

### -- Emerging evidence shows reason for gun owners to be concerned

by Erich Pratt

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As the Senate begins confirmation hearings on Judge John Roberts, there are still many unanswered questions regarding his views on several key issues related to gun ownership.

So far, there is little direct evidence showing how Judge Roberts would come down on Second Amendment rights. But a pile of indirect evidence has recently been unearthed that should greatly trouble gun owners.

“Balancing rights” translates into infringements

James Burling is an attorney for the Pacific Legal Foundation, who has authored an article entitled, “John Roberts: A Supreme Property Rights Disaster in the Making.”

After analyzing some of Roberts’ opinions and writings, Burling shows how Roberts has often favored a “balancing test” which typically pits the interests of government bureaucrats OVER the interests of private property owners. [\[1\]](#)

In fact, Judge Roberts has gone so far as to argue AGAINST placing clear limits on the power of government officials to “take” private property, and in one case, he actually argued that the

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landowners should not receive a SINGLE PENNY in compensation, even though a government agency had outlawed all use of their property for nearly 30 years. [\[ii\]](#)

The threat to gun owners could not be more obvious. Any judge who favors a “balancing test” regarding inalienable rights doesn’t understand the very nature of our rights as described in our founding documents.

The Declaration of Independence states that, “All Men are created equal [and] are endowed by their Creator with certain unalienable Rights.” [\[iii\]](#) This view was echoed by many of the Founding Fathers, including John Dickinson, who was one of the signers of the Constitution.

Dickinson said that our rights do not originate from the “parchments or seals” of kings or earthly covenants, rather “we claim them from a higher source, from the King of Kings and Lord of all the earth.” [\[iv\]](#)

### **Inalienable rights can not be legitimately restricted by government bureaucrats**

Quite simply, our rights are a gift from God. They are inalienable . . . which means that all of our rights -- including the right to own and carry arms for self-defense -- can not be eliminated, restricted or infringed in any way by a government bureaucrat.

Is it any wonder that the Founding Fathers were so concerned about the “infringement” of our liberties, as evidenced by the language in the Second Amendment? The latter part of that text says, “The right of the people to keep and bear arms SHALL NOT BE INFRINGED.” The founders never viewed this amendment as establishing a right. No, they understood that this language protected a PREEXISTING, INALIENABLE RIGHT from any and all government encroachments (or infringements).

Because our judges and elected officials have rejected the doctrine of inalienable rights -- in exchange for the theory of “balancing tests” -- the rights of Americans gun owners have come under fierce attack in recent decades. (More on this below.)

But before the U.S. Senate sends another judge to the high court, it would be good for him to answer some basic questions relating to judicial power and individual rights.

### What is a judge's role?

Roberts has correctly noted that judges should not impose their own personal views (over that of the legislature). In prior trips before the Senate, he has emphasized "judicial restraint" and referred to the framers' desire that judges "[discern] the law, not [shape] policy. That means the judges should not look to their own personal views or preferences in deciding the cases before them. Their commission is no license to impose those preferences from the bench." [\[v\]](#)

But as noted by legal pundit Benjamin Shapiro, there is something conspicuously absent from this description of the judicial role. What is missing, he says, is "an appeal to the original meaning of the Constitution. Roberts rails against 'personal views' and advocates judicial neutrality, but he does not suggest an alternative source of values."

No judge truly believes that he is imposing personal views on statutes, Shapiro says. "Every judge appeals to some higher set of values, be they moral or legal. Some worship doctrine. Others worship 'evolving standards of morality.' But there is no substitute for the higher authority of the Constitution itself -- and this Roberts does not say." [\[vi\]](#)

If true, this should concern gun owners tremendously. Not only does he favor so-called "balancing tests" (read: infringements), he doesn't seem to have good understanding of the constitutional limitations on Congress that are indelibly inscribed in Article I, Section 8 of the U.S. Constitution.

For this reason, Senators should shower Judge John Roberts with some very basic questions. For example:

1. Is the Supreme Court the final authority on what the Constitution means? (The Founders

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would say, “No.” [\[vii\]](#) )

2. Is it legitimate (or constitutional) for Congress to pass any legislation which lacks authority under Article I, Section 8, of the Constitution?

3. Is it ever appropriate for a U.S. judge to authoritatively appeal to foreign law when adjudicating a case that is before him?

4. What is the Court’s role in considering a “law” which lacks constitutional authority? Could the Supreme Court’s authority be described as one of “judicial supremacy” (where the other two branches must adhere to the Court’s decision) or can the Court only exercise “judicial review” (which limits the Court to merely pronouncing its verdict on unconstitutional legislation)?

