

TESTIMONY OF JOSHUA HORWITZ
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HEARING OF THE SENATE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND HUMAN RIGHTS
“PROPOSALS FOR REDUCING GUN VIOLENCE: PROTECTING OUR
COMMUNITIES WHILE RESPECTING THE SECOND AMENDMENT”
FEBRUARY 12, 2013

Mr. Chairman and Members of the Committee,

My name is Josh Horwitz and I am the Executive Director of the Coalition to Stop Gun Violence. I appreciate this opportunity to provide written testimony on behalf of my organization, a coalition of more than 48 national organizations dedicated to reducing gun death and injury in the United States. We seek to secure freedom from gun violence through research, strategic engagement, and effective policy advocacy.

On January 30th, at a hearing of the full Senate Judiciary Committee the following exchange took place between Senator Durbin and witness Wayne LaPierre, the Executive Vice-President of the National Rifle Association.

DURBIN: Mr. LaPierre, I run into some of your members in Illinois and here's what they tell me, "Senator, you don't get the Second Amendment." Your NRA members say, "You just don't get it. It's not just about hunting. It's not just about sports. It's not just about shooting targets. It's not just about defending ourselves from criminals," as Ms. Trotter testified. "We need the firepower and the ability to protect ourselves from our government--from our government, from the police--if they knock on our doors and we need to fight back." Do you agree with that point of view?

LAPIERRE: Senator, I think without any doubt, if you look at why our Founding Fathers put it there, they had lived under the tyranny of King George and they wanted to make sure that these free people in this new country would never be subjugated again and have to live under tyranny.

As this subcommittee considers the various pieces of gun violence prevention legislation that have been proposed in this body Senators should understand that – contrary to Mr. LaPierre’s assertion – taking up arms against the government has always been considered treason, and that the Second Amendment does not offer a constitutional safe harbor for traitors.

From the founding of the republic, we have rejected the notion that individual citizens may

¹ Senate Judiciary Committee hearing on gun violence on Jan. 30, 2013 (Transcript), *available at* http://www.washingtonpost.com/politics/senate-judiciary-committee-hearing-on-gun-violence-on-jan-30-2013-transcript/2013/01/30/1f172222-6af5-11e2-af53-7b2b2a7510a8_story.html

violently rise up against their government. Consider Shay's Rebellion of 1786, in which citizens from central and western Massachusetts shut down county courts to prevent hearings for tax and debt collection, and attempted to seize a federal armory. In response, the governor of Massachusetts raised an army to quell the rebellion. Our Founding Fathers – James Madison, Samuel Adams, John Jay, George Washington, Benjamin Franklin, and John Marshall – endorsed the governor's action.² Furthermore, in a letter to Thomas Jefferson, James Madison defined the rebellion as treason.³

With Shay's Rebellion fresh in their minds, delegates to the Philadelphia Convention set to drafting a new constitution. In fact, Governor Edmund Randolph, when he introduced the Virginia Plan he noted, the "rebellion [that] had appeared . . . in [Massachusetts] underscored the need for a stronger government."⁴ As such, the Framers included in the Constitution a series of clauses to address domestic insurrection. Specifically, Article I, Section 8, Clause 15, which states that one of the primary purposes of the [state] militia is "to . . . suppress Insurrections,"⁵ and Article IV, Section 4, which provides, "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."⁶

The Founders' dismissal of the legitimacy of insurrectionism was affirmed during the Whiskey Rebellion of 1794, in which Pennsylvania farmers rebelled against a new tax on Whiskey. In response, George Washington said allowing such conduct would bring an "end to our Constitution & laws," and he personally led 12,000 troops to put an end to the rebellion.⁷

In the same manner, as a response to the nullification crisis in the early 1830's Andrew Jackson wrote, "Can any one of common sense believe the absurdity, that a faction of any state, or a state has the right to secede and destroy this union, and the liberty of our country with it, or nullify the laws of the union; then indeed is our constitution a rope of sand; under which I would not live."⁸

Most notably during the Civil War, this country reaffirmed its rejection of insurrectionist ideology. By accepting original jurisdiction, the Supreme Court in *White v. Texas* held that the Constitution does not permit States to unilaterally secede from the United States and that the ordinance of secession and all acts of the legislatures "intended to give effect to that ordinance

² Carl T. Bogus, *Heller and Insurrectionism*, 59 Syracuse L. Rev. 253, 255 (2008).

³ *Id.* at 254-255.

⁴ Paul Finkelman, *A Well Regulated Militia: The Second Amendment in Historical Perspective*, 76 Chi.-Kent L. Rev. 195, note 293, at 211. (2000).

