Fall 2001 *The Bill of Rights Sentinel*

The Six Things Americans Should Know About the Second Amendment

by Richard W. Stevens

The text of the Second Amendment:

> **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.**

FIRST: The Second Amendment protects an individual right that existed before the creation of any government. The *Declaration of Independence* made clear that all human beings are endowed with certain unalienable rights, and that governments are created to protect those rights.

A. The unalienable right to freedom from violent harm, and the right to self-defense, both exist before and outside of secular government.

1. Torah: *Exodus* 22:2.

2. Talmud: Jewish law set forth in the Talmud states, "If someone comes to kill you, arise quickly and kill him." *(Talmud, Tractate Sanhedrin.* 1994,2, 72a; *The Babylonian Talmud: Tractate Berakoth.* 1990, 58a, 62b).

3. Roman Catholic Doctrine: Christian doctrine has long asserted the right and duty of self defense. "Someone who defends his life is not guilty of murder even if he is forced to deal his aggressor a lethal blow." See *Catechism of the Catholic Church* 1994, sections 2263-65 (citing and quoting Thomas Aquinas).

4. Protestant Doctrine: Individual has personal and unalienable right to self-defense, even against government. Samuel Rutherford, *Lex, Rex* [1644]1982, pp. 159-166, 183-185 (Sprinkle Publications edition.) Jesus advised his disciples to arm themselves in view of likely persecution. *Luke* 22:36.

B. John Locke's *Second Treatise of Government* (1690) aimed at reforming Britain's monarchy and parliamentary system and limiting the power of government, and profoundly influenced the Founders and all Western Civilization. John Locke explained that civil government properly exists to more effectively protect the rights that all individuals have in the "state of nature." The individuals have the rights to life, liberty, and property. They give civil government the power over themselves only to the extent that it better protects those rights. Thomas Jefferson, author of the *Declaration of Independence,* specifically declared that the ideas of John Locke's *Second*

Treatise were “generally approved by the citizens of the United States.”Jefferson mandated that Locke’s *Second Treatise* be taught in theUniversity of Virginia.

C. Christian religious thinkers, such as Samuel Rutherford (in *Lex, Rex,* 1644) argued that man’s rights come from G-d. Using Biblical principles and examples, they argued against the notion that kings ruled by divine right. To be legitimate authorities, all governments must uphold man’s rights and do justice. Otherwise, the people owe a lawless and tyrannical ruler no allegiance at all.

D. Cicero, Rome’s leading orator, had early argued that the right to self-defense was natural and inborn, and not a creation of the government.The right to use weapons was a necessary part of the right to self-defense — any view to the contrary was silly nonsense. [Stephen P. Halbrook, *That Every Man Be Armed: The Evolution of A Constitutional Right* (1984), p. 17, fn 76-77.]

E. The right to keep and bear arms simply implements the unalienable right to individual self-defense against aggression of any kind. The Second Amendment refers to “the right of the people” (not the state) as a pre-existing right that government must respect.

F. The United States Supreme Court, in *United States v. Verdugo-Urquidez,* indicated that the word “people” in the Second Amendment referred to individuals, not to states. [494 U.S. 259 (1990)] (This was not a holding or ruling of law, but an observation by the Court).

SECOND: The language of the Second Amendment prohibits the Federal Government from “infringing” on this right of the people. There is nothing ambiguous about “shall not be infringed.” (See *Webster’s New Universal Unabridged Dictionary,* 2d ed.1983, p. 941.) The language of the Second Amendment is about as clear as the First Amendment’s prohibiting Congress from infringing the right to freedom of speech, press, and religious expression. There is no logical reason to read the Second Amendment as a weak statement, while treating the First Amendment as a strong protector of rights.

A. The Second Amendment protects a fundamental right and should be read broadly because it implements the right of self-defense. Self-defense is the ultimate right of all individuals to preserve life. The rights to a free press, free speech, assembly, and religion are extremely important — but none of them matters very much if you can’t defend your own life against aggression. None of them matters very much when an evil government is fully armed and its citizens are disarmed.

B. Article I, Section 8, clauses 15 and 16 of the U.S. Constitution refer to Congress’s powers concerning the state militias. Clause 15 empowersCongress to “call forth” the state militias into national service for specific purposes. Clause 16 empowers Congress to organize, arm and discipline the state militias, and to govern the militias while they are in national service. The Second Amendment confines Congress’s power by guaranteeing that the Congress cannot “govern” the militias right out of existence and thereby disarm “the people.”

THIRD: The Second Amendment refers to “a well-regulated militia.”The right of the people to form citizen militias was unquestioned by the Founders.

A. *The Federalist Papers,* No. 28: Alexander Hamilton expressed that when a government betrays the people by amassing too much power and becoming tyrannical, the people have no choice but to exercise their original right of self-defense — to fight the government.[Halbrook, p. 67]

B. *The Federalist Papers,* No. 29: Alexander Hamilton explained that an armed citizenry was the best and only real defense against a standing army becoming large and oppressive. [Halbrook, p. 67]

C. *The Federalist Papers,* No. 46: James Madison contended that ultimate authority resides in the people, and that if the federal government got too powerful and overstepped its authority, then the people would develop plans of resistance and resort to arms. [Halbrook, p. 67]

D. There was no National Guard, and the Founders opposed anything but a very small national military. The phrase "well-regulated" means well-trained and disciplined — not "regulated" as we understand that term in the modern sense of bureaucratic regulation. [This meaning still can be found in the unabridged *Oxford English Dictionary,* 2d ed. 1989, Vol 13, p. 524, and Vol 20. p. 138.]

E. The Federalists promised that state governments and citizen militias would exist to make sure the federal military never became large or oppressive. To say that the National Guard replaces the notion of the militia runs contrary to what the Founders said and wrote.

