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**Testimony before the U.S. Senate Judiciary Committee's Subcommittee on the  
Constitution, Civil Rights, and Human Rights**

**Hearing on “‘Stand Your Ground’ Laws: Civil Rights and Public Safety  
Implications of the Expanded Use of Deadly Force”**

**Ilya Shapiro  
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**October 29, 2013**

Chairman Durbin, Ranking Member Cruz, and distinguished members of the Subcommittee, thank you for this opportunity to discuss “stand your ground” (SYG) laws and other protections for the constitutional right to armed self-defense.

It is perhaps most appropriate that this hearing was originally scheduled for September 17, Constitution Day, which marks the anniversary of the signing of our Founding document in 1787. On that day, all publicly funded educational institutions have to provide programming on the history of the Constitution. My own organization, the Cato Institute, which thankfully isn't publicly funded, celebrates Constitution Day by releasing our annual *Cato Supreme Court Review*—now in its 12th year—and hosting a conference that reviews the previous Supreme Court term and previews the next one. In reality, of course, every day is Constitution Day, so please excuse me if I have to leave this hearing early to travel to the National Constitution Center in Philadelphia to debate the constitutional issues attending the recent government shutdown and our ongoing budget and debt-ceiling disputes.

Now, by way of overview, let me note that SYG laws are a tremendously misunderstood aspect of the debate over firearms regulation and criminal-justice reform. Notwithstanding recent efforts to politicize the issue—sparked by some truly unfortunate events that have nothing to do with “standing your ground”—there's nothing particularly novel, partisan, or ideological about these laws. All they do is allow people to assert their right to self-defense in certain circumstances without having a so-called “duty to retreat.” The SYG principle has been enshrined in the law of a majority of U.S. states for over 150 years, originating as judge-made common law and eventually being codified by statute.

At present, about 31 states—give or take, depending on how you count—have some type of SYG doctrine, a vast majority of which had it as part of their common law even before legislators took any action. So even if these statutes were repealed tomorrow, SYG would still be the law in most states because of preexisting judicial decisions. And, of course, some states, like California and Virginia, maintain SYG only judicially, without having passed any legislation.

It's also worth noting that of the 15 states that have passed variations of the law since 2005, the year Florida's model legislation became law, eight—a majority—had

Democratic governors when the laws were enacted. None issued a veto. Democratic governors who signed SYG bills, or otherwise permitted them to become law, include Kathleen Blanco of Louisiana, Jennifer Granholm of Michigan, Brian Schweitzer of Montana, John Lynch of New Hampshire, Brad Henry of Oklahoma, Phil Bredesen of Tennessee, Joe Manchin of West Virginia, and Janet Napolitano of Arizona. The bills in Louisiana and West Virginia passed with Democratic control of both houses in the state legislatures, in 2006 and 2008, respectively. Even Florida's supposedly controversial law passed the state senate unanimously and split Democrats in the state house. Conversely, many so-called "red states," or those that have a significant gun culture—such as Arkansas, Missouri, Nebraska, and Wyoming—impose a duty to retreat. And even in the more restrictive states, such as New York, courts have held that retreat isn't required before using deadly force in the home or to prevent a robbery, kidnapping, or rape.

Having outlined the current state of play, let's step back and examine the development of the law regarding the right to self-defense and the use of deadly force, to see how SYG emerged and understand what it means.

It's a universal principle of law that a person is justified in using force (but not deadly force) when and to the extent that he or she reasonably believes that such conduct is necessary to defend him- or herself or someone else against an imminent use of unlawful force. Where there is no duty to retreat—as in most of the United States—a person is further justified in using *deadly* force if he or she reasonably believes it to be necessary to prevent imminent death or great bodily harm to him- or herself or someone else, or to prevent the imminent commission of a forcible felony (such as rape or armed robbery). That's the norm throughout the United States: that deadly force may be used only in cases of "imminent death or great bodily harm" that someone "reasonably believes" can only be prevented by using lethal force.

It's not an easy defense to assert, and it certainly doesn't mean that whenever you're afraid, you can shoot first and ask questions later. Every day, criminals assert flimsy self-defense claims that get rejected by judges and juries regardless of whether the given state has a SYG law. These laws are not a license to be a vigilante, commit murder, or otherwise behave recklessly or negligently with firearms and other deadly weapons. They simply protect law-abiding citizens from having to leave a place where they're allowed to be simply because criminals show up and threaten them. In other words, in most states, victims (or would-be victims) of a violent crime don't have to try to run away before defending themselves.

