AMERICANS AGAINST GUN VIOLENCE

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Does the Second Amendment guarantee an individual right to own a gun unrelated to service in a "well regulated militia?"

Until 2008, the answer to this question was a definite, "No."

The full text of the Second Amendment reads:

> 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.

Prior to 2008, the Supreme Court had ruled in four separate cases that the Second Amendment did not confer an individual right to own guns unrelated to service in a well regulated militia.[i] In the first two cases (*Cruikshank* in 1876 and *Presser* in 1886), the Court based its ruling on the prevailing view at the time that the Bill of Rights didn't grant rights to individual citizens, it merely prohibited Congress from impinging on rights derived from other sources. This theory gradually gave way to the view that the rights enumerated in the Bill of Rights were "incorporated" by the "equal protection of the laws" clause of the Fourteenth Amendment into the rights conferred by the Constitution to all citizens.[ii] In 1939, after the "incorporation" theory had become generally accepted, the Supreme Court revisited the question of whether the Second Amendment conferred an individual right to own guns unrelated to service in a well regulated militia in the case of the *United States v. Miller*. The Court ruled unanimously in this case that the Second Amendment did not confer such a right. The Court stated:

> The Constitution as originally adopted granted to the Congress power — "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.[iii]

In 1980, in the case of *Lewis v. United States,* quoting from another part of the *Miller* decision, the Supreme Court reiterated:

> The Second Amendment guarantees no right to keep and bear a firearm that does not have "some reasonable relationship to the preservation or efficiency of a well regulated militia."[iv]

Beginning in the 1970's, however, the gun lobby began seeding the legal literature with articles claiming that the courts had been wrong in ruling that the Second Amendment did not confer an individual right to own guns unrelated to service in a well regulated militia.[v] Supreme Court justices were aware of this propaganda campaign, and for decades, they did not bow to it. As Justice William Douglas wrote in the 1972 case of *Adams v. Williams,* citing the precedent of the Court's *Miller* decision:

> A powerful lobby dins into the ears of our citizenry that [handgun] purchases are constitutional rights protected by the Second Amendment….There is under our decisions no reason why stiff state laws governing the purchase and possession of pistols may not be enacted….There is no reason why all pistols should not be barred to everyone except the police.[vi]

Lower courts also resisted the gun lobby's propaganda campaign. With a single exception, every federal court that considered the Second Amendment in a case between 1939 and 2007 ruled, consistent with the *Miller* decision, that the Second Amendment did not confer an individual right to own guns unrelated to service in a well regulated militia. (The single exception was the 2001 case of *U.S. v. Emerson* in which two members of a three judge panel of the Fifth Circuit Court of Appeals opined in a lengthy treatise unrelated to the decision in the case at hand that the Second Amendment was intended to confer an individual right to own guns unrelated to service in a well regulated militia.[vii])

In 2007, though, the gun lobby's propaganda campaign came to fruition. In the case of *Parker et al v. District of Columbia,* a three judge panel of the DC Court of Appeals ruled that the District of Columbia's partial handgun ban and safe firearm storage laws violated the Second Amendment.[viii] The *Parker* case became the *Heller* case after it was ruled that of the six plaintiffs in the case, only Dick Heller had standing to sue the District of Columbia as he was the only plaintiff who had actually been denied a handgun permit by the District.[ix] The District of Columbia appealed the case to the Supreme Court, and in the 2008 *Heller* decision, a narrow 5-4 majority of justices upheld the appeals court ruling.[x]

Technically, the only question that the Supreme Court agreed to consider in the *Heller* case was whether the District of Columbia's partial handgun ban and firearm safe storage laws violated the Second Amendment.[xi] The Court went much further in its ruling, however, concluding that, "The Second Amendment protects an individual right to possess a firearm unconnected with service in a militia…."[xii] Prior to the *Heller* decision, no gun control law in the United States had ever been overturned on a Second Amendment basis. The majority opinion in *Heller,* however, written by Justice Antonin Scalia, effectively declared "open season" for the gun lobby to challenge all sorts of gun laws on a Second Amendment basis.

Between 2008 and 2016, the gun lobby filed more than 1,500 Second Amendment challenges against a wide variety of gun-related laws, with 9% of these lawsuits resulting in existing gun laws being declared unconstitutional.[xiii] It's likely that the number of successful Second Amendment challenges will continue to increase in future years, even

against the kinds of gun laws in which previous challenges have failed, as a result of the ability of the gun lobby to go "judge shopping" among the unusually large number of federal judges, including three Supreme Court justices, appointed by Donald Trump,[xiv] who promised NRA members at the beginning of his single term as President from 2017 to 2021, "I will never, ever let you down."[xv]

The *Heller* majority opinion has been appropriately described by respected authorities as "gun rights propaganda passing as scholarship"[xvi] and as "evidence of the ability of well-staffed courts to produce snow jobs."[xvii] The late Supreme Court Justice John Paul Stevens, who authored a dissenting opinion in *Heller,* described the majority opinion as "unquestionably the most clearly incorrect decision that the Court announced during my [35 year] tenure on the bench."[xviii] Justice Stevens noted that in the *Heller* decision, the majority endorsed an interpretation of the Second Amendment that the late Supreme Court Chief Justice Warren Burger had called "[O]ne of the greatest pieces of fraud, I repeat the word 'fraud,' on the American public by special interest groups that I have ever seen in my lifetime."[xix]

The *Heller* decision is worse, though, than even these harsh criticisms might indicate. In creating a constitutional obstacle, where none previously existed, to the adoption of stringent gun control laws in the United States comparable to the laws that have long been in effect in all the other high income democratic countries of the world, *Heller* is literally a death sentence for tens of thousands of Americans annually.

