearms Policy Coalition, a fiercely non-partisan nonprofit organization that promotes individual liberty and sound public policy through litigation, research, education, grassroots outreach, and direct advocacy. I write to you to express my concern for your recent letter to Congressional leadership.

I am aware of your desire to see the reauthorization of the Violence Against Women Act (VAWA), the same being clear to anyone. While I understand the sentiment that “passage of VAWA in 1994 was an acknowledgement of the insidious epidemic of violence against women in every community across the country[,]” the current reauthorization, I fear, has little to do with the protection of American women. Instead, it features several very concerning, due-process devoid components which explain why, unlike previous reauthorizations, this one has been met with serious opposition. A more thorough analysis of the problems inherent in this reauthorization act is attached here for your convenience.

Most pernicious in the reauthorization, which you may have mistakenly endorsed, is expanding the scope of misdemeanor conduct resulting in permanent, automatic deprivations of civil rights upon conviction. Given your position, you are no doubt aware of the aggressive nature of plea bargaining, where misdemeanor defendants, especially those underprivileged defendants, are encouraged to “plea out” to crimes they may well not have committed. The fact that many such prosecutions are “just misdemeanors” means these defendants may get less serious treatment by state-appointed lawyers and judges.¹

The most vulnerable people in our country are the same as those whose need of an effective means of self-defense is most acute. These people are not only most likely to be violently victimized, but also the most likely to be victimized by the state.² Making a permanent loss of civil rights part of more misdemeanor convictions, especially with terms so vague as those in H.R. 1585, is curative of none of our society’s ills, but exacerbates many.

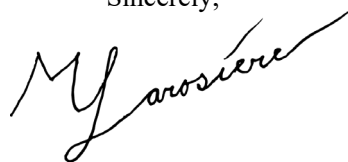
I am distinctly concerned with recent desires to shoehorn the reauthorization act into COVID-19 stimulus. This is a double-stuffed bait-and-switch, and is wholly inappropriate both in that it frustrates COVID relief, and separates the reauthorization act from whatever merits it may have. I humbly ask that you oppose any such attempt to consolidate the reauthorization with unrelated measures.

¹ Jordan Smith, “How misdemeanors turn innocent people into criminals,” THE INTERCEPT (Jan. 13, 2019) <https://bit.ly/2AeYKff>.

² Edwin Grimsley, “What Wrongful Convictions Teach Us About Racial Inequality,” THE INNOCENCE PROJECT, <https://bit.ly/3be4CeE>.

I trust that, after reading the attached, and considering the numerous injustices already inherent in our system, you will realize this reauthorization act—far from protecting women—abuses them as a means to damage due process of law.

Sincerely,

A handwritten signature in black ink, appearing to read "M. Larosiere". The signature is written in a cursive, flowing style with a long horizontal stroke at the end.

Matthew Larosiere
Director of Legal Policy

-ATTACHMENTS-



POLICY MEMORANDUM

Violence Against Women Reauthorization Act (VAWRA)

September 4, 2019

FIREARMS POLICY COALITION

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SUMMARY

Since 1994, the Violence Against Women Act (VAWA) has received varying degrees of bipartisan support. Although it has been reauthorized several times, VAWA has been met with opposition whenever its reauthorization bills sought to expand its scope beyond the original intention of protecting victims of domestic violence.

The 2019 Violence Against Women Reauthorization Act (VAWRA) is a thinly veiled effort by radical leadership in the Congress to bootstrap broad, unconstitutional legislation into federal law under the guise of protecting women.

Some of its provisions include changing the definition of “domestic abuse” to also include “verbal emotional, economic, or technological abuse or any other coercive behavior,” expanding the definition of “intimate partner” to include former partners who no longer live together, and defining “stalking” so broadly to include annoying, but physically harmless behavior such as making several phone calls.

Passage of VAWRA in its current form will result in the denial of due process by depriving Americans of a hearing before losing their rights and property. It will provide for the unconstitutional federalization of state resources, dramatically expanding the federal government’s reach into matters traditionally controlled by the states.