5. Where do human rights come from? Do they come from government, the Declaration of Independence or the Constitution? Or do they come from somewhere else?

6. Are individual rights fixed and eternal, or can they evolve over time?

7. The Declaration of Independence states that all men are “endowed by their Creator with certain unalienable rights.” What implications or limitations does this create for our government?

8. “Balancing tests” pit individual rights against the supposed needs of society. But if rights are “endowed by our Creator” and are “inalienable,” then can government EVER restrict, deny or infringe the rights of law-abiding citizens?

9. If yes, when would such “infringements” be constitutionally appropriate?

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10. By appealing to “the Supreme Judge of the world for the rectitude of our intentions,” does the Declaration of Independence lay the groundwork for establishing morality as the basis of law?

### **Congress used to oppose any notion of “balancing” away our gun rights**

Shapiro says that there is nothing in Roberts’ short judicial record to indicate that his judicial philosophy involves “strict fidelity to the original meaning of the Constitution.”

According to Shapiro, Roberts is “not Antonin Scalia, nor is he Clarence Thomas. At best, he is William Rehnquist, for whom he once clerked. While Rehnquist has been a steady political conservative on the bench, the bench should not be about political persuasion: It should be about upholding the explicit words of our Founding Fathers. There is nothing to indicate that Roberts prioritizes the words of the Constitution above other, more immediate political concerns.” [\[viii\]](#)

Shapiro is right on point. It doesn’t help gun owners to have a jurist that “balances” rights in a conservative way versus a liberal way. The constitutional doctrine of limited and enumerated powers prevents our federal government from legislating in ANY area that is not designated in Article I, Section 8, of the Constitution.

This used to be gospel truth in the halls of Congress. For example, when the legislature passed the Property Requisition Act in 1941 to allow the President to requisition and purchase military property that was privately owned, Congress specifically rejected a “balancing test” approach.

Consider the import of this. The country was looking at a World War. It was the desire of Congress to give the President extraordinary powers to aid in the common defense of the nation -- but, not at the expense of individual liberties!

In addition to requiring that fair compensation be provided for any military equipment that was purchased from individuals, the Property Requisition Act contained a clear statement that nothing in the act should be construed “to impair or infringe in any manner the right of any

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individual to keep and bear arms.” [\[ix\]](#)

Explaining this limitation, the House Committee on Military Affairs stated:

In view of the fact that certain totalitarian and dictatorial nations are now engaged in the willful and wholesale destruction of personal rights and liberties, our committee deem it appropriate for the Congress to expressly state that the proposed legislation shall not be construed to impair or infringe the constitutional right of the people to bear arms. In so doing, it will be manifest that, although the Congress deems it expedient to grant certain extraordinary powers to the Executive in furtherance of the common defense during critical times, there is no disposition on the part of this Government to depart from the concepts and principles of personal rights and liberties expressed in our Constitution. [\[x\]](#)

In essence these Congressmen were saying, “The need may be great ... we may be embroiled in a World War. But we’re still not going to ‘balance’ away the basic rights of individuals. We’re not going to sacrifice the right to keep and bear arms for the supposed greater good.”

### **Will Roberts support continued efforts to “balance” away our gun rights?**

“Balancing tests” run totally contrary to the notion of inalienable, God-given rights. And they lead to the gross infringements of people’s liberties. The “balancing test” mentality gave us the Instant Background Check at the federal level (for buying firearms) and a whole litany of background checks at the state level (for carrying guns).

The idea behind such “balancing tests” is this: government officials should be able to weigh the rights of private individuals against the interest that society has in controlling crime. If allowing people to have easy access to firearms means that bad guys can get guns -- so the theory goes -- then the government should be able to set up hurdles for EVERYONE to clear before buying or carrying a firearm.

Of course, empirical evidence has shown that background checks DON’T keep bad guys from getting guns. [\[xi\]](#) And while “balancing” the rights of gun owners has not curbed crime, it has

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been effective at one thing -- it has succeeded in allowing government officials to abuse, intimidate and deny honest citizens their right to keep and bear arms.

In short, balancing rights has led to infringements.

### **BATFE using background checks to intimidate gun buyers in Virginia**

Over the last year, agents from the Bureau of Alcohol, Tobacco, Firearms and Explosives (BATFE) have been showing up at gun shows in Virginia and conducting “residency checks” on prospective gun buyers. But these “residency checks” are much more than the name implies, for they amount to nothing less than “harassment checks.”

