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(pg.24) OTHER VIEWS OF THE SECOND AMENDMENT

DOES THE SECOND AMENDMENT MEAN WHAT IT SAYS?

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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."

- Second Amendment, the U.S. Constitution

The "right of the people to keep and bear arms" is part of the Bill of Rights. It stands alongside the First Amendment's rights of freedom of speech, press, religion, and assembly. Opponents of strict or any regulation of private possession of firearms regard the Second Amendment as no less important than the First, indeed as a defense against a tyrannical government that would deprive the people of the basic rights for which a revolution was fought and an independent nation founded. Regardless of the degree of gun control any of us may prefer, it is essential that the meaning and intent of the Second Amendment be clearly understood, and its mandate carried out.

### **100 Years of Court Decisions**

Although a lively debate has raged over the purpose of the Second Amendment, the nation's courts—federal and state alike—have been in basic agreement on this subject for as long as judicial judgments have been made on contentions that the Second Amendment establishes a personal right to have firearms, free from government regulation. Such decisions go back more than 100 years. The Supreme Court's first decision in this field was in 1875 in *United States v. Cruikshank*. Here the Court found that

the right to keep and bear arms was not a right granted by the Constitution, was not dependent on the Constitution for its existence, was protected only against infringement by the federal government, and in any case its application to personal rights was only in the context of the freedom of the states to have their own militias. That is, the right of the individual to have firearms was given constitutional protection only to the extent that the right of the particular individual to have a gun was essential to the ability of the state to have an effective militia.

The significance of this relationship of the individual to the organized militia is better understood when one recalls the nature of the armed forces (pg.25) (i.e., the land forces) in the early years of the nation's history.

### **Bone and Muscle of the Infantry**

There was no national standing army at the time the Second Amendment became law (1791) and there would be none of any consequence for over 100 years. The state militias were the bone and muscle of the nation's infantry both during and after the Revolution. Fear of a national standing army with any real strength permeated attention to the military

powers of the national government and the various state governments. The basic Constitution, in Article I, Section 8, empowered Congress to provide for "calling forth the militia to execute the laws of the union, suppress insurrections, and repel invasions," and for "organizing, arming, and disciplining the militia." The state militias were by no means regarded as the sole instrument of national defense. They were, however, regarded, not only as a vital national resource, but as the sole defense of the states against national encroachment.

At that time, and for about another hundred years, the firearms used in the state militias were mostly those brought into such service by the citizen soldiers themselves. If these men didn't have guns, the militias could hardly be effective. Thus, the "right of the people to keep and bear arms" was essential to the viability of the "well-regulated militia," which in turn was "necessary to the security of a free state."

Those who interpret the Second Amendment as providing only for a state's right to have a militia see only half the picture, omitting the Amendment's implication that private possession of guns is basic to the existence of such militias (at the time the Amendment was adopted and for many years thereafter). Those who interpret the Second Amendment as providing or protecting the individual's personal right to have firearms see only the other half of the picture, omitting the component that the individual's right to have a gun must be shown to be essential to the formation of an effective militia.

If, as now and indeed ever since Congress in 1903 established state militias known as the National Guard, the arms used by the state militias are entirely provided by the government, the right of the people to keep and bear arms appears to lose whatever meaning it once had as an individual right protected by the Constitution. The 1903 act also provided for a reserve militia consisting of all able-bodied men between 18 and 45 who were not members' of

the organized militia. But no firearms were issued to them in this reserve status. Nor are reservists expected or required to have and bring their own.

### **Title 10, Section 311**

Many opponents of gun control make much, in fact too much, of Title 10, Section 311 of the United States (pg.26) Code in their attempt to prove that the militia is not limited to the National Guard—namely, that there is an "unorganized militia" and that under the Second Amendment every member of it has a constitutional right to have firearms. Title 10, Section 311, states that "the militia of the United States consists of all able-bodied males at least 17 years of age and ... under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States."

Those who cite that regulation in the debate on gun control interpret it to mean that every such person, in fact every adult citizen, has a Second Amendment right to a gun to protect himself or herself against violent harm to themselves, their families and their communities. The police, they contend, are not always available. When widespread violence occurs, the National Guard and other military forces may be preoccupied elsewhere. In this light, the National Rifle Association sees the armed citizen as "a potential community stabilizer" whether as a civilian member of an organized posse or simply as a member of the "unorganized militia." In some renditions of the right to keep and bear arms, the armed citizen is seen as "a vital last line of defense against crime, federal tyranny, and foreign invasion"—the people's "ultimate check against abuses by their government," including abuse of power by a militia.

### **"Well Regulated" Militia**

Whatever the merits of such notions about personal and national security (they are, to

say the least, highly questionable in this day and age), it is important to note that the only kind of militia the Second Amendment expressly regards as consistent with security is a "well-regulated" militia. One may rationally and reasonably conclude that this applies both to an organized militia and an unorganized one. Otherwise, an armed citizenry consisting of men and women using guns for presumed high purpose according to their respective dictates of personal whim and political fancy is the stuff from which anarchy could result, and in turn the tyranny against which the private possession of guns is supposed to protect Americans.

The right to keep and bear arms (a term that connotes a military purpose) stems from the English common law right of self-defense. However, the possession of guns in the mother country of the common law was never an absolute right. Various conditions were imposed. Britain today has one of the strictest gun laws in the world.

There is nothing absolute about the freedoms in our own Bill of Rights. Freedom of speech is not freedom to shout "fire" in a crowded theater. Freedom of religion is not freedom to have multiple spouses, or sacrifice a lamb in the local park, as religiously sanctioned practices. Similarly, whatever right the Second Amendment protects regarding the private possession of guns, for whatever definition of "militia," is not an absolute right. It must serve the overall public interest, including (from the preamble of the US Constitution) the need to "insure domestic tranquility, provide for the common defense and promote the general welfare." Whatever right there is to possess firearms is no less important than the right of every American, gun owners included, to protection against the possession of guns by persons who by any reasonable standard lack the crucial credentials for responsible gun ownership.

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