The Second Amendment in the Modern World

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"A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed"

The Second Amendment in History

In October, 1776, John Hancock, President of the Continental Congress sent to each State quotas for troops to be supplied by the State to the Continental Army. The Continental Congress, however, had no right or power to compel the States to comply, and indeed, none of them did. Two reasons for this refusal have been cited. First, the States needed to protect their own citizens from the British and believed this best done by their own militias. Second, they feared the establishment of an independent, standing army which a central government might use to impose its will on their citizens just as the British army was attempting to do. They did not want to repulse one tyranny only to have it replaced by another.

These concerns were addressed in the Articles of Confederation sent to the States for consideration in November, 1777. Article XI provided in part, *"…every State shall always keep a well regulated and disciplined militia sufficiently armed and accoutered*...." and thus specifically assured the States of the right to self-protection by their own militias against invasion from domestic or foreign aggression.

The Articles, however, were not intended to be the framework for a national government, but rather as the name suggests, to create a confederation of thirteen separate, sovereign States for the prosecution of the Revolution. Accordingly, the Articles were replaced by the Constitution, but the concerns of the States regarding self protection by their own militias and distaste for a standing army remained. These issues were partially addressed in Article I, Sections 8(15) and 8(16) which recognized an implied, but not guaranteed, right of the States to maintain militias while giving Congress the power to call on those militias to "*execute the Laws of the Union*, *suppress Insurrections and repel Invasions".* Five States, still unsatisfied, ratified the Constitution, calling at the same time for an amendment which would prohibit a permanent, standing army and preserve their militias.

James Madison, sole author of the Bill of Rights, responded, originally writing: "The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia, composed of the body of the people, being the best security of a free country; but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person".

After significant editing in the Senate, which deleted the reference to the "composition" of the militia and the religious exception to service, the Second Amendment was ratified in 1791 as part of the Bill of Rights as we now know it.

The Second Amendment Interpreted

It is clear from the historical context that Madison's intention in drafting the Second Amendment was to reassure the skeptical States that the defense of the United States would depend on State militias composed of citizens rather than a federal army. His use of the word "people" obviously reflects a continued concept of the same word as used in the Preamble of the Constitution, meaning a body of the whole rather than individuals. Similarly the words, "the right to bear arms" are essentially military in nature. A hunter headed into the woods would not likely have thought of himself as "bearing arms".

Therefore, while the meaning of the Second Amendment would seem obvious, its language has given rise to two very distinct interpretations. One view is that the Amendment confers on State governments the right to establish and maintain "militias" for the defense of the State and protection of its citizens.. Under this view, the individual's right to bear arms is inextricably linked with performing services with the militia. The opposing view is that the Second Amendment protects the right of every individual to have a firearm for any or no particular purpose at all totally unrelated to service in a militia.

From its ratification in 1789 up until 1939 through most of the last century the militia based concept was generally accepted by historians, courts and legal scholars. And yet, its core concept, the "militia", was slowly being eroded. Following the Civil War, fought almost entirely by State militias, the Founders' "militia" has steadily given way to a national military force which is quite different. Nonetheless, during the last century in response to violence associated with Prohibition and later, organized crime and social unrest, both federal and state legislation regulating gun registration and ownership was enacted without significant challenge in the courts.

The Second Amendment and the Supreme Court

United States v. Miller

Then in 1939, the Supreme Court directly addressed the Second Amendment. United States v. Miller, involved a challenge to the National Firearms Act of 1934 (NFA) which had been passed in response to the St. Valentine's Day gangland massacre. The NFA required certain types of firearms to be registered with the government. The defendant, Jack Miller, was an Oklahoma bank robber who was arrested while carrying a sawed off, 12- gauge, unregistered shotgun. At trial, he argued that the registration requirements of the NFA were an unconstitutional

violation of the Second Amendment. On appeal, the Supreme Court held that, *"In the absence of any evidence tending to show that possession or use of a shotgun having a barrel of less than eighteen inches in length, at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument*". In other words, the Supreme Court was saying that the Second Amendment only protects individual ownership of military type firearms appropriate for use by a militia. Both gun control and gun rights groups have claimed support for their respective views in this decision. Gun rights groups have argued that the decision was limited only to a specific type of weapon, not all guns. Gun control groups, however, have pointed to concluding language in the opinion stating, "*With obvious purpose to assure the continuation and render possible the effectiveness of such [militia] forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view".*

United States v. Heller

There was little controversy over the meaning of the Second Amendment in the decades following the Miller decision. However, in the 1980's and 1990's in response to growing domestic unrest and urban violence, a number of conservative and libertarian scholars, some funded by the NRA and other conservative groups, began to publish law review articles urging the individual rights interpretation. This led to efforts by libertarian attorneys working with public interest law firms like the Institute for Justice to seek out individuals who might have viable claims that their rights as individuals to have firearms had been infringed by the Second Amendment. In Dick Heller, they found such a person.

Dick Heller was a security officer who had moved to the District of Columbia in 1975. At the time he moved to the District, he brought with him a pistol and rifle. He was allowed to carry a gun on the job, but pursuant to the Firearms Control Regulations Act of 1975 applicable in the District, he could not have an unregistered handgun at his home. The Act did provide that guns owned prior to 1975 would not be covered, but that such weapons must be kept "*unloaded and disassembled or bound by a trigger lock*". Heller was prevailed upon by his attorneys to seek registration which would allow him to have a gun at home. Knowing he would not succeed, he did and was turned down. Thus he became a suitable plaintiff (the legal term is he had "standing") to assert that the Second Amendment unconstitutionally infringed his right as an individual to own a handgun.

Before the Supreme Court, attorneys for the District of Columbia argued that the right to bear arms set out in the Second Amendment was militia based. They pointed out there was nothing in the language or history of the Second Amendment that referred to the use of weapons by individuals for personal purposes and cited the Miller case in support of their position

Therefore, they said, reasonable restrictions for the purpose of public safety were not unconstitutional.

In a 5 to 4 decision, handed down in 2008, the Court disagreed, overturning the Miller decision which had been the established law for sixty-nine years. Writing for the majority, Justice Scalia found that the Second Amendment protects the individual's right to possess a weapon unconnected with service in a militia and to use that weapon for all lawful purposes. He concluded that the Amendment's preamble referring to a "militia" stated a purpose, but did not restrict the right to own a firearm to service in a militia. It is important to note that Scalia emphasized the right to bear arms was not unlimited. He wrote, *"Nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms*". Referring to the Miller case and the sawed-off shotgun involved there, he noted that the there was a constitutional limitation on the carrying of "*dangerous and unusual weapons".*

The Future

Under the present and prospective composition of the Supreme Court, there appears no chance whatsoever that the Heller decision will be modified or reversed in the foreseeable future. It appears even less likely that a Constitutional amendment clarifying the right to ownership of weapons as recently suggested by former Justice John Paul Stevens will even be proposed. Unlike the restrictions on alcohol consumption during Prohibition, gun rights advocates are offering an expansion of individual rights. Gun control groups are faced with the dilemma of campaigning for a restriction of citizen rights with its negative connotation. It is far easier to grant a right than to take one away. The only alternative, therefore, appears to be to advocate constantly for federal and state legislative laws and regulations which will fall within the permissible boundaries referenced by Justice Scalia in Heller.