Once gun buyers fill out the paperwork to buy their firearms (for the required NICS check), federal agents have been systematically copying down the buyers’ addresses (which is itself, a violation of federal law). [\[xii\]](#) As reported by *CNSNews*, officers are then dispatched to the homes of the prospective gun buyers to speak with family members, asking for example: “Gee, did you know your husband was going to a gun show today? Do you have his cell phone number? Did you know he was buying a gun?”

[\[xiii\]](#)

Philip Van Cleave, president of the Virginia Citizens Defense League (VCDL), says that if people aren’t home, then agents have even gone to neighbors to ask the same questions.

The result? According to a Freedom of Information Act request that was launched by VCDL, law enforcement officials admit that almost two dozen gun buyers have been dissuaded from purchasing firearms (and there is no evidence that these gun buyers were prohibited purchasers in any way).

But this figure probably understates the real figure by a wide margin. The gun show promoter, Showmasters, asserts that the heavy-handed police tactics dissuaded many other attendees from shopping at the most recent gun show in August -- resulting in a shortfall of \$7,000 for the promoter.

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This type of harassment underscores the very reason that GOA opposed the Instant Background check when it was initially proposed. GOA has long predicted that whenever good people are forced to jump through hoops before they can exercise their rights, rogue bureaucrats are then given a chance to harass them.

### Background checks have a long history of abuse

While the Virginia example is certainly the most recent example of abuse, it is by no means an isolated incident. Consider some of the many abuses that have resulted from background checks:

**Frivolous denials.** The General Accounting Office (GAO) found that almost 50% of the denials of firearms purchases under Part I of the Brady Law were erroneous -- that is, the purchases were denied because of administrative snafus or traffic violations.

[\[xiv\]](#)

**Gun store shut downs.** A review of FBI computer records revealed that the firearms industry was shut down 84 times on account of the NICS (National Instant Background Check) system in just the first six months that Part II of the Brady Law was in place.

[\[xv\]](#)

**Delays.** After sending its undercover agents to purchase firearms at gun stores all around the country, the GAO found that 60 percent of the gun purchases were delayed. [\[xvi\]](#)

**Abusive denials.** In Oregon, officials have used the background check process to arbitrarily deny concealed carry licenses based on the applicant's political views. [\[xvii\]](#)

[1](#) In Indiana, the former mayor of Gary once stated that he would not be approving any citizens' concealed carry applications. Then-Mayor Richard Hatcher boasted that if anyone wanted to challenge his authority, they were welcome to take him to court. It took citizens over 10 years (and thousands of dollars in legal fees) to get any relief.

[\[xviii\]](#)



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**Misuse of information.** In most states, background checks are conducted on gun owners before they can carry their firearms away from home. But in several states, newspapers have misused this information and disregarded the privacy of gun owners by printing the names of concealed carry permit holders in their publications. [\[xix\]](#)

What will the future hold?

Perhaps the most nefarious aspect to background checks is that they give government bureaucrats the names of gun buyers. This is registration, pure and simple.

Yes, there are supposedly limitations on the retention of gun buyers' names. But legal restrictions notwithstanding, the history of background checks is replete with abuse, as elected officials have sought to keep these names, even in violation of the law. [\[xx\]](#)

But why all the fuss about gun owner registration? Quite simply, gun registration has been used -- even in this country -- to later confiscate firearms. One such instance occurred in New York City just a few years ago. [\[xxi\]](#)

Will Roberts come down on the right side of all these issues? Well, there are some ominous trends in his prior record, but we may not know for several years -- assuming he is confirmed by the Senate later this year.

Columnist Ann Coulter calls the President's pick a "Souter in Roberts' clothing" -- an obvious reference to the fact that Supreme Court Justice David Souter was a "stealth nominee" himself when he was nominated by President Bush in 1990, and, for most constitutionalists, has turned out to be quite a "dud."

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Coulter says that the current President “has given us a Supreme Court nomination that will placate no liberals and should please no conservatives. Maybe Roberts will contravene the sordid history of ‘stealth nominees’ and be the Scalia or Thomas Bush promised us when he was asking for our votes. Or maybe he won’t. The Supreme Court shouldn’t be a game of Russian roulette.” [\[xxii\]](#)

How true.

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[\[i\]](#) James S. Burling, “John Roberts: A Supreme Property Rights Disaster in the Making,” (August 15, 2005) at [http://www.pacificlegal.org/view\\_Commentaries.asp?ilD=169](http://www.pacificlegal.org/view_Commentaries.asp?ilD=169). Burling says, “In a notorious case in 2002, John Roberts, then a private attorney, argued that several dozen mostly elderly and middle class landowners should not receive a penny in compensation even after a local land use agency had prohibited all use of their property near Lake Tahoe for nearly 30 years. In a nutshell, Roberts argued that impacts to property owners must be balanced against the utility of the regulation -- in a way that tilts almost every time in the government’s favor. Unfortunately for the landowners, the Court agreed with him.

