

Spring 2008

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***CURRENT***

***CONTROVERSIES:***

*Volume Two, Spring 2008*

***Targeting the Second***

***Amendment -***

***Emptying the Clip on the***

***Debate***

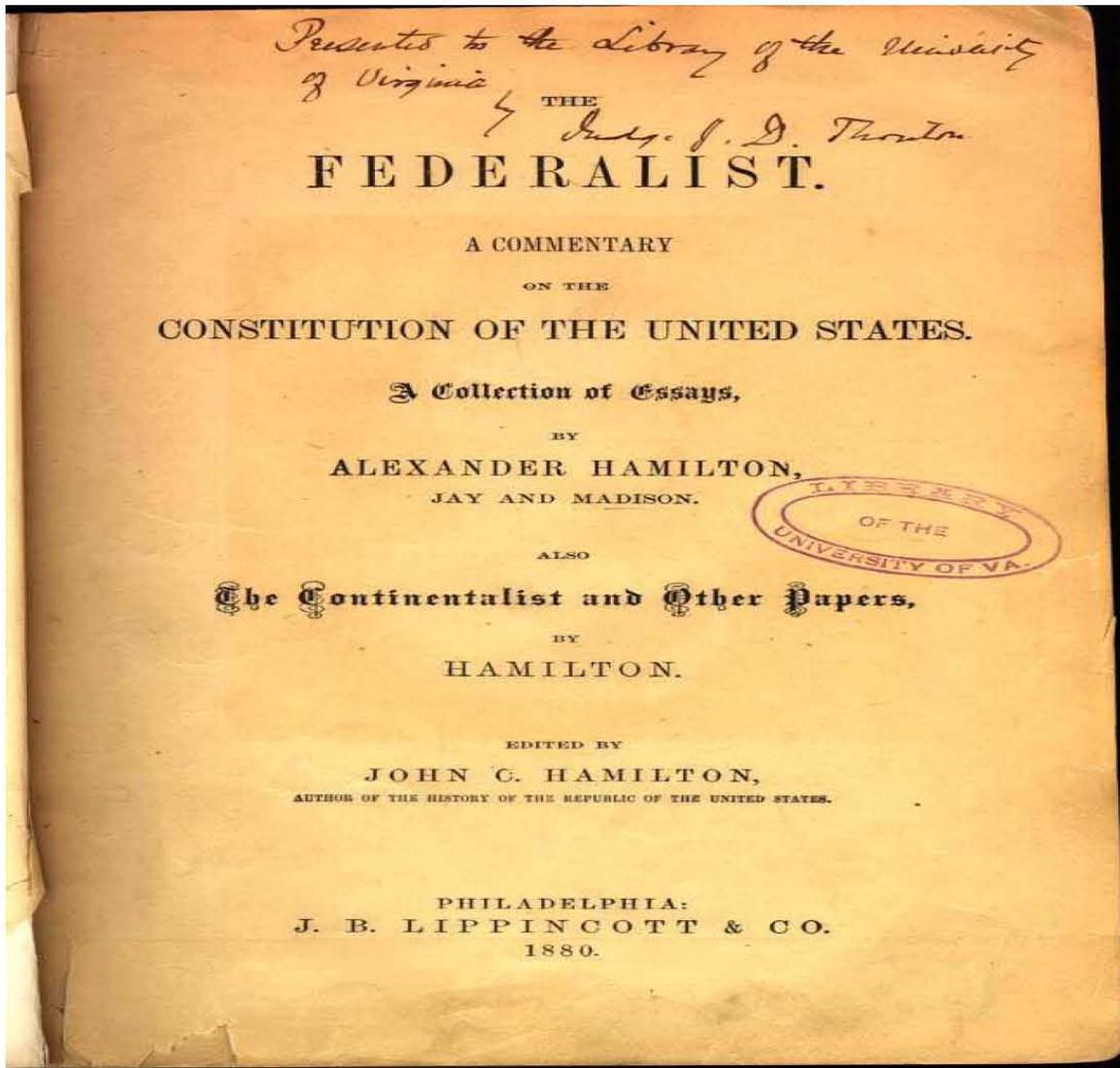


**Sanda Hadzisabic, Editor-in-Chief**

*The Second in a Series of journals written by students in  
Political Science 100W*

**CURRENT CONTROVERSIES:**

Volume Two, Spring 2008



***Targeting the Second Amendment -  
Emptying the Clip on the Debate***

***Sanda Hadzisabic, Editor-in-Chief***

## Foreword

The issue of gun control has become extremely controversial in the last decade. The Virginia Tech rampage that left at least 33 people dead and the Columbine High School massacre which resulted in 12 students and a teacher being shot to death has ignited debate on whether guns or people cause crime. A variety of statistics have come from both sides of the spectrum claiming either more guns cause more crime or the opposite, more guns protect more innocent people who are in danger of becoming victims of gun assaults. Regardless of whether you believe that criminal behavior is enhanced by the availability of guns, or by restrictive gun laws that keep guns away from innocent law-abiding people, a more important debate arises whether the right to bear arms for all citizens was intended in the Second Amendment of the Constitution's Bill of Rights.

In the *Current Controversies* series, the issue at hand is the gun controversy. With so much debate it becomes difficult to know what is fact and what is fiction regarding guns and the Second Amendment. With school shootings, gun trafficking, and the threat of terrorism, the United States will continue to make gun policies that will affect many people, and informed citizens can make a difference in the resolution of the gun debate.

The second edition of the journal, *Targeting the Second Amendment-Emptying the Clip on the Debate*, is intended to inform the reader about what is fact and what is not regarding guns. The goal, after reading the journal, is to be an informed and educated resident of the United States. The journal is broken up into different sections that will help the reader understand different aspects of the gun debate.

- Section One deals with the history of the Second Amendment, in order for the reader to better grasp what our founding fathers believed the purpose of guns were.
- Section Two, edited by Luan Mai, depicts gun control throughout different regions to demonstrate how gun laws can be strict or loose, depending on the region you live in.
- Section Three presents gun control organizations that range from being anti-gun advocates to pro-gun advocates.
- Section Four, edited by Rupesh Saran, deals with gun regulation which shows the evolution of gun regulation and its impact on the society.
- Section Five, edited by Olivia Reddick, reveals important landmark cases that have had a huge impact on gun control in the United States.

Sanda Hadzisabic

Editor in chief

**Current Controversies:**  
***Targeting the Second Amendment –  
Emptying the Clip on the Debate***

*Volume Two*

**2008**

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History of the Second Amendment

# **WHY HAVE THE SECOND AMENDMENT?**

By Christopher Choi

## **ABSTRACT**

The Second Amendment is an important and necessary part of the American Constitution that protects an individual's right to bear all arms, including firearms. Many gun-control advocates have been attempting to limit or even ban firearms from citizens, but the current stance of the courts has protected the individual right of Americans. While regulations and restrictions have increasingly been implemented on firearm possession, examples from the United States and other countries have shown that the loss of the Second Amendment would be detrimental to all Americans, and would cause an increase in the amount of crime that the United States experiences.

## **INTRODUCTION**

The Second Amendment has long been considered to be one of the most important amendments in the American Constitution. However, in the last two decades, the Second Amendment has been under attack by anti-gun advocates all over the world. Many anti-gun advocates have questioned the necessity of such an Amendment and Congress has seen many bills that have goals to limit firearms ownership in the United States. Advocates on both sides of gun ownership have offered different interpretations of what the Amendment actually means. The Second Amendment gives Americans the right to bear arms with the intention of protecting citizens from invasion and oppression, but the question remains whether or not the Amendment protects the right of the actual

individual to possess firearms or if it protects the right of a militia to be armed.

Guns are also a major source of crime and it is the belief of many anti-gun advocates that eliminating firearms from society will decrease the amount of gun-related crime in the United States. However, the fact remains that the majority of firearms used in crimes are unregistered, and if registered firearms are taken away from citizens, crime will run rampant. Police forces are already thin, and police are more so obligated to protect society as a whole rather than the individual.

This paper will verify that the Second Amendment is still a vital part of American society, and will show that it holds an important spot in American life both as a form of protection and as a form of recreation. The Second Amendment protects Americans' individual right to possess firearms. Loss of Second Amendment gun rights would deprive Americans of the ability to defend themselves against crime, and could lead to an increase in crimes against persons. Taking away the Second Amendment would be a mistake. A better solution is reasonable regulation, and ensuring that gun-owners have more opportunities to be responsible and educated about their firearms.

## **PROBLEM STATEMENT**

The Second Amendment states, "A well regulated Militia, being necessary to the security of the State, the right of the people to keep and bear Arms, shall not be infringed." This simple statement has caused a huge debate over its interpretation for analysts and lawyers since gun restrictions began to be imposed in the mid-twentieth century. This paper will attempt to address different understandings of the Second

Amendment and to come to a conclusion on its meaning. In this regard, this paper will show that the Second Amendment protects the individual's right to bear firearms. After proving that the Second Amendment protects the individual's right to bear arms, this paper will show that the Second Amendment is valuable to Americans despite anti-gun advocacy in recent decades. This paper will show that loss of the Second Amendment would be detrimental to American society and that loss of the right to be armed would lead to an increase in crime rather than a decrease as many pro gun-control advocates will argue.

## **METHODOLOGY**

A variety of methods were used to support the hypotheses of this paper and to draw logical conclusions. In an attempt to interpret the Second Amendment and whether or not it protects an individual's right to bear firearms, or if it protects a militia's right to arms many journals and peer-reviewed papers have been evaluated so that a conclusion could be drawn on this subject. This paper also used a variety of methods to evaluate the importance of the Second Amendment to American society. The research used includes statistics that show the amount of gun-related crimes in the United States every year and estimates that show the amount of crimes resulting from the use of unregistered firearms. However, the statistic showing crime with unregistered firearms was difficult to obtain, because it is unknown exactly how many unregistered firearms there are in the United States. Unregistered firearms are difficult to count, because these firearms are nearly impossible to trace and most times they are imported from foreign countries. Statistics

and crime reports were used from other countries including Brazil and the United Kingdom, because both of these countries have imposed strict gun laws in the last two decades, and crime statistics from these countries can give Americans a better idea of what could result from increased gun control in the United States.

The interview was also an important part of this paper. As part of the research, an interview was conducted with a registered member of the National Rifle Association who is familiar with Congress's activity, and is a pro-gun advocate. Research was also done through statistics and articles to address the myths about firearms, including the myths that civilians are more likely to be injured protecting themselves when they use a firearm than when they do not, firearms are risks to children; that the police are spread too thin to protect civilians, and that there are too few people that are effectively able to protect themselves with their own firearms. Finally, journals were used to find the different uses of firearms, other than protecting one's self, and through an accumulation of all this research, a conclusion was reached that loss of the Second Amendment would present more of a risk to Americans than if it is left in its place.

## **LITERATURE REVIEW**

Myths About Gun Control, National Center for Policy Analysis is a web site that examines the myth about gun control which states that fewer guns will result in fewer crimes. It takes a look at cities in New Jersey and Washington, D.C. and focuses on the fact that crime involving firearms actually increased as gun bans were implemented.

Lucas, Peter, Disarming Brazil: Lessons and Challenges. NACLA Report on the Americas, reviews gun control in Brazil, a country that attempted to fully restrict firearms in the 1990's. It mainly discusses Brazil's Disarmament Statute and the effect it has had on firearm-related crimes in the country.

McPherson, Scott, Britain's Gun-Control Folly, Future of Freedom Foundation takes a deeper look into Britain's advocated gun laws and how the original idea of eliminating gun-related crime resulted in a program that has become utterly ineffective. This article takes note that crime has doubled in the United Kingdom and that it continues to rise at a rapid rate.

Rauch, Jonathan, The Right Kind of Gun Rights, *National Journal* discusses the case of *District of Columbia v. Heller*. It gives an in-depth analysis of the meaning of the Second Amendment and the issues that will arise if gun-ownership continues to be restricted. It also gives an analysis of the definition of self-defense when it comes to using firearms for protection.

Schwartz, Emma, In Congress, the Uphill Battle for Gun Control, *U.S. News and World Report*, takes a look at the various issues revolving around firearm ownership and studies both sides of the opinion spectrum. It concludes that banning firearms is not the solution for reducing gun-related crime. This article leaves debate open for solutions to end firearm related crimes, but includes various strategies that major cities have used and the results of these methods.

Shaffer, H.B., Firearms Control. Editorial Research Reports, studies many of the reasons why gun control is such an important issue and supports the argument that

handguns and other dangerous weapons need to be further restricted. It uses statistics and examples from different states for the reasoning behind its arguments.

Shields, Nelson, A Quick Trip Through the SECOND AMENDMENT. *Outdoor Life*, takes the position of protecting the Second Amendment rights of individuals by discussing issues that anti-gun advocates have presented and gives reasons why they are ineffective. The author also gives reasons why citizens must protect their Second Amendment rights from a personal perspective.

Stossel, John, Gun Control Puts People at Risk, *Human Events*, takes a look at initiatives that would create gun-control laws in various states and gives different reasons why guns are a valid source of self-protection. This article discusses reasons why anti-gun advocates want to get rid of firearms, self-defense laws, and solutions to firearms. The article shows why gun statistics are often flawed and uses available information to protect firearm possession in American society.

Winkler, Adam. Scrutinizing the Second Amendment. *Michigan Law Review* focuses on the Second Amendment and how it protects the right to bear arms in the United States. It focuses on issues such as “reasonable regulation,” and why the Second Amendment is so valued to American society.

## **RESEARCH FINDINGS**

The Second Amendment has been a topic of debate that is complex and difficult to untangle. The Second Amendment states, “A well regulated Militia, being necessary to the security of the State, the right of the people to keep and bear Arms, shall not be

infringed.” Those who support private gun ownership, led by the National Rifle Association, state that this Amendment protects the individual’s right to bear arms and claim that those who desire to remove guns from American society are attempting action that is unconstitutional. Those who support gun-control feel that this Amendment supports a militia’s right to bear arms, but an individual’s right to arms is not protected by the Second Amendment.

According to various statistics analyzed by the United States government, there are approximately 235,000,000 registered firearms in the United States and an unknown number of unregistered firearms. This statistic can be deceiving however, because most gun-owners tend to own multiple firearms and only twenty-eight-percent of Americans own registered firearms. However, this does not change the fact that every year, an average of forty-thousand deaths result from some form of firearm violence. While the majority of these deaths result from suicide, the second leading cause of death by firearm is homicide. Every year approximately fourteen-thousand civilians are murdered by the use of a firearm, usually a handgun. (Tincher, 2001)

Firearms used in crime tend to be older and unregistered, while less than a fraction of a percent of legal, registered firearms will ever be used in a crime. However, every year, nearly one-thousand bills are introduced to limit firearms in the United States despite the fact that between 2,500,000 and 3,500,000 civilians are able to protect themselves every year strictly because they were in possession of a firearm. This number outweighs the amount of firearm-related deaths nearly ten to one. (Tincher, 2001)

Without firearms, crime could easily increase dramatically, because citizens

would not be able to protect themselves, and if law-abiding citizens do not have firearms, criminals certainly will. Police forces are not large enough to protect every citizen when they need protection. (Bureau of Justice Statistics, 2003) Correlating with this idea, most victims who are able to fend off attackers or muggers through the use of a firearm, do not file police reports about being attacked, making it nearly impossible to know just how many people are able to prevent crime each year. This means that statistics may show that a certain number of citizens report prevented crimes, but there is a strong likelihood that a higher-than-estimated amount of people protect themselves with firearms every year.

Many states have implemented gun control laws over the last half-century. Washington, D.C. has some of the strictest gun laws in the country and serves as the primary American example of gun-control's effects on crime. In 1976, Washington D.C. put into place the strictest gun control laws of any city in the United States. After this gun ban, a Department of Justice study found in 1991 that homicide had dropped nearly 25% and that suicide by firearm was down nearly 23%, while neighboring states saw nearly no change in either of these areas. However, many critics of this survey claim that this study was biased because it focused on wealthier areas rather than poorer areas that were more prone to crime. In a collective study dating back to 1976, Washington D.C. has seen a murder rate increase totaling a 134% while the national murder rate has actually decreased. (Bureau of Justice Statistics, 2003)

The general consensus of those who have studied the trends is that gun-control was ineffective in Washington, D.C. The problem remains that when guns are removed

from law-abiding citizens, criminals have increased opportunity to commit criminal acts. The threat of fines or minor jail time for possession of an illegal firearm will not deter a criminal from performing an act that could land him many years to life in prison. The only people who are really affected by gun-control laws are those that are in possession of registered, legal firearms. Washington, D.C. serves as an excellent example of this and has served as the national example that imposing gun laws is not the solution to preventing firearm related crime. The simple conclusion is that when criminals know there is no chance that civilians are armed, crime is much easier to commit because people cannot protect themselves. This is mostly due to the fact that there is not even an option of firearm protection, so criminals really only have to fear the police. (Stossel, 2008)

The American government and its politicians have closely watched gun bans in foreign countries such as the United Kingdom and Brazil, because the reach of gun-control extends to every part of the world and governments are constantly looking to other countries for models to mimic for their own laws. The United Kingdom has the strictest gun laws of any country in the world. In February, 1997, the United Kingdom imposed a ban on any handgun that was .22 caliber or above. This meant that all of the 200,000 registered handguns had to be turned into the British government or those in possession of firearms would face punishment including fines and jail time. This ban resulted from a massacre of sixteen children at a school by a gunman. The British government paid gun-owners for their firearms, but this did not stop protests amongst these gun-owners.

Since the law was enacted, the British gun ban has had mixed results. The amount of gun crime in the United Kingdom has actually increased following the 1997 ban. According to British statistics, in 1998, crimes involving the use of a firearm numbered 13,874, but this number jumped to over 20,000 in 2002 and has remained over 20,000 in every year since then. In conclusion, gun crime in the United Kingdom has actually increased by 110% since gun bans were imposed upon the British citizens. Many American legislators wish to impose laws that mimic what the English have done, but it seems that imposing stricter gun-control laws is actually detrimental to society. These findings support the thesis that the loss of Second Amendment rights would lead to an increase in crimes against persons rather than the common argument that it would deter them. (National Center for {Policy Analysis.})

Brazil has some of the highest firearm related deaths in the world. Brazil sees approximately 30,000 citizens killed every year as a result of the use of a firearm. While this number is 10,000 less than what the United States sees every year, Brazil's population is also 100,000,000 people smaller. In an attempt to curb gun violence, Brazil's Congress instituted the Disarmament Statute, which increased the legal age to purchase firearms from 21 years to 25 years. The reasoning behind this was because generally firearm crimes occur with men ages 18 to 25. The Brazilian government decided that if the legal age to purchase a firearm was 25, citizens would be mature enough to resist criminal activities. This statute also imposed psychological tests and firearm safety tests for potential buyers. Finally, this law prevented Brazilian citizens from carrying concealed firearms unless it was for hunting or special activities. Studies

have shown that the Disarmament Statute has had a positive effect on Brazilian society and 2003 was the first decrease in firearm homicide rates in thirteen years. (Lucas, 2008)

However, a full-scale attempt to ban guns was rejected by the Brazilian voters, mostly due to the National Rifle Association's efforts and huge budget. While Brazil's attempt to curb firearm violence by increasing gun-owner responsibility has been successful, the issue of completely banning guns is still outstanding. Brazilian citizens fear that if citizens lose their right to possess legally purchased firearms, crime will run rampant and muggings and robberies will actually increase. Brazil's example serves an important purpose. Banning guns is simply not the solution, but responsible ownership can lower crime. Brazil's restrictions on firearms do not keep law-abiding citizens from possessing firearms, but it does a good job of preventing criminals from obtaining firearms. This has had a positive effect on the country's crime rates, but Brazil still has much work ahead. (Lucas, 2008)

The Second Amendment was designed with the purpose of protecting the American people from invasion and oppression from foreign and domestic threats. The Second Amendment was created shortly after the United States fought for its independence and won it from Great Britain. However, many advocates for gun control feel that the need for such a law is extreme, especially in modern times. The debate over the Second Amendment has long been based on the premise that the Second Amendment protects the right of the individual to possess firearms. According to Adam Winkler's article, *Scrutinizing the Second Amendment*, "Over the past few years, the individual-rights view has won over at least one federal circuit court and has become the official

position of the Bush Administration's Department of Justice" (Winkler, 2008, 685). The individual right to bear arms seems to have ultimately overpowered the argument that only a militia has the right to arms, and while many laws have placed restrictions on the types of arms that an individual can possess and who can possess arms, the court currently takes the side of pro-gun advocates.

However, courts have also imposed something called, "reasonable regulation," which keeps weapons such as sawed-off shotguns and assault weapons out of the hands of citizens. The courts have applied this reasonable regulation standard in firearm possession cases in the forty-two states that guarantee individuals the right to possess arms. The most influential case regarding individual firearm possession rights was the case of *United States v. Emerson*. In 2001, the Fifth Circuit Court issued a ruling that protected the individual right to bear arms, which went against previous court rulings from the past eight decades. While the case upheld the law stating that any person under a restraining order cannot be in possession of a firearm, the main focus revolved around the courts supporting the individual right to bear arms. Current court decisions side with the individual right to bear arms rather than a militia's right to bear arms, and this case has set the precedent for modern stances and has been used as an example in countless cases since 2001. (Tincher, 2008)

Another area that gun-control advocates often promote is the idea that guns are a threat to society, because they are dangerous even when they are not used for protection. There are many myths regarding firearms and safety issues. Accidental deaths resulting from firearm account for some of the highest numbers of gun-related deaths every year in

the United States. There is also a widespread accusation that firearms are extremely dangerous for children and kill thousands of children every year. However, according to the Centers for Disease Control, “More than two out of every three gun deaths are either suicides or drug-related murders” (Bureau of Justice Statistics). This means that one-third or less of gun-related deaths are homicides or accidental. Generally, most owners of registered firearms are responsible with their guns, and devices such as fireproof gun safes and gun locks are key factors in increasing the safety of firearms and avoiding accidental death. Courses focusing on gun safety are also important for increasing gun safety, and the National Rifle Association stresses these to all gun-owners, and offers courses all over the country.

Tying into issues of safety is the myth that guns are extremely dangerous to children. During the 1990’s, the introduction of crack-cocaine to American society caused an epidemic, because the drug is extremely addictive and because drug wars arose at an alarming rate. According to the Centers for Disease Control, in 1997, 2,284 children up to the age of seventeen were killed by firearms. However, as law enforcement began to curb the crack-cocaine epidemic, gun-related deaths decreased as well. In 1998, 1,971 children were killed by firearms and this number has slightly decreased since then. However, the key issue in this myth is the definition of who is considered a child. Many politicians that support more gun laws include people up to and including the age of eighteen in “firearm-related deaths amongst children,” which has the effect of giving the impression that children, rather than teenagers and legal adults, are being victimized. According to American law, once a person reaches the age of eighteen

he or she becomes an adult. Therefore, deaths of legal minors resulting from firearms have actually remained relatively low, but the size of the population of teenage males has a correlation to the amount of deaths resulting from firearms amongst “children.”

(Tincher, 2008)

Another common myth is that citizens do not need firearms, because police officers will protect them. However, according to the International Association of Police Chiefs, there are 2.5 police officers for every 1,000 American citizens. This number is far too low to guarantee effective response times and makes it difficult for immediate response in emergencies. This means that citizens are mostly responsible for protecting themselves, because they are the first line of defense in the event of an attack. Citizens who possess firearms are much more likely to deter criminals, and the millions of citizens that protect themselves every year are evidence of this.

Firearms are not limited to use only when protection is needed. Firearms have been a source of recreation since the time of their invention and are also a valued asset to hunters worldwide. Many enthusiasts collect vintage firearms and have massive collections for nothing more than enjoyment. They will most likely never use their firearms for anything more than entertainment, which make these firearms relatively harmless.

Many Americans also enjoy activities such as skeet shooting, target shooting, and hunting. In an interview with a multiple gun-owner and member of the National Rifle Association, it was found that gun owners often consider recreational purposes of firearms just as important as protection uses. Danny Muela is the owner of two

handguns. In my interview with him, he said that he has always been a strong believer that, “Guns don’t kill people, people kill people.” He takes his handguns to shoot targets at least once a week and believes that firearms have many uses. He said that he enjoys target practice, but he also knows that he will be prepared if an event ever arises that would force him to protect himself or his family with one of his weapons. He was very adamant when he said that his purpose for purchasing handguns was more for recreation than protection. As an active member of the NRA, Danny is very current with his knowledge of bills in Congress regarding guns and he said that it is a shame that advocates are trying to baby sit citizens rather than allowing them to be responsible. (Personal communication, April 21, 2008)

Denying Americans their right to bear arms would be an attack not only on those who desire to protect themselves; it would be an attack on citizens such as Danny Muela who purchased firearms for the primary reason of recreation. Danny also said that responsible gun-owners should not be punished due to the behavior of criminals who have no regard for life. He told me that his guns remain locked in a gun safe with trigger guards for extra safety. While Danny does not have children, he is active in the gun community and attends NRA meetings on a regular basis. His biggest fear of his firearms being taken away was that he would lose his right to enjoy his firearms in a responsible manner, and that he could then easily be a target for criminals, because he would have no way to protect himself. (Personal communication, April 21, 2008)

## CONCLUSION

It can be concluded that the Second Amendment is still a necessity in American society. The Second Amendment was created to protect American citizens from oppression and so far it has done its job well. The debate will continue on whether or not the Second Amendment protects the rights of the individual or if it protects the rights of a militia to bear arms, but currently, the courts are pledging their alliance with the individual.

The Second Amendment is imperative to the safety of American citizens. Every year the Second Amendment's protection of an individual's right to bear arms prevents millions of crimes and homicides. Banning firearms from American society is not the solution to a safer society. The loss of legal firearms would put all Americans in a greater amount of danger and would allow crime to escalate to higher levels than ever seen before.

The myth that banning guns makes it safer for citizens is nothing more than that: a simple myth. Examples proving that this is a myth can be seen in countries such as the United Kingdom and Brazil, as well as in states in the US with strict laws. The solution is to reasonably regulate firearms and allow Americans to possess firearms within reason. This means that weapons such as sawed-off shotguns, grenades, and assault weapons should be regulated, but any firearm with a sporting or self-protection purpose should fall under the protection of the Second Amendment.

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# **THE FEDERALIST PAPERS AND THE INDIVIDUAL RIGHT TO BEAR ARMS**

By Matthew Minser

## **ABSTRACT**

The wording of the Second Amendment often leads to questions about its true meaning. The Federalist Papers show a clear record of the Framers' thoughts during the adoption of the Constitution and Bill of Rights. The Federalist Papers explain the various contemplations and decisions reached regarding which rights must be incorporated into the United States Constitution. A close examination of Federalist Papers 29 and 46 clearly reveals the unquestionable fact that the Framers of the Constitution support a right for individual citizens to bear arms.

## **INTRODUCTION:**

In modern times, an increasing number of anti-gun advocates have sparked the debate on whether the Framers truly intended for the average citizen to have an individual right to bear arms. According to Samuel Francis, "...the gun Gestapo is busily inventing a new constitution that conveniently erases the Second Amendment's right to keep and bear arms (Francis, 1995, p.16). Fortunately for those who wish to maintain the Constitution's integrity, The Federalist Papers provide a unique look beyond the words of the Second Amendment. During the constitutional ratification process the Federalists took the time to clearly explain the meaning of each proposed piece. By examining the Federalist papers, the modern readers of the Constitution are provided with a deeper look

into the few concise words that are actually written into the Constitution and Bill of Rights. A careful analysis of the Federalist Papers reveals that the Framers did in fact intend the Second Amendment to signify an individual right to bear arms.