And, crucially, it will permanently deprive people of their fundamental human right to keep and bear arms on the basis of nonviolent misdemeanors.

For these reasons, VAWRA is not only flawed, but dangerous and unconstitutional. Firearms Policy Coalition (FPC) thus opposes VAWRA.

INTRODUCTION

The Violence Against Women Act¹ (“VAWA”) was initially enacted in 1994 under the premise of reducing domestic violence. The act contains a sunset provision, and thus comes up for reauthorization every few years. Usually, the reauthorizations are pretty apolitical and sail through the legislature. The focus of the 2013 reauthorization, for example, was establishing voluntary reporting, training participation, and conducting studies on domestic violence.² But reauthorization of the bill has not always been met with bipartisan support. VAWA lapsed in 2011 and remained expired until the 2013 reauthorization.

Republicans refused to reauthorize the act in 2011 over concerns of its expansion to include rural and tribal areas, its redefinition of violence against women to include stalking, and revisions permitting unlawful immigrants to present themselves as victims of domestic violence in order to obtain temporary visas.³ Until the 2019 Violence Against Women Reauthorization Act (“VAWRA”)⁴ there had been no mention of firearms whatsoever in VAWA, the Family Violence Prevention and Services Act,⁵ or Title XVII of the Violent Crime Control and Law Enforcement Act of 1994.⁶

With the introduction of the 2019 VAWRA, we can see that lawmakers have shifted from providing assistance to states, to a federal attempt to force state action. The 2019

¹ Violence Against Women Act of 1994, 42 U.S.C. § 12291 (2013).

² *Supra*, note 1; *see, e.g.*, Violence Against Women Reauthorization Act of 2013, S. 47, 113th Cong. (2013) §§ 40152 (training programs to provide assistance to sexual assault victims), 40154 (information programs for the same), and 40291 (establishing state databases).

³ Jonathan Weisman, *Violence Against Women Act Divides Senate*, New York Times (Mar. 14, 2012), <https://www.nytimes.com/2012/03/15/us/politics/violence-against-women-act-divides-senate.html>

⁴ Violence Against Women Reauthorization Act of 2019, H.R. 1585 (2019).

⁵ 42 U.S.C. § 10401 (2013).

⁶ 42 U.S.C. § 14071 (2013).

reauthorization act has also introduced changes and new sections that would adversely affect the people’s right to due process of law, the right to keep and bear arms, and the principles of federalism that stand at the foundation of our legal system.

REVISED TERMINOLOGY

Unlike previous reauthorizations, the 2019 VAWRA is neither bipartisan nor bicameral, but rather an expansive, partisan House-led proposal colored by anti-gun animus. The most notable change under the proposed VAWRA is the expansion of what constitutes “domestic violence” and the associated punishment that VAWA brings. For example, under current law, domestic violence “includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner . . . or against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction.”⁷

VAWRA expands the definition to include “verbal, emotional, economic, or technological abuse or any other coercive behavior committed, enabled, or solicited to gain or maintain power and control over a victim . . .”⁸ This definition is vague and overly-inclusive—expanding to even “economic abuse”—clearly far beyond the scope of protecting victims of domestic violence.⁹

VAWRA also dramatically expands the definition of “misdemeanor crime of domestic violence” against an “intimate partner” as it applies to 18 U.S.C. § 921(a), which prohibits persons convicted of such from owning firearms. Among other things, the class of potential

⁷ 42 U.S.C. § 13925 (2013).

⁸ VAWRA § 2(10).

⁹ *See, e.g.*, N.Y.P.L. §§ 120-21 (2019) (limiting domestic violence offenses to assault, menacing, stalking, and strangulation); MISSOURI REV. STAT. Title XXXVII § 565 (2019) (limiting domestic violence charges to attempted murder or causing physical injury of varying degree to a family member).

victims includes current and former dating partners, regardless of whether the affected people live together.¹⁰ This is important because previous versions only forbade domestic violence misdemeanants from gun ownership if they were cohabitating with the victim, and thus the prohibition was at least logically related to protecting the victim.