“Of course, one might argue, Roberts was only doing what he was being paid to do as a high-priced lawyer to represent his client. But why then did he take the case for a ‘substantially reduced’ fee as the chief of the Tahoe Regional Planning Agency admits?

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“More disturbingly, Robert’s representation of the agency is entirely consistent with the statist philosophy he expressed in a 1978 Harvard Law Review article on land use law. He argued against clear rules that would put boundaries on government power over property in favor of essentially the same government-friendly ‘balancing test’ that he advocated for in the Lake Tahoe case.

“Even more troubling, he proposed a scheme that would deny money to landowners whose property is taken, using the sort of rhetoric that reminds us of Bill Clinton’s prevarications over the meaning of the word ‘is.’ Roberts wrote: ‘The very terms of the fifth amendment, furthermore, are sufficiently flexible to accommodate changing notions of what compensation is “just.”’

“Put another way, what we have here is not the ‘living constitution’ so derided by strict constructionists, but a ‘mutating virus’ infinitely malleable in the service of the state, and undeniably threatening to the rights of property owners. Justice O’Connor was a swing vote on property; with Roberts it will be the property owners who will be twisting in the wind.”

[\[ii\]](#) Ibid.

[\[iii\]](#) While the Declaration of Independence uses the word “unalienable,” modern dictionaries use the word “inalienable.” Both terms are interchangeable.

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[iv] John Dickinson, *The Political Writings of John Dickinson* (Wilmington: Bonsal and Niles, 1801), Vol. I, pp. 111-112, as cited in David Barton, "Was the American Revolution a Biblically Justified Act?" (2003) at [http://www.wallbuilders.com/resources/search/detail.php?ResourceID=40#\\_ftn2](http://www.wallbuilders.com/resources/search/detail.php?ResourceID=40#_ftn2)

[v] Benjamin Shapiro, "John Roberts is no Scalia," *WorldNetDaily* (July 21, 2005).

[vi] Ibid.

[vii] A look at the writings of several Founding Fathers -- as well as the Constitution itself -- reveals that it was not their collective opinion that the Supreme Court was to be the final word on what the Constitution means. See Erich Pratt, "Putting All The Eggs In The Wrong Basket: Judicial Supremacy, The Supreme Court, And Gun Rights" (November 2003) at <http://www.gunowners.org/fs0305.htm>

[viii] Shapiro, "John Roberts is no Scalia."

[ix] Stephen P. Halbrook, "Firearms Law Deskbook," *Supreme Court Gun Cases* (2004), p. 43.

[x] Ibid.

[xi] To read how undercover federal agents were able to buy guns with fake ID's 100 percent of the time -- thus showing that the Brady Law is NOT stopping criminals from using such bogus documentation to buy firearms --

see General Accounting Office, "Firearms Purchased From Federal Firearm Licensees Using Bogus Identification" (March 2001) at [http://www.house.gov/reform/min/inves\\_guns/guns\\_loop.htm](http://www.house.gov/reform/min/inves_guns/guns_loop.htm) on the internet.

To read the JAMA study which concluded that states implementing waiting periods and background checks did "not [experience] reductions in homicide rates or overall suicide rates," see Jens Ludwig and Philip J. Cook, "Homicide and Suicide Rates Associated With Implementation of the Brady Handgun Violence Prevention Act," *Journal of the American Medical Association*, vol. 284, no. 5 (August 2, 2000).

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To read how England's total handgun ban has failed to prevent its crime rate from becoming the HIGHEST among more than a dozen industrialized nations (including the United States), see John van Kesteren, Pat Mayhew and Paul Nieuwbeerta, "Criminal Victimization in Seventeen Industrialised Countries: Key findings from the 2000 International Crime Victims Survey," (2000) at [http://www.minjust.nl:8080/b\\_organ/wodc/reports/ob187i.htm](http://www.minjust.nl:8080/b_organ/wodc/reports/ob187i.htm) .

[xii] It would appear that the BATFE violated a couple of federal laws, at a minimum. For example, 18 USC 923(g)(3)(B) provides that the BATFE may not give anyone information contained in the licensees' forms, and 18 USC 923(g)(1)(B) provides that they may look at forms only once a year or pursuant to a criminal investigation.