Two specific Federalist Papers stand out in reference to the Second Amendment. Federalist 29, written by Alexander Hamilton, and Federalist 46, written by James Madison clearly show the Framers' views on federal standing armies, militias, and most importantly, the individual right of Americans to bear arms. In Federalist 46, Madison details the benefits of arming the American people. In Federalist 29, Hamilton simply assumes that Americans will hold an individual right to bear arms. Additionally, Hamilton goes into detail in defining the word "militia". Hamilton's definition is crucial because of the context of the word "militia" in the Second Amendment.

The usage of the word "militia" and its misinterpretation as a standing army is often one of the main arguments of anti-gun advocates against the right of citizens to bear arms. These misconceptions lead anti-gun advocates to believe that the Second Amendment implies only a states' right, and not an individual right. Legal scholar Sanford Levinson of the Yale Law Journal describes a militia as, "... all of the people, or at least all of those treated as full citizens of the community" (Levinson, 1989, p.5). The evidence Levinson uses to draw this conclusion comes primarily from the Federalist Papers. Once both Federalist 29 and 46 are dissected, the Framers' intentions on the right to bear arms become exceptionally clear.

## **METHODOLOGY**

The methodology used in this paper is library research. The topic is specific, and mainly revolves around the Federalist Papers and the Second Amendment. Therefore, the main sources incorporated into the paper are the two relevant Federalist Papers as well as the Second Amendment itself. If these were the only sources consulted, however, the interpretation would be rather narrow and useless in contemporary terms. In order to implement a comprehensive look at this topic, a literature review was completed.

After the primary sources, books are used as the secondary sources. One specific book is used primarily throughout this paper because of the author's detailed analysis of this topic and his analysis of other legal scholars. The books provide a specific and detailed look at this issue and include not only the author's opinion, but the analyses of other scholars as well.

A search of JSTOR, EBSCO, and Lexis Nexis provided references to a variety of journal articles written on similar topics. Journal articles are also used as research for this paper in order to give any authors with similar points of view the credit they are due.

The paper also includes an interview conducted with Professor Kathryn Wood, a political science professor at San Jose State University. Professor Wood provides her modern scholarly analysis of the original intent of the Second Amendment.

Finally, several websites were consulted for additional data sources for this paper. The website materials was generally not useful, however, because they often had anonymous sources, their information was generally biased.

## LITERATURE REVIEW

Adams, L (1996). *The Second Amendment primer: a citizen's guidebook to the history, sources, and authorities for the Constitutional guarantee of the right to keep and bear arms* is the most crucial piece of literature consulted for this paper. Adams studied the history of the Framers in relation to their feelings on the right to bear arms. He looked at the context in which the Second Amendment was written, and explained the text in an eighteenth century meaning, rather than the way it is interpreted when read in a 21<sup>st</sup> century context. Adams also took apart the words of the Second Amendment and explained them as they are related to the Federalist Papers.

Francis, S., *Gun-controllers ignore history* is a journal article that explains the historical background of the Federalist papers and the Framers themselves in relation to the Second Amendment. The article explains that the Framers' attitudes were set at a time when traditional law in England had allowed citizens the right and duty to own arms.

Kardell, M., *Gun control for dummies*. *Pittsburgh Tribune Review*, was published in late 2007. It attempts to define the word "militia." Since the context of militia is often misinterpreted, Kardell's brief analysis provides the correct context and usage of the word. Additionally, Kardell connects the word "militia" in the Second Amendment to the phrase "the whole of the people" in the Federalist papers.

*NRA and the Second Amendment* comesw from the National Rifle Association's Institute for Legislative Action, and provides an interesting view regarding the Second Amendment's relation to the Federalist Papers. The article explains that at the time and context of the world, very few nations entrusted their citizens with the power of gun

ownership. The article goes on to explain that the Framers, especially Madison, embellished the American power to “be armed”. In addition, the article explains that the Second Amendment, being part of the Bill of Rights, is inherently an individual power. No matter how the words are twisted, or how militia is interpreted, the Bill of Rights solely describes individual freedoms, and thus the Second Amendment is the ultimate guarantee of the individual right to bear arms.

Rosen, G. Controlling guns. *Commentary*, is an article from 2000 addressing the issue of the true meaning of a militia. Overall, Rosen stresses the fact that the time and context are crucial when attempting to interpret the language of the Second Amendment and the Federalist papers.

Snyder, S., Gun rights and the Federalist Papers. *The Washington Times* describes the connection of the Federalist Papers to the Second Amendment and the Constitution as a whole. This 2007 article cites Federalist 29, and explains that Hamilton’s explanation of the people and their connection to the militia will always ensure that the Federalists intended an individual right to bear arms.

Subcommittee on the Constitution. United States Senate. (97<sup>th</sup> Congress) *The right to keep and bear arms* is a 1982 report was delivered by the 97<sup>th</sup> United States Congress regarding the Second Amendment. A Congressional Committee was appropriated to specifically study certain aspects of the Constitution. In this specific hearing, the committee focused on the Second Amendment, its origins, and whether it implies an individual right to bear arms. The article is crucial because it gives congressional opinions on the literal meaning of the Second Amendment. Most

importantly, the committee looked into the historical basis of the Second Amendment, specifically the Federalist Papers and the time in which it was written. Overall this document remains essential as a contemporary means of proving the historical context of the Second Amendment through the Federalist Papers.

## **HISTORY OF THE FRAMERS**

An understanding of the Framers themselves is essential to understanding their writing. According to Adams, "...the Founding Fathers of the new American Republic...had been rigorously trained in classical European Tradition" (Adams, 1996, p.17). The academic training of the Framers included studies of philosophers such as Machiavelli. According to Robert E. Shalhope, a professor of history at Oregon State University:

"In order to delineate libertarian beliefs regarding the relationship between arms and society, it is necessary to start with the Florentine tradition upon which republican thought drew so heavily...This tradition, articulated most clearly by Niccolo Machiavelli, idealized the citizen warrior as the staunchest bulwark of a republic" (Shalhope, 1982, p.601).

Once the educational background of the Framers is understood their writings and political philosophies often make more sense. Adams states that "This makes understanding the Second Amendment quite simple, just as the Framers intended it should be...they were well-educated statesmen" (Adams, 1996, p.18). While many modern day readers may see the Framers' writing as archaic and difficult, for the Eighteenth century it was modern

and revolutionary. Understanding the Framers' background completely refutes the idea that the right to bear arms was not meant as an individual right. Adams states that, "...these men knew how to say things in plain Eighteenth century English, and they meant what they said" (Adams, 1996, p.19). In clear Eighteenth century English, the Framers promoted an individual right to bear arms in both the Federalist Papers, and the Second Amendment to the United States Constitution. Shalhope states, "The vision of their nation as a virile and uncorrupted society permeated the writings of Americans during and after the revolution...these American writers perceived a vital relationship between vigorous republican husbandmen and the possession of arms" (Shalhope, 1982, p.608).

## **BACKGROUND ON THE FEDERALIST PAPERS**

Before attempting to discuss the specifics of the Federalist papers, a clear understanding of what the Federalist Papers were must be established. The Federalist papers were primarily written by three of the Constitutional Framers who were the major supporters of the document. The Constitution advocated replacing the loose confederation of states with a more powerful and central federal government. The Framers were aware that their document would have a great deal of opposition. The greatest opposition came especially from the Anti-Federalists who maintained a strong support of state's rights. The conflict is commonly simplified to be states' rights vs. individual right. The Anti-federalists believed that a federal government takes liberty away while local and state governments protect it. The Anti-federalists believed that state

and local governments are small and therefore maintain liberty. A central government that is far away cannot care about the liberty of its constituents. Adams points out that, "...the Federalists believed that the strong national government would be sufficient protection against all evils" (Adams, 1996, p.81). Despite this notion, however, the Federalists knew they must appease the Anti-Federalists in order to have the Constitution ratified.

The common understanding of the Federalist Papers is that they were written to convince the Anti-Federalists of the benefits of the Constitution's support of a stronger central government. According to Sanford Levinson of the Yale Law Journal, "...the Federalists, fending off their opponents who accused them of foisting an oppressive new scheme upon the American people, were careful to acknowledge the risks of tyranny" (Levinson, 1989, p.5). Both Hamilton and Madison acknowledge that the Federalist Papers explain the various rights that the Constitution gives to the people. Since the Constitution itself is short and concise, the Federalist Papers allowed the Framers the freedom to express the ideals of their Constitution at length. (Adams, 1996, p.82-84). Hamilton and Madison devote two whole Federalist Papers to explaining the Constitutional concept of arms, the militia, and a standing army. Through these explanations, Federalist 29 and 46 are formed.

### **TEXTUAL ANALYSIS OF FEDERALIST 29 AND FEDERALIST 46**

Federalist 29, written by Alexander Hamilton, mainly expresses Hamilton's Federalist view on militias and standing armies. According to Don B. Kates, a Second

Amendment scholar, “The militia was the entire adult male citizenry, who were not simply allowed to keep their own arms, but affirmatively required to do so...With slight variations, the different colonies imposed a duty to keep arms and to muster occasionally for drill...” (Adams, 1996, p.79). According to author Mike Kardell, “...this militia was in place to protect the free state (the people) against a tyrannical government, especially our own”(Kardel, 2007, p.1).

Hamilton devotes Federalist 29 to explain his Federalist view on the militia and standing army. Additionally, through the context of Federalist 29, Hamilton specifically provides support for the individual right to bear arms. Hamilton implies that owning a weapon was an expectation. Author Scott Snyder, writing on Federalist 29, refers to it as, “...one piece of history that proves that the right to own and bear arms was and always will be an individual right...” (Snyder, 2007, p.A20).

Hamilton wrote Federalist 29 on January 10, 1788 and addressed the document to the State of New York. At the time, the United States had only been free from Great Britain for twelve years. Hamilton writes to address the fear of the Anti-federalists over a standing federal army. At the time, the Anti-Federalists even feared a state led militia of ordinary citizens. According to Adams, “As far as the Anti-federalists were concerned, such a skilled and select militia would, for all practical purposes, be the same as the standing army that they so feared and detested” (Adams, 1996, p.78). The Anti-federalists were concerned because the British army had used their paid standing army in order to invoke their despotic and oppressive will. When Great Britain tried to inflict their despotic will on the colonists, however, they ended up face to face with an armed battle.

Hamilton begins Federalist 29 with a discussion of the fears of a militia. Hamilton realized that the American key to the revolution was their ability to be armed and to fight for their freedom. Hamilton writes that “If standing armies are dangerous to liberty, an efficacious power over the militia, in the body to whose care the protection of the State is committed, ought, as far as possible, to take away the inducement and the pretext to such unfriendly institutions”(Hamilton, 1788, p.1). Hamilton is attempting to quell the fear over the concept of a standing army. He is stating that if the United States has an army based on commitment of the states, Americans will not have to worry about threats upon their liberty through the common fear of a standing army beholden only to the central government.

In Federalist 29, Hamilton makes a clear point that it is impossible for the American federal government to become despotic due to the way The Constitution was written. Hamilton states, “By a curious refinement upon the spirit of republican jealousy, we are even taught to apprehend danger from the militia itself, in the hands of the federal government (Hamilton, 1788, p.1). In other words, Hamilton is emphasizing that it is a popular belief that a standing army will be despotic in the hands of the federal government. It is obvious in his tone that Hamilton does not agree with this point of view. He goes on to state, “If it were possible seriously to indulge a jealousy of the militia upon any conceivable establishment under the federal government, the circumstance of the officers being in the appointment of the States ought at once to extinguish it. There can be no doubt that this circumstance will always secure to them a preponderating influence over the militia” (Hamilton, 1788, p.1).

Hamilton's Federalist 29 explains his views rather clearly. Hamilton attempts to reduce the fears of the people towards any sort of militia or standing army. Most important is Hamilton's assumption that all the people in the general population are armed. When Hamilton goes back and forth between referring to a federal army and a militia, he makes it clear that a militia is a group of armed individuals who have come together to fight for a state. A federal army can only be appointed by the legislature to fight on behalf of the executive. From these points, one must remember Hamilton supports not only an individual right to bear arms, but also supports the formation of citizen militias and state militias. Hamilton is merely advocating a federal army because he believes its centrality allows for more effectiveness over the alternative of various militias coming together to fight for one cause. From these points, it is possible to state that Hamilton supported no less than a completely unhindered right for all Americans to bear arms.

“When the first Congress convened for the purpose of drafting a Bill of Rights, it delegated the task to James Madison” (Thurmond et. al., 1982, p.1). “When Madison wrote the amendments to the Constitution that formed the basis for the Bill of Rights, he did not do so within a vacuum. Instead, he composed them in an environment permeated by the emergent republican ideology” (Shalhope, 1982, p.608). When attempting to understand the Second Amendment, or any other part of the Bill of Rights, it is crucial that one fully understands the text in Madison's Federalist Papers. Madison declared his views on arms in Federalist 46. The main point of Federalist 46 is to explain why the state governments should not be worried about encroachment or oppression by the federal

government. As part of this explanation, Madison makes a clear expression on his views on the right to bear arms, and how it applies to individual Americans.

Federalist 46 was written January 29, 1788 and addressed to the people of New York. The beginning of Federalist 46 is Madison's explanation of what the relationship is between the federal and state governments. Madison states that many of the people who are against the ratification of the Constitution feel that the federal government will take away their authority and their liberty. To this, Madison responds:

“They must be told that the ultimate authority, wherever the derivative may be found, resides in the people alone, and that it will not depend merely on the comparative ambition or address of the different governments, whether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expense of the other” (Madison, 1788, p. 1).

Madison is stating that the ultimate authority of the state, whether the government is a federal or confederate system, relies in the people themselves. Such a notion becomes very important later in Federalist 46 when Madison goes into more detail on his specific feelings towards the right to bear arms.

The next part of Federalist 46 focuses on the relationship between the people and the states. Madison explains that the people will always have a stronger bond to their state than they will to a centralized government. The states hold friendships and communities. They are closely knit, and thus it is unavoidable for people to form a stronger bond to such an entity. However, Madison states:

“If, therefore, as has been elsewhere remarked, the people should in future

become more partial to the federal than to the State governments, the change can only result from such manifest and irresistible proofs of a better administration, as will overcome all their antecedent propensities”(Madison, 1788, p.1).

Madison is explaining in more detail that the government will move at the will of the people. If people have a stronger tie to the states, then that will be the de facto situation. If there ever comes a time, however, that the people are more attached to their federal government, this will only be because they chose for this to happen.

In the third part of Federalist 46, Madison goes on to clearly explain that the federal government will never have the right to encroach on state affairs. Madison states, “Measures will too often be decided according to their probable effect, not on the national prosperity and happiness, but on the prejudices, interests, and pursuits of the governments and people of the individual States” (Madison, 1788, p.1). He explains that the state and federal governments will be solely about the people and what they want, not about who has the power. Madison explains that the popular opinion of a state shall never supercede some sort of national agenda. Madison explains this by saying, “If an act of a particular State, though unfriendly to the national government, be generally popular in that State and should not too grossly violate the oaths of the State officers, it is executed immediately and, of course, by means on the spot and depending on the State alone” (Madison, 1788, p.1). Basically, as long as the people are not breaking a state law, or violating the oath of their legislature, then their will shall be respected.

The final portion of Madison’s 46 explains the relation of the former statements, to the right to bear arms. Madison supports the idea of individuals bearing arms. The

most commonly quoted statement of Madison's 46 is, "...the advantage of being armed, which the Americans possess over the people of almost every other nation..." (Madison, 1788, p.1). In this quote, in plain black and white, is Madison's view on an individual right to bear arms. Additionally, While Madison does not support a federal standing army, he makes this statement:

Let a regular army, fully equal to those resources of the country, be formed; and let it be entirely at the devotion of the federal government; still it would not be going too far to say, that the State governments, with the people on their side, would be able to repel the danger. The highest number to which, according to the best computation, a standing army can be carried in any country, does not exceed one hundredth part of the whole number of souls; or one twenty-fifth part of the number able to bear arms (Madison, 1788, p.1)

Madison explains that the crucial aspect that keeps the formerly mentioned will of the people in line. He explains the fact that any federal army made up of hired mercenaries, could never betray the will of an armed population.

In the last part of Federalist 46, Madison explains that, "To these [a federal army] would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence"(Madison, 1788, p.1). In no way could any federal army betray the will of the armed population with a common will in mind. Madison clearly explains this by stating.

“... existence of subordinate governments, to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of” (Madison, 1788, p.1). Madison is explaining that the states have the capability to form militias of their already armed citizenry, which can defend their government against the ambitions of an encroaching federal tyranny. Author Gary Rosen stresses the point that, “Alarming though it may sound to modern sensibilities, the Eighteenth century militia was universally considered an essential popular check on government power--and a reflection, ultimately, of the people's sovereignty and indefeasible right of self-defense” (Rosen, 2000, p. 1). Just as Madison is explaining, the militia would be made up of citizens who are already armed, and would serve as the final check on any possible tyranny of the central government.

## **TEXTUAL ANALYSIS OF THE IMPLEMENTATION OF THE SECOND AMENDMENT**

After a full description of the Framers' various viewpoints on the right to bear arms in the Federalist Papers, it is necessary to examine how these views were implemented by the Second Amendment itself. The full text of the Second Amendment states, “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”. According to Adams, in modern day English this is simply stating, “...the American people have a collective right to protect themselves against the evil of standing armies by forming a general militia composed of all the people” (Adams, 1996, p.19). Stephen Halbrook, a Constitutional

scholar, states that the Second Amendment's modern day translation is "...a militia of the body of the people is necessary to guarantee a free state and that all of the people all of the time and a right to keep arms" (Adams, 1996, p.20). Constitutional scholar Don Kates also gives his point of view on the Second Amendment when he states, "Two of these truisms that got cobbled into one article were: that there is a natural right to be armed and that militias are a good thing..." (Adams, 1996, p.81). Finally, Francis Adams states that the Second Amendment, "...was meant to guarantee the individual's right to have arms for self-defense and self-preservation" (Francis, 1995, p.1). With these interpretations in mind, in order to fully explain the Second Amendment, and its relationship to Federalist 29 and Federalist 46, it is necessary to look at the wording in pieces.

The first part of the Second Amendment states, "A well-regulated militia being necessary to the security of a free state". For all intents and purposes, this refers back to both Federalist 29 and Federalist 46 in which Hamilton and Madison respectively expressed their concern over a standing army. Madison wrote this first portion of the Second Amendment to state that Americans have an individual right to form their own well-regulated militias in order to secure the freedom of the United States against despotism.

The second part of the Second Amendment states, "...the right of the people to keep and bear arms shall not be infringed". A simple reading of these words should rid doubt and confusion about the purpose of the Second Amendment. In the previous analysis of both Federalist 29 and Federalist 46, Hamilton and Madison respectively stated the necessity for all individuals to bear arms. Both Framers express the sincere

need for an armed population to protect against despotism, and to protect the nation against enemies.

## **INTERVIEW**

On April 16, 2008 an interview took place with San Jose State University professor Kathryn Wood. The discussion with Professor Wood mainly revolved around the relevance of a strict reading of the Second Amendment. Professor Wood expressed her expert opinion on the Framers' view of the right to bear arms. A common fear of judicial review of the Second Amendment is the chance of a snowball effect. More specifically, some worry that if the Supreme Court determines that the Second Amendment is deemed to not enumerate an individual right, the possibility of the Court then attacking other Amendments becomes real. In this case, the United States would lose some of the rights and liberties currently upheld for American Citizens. More specifically, if we change our interpretation of the framers on the Second Amendment, we might do the same regarding the 1<sup>st</sup> Amendment right to free speech.

Professor Wood was questioned specifically about the relevance of this fear today and into the future. Her reply was:

The constitution is a dynamic, flexible, living document. The forefathers wrote it that way so that it could be geared towards the modern society. Taking a strict interpretation of the constitution is silly because a strict interpretation is based on the 1700s. We have reinterpreted what it means time and time again" (K. Wood, personal communication, April 17, 2008).

Professor Wood went on to explain that we have constantly reinterpreted the Constitution and the Bill of Rights to coexist with our modern day interpretation and jurisprudence.

Typically our modern day interpretations have expanded American Constitutional rights.

A literal reading of some of the Bill of Rights actually seems to limit what we have ended up taking from them. Professor Wood pointed out the “Right to Privacy” as a prime example of this. The “Right to Privacy” has been conjured up through jurisprudence, not through specific enumeration. Professor Wood explained that the Framers designed the Constitution vaguely so that it could fit in with what may become of the United States in the future. The Framers intended with the Second Amendment for Americans to be individually armed, and thus declared this through the Second Amendment. While Professor Wood does not agree with a fully armed American populous, she nevertheless took a literal interpretation of what the Framers meant.

Professor Wood concluded by reaffirming the notion that only a Constitutional amendment could take away the Constitution’s enumerated right to bear arms (K. Wood, personal communication, April 17, 2008).

## **CONCLUSION**

The Second Amendment was written to protect the individual right of United States citizens to bear arms. According to Scott Snyder, “It’s amazing the lack of historical knowledge many of our illuminated judges show when they rule that the Second Amendment is not an individual right but a collective one” (Snyder, 2007, p.A20). A simple analysis of the history of the Bill of Rights sheds light on any doubt

over this issue. The Framers expressed their thoughts fully in the Federalist Papers regarding the various aspects of the Constitution and Bill of Rights they were trying to have ratified. The Framers expressed their views on the right to bear arms in Federalist 29, by Alexander Hamilton and Federalist 46, by James Madison. The text in both these documents provides indisputable evidence that the Second Amendment describes an individual right.

According to Shalhope, “These men firmly believed that the character and spirit of the republic rested on the freeman’s possession of arms as well as his ability and willingness to defend himself and his [free] society” (Shalhope, 1982, p.612). While many debates today rage on over this issue, it is hard to believe that the anti-gun advocates have a leg to stand on. Unless a Constitutional amendment is passed refuting the words of the Second Amendment, the individual rights expressed must be upheld in the legislature and the judiciary as intended by the Framers.

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# **THE HISTORY AND ORIGINAL PURPOSE OF THE SECOND AMENDMENT**

By Stacy Candeias

## **ABSTRACT**

Controversy over the context of historical documents has continued until today. The original intent prompting the Founders to include the Second Amendment within the Bill of Rights is debated amongst its modern interpreters. Potential sources of answers are limited, as our Founding Fathers and the eighteenth-century populace has long been deceased. Fortunately, written documents authored by the Framers, such as speeches, notes and letters, have survived throughout the centuries. These documents provide constitutional analysts with clues to the mindset of the Constitution's contributors.

## **INTRODUCTION**

In a time set on escaping the hands of oppression, our Founding Fathers drafted the Constitution. They sought to insure the right to liberty, justice and equality of American citizens. In order to accomplish such an intricate task, a division of power between the national government and its citizens was essential. Many debates ensued over ways in which to keep the states united while simultaneously allowing for the people to remain free. The exact purpose behind the incorporation of the Second Amendment into the Bill of Rights is a controversial matter. Incomplete records during the time of its ratification proceedings have left modern-day analysts of the Second Amendment to establish radically opposed and partisan stances on its original meaning.

Two stances dominate these debates: the individual right interpretation and the states' right interpretation. The individual right interpretation holds that the right to bear arms is a basic fundamental right meant to reside exclusively with the citizens. The states' right interpretation suggests that the original intent of the Second Amendment is to grant states the power to arm its citizen-militia. A study of the history preceding the ratification of the Bill of Rights proves that the right to bear arms is intended to secure the personal freedom of individuals against the threat of potential oppressors of liberty, justice or equality. Consequences credited to modern times, such as an increase in crime and violence executed by armed individuals, lead gun control advocates to argue the states' right interpretation in an attempt to safeguard society. Such an interpretation is incorrectly correlated to the original intent of the Second Amendment.

## **METHODOLOGY**

Library research and an expert interview provided the foundation for the development of this paper. Books, journals and websites offered diverse points of view to enrich the analysis.

## **LITERATURE REVIEW**

*Citizens Committee for the Right to Keep and Bear Arms. Important Quotes on Guns, Liberty, Government, Militia & Crime* was selected to begin fact-finding. A search of databaseS yielded journal articles directly related to the history and original purpose of the Second Amendment. Three articles, written by Stephen P. Halbrook, Lawrence

Delbert Cress and Robert E. Shalhope, provided solid support for the private right to own a firearm were printed. To diversify research material, the worldwide web was accessed to hunt for alternate sources using the keywords, “right to bear arms.” “The Right to Bear Arms,” a report written by the Subcommittee of the Constitution of the United States Senate, presented new supplementary data. A search of the New York Times archive then provided a news article based on the opinion of several constitutional experts and scholars concerning the right to bear arms. Additionally, *Constitutional Law for a Changing America: Rights, Liberties, and Justice* authored by Lee Epstein and Thomas G. Walker provided a source for the historical aspect of this topic.

An interview with Kathryn Wood, a San Jose State University lecturer and political scientist, together with the Citizens Committee on the Right to Bear Arms website, were used to further diversify points of view.

## **HISTORICAL OVERVIEW**

In order to draw conclusions about the origins of the Second Amendment, the setting and time frame in which it was written must be considered. Prior to forming an interpretation, modern mindsets must be abandoned while reviewing relevant history to identify the purpose of the Second Amendment. By evaluating historical documents and events preceding the Second Amendment, the accurate theory behind its purpose will become evident.

While the Framers believed the wording of the Second Amendment was clear, the emergence of its varied interpretations has proven otherwise over time. The American

Bill of Rights was authored and ratified by those subject to the influence of English customs. With this being the case, reference to the English experience can shed light on the origins of the American right to bear arms. The standing army in England was an infringement of individual liberty and granted the government unlimited power. During the seventeenth and eighteenth-century England adopted an “antigovernment and anti-army legacy.” (Malcolm, 1994, p.141) English liberties, or a lack thereof, impacted American political thought. To limit the power of the federal government, America would establish a “freer use of private arms than had existed in England.” (Malcolm, 1994, p. 140) A review of American law proves legislators attempted to assure a private use of arms.

Legislation drafted previous to the ratification of the Constitution provides modern interpreters with some level of insight as to the Second Amendment’s original purpose. In 1639 a Newport law read “Noe man shall go two miles from the Towne unarmed, eyther with Gunn or Sword; and that none shall come to any public Meeting without his weapon.” (Malcolm, 1994, p. 139) A Virginia law passed in 1640 ordered “All masters of families to furnish themselves and all those of their families which shall be capable of arms (except negroes) with arms both offensive and defensive.” (Malcolm, 1994, p. 139) In 1770, only a relatively short period of time prior to the American Revolution, Georgia passed legislation in an effort to protect the security of its citizens by requiring “Every white male resident to carry firearms to places of public worship.” (Malcolm, 1994, p. 139) With these few pieces of legislation, self defense against internal and external sources coupled with providing the ability to repel oppression were

clearly the mindset of lawmakers. The private right to possess arms was not only granted but required at times immediately before the ratification of the Second Amendment.

(Malcolm, 1994, p.142)

In May of 1787, the Founding Fathers assembled in Philadelphia for a Constitutional Convention. Their mission was to revise the many weaknesses of the Articles of Confederation. Rather than a revision, the Articles of Confederation were completely abolished. Our present United States Constitution resulted four months later on September 17, 1787. (Epstein & Walker, 2007, p. 3) The Constitution was then sent to the states for ratification.

A group who would come to be known as the Anti-Federalists met the process with extreme opposition. Anti-Federalists felt that without a list of private rights, the Constitution granted the central government too much power. This power could be used to abridge the personal freedom of American citizens. Delegate Gerry Elbridge was one of three Founders who even refused to grant the Constitution approval with his signature because he felt it awarded the federal government an excess of military power.

Federalists favored ratification and felt no alterations needed to be made.