Under VAWRA, if passed, the definition would be so vague and malleable that it could include misdemeanors no state currently considers domestic violence. Where, as now, people regularly “plea out” to misdemeanors because they believe the stakes to be lower, the permanent loss of the defendant’s fundamental right to self-defense is clearly not something a misdemeanor typically contemplates.

The fact that this law concerns misdemeanor charges is more than a technical distinction. People facing misdemeanors are often given less serious treatment, both by disinterested public defenders and prosecutors who are all too often more interested in pursuing a conviction than the truth. This is especially concerning given the fact that many people facing misdemeanor charges are unable to afford a good defense. They are left susceptible to slick prosecutors who coerce guilty pleas, even when the state lacked a strong case to begin with.

For the statute governing who cannot possess arms—18 U.S.C. § 921(a)—to apply presently, a domestic violence conviction must be based on a crime which “has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon.”¹¹ Clearly the law was intended to apply only to people who showed some propensity to use unlawful force against another person.

VAWRA seeks to turn this on its head and apply the prohibition to a much broader class of people who have not been shown to be violent. For example, VAWRA changes the

¹⁰ VAWRA § 801.

¹¹ 18 U.S.C. § 921(a)(33).

“stalking” definition under § 921(a) to the federal stalking statute’s language,¹² a statute that has nowhere near the civil rights effect that VAWRA threatens, and would effectively force state, tribal, and local governments to adopt it.

Under this new standard, people who pose no violent threat could be convicted of stalking for behavior “caus[ing], [or] attempt[ing] to cause, or would reasonably be expected to cause emotional distress [to spouses, dating partners, etc.]”¹³ Not only are these new terms overly broad, Congress made it a point to retain the perplexing language under 18 U.S.C. § 921(a)(33)(B)(ii):

A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

Stated coherently, if VAWRA passes, a subject person will be prohibited from owning a firearm even if: 1) the purchase is purely intrastate; and 2) he has received a pardon or expungement that restores his civil rights. Our federalist system precludes such federal punishments because the crimes in question are purely local—leaving no room for Congressional action—and because all preceding iterations of VAWA showed no Congressional intent to regulate access to firearms.¹⁴ Even if a court were to find that there

¹² 18 U.S.C. § 2261(A).

¹³ VAWRA § 801.

¹⁴ *See Bond v. United States*, 572 U.S. 844, 848 (2014) (“Because our constitutional structure leaves local criminal activity primarily to the States, we have generally declined to read federal law as intruding on that responsibility, unless Congress has clearly indicated that the law should have such reach.”). Here, the government is attempting to sanction individuals for activity that is no longer considered to have even occurred in the jurisdiction regulating the predicate behavior, which is a Fifth Amendment Due Process violation.

were such intent, Congress cannot touch purely intrastate activity under the Commerce Clause.^{15 16}

When we think of appropriate punishments for a misdemeanor offense, we think of short stints in jail and fines—not a permanent deprivation of a person’s fundamental rights. VAWRA suggests that someone convicted of a misdemeanor charge of “stalking” (which, as defined, could include excessive phone calls) at 18, could spend the rest of his life as a model citizen without ever restoring his constitutional right. Should that really be part of a misdemeanor conviction? We think not.

DUE PROCESS CONCERNS IN RESTRAINING ORDERS

VAWA affects gun rights as a result of its interplay with § 921(a), as previously discussed. This section also impacts the rights of people subject to a restraining order by an intimate partner. Many states will grant restraining orders with little evidence. While there are sometimes good reasons for this, revoking an individual’s civil rights is a serious—and dangerous—solution; a solution our Constitution does not contemplate using lightly.