That's why the core of the debate over SYG—the real one, not the phony war we've been having lately—is really one about the duty to retreat. This is not a new debate, but something that's been going back-and-forth in Anglo-American law for centuries. In ancient Britain, when the deadliest weapons were swords, a duty to retreat made sense and greatly reduced everything from violent incidents to blood feuds. Firearms and especially handguns were also not as widespread in modern Britain until fairly recently, and British law continues to reflect the historic "deference to the constabulary," by which the King owed a duty of protection to his subjects. That deference to the sovereign was never part of the American tradition, for understandable reasons. In this country, at any given time about half the states may have had SYG laws, and today's split is well within historical norms.

Indeed, despite what gun prohibitionists claim, the no-retreat rule has deep roots in traditional American law. At the Supreme Court, SYG dates back to the 1895 case of *Beard v. United States*, in which the great Justice John Harlan wrote for a unanimous Court that the victim “was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground, and meet any attack upon him with a deadly weapon, in such a way and with such force as, under all the circumstances, he, at the moment, honestly believed, and had reasonable grounds to believe, were necessary to save his own life, or to protect himself from great bodily injury.”

In jurisdictions that do have a duty to retreat, people who were at genuine risk of death or grievous bodily harm can be prosecuted and sent to prison for very long terms, even if they were doing nothing but defending themselves. That’s controversial for any number of reasons, one of which is that the law never demands any other type of duty of people who face imminent violence. You don’t have to give up your wallet. You don’t have to reason or call for help. You don’t have to say “uncle” or apologize. But you do have to retreat. That’s odd. A mugger doesn’t have the right to demand someone’s wallet, so why should an aggressor have the right to demand something else to which he or she has no right?—that you leave or retreat from a place where you have every right to be.

The old “duty to retreat” rule made it hard to invoke self defense even if you had faced an immediate threat of assault: “you could have run away,” the state would argue, and conviction would follow. Among those who often lost out under that old rule were domestic violence victims who turned on their assailants. Feminists pointed out that “you could have run away” may not work well when faced with a stalker or vengeful ex.

SYG laws are thus designed to clarify the law in order to protect the law-abiding citizen who is under attack by a criminal. It’s slightly less controversial in the case of a home: It’s bad enough to have your home burglarized and your life threatened, but to have to hire a lawyer and fend off a misguided prosecutor or personal-injury lawyer defending an injured criminal was considered too much for many lawmakers. That’s how we have the Castle Doctrine, which holds that you don’t need to retreat when your home is attacked. Nearly all states recognize some version of the Castle Doctrine, such that modern laws presume that someone forcing entry into a house is doing so with the intent to commit a felony and that the use of defensive force by residents is due to a reasonable fear of bodily harm or death.

When you extend that doctrine to public spaces—as most states do—you get SYG. What’s been overlooked in the current debate about these laws is that they only apply to people under attack. Again, the rationale is that it’s bad enough for an innocent person to find him- or herself threatened by a criminal, but to then have to worry about whether he or she should retreat, lest he or she face prosecution or lawsuits for hurting the criminal, is simply too much to ask. As the great progressive Justice Oliver Wendell Holmes wrote for a unanimous Supreme Court in the 1921 case of *Brown v. United States*, “detached reflection cannot be demanded in the presence of an uplifted knife.” Nearly a century later—and regardless of one’s views on the scope of the Second Amendment or appropriate types of gun regulations—I don’t think we can demand more of crime victims trying to defend themselves.

Of course, any self-defense rule bears the potential for injustice or unfairness. For example, there can be an altercation between two people, one of whom is left dead and the other whose invocation of self-defense is dubious—but there aren’t any witnesses or

other evidence to contravene it beyond the standard required for criminal conviction. That's the Trayvon Martin case, where only George Zimmerman knows what actually happened. These sorts of cases implicate the availability of a self-defense justification for taking someone's life rather than the existence of a duty to retreat. If Zimmerman was the aggressor, shooting and killing Trayvon for no lawful reason, then he committed murder and has no self-defense rights at all, whether the incident had taken place in a SYG jurisdiction or not. If Trayvon attacked Zimmerman, then the only question is whether Zimmerman reasonably believed that his life was in danger, not whether he could've retreated. And if Zimmerman provoked their confrontation, even if Trayvon eventually overpowered him, he lost the protections of the SYG law.