Federalists supported the Constitution because it alone balanced the power of the national government effectively. (Epstein & Walker, 2007, p. 4) Due to opposition, Federalists came to realize the Constitution would not be ratified by the states, and so a compromise was agreed on. States would ratify the Constitution so long as it would be changed to adopt amendments known today as the Bill of Rights. Federalist James Madison drafted the Bill of Rights. He had received over two-hundred suggestions from

the states. Only ten amendments made it through the ratification process. One of these is our personal right to bear arms, also known as the Second Amendment. (Epstein & Walker, 2007, p.6)

American citizens share a history. Over time that history has been perceived in a variety of ways that have resulted in opposing views. Some argue validity is lacking in the notion that the right to bear arms lies with the people. Constitutional scholar Robert Shalhope offers a compelling argument against them in his article “The Ideological Origins of the Second Amendment.” According to Shalhope, the Framers were working to secure a republic that would be free from the infringements European societies endured. England kept an unarmed citizenry and a professional army. The unarmed citizen cannot truly be free because he is in jeopardy of being tyrannized. Freedom is at risk because independence remains at the discretion of the government. The right of citizens to bear arms is necessary to preserve liberty because liberty is essential to the survival of a democracy. (Shalhope, 1982, p. 604)

The Framers and fellow libertarian writers evidently concurred with Shalhope’s stance. In the view of George Mason, "To disarm the people [is] the best and most effectual way to enslave them." (Citizens Committee for the Right to Keep and Bear Arms [CCRKBA], 2001) Libertarian James Burgh believed the distribution of arms amongst the citizenry determined the “very nature of society.” Burgh claims “No kingdom can be secured otherwise than by arming the people. The possession of arms is the distinction between a freeman and a slave.” (Shalhope, 1982, p.604) He insisted arms are necessary to preserve liberty and protect all that man values.

Florentine tradition influenced the mind of many libertarian writers.

Machiavelli wrote of the remedy to the corruption which plagued societies. He explains:

There never was a new prince who has disarmed his subjects; rather when he has found them disarmed he has always armed them, because, by arming them, those arms become yours, those men who were distrusted become faithful, and those who were faithful are kept so, and your subjects become your adherents...But when you disarm them, you at once offend them by showing that you distrust them, either for cowardice or for want of loyalty, and either of these opinions breeds hatred against you. (CCRKBA, 2001)

According to Machiavelli, an armed citizenry is mandatory if a republic is to thrive positively. The independence that is gained from a citizen's willingness to arm himself, and exercise the trigger of that arm, repels oppression and is his grasp onto liberty.

Machiavelli wrote that the "citizen-warrior" was the strength of a republic and that armed citizens is what would keep rulers honest. (Shalhope, 1982, p.601)

Over time changes in society and the environment led to revised versions of Machiavelli's theory. Libertarian authors Marchamont Nedham and James Harrington both wrote of limiting the possession of arms to "responsible citizens." (Shalhope, 1982, p.602) This was to remedy the imbalance between power and liberty caused over time. Still, the basic principle remains the same. The right to bear arms should remain with the people in order to contain an otherwise all powerful, corrupt government. Shifts in opinions concerning the Second Amendment do not change the original intent behind the right to bear arms or grant the collective right theory credibility.

## **TEXTUAL ANALYSIS**

The Second Amendment to the Constitution states “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.” (Shalhope, 1982, p. 599) The ambiguity of the Second Amendment’s wording invites interpreters to attempt to persuade others to share their stance on the matter. Each side tries to present the most convincing evidence because as of yet the United States Supreme Court has not rendered a decision that clearly defines the Second Amendment. The side advocating the individual right theory emphasizes the importance of the second half of the amendment. The side advocating the collective right theory emphasizes the importance of the first half. Together, the ambiguous nature and lack of judicial review concerning the Second Amendment leaves legal analysts to continue debating the matter. (Epstein & Walker, 2007, p. 406)

Many legal scholars review the actual text of the Second Amendment to determine the intent of the Framers. Those in favor of the amendment as an individual right claim the wording of the text is proof it is meant to safeguard the possession of guns by citizens. Pro-gun advocates claim without the first clause, the amendment is without a doubt an individual right. The well-regulated militia clause is merely a preamble to the second half of the amendment. It is not a qualification. (Epstein & Walker, 2007, p. 406) An analysis of Second Amendment terms help support this assertion.

George Mason said, "I ask, Who are the militia? They consist now of the whole people, except a few public officers." (CCRKBA, 2001) At the time the Bill of Rights was drafted, the words “militia” and “citizens” were synonymous with one another. Both

could be defined as “the people.” Realizing this, it becomes obvious the Framers intended to provide individuals protection from the possibility of oppression by the federal government. This protection was not limited to the states. Had the Framers meant to provide the states with this as an exclusive right, the Second Amendment would have been phrased “A well regulated militia, being necessary to the security of a free State, the right of the States to keep and bear Arms, shall not be infringed.” (Epstein & Walker, 2007, p.408)

The examination of written documents such as speeches, draft legislation and letters authored by the Constitution’s writers also provides evidence that the Second Amendment was meant to be a private right. In his Federalist Paper No. 46 James Madison wrote:

The advantage of being armed...the Americans possess over the people of all other nations...Notwithstanding the military establishments in the several Kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms. (Subcommittee on the Constitution, 1982, p.3)

Thomas Jefferson, who was a private owner of firearms himself, suggested Virginia’s state Constitution adopt an amendment that proposed “No free man shall ever be debarred the use of arms.” (Subcommittee on the Constitution, 1982, p.5) Samuel Adams, another contributor, recommended an amendment that would serve to prohibit the passing of future legislation aimed “To prevent the people of the United States who

are peaceable citizens from keeping their own arms.” (Subcommittee on the Constitution, 1982, p.6) These statements make the intent behind the incorporation of the Second Amendment into the Bill of Rights abundantly clear.

Understanding the original meaning of the Second Amendment can be done through an analysis of eighteenth-century publications and common knowledge. Through researching the historical context of the Second Amendment it is clear to Stephen Halbrook, the author of “What the Framers Intended: A Linguistic Analysis of the Right to “Bear Arms” and constitutional scholar, what the Framers’ intentions were. By examining the phrase “bear arms” in an eighteenth-century mindset, Halbrook concluded what constitutional rights the Second Amendment is meant to reserve. He claims not only did they intend to guarantee individual citizens the right to own a gun, but requirements such as having to register or obtain a permit prior to arms ownership is unconstitutional. (Halbrook, 1986)

The “arms” constitutionally protected are those of self and military defense which one can physically “bear” or carry. James Madison supported a belief in a personal right to arms ownership. He endorsed an article written by Tench Coxe shortly after the Bill of Rights was proposed which describes Second Amendment arms as “private” in reference to muskets, rifles and pistols. (Halbrook, 1986, p. 155) Explosive or highly destructive weaponry such as bombs and artillery pieces are not protected by the Second Amendment, as they are not typically used for self defense and can injure innocent bystanders in an attempt to strike the target. They are not weaponry the average individual would be physically capable of “bearing.” (Halbrook, 1986, p. 158)

Therefore, the phrase “to bear arms” typically meant to carry a musket, rifle or pistol. In addition, Halbrook makes it clear that “to bear arms” is not synonymous with military duty by evaluating a piece of game restrictive legislation authored by Thomas Jefferson. The term “to bear” is used to describe the carrying of a gun by a hunter. This in turn provides evidence militia affiliation is not a prerequisite to carrying or owning a firearm, further discrediting the collective right theory. (Halbrook, 1986, p. 153)

Finally, Halbrook explains the unconstitutionality of a license or registration requirement to carry a firearm. He argues that citizens are not required to register prior to exercising their constitutional right to speak freely. Therefore, they should not be subject to any such prerequisite to owning a firearm. (Halbrook, 1986, p. 160) In 1788, the *Pennsylvania Gazette* wrote of the importance behind a right to bear arms without first obtaining permission, because it is a citizen’s means of defense against impositions on liberty; the very impositions on liberty by those who would require the permit in the first place. To say the Framers would have approved of a permit requirement to allow citizens to exercise their right to speak freely is clearly absurd. Equally absurd is the notion they would concur with the same type of restrictive requirement concerning the right to own a gun. (Halbrook, 1986, p.162)

## **CONTEMPORARY CONTROVERSY**

The right to bear arms is a controversial matter today due to varying interpretations of late eighteenth-century politics coupled with bias concerning contemporary gun ownership issues. Constitutional scholars Lawrence Delbert Cress and

Robert Shalhope have two opposed understandings of the Second Amendment's original intent. Cress advocates a communal possession of arms. Shalhope insists upon the accuracy of the individual right interpretation. The arguments these two present, specifically the rebuttal of Shalhope against Cress' assertions, strengthen the logic behind the individual right theory. (Shalhope & Cress, 1984, p. 587)

Cress denies the right to bear arms is a private promise granted by the Second Amendment guaranteeing the right to gun ownership. He claims the Founders never intended to award arms ownership to citizens standing outside a well regulated militia. According to Cress, the sole purpose behind arming citizens is to provide for the common good of the republic. It is a corporate function which served to unite society with order and respect for authority. (Shalhope & Cress, 1984, p. 588)

The above interpretation is criticized by advocates of the individual right interpretation like Shalhope. Shalhope calls Cress' contentions a "naïve" misunderstanding of the eighteenth-century political realm. (Shalhope & Cress, 1984, p.588) While unity was often the theme recited in speeches and written of in political literature it was only spoken of as an ideal. The reality was that individualism was on the rise. Cress' literal perception of political speech has led him and others to advocate this point of view which is far from the Second Amendment's actual purpose. (Shalhope & Cress, 1984, p. 589)

The Bill of Rights was drafted at a time credited with the reinforcement of civil liberty and individual rights. When Madison presented the Bill of Rights, the Second Amendment was grouped with the rest of the individual right-promising amendments.

Had the Second Amendment been placed within Article I, Section 8 which addresses militia construction, Cress' assertion might actually be a credible argument. (Shalhope & Cress, 1984, p. 589)

This popular debate among advocates on both ends of the controversy has stemmed in part due to an increase in gun-related criminal activity. (Malcolm, 1994) The emergence of relatively recent public safety issues has the American right to bear arms on the decline, as gun control advocates continue to amplify their argument. While legitimate reason exists to justify the goal of anti-gun movements, their methods have resulted in distorted interpretations of the Second Amendment. In an attempt to disarm America to serve the purpose of safeguarding society, the original intent of the Second Amendment's incorporation into the Bill of Rights is being compromised.

Those in favor of declaring the right to bear arms as an exclusive state right are under suspicion of harboring a biased mindset. The right to own a firearm has become a highly emotional topic for many engaged in the matter. The dilemma today's American society is attempting to remedy is unique to our time. Some of the reasons currently apparent in support of restricting gun ownership were not relevant at the time the Second Amendment was ratified. Gun control advocates seem to have interpreted the Second Amendment to suit their own agenda and vision of what they believe it should now mean. As a result, the bias surrounding the advocacy of the collective right interpretation is overriding the origins of the Second Amendment.

For a long time, the Second Amendment was ignored by the majority including the courts. With the recent rise in controversy concerning gun ownership, the United

States Supreme Court is being pushed towards granting the matter judicial review. If the Second Amendment is established as a private right belonging to citizens, current gun restrictive legislation would be at risk of modification or even being ruled unconstitutional. This provides those in favor of restricting gun ownership with the ultimate motivating factor for attempting to distort evidence supporting the original meaning of the Second Amendment. For example, some gun control advocates will agree that the British Bill of Rights helped shape the Framers in constructing the American Bill of Rights. They claim “The British Bill’s language permitting gun ownership...was really a form of gun control because there had long been curbs on owning weapons.” In addition, “The purpose of the measure, they say, was to make it clear after the reign of the Catholic King James II that Parliament, not the monarch, would decide who would have weapons.” (Glaberson, 1999)

Both liberal and conservative constitutional experts are agreeing recent evaluations of the Amendment’s history prove the individual right theory’s validity. A look at the influence of the English Bill of Rights of 1689, together with other historical texts, comprises the history being referred to. In their evaluations, “There was never even a suggestion that it would be appropriate for the national Government to deny gun ownership to a private person,” said William Van Alstyne, a constitutional law professor at Duke University who has been studying the origins of the Second Amendment since it became such a hot topic. (Glaberson, 1999)

According to Kathryn Wood, a political science professor at San Jose State University, the Constitution is a “flexible” document. She finds a strict interpretation of

it “silly” because it is “based on the 1700s.” The Constitution has already been taken out of its literal context and reinterpreted to match contemporary societal problems. For example, the Framers never meant to prohibit car searches without probable cause but today the Fourth Amendment serves to prevent such an act. A changing society needs new laws to address problematic issues that have recently evolved. However, you cannot give people something for two-hundred years and then say it is illegal and take it back. (K. Wood, personal communication, April 17, 2008)

## **CONCLUSION**

The collection of findings written in the above paragraphs serves to create doubt that the Founding Fathers intended that the Second Amendment provide states with the exclusive right to bear arms. The Second Amendment was incorporated into the Bill of Rights to provide citizens with the means to preserve liberty and security by guaranteeing the possession of arms which could be used to repel threats of oppression. Contemporary struggles with gun violence burdening the safety of American citizens have significantly contributed to the motives of gun control advocates. The proponents of banning the use and possession of firearms who claim the Second Amendment never meant to grant individuals the right to own a gun are disregarding the original intent of the Framers. Those who believe that an armed citizenry currently causes more harm than good can follow the amendment process with respect for our Founding Fathers.

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**DEFINITION OF A MILITIA:  
LEXINGTON AND CONCORD; ORGANIZED AND UNORGANIZED**

By Luan Mai

**ABSTRACT**

There is no greater safeguard to liberty than to put that safeguard in the hands of the people themselves. The people themselves forming a militia, organized under the states, will deter any central government with great ambition. So far the U.S. Supreme Court has yet to decide if the right to bear arms is a fundamental right, and it has been unwilling to strip the people of that right.

Currently, the right to bear arms is a privilege that is given by the power of the State to its citizens for the purpose of maintaining a militia. While the organized militia under the flag of the National Guard has the right to bear arms and has great responsibility, it is important that the right to bear arms is also extended to the unorganized militia, which is every adult who is not a member of the National Guard. One should be wary if the central government should ever attempt to disband all militias or to have full control of State militia.

**INTRODUCTION**

The Second Amendment stated that, “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.” Within this clause the Amendment referred to two important words, Militia

and people. One can see that the phrase by itself can be broken into two parts: 1) a well regulated Militia, being necessary to the security of a Free State, and 2) the right of the people to keep and bear Arms, shall not be infringed. Is the right of the people to bear Arms necessary to the maintenance of a militia? The definition of “militia” is a military force composed of ordinary citizens that is not part of a regular army and is subject to call for service in an emergency. The Battle of Lexington and Concord is a prime example of an organized militia that was necessary to achieving independence from Great Britain. Although the need for an organize militia is ultimately overtaken by an organized police force in keeping the peace, should an unorganized militia composed of ordinary citizens be allowed to bear Arms? History showed that an organized militia is the product of ordinary citizens who are farmers and hunters that needed guns, thus to have an organize militia, ordinary citizens must first be allowed to bear Arms.

## **LITERATURE REVIEW**

Burger, Warren E. “The Right to Bear Arms.” *Parade Magazine*, revisits the history of the militia in America and argues that the framer’s concern in the Second Amendment is now no longer relevant. Justice Burger considers that the owning of guns should be regulated and licensed.

Edward, F. & Dolan, Jr. (1982) *Gun Control* gives insight into the gun rights as a tradition of the early colonist of America. It also goes into detail as to questions that were asked regarding the Second Amendment and the argument provided during the 1980s.

Henderson, H. (2000). *Gun Control* provides a summary of cases relevant to gun control

and the law on Militia and military weapons, and also discusses the issue of the right to bear arms in state constitutions.

Streissguth, T. (2001). *Gun Control Pros and Cons* describes the history of the U.S. and guns. It showed historical incidents where a militia was needed to overcome an external threat and to defeat the British troop, claiming independence from Great Britain.

Winters, R. (2006). *The Rights to Bear Arms* focused on the intent of the founders and also provides a personal explanation of the author's definition of militia and what it means to the Second Amendment.

## **METHODOLOGY**

This research is based on a literature review method to gather the majority of the information from books like *Gun Control*, *The Right to Bear Arms*, *Gun Control The Pros and Cons*. Other research included databases such as JSTOR, CQresearch, and also from findlaw.com, which provides constitutional cases and Second Amendment text with annotations. An interview was conducted with Professor Ken Nuger, who is an expert on constitutional law.

## **BACKGROUND**

What makes a militia so different from a military organization? The dictionary defines militia as “a body of citizens organized for military service that operates like an army but whose members are not professional soldiers.”(Webster, 2008) Essentially, militia is another term for ordinary citizens that were given the right to carry arms for the

protection of the community and the State.

There are two types of militia mentioned by Hamilton: organized and unorganized. Organized militia would be manned by citizen soldiers, and the unorganized made up of the rest of the population. (Dolan & Edward, 1982, p. 47) It is obvious why we have two types of militia, since not all able-bodied men would be serving at the same time, thus the rest that is not serving would be in the reserve pool and hence called the unorganized militia.

## **LEGAL ISSUES**

In 1181, King Henry II gave “every knight and freeman” the right to have weapons and armors and made them swear to obey the king and defend the kingdom, resulting in a protomilitia. (Henderson, 2000, p. 85) By the 16<sup>th</sup> Century, the British saw their first line of defense as being a navy that was able to defeat any combination of opponents, but lacked land-based military power when compared to the emerging powers of the European mainland. The English standing army would always be small because it lacked the population and resources but it had another military resource, and that was the armed and organized citizens of the militia.

From 1485-1603, the Tudors continued to rely on citizen soldiers as the primary defense. Professional forces were used in England but they were mostly used to train the local militias. Muster became an important ritual and aspect of training militia. During Queen Elizabeth I’s reign, she required musters four times a year and authorized payment for those attending. Eventually conflict emerged in England as to who had control of the

Militia, and the parliament declared that it, not the king, had the right to regulate the militia. After the parliament won the Glorious Revolution in 1688, the English Bill of Rights gave the Protestant the right to have arms for their defense, and also to serve as a counterweight to the standing army to preserve liberty against tyrannical government.

When the English established colonies in America in the seventeenth century, all able-bodied free men were required to possess arms and participate in the colonial militias. Militia was the main line of defense for the settler's homes and villages against Indian raids and foreign invasion. England did not want to spend the resources or the manpower to send a standing army to protect the settlers, thus settlers must arm themselves at their expense and provide for their own protection.

## **MILITIA IN AMERICA**

Whether it was purely for self defense or for the common defense, the colonist brought the militia system with them when they settled in North America. In the 1770s, conflict arose regarding taxes and parliamentary representation between the colonists and the British rulers in Great Britain. Fearing of an uprising, the British began seizing weapons from the colonists. In response to this, Virginia and other colonies began forming citizen militias, which armed themselves with muskets. Soon after was the great event of Lexington and Concord, in which the militia confronted the British army for the first time. (Streissguth, 2001, p. 16)

## **LEXINGTON AND CONCORD**

The battle of Lexington and Concord were the first military engagement that started the American Revolutionary War. On April 15, 1775, General Thomas Gage decided to send seven hundred troops under the control of Colonel Francis Smith to Concord to seize military supplies. In the meantime, British troops under the command of Major John Pitcairn marched his soldier to Lexington, where Captain John Parker and a muster of militia stood waiting during the night. Parker and his men had decided that they would let the soldiers pass through Lexington, since most of the stores of munitions and gunpowder had been dispersed to other sites and hidden away. Past experience with British troops, Parker had expected that the British would once again not fire upon any militia in similar circumstances and the British would yield rather than fight.

However, on the morning of April 19, 1775, the British troops began to accelerate their pace and advanced in the direction of the militia. Parker, who saw the oncoming troops, ordered the militia to disperse and scatter so they would not be exposed to the oncoming charge. Within the yelling and the mayhem, a sound erupted. “From behind a stone wall a shot rang out—no one has ever discovered who first fired” (Higginbotham, 2002) “The shot heard round the World” was fired and ignited the American Revolution. Despite the short skirmish that lasted only a few minutes, eight militia men died and nine were wounded. Horsemen carried the news of the bloodshed at Lexington to nearby Massachusetts towns. Hours later, Colonel Smith and Major Pitcairn’s troops arrived at North Bridge in Concord and there they met resistance from the minute men who fought and push back the British troops.

It was inevitable that the shot was to be heard. According to the notebooks of Barret, “20,000 pounds of musket balls and cartridges, 50 reams of cartridge paper, 318 barrels of flour, 17,000 pounds of salt fish and 35,000 pounds of rice lay hidden through the community.” (Higginbotham, 2002) There was little doubt that Massachusetts was getting ready to wage a war. Lexington and Concord was simply a spark that was needed for the colonists to start a war. Historians have said that, “without the old flintlock that hung on the kitchen door or above the fireplace mantel, the colonists could never have gone out to meet the British at Lexington. (Edward & Dolan, 1982, p. 13) The militia was a necessary component in the resistance and without it the war would not have been won.

After gaining independence from Great Britain, James Madison wrote the Second Amendment of the U.S. Constitution. Militia and gun became an important symbol of liberties wrested from the British through the skill and courage of the colonists. James Madison said:

Let a regular army, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the federal government; still it would not be going too far to say that a State governments with the people on their side would be able to repel the danger...a militia amounting to near a half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties and united and conducted by governments possessing their affection and confidence... (Streissguth, 2001, p. 81)

Essentially, Madison saw the Amendment as giving the power of the sword to the people.

If the government ever becomes oppressive, the State militia would have the power to overthrow such a tyrannical government. No matter how large a standing army is, it would never be at the same proportion as an army made up of all the citizens combined.

## **ROLE OF MILITIA IN THE CIVIL WAR**

Prior to the Civil war, the United States had a standing army of 1,108 officers and 15,259 enlisted men. The size of the Regular Army was small and militia provided the majority of the troops. However, most states had poorly equipped militia and were unprepared for war. Maine, with 63,000 men enrolled, could field at the most 1,200 men. Michigan, with 109,000 on the muster rolls, could only assemble in a short time of no more than 1,241 men, and while New York had 19,000 men in the organized militia, only 8,000 muskets were available for them. Few States had their militia equipped and ready for battle. Connecticut, Massachusetts, and Rhode Island were among the exceptions that had attended to their militia throughout the years. Of the total militia, 40 percent of the 93,000 militiamen that answered the President's call were old volunteers. Despite serious flaws with the militia during the Civil War period, it still proved to be effective when summoned to serve the country in time of need. Drastic reform was later put in place to strengthen the militia.

## **REFORM OF THE MILITIA**

“Unorganized” and “organized” militia is what came out of the reform. The term “unorganized” emerged in the 1830s and 1840s when many had strong opposition to the

compulsory militia system. People did not want to serve in the militia, but states had a duty under the Uniform Militia Act, which required all men 18-45 to be in the militia. An exception to the 1792 Uniform Militia Act was that it allowed the states to determine who was exempt from militia duties, and states used this loophole to divide the militia into two sections: organized and unorganized.

Organized militia would be composed of volunteers who wanted to perform militia service. The organized militia would have uniforms, guns, and would drill, review and encamp and be called upon whenever needed. Members of the unorganized militia would be exempt from militia service and were not supposed to perform any duty or carry any weapons. Although unorganized militias were free from responsibility, everyone at least the age of 17 to 45 who were not members of the National Guard or Naval Militia had to register, and essentially be ready to be called into service.

“In 1903, important national defense legislation increased the role of the National Guard as a Reserve force for the U.S. Army.” (Ngb, 2008) In 1917, the U.S entered World War I and the National Guard were called into service making up 40 % of the U.S force. The entire National Guard of 300,000 men was called to active duty and sailed to France to fight with the British and the French. In World War II, the National Guard was mobilized and trained in 1940 and 1941, well before the attack on Pearl Harbor, and was the first units that were deployed overseas to fight. The National Guard was involved in small to large conflicts throughout American history. In the Viet Nam war, 23,000 Army and Air Guardsmen were called up for a year of duty and 8,700 were deployed to Vietnam. Other involvement included the support of NATO during the Berlin crisis, and

support in the Desert Storm operation of Kuwait.

## **THE SECOND AMENDMENT-MILITIA OR THE PEOPLE**

“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.” Whether it was on purpose or accidental, the founding fathers had combined militia and the right of the people to keep and bear arms into one, which has caused great controversy in the courts as to who has the right to bear arms.

Several cases were decided by the U.S. Supreme Court on the Second Amendment. The first case that was brought to the Supreme Court was *U.S. v. Cruikshank* in 1875, which involved a group of white supremacists, also known as the Ku Klux Klan, who after regaining control of a particular area decided that they would disarm blacks and leave them defenseless. Cruikshank and other ring leaders attacked and burned down a courthouse and killed over one hundred black men trying to defend their rights in post-Civil War Louisiana. The appellant argued that they had been deprived of certain federal rights, including the Second Amendment right to bear arms. In this case the Supreme Court decided that the Second Amendment limited the powers of the federal government, not the state governments or individuals. In this case, it was the individuals that violated the victims’ rights, so the Second Amendment did not apply. The Court also noted that the Second Amendment is intended to limit federal power, and did not forbid a state government from passing gun control laws.

In *Presser v. Illinois*, 1886, the State of Illinois prosecuted a German immigrant

named Herman Presser, who had formed his own private militia to protect the rights of working-class Germans. When the militia held a parade, carrying rifles, the State of Illinois arrested Presser for maintaining a private militia. Presser argued that the state had violated his right to assembly and the right to bear arms. The Court ruled in favor of the state saying that state had a right to establish its own militia and prevent private citizens from forming their own. Again, the Court restated that the Second Amendment was intended to limit federal power, not state, in regulating arms. This case was significant, because it showed that even though the militia is made up of a body of citizens, without the consent of the State, a militia cannot be form. Furthermore, the Court held that “the national government has a constitutional interest in state militias as a bulwark of national defense; therefore, the states could not go so far as to actually disarm their citizens or otherwise eliminate their effectiveness as militia members.” (Winters, 2006, p. 13)

A third and important case was the case of U.S. v. Miller, 1939. Here the Court dealt with a federal law. The Court were asked to rule on a case involving the National Firearms Act of 1934, which mandated registration of various weapons. Jack Miller and Frank Layton were arrested and convicted when they were transporting unregistered sawed-off shotguns over state lines. The District Court of the Western District of Arkansas held that the National Firearms Act was unconstitutional in mandating this registration. The Supreme Court upheld the National Firearms Act and also stated that the possession of a particular weapon had to have “some reasonable relationship to the preservation or efficiency of a well regulated militia” in order to be protected by the Second Amendment. (Winters, 2006, p. 14) The significance of this case is that the Court

ruled that it was constitutional to have federal regulation of firearms, but it also stated that possession of firearms must have some reasonable relationship to maintaining a militia. The preservation of a militia and arming a militia seemed to be the first priority, not an individual right to gun ownership.

In all the cases above, a trend could be seen that the Supreme Court has decided to interpret the Second Amendment in a way that gave the priority to a state militia for the right to bear arms. States have the power to regulate, enforce and maintain a militia. The question of whether States have the right to ban individuals from gun ownership has never been mentioned clearly, but since the Court has declared that it was a constitutional interest that a State maintain a militia, States would be obliged to keep citizens arm in order to maintain a militia.

Professor Ken Nuger, who is an expert on constitutional law, was asked if allowing citizens to have gun ownership was a necessary component to maintaining a militia, and in his respond he said “no”. “It is not what you have but what function...” said Nuger. (Nuger, 2008) He goes on to explain that citizens could be armed with a knife, bat, or any type of weapons besides a gun and could still function as a militia. Gun ownership is not a requirement for a militia to function. If Professor Nuger was right, states could disarm their citizens if they wanted to, and could still train and maintain a militia.