F. The Third Amendment: Expressly restrains the federal government from building a standing army and infiltrating it among the people ...and at the people's expense ... in times of peace. The Third Amendment runs against the idea of a permanent standing army or federalized National Guard in principle, if not by its words.

FOURTH: The Second Amendment begins with the phrase "A well-regulated militia being necessary to the security of a free State." Some people argue that this phrase limits the right to keep and bear arms to militias only ... which they say means the National Guard. Very recent research shows, however, that it was the style of writing legal documents in the late 1700's to include a preamble. The Constitution has a preamble, the Bill of Rights has a preamble — yet people don't argue that the Constitution is limited by the preamble. Professor Eugene Volokh at the UCLA Law School has examined numerous other state constitutions of the same general time period, and observed this kind of preamble language in many of them. *(The Commonplace Second Amendment,* 73 N.Y. Univ. Law Rev. 793-821 (1998)). The preamble states a purpose, not a limitation on the language in these government charters.

A. Examples:

- New Hampshire's Constitution in 1784 contained a preamble for the freedom of the press: "The Liberty of the Press is essential to the security of freedom in a state; it ought, therefore, to be inviolably preserved."
- Rhode Island's 1842 state constitution recited a preamble before its declaration of the right of free speech and press: "The liberty of the press being essential to the security of freedom in a state, any person may publish his sentiments on any subject, being responsible for the abuse of that liberty..."
- New Hampshire's Constitution in 1784 also contained a detailed preamble and explanation of purpose for its right to a criminal trial in the vicinity where the crime occurred.
- The Massachusetts Constitution of 1780, the 1784 New Hampshire Constitution and the 1786 Vermont Constitution, all contained preambles or explanations of the right of freedom of speech and debate in the state legislatures.
- The New Hampshire Constitution also gave an explanation, right in the text, for why there should be no *ex post facto* laws.

B. The Second Amendment falls right within the style of legal drafting of the late 1700's. The "militia" clause emphasizes the individual right to keep and bear arms by explaining one of its most important purposes. The militia clause does not limit the right.

FIFTH: Before the Civil War and the Fourteenth Amendment, many states enacted laws that made it illegal for slaves and for free black people to possess firearms (unless they had their master's permission or a government approval). [See list, with sources in law reviews, in *Gran'pa Jack No. 4]*

A. The Second Amendment did not protect black people then, because(1) it was understood to

limit the federal government's power only and (2) black people were not considered citizens whose rights deserved to be protected. [*Dred Scott* decision, 60 U.S. 393 (1857) (Judge Taney observed that if blacks had the privileges and immunities of citizenship, then they would be able to freely possess and carry arms ... unthinkable to Southern slave owners.) [Halbrook, pp. 98, 114-15]

B. The Second Amendment was designed by people who did not want to become slaves to their government, but they were unfortunately and tragically willing to permit private slavery in some states. Now that slavery is abolished,however, all citizens of all races should enjoy the Second Amendment's legal protection against despotic government.

SIXTH: Several Federal Circuit Courts of Appeal have held that theSecond Amendment does not confer an individual right, but only a collective right of states to form a militia. The federal court decisions cite *United States v. Miller* as precedent. The 1939 Supreme Court case, *United States v. Miller,* did not make that ruling. Even in *Miller,* where only the prosecution filed a brief and the defendant's position was not even briefed or argued to the Court, the Supreme Court held that the federal government could only regulate firearms that had no military purpose. [307 U.S. 174 (1939)] [See JPFO special report about *Miller* case]

A. Nowadays, gun prohibitionists want to illegalize firearms unlessthey have a "sporting purpose." The "sporting purpose" idea was part of the Nazi Weapons Law of 1938. JPFO has shown that the U.S. Gun Control Act of 1968 imported much of its organization, content, and phrasing, from the Nazi Weapons Law. [See ... Zelman, *Gateway to Tyranny*]

B. In contrast, even under the *U.S. v. Miller* case, the Second Amendment protects the individual right to keep and bear military firearms. Learn how the federal courts deceptively and misleadingly employed the *Miller* decision to deny the individual right to keep and bear arms in Barnett, *Can the Simple Cite Be Trusted?: Lower Court Interpretations of United States v. Miller and the Second Amendment,* 26 Cumberland Law Review 961-1004 (1996).

C. A federal judge recently struck down a federal "gun control" statute as unconstitutional in *United States v. Emerson,* 46 F. Supp. 2d 598 (N.D. Tex. 1999). In his scholarly written opinion, District Judge Cummings exten-sively reviewed the law and historical foundations of the Second Amendment to conclude that the right to keep and bear arms protected by the Second Amendment is an individual right. The Emerson decision remains pending an appeal in the Fifth Circuit as of this date.

Before a government can become a full-blown tyranny, the government must first disarm its citizens. The Founders of this nation, from their own experience, knew that when government goes bad, liberty evaporates and people die ... unless the people are armed.

CHALLENGE TO AMERICANS

As you read the Constitution and the Bill of Rights:

(1) Look at the enumerated powers of the federal government;

(2) Look at the express limitations on federal power as set forth in theSecond, Ninth, and Tenth Amendments;

(3) Ask yourself, where does the federal government get any power at all to regulate firearms?

(4) Ask yourself, why don't the high school and college textbooks devote any time to the history, philosophical basis and practical meaning of the Second Amendment?

And then consider that law students and future lawyers likewise have received precious little education about

the Second Amendment.

Realize, too, that the judges know just about as little. Then imagine how little the average American knows — based on the average public school coverage of the Constitution.

The protection of our sacred right of self-defense against both petty criminals and oppressive government — the right of civilians to keep and bear arms — is in your hands.

The Bill of Rights Sentinel, Fall 2001, pp. 31-33

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