



President
Mark W. Pennak

February 13, 2018

WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN OPPOSITION TO SB 448 AND HB 402

I am the President of Maryland Shall Issue (“MSI”). Maryland Shall Issue is an all-volunteer, non-partisan organization dedicated to the preservation and advancement of gun owners’ rights in Maryland. It seeks to educate the community about the right of self-protection, the safe handling of firearms, and the responsibility that goes with carrying a firearm in public. I am also an attorney and an active member of the Bar of the District of Columbia. I recently retired from the United States Department of Justice, where I practiced law for 33 years in the Courts of Appeals of the United States and in the Supreme Court of the United States. I am an expert in Maryland Firearms Law, federal firearms law and the law of self-defense. I am also a Maryland State Police certified handgun instructor for the Maryland Wear and Carry Permit and the Maryland Handgun Qualification License (“HQL”) and a certified NRA instructor in rifle, pistol and personal protection in the home and outside the home. I appear today as President of MSI in opposition to SB 448 and HB 402.

These bills basically prohibit an otherwise disqualified person from possessing an “antique” firearm. Under current law, Public Safety, § 5-205 prohibits a disqualified person from possessing a rifle or a shotgun, but makes an exception from that prohibition for “a rifle or shotgun that is an antique firearm as defined in § 4-201 of the Criminal Law Article.” SB 448 and HB 402 remove that exception from Section 5-205. Section 5-205 is then further amended by the bills to state that an otherwise disqualified person “may not possess a rifle, a shotgun, or an antique firearm.” The bills leave unchanged the current definition of an “antique firearm” found at MD Code, Criminal Law, § 4-201(b).

First, the ban on possession of an antique firearm imposed by these bills is unenforceable. Federal law, 18 U.S.C. § 922 comprehensively addresses sales of all modern firearms, including requiring that all persons who are “engaged in the business” of selling firearms in interstate commerce must become Federal Firearms Licensees. See *Abramski v. United States*, 134 S.Ct. 2259, 2271 n.9 (2014) (“the federal scheme ... controls access to weapons’ through the federally licensed firearms dealer, who is ‘the principal agent of federal enforcement’”), quoting *Huddleston v. United States*, 415 U.S. 814, 824, 825 (1974). However, federal law expressly defines firearms to “not include an antique firearm.” 18 U.S.C. § 921(a)(3). Maryland law similarly requires that “[a] person must lawfully possess a dealer’s license issued by the Secretary before the person engages in the business of selling, renting, or transferring regulated firearms” (handguns). MD Code, Public Safety, § 5-106. And, like federal law, Maryland regulates to whom a dealer may sell regulated firearms, including also categorically banning the sale of any such

firearm to a minor. MD Code, Public Safety, § 5-134. But, Maryland law does not otherwise address the sale to adults of unregulated firearms, such as modern long guns (leaving those sales to federal regulation under Section 922). Like federal law, Maryland also excludes “antiques” from its definition of firearms. MD Code, Criminal Law, § 4-201(b). Accordingly, since antique firearms are not regulated by either State law or federal law, a person may purchase such antiques in the United States without undergoing any background check. That reality makes these bills impossible to enforce because a disqualified person may freely buy any antique firearm virtually anywhere in the United States. Criminalizing the possession of antiques by disqualified persons thus cannot not stop such sales. Passing an unenforceable law simply invites disrespect for the law.

Second, if a disqualified person is intent on using an antique firearm in a crime, making his possession illegal simply will not stop that crime. We understand, of course, that an antique gun was used in a horrendous Germantown, June 2015 murder by a disqualified person. However, these bills would have not prevented that murder. The bills would have only made possession of the antique by the disqualified person a crime under Section 5-205. Thus, if these bills had been law at that time, the Germantown killer would have faced only an “illegal possession” charge in addition to the charge of first degree murder. The prospect of that additional charge would not possibly have deterred the Germantown murderer who committed the far more serious offense of first degree murder, which is (and was then) punishable by life imprisonment. MD Code, Criminal Law, § 2-201.

Third, while federal statistics do not separately identify the use of antique firearms in crime, the use of an antique or replica firearm in a murder appears to be extraordinarily rare. That is for easily understandable reasons. Antiques are, by definition, more than a 100 years old. State law defines an antique to be a firearm “with a matchlock, flintlock, percussion cap, or similar ignition system, **manufactured before 1899.**” MD Code, Criminal Law, § 4-201(b). Federal law, 18 U.S.C. § 921(a)(16), similarly defines an antique to mean “any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) **manufactured in or before 1898.**” Such antiques are not often fully functional if only because these antiques used “black power” as the propellant and black power is extremely corrosive to metal surfaces.

Both federal and State law also define “replicas” of such pre-1899 firearms as antiques, but **only** to the extent that the replica “is not designed or redesigned to use rimfire or conventional centerfire fixed ammunition; or (ii) uses rimfire or conventional centerfire fixed ammunition that is no longer manufactured in the United States and is not readily available in the ordinary channels of commercial trade.” Thus, these replicas only use black power as the propellant in much the way black power was used by actual antiques in the 19th century. The functionality of such replicas is thus quite primitive by comparison to modern firearms that use modern ammunition, including those firearms which are readily, but illegally, available on the streets of Baltimore and other cities. For these reasons, antiques

and replicas are obviously not the gun of choice by criminals. That such an antique replica was used in the Germantown murder is quite anomalous. In short, there is no need for this legislation and, if enacted, the bill would be wholly ineffective in preventing the extraordinarily rare misuse of antique firearms in crimes.

Sincerely,

A handwritten signature in blue ink that reads "Mark W. Pennak". The signature is fluid and cursive, with the first name "Mark" being the most prominent.

Mark W. Pennak
President, Maryland Shall Issue, Inc.
1332 Cape St. Claire Rd #342
Annapolis, MD 21409
mpennak@marylandshallissue.org