## **MILITIA IN THE 21<sup>ST</sup> CENTURY**

Militia as the founding fathers imagined has changed over the course of time. In

the 21<sup>st</sup> century, there are those who believe we still have a militia, and others that claim the militia has become federalized and no longer serves its original purpose. In an interview Professor Ken Nuger, stated that there is no longer a need for militia in the 21<sup>st</sup> Century. We are no longer living in a hostile environment, and our government system of checks and balance ensure lasting stability. Domestic disputes are resolved through state's police, and foreign disputes through the federal army. The only militia left today is the National Guard, which was federalized through the Militia Act of 1903. Professor Nuger stated that the National Guard cannot be claimed as a militia, because it operates under the blessing of the federal government and is controlled by the federal government.

The National Guard today is involved mostly with federal mission. It has been sent overseas to Haiti, Bosnia, Kosovo, and even Iraq. Following September 11, 2001, 50,000 Guard members were called by the states and federal government to provide security at home and to combat terrorism. 50,000 Guards were deployed to support the Gulf States after Hurricane Katrina in 2005, and thousands are serving in Iraq as of now. (Ngb, 2008) Wherever there is life and liberty at stake, the National Guard continues its tradition and provides the states and the nation with well equipped and readily available troops to protect those interests at stake.

Since the 2003 invasion of Iraq, many National Guard members were sent overseas, and states that relied on the National Guard for internal emergencies were left empty handed. To fix this problem several states formed their own militia called the State Guards, a separate force under the control of the governor of the States. However, State Guard could be called into federal service at anytime, and remains part of the reserve for

the National Guard. States that have formed State Guards included New York, Maryland, and Ohio. Other states have similar proposals as well.

In the case of *Perpich v. Department of Defense*, the Supreme Court was asked to rule on whether Congress may authorize the President to order members of the National Guard to active duty for purposes of training outside the United State during peacetime without either the consent of a State Governor or the declaration of a national emergency. The Court held that Congress may authorize members of the National Guard to be ordered to active federal duty without either consent of the state governor or declaration of national emergency. The Court relied on the Dick Act of 1903 that made the National Guard conform to the Regular Army, and “provided that federal funds and Regular Army instructors should be used to train its members.” (Adl, 2008) Furthermore, in 1916 Congress federalized the National Guard and required every guardsman to take a dual oath to support the Nation as well as the states, and authorized the President to draft members of the Guard into federal service. Ever since then, the National Guard no longer remains only in the control of the State. One could argue that it is a part of the federal army.

## **ANALYSIS OF THE MILITIA ISSUE**

It is needless to debate whether the Second Amendment granted the militia or the people the right to bear arms. Based on historical reference, a militia could only be

maintained because government wanted civilians to be armed and be used as a source of military power in case of insurrection or invasion, and for the common defense. Since no government wanted to tackle the gigantic task of providing arms for every citizen, it has left this task to the citizens themselves. The only requirement for those who wish to be armed is to prove their allegiance to the state and to the nation to which their allegiance lies. Thus, having a militia in every state must also require that citizens must be allowed to bear arms, unless the state is willing to spend its own money.

What we should be concerned about today is whether our government will attempt to take away the power of the states. What if states can no longer have militia, or if the states' militias will be under the absolute control of the federal government? The National Guard is as much an entity of the state as it is of the Federal government. Chief Justice Burger mentioned how "monarchs had used standing armies to oppress their ancestors in Europe." (Burger, 1990) Although the National Guard is under the control of the federal government, it is also important to note that the National Guard is made up of volunteers who have taken a dual oath to the Nation and to the States. It would be unlikely that the National Guard would someday be used against the state they pledge allegiance to. In addition, states are forming State Guards as a counter to the tight control that the federal government has over the National Guard.

While no attempt has been made by the federal government to disarm the people or the state militia, government has been regulating the type of arms that could be carried. To keep and bear arms today is essentially for recreational activity, and not so much for survival as it was prior to the Civil War. Chief Justice Burger said that "Saturday night

specials and machine guns are not recreational weapons...” (Burger, 1990) Indeed, such weapons serve no special purpose in maintaining a militia or for the safety of the community. Regulation on what types of arms should be maintained has always been implemented in England. During Queen Elizabeth I’s reign, she required that only households with certain earnings could bear arms. The intention was to keep arms from poor individuals, who often committed most of the petty theft and crimes. Regulation is necessary when discussing bearing arms, but just how far can government attempt to regulate arms to the point that individuals will have a great obstacle in obtaining arms? As citizens, we can only be vigilant to make sure our government does not exceed its authority granted by the people.

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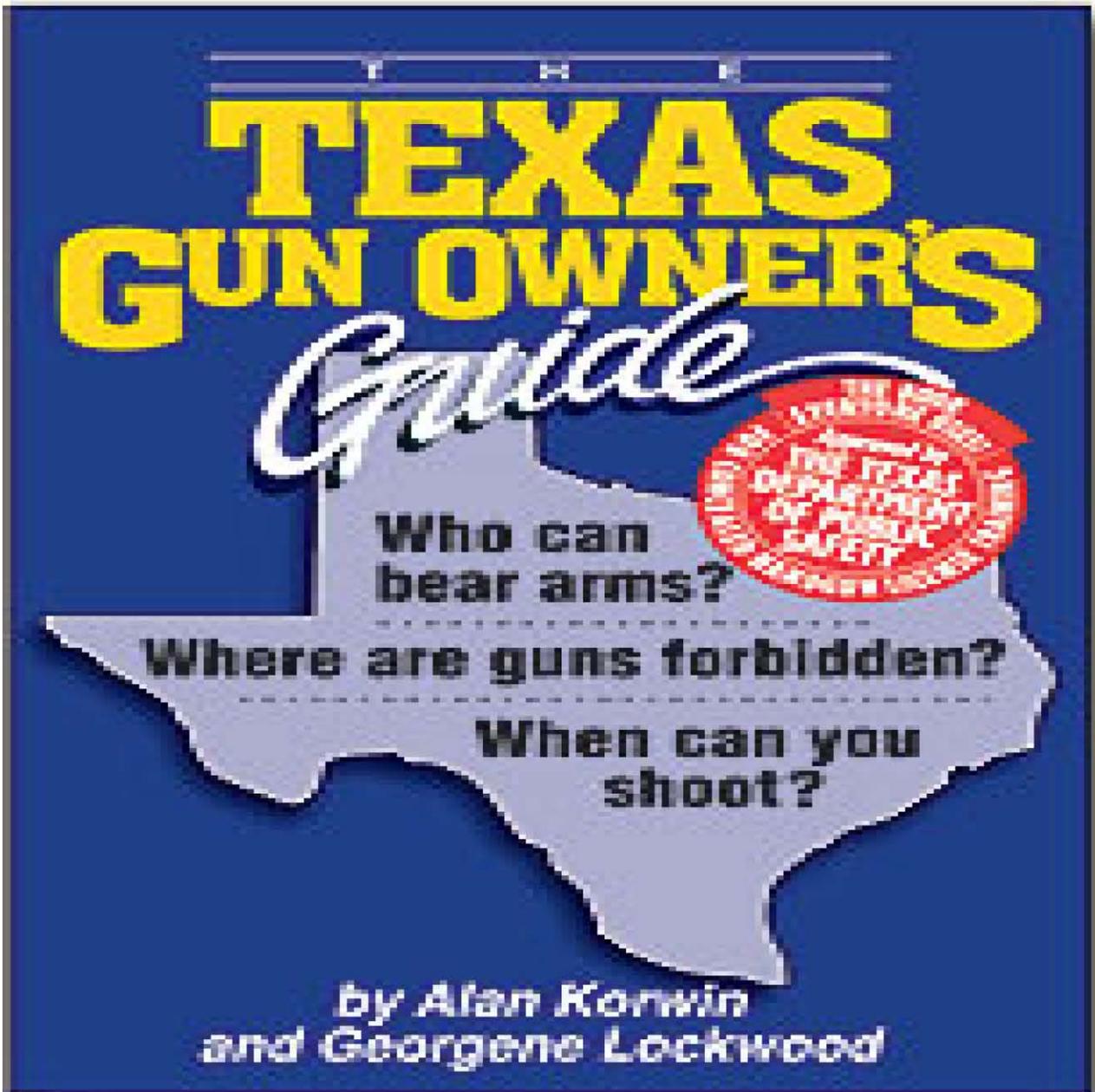
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**Geographic Regulations for  
Firearms**

# **MILITIA AND ARMS IN SWITZERLAND**

By Chad Lama

## **ABSTRACT**

Switzerland has one of the highest gun ownership rates in the world. They also have one of the lowest crime rates involving guns. In addition to having a high gun rate per capita, Switzerland has the second biggest militia in the world. The government depends on its armed populace for defense, emergency law enforcement, and parliamentary service in times of crisis. When a man turns eighteen, he is trained in the military and taught how to properly use a gun effectively and safely. These factors directly contribute to the country's low crime rate involving firearms.

## **INTRODUCTION**

Switzerland in its modern form was established after the 1850's. Prior to this time, it was an alliance of autonomous cantons or states that cooperated with each other. However, after the 1850's, they ended the alliance and became a federation, giving it a central authority by which to limit the power of individual cantons (Wilson, 2007).

Historically, Switzerland has established itself as a neutral state. In times of conflict, they stay true to their motto, which was spoken by Nicholas of Flu, a famous saint: "*Never get involved in other people's affairs.*" This has become the staple of their foreign policy, and is respected in the international arena. In addition to having protected them from war, Switzerland's neutrality has also prevented the country from falling apart

by the many different language speaking communities turning against one another in times of conflict. Being serious about this position means that in times of war, neutral states must stay out of military blocs, like NATO. However, in 1996, Switzerland signed the NATO Partnership for Peace.

Taking the position as a neutral state has enabled Switzerland as the prime candidate for mediator. They may represent countries in which they have no official affiliation with, such as Cuba and Iran. Also, their country is the perfect hosting ground for negotiations and conferences among various states. They have also hosted dubious discussions between governments and guerrilla groups. For example, they have successfully hosted talks between Columbia and FARC rebels since 2001 (Di Scala, 2003). Furthermore, located in Switzerland is Geneva, the “International capitol of Switzerland.” It is the European headquarters of the UN, as well as the Red Cross.

In June of 1930, the Nazis came to take over Switzerland, but they were unsuccessful for two reasons: 1) It was very difficult to overwhelm them when the majority of the population had at least one gun in the house; and 2) They practiced *Geistige Landesverteidigung*, which means spiritual national defense. In other words, they were dedicated to peaceful resolutions and disassociation from violence entailed by being a neutral state (Wilson, 2007).

In modern day Switzerland, when a boy turns eighteen he is required to be trained by the military. During their education, they learn how to effectively use a weapon and proper safety protocol. This is called the Swiss Militia Model, which means simply that the government depends on its citizens between the ages 18-42 to protect the country in

response to foreign aggressors. Consisting of 33% of the male population, Switzerland has the second largest militia in the world. As soon as a person's mandatory military training is over at the age of 20 or 22, he is given a pistol, which he must keep with him, and an assault rifle, which is always to be kept at home (Church, 2004).

The standard firearm is a SIG 550 for an enlisted person, a SIG 510 battle rifle for officers, and a SIG Sauer P220 9mm pistol for medical personnel. Restrictions extend only to the distribution of ammunition. An individual is allowed no more than 72 rounds, and the government regularly inspects how much ammunition a person has. Also, the ammunition is subsidized by the government. To make it more accessible to buyers, guns and ammunition are sold at shooting ranges—which are quite common in Switzerland—and by individual sellers (Wilson, 2007).

The crime rate in Switzerland is one of the lowest in the world. The United Nations International Study of Firearm Regulation found in 1997 that Switzerland's homicide rate was of 1.2 per 100,000 people, 9% of which involved firearms. The UK is listed at 1.4 per 100,000 people, with 91% involving firearms. In the US, the homicide rate in 1997 was at a rate of 9.0 per 100,000 people, with 70% involving firearms.

## **METHODOLOGY**

Research for this project began with a literature review, including many sources on the history of Switzerland, its politics, and culture. This research includes an interview with the Secretariat of the Swiss National Council, Ursula Pedrolini, who works directly with the National Council as well as the Council of States. Also included are data that

compared the crime rate of Switzerland with the US and UK, two major states.

## **LITERATURE REVIEW**

Church, Clive (2004). *The Politics and Government of Switzerland*. Clive Church is a renowned scholar of Switzerland and its politics. In this book, Church argues that Switzerland is one of the most peaceful nations, where very little violence takes place. He describes its history, as well as current politics and how it plays a role in the modern world.

Di Scala, Spencer M. (2003). *Twentieth Century Europe: Politics, Society, and Culture* discusses the evolution of European law, with a considerable portion dedicated to Switzerland and their “Militia Model”.

Hallbrook, Stephen P. (1999). US vs. Switzerland: Gun Laws. June 4. *Wall Street Journal* is an article that compares the crime rates of Switzerland and the US. Discussed are the contrasting crime rates, as well as the gun rate per capita.

Lott, John R. (2003). Swiss Miss. *National Review Online*. National Review Online. October 2. This article was written by John R. Lott and describes Switzerland’s registration process in order to receive a gun.

Stuedler, M. (2004). Tightening restrictions on guns in Switzerland is a government article that discusses the process by which a Swiss citizen can obtain a permit to carry a firearm. The article also describes tightened restrictions certain government officials are lobbying to put on permits.

Wilson, John (2007). *The History of Switzerland* is a comprehensive history of

Switzerland, including their politics and culture.

## **BIRTH OF THE SWISS MILITIA MODEL**

Since Switzerland's founding in 1291 its natives have been ardently supportive of their country. In these early times, the Old Swiss Confederacy, as it was called, was constantly under attack from European monarchs. Before guns, they used crossbows, and managed for centuries to repel European takeover.

The Swiss Cantons used to have a less strict regulation on weapons than they do now. In 1850 and earlier they were much less established and did not have a system to keep track of firearms owners and their weapons. But people lived in fear that they could be attacked at any moment by European powers, therefore, man, woman, and child had to be prepared to drop everything to fight for their land (Church, 2004).

But in the early 1900's the Cantons, in response to the growing number of firearms, as opposed to crossbows and muskets, decided to put some regulation on firearms. In 1917 the permit was established. There were two requirements to be eligible for a permit: 1) must be seventeen-years-old; 2) must partake in military services (Church, 2004). If you compare this set of requirements to modern times, the regulations have indeed become more restrictive. For example, a buyer must be at least eighteen-years-old, have no criminal record, and have no past history of psychological instability.

## **GENESIS OF SWITZERLAND'S FIREARM RESTRICTIONS**

Some would argue that the Swiss Militia Model inspired the Second Amendment

of the US Constitution, which says: “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.” Patrick Henry lauded the Swiss for maintaining their independence without a “mighty and splendid president”, or a standing army. The US even sent observers there, in order to emulate their shooting culture (Halbrook, 2007).

Historically, Switzerland has maintained peace with all the major nations. Their culture has enjoyed modest success, and their citizens do not appear to be unhappy with their government. However, restrictions came about in the 1900’s as a result of the huge emergence of firearms as the preferred weapon. This yielded the Buyers Permit.

In 2001, a man entered the regional parliament at Zug, a canton in central Switzerland, and killed 14 elected officials, before killing himself. The guns he had used were a standard SIG Sauer 90 rifle and a SIG 44mm. pistol. It was discovered that the man had served a two year prison sentence in 1970. What alarmed lawmakers and citizens was that the guns he had used in his crime were registered, even though Switzerland has a requirement for their buyer permits for firearms which states that a person with a record cannot receive a permit to buy a firearm. What they found was a loophole, in which, due to the passage of time, his prior felonies had been expunged (Lott, 2003).

This sparked controversy in the Swiss government. Lawmakers are trying to put heavier restrictions on firearm permits. In 2004, Switzerland’s Minister of Justice announced that tighter gun-control restrictions were being drafted. Shortly after, the Federal Weapons Law was enacted. This regulates import, export, manufacture, and trade

of firearms (Lott, 2003). The law forbids selling fully automatic arms and certain semi-automatics sold by private dealers. The focus of the implementation of the law was a new psychological stability exam that had been created. Unlike the previous test, this one is much more “rigid and critical. Sometimes administrators may deny a person even if his family has an exceptional background of mental stability. But this is a very rare case” (Pedrolini, 2008).

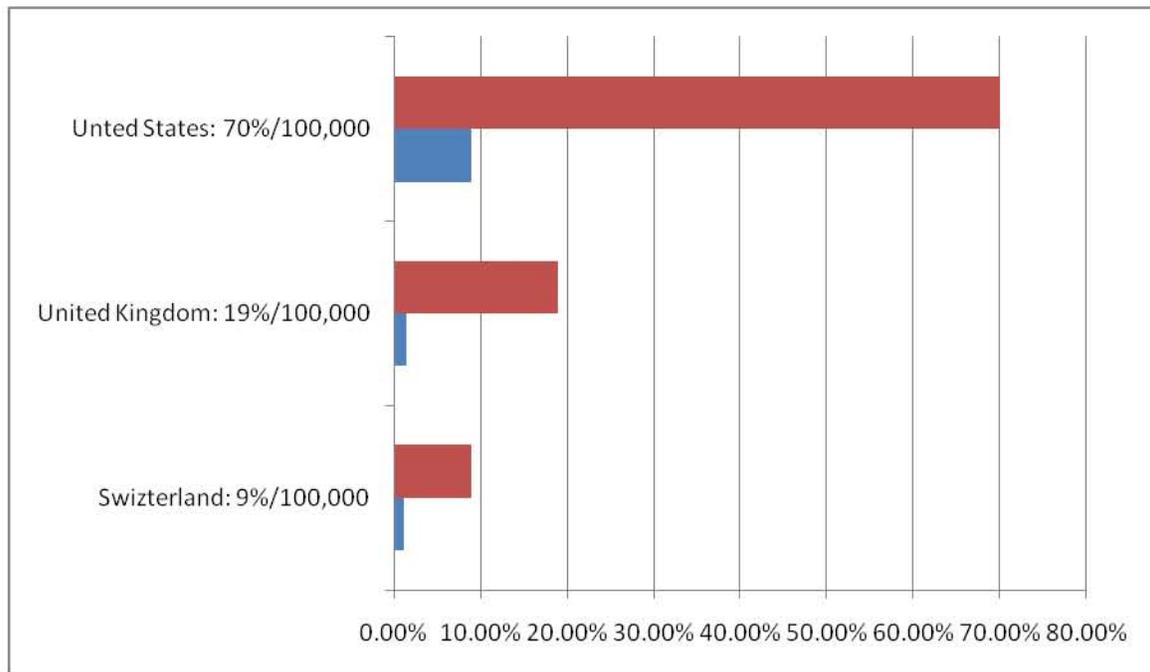
New penalties include incarceration of up to five years for willful intent with use of firearm. However, for other offenses, such as failure to comply through neglect, or without intent, may result in no punishment at all. (Stuedler, 2003).

## **ANALYSIS**

In 1997, the United Nations International Study of Firearm Regulation assessed the relationship between firearms violence and firearms ownership, comparing the United States, United Kingdom, and Switzerland. They found that although maintaining the highest registered gun ownership, Switzerland had the lowest homicide rate with a firearm. The homicide rate that year was 1.2 per 100,000 people. Of 102 homicides, 9% involved firearms. In the UK, where individual firearms ownership is forbidden, the homicide rate was at 1.4 per 100,000, 19% of which involved firearms. The United States, which has relatively strict firearms ownership regulations, has maintained the highest homicide rate of the three. The homicide rate was at 9.0 per 100,000 people, 70% involving firearms (Halbrook, 1999).

The blue bar represents the rate of homicides per 100,000 people, and the red bar

represents the percentage of those homicides involving a firearm.



Source: United Nations International Study of Firearm Regulation, 1997.

Another statistic taken from the FBI Archive of Criminal Justice compares the overall crime rates of Switzerland, US, and UK. Included are the population, total homicide rate, firearm homicides, non-gun homicides, and households with guns. Even though Switzerland has the highest number of guns per household, at 39.0%, they still maintain the lowest total homicide rate, which was at 1.32%, and 0.58% involving firearms. The UK is at 1.4% for total homicide rate, 0.11% for homicides involving a firearm, and 4.7% of households with firearms. The US, like the previous statistics from the UN Study of Firearm Regulation, was the highest in two of three categories, with a total homicide rate of 5.7%, homicide with a firearm at 3.32%, and number of households

with firearms at 27%. (Kaplan, 2007

After reading literature on Switzerland's history, its politics, and its crime rate in 1997 and 2001, it is evident that their policies of requiring every male between the ages of 18 to 42 are to be armed, and their neutral foreign policy position, has proven successful for them. In his book *Twentieth Century Europe: Politics, Society, and Culture*, Spencer Di Scala asks the question, "Why is well-armed Switzerland so free of crime?" The answer lies in the fact that, as opposed to the United States, where guns belong to a "subculture" of people and not the entire population (Wilson, 2007), or the United Kingdom, where they have a zero-tolerance policy, Switzerland promotes gun use as a means of protection as well as a national sport.

Secretariat Ursula Pedrolini, who I interviewed for my research, had this to say about the homicide rate with firearms in Switzerland compared to the US and UK. "Homicide is tied to a willingness to resort to violence, not the presence of guns. In Switzerland, the prevalence of firearms in the home and the participation of youth in shooting competitions bind the entire country together" (Ursula Pedrolini, personal communication, 2008, April 21)

I would argue that what she is saying is that it could have been the opposite in Switzerland, the way it is the UK. But because they embrace gun use, it is seen as a fun activity. Also, because the government depends on its populace for protection from international aggression, gun use is seen as a civic duty willingly put on the shoulders of Switzerland's citizens.

## CONCLUSION

The different statistics presented in this research supported the original thesis statement, that in Switzerland, their gun crime rate was significantly lower than that of the United States and United Kingdom. According to the study by the UN Firearm Regulation, in Switzerland the rate of homicide, plus homicide with a firearm, was about a fifth of the United States. With other statistics from the FBI Archive of Criminal Justice online, the rates were similar if not higher for the US.

Statistics of 1997 and 2001 indicate that Switzerland's low gun crime rate is contributed to by the effort on behalf of the Swiss government to encourage children at a young age to understand the moral and virtuous obligations that go into gun ownership. Furthermore, their militia includes a high percentage of their total male population, which, helps to glorify guns and militias in general. When a child grows up in an environment where shooting ranges and hunting are the country's national sport, and people—your family, friends, neighbors, and government—are dependent on you for protection against foreign aggressors, there is a certain incentive to go along with the tradition.

As John Wilson said in his book, *The History of Switzerland*, referring to Switzerland's low crime rate, "Populations with a strong sense of civic virtue do not experience sensational massacres or high crime. To the contrary, they deter crime."

In Switzerland, the belief in weapons knowledge, safe handling, and lawful usage of weapons is reinforced so thoroughly, in addition to the sense of nationalism guns clearly represent, that there is an enormous stigma that accompanies misuse of a firearm.

This is what appears to separate Switzerland from other nations, and, as a result, they maintain the lowest crime rate of the states examined.

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# **MILITIA AND ARMS IN ISRAEL**

By Laura Williams

## **ABSTRACT**

The State of Israel has one of the best militias in the world, with mandatory conscription for most of its citizens. After service in the Israeli army, (Israeli Defense Forces), individuals are placed into a reserve militia until the age of forty-five. Israel also has one of the lowest homicide rates in the world, yet few countries hoping to emulate their low homicide rate have adopted Israel's policies of arming and training a vast majority of their citizens. However controversial, Israel's militia and arms policies have proven to be an effective deterrent to crime, as well as a unifying element for their society.

## **INTRODUCTION**

David Ben Gurion, Israel's first Prime Minister and Defense Minister, used to say the IDF is not only a means of defending the country, but also a means of integrating and building Israeli society. The Israeli Defense Forces, (the IDF) is not simply a military in charge of protecting the state of Israel, but is also a way of life, with mandatory conscription for both men and women of Israeli citizenship. Formally created in 1948, the Israeli Defense Forces is Israel's first line of defense, and has come a long way from the nomadic militias of Israel's past ([www.dover.idf.il](http://www.dover.idf.il)).

The State of Israel declared its independence on May 14<sup>th</sup>, 1948 due to the British

Mandate of Palestine, which declared, “in favor of the establishment in Palestine of a national home for the Jewish people, it being clearly understood that nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country; and whereas recognition has thereby been given to the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country”. This mandate, approved by the League of Nations declared that the State of Israel was to be created in Palestinian land, despite the objections of the Arab League, whom was made up of the countries bordering Israel, Syria, Lebanon, and Jordan, with largely Arab and Palestinian populations. The State of Israel became a representative democracy, led by a President, Prime Minister, and the Knesset, a legislative body similar to the Congress of the United States. The Prime Minister holds the most power while the President’s duties are largely ceremonial ([www.knesset.gov.il](http://www.knesset.gov.il)).

Members of the Knesset were quick to develop the Basic Laws, which serve somewhat in a similar way as a Constitution. However the Basic Laws did not have Constitutional powers until 1998 when Chief Justice of the Supreme Court Aahron Barak declared a Constitutional revolution, and attached Constitutional powers to the Basic Laws. The Basic Laws weren’t given Constitutional power until this time due to the Harari Decision, a policy that determined that Constitutional powers would not be given to the Basic Laws until they were deemed complete by the Knesset (Allon, 1970).

Having many Arabic enemies surrounding their territory, the Israelis were quick to form a professional army, the Israel Defense Forces. Basic Laws were written to

regulate the Israeli Defense Forces (IDF), and are as follows:

*Defense Army of Israel*

The Defense Army of Israel is the army of the State.

*Subordination to Civil Authority*

(a) The Army is subject to the authority of the Government.

(b) The Minister in charge of the Army on behalf of the Government is the Minister of Defense.

*Chief of the General Staff*

(a) The supreme command level in the Army is the Chief of the General Staff.

(b) The Chief of the General Staff is subject to the authority of the Government and subordinate to the Minister of Defense.

(c) The Chief of the General Staff shall be appointed by the Government upon the recommendation of the Minister of Defense.

*Duty to Serve and Recruitment*

The duty of serving in the Army and recruitment for the Army shall be as prescribed by or by virtue of Law.

*Instructions and Orders in the Army*

The power to issue instructions and orders binding in the Army shall be prescribed by or by virtue of Law.

No armed force other than the Defense Army of Israel shall be established or maintained except under Law.

The Israeli Defense Forces (IDF) was then given the mission statement, “to defend the

existence, territorial integrity and sovereignty of the state of Israel” (www.dover.idf.il).

## **METHODOLOGY**

This research was conducted using online articles and databases, including JSTOR, Academic Search Premier, and CQ Weekly Researcher. Expert information was given by Aaron Zelman, founder and director of the Jews for the Preservation of Firearms Ownership, a group that advocates Second Amendment protection and conservation for individuals.

## **LITERATURE REVIEW**

In *The Making of Israel's Army*, Yigal Allon discusses the history behind the creation of the IDF and the reasons behind Israel's interest and demand for security. The book contains valuable information regarding the steps Israel and the Jewish community took in protecting themselves, creating their state, creating and writing their laws, and determining the policies of the IDF. Allon also describes armies created by the Jewish people before the creation of the State of Israel, such as groups like the Hagananah, as well as key battles that led to the British Mandate that created Israel.

Asher Arian's study, *National Security and Public Opinion in Israel* discusses the many opinions held by members of Israeli society on their safety and psychological damages that are still present from the Holocaust. He explains that even though younger members of society, those making up the IDF, did not directly experience the Holocaust, those who were alive and involved have been relentless in passing the fear and memories

down to younger generations. Arian also points out the location of Israel, surrounded by enemy states, has led to the constant fear of attack, and therefore a psychological need and love for national security. This situation has also led to a strong sense of nationalism in Israel.