⁵ U.S. Const. art. I, § 8, cl. 15.

⁶ U.S. Const. art. IV, § 4.

⁷ Bogus, *supra*, at 255.

⁸ Currie, David P. *The Constitution in Congress: Democrats and Whigs, 1829-1861*. Chicago: University of Chicago, 2005. Pg. 193-194.

were absolutely null.”⁹

Arguments for the constitutionality of insurrectionist ideology, in part, stem from the 2008 Supreme Court case *District of Columbia v. Heller*. However, the Court held only that the Second Amendment conferred an individual right to keep a handgun in the home. It failed to articulate the scope of this right other than to say that it definitely included the right to own a handgun for the purpose of self-defense. Importantly, the Court recognized a non-exhaustive list of “presumptively lawful regulatory measures,” and limited the right to weapons “in common use at the time.”¹⁰

Lower courts have relied on *Heller* to uphold prohibitions on possession of firearms by felons,¹¹ and those convicted of misdemeanor crimes of domestic violence.¹² Lower courts have also held that the Second Amendment, as construed by *Heller*, allows for the prohibition of assault weapons and high-capacity ammunition.¹³

Though Justice Scalia, in the *Heller* decision, mused about why the right was not limited to participation in an organized militia, stating, “If ... the Second Amendment right is no more than the right to keep and use weapons as a member of an organized militia – if, that is, the *organized* militia is the sole institutional beneficiary of the Second Amendment’s guarantee – it does not assure the existence of a ‘citizens’ militia’ as a safeguard against tyranny,”¹⁴ the Court stressed in its findings that the individual right to keep and bear arms protects only *lawful* conduct that properly falls within the confines of the rule of law.¹⁵ The NRA and other proponents of insurrectionism have stretched Justice Scalia’s words well beyond their intended meaning if they take them to mean that there is an individual right to use political violence to avoid following democratically enacted laws.

I make no judgment today about the rights of organized state militias to violently oppose tyranny. However, to endorse an individual right to armed rebellion against the United States Government is antithetical to a democratic society. Such a right makes each man a law unto himself; allowing him to make an individualized assessment of when democratically elected lawmakers become despots and allowing him to fashion an individualized, violent remedy.

Political scientists have long recognized that an integral feature of a State is to have a monopoly of the legitimate use of force.¹⁶ Our strong yet democratic state--which maintains a monopoly on

⁹ *Texas v. White*, 74 U.S. 700 (1869)

¹⁰ *Id* at 626-627.

¹¹ See *United States v. Barton*, 633 F.3d 168 (2011).

¹² See *United States v. Skoien*, 614 F.3d 638, 643 (7th Cir. 2010).

¹³ See *Heller v. District of Columbia*, 670 F.3d 1244 (D.C.Cir.2011).

¹⁴ *District of Columbia v. Heller*, 554 U.S. 570, 600, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008).

¹⁵ *Id* at 620.

¹⁶ Josh Horwitz, *The Game of Monopoly*, Huffington Post (2008) available at http://www.huffingtonpost.com/josh-horwitz/the-game-of-monopoly_b_99793.html

force--has allowed us to walk the fine line between anarchy and totalitarianism.¹⁷ Legal scholar Roscoe Pound put it best when he wrote that a “legal right of the citizen to wage war on the government is something that cannot be admitted . . . a general right to bear efficient arms so as to be enabled to resist oppression by the government would mean that gangs could exercise an extra-legal rule which would defeat the whole Bill of Rights.”¹⁸

When the Patient Protection and Affordable Care Act was being debated in the U.S. Congress, we experienced a small taste of why insurrectionism is such a dangerous ideology.

Representatives received threats of physical violence and pictures of nooses. Windows were broken at Rep. Gabrielle Gifford's (D-AZ) Tucson office, Rep. Louise Slaughter's (D-NY) district office, and Democratic Party offices in Ohio, western New York and Kansas.¹⁹ As you know, Jared Loughner, a man with serious mental illness, also targeted Gabrielle Giffords for “assassination” in the horrific mass shooting in Tucson on January 8, 2011.

The Founding Fathers never endorsed an individual right to armed political violence as such an idea could lead to the downfall of the newly created Republic. Senators should similarly reject this principle as they consider how best to improve our nation’s gun policy.

¹⁷ *Id.*

¹⁸ Robert J. Spitzer, *Law and Politics Book Review*, Vol. 19 No. 6 (June, 2009) pp.390-393 (reviewing Josh Horwitz and Casey Anderson, *Guns, Democracy, and the Insurrectionist Idea* (2009)).

¹⁹ <http://tpmdc.talkingpointsmemo.com/2010/03/a-week-of-threats-and-vandalism.php>