In short, hard, emotionally wrenching cases make not only for bad law, but for skewed policy debates. The members of this committee are of course well familiar with that demagogic dynamic given the flurry of gun-control proposals after Sandy Hook. While anti-gun lobbyists have used both that tragedy and Trayvon Martin's death to pitch all sorts of legislative changes, what they really seem to be targeting, as it were, is the right to armed self-defense. With SYG laws, yes, prosecutors may need to take more care to marshal a show of actual evidence to counter claims of self-defense rather than simply arguing that the shooter could've retreated. For those who value due process in criminal justice—a group that should emphatically include members of historically mistreated minorities—that should count not as a bug but a feature.

And it turns out that threats to constitutional criminal procedure come not just from domestic lobbies but also from abroad. Just two weeks ago, the United Nations latched onto Trayvon Martin's death to call on the United States to review its criminal laws, citing our international treaty obligations. The press release from the so-called independent human rights experts was characteristically short on specifics, but if the UN claim is that we have some obligation to change our SYG laws, reduce the burden of proof for criminal convictions, or dilute our prohibition against double-jeopardy—which Article 14, Section 7 of the International Covenant on Civil and Political Rights actually forbids—then I agree with UCLA law professor Eugene Volokh's suggestion that the UN "go take a hike."

Finally, I would be remiss if I didn't mention before concluding one episode in the leadup to this hearing that has unfortunately contributed to the sensationalism surrounding discussions of SYG laws: Chairman Durbin's attempt to intimidate businesses and organizations that have had any affiliation with the American Legislative Exchange Council (because ALEC had sponsored model SYG legislation, among other reforms that may not have curried Chairman Durbin's favor). Chairman Durbin's letter noted that responses would be included in this hearing's record, but just to be safe, I'm submitting with this statement both the Chairman's letter and the response by Cato's president, John Allison.

Thank you again for having me. I welcome your questions.

Attachments:

1. Letter from Sen. Richard Durbin to Cato President John Allison, Aug. 6, 2013.
2. Letter from Cato President John Allison to Sen. Richard Durbin, Aug. 8, 2013.

United States Senate  
Washington, DC 20510-1304

August 6, 2013

John Allison  
President and CEO  
Cato Institute  
1000 Massachusetts Ave, NW  
Washington, DC 20001

Dear Mr. Allison,

I write to seek information regarding your organization's position on "stand your ground" legislation that was adopted as a national model by the American Legislative Exchange Council (ALEC).

ALEC describes itself as a think tank that develops model bills for state legislators. In 2005, ALEC approved the adoption of model "stand your ground" legislation entitled the "Castle Doctrine Act."<sup>i</sup> This model legislation was based on Florida's "stand your ground" law<sup>ii</sup>, and it changes the criminal law regarding self-defense and provides immunity for certain uses of deadly force.

In years subsequent to 2005, ALEC cited the introduction and enactment of state bills based on its model "stand your ground" legislation as "ALEC's successes."<sup>iii</sup> As recently as March 2012, ALEC issued a statement defending its model "stand your ground" legislation from criticism after the killing of Trayvon Martin in Florida.<sup>iv</sup> On April 17, 2012, ALEC issued a press release stating that it was eliminating the task force that had initially approved the model "stand your ground" legislation.<sup>v</sup> However, ALEC has never issued a statement retracting the organization's approval of its model "stand your ground" legislation, nor has ALEC ever issued a statement calling for any state laws based on ALEC's model "stand your ground" legislation to be repealed.<sup>vi</sup>

Although ALEC does not maintain a public list of corporate members or donors, other public documents indicate that your organization funded ALEC at some point during the period between ALEC's adoption of model "stand your ground" legislation in 2005 and the present day. I acknowledge your organization's right to actively participate in the debate of important political issues, regardless of your position, and I recognize that an organization's involvement with ALEC does not necessarily mean that the organization endorses all positions taken by ALEC. Therefore I am seeking clarification whether organizations that have funded ALEC's operations in the past currently support ALEC and the model "stand your ground" legislation.

I ask that you please reply to this letter by answering yes or no in response to the two questions below. Please feel free to provide additional information explaining your yes or no response.

1. Has Cato Institute served as a member of ALEC or provided any funding to ALEC in 2013?
2. Does Cato Institute support the “stand your ground” legislation that was adopted as a national model and promoted by ALEC?