Larry Derfner's, *People of the Gun* article provided me with a wealth of information pertaining to the process of obtaining a gun license in Israel, as well as societal views of having fully armed citizens. Derfner spoke with different members of Israel's society to portray an idea that most feel safe, comfortable, and protected by having an armed population. His article also points out that contrary to popular belief, obtaining a gun license in Israel is difficult and very well regulated.

David Masci's article, *Israel at 50*, contains a transcript of an interview with John Lott, author of, [The Bias Against Guns: Why Almost Everything You've Heard About Gun Control Is Wrong](#). Lott promotes the idea that concealed carry weapons laws abroad have had positive effects on those countries who are more lenient with their licensing. He also discusses the relationship between having a gun license and the likelihood of being killed with a gun, which affects homicide rates in respective countries.

#### Defense Service Law 5746-1986

The Defense Service Law is a very important government document that outlines the laws of mandatory conscription and terms of service for active military members as well as reserve members. It also outlines the structural pattern of the Israeli Defense Forces pertaining to the placement and subordination of officers versus regular members of the army.

<http://www.knesset.gov.il/>

Although this source was found as a website, it contains exact Israeli government documents, such as the Basic Laws, which outline laws for conscription as well as laws based upon the structure of the military. The laws also declare the government as the sole power behind the Israeli Defense Forces.

<http://www.lectlaw.com/inll/68.htm>

This website is composed of the Basic Laws of the State of Israel, which determine the status and conscription laws for the Israeli Defense Forces, as well as all other aspects of Israeli life. These government documents are written in a way very similar to our Constitution.

<http://dover.idf.il/IDF/English/about/doctrine/default.htm>

This online source has been extremely helpful and beneficial to my research because it is the home page of the Israeli Defensive Forces. It has provided me with the history, mission statement, make up and laws of the IDF, which has been extremely valuable in drawing comparisons between our second amendment and Israeli militia and laws. It has information regarding who can serve, for how long, and under what conditions. It contains charts that point out the exact ranking of individuals in the IDF as well as information for foreigners who would like to support the IDF.

[www.jpfo.org](http://www.jpfo.org)

This is the online website for the Jews for the Preservation of Firearms Ownership, a group that supports concealed carry and lenient gun laws in the United

States, based upon the success of lenient gun laws in Israel (amongst other positions).

This website has many additional articles I plan to use in my paper, as well as plenty of factual information.

In addition to the above research, an interview was conducted with Aaron Zelman, the founder and executive director of JPFO, Jews for the Preservation of Firearms Ownership.

## **THE CREATION OF THE ISRAELI ARMY AND MILITIA**

The Knesset created the Israeli Defense Forces in 1948 to be Israel's permanent army with a doctrine stating its purpose: "To defend the existence, territorial integrity and sovereignty of the state of Israel". Since then many laws have been put in place regulating who can, cannot, and must participate in active military duty. It is mandatory for Jewish men and women eighteen and older to join the IDF, with men serving a minimum of three years and women serving a minimum of two years. Very few are exempt from service, but reasons include religious prohibition, as well as physical and mental disability. Groups such as Mahal 2000 allow people of non – Jewish and non – Israeli citizenship to serve as well ([www.dover.idf.il](http://www.dover.idf.il)).

The IDF was created out of the Haganah, which was derived from the early, informal militia the Hashomer (watchmen). Author Yigal Allon (1970), explains the history of the Jewish militia beginning in 1880. He states, "When the country was under Ottoman rule, ... and local "cells" had begun to be formed for self – defense... The Jews recognizing that they could not safely depend on the Ottoman authorities, became more

and more accustomed to depend on themselves for the protection of their lives”. Due to their history and the unrelenting prejudice against their race, the Jews were always concerned first and foremost with their defense. The Hashomere, the Israeli militia during the rule of the Ottoman Empire, eventually gave way to the Haganah, the Jewish response to the lack of protection offered by the British after they declared Palestinian land for the Jews. The power and size of the Haganah increased as many people of Jewish decent came to defend each other against threats from the Arab states, as well as racist propaganda from World War II. When Israel officially declared its independence and could therefore legally have an army, the Israeli Defense Forces were created, and thus is the army that is in place today (Allon, 1970).

### **SERVICE IN THE IDF**

Military service in the IDF is an enormous part of Israeli life. Conscription is mandatory for men and women of Jewish and Druze decent once they reach the age of eighteen, and only few exceptions are made for those who are exempt from service. For example, individuals with physical and mental disabilities are exempt from service, as are those who have religious reasons for not participating (A. Zelman, Personal Communication, April 2008).

Overseas service is possible for those who become sworn in citizens of Israel. The main recruiting force for non – Israelis who wish to become soldiers in the IDF is a group called the Mahal 2000. This group offers mandatory language lessons, training and job placement for individuals wishing to be an active member of the IDF. Many individuals

of Jewish ancestry have chosen to leave their countries of residency to serve along side their family members and religious proximities. Approximately 2000 Americans per year are sworn in, stripping them of their American citizenship ([www.mahal-idf-volunteers.org](http://www.mahal-idf-volunteers.org)).

Different jobs in the IDF require different methods of training, and therefore different minimum years required of service are available. For example, women are required to serve only two years, unless they agree to serve under combat roles, which makes their service mandatory for three years. Once service in the IDF has been completed, the men and women who have served remain on call for active duty in the reserves until the age of forty-five. While in the reserves, men and women have different firearms laws that pertain to them, determining which weapons they are allowed to own (A. Zelman, Personal Communication, April 2008).

## **GUN LICENSING IN ISRAEL**

The laws and regulations for obtaining a gun in Israel are strict and uniform, contrary to popular belief. All Israelis who wish to have a gun after their mandatory service in the IDF and in between possible reserve service must apply for a gun license and endure a rigorous process if they are approved. The rules and regulations are as follows:

- Applicant must be a permanent resident of Israel for 3 consecutive years prior to making application for a firearm permit.
- Applicant must be 21 years of age.

- The permit request must be for personal use, not to engage in the business of firearms sales.
- Applicant must fall into one of the following categories:
  - a. Part-time reservist (volunteer) for 3 years- may own 1 handgun□
  - b. Such a reservist (volunteer) is a member of a gun club- may own 1rifle□
  - c. Professional, licensed public transportation driver, transporting a minimum of 5 passengers- may own 1 handgun□
  - d. Licensed animal control officer- may own 2 hunting rifles, \*not\*full automatic weapons, or semi-automatic weapons with a limited capacity magazine.
  - e. Full-time dealer of jewelry or large sums of cash or valuables-may own 1

handgun

*West Bank and Gaza Strip Settlers:*

- A resident in a militarily strategic buffer zone, essential to the security of the State of Israel- may own 1 handgun
- A business owner in these geographic areas- may own 1 handgun

*Veterans:*

- Veterans of the Regular Army honorably discharged with the rank of noncommissioned officer, and veterans of the Reserve Army with the rank of regimental commander- may own 1 handgun
- Retired law enforcement officers with the rank of sergeant- may own 1 handgun
- Retired prison guards with the rank of squadron commander- may own 1 handgun

*Individuals:*

- Upon presenting documentation that one is about to receive a souvenir, a prize, an inheritance, or an award of appreciation from the Israel military ([www.jpfo.org](http://www.jpfo.org)).

In order to be considered an applicant for a gun license, an individual must be an Israeli citizen at least twenty-one years of age “with a clean criminal record, in good health, and with no history of mental illness” (Derfner, 2002). Those who live in the Gaza Strip, those who drive passengers for a living (such as bus drivers), those who own a jewelry store, those who are police volunteers and those who hold a rank of Lieutenant or higher in the IDF are much more likely to be able to obtain a gun carry license than the average person (Derfner, 2002).

Licensing has become even more strict in Israel in recent history. For example, gun-license regulations were tightened after a gunman shot four social workers in Jerusalem in the early 1990s, and again after Prime Minister Yitzhak Rabin was assassinated in 1993 by Yigal Amir, an extremist who obtained a licensed gun when he lived in a Jewish settlement in the West Bank (Rodriguez, 2007). About sixty percent of applicants for gun licensing received approval in 2002. In this same year it is estimated that only 265,000 Israelis owned a gun (Derfner 2002).

The process for actually obtaining the weapon once you have been approved is not easy, and deters many from applying in the first place. An individual must submit an application to the Interior Ministry, where a six-week background check is performed. If approved, a letter is mailed to the individual who then takes the letter to a gun store where he or she may purchase a gun. The individual must then take lessons on how to effectively and safely shoot their gun, which includes shooting fifty shots at a target ten

meters away. An instructor must then sign off that the individual has shown proficiency in using their weapon. Next, the individual takes a signed letter of proficiency from the instructor plus the gun registration to their doctor who must sign off that the patient is mentally and physically healthy enough to own the weapon. Then it is back to the Interior ministry and then the individual may finally receive his or her license. Finally, the individual goes back to the gun store and may pick up their already purchased gun, which has been on hold. (Renewal of the license is much more simple, with the individual having to shoot fifty rounds at a licensed shooting range every three years (Derfner, 2002). The difference between Israel and the United States is that at this point, the individual may carry their weapon with them wherever they go. In the United States, once you receive a license to own a gun, you must apply for a concealed carry license to have the weapon with you.

While it has become more difficult for a regular individual to obtain a gun license, those who already have them are being prompted to keep their weapon on themselves at all times. One Rabbi commented, “It has gotten to the point where in some of the synagogues of Modi’in, there would be thirty or forty men coming to pray with guns on their belts – and sometimes more than one gun” (Derfner, 2002). Larry Derfner, a writer for Israeli Newspaper the Jerusalem Post, interviewed multiple members of Jewish society to obtain differing and similar views on gun control and carrying weapons in Israel. Unanimously all interviewed agreed that arming Israeli citizens was important due to the constant threat of terrorism from their surrounding countries and suicide bombers. Many Israelis feel that they themselves are a first resort against fighting crime and will be

comfortable shooting a weapon in order to pacify a terrorist situation. While many interviewed seemed at ease with using and carrying a weapon, it was acknowledged that if in a tense situation they shot the wrong person, they would be held accountable by law.

## **HOMICIDE RATES IN ISRAEL**

Israel has one of the lowest crime rates in the world, and their low homicide rate is especially impressive. They have an average homicide of 2.3 civilians out of every one hundred thousand (www.guncite.com, 2007).

## **CONCLUSION**

The United States has a much larger homicide rate than the State of Israel, perhaps due to each different interpretation of gun control and the usage of a militia. Our Second Amendment states, “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. “ and Israel’s laws are similar, outlined in their Basic Laws. It is interesting to see how different interpretations of similar word usage lead two countries down different paths. The right to a well - regulated militia in Israel has led to one of the most powerful reserve militias in the world, having all adults who served in the IDF in their militia until the age of forty-five.

Gun licensing in Israel, while uniform and strict, has allowed those no longer active members of the IDF to carry a weapon if they have good reason. By arming their citizens, especially those who live in border cities, Israel has created an active militia in

addition to their armed forces. Not only has mandatory conscription been a benefit to the safety of Israeli citizens, it has also been a unifying concept that ties the culture and country together under common goals and service.

It is important to note the cultural differences between the United States and the State of Israel. Aaron Zelman, founder of the Jews for the Preservation of Firearms Ownership in the United States, made an interesting point in our interview; Israel is surrounded by enemies on all of their borders, and is consistently dealing with the threat of terrorist attack and war. Citizens are often encouraged to carry their weapons and be responsible for their own safety, even if it means bringing a gun to Temple. On the other hand, the United States has virtually no threat of a land attack from neighboring countries and has a relatively low need of most of its citizens being armed and conscripted into the military. Almost all of Israel's citizens belong to a militia, while few American citizens take part. Although our interpretations of Second Amendment may be similar, cultural differences and necessity amongst individuals lead to the differences. Because of these differences, the interpretation of the right to bear arms and a well regulated militia have differed. The question is, which interpretation has led to a safer country? Israel has less strict gun licensing laws, as well as mandatory conscription. By trusting their citizens as their militia, Israel has effectively created a safe and prosperous country, united by their common conscription and duty to protect each other and their state.

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# **A BRIEF HISTORY OF GUN CONTROL IN GERMANY**

By Kamran Johal

## **INTRODUCTION**

Germany has some of the most strict gun control laws in the world. The root of German gun control can be traced to the defeat of Germany in World War I. It may be disappointing to note that despite the strict gun controls there are still shootings in Germany. There are essentially three eras of German gun control: the initial phase after World War I, the gun controls of the Nazi regime, and current German gun control laws.

## **WORLD WAR I ENDS**

Germany's initial gun control laws started after the German defeat in World War I. The reasons for gun control at the time were two-fold. "After Germany's defeat in World War I, the democratic Weimar government, fearing (with good cause) efforts by Communists or the militaristic right to overthrow the government, ordered the surrender of all firearms. Governmental efforts to disarm the civilian population-in part to comply with the Versailles Treaty-apparently ended in 1921". It is the fear of violent uprising that led to the strict gun controls of the time, which were restrictive at an unprecedented level.

The law required a permit to acquire a gun or ammunition and a permit to carry a firearm. Firearm and ammunition dealers were required to obtain permits to sell and to keep a register of their sales. Also, persons who owned guns that did not have a serial

number were ordered to have the dealer or manufacturer stamp a serial number on them. Permits to acquire guns and ammunitions were to be granted only to persons of ‘undoubted reliability,’ and carry permits were to be given ‘only if a demonstration of need is set forth.’(Kopel 1995)

The Weimar gun control laws are eerily similar to the types of restrictions that current gun control advocates approve of. While these gun controls were not aimed at oppressing the people of Germany that does not mean that there is no possible scenario for such a thing to happen.

## **NAZI GERMANY**

In fact it would be the rise of the Nazis that would lead to two important changes in gun control in Germany. The first major change was the addition of non-guns to be regulated by a gun control act. “In 1931, amidst rising gang violence ... carrying knives or truncheons in public was made illegal, except for persons who had firearm carry permits under the 1928 law.” (Kopel 1995) The banning of knives and truncheons is important because it lays the groundwork for similar restrictions to be enacted by both Nazi Germany and modern Germany.

The second major change in German gun control was enacted by the Nazis when they gained control of the government. The Nazis made their gun regulations even stricter than the Weimar law, however the crucial difference is that the Nazi law banned Jews

from owning guns.

“Additional controls were layered on the 1928 Weimer law: Persons under eighteen were forbidden to buy firearms or ammunition; a special permit was introduced for handguns; Jews were barred from businesses involving firearms, Nazi officials were exempted from the firearms permit system; silencers were outlawed; twenty-two caliber cartridges with hollow points were banned; and firearms which could fold or break down ‘beyond the common limits of hunting and sporting activities’ became illegal.”(Kopel 1995).

Kopel provides an account of “‘Kristallnacht’ (night of the broken glass)”, during which Jewish businesses were attacked by rioters. After the openly anti-Semitic attitude of Nazi Germany was established, Hitler moved to further oppress Jews. “On November 11(1938), Hitler issued a decree forbidding Jews to possess firearms, knives or truncheons under any circumstances and to surrender them immediately.”(Kopel 1995)

Many scholars feel that the reason for disarming the Jewish people was to make it easier to slaughter them. In fact without the adequate means to defend themselves it seems inevitable that the Jews would be slaughtered by the Nazis. After disarming the Jewish population, Hitler did not pass any more legislation regarding gun control.

## **GERMANY TODAY**

Current day gun control in Germany is just as restrictive as the two earlier eras. While Jews are no longer barred from owning guns in Germany, it is safe to say that Germany has some of the strictest gun laws in Europe. The gun control laws of Germany do address some of the most pressing issues in the gun control debate. These issues include the mentally unfit, age, travel, hunting, and, the most interesting, weapons that are not guns.

“All persons under 25 must now obtain a certificate of medical and psychological fitness prior to acquiring their first firearm for which authorization is required (hunters and marksmen are exempted from this requirement under certain conditions), and the authorities' right to demand a certificate if they doubt the mental fitness of a person, even if over 25 years of age, has been transformed into a duty.”(Firearms, 2003)

The issue of the mentally unfit obtaining firearms has been a concern in the United States as well. James Brady was shot by John Hinckley, who had a history of mental illness, during an attempted shooting of President Ronald Regan. It is therefore not surprising that, as a nation with strict gun laws, Germany would be explicit in addressing this issue. “... the minimum age for the acquisition and possession of weapons has been raised from 16 to 18 for hunters, and, as a rule, from 18 to 21 for marksmen.”(Firearms, 2003)

The variance of age and the special clauses designed for hunting makes

Germany's gun control laws confusing at first glance. Put into simple terms, the absolute minimum age for owning a gun is 18, and that is for sporting use. The difference between marksmen and hunters is the reason for owning a gun. Marksmen can be defined as someone in the military or someone who engages in target shooting as a sport, and therefore their proficiency with a gun is also likely to be higher than that of somebody who hunts. However, this is not the only part of German gun legislation which deals with hunting. "... certain relaxations have been introduced for hunters, marksmen and members of traditional rifle associations, especially with regard to (temporarily) bringing firearms and ammunition into Germany."(Firearms, 2003)

One of the major causes of strict gun control is the illegal trade of guns. As of 2002, there were "10 million legally-owned guns in Germany. But at least 20 million are illegally held." (Cracking down, 2002). This means that guns have been smuggled into Germany. This leads to the question of what percentage of legally obtained guns are used to commit crime in Germany. The answer is, "According to police statistics, only 0.004 percent of armed crimes are committed with a legally obtained firearm." (Cracking down, 2002). While this statistic is from 2002, it does illustrate the age old argument for gun owners that gun control does not stop crime, but only prohibits good citizens from obtaining guns for recreation and personal use.

Currently gun violence is still a prominent issue in Germany, and on February 22, 2008, "The German parliament approved tighter gun-control laws...in a move designed to stop the spread of violent crime". The move retracts Germany's earlier policy of not regulating "airsoft weapons."(DPA 2008) "The new law bans the public

display of fake guns and airsoft weapons, which work on the principle of compressed gas expanding to force a pellet down the gun's barrel. It will also be forbidden to carry combat knives and knives with a fixed blade longer than 12 centimeters.”(DPA 2008)

It seems as though Germany has fallen into the fallacy that stricter gun control laws will reduce gun violence. The purpose of the law is to not prevent gun violence, but to prevent confusion. “There are around 3 million imitation and airsoft guns in circulation in Germany. It is often difficult for police to tell them from real ones when confronting suspects.” However, despite all of these restrictions guns are not completely banned within Germany.

General exceptions, in particular to the license requirement for carrying weapons (Waffenschein), apply in one's own home, business premises or fenced-in property; a legally acquired and held weapon may be carried in these places, ready to fire, without official authorization. This privilege also applies to the home, business premises or fenced-in property of another person (with their consent). A weapon may also be transported on unavoidable journeys directly relating to the purpose for which it was acquired. One may also fire one's weapon at licensed shooting ranges without a license of one's own.(Firearms, 2003)

“Under the general rules of criminal law, one may also fire one's weapon in self-defense, to defend another or if justified by necessity.”(Firearms, 2003) In place in German law is something that is similar to the Texas “Castle Doctrine,” which allows citizens to defend their property. It does allow for the recreational use of

guns at legal centers. However, the carrying of a gun outside of one's own home is heavily regulated. The current trend in restricting guns, as shown with the banning of airsoft replicas, may lead to the banning of purchasing guns online, and even stricter laws on carry permits.

In the end gun control laws have only become restrictive in Germany ever since the Weimer government's gun laws passed in 1928. The Nazis were the most oppressive in regards to gun control, and even banned Jews from having businesses that dealt with guns, and eventually banned Jews from having arms. The trend of banning both guns and arms still continues with the modern regime in Germany. While Jews are no longer barred from owning guns, the current government's gun laws are nonetheless oppressive. The current government has included banning airsoft guns and long knives with gun control laws.

The problem with the current laws is that most of Germany's gun crimes are committed with illegal weapons, therefore all the government is doing is disarming the law abiding citizens, and preventing these citizens from defending themselves. This is contrary to allowing citizens to "fire one's weapon in self-defense", because it would seem that threatening a robber with a gun replica could be just as effective as confronting a robber with a real gun.

## **CONCLUSION**

In a European Union without borders, modern Germany is challenged with regulating guns to prevent crime. Gun control for the law abiding has been shown

in many places, including Washington, D.C., to have little effect on gun-related crime. However, preventing the mentally ill and immature from obtaining weapons may prevent some crimes of passion.

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# **CALIFORNIA GUN CONTROL**

By Thomas Edwards

## **ABSTRACT**

California is an extremely diverse state culturally, ethnically, and especially politically. California has enacted some of the toughest gun control policies in the United States of America and continues to pass innovative new laws. These controversial laws in California have sparked heated debates on both sides of the gun control issue. While the United States Constitution guarantees individuals the right to keep and bear arms, the Constitution also allows states to pass and enforce state laws on gun control as long as they do not contradict federal law.

## **INTRODUCTION**

California is the most populous and diverse state in the United States of America and is home to over thirty-six million people. Gun control in the state has evolved with the growth of its populace. With so many people living in urbanized areas throughout the state, the demand for gun ownership regulation has increased with the availability of cheap easily accessible guns. California has been on the two extremes of the gun control spectrum, from gun carrying cowboys during the gold rush to the evolved state of the west coast liberalness associated with modern day California. California has transitioned from a pro-gun state to one of the most regulated states in America regarding

gun control, and continues to pass ever more restrictive laws. Gun control within American society is shaped and influenced by major events within the U.S as well as technological advances within the gun industry. Present-day private gun ownership regulations in the state of California cover purchase, storage, registration, use, and concealment.

## **METHODOLOGY**

Literature review was my primary methodology for this research project, supported by an expert interview. Throughout my research I have used several different sources to gather my information. While conducting my research I focused on the relevance, quality, and content of each source to determine if it was appropriate or not. The sources that I examined were both current sources and historical sources. The value of historical sources is that they enable one to view where the topic has evolved from, while current sources can show where the topic currently stands. Research has included library research, internet research, personal interviews, and data analysis. I have reviewed books, scholarly articles, non-governmental websites, as well as government websites, laws and statutes, and also newspaper articles. The library is a very useful research tool that I have used throughout the entirety of this research project. The library has provided many benefits that would not be found by only using the internet as a primary research tool. The San Jose State University library combines traditional library research with new age technology. Using the library's online search engine I was able to find all the articles I used throughout my paper. The articles were either directly available in the library or

indirectly through the library's access to different databases.

## **LITERATURE REVIEW**

Assembly of California Legislature. (2001). *Koretz, Congressman Waxman Push for Legislation to Regulate the .50 Caliber Sniper Rifle* is a release by the Assembly of California Legislature detailing the need to regulate civilian use of the .50 caliber sniper rifle. A bill was introduced to California's legislature to do just that, AB 2222 proposed by Assemblyman Paul Koretz.

*California Penal Codes SECTION 12087-12088.9* is a website providing access to any type of code, in any one of the different California Code books.

Durston, B (M.D). (2001) *Essay on Firearms Violence* gives a brief background of firearm violence in the United States with an emphasis on the state of California. It also relates firearm violence to medical costs. Finally, this article mentions significant firearm regulations federally and by state.

Henderson, H. (2000). *Library in a Book: Gun Control* is a book that gives a complete historical background on gun control. It reviews important dates and events in history that have to do with gun control. The back of the book provides a glossary about gun related terms and ideas. It also provides information regarding California gun control that has been innovative and new.

Lott, J. R (jr.). (2000, August 23.) *Gun Licensing Leads to Increased Crime, Lost Lives. Los Angeles Times* is an article in which the author contends that gun control, especially gun licensing in California, does not work. Gun licensing will cost millions of

dollars in taxes to put into effect and will not help reduce crime. His rationale is that criminals do not use legally obtained guns anyway, so gun licensing is a waste of time and taxpayers' money.

Machtinger, J. (2006). *How to Own a Gun & Stay Out of Jail: California 2006* is a detailed book about gun laws and regulations in California. This book explains how to purchase and maintain a gun legally so one does not get arrested. It covers purchase, storage, and handling of guns.

Williams, D. (2001) *Study Examines Gun Laws and Crime* is an article that examines a study conducted by the University Center for Gun Policy Research. It concludes that where there are both licensing and registration laws in place it is harder for criminals to obtain weapons.

## **BACKGROUND**

Gun control is an extremely controversial subject within the United States and has been debated since the founding of this country. One of the main arguments in the gun control debate is over the meaning of the Second Amendment of the Bill of Rights. The Second Amendment states, "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." Many arguments have been raised over the years in either support of private gun ownership or for government regulation of firearms. Both sides of the debate use the wording of the Second Amendment to support their argument.

The right to keep and bear arms is deeply rooted within American society

because of the role militias played in the American Revolution. Without private gun ownership and American minutemen, America may not have gained independence. This is clearly demonstrated in the wording chosen for the Second Amendment, “A well regulated Militia, being necessary to the security of a free state.” The American Revolution proved that individual gun ownership when organized could be an effective force that can be used to secure freedom, and to protect and to ensure the security of a free state. Having a well-regulated militia and ensuring individual gun rights would help protect the country if the need ever arose again.

Gun control in America is shaped and influenced by major events and technological advances that take place within the country. Laws and rules are not usually made as a preventative measure, but as a reactionary measure. Laws and regulations are passed in response to an act or invention. In 1933 an assassination attempt on recently elected President Franklin D. Roosevelt was followed shortly after by one of the first federal gun laws to be passed in America. The National Firearms Act of 1934 imposed a two hundred dollar tax on machine guns and sawed off shotguns. The 1960s also proved to be a milestone decade in gun control. The 1960s marked an overall increase in crime as well as three assassinations of American leaders. The assassinations of President John F. Kennedy in November of 1963, Martin Luther King, Jr. in April of 1968, and Senator Robert F. Kennedy in June of 1968 resulted in a move toward stricter gun control and federal regulation nationally. In October of 1968 in response to the assassinations, Congress passed the Gun Control Act of 1968, which enacted stricter rules and penalties on interstate gun sales as well as selling firearms to known criminals (Henderson, 2000,

p. 91-99). As technological advances within the gun industry made firearms more powerful and deadly, the government realized the need for regulation and control of such a potentially deadly industry.

One of the states that is on the front line of the gun control debate is the state of California. California has been gaining steady momentum in passing more restrictive gun control measures at the state level beginning in the early 1990s and continuing to the present. California has been passing and enforcing gun control legislation that has never been adopted anywhere else in the country. Modern day gun control in California includes, but is not limited to, purchase, registration, use, storage, and concealment. All states enforce federal laws, each state has the constitutional right to pass and enforce individual state laws as long as they do not contradict federal law. California does follow federal firearm laws, but in some cases has passed more stringent restrictive measures than the federal government. California's state Constitution has no provision or amendment guaranteeing state's residents the right to keep and bear arms. The state constitution does include in Article XI section six, the right to any city or county within the state to pass and enforce ordinances and regulations as long as they do not contradict state law. "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws" (CA legal Info, Article XI section six). This article of the state Constitution is one of many measures that provides California the power and authority to pass and enforce its own gun control measures at the local level of government.

To purchase any firearm in California, one has to go through a verification

process that includes proof of residency as well as proof of age. To buy any rifle or shotgun the legal age is 18 years old, however, to purchase any handgun one has to be 21 years old and has to have a Handgun Safety Certificate (HSC). With these two types of firearms the buyer has to wait for a mandatory period. "California's waiting period requirement is longer than the federal Permanent Brady law, therefore Permanent Brady is largely irrelevant in California" (Machtinger, 2006, p. 8). The California wait period is ten, twenty-four hour periods compared to the Federal Brady law that only requires a five-day wait period. During this waiting period the Department of Justice conducts a background check on the individual to ascertain if he/she is eligible to be in possession of a firearm. People who are ineligible to own or possess a firearm are people that are placed in a prohibited group. Examples of these groups include convicted felons and people who have been convicted of other serious violent crimes. Also sex offenders and drug addicts, as well as certain mentally ill people, are prohibited from owning a firearm. Some of the prohibitions result in a life long ban, while other bans are for a predetermined period of time.