Americans Against Gun Violence is currently the only gun violence prevention organization in the entire United States that openly advocates and is actively pursuing overturning the Supreme Court's 2008 *Heller* decision. A key component of our strategy for overturning *Heller* is educating the general public, policy makers, and even federal judges and justices about the true history and intent of the Second Amendment and the fact that the *Heller* decision is not based upon any new information that has become available since the Supreme Court's *Miller* and *Lewis* decisions, but rather upon gun lobby propaganda. Similarly, Justice Scalia's majority opinion does not involve any complex legal theories. Rather, it is characterized by gross distortions of historical facts, quotations taken out of context, circular reasoning, and bombastic and sarcastic rhetoric.

Another component of our strategy for overturning the *Heller* decision is filing *amicus curiae* (friend of the court) briefs in important Second Amendment cases in which we make the point that *Heller* was wrongly decided and should be interpreted by lower courts as narrowly as possible until the time that it is eventually overturned by the Supreme Court. Americans Against Gun Violence is the only organization to have filed such briefs in the recent cases of the *New York State Rifle and Pistol Association v. New York City, Duncan v. Becerra,* and the *New York State Rifle and Pistol Association v. Bruen.*

In summary, from the purist's point of view, the answer to the question, "Does the Second Amendment guarantee an individual right to own a gun unrelated to service in a 'well regulated militia?'" is still "No." The Second Amendment itself was

never intended to confer such a right. In the rogue 2008 *Heller* decision, however, a narrow 5-4 majority of Supreme Court justices created a constitutional right to own a gun unrelated to service in a well regulated militia. The extent of that newly created right is a matter of ongoing debate.

References

[i] United States v. Cruikshank, 92 US 542 (Supreme Court 1876); Presser v. Illinois, 116 US (Supreme Court 1886); U.S. v. Miller, 307 U.S. 174 (1939) (n.d.); Lewis v. United States, No. 55 (U.S. 1980).

[ii] Earl M. Maltz, "The Concept of Incorporation," *University of Richmond Law Review* 33 (1999): 525.

[iii] *Miller* at 178.

[iv] *Lewis*, 445 at 65 Footnote 8.

[v] Michael Waldman, "How the NRA Rewrote the Second Amendment," POLITICO Magazine, May 19, 2014, http://www.politico.com/magazine/story/2014/05/nra-guns-second-amendment-106856.html.

[vi] Adams v. Williams, 407 US 143 (Supreme Court 1972).

[vii] US v. Emerson, 270 F. 3d 203 (Court of Appeals, 5th Circuit 2001).

[viii] Parker v. District of Columbia, 478 F. 3d 370 (Court of Appeals, Dist. of Columbia Circuit 2007).

[ix] Parker v. District of Columbia, 478 F. 3d at 373–78.

[x] District of Columbia v. Heller, 554 US (Supreme Court 2008).

[xi] District of Columbia v. Heller, 478 F 370 (D.C. Cir. 2007), *cert. granted,* (U.S. November 7, 2011) (No. 07-290).

[xii] *Heller*, 554 US at 2786.

[xiii] Eric Ruben and Joseph Blocher, "From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller," *Duke Law Journal* 67 (2017): 1433.

[xiv] John Gramlich, "How Trump Compares with Other Recent Presidents in Appointing Federal Judges," *Pew Research Center* (blog), January 13, 2021, https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/. Trump appointed a total of 226 federal judges, including 174 district court judges, 54 appeals court judges, and three Supreme Court judges during his single term. His predecessor, President Obama, appointed a total of 320 federal judges, including just one more appeals court judge than Trump, and just two Supreme Court justices, during his two full terms in office. Obama nominated Merrick Garland to the Supreme Court to replace Justice Scalia, who died suddenly and unexpectedly in February of 2016, but the Republican controlled Senate refused to grant Garland a hearing, instead allowing Trump to nominate Neal Gorsuch to replace Scalia in January of 2017.

[xv] Michele Gorman, "Full Transcript: President Trump's Speech Fires up the NRA," Newsweek, April 28, 2017, http://www.newsweek.com/donald-trump-full-transcript-atlanta-592039.

[xvi] Saul Cornell, "Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller," *Ohio State Law Journal* 69 (2008): 629.

[xvii] Richard Posner, "In Defense of Looseness," *The New Republic* 239, no. 3 (August 27, 2008): 35.

[xviii] John Paul Stevens, *The Making of a Justice: Reflections on My First 94 Years* (New York: Little, Brown, 2019), 482.

[xix] Stevens, 483.