Please provide a response to this letter by September 1, 2013. Note that I am sending similar letters to other organizations that have been identified as ALEC funders at some point between 2005 and today. In September, I plan to convene a hearing of the Senate Judiciary Committee Subcommittee on the Constitution, Civil Rights and Human Rights to examine “stand your ground” laws, and I intend to include the responses to my letters in the hearing record. Therefore, please know that your response will be publicly available.

Thank you for your attention to this request. Please feel free to contact Dan Swanson or Stephanie Trifone on my staff at 202-224-2152 if you have any questions. I look forward to receiving your response.

Sincerely,



Richard J. Durbin  
United States Senator

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<sup>i</sup> See National Rifle Association Institute for Legislative Action, “NRA Presents ALEC Model Legislation in Grapevine, Texas,” August 12, 2005, available at [http://www.prwatch.org/files/NRA\\_2005.png](http://www.prwatch.org/files/NRA_2005.png). The text of the ALEC “Castle Doctrine Act” is attached.

<sup>ii</sup> See “ALEC Statement on ‘Stand Your Ground’ Legislation” – 3/26/12 (stating that “Florida’s ‘Stand Your Ground’ law was the basis for the American Legislative Exchange Council’s model legislation”), available at <http://www.alec.org/alec-statement-on-stand-your-ground-legislation-32612/>.

<sup>iii</sup> See “Model Bill Highlights for 2007” stating that “The ALEC Legislation Scorecard tracks ALEC’s successes in the states by its model bills that were introduced and those that were enacted.” The Scorecard listed among its “legislative highlights” that Maine, North Dakota and Tennessee had introduced or adopted ALEC’s model Castle Doctrine Act which “Protects citizens from prosecution or liability if they use a firearm in self defense inside or outside their homes.” Available at [http://web.archive.org/web/20081106040540/http://www.alec.org/AM/Template.cfm?Section=Legislative\\_Scorecard](http://web.archive.org/web/20081106040540/http://www.alec.org/AM/Template.cfm?Section=Legislative_Scorecard)

<sup>iv</sup> See “ALEC Statement on ‘Stand Your Ground’ Legislation – 3/26/12”, supra note ii.

<sup>v</sup> See “ALEC Sharpens Focus on Jobs, Free Markets and Growth — Announces the End of the Task Force that Dealt with Non-Economic Issues,” April 17, 2012 press release, available at <http://www.alec.org/alec-sharpens-focus-on-jobs-free-markets-and-growth-announces-the-end-of-the-task-force-that-dealt-with-non-economic-issues/>.

<sup>vi</sup> In contrast, ALEC has issued statements announcing that it had reevaluated its policies and repudiated its involvement on other issues. For example, on March 27, 2012, ALEC issued a press release saying that “[ALEC] today is no longer involved with the private prison industry.” This press release stated “ALEC legislators are committed to finding and sharing solutions for the most critical issues facing their states. Sometimes that commitment will require us to reevaluate policies and change course. We are not afraid to do so when the facts demand it.” See “Response to Krugman’s Erroneous Claims” -3/27/12, available at <http://www.alec.org/alec-response-krugman%e2%80%99s-erroneous-claims/>



August 8, 2013

JOHN A. ALLISON  
*President and CEO*  
*Retired Chairman and CEO, BB&T*

The Honorable Richard C. Durbin  
711 Senate Hart Bldg.  
Washington, D.C 20510

Dear Senator Durbin:

Your letter of August 6, 2013 is an obvious effort to intimidate those organizations and individuals who may have been involved in any way with the American Legislative Exchange Council (ALEC).

While Cato is not intimidated because we are a think tank—whose express mission is to speak publicly to influence the climate of ideas—from my experience as a private-sector CEO, I know that business leaders will now hesitate to exercise their constitutional rights for fear of regulatory retribution.

Your letter thus represents a blatant violation of our First Amendment rights to freedom of speech and to petition the government for a redress of grievances. It is a continuation of the trend of the current administration and congressional leaders, such as yourself, to menace those who do not share your political beliefs—as evidenced by the multiple IRS abuses which have recently been exposed.

Your actions are a subtle but powerful form of government coercion.

We would be glad to provide a Cato scholar to testify at your hearing to discuss the unconstitutional abuse of power that your letter symbolizes.

Sincerely,

A handwritten signature in blue ink that reads "John A. Allison".

John A. Allison

JAA/ems