Three unique requirements in California are the One Handgun a Month Act, the Handgun Safety Certificate requirement, and the Firearm Safety Device Act. California is one of three states, which include Maryland and Virginia, that currently have passed a law limiting handgun purchases and is one of six other states that have passed similar firearm safety device laws. The One Handgun a Month Act allows for individuals to purchase only one handgun every 30 days and is part of the California Penal Code section 12072(a)(9)(A). This law was passed in April of 1999 following the Columbine High

School shooting in Colorado. The Handgun Safety Certificate is covered under California Penal Code section 12071(b). This certificate is required to buy any handgun within the State of California. The Firearm Safety Device Act required all guns sold or transferred to be accompanied by an approved safety device effective as of January 2002. The safety devices are approved by the Department of Justice, which approves each device in a certified laboratory. Any person who disobeys either of these laws is guilty of a misdemeanor for their first offense (C.A legal Info). All three of these laws are unique to California and are designed for the safety of the public.

The recent passage of California Assembly Bill Number 1471 is another example of California's drive to be an innovative trendsetter in gun control. Assembly Bill 1471 will require all semi-automatic handguns sold in California after 2010 to have the technology to microstamp when fired. Microstamping technology will engrave each cartridge fired from these semi-automatic handguns with the gun identifying information. Identifying information includes the make, model and serial number. This is only one of the latest gun control bills passed in California.

Assembly Bill 1471 is designed to track weapons and identify the owner of a weapon when fired illegally. In theory, after the illegal firing of a weapon, police will be able to look at the cartridge and identify the owner. Unfortunately, most criminals do not purchase their weapons legally. The weapons criminals use are either stolen or bought illegally. While most criminals buy or steal the weapons they use, with this technology in place it will give the police a lead to follow up on. Finding the legal owner of the weapon will enable police officers to locate where the weapon came from and provide a time

frame if the gun was stolen.

Another effect of this bill could possibly limit semiautomatic handgun sales to those with microstamping. The state of California is a large and populous state that has one of the largest economies in the world. If California implements a ban on all non-microstamped handguns this could have a ripple effect throughout the rest of the world. This could motivate other states to adopt a similar law that requires microstamping. The more guns that have this capability the easier it will be to track down the owner of the firearms. If all states required microstamping technology on weapons sold, then this could provide law enforcement with a great advantage in tracking firearms.

AB 1471 is the first ever law established that would require guns to have microstamping capabilities. California will be an experiment for the rest of the world to scrutinize or accept. If successful, California can serve as an example for other states to follow. Some states are already considering following California's example and are in the process of implementing microstamping requirements. Such states include, New York, Rhode Island, Connecticut, and Illinois.

Gun registration in California is similar to most other states around the country. There is no general gun registration requirement, but does include a few exceptions when gun registration must take place. As of January 1998, handguns brought into the state must be registered with the Department of Justice. Also before handguns are transferred to a new owner, a dealer's record of sale (DROS) must be filled out. Copies of this form are sent to local law enforcement agencies as well as to the Department of Justice in Sacramento. While handguns have become more regulated in the state, weapons

classified as assault weapons recently have been gaining more regulation. California set precedent when in 1989 it became the first state to pass an assault rifle ban, “California adopted the Robert-Roos Assault Weapon Control Act, which bans many types of semiautomatic weapons and bans sales by unlicensed dealers” (Henderson, page 95). This law was enacted after a gunman in Stockton, California, gunned down five school children using a high-powered assault rifle. The federal government followed California’s example, and in 1994 Congress passed the Assault Weapons Ban Bill, which bans specific types of semiautomatic firearms. Unlike the California assault weapon ban, the federal ban expired in 2004. Congress did not renew the expired legislation and as a result, the federal ban is no longer in effect. This federal ban expiration has no effect on California gun owners because the California ban is more restrictive than the federal ban and is still in effect. California is one of several other states to ban assault weapons.

California’s Assault Weapons Ban placed specific types of weapons into a new category of firearms, now known as assault weapons. At first the California act put specific weapons on a “banned list”, however, in 1999 the state legislature passed an amendment, Senate Bill 23. “This law took effect January 1, 2001 and added a new and expanded definition of assault weapon to the Robert-Roos Assault Weapon Control Act, SB 23 regulated guns by their features” (Machtinger, page, 139). Any weapon classified under this list of assault weapons or defined by its features in the assault weapon definition cannot be sold, bought or transferred to anyone. This act does provide a grandfather clause to allow gun owners to register their assault weapons with the Department of Justice. As each list is published, or any feature added to the definition,

any owner of the described weapon has a specified time in which they must register that weapon with the Department of Justice as an assault weapon. “There are two ways guns are added to the California assault weapon list, the legislature can pass a law which adds a gun to the list, or the Attorney General can ask the Superior Court to rule that a gun is an assault weapon” (Machtinger, pg 147).

The use of firearms in California, as well as anywhere else within the United States, is highly regulated. Regulations cover everything from when and where a gun can be used, to how to transport a firearm. Discharge of a firearm in an illegal manner can result in severe criminal action as well as civil action. There are certain places that are designated or are acceptable to use a firearm, such as public and private firing ranges, authorized gun clubs, and private property outside of city limits to name a few. However, the prohibited list of places to use or bring firearms is much more extensive and concrete. Places that have extra firearm restrictions placed upon them include airports, courthouses, colleges, schools, federal buildings, and other public buildings. Transport of a legal firearm requires that the firearm must be unloaded and in a different inaccessible compartment of the vehicle than the ammunition.

Each state provides different exceptions to their laws. A huge exception in many states is the concealed carry law. Some states provide an opportunity for a private individual to bypass some firearm laws and regulations by obtaining a concealed carry permit. The State of California is a “may issue” state regarding concealed carry permits. This means that the state is not required by any law or statute to give anyone who applies the right to carry a concealed firearm. The application to receive a concealed carry permit

is authorized by the Sheriff or Chief of Police of the county or city that the individual resides in. This concealed carry permit is only for the State of California and is not valid outside of the state. Being granted a concealed carry permit in California largely depends on where you live within the state. The more populated and urbanized an area, the more restrictive measures will be placed upon getting a permit. Detective Bill Veteran of the Fremont Police Department is in charge of processing the concealed carry permits for the City of Fremont. During the seven years he has had that duty, only nine people have requested an application, and out of the nine given out he has not had one application returned (B. Veteran, personal communication, 2008, April 18.). Rural areas within the state tend to have a higher number of permits issued than populated areas. There are only basic requirements to receive a permit, such as you must be resident of the county or city and have completed a gun safety-training course, but the decision to issue is solely based upon the discretion of the chief of police or sheriff of the county the individual resides in.

## **LEGAL ISSUES**

Since gun control is such a controversial issue there are many legal issues that are connected with this subject. Legal provisions are contested based on the federal constitution, as well as on individual state laws and regulations. As noted earlier, California does not have any provision within the state constitution guaranteeing its citizens gun rights. The United States is a federal government and federal law does supersede state law. The Second Amendment of the Bill of Rights does provide U.S. citizens with the right to gun ownership. Several legal issues derive from this

amendment, so the question is whether or not the 2<sup>nd</sup> Amendment applies to individuals or to groups? As of right now, and since the ratification of the Constitution, individuals have had a right to keep and bear arms. What will happen in the future is unknown, but up to this point individual rights to gun ownership have been protected in court decisions.

Several California gun control policies have been challenged in court in attempt to overturn certain laws or policies, or to enact or to set a precedent for others. The main argument proposed by gun advocates is that California gun control policies infringe upon their Second Amendment Right to keep and bear arms. However, the state has been successful in passing and implementing gun control policies. The California Assault Weapons Ban of 1989 has been one policy that has withstood several court challenges. In two different cases appellate courts and the state Supreme Court have upheld and maintained the ban. In 1996 *The People of California vs. Dingman*, the 6<sup>th</sup> District Court of Appeals rejected a claim by a defendant who claimed the assault weapon ban was illegal, thus reinforcing the ban. Then again in 2000, the California Supreme Court heard *Kasler v. Lockyer* and once again upheld the validity of the assault weapons ban. The court also ruled that the amendment for the State Attorney General to add weapons to the banned list is also within the law (California Legal Information, 2008).

The most recent decision was reached this month regarding California gun control. The California Supreme Court reached a decision on *San Francisco vs. Fiscal* regarding San Francisco Proposition H. The proposition was approved by voters in a 2005 initiative but never took effect because of the legal issues surrounding the proposition. Proposition H would have banned all firearm manufacture and sales within

San Francisco city limits, but the court ruled in opposition of the city and rejected the proposition. This defeat by the California Supreme Court is a significant decision that will impact the rest of the state and possibly the nation. Gun advocates will now likely challenge other cities and counties within the state that already have in place a similar ordinance. This decision could also possibly influence the United States Supreme Court when they reach a decision on the Washington D.C handgun ban.

Gun control plays a large part within the United States and specifically within California. Politicians from California have been large supporters of gun control as well as fierce opponents of gun control. Two of the most well-known politicians within California are Senator Barbara Boxer and Senator Dianne Feinstein. Both women are gun control advocates and have sponsored gun control bills through the state level and the national level. One of the main community concerns within California is the issue of violence, and especially firearm violence. With increased youth violence and the rise of firearm related incidents, politicians and law enforcement turn to gun control as a solution. “In 2006, firearms were used in 67.9 percent of the Nation’s murders, in 42.2 percent of the robbery offenses, and in 21.9 percent of the aggravated assaults” (FBI, 2008). Politicians and law enforcement goals are to reduce these crime percentages and provide safety and security to all.

Youth violence has increased along with gang membership and gang violence. Within California, “There are more than 420,000 gang members statewide” (Governor webpage). Young male adults are more likely to be involved in and die from firearm related incidents than any other group. “The homicide rate for U.S males ages 15-24 is

more than ten times higher than in most other industrialized countries” (Durstun, 2001). California is also home to several of the United States’ supergangs. Supergangs are not an average street gang but are large structured organizations. Examples of these supergangs are the Crips and Bloods Los Angeles street gangs, Norteno and Surenos that originated in the California State Penitentiary system, and also The Hells Angels biker gang that originated in California.

Youth violence within California and the United States has spurred several groups to organize and take action. Examples of these organizations include National Youth Violence Resource Center, Urban Networks to Increase Thriving Youth Through Violence Prevention (UNITY), and SafeYouth.org. Governor Arnold Schwarzenegger has just awarded over 15 million dollars to cities and counties to help reduce gang violence. “These grants will help reduce gang violence at the street level, improving public safety and assisting anti-gang efforts in many of our communities” (Office of the Governor). Addressing community concerns at the local level and the state level is needed in combating youth violence and firearm violence. Increased media coverage of school shootings have made people more aware of the threat of youth violence and especially of firearm violence. The recent Virginia Tech School shooting and the infamous Columbine shootings are an ever-present reminder of the deadly potential firearms can have in the hands of some people. California residents have taken action in response and have continually approved innovative gun control legislation.

## **BUDGETARY IMPACTS**

Firearms violence within the state and country has a large budget impact that costs taxpayers millions of dollars each year. Several different aspects of firearms are related to costs that are passed on to the taxpayer. Costs stem from implementation of gun control policies, law enforcement, and medical costs. “The overall cost to society of firearms related injuries in the United States has been estimated to be 112 billion dollars annually” (Durstun, 2001). Not only are there monetary costs associated with firearm violence there is also loss of human life. Each year within the United States thousands of people lose their lives due to firearms. In 1998, there were over 30,000 fatal shootings in the United States” (Durstun, 2001). Each year thousands of people across the state are injured or killed in firearms related incidents, costing taxpayers thousands of dollars for each incident.

Gun control policies are designed to reduce crime and injuries. The benefits of more gun control may be less crime and fewer firearm associated injuries that cost taxpayers money. Citizens have to make a cost benefit analysis regarding gun control. Do citizens want their Second Amendment right guaranteed under any circumstance, or are they willing to pass and enforce stricter gun control laws in return for security and fewer costs? As demonstrated in California’s willingness to pass more gun control laws citizens are willing to move in the direction of less crime and more security by regulation and not an all out ban of firearms.

Citizens and politicians throughout the State of California have come together to address the issue of gun control. There are strong gun control advocates within the

state and also one of the strongest gun advocate lobbies within the country. The State of California is a culturally diverse state and is also extremely diverse when it comes to political positions. There are the far left liberals who support gun control and there are also the far right conservatives who support private gun ownership and no governmental regulation. Pro gun groups within California include the California Rifle and Pistol Association (C.R.P.A) and the National Rifle Association (N.R.A). These two groups are two of the largest gun advocate groups within the State of California. Both groups were started in the 1870's and still have a strong political presence within the state.

The state legislature has created a special Select Assembly Committee on Gun Violence to do a study on firearm violence. This committee was created in response to a concern about firearms violence within California and within the United States. Gun control receives a large amount of media coverage due to its deadly potential. Media coverage is one factor that drives the concerns of citizens throughout the state. With the ever-present media coverage of firearm violence throughout the state it is hard for someone to not to notice.

California is a populace state with an urban setting and has begun to enact stricter gun control. Within the past two decades California has enacted gun control measures that are innovative and the first of their kind. Other states have begun to follow California's example and are in the process of passing similar laws. This year marks a crucial point in gun control history with two historic cases being heard from the California Supreme Court and also the United States Supreme Court. Each court decision will have a drastic and long lasting impact on the issue of gun control. Major events

within society as well as technological advances within the gun industry influence gun control within the state and within the nation. Whether the latest series of gun control is a trend in politics or if gun control is here to stay, only time will tell.

## **CONCLUSION**

Based on the research and analysis conducted throughout this project, California has and continues to pass and enforce restrictive gun control. The citizens of this great state continue to elect officials who write and propose those stricter gun control policies. Elected officials are the representatives for the public, so who the people elect represents their views. This year marks a historic time in gun control with the hearing of two Second Amendment cases. The California Supreme Court has heard one and the United States Supreme Court has heard another.

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# **GUN CONTROL: LAWS AND REGULATIONS IN WASHINGTON D.C.**

By Olivia Ramadanes-Reddick

## **ABSTRACT**

This paper seeks to address the following questions: What local laws does the District of Columbia utilize to regulate firearms? How did they proceed through the legislative process? Were they effective? What is the current status of the regulations? This essay will describe the Firearms Control Regulations Act of 1975 which is the only piece of legislation that controls firearms at the local level. Congress reviewed the law before it was enacted. The legislation has performed poorly despite some false positive reports. The local law is currently under appeal with the United States Supreme Court.

## **THESIS**

Gun control laws in Washington, D.C., which are among the most restrictive in the nation, shape the current struggle the district faces with the Supreme Court on a citizen's right to keep and bear arms. The Washington, D.C. Firearms Control Regulation Act of 1975, a ban on handguns, did not produce the reduction in crime the legislature was hoping for. Upon review at the US Conference of Mayors in 1980, the positive impact the stringent law was believed to have made was not supported by the evidence presented.

## **LITERARY REVIEW**

Henderson, H (2000). *Library in a book: Gun control* provides an excellent history of crime prevention legislation through gun control laws throughout the United States. Through government sources, including the Federal Bureau of Investigations and the Department of Justice publications, Henderson compiles a thorough chronological record of gun control laws in the United States. Henderson develops a complete summary of Supreme Court cases that contribute to the current state of gun control in the United States of America. His expansive chapter on biographical figures in the gun control debate includes a section about John Lott, a leading examiner of gun control laws and a strong source for precise information on the topic.

Jones, Edward D. III (1981). The district of Columbia's "Firearms Control regulations act of 1975": The toughest handgun control law in the United States -- or is it?. *Annals of the American Academy of Political and Social Science*, was written by a man previously employed by the Department of Justice. His account testifies to the intentions of the Washington, D.C. Council that passed the Firearms and Control Regulation Act of 1975. He develops the specific history of this gun ban and the attempts to avoid conflict on the matter by Congress. He identifies flaws in the studies that led up to the reevaluation at the Conference of Mayors in July 1980. The article concludes that more reliable research must be done to develop future effective laws to achieve the goals set out by authorities who disproportionately relied on this law, and

others like it, to resolve the crime problem.

Lott, J. J. (1998). *More guns, less crime*. presents a variety of studies directly related to the criminal activity following the passage of legislation and regulation of guns. His studies span a vast geographical area from the state level down to the evaluation of individual counties. Lott uses both primary and secondary sources. He compiles data from popular sources, such as exit polls during elections, and government publications, such as published information from the Department of Justice. Utilizing a variety of sources, and persistently striving for accuracy in technique, Lott compiles an entire book dedicated to an in depth study that supports his theory of the lack of desired results once regulations are in place. Lott has a Ph D. in economics and has taught at some of the most prestigious universities in America.

## **METHODOLOGY**

This research is based on a literature review, including online sources, and an expert interview.

## **INTRODUCTION**

Although the District of Columbia is not a state, it is bound by the same federal firearms regulations as the rest of the states. Some of the national regulations that restrict D.C. citizens' right to bear arms include The National Firearms Act of 1934, the Assault Weapons Ban in the Omnibus Crime Bill of 1994, the Undetectable Firearms Act of 1988, and the Violent Crime Control and Law Enforcement Act of 1994. Harry

Henderson, an expert on gun control and author of *Library in a book: Gun Control*, provides an extensive chronology of federal regulations of guns including those named above. According to Henderson's book, published in 2000, "Court decisions...have generally held that cities or other jurisdictions are free to ban all handguns if they wish, though few have done so." (Henderson, 2000, p33) Washington D.C. is one of the few cities that have imposed further restrictions on handguns, embodied in the Firearms Control Regulations Act of 1975.

The Firearms Control Regulations Act of 1975 had two purposes, according to Edward D. Jones III, a former employee with the Justice Department. "The first objective was to 'reduce the potentiality' of firearm related crime and accidents, and the second was to more effectively 'monitor the traffic in firearms.'" (Jones, 1981, p142) The Washington D.C. Council recognized the difference between law abiding citizens and their potential to follow regulations versus criminals which are less likely to abide by possession and registration constraints. Nonetheless, the council did not see the importance of handguns for protecting a citizen's home, and thus required weapons to remain in an inoperable state within law abiding residences. It is illegal to own handguns unless they were registered prior to the enactment of the law, 1977. Residents are unable to re-register or register handguns within the District of Columbia without proof of registration prior to 1977. Through the banning of registration the Firearms Control Regulations Act of 1975 rendered the selling, transferring, or purchasing of firearms illegal for the residents of the District. This was meant to eliminate the necessity of monitoring firearms traffic by reducing the number of handguns available.

## **HISTORY**

Washington, D.C. has a different government structure for the passage of legislation than the fifty states. It was established on July 16, 1790 and carved from Virginia and Maryland. It was founded under the jurisdiction of the federal government, and until recently Congress had played a major role in its governance. Because it does not fall under the category of a state, voting rights for its citizens were granted only as recently as 1973. According to the city's website, "...in 1973, the Home Rule Act passed in Congress," and, "In a historic leap for greater self-determination, District citizens elected a Mayor and Council in the fall of 1974." (The Council of the District of Columbia, 1997) This new governing structure initiated the Firearms Control Regulations Act of 1975. "Under the Home Rule government, however, Congress reviews all legislation passed by the Council before it can become law and retains authority over the District's budget.," as set up by prior administrations to maintain neutrality and comprehensive security around the capital (The Council of the District of Columbia, 1997).

The Firearms Control Regulations Act of 1975 was approved by the Council of the District of Columbia in a 12 to 1 vote and sent on to Congress, in accordance with the Home Rule Charter, for a period in which Congress has the opportunity to disapprove and thus veto the legislation.

The Firearms Control Regulations Act of 1975 came before Congress during an election year, 1974. Members of Congress did not want to address such a controversial

issue in an election year. According to Jones, to evade such a decision, Congress instead passed legislation limiting the District of Columbia from passing any legislation which changed, "...the District's Police Regulations and Criminal Code until 1979." (Jones, 1981, p140) This prohibition was not retroactive and the Firearms Control Regulations Act of 1975 was passed by the Council of the District of Columbia prior to Congress's attempt to veto the law.

The actual implementation would take some time as the law was challenged by the National Rifle Association, several residents and a few companies. The D.C. Superior Court executed an injunction on behalf of the plaintiffs in 1976. In 1977 the Appeals Court for the District of Columbia reinstated the strict gun control ban. That same year, a portion of the Act was found unconstitutional since it restricted nonresidents from bringing handguns into the city for the purpose of leisure activities. According to Jones,

Finally, in August 1977, the Firearms Control Regulations Act was amended to permit licensed security agencies to register new handguns that are used during working hours by employees who are licensed to carry a handgun. Since that time, the Firearms Control Regulations Act, as amended, has been law in the District of Columbia. (Jones, 1981, p141)

The passage of the Firearms Control Regulations Act of 1975, implemented a, "barring [of] pistols [not] already registered from being carried from room to room in the

home without a license (which is never granted), and requiring all firearms in the home, including rifles and shotguns, to be unloaded and either disassembled or bound by a trigger lock.” (Levy 2007)

## **RE-EVALUATION**

In 1980 the United States Conference of Mayors gathered data and reviewed the progress made in Washington, D.C. after the enactment of the Firearms Control Regulations Act of 1975. The evidence used to substantiate claims of overwhelming success was of questionable accuracy and “...were immediately challenged by both the D.C. police and the National Rifle Association, the national gun lobby,” according to Paul W. Valentine, a Washington Post Staff Writer (Valentine, 1980).

The flaws in the research included a deficient look at the progression of programs that the local police department had enacted to fight crime. Since the enactment of the Act and the evaluation, the police departments had recovered 52 illegal firearms, improved processes and according to Jones, “...the Bureau of Alcohol, Tobacco and Firearms (ATF) initiated an intensive federal enforcement effort known as Operation CUE, aimed at stemming regulatory and criminal abuses pertaining to the use of and transactions involving firearms.” (Jones, 1981, 9145) Therefore, decreases in crime credited to the Washington D.C., gun ban may have actually derived from other actions.

According to John Lott Jr., a leading authority on gun control and author of, *More Guns, Less Crime*, neighboring jurisdictions contribute to crime rates and the easy accessibility to guns from neighboring jurisdictions needs to be taken into account when

evaluating the effectiveness of gun control laws within specific geographical boundaries. This was a factor he considered when conducting primary surveys similar to those presented at the US Conference of Mayors. According to Jones, the ease of trafficking in firearms from Virginia was not taken into consideration when evaluating the Firearms Control Regulations Act of 1975.

Jones also took aim at controls used during the survey of information. He claims that Washington, D.C. was not comparable to those used as control cities, since some of the control cities were still enacting progressive programs to prevent gun related crimes and thus did not provide a motionless stable control with which to compare data.

#### **FALSE SENSE OF SAFETY**

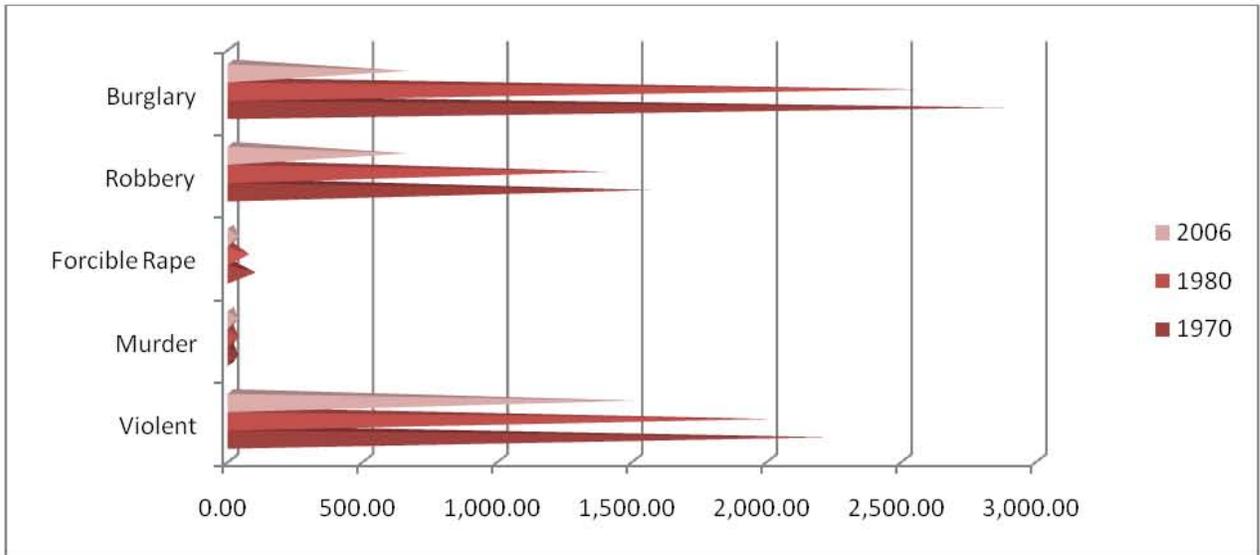
Even though the Conference of Mayors' report in 1980 produced false positive results of the effectiveness of Washington, D.C. handgun ban, if accurate surveys were conducted, would the results be the same? According to John Lott's article, *Gun bans lead to increases in violent crime*, "...anyone who can look up the crime numbers will see that D.C.'s murder and violent crime rates went up, not down, after the ban." (Lott, 2007) Lott examined the District's murder rate and concluded that it only fell below the pre-ban rate once since the enactment of the handgun ban.

After researching the crime rates published by an official government agency, it appears the Federal Bureau of Investigations agrees with Lott. Statistics which are used in practice by other government agencies to examine crime are shown below. When observing the pre-ban murder rate the 1970 figure reflects 29.2. According to Lott, and

as you can see, the murder rate fell below 29.2 in 1985 to 23.5 and only one other time in 2006 to 29.1. When isolated, the year of 1970, pre ban, 1980 post ban, and recent figures from 2006, the FBI's version of crime rates is identical to John Lott's conclusion that crime was not deterred by the District's ban.

| Year        | Population     | Index            | Violent         | Murder      | Forcible Rape | Robbery         | Burglary        |
|-------------|----------------|------------------|-----------------|-------------|---------------|-----------------|-----------------|
| 1960        | 763,956        | 2,712.90         | 553.7           | 10.6        | 14.5          | 140.3           | 600.4           |
| 1965        | 803,000        | 4,219.80         | 722.8           | 18.4        | 17.4          | 358.8           | 1,231.10        |
| <b>1970</b> | <b>756,510</b> | <b>10,883.40</b> | <b>2,226.80</b> | <b>29.2</b> | <b>95.2</b>   | <b>1,561.90</b> | <b>2,873.70</b> |
| 1975        | 716,000        | 7,703.50         | 1,774.30        | 32.8        | 72.6          | 1,276.10        | 1,838.50        |
| <b>1980</b> | <b>635,233</b> | <b>10,022.80</b> | <b>2,010.60</b> | <b>31.5</b> | <b>69.1</b>   | <b>1,400.60</b> | <b>2,559.70</b> |
| 1985        | 626,000        | 7,999.20         | 1,624.80        | 23.5        | 53.8          | 835.5           | 1,598.20        |
| 1990        | 606,900        | 10,774.30        | 2,458.20        | 77.8        | 49.9          | 1,213.50        | 1,983.00        |
| 1995        | 554,000        | 12,173.50        | 2,661.40        | 65          | 52.7          | 1,239.00        | 1,838.40        |
| 2000        | 572,059        | 7,276.50         | 1,507.90        | 41.8        | 43.9          | 621.3           | 829.5           |
| 2005        | 582,049        | 5,948.80         | 1,459.00        | 33.5        | 28.5          | 635.7           | 614.6           |
| <b>2006</b> | <b>581,530</b> | <b>6,162.20</b>  | <b>1,508.40</b> | <b>29.1</b> | <b>31.8</b>   | <b>658.4</b>    | <b>659.5</b>    |

Source: FBI UCR for Metropolitan Statistical Areas, September 2006.