[xiii] Jeff Johnson, "ATF, Virginia Police Accused of 'Persecuting' Gun Shows," *Cybercast News Service* (August 23, 2005) at [www.cnsnews.com/ViewSpecialReports.asp?Page=%5CSpecialReports%5Carchive%5C200508%5CSPE20050823a.html](http://www.cnsnews.com/ViewSpecialReports.asp?Page=%5CSpecialReports%5Carchive%5C200508%5CSPE20050823a.html) .

[xiv] Of persons denied the right to purchase a firearm under Part I of the Brady Law (before the Instant Check went online in 1998), 7.6 percent of the denials involved routine traffic stops. Another 38.9 percent were the result of administrative snafus. Only 44.7 percent of denials were as a result of felony convictions, and many of these resulted from white-collar crimes and

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ancient peccadilloes which would not suggest that the person would pose a danger. [General Accounting Office, "Gun Control: Implementation of the Brady Handgun Violence Prevention Act" (January 1996), pp. 39-40, 64-65.]

[xv] A review of FBI computer records revealed that the firearms industry was shut down for more than eight full business days during the first six months that the National Instant Background Check (NICS) was online. The four-page report, obtained by the National Association of Federally Licensed Firearms Dealers, indicated that legitimate businesses endured federal closures 84 times on account of the NICS system during the six-month period. See Gun Owners of America, "Instant Registration Check Threatens Gun Owners' Rights," (2002) at <http://www.gunowners.org/fs0202.htm>.

Even when FBI computers are not experiencing problems, it is not uncommon for law-abiding citizens to experience delays when trying to purchase firearms. The GAO sent undercover agents into five states to buy firearms at randomly selected gun shops. [General Accounting Office, "Firearms Purchased From Federal Firearm Licensees Using Bogus Identification" (March 2001) at [http://www.house.gov/reform/min/inves\\_guns/guns\\_loop.htm](http://www.house.gov/reform/min/inves_guns/guns_loop.htm) on the internet.]

All the gun purchases in the study required the FBI to run background checks on fake names and false social security numbers. Amazingly, three out of the five transactions in the study -- or 60 percent -- required that the purchaser return to the gun shop at a later time. Why is this amazing? Because by definition, none of the fraudulent social security numbers being used by the undercover agents should have generated any adverse information. Nevertheless, 60 percent of the gun purchases were delayed!

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[xvii] In one case, a permit holder had his license revoked because he was the editor of a pro-life newspaper. In a court hearing to have the license returned, the judge in the case admitted that the individual did not meet the criteria for a revocation (i.e., he had never engaged in acts of violence or made threats of violence) but agreed to uphold the revocation anyway. The justification the judge gave was that the abortion issue was "a volatile one" and people involved in it should not be allowed to carry guns. A friend of the "defendant" made a routine inquiry to the sheriff's department to see if any abortion doctors or activists had their licenses revoked. By Oregon law this is public information. He was immediately visited by four FBI agents who demanded to know the reason for the request. Statement by Kevin Starrett, Oregon Representative for Gun Owners of America, August 21, 1995.

[xviii] Supreme Court of Indiana, *Kellogg v. City of Gary* (1990).

[xix] North Carolina, Ohio, Pennsylvania and Virginia are just four examples where local newspapers have printed the names of concealed carry permit holders.

[xx] Despite prohibitions in federal law, the FBI announced in 1998 that it would begin keeping gun buyer's names for six months. Although this registration period was later dropped to 90 days, the FBI had originally wanted to keep the names for 18 months. They reduced the time period after groups like Gun Owners of America strongly challenged the legality of their actions. GOA submitted a formal protest to the FBI, calling their attempt at registration both "unlawful" and "unconstitutional." Among some of the reforms instituted by President George Bush in 2001 was a change in this 90-day record-keeping requirement. His Attorney General, John Ashcroft, announced in June of that year that the FBI would not keep records of innocent gun owners for longer than 24 hours. See Gun Owners of America, "Instant Registration Check Threatens Gun Owners' Rights," (2002) at <http://www.gunowners.org/fs0202.htm>.



[xxi] In the mid-1960's, officials in New York City began registering long guns. They promised they would never use such lists to take away firearms from honest citizens. But in 1991, the city banned (and soon began confiscating) many of those very guns. In 1992, a New York City paper reported that, "Police raided the home of a Staten Island man who refused to comply with the city's tough ban on assault weapons, and seized an arsenal of firearms. . . . Spot checks are planned [for other homes]." See *supra* note 20, "Instant Registration Check Threatens Gun Owners' Rights."

[xxii] Ann Coulter, "Souter in Roberts Clothing," (July 20, 2005) at <http://www.anncoulter.org/cgi-local/article.cgi?article=66>

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