Previously, the right to keep and bear arms of a person subject to a restraining order were only affected if the person was actually notified of a hearing and had an opportunity to participate in it. This means before a person’s rights were taken, he was able to present his case—a critical cornerstone of due process. VAWRA all but eliminates the hearing

¹⁵ *U.S. v. Lopez*, 514 U.S. 549 (1995). If a state (or the federal government, via universal background check legislation) were to compel all persons to file an ATF Form 4473 for firearms purchases, even if the transaction was intrastate involving a firearm which had never traveled in interstate commerce, the current language of § 921(a)(33)(B)(ii) would extend the federal government’s reach beyond what is permissible in *Lopez* because the transaction would fail to meet any of the three channels of commerce defined therein.

¹⁶ *See also Printz v. United States*, 521 U.S. 898, 938 (1997) (Thomas, J., noting that if “the Second Amendment is read to confer a personal right” to keep and bear arms – as *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783 (2008) so held – “a colorable argument exists that the Federal Government’s regulatory scheme, at least as it pertains to the purely intrastate sale or possession of firearms, runs afoul of that Amendment’s protections.”).

requirement, expressly contemplating *ex parte* restraining orders (where the subject person never appears) as automatically removing an individual's rights.

COMPELLING ACTION BY THE STATES

Sections 1201 and 1202 of VAWRA also introduce new requirements for purchases from Federal Firearm Licensees (FFL). § 1201 requires federally licensed importers, manufacturers, and dealers of firearms to report any background checks that indicate an individual's purchase would violate 18 U.S.C. 921(g)(8),¹⁷ (g)(9),¹⁸ or (g)(10),¹⁹ to the nearest FBI field office, state police, and local police. (This, despite frequent "false positives" in the background check system.) And § 1202 provides that the U.S. Attorney General shall provide the same notification, but with the time, date, and the location of the place of request for the failed background check; in essence, a criminal complaint from the federal government will be provided to local law enforcement authorities.²⁰

Section 1203 is the most problematic because it not only permits the U.S. Attorney General to appoint state, tribal, and local special prosecutors, but also allows the DOJ to deputize that jurisdictions' law enforcement officers to aid the BATFE in executing arrests and prosecutions for failed background checks. This is Congress's attempt to sidestep *Printz v. United States*.²¹ § 1203 permits the AG to deputize, but it does not clarify the manner by which he may do so, nor does it provide language pertaining to the state's consent to such. The federal government cannot compel state actors to give force to federal programs.

¹⁷ Person subject to a restraining order.

¹⁸ Person convicted of a misdemeanor crime of domestic violence.

¹⁹ Which does not exist.

²⁰ VAWRA § 1202.

²¹ 521 U.S. 898 (1997) (rejecting the federal government's attempt to compel state police officers to temporarily conduct background checks while the NICS system was under construction because it would be a violation of dual sovereignty).

CONCLUSION

VAWRA introduces new language that may result in perverse outcomes including, but not limited to, the following:

- An individual could be prosecuted for nonviolent disorderly conduct on a first date, branded a domestic abuser, and denied permission to purchase firearms;
- After receiving a pardon, expungement, and/or total restoration of constitutional rights, an individual would still be denied his right to secure firearms;
- Federalizing local resources to arrest people for potentially erroneous results on a background check;²² and,
- Federalizing local resources to prosecute people for attempting to make a purely intrastate firearms purchase (if UBC or state legislation required submission to a NICS check).

The original VAWA was never intended to be a vessel for gun control. The 2019 VAWRA is an express attempt to dramatically expand the scope of federal criminal law—and sacrifice the rights of an unknowable number of people—for purely political reasons detached from constitutional principles and evidence. And there is precedent for opposing VAWRA, as it lapsed in 2011 due to changes less egregious than those here at hand.

FPC is opposed to the 2019 Violence Against Women Reauthorization Act.

²² Errors resulting from the use of common names are not unheard of in databases, such as the UCC lien search. Drastic expansion of the NICS program due to implementation of this and legislation like “universal background checks” would likely result in more false arrests.