**Source: FBI UCR for Metropolitan Statistical Areas, September 2006.**

In Lott’s article, there appears to be a struggle to phrase the issue before the Supreme Court. The District of Columbia claims to seek to reduce violent crime rates by outlawing handguns and at the same time essentially asserts alternatives that are legal such as shotguns and rifles. However, Robert Levy describes how these alternatives lack functionality as options in the home and become illegal once they become operable in a residence. “...firearms in the home, including rifles and shotguns, must be unloaded and either disassembled or bound by trigger locks.” (Levy, 2007) The Washington, D.C. Firearms Control Regulations Act of 1975 has rendered its citizens vulnerable to predators. “Since potentially armed victims deter criminals, storing a gun locked and unloaded actually encourages increased crime.” (Lott, 2007)

John Lott’s findings were not limited to Washington, D.C.’s handgun ban. The

results of his studies span the United States and thus offer evidence that the statistics he has developed and applied to the District of Columbia are not a fluke but instead fall in line with the statistics that are found across America. John Lott, "...published a book on gun control that analyzed FBI crime statistics for all 3,054 American countries from 1977 to 1994 as well as extensive information on accidental gun deaths and suicides." (Lott, 1998) Through detailed methodology, Lott was able to isolate extenuating factors and the results were his ability to affirm with great confidence that,

The findings were dramatic. The more people who obtain permits over time, the more violent crime rates decline. After concealed handgun laws have been in effect for five years, murders declined by at least 15 percent, rapes by 9 percent and robberies by 11 percent. These are the drops over and above the recent national declines and after such things as changing arrest and conviction rates, demographics, and other gun-control laws have been accounted for. The reductions in violent crime are greatest in the most crime-prone, most urban areas. Women and blacks gained by far the most from this ability to protect themselves. (Lott, 1998)

Lott continues, "Both sides in the gun control debate have their own anecdotal stories, and surely many hypothetical horror stories will be raised before this campaign is through. Fortunately these fears are easily disproved once one looks at the experience in other states. The benefits are also equally obvious." (Lott, 1998)

It appears the Firearms Control Regulations Act gives a false sense of security to those who seek to reduce crime through regulation of legal firearms. The District of

Columbia passed a ban to reduce crime; the results have emerged to show that the opposite has occurred. The results in Washington, D.C. are not isolated and crime spikes and consistent crime rates have materialized as a result of bans across the United States.

## **INTERVIEWS**

The Metropolitan Police Department of the District of Columbia was contacted for comments regarding the current status of the Firearms Control Regulation Act of 1975. Once communication was secure, information from an average police officer who would experience the direct results of the ban was sought for insight. After contacting the Metropolitan Police Department for an opinion on the matter however, information was not easily forthcoming. Officer Osgood answered the phone and, though keeping a professional tone, used his seemingly rehearsed response stating, “We don’t have an opinion. We are police officers, we apply the law. You need to contact Public Affairs. Please hold while I get that number for you...” (Officer Osgood, 2008) When the Metropolitan Police Department’s Public Affairs Office was contacted, the officer answered the telephone but the only comment offered to the introducing statement was, “We don’t comment on matters while in litigation. The ban is in litigation and we don’t comment on matters in litigation. Thank you for calling.”

The San Jose Police Department was a little more helpful. The officer who answered the telephone was informative and stated that the public affairs office was closed for the day, but that if an every day officer was requested, she could find one for the few questions posed. The officer who she found requested to remain anonymous and

made it explicitly clear that all comments were, “Off the record,” but was more than happy to comment on the topic. According to the officer, the Firearms Control and Regulation Act should not be upheld, and the Second Amendment is applicable to individual citizens. His thoughts were, “The everyday citizen obeys the laws. Do you really think that those who are running around here with guns have permits?” The officer then went on to express that the department, at least those he has spoken to, in large part are in agreement that a ban would cause more crime not less, and disarming law abiding citizens will inevitably bring about a surge in crime. He concluded that if the Supreme Court “...upholds the ban it would have a negative effect which seems to be most of the department’s sentiments.” The officer was very knowledgeable on the subject and paralleled John Lott’s ideas. He agreed that criminals would take advantage of the situation if handgun bans were to go into effect here in San Jose, rendering law abiding citizens helpless.

## **CONCLUSION**

In 1974 Congress had the opportunity to negate the Firearms Control Regulation Act of 1975 passed by the local council of the District of Columbia. To avoid an election year controversy, Congress chose to pass another law instead which they thought would nullify the argument. The ban went into effect despite Congress’s efforts to shun and avoid the issue. The Firearms Control and Regulation Act of 1975 survived challenges by the National Rifle Association, private citizens, and interest groups when it was initially put into practice.

Despite reports to the contrary, the Firearms Control Regulation Act of 1975 was not successful and the results mirror those found across the nation which have attempted to achieve the same goals through the same methods only to succumb to the same pitfalls.

The Firearms Control Regulations Act of 1975 has been appealed to the United States Supreme Court. The Court has granted the writ of Certiorari and oral arguments were held earlier this year. The decision before the Court brings the Second Amendment and an individual's right to bear arms directly to the Supreme Court. Due to the high public interest on the matter, it is rumored that the Supreme Court will publish a decision in May or June of this year, earlier than expected for most Supreme Court opinions (J Brent, public presentation, April 9, 2008).

The supporters of the ban have already won small battles at inception but face the ultimate decision of the highest court of the land.

The facts, statistics, and expert opinions presented here support the idea that by disarming citizens through the Firearms Control Regulation Act of 1975, the District of Columbia has brought upon itself one of the highest murder rates for the United States of America.

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# **NEW YORK STATE GUN LAWS AND THEIR RELATION TO THE SECOND AMENDMENT**

By Andrew Siegler

## **ABSTRACT**

New York's gun laws are among the strictest in the nation, yet there is a great deal of diversity in what is allowed throughout the state. There is a running tension throughout the state between the needs for firearms in sparsely populated areas and restrictions on firearms in the densely populated cities. A power struggle continues at both the state and local levels with little meaningful political progress for either side of the argument, and a general unwillingness to compromise pervades the political climate.

## **INTRODUCTION**

In attempting to understand the State of New York's gun laws, and their relationship to the Second Amendment, one must consider several questions: what are the firearms laws in New York State in terms of purchase, ownership, ability to carry, and use? What difference is there between state law and local laws—and what difference is there by region and density of population between different local laws? And lastly, what is the result of the political relationships of the local governments with each other and with the state government?

While the gun laws in New York are fairly strict in comparison to most of the rest of the country (Brady Campaign, 2007), there are extremely diverse laws dealing with firearms across the state, differing from county to county (NYSRPA, 2008). New York

is having difficulty bridging the gap between the different needs for gun legislation between the densely populated New York City Metropolitan Area and the far more sparsely populated upstate New York. This rift is not only along party lines in the state legislature, but along regional lines. This conflict, unless it can be resolved by some compromise between the seemingly polarized needs of these regions, could create a serious problem where a very slim majority creates legislation that is unpopular with a very large minority.

## **METHODOLOGY**

The methodology used for this paper is a literature review, including on-line materials, as well as two expert interviews. This paper will examine the difference in the laws within the state of New York first by looking at the laws that apply throughout the state, using information from the New York State website, and then looking at the laws that apply locally within the state, using information from the websites from various cities and counties. In addition to this, this paper will look at groups that are trying to rectify the difference in gun laws and apply them statewide. Information from the New York State Rifle & Pistol Association (gun rights) and New Yorkers Against Gun Violence (gun control) will be used. Also, this paper will employ interviews with two law students in New York that actively follow gun legislation in the state and participate in the lobbying efforts. Furthermore, this paper will use newspaper articles to trace the legislative battle ensuing at both the state and local levels.

## LITERATURE REVIEW

Brabner-Smith, J. (1934, October) Firearm Regulation. *Law and Contemporary Problems*, summarizes the history of the Sullivan Act in New York and places it in context of the history of firearms regulations dating back to 14<sup>th</sup> Century England, and the modern contexts of the 2<sup>nd</sup> Amendment.

Cardwell, D. (2006, June 6) Bloomberg Spells Out Plan for Gun-Sale Restrictions. *The New York Times*, is one of several articles looking at the Mayor of New York's plan to reduce gun-trafficking. The police back this plan up, noting that it is a pre-emptive move against gun violence, as it forces gun dealers to report their sales and inventory with greater regularity, and helps to create a registry of those that do not comply.

Clinton County Clerk's Office. (2008) *Pistol Permit Information Guide* gives the requirements necessary to obtain a pistol permit in the county, and what restrictions apply. This will help establish what rural Clinton County sees fit for their firearm laws. Erie County Clerk's Office. (2008) *Pistol Permits* gives the requirements for pistol permits in Erie County, and helps establish the needs for the laws in the county. These two documents provide examples of the differences in gun control within the state. New York City. (2008) *The License Division*. This city (five county) document describes the various types of carry and conceal licenses that are offered, how to obtain these licenses, and what restrictions apply. The complexity of the rules and specificity of who is allowed to carry firearms in NYC allow for a great contrast to be shown between this large urban area against those of the smaller urban, suburban, and rural areas of the state.

Frederick, K. T. (1932) *Pistol Regulation: Its Principles and History*, Part III, *Journal of Criminal Law and Criminology* points out that a provision similar to the 2<sup>nd</sup> Amendment is not found in New York's State Constitution, but in a general "Civil Rights Law" statute. This provides some historical context for the situation and the way the laws developed over time.

Henderson, H. (2000) *Library in a Book: Gun Control* contains a brief mention of New York state gun laws, acknowledging that New York was the "first state to require hunting licenses," and also set up the Sullivan Act, the "prototype for handgun registration laws." This background is necessary to tie in with the desires of the NYAGV, showing precedence in state legislation.

New York Times. (2008, January 8) Progress on Guns, *The New York Times* is an article about federal firearms legislation dealing with the restrictions on people with a history of violence or dangerous mental illness. It should be noted that it is New York Democrats that penned and pushed for the bill. This legislation at the federal level is reflective of the same kind of legislation at the state level.

NRA-ILA. (2005) *Firearms Laws for New York (As of August, 2005)* and NRA-ILA. (2006) *Firearms Laws for New York City*. give a concise, direct overview of the gun laws in both New York State and New York City, and enable these gun laws to be compared.

Rizzo, C. M. (2007, June 27) State Seeks Registry to Enhance Gun Control, *Suffolk Life* describes an effort by Democratic New York State Assemblyman Phil Ramos to sponsor a bill aiming to create a register of people suffering from mental illnesses,

convicts, and suspects that could be used to prevent them from purchasing or owning guns.

Stevens, R. W. (1999) *Dial 911 and Die* has sections on each state describing the concept of police duty to protect individuals. In New York there is a legal precedent set in the state court that the police do not have a legally binding obligation to protect civilians. There are three specific instances referred to which provide the background necessary to tie in to the arguments set by the NYSRPA and legislators fighting for gun rights.

## **BACKGROUND**

New York has a long history of restrictive gun legislation. In 1911, New York passed the Sullivan Act, making it the first state to pass a law restricting the ownership of firearms. (Brabner-Smith, 1934, 400) The law itself was a product of party machine politics out of the notorious Tammany Hall, and the true motivation behind it was to act as a restriction on the large Southern and Eastern European immigrant populations in New York City, preventing them from obtaining firearms. (Cottrol, 1995, 1329) This law is still on the books, and it “requires a permit to carry or own any gun small enough to be concealed.” (Gun Law News, 2008) The other aspect of the Sullivan Act that makes it so powerful is that it renders most of the control of firearms to the local authorities, as these are the agencies that provide the permits. (Gun Law News, 2008) By allowing the local jurisdictions to maintain and allocate firearms permits, the likelihood for a fairly diverse set of firearms regulations throughout the state increases. This is one of the key reasons why gun laws are so varied throughout New York State.

In addition to this, New York's gun laws, unlike those at the federal level, are not protected by the state constitution, and are instead listed in the state's Civil Rights Law. (Frederick, 1932, 540) Historically speaking the Second Amendment applies to federal law, and the state laws that deal with the restriction or outright prohibition of firearms fall under the 10<sup>th</sup> Amendment and the state's "police power". (Frederick, 1932, 540) It was this judicial acknowledgment of state police power that affirmed the constitutionality of the Sullivan Act in the case *People ex rel. Darling v. Warden of City Prison* in 1913. (Frederick, 1932, 540) It should be noted that this decision carried a warning in the dissenting opinion of the court that pointed out that "the professional criminal will generally violate the act...while the law-abiding citizen will be obliged to disarm himself of his only effective protection against the predatory classes." (Frederick, 1932, 540) The argument has not changed a great deal in the last century, and the relevance of that warning is just as strong today.

The other aspect of note that shapes the way the gun laws were designed in New York State are the demographics throughout the state. There is a distinct difference in the application of gun laws between densely populated urban areas like New York City, and sparsely populated rural areas in Upstate New York. (ATF, 2005, 285, 296) According to the 2006 election information from the New York State Board of Elections, generally speaking, the more urban and densely populated, the more likely it was that the winning candidate was a Democrat. In the less populated, suburban areas, Democrats were favored, but only by a narrow margin, with Republicans taking several victories in both state and federal elections. In the rural areas, however, Republican candidates

predominantly won. While there is some division along party lines in regards to gun legislation, the stronger divide is based on the geographic and demographic situations of the state. However, these demographics are inconclusive when trying to analyze whether the party politics influence the regions, or whether the regional lifestyles dictate the party politics and the way gun legislation is fought over.

What can be taken from the data, other than a general background, is the way these two parties approach law enforcement and crime reduction. When given the choice of how to approach crime control, 50% of New York State legislators preferred to engage problematic societal roots, 21% felt that stronger law enforcement agencies was the best manner to approach crime, and 24% of the legislature saw both strategies as complimentary to each other. (Flanagan, 1993, 415) Representatives affiliated with the Democratic Party had a stronger tendency towards liberal approaches to crime control, whereas affiliates of the Republican Party leant towards conservative approaches. (Flanagan, 1993, 417) This data coincided with the fact that “lawmakers who represented urban areas (40% of respondents) scored... higher on the liberal scale than lawmakers from suburban, rural, or mixed districts.” (Flanagan, 1993, 417) While this may seem like common sense, it is a scientific study that shows how the political and crime control ideologies are geared more towards regional factors rather than party politics.

In addition, this study, along with a 1985 study of the New York legislature, finds that there are disparate viewpoints of the management of crime and law enforcement, and that this is a political hurdle as these views are translated into policy for a diverse

statewide population. (Flanagan, 1993, 419)

## **LEGAL ISSUES**

Currently, the laws statewide are fairly strict, but they are not extensive. Locking devices must be sold or given along with every purchase of a firearm in New York, and they must either be an “integrated design feature or an attachable accessory that is resistant to tampering and effective in preventing the discharge” of the weapon. (ATF, 2005, 273) In addition to this, there must be an effort on the part of the seller or manufacturer to notify the purchaser of the firearm that a gun lock is only “one aspect of responsible firearm storage”. (ATF, 2005, 273)

Another state-wide law is that any manufacturer that “delivers a pistol or revolver to any person” in New York State must provide a spent shell casing to law enforcement in a sealed container for identification purposes. (ATF, 2005, 273) The police will then enter the information about the shell casing into an electronic data-bank for the purposes of ballistics analyses. Also, many types of weapons and accessories are banned statewide, including machine guns, silencers, firearms with shortened barrels, electronic dart guns, semi-automatic weapons, and disguised firearms. (ATF, 2005, 274-275)

With the Sullivan Act and the New York Civil Rights Law still acting as the general framework through which New York gun legislation acts, the role of local legislation becomes crucial to how the law is shaped. Because gun laws are not part of the state constitution, a local law can be out of accord with state law without preempting state law, “if it can be shown that there is a specific local problem justifying the

enactment.” (Legal Community Against Violence, 2007) If the interests of the locale show that the restrictions upon gun ownership are strong enough, they have the ability to supercede the statewide rights.

The gun regulations in New York City are by far the strictest throughout the state. For handguns, rifles, and shotguns, an application must be typed, signed, notarized, and sent in with a \$340.00 application fee and an additional money order of \$94.25 for fingerprinting costs. (New York City, 2008) Additional documentation is necessary for the application, including the birth certificate, proof of citizenship, two recent photographs, military discharge papers, proof of residence, proof of business ownership (if applying for use in business), and a letter of necessity. (New York City, 2008) There are five types of licenses: the premises license, the carry business license, the limited carry business license, the special carry license, and the carry guard license. (New York City, 2008) The premises license restricts the firearm to the home or business listed on the license, and the weapon and ammunition must be carried in separate, locked containers and the firearm unloaded during any transport off the premise. (New York City, 2008) The other four licenses allow firearms to be carried by licensees for very specific purposes. (New York City, 2008)

Rural Clinton County has far less restrictive firearms regulations than New York City. An application for a pistol permit can be picked up for \$15.00, and it must be completed and returned with a \$105.25 processing fee for the New York State Department of Criminal Justice Services. (Clinton County, 2008) The only requirements to obtain a permit are to be at least 21 years of age, and to have been a resident of Clinton

Country for at least 6 months. (Clinton County, 2008) Those that have been convicted of crimes are not automatically disqualified from obtaining a permit, though full disclosure of the crime is needed along with the application. (Clinton County, 2008) The pistol license in Clinton County is valid for target shooting, hunting, fishing, and any other sporting purposes. (Clinton County, 2008)

Erie County, a mixed-urban county, is also much more lenient than New York City, but it has certain restrictions not found in Clinton County. In order to obtain a permit, one must be at least 21 years of age and a resident of Erie County. (Erie County, 2008) The application process takes 6 to 8 months, and includes background checks by the local police, New York State, and the FBI. (Erie County, 2008) After obtaining the permit, residents may add firearms to their permits for a \$3.00 fee, and they must include a detailed bill of sale describing the firearm in its entirety. (Erie County, 2008)

## **ANALYSIS**

The political approach to gun control is divided throughout the state at every level. Because of the aforementioned ability of local governments to supersede state-wide gun legislation, cities are regulating themselves in different manners. New York City Mayor Michael Bloomberg has proposed a plan to restrict the sale of handguns and create a registry of gun offenders. (Cardwell, 2006, June 6) The object of this maneuver is to attack gun traffickers while still minding the firearms rights of law-abiding citizens. (Cardwell, 2006, June 6) There is a driving interest in New York City to find a way to stem gun violence, as found in the New York State crime data. While the trends in

violent crime in New York City slowed down remarkably from 1997 to 2006, (Division of Criminal Justice Services, 2007, 2) the difference in the murder rate jumped up 10% between 2006 and 2007. (Division of Criminal Justice Services, 2008, 2)

In addition to the need for a legislative response in New York City, the rate at which violent crimes occur with a firearm outside of New York City is on the rise from 5,380 instances in 1997 to 6,155 cases in 2006. While this increase is not dramatic for a nine year time span during which the population also rose, it is enough to raise a great deal of concern among policy-makers throughout the state.

## **PUBLIC POLICY & LOBBIES**

Leading the way for the gun rights lobby is the New York State Rifle & Pistol Association (NYSRPA), which is the New York State affiliate of the National Rifle Association—and it is the oldest state association in the nation started in 1888. (NYSRPA, 2008) The organization provides insurance and training for gun owners, as well as sponsoring competitions and promoting responsible firearm use. In addition to this, the NYSRPA is an extremely vocal lobby in New York State politics, fighting for less restrictive gun laws. The organization maintains a “legislative and political awareness” where they “maintain active personal contact with legislators in Albany and at the local level to monitor all proposed and pending bills which affect the rights of New Yorkers to own and responsibly use firearms.” (NYSRPA, 2008)

Leading the lobby for restrictive gun measures in the state is the organization

New Yorkers Against Gun Violence (NYAGV). This organization is a state-wide policy-shaping and direct action network founded in Brooklyn in 1993 in response to the shooting death of a young child. (NYAGV, 2008) While the primary focus is to reduce gun violence through education and building public awareness, the organization plays a key part in lobbying local and state officials to respond to gun violence for legislative action.

In the research for this paper, two interviews were conducted with two New York City residents and political activists who follow the role of gun legislation in New York. Both respondents were asked the same set of questions dealing with New York State gun laws and their relationship with the Second Amendment. Despite the fact that these two people maintain relatively polar opposite political ideologies—Abigail Paul-Cyril is a strong advocate for the NYSRPA, while George Mathieson Sterling holds the views of the NYAGV—their answers were strikingly similar.

When asked whether or not there was some compromise to be found between the most liberal interpretation of the 2<sup>nd</sup> Amendment and the idea of “sensible gun laws” as advocated by NYAGV, both found room for compromise. Paul-Cyril noted that the clarification of the 2<sup>nd</sup> Amendment “as an individual’s right to bear arms, and not simply the right of the organized group... is long overdue,” however, “some restrictions surely apply... [and] I believe that there is a compromise to be had.” (A. Paul-Cyril, interview, March 31, 2008) Sterling noted that the 2<sup>nd</sup> Amendment is “usually treated as an all or nothing federal issue, but it seems to make more sense as a regional issue.” (G. M. Sterling, interview, April 1, 2008)

Sterling clarified his point further, noting that “the situations in the Bronx and the outskirts of Albany are so radically different as to make any legislation inappropriate to one or both.” (G. M. Sterling, interview, April 1, 2008) In order for the 2<sup>nd</sup> Amendment to truly be effective, its modern implementation needs to be tailored to the regional demands. Paul-Cyril had a similar point when asked whether or not restrictive gun legislation is more effective at the state level than the federal level, noting that the effectiveness and relevance would increase at the state and regional levels. (A. Paul-Cyril, interview, March 31, 2008)

Both respondents also noted that while background checks should be required, there are inherent flaws in creating public directories of people with a past history of mental illness. This sentiment was echoed recently by Wendy Brennan, executive director of the National Alliance on Mental Illness, noting that a proposed registry could “potentially stigmatize the mentally ill.” (Rizzo, 2007, June 27) Nonetheless, the idea of a registry of “disqualifying information” has support from both political parties, and while “not the cure-all of every issue, it’s the first step to addressing the problem.” (Rizzo, 2007, June 27)

## **CONCLUSION**

Ultimately, while there is a political stalemate both at the state and local levels, the lack of progress is revealing itself as a strained climate where tragedy repeats itself time and time again. High profile incidents such as the Amadou Diallo or Sean Bell tragedies, where police shot and killed unarmed men with a flurry of bullets, show

evidence of the troubled reasoning the population is left to work with in this political climate. (Fernandez, 2008, April 27) While the restrictive gun laws of New York City keep the general population unarmed, the police still need to approach any and every situation as if any person they come across is armed and dangerous. Ultimately, the political deadlock is creating a sort of schizophrenic viewpoint for both civilians and police to work with, and until there is some work towards conciliatory and compromising legislation that address both the needs for public security and safety, along with the individual needs for protection, it should not come as a surprise to see more of these tragic incidences occur. With the inability at the state level to come to find a relevant compromise for gun legislation, perhaps the call for more local power dealing with its firearms issues is necessary.

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# **GUN CONTROL IN TEXAS**

By Anne Adiele

## **INTRODUCTION**

The laws and policies concerning the registration of concealed handguns in the state of Texas have had a history of substantial controversy. Yet, in comparison to the rest of the United States, the laws controlling concealed handguns in Texas are considered relatively liberal. The Second Amendment of the U.S. Constitution states: “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” ([usconstitution.net](http://usconstitution.net)). Drawing from the legitimacy granted by the Amendment, the question of whether gun owning should be regulated at all is logical. Each of the fifty states in the Union interprets this particular amendment to the Constitution differently; for example, the gun control laws in California are quite different than those in South Dakota. A discussion of Texas gun culture, historical perspectives on guns, and the development of present-day gun laws in Texas are essential for the purpose of this paper.

## **METHODOLOGY**

Research for this article began with a literature review, including access to on-line resources. It included an expert interview with Dan Walker, current president of the Texas State Rifle Association, a former police officer. Finally, crime statistics data from various web sites, and eye witness testimonies in Texas collected through the online

databases and archives were analyzed for their impact on the legislation and the formulation of the concealed-carry laws.

## **LITERATURE REVIEW**

Campbell, L. P. (2008, February, 28). Connecting those dots. *Star-Telegram*. In the *District of Columbia v. Heller*, the US Supreme Court approached the litigation with caution. The decision from this controversial case could impact the other 49 states.

The State of Texas concealed carry law may be in jeopardy as a result of the *Heller* case when the Supreme Court makes its decision in the summer of 2008.

Podgers, J. (1994). Gun law under fire court challenges to Brady Bill produce conflicting results. *American Bar Association*. The Brady Handgun Violence Prevention Act has been attacked because some have found it is a violation of the 10<sup>th</sup> Amendment. In the State of Texas, plaintiffs argued that the Brady Act brought state government into the services of federal regulatory purpose. Furthermore, it would be inconsistent with the Constitution's division of authority between state government and the national government.

Regulatory Licensing Service (2000) website provides a full and current online version of the state of Texas handgun and registration laws. Further, it provides many other tools, such as online renewal of handgun licenses and a list of qualified handgun instructors.

The Texas State Rifle Association website describes the objective of the Texas State Rifle Association (TSRA), which is to support the rights of law abiding, registered, gun owning citizens of the state of Texas. The gun lobby also supports the rights of

citizens to own, carry, transfer, and acquire a registered fire arm. Moreover, the TSRA goals are protected by the Second Amendment. Finally, TSRA also educates the Texas legislators on the laws and legislation concerning the protection or endangerment of the Second Amendment.

## **BACKGROUND**

To research and inform oneself on Texas concealed-carry laws, it is crucial to understand that Texas is a right-to-carry state (RTC). Within the United States, as of 2007, “there are 40 right to carry (RTC) states: 36 have “shall issue” laws, which require that carry permits be issued to applicants who meet uniform standards established by the state legislature” (NRA-ILA fact sheet.). Texas is included in those thirty-six states that recognize the “shall issue” as law. Moreover, any right-to-carry state “respects the right to self-defense by allowing individual citizens to carry firearms for protection” (NRA-ILA fact sheet.).

It is the decision of the individual state to become a right-to-carry state or, on the other hand, to ban handguns or other arms entirely. A proper example of an extremely conservative area is Washington D.C., “where it is nearly impossible to own a fire arm” (D. Walker, personal communication, April 21, 2008). In comparison to the extreme case of Washington, D.C., the concealed-carry laws in Texas are on the other side of the spectrum.

The creation of concealed-carry laws in Texas is the result of the tragic Luby’s Massacre, which took place October 16, 1991, in Killeen, Texas. In the aftermath of this

horrible event at a Texas restaurant, twenty-three innocent individuals were left dead, more than twenty people were injured, and countless family members and friends were devastated. George Hennard, the gunman, later turned the gun on himself and committed suicide before officers reached the scene. A survivor of the incident, Suzanne Gratia-Hupp, who lost both of her parents in the massacre, viewed the incident as the kind of situation that could have been prevented if she had had her handgun with her and not in the trunk of her car.

Hupp kept this stance on handguns and ran for the political office of 54th District Representative and won. Four years later, in 1995, she testified to state legislators in support of the concealed-carry laws that were being proposed. Hupp said, “A gun is not a guarantee, but it changes the odds.” In September 1995, after many years of deliberation, the concealed-carry proposals were enacted into state law. The Texas concealed-carry law “requires a person to be over 21 years of age unless they are active-duty military and to submit to a background check, complete a minimum 10-hour gun laws and proficiency course, and pay a \$140 fee” (O’Brien, 2008). These requirements are for the initial license, which is issued for a minimum of four years. In addition, “. . . with a license, a person is allowed to carry a gun on their body, in a purse or near them as long as it is concealed and they are not in restricted locations such as schools” (O’Brien, 2008).

The laws relating to the carrying of concealed handguns in Texas are found in seven codes: government code chapter 411, health and safety code, penal code, education code, government code, human resource code, and local government code ([.txdps.state.tx.us](http://.txdps.state.tx.us)). Each code outlines the important definitions, proper registration for

the firearms, notice, and so on.

One of the most recent and important additions to Texas concealed-carry and handgun registration laws is the Castle Doctrine of 2007, which establishes the following:

Presumption that a criminal who unlawfully enters or intrudes into you home, occupied vehicle, or place of business or employment is there to cause death or great bodily harm, and you may therefore use any manner of force, including deadly force, against that person. (NRA-ILA fact sheet.)

This law basically states that an “individual’s home is his castle” (D. Walker, personal communication, April 21, 2008). If someone enters without permission, individuals have the right to protect themselves with deadly force. “Before the passing of the castle doctrine there was actually an obligation for the citizen to retreat into their home if attacked” (D. Walker, personal communication, April 21, 2008). The problem with retreating into the home when in mortal danger is simply understood. If someone wants to kill another person, they will do anything necessary until the possible victim employs equal force to stop them. The state of Texas recognizes the Castle Doctrine as a self-defense protection against criminals. Prior to this, some states did not recognize self-protection as self-defense. Consequently, individuals could also be prosecuted as criminals despite being victimized first.

Texas is famously known as the Lone Star State, and it has a thriving gun culture statewide. The nickname comes from the “symbolism of the star on the 1836 flag of the republic, the ‘National Standard of Texas’” ([.netstate.com](http://netstate.com)). The origin of the gun culture

dates back to the days of the Texas Republic and the legend of the Colt Six Shooter handgun.

According to the legend, the early settlers in the territory that later became Texas had discovered that the single-shot long guns were not very successful against the Native American tribes. Because of the terrain of Texas, which was extensively undeveloped at the time, the settlers faced threats from wildlife as well as Native American tribes such as the Comanche. Long guns required repeated reloading, and when the settlers were reloading, the Native tribesmen could attack during the waiting period, putting the settlers at an acute disadvantage—a deadly one.

As a result, the development of the repeating rifle was essential to the survival of the settlers in the West. However, they came to the logical conclusion that a handgun was more practical and handier to use, especially for use while riding a horse or corralling cattle. At the time, the New Jersey Colt Company (now known as Colt Manufacturing Company) created a five-shooter revolver. Prominent Texas Ranger Sam Walker made some key suggestions to upgrade the firearm to its legendary status: “increase the number of shots from five to six and provide a trigger guard to prevent inadvertent firing” (Watkins). Consequently, despite unpredictability in their lives because of the terrain, the settlers were fitted with a new, more efficient form of self-defense. In modern-day Texas, Colt handguns, specifically the Six-Shooter, are collectible and quite expensive.

## **LEGAL ISSUES**

In Texas, there are no handgun regulations for gun dealers to adhere to—whether

at their private place of business or at a public place of business such as a gun show.

Private citizens must complete a few basic steps in order to comply with Texas handgun regulations:

- “You must be 21 years of age at the time DPS reviews the full application unless you are active duty in the military and at least 18 years old. (New application fees are \$100.00)” ([.concealedhandgun.com](http://concealedhandgun.com)).
- “Any resident of any state may apply for a Texas Concealed Handgun license as long as you are a United States Citizen. You will need a Driver’s License from the state you are a resident of” ([.concealedhandgun.com](http://concealedhandgun.com)).
- “You may never have been convicted of violent crime or felony; however, you may have received differed adjudication for some nonviolent felony crimes and be eligible. You cannot have been convicted of a Class A or B misdemeanor within the last 5 years” ([.concealedhandgun.com](http://concealedhandgun.com)).
- “You may not have been convicted of a Class C misdemeanor within the last 5 years” ([.concealedhandgun.com](http://concealedhandgun.com)).
- “You cannot be a fugitive from justice, a chemically dependent person, or a person of an unsound mind” ([.concealedhandgun.com](http://concealedhandgun.com)).

If individuals who want to obtain handguns are cleared through these requirements, they can purchase such a gun almost anywhere in the State of Texas. However one of the ongoing controversial legal issues in regards to handguns in Texas is the gun show loop hole: “. . . if a supplier is selling from his or her private collection and the principal

objective is not to make a profit, the seller is not ‘engaged in the business’ and is not required to have a license” ([.csgv.org](http://csgv.org)). The gun show loophole refers to the fact that anyone—even a convicted criminal or a child—can buy a handgun at a gun show, avoid a background check, or find unlicensed sellers at gun shows.

The legal issue that arises is obvious to many who are against the loophole: the purchasing of a handgun at a gun show is virtually untraceable. Moreover, individuals who are prohibited by regular law from having a firearm can obtain one without any restrictions whatsoever. The groups that are against the loophole view this situation as a major problem.

In sharp contrast, those who support the loophole view a background check at a private gun show as an infringement on their Second Amendment rights. Although some view it as an infringement, it would be interesting to examine the percentage of Texas citizens who would be willing to undergo a background check at a gun show. This could determine true public opinion on this debate.

Furthermore, the gun show loophole also pertains to “straw purchases.” A straw purchase is the purchase of a firearm between two individuals. For example, most Texas newspapers’ classified sections list individuals selling used or new firearms. Individuals wanting to buy that firearm could simply call and set up an appointment and buy the gun without a background check of any kind.

The advocates of closing the loophole believe that the changes would be easy and would not inconvenience anyone who is willing to cooperate. “More than 95% of background checks are completed within two hours, and most are completed in just two

minutes” ([csgv.org](http://csgv.org)). Furthermore, “. . . We need background checks at guns shows to protect law-abiding citizens while keeping guns out of the hands of those prohibited from owning them.” ([csgv.org](http://csgv.org)) For the advocates of closing the loophole, the stance is valid, but, unfortunately, some of their research does not indicate direct links to crime statistics

Handguns and other firearms employed in violent crimes are most likely to be stolen. It is rare to find a registered weapon in a gun-related violent crime. In addition, because most gun-related crimes are committed with stolen guns, it is almost impossible to trace the gun back to a gun show dealer, hence the conflict. One side wants to stop this practice and the other believes that the rights of United States citizens are being compromised. Both sides are still at odds.

## **ANALYSIS**

Some of the societal concerns of gun control in Texas are common to other “shall-issue” states. In the early 1990s, the incidence of firearm-related violence was considerably high in Texas; specifically, in 1991–1993, Texas was among the top ten states in weapon offenses in the United States. In 1993, Texas had 139 weapon offenses and Washington D.C. had a total of 301 that same year; however, in a drastic contrast, Vermont had only 1 weapon offense. In 1993, the FBI estimated that state and local law enforcement agencies made 262,300 arrests in which a weapon offense was the most serious charge ([bjsdata.ojp.usdoj.gov/dataonline](http://bjsdata.ojp.usdoj.gov/dataonline)). However, important external factors are crucial: the size of the male population aged 18-25, the population of the state as a whole, and the geographical size of the state. Vermont has a significantly smaller

population than Texas, which is one of the Union's largest states.

In the years following the relaxation of the concealed carry laws in 1994, gun violence rates in Texas have continued to drop in comparison to those in other states. After the concealed-carry laws were passed, by former Texas Governor and now United States President George W. Bush, homicides committed with guns dropped to from 73.3 to 66.1 percent in 1997 ([bjsdata.ojp.usdoj.gov/dataonline](https://bjsdata.ojp.usdoj.gov/dataonline)). Furthermore, in 2005, homicides committed with a gun were recorded at 67.1 percent compared to 73.3 percent in 1994 ([bjsdata.ojp.usdoj.gov/dataonline](https://bjsdata.ojp.usdoj.gov/dataonline)).

Violence among licensed handgun owners and other firearm owners, according to the data, is notably low. Before the passing of the concealed-carry laws, opponents predicted a decline in public safety. They also believed that “with minor incidents escalating (misdemeanors) into killing, the concealed-carry laws placed more guns in irresponsible hands.” They also advocated the idea that criminals would be undeterred by an increase in armed citizens. Statistically speaking, the data were found to be misrepresented and incorrect on both accounts.

The Violence Policy Center (VPC) published research allegedly proving that licensed handgun owners were being arrested “for nearly two crimes a day in 1998, and more than one arrest a month for violent crime.” Yet there were major problems, which were later discovered by organizations in favor of concealed-carry laws. At the forefront of the issues with the study was the lack of differentiation between crimes committed with licensed firearms, unlicensed firearms, stolen firearms, or without use of a firearm.

William E. Sturdevant compared violent crime rates among concealed handgun-

owning Texas males, concealed handgun-owning Texas females, general population males, and general population females. He found that violent crimes involving concealed handgun-owning men were much lower than the violent crimes involving the general population Texas male.

“The average male Texan who is 21 years or older is 7.7 times more likely to be arrested for the violent crimes of murder, rape, robbery, and assault than the average male CHL holder. The average male Texan who is 21 years or older is 18 times more likely to be arrested for committing a nonviolent crime than the average male CHL holder.” ([txchia.org](http://txchia.org))

Public opinion in Texas is not pushing toward stricter gun control measures. Texas Governor Rick Perry stated, “Texans would be a lot safer if gun owners who hold concealed weapons in places where they are now prohibited, such as churches, courthouses, and bars” (Witt, 2007, ¶ 4) were allowed to carry their guns. The governor also voiced the opinion that it is natural to protect oneself from “deranged individuals” (Witt, 2007, ¶, 7). Moreover, state legislators have recently been further developing the rights of gun owners to include a law that “prohibits law enforcement officials from confiscating legally owned weapons during a state of emergency.” The last measure “would allow workers to keep licensed gun in their cars, even at work sites where employees have decided to ban firearms” (Witt, 2007). These two measures are historical in Texas. In support of Governor Perry’s open advocacy of gun owners’ rights, “nearly 250,000 Texans held licenses to carry a concealed handgun in 2005” (Witt,

2007). However, his advocacy of guns in bars is controversial and has triggered publicized criticism. Jerry Patterson, Texas Land Commissioner, stated, “firearms maybe aren’t the best thing there . . . When you’re drunk, your aim is not so good” (Witt, 2007). His words were spoken with good reason because individuals who are legally drunk can quickly become a liability to themselves and others around them. Not only that, but alcohol can also have extremely adverse affects on some individuals. It can heighten emotions in individuals who are presently prone to violent rages, increasing untold risks.

The Executive Director of Texans for Gun Safety, Tommie Garza, was also opposed to Perry’s advocacy of guns in the workplace, stating “If there’s going to be any place that emotions are running high, it’s going to be a workplace. Can you imagine how many more killings there would be if everyone was carrying a gun to work?” (Witt, 2007) On this particular point, it is difficult to say which side is making a more valid point. Both sides present strong points yet the proposal of each side also contains its own obvious drawbacks. The unpredictability of other people can leave unsuspecting employees at risk. However, that same attitude can also put the employer at risk. This debate could lead to a slippery slope type of situation that either side could employ to their advantage to advocate their position.

As the Texas legislature continues to pass more laws in favor of the rights of gun owners, and as the registration for gun licenses increases, community opinions becomes clearer. The gun culture is still alive and well in the state. The majority of the citizens and the state government are apparently in favor of liberalization of the laws.

## **BUDGETARY IMPACTS**

Some of the costs of the liberal approved gun ownership laws are freak incidents such as Luby's Massacre. In addition, in 1966, a former Marine named Charles Whitman stationed himself in the clock tower at University of Texas and killed sixteen people. This incident took place many years prior to the Virginia Tech massacre, which left thirty-two people dead. This situation has led to a heated debate about the institution of a federal database used to conduct background checks on potential, present, and past gun buyers.

The Virginia Tech gunman, Seung Hui Cho, had been previously ordered by a judge to get out-patient mental health treatment (O'Hare, 2007). Advocates of the database argue that, because there was no database with this crucial information that could be readily accessed, Cho was able to purchase the gun without any barriers. And this missing information became a fatal mistake. Texas, like many other states, does not supply mental health information about its residents to the federally licensed gun dealers. However, it is important to note that in Texas background checks are performed for those who are applying for a gun owner's license, but not for those who wish to purchase a gun. The two processes are separate.

In contrast, since 2000, the National Mental Health America's Board of Directors has been opposed to formation of a database. Lynn Lasky Clark, who is the president and CEO of the Mental Health Association in Texas argues, "There could be barriers to people seeking treatment if they know this information is going to go into a database" (O'Hare, 2007). Clark makes a compelling argument: those with mental illnesses have faced various forms of prejudice and many have struggled with accepting that they have a

problem that requires mental health assistance. With the creation of a file that could be accessed by federally licensed gun dealers, the issue of patient privacy is an acute concern. Many mentally disabled individuals could find this to be a breach of their privacy.

Nevertheless, supporters of the concealed-carry laws have contrasting opinions. They stress the benefits of concealed-carry laws and their preservation. The overarching argument proposed by supporters is based on self-defense and defense of private property. Suzanne Gratia Hupp, a survivor of the 1991 Luby's Massacre and former Republican lawmaker, advocates self-defense. She was quoted as saying, "My safety is my responsibility." She goes even further by saying, "We cannot predict random violence, and therefore people should be allowed to defend themselves, period" (Langford, 2007). The Governor of Texas believes that the preservation of gun owners' rights is important, and he supports the concealed carrying of guns in bars, in courthouses, and on college campuses. Although Governor Perry's opinion is somewhat more liberal than general public opinion, the State of Texas still supports the concealed-carry laws.

Presently, there has been fierce debate on the topic of the right to carry a gun in the parking lot of a business or workplace. Legislators and the public are torn on this subject. It is a difficult situation because there is not clear opinion that is correct. Both sides of the debate present valid perspectives. Equally important are the rights of the business owners and the citizens. The question of whose rights take precedence has been

the focus of conflict and has yet to be resolved. But, whatever the outcome, Texas citizens support gun owners' rights, and that will most likely remain the same.

## **PUBLIC OUTREACH**

Texas State Rifle Association (TSRA) is one of the most popular and largest membership groups in support of gun owners' rights in the state. It was established in 1919 as a support system and an instrument to protect the gun owner's rights in Texas. Its primary mission is "to champion and support the rights of law abiding Texans to own, enjoy, and use firearms as guaranteed by the Constitution of the state of Texas and the United States." A membership in the TSRA is beneficial to a Texas gun owner. For example, collectively, members are allowed to be heard in the Texas Legislature, afforded legal consultation, education and training programs, and updates on government and legislative issues affecting their membership. In addition, TSRA can work as a political tool for active gun owners or for those who wish to remain politically neutral.

There an obvious split along party lines in regard to concealed carry and registration laws. The Republican Party (GOP) is the main supporter of TSRA and an advocate of the concealed handgun legislation. The GOP and the Democratic Party have been at odds over the issue of gun control since the late 1960's. For instance, in the 1968 presidential general election the "Republican Party platform urged safeguarding the right of responsible citizens to collect, own, and use firearms... retaining primary

responsibility at the state level” (Spitzer, 2008, p. 113). On the other hand, the “Democratic Party platform urged the passage and enforcement of effective federal, state and local gun control legislation” (Spitzer, 2008, p. 114). Furthermore, the two political parties have become more polarized over the issue of gun control both at the state and national levels. The Democratic Party has been a strong supporter of stricter gun laws, federal documentation, and registration. One can link this stance to the party’s advocacy for more government involvement in the private sector, whereas the Republican Party has been a supporter of the protection of gun owners’ rights, such as the Castle Doctrine. This could be linked to the party’s advocacy position on the issues of protecting the rights to privacy.(Podgers 1994) The two parties are so far apart on these issues that it does not appear that they will ever come to an agreement.

The concealed carry law won by majority in both houses of the Texas legislature. The Texas House bill was authored by the Republican Texas Land Commissioner, Jerry Patterson. Similarly, the Texas Senate bill was authored by Chris Harris, Republican of the 9<sup>th</sup> District. In the Senate Committee, the bill received five ayes to one nay, while in the House Committee it won seven ayes to one nay. The bill went into effect on September 1, 1995.

Republican Representative. Suzanne Gratia Hupp has given her eyewitness testimony of the Luby’s massacre in several hearings. As mentioned previously, she was one of the strongest supporters of the concealed carry laws in Texas. She also used the tragic death of her parents as the platform for her legislative position. But it was her

eyewitness accounts in 1991 that contributed to the eventual passage of the concealed carry laws.

The advent of the Internet has played a significant role in the Texas concealed carry laws and registration. There are several web sites that promote and protect gun owners' rights. Some of the web sites are purely informational and they include: <http://www.tsra.com>; <http://www.txchia.org>, and [www.concealedhandgun.com](http://www.concealedhandgun.com). These web sites offer useful information on Texas concealed carry laws and Texas gun culture. Because of the tragic yet historical events behind the legislation, media coverage at the time was substantial. The Luby massacre was the worst shooting in the US history, until the recent Virginia Tech shootings that left 32 students and teachers dead. Unfortunately, the Luby massacre remains the second deadliest bloodshed, and more than 10 years later, the survivors still remember vividly the horrific events of that day.

## **CONCLUSIONS:**

Based on the research in this paper and the analysis of the data collected from a variety of sources, the Texas gun control laws and registration laws may experience minor changes. Drastic modifications to the legislation are not likely. Texas has a greater

chance of becoming slightly more liberal than regressing and becoming more conservative as it has been historically.

Many argue that the concealed-carry laws in Texas match the statewide sentiment. Supporters argue that there are more than 291,380 concealed handgun license holders in the state. (Campbell, 2008). With the enactment of such precautionary measures such as the Brady Law which works “To provide for a waiting period before the purchase of a handgun, and for the establishment of a national instant criminal background check system to be contacted by firearms dealers before the transfer of any firearm” (Podgers, 1994, p. 83), there are restrictions on Texas’ ability to liberalize gun laws.. Texas has viewed such laws as in conflict with the constitution. In *Koog v. U.S.*, DR-94-CA-8 (May 31,1994), the plaintiff argued that the “Brady Act brings state governments into the service of federal regulatory purposes...” (Podgers, 1994, p. 83). Texas has historically supported the separation of federal and state governments, and has been an advocate for individual rights. The likelihood of Texas adopting the Brady Law was low. However, in comparison to the Castle Doctrine, which works to ensure the rights of gun owners, Texas consistently support the right of the individual.

Consequently, Texas has been working to uphold the individual’s rights to bear arms. Texas Attorney General Greg Abbot has “assigned a posse of lawyers to a friend-of-the-court brief arguing against the District of Columbia’s handgun ban” (Campbell, 2008.). The Attorney General is concerned that the ruling could impact the other 49 states but the outcome has yet to be decided. In addition, the effects on the rest of the union are

presently up for emotional debate. Abbott and his team exemplify these heightened sentiments. However, it is difficult to imagine that Texas gun culture and the concealed carry legislation will be swayed by the Supreme Court's ruling. One can conclude that Texas will continue to support the Second Amendment and the individual's right to own and carry firearms.

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## Gun Control Organizations

# **HAND GUN CONTROL, INC./ THE BRADY CAMPAIGN**

By Laura Ochoa

## **ABSTRACT**

Thousands of lives are lost each year due to gun violence, and unfortunately many Americans killed are innocent victims. Gun control is a difficult issue to enforce in a gun loving society. Handgun Control Incorporated, now known as The Brady Campaign to End Gun Violence, is the largest organization working to enforce more restrictive gun control laws. The United States courts have not been able to come to an agreement about the meaning of the Second Amendment. For this reason The Brady Campaign is working to enforce stricter gun laws in order to decrease gun violence in society.

## **INTRODUCTION**

For the last several decades the United States has been engaged in a controversial debate between Americans who believe in an individual's right to own guns, and Americans who believe that the government needs to create gun control laws in order to prevent crime. The right to own a gun is considered by some central to the American identity. This goes back to the nation's frontier history, where guns were crucial in order to expand to the west and guard against foreign invaders, as well as Native Americans. As societies got more industrialized and violent crimes with guns began to occur with more frequency, gun control legislation came about. One important trigger was the assassinations of Dr. Martin Luther King Jr. and Attorney General Robert F. Kennedy,

which brought about the Gun Control Act of 1968.

Although only a handful of public figures are killed by shootings, the reality is that many innocent victims are continuously losing their lives to gun violence. Citizens, who feel stricter laws are needed and who have been directly affected by gun violence, have organized in order to reform the gun industry and prevent gun violence. This research paper will explain who The Brady Campaign is, what it does, and the successes it has had.

## **METHODOLOGY**

This research of The Brady Campaign was conducted using a literature review, including on-line resources and two expert interviews. Linda Balwine, the public outreach representative for The Brady Campaign, answered questions about the organization. A deputy sheriff of Santa Cruz County's undercover gang and narcotics task force, explained his findings, based on his experience with gun control laws.

## **LITERATURE REVIEW**

Stanton, J. (2004, February 7) Gun Control Group Files Ethics Complaint Against Craig, *Congress Daily*, describes the actions of a congressman voting on the gun control bill, and his affiliation as a member of the NRA. The facts and opinions provided illustrate a clear example of the battles The Brady Campaign fights against politicians who are pro-gun. It helped to explain how an organization's power is highly dependent on the political support they have.

Stolberg, G. (2004) Effort to Renew Weapons Ban Falters on Hill. *The New York Times*, page A1, discusses the fear of the gun control issue among Democrats, and describes the political activities between House Republicans and President Bush in declining to renew the 10-year-old ban on assault weapons. This article makes clear why The Brady Campaign has not had much success since the Democrats lost control of the House of Representatives in 1994.

The Brady Campaign to Prevent Gun Violence (2008) webpage provides historical information about the organization, current leadership information, the mission of the organization, as well as the methods and programs the organization is currently operating under. The information contained provided background for what The Brady Campaign is, what they do and how they have been successful. The web site also contains facts regarding the gun control issue, gun violence statistics, overviews of federal and state gun laws, an analysis of the Second Amendment, information on the gun industry and a very insightful analysis of the key issues of federal legislation. The website also contains very useful information on how legislation The Brady Campaign has supported is currently being used, and how they are working to get these bills strengthened.

The Bureau of Justice Statistics website provides access to important statistical data on the number of guns that are currently circulating, and a brief analysis of the data. This website's data makes clear the number of people in different gun related incidents each year.

Kenneth , J. (1997, December 19) Gun Control Standoff is an analysis of current

research on gun control. This article includes a discussion of the NRA's role in defeating the 1997 gun-safety initiative influenced by The Brady Campaign in Washington State. This information has helped me understand the reality of how The Brady Campaign has to work against other very politically powerful organizations and yet work to get new bills passed.

## **BACKGROUND**

Gun violence in the United States is nothing new. As early as 1865 the life of President Abraham Lincoln was taken by a gun shot. To follow that unfortunate event came many other violent shootings in the history of the United States, such as the University of Texas massacre in 1966, the Columbine shooting in 1999, the Beltway sniper shootings in 2002, and the [Virginia Tech massacre](#) in 2007. There are numerous reasons that the United States has such a high rate of gun violence, one of them being the country's historical gun culture, and another being the amount of gun violence that people are exposed to through the media and electronic games. The result is that the United States has one of the highest gun violence rates in the world. ( Abrams, 1997, pg 77)

Citizens are becoming more concerned and less tolerant of gun violence. This concern has lead thousands of people to organize politically. Many of these citizens believe that stricter gun laws could have prevented some of these horrible incidents in our nation's history. Citizens discontent with current legislation know that the best hope for change is becoming a part of the solution. Dr. Mark Borinsky made a life changing

decision to stop waiting for gun violence to right itself, and established a coalition to fight back in 1974, known as the National Council to Control Handguns. As a victim of gun violence Borninsky knew that the current legislation had not been enough to protect him against guns, and current legislation would not be enough to prevent other people from being harmed. Unfortunately his hypothesis has been right until now.

(BradyCampaign.org/firearm facts,2006)

Another very significant founding leader of the organization was a DuPont executive, Nelson Shields, who took a leave of absence from his job to join NCCH in 1974. Just one year later his son was killed, which lead him to he leave his job and work full-time for NCCH. In 1978 Shields became the organization's chairman.

In 1980 NCCH's board members decided to rename the organization Handgun Control Incorporated. In 1983, The Center to Prevent Handgun Violence (CPHV), an educational outreach organization dedicated to reducing gun violence, was founded as a sister organization to Handgun Control Incorporated.

In 1985, James Brady, Ronald Reagan's press secretary, was shot in the head and seriously wounded when John Hinckley attempted to assassinate the president. This event was what drew the Brady family into advocacy for stricter gun laws. Sarah Brady joined the handgun control movement in the 1980s after her husband had been shot and she had found her son playing with a loaded gun at a relative's house. In 1989 Sara Brady filled Shield's position in the organization, and in 1991 she also became chair of the Center to Prevent Handgun Violence (bradycampaign.org).

On June 14th, 2001 HCI was renamed The Brady Campaign to Prevent Gun

Violence and the CPHV was renamed The Brady Center to Prevent Gun Violence, both in honor of Jim and Sarah's dedication to making America safer from gun violence. In 2001 The Brady Campaign and Million Mom March (MMM), another organization dedicated to fighting against gun violence, merged in order to become a more solidified coalition. In 2006 three term former mayor of Indiana, Paul Helmky, became president of The Brady Campaign and still is till this day.

The Brady Campaign has now become the nation's largest, non-partisan grass roots organization leading the fight to prevent gun violence. It consists of 400,000 members and works with a budget of \$7,500,000 ([bradycampaign.org/annualreport](http://bradycampaign.org/annualreport)). Their mission is to create sensible gun laws, regulations, and public policies that will make it more difficult for criminals and mentally ill people to obtain guns. They work hard through grass root activism, forming relations with public officials who favor gun laws, and by increasing the awareness of gun violence throughout many communities. They have various methods of carrying out these goals, such as educating the public, getting support from other volunteers, establishing numerous outreach programs, and also merging with other organizations that have similar goals. The MMM work locally to educate, remember victims, and pass sensible gun laws, believing that children have the right to grow up in environments free from the threat of gun violence.

In order to carry out their mission, The Brady Campaign has formed very specific programs for the areas of civic engagement they think are the most valuable. Having legal support in any effort to make and change current policy is vital. For this reason the Legal Action Project (LAP) was founded in 1989. The LAP is a public interest law

program that provides the opportunity for courts and attorneys to combat gun violence. LAP's goal is to unite the efforts of The Brady Campaign, with the effort of individuals within the court system, such as attorneys and judges, so that gun control advocates may have a voice in this crucial process. This in turn will increase the likelihood of bringing about legal precedents that will place responsibility in the hands of gun manufactures, negligent gun owners, and negligent gun sellers. Without adequate gun control laws in place, it is more difficult to achieve change within society, for this reason the LAP is one of the most important ways The Brady Campaign is working to end gun violence.

Law Enforcement Relations (LER), works with law enforcement organizations, criminal justice practitioners and individual law enforcement professionals throughout the country on public policy, safety education and prevention initiatives to reduce gun violence in schools and communities. LER also works closely with law enforcement to inform them on The Brady Campaign issues and gain their support. It is very important for a handgun control organization to work closely with those individuals in society that will be a part of the efforts to make the streets safer from gun violence, as well as to arrest and prosecute people who are breaking the laws established for gun control. By working with law enforcement agencies, The Brady Campaign organization is able to form a stronger coalition of people that not only feel passionately about making the streets a safer place for all, but individuals who are in a position to make a meaningful difference.

The police officer interviewed for this project wanted to remain anonymous. He stated that although handgun control organizations such as The Brady Campaign aim to

do well, the laws they promote actually make access to guns worse, because people involved in gun violence are getting guns unlawfully, and this creates an incentive for more criminal activity. (Personal communication, April, 2008)

Million Mom March (MMM) started out as a group of women that came together, particularly mothers whose children had died because of gun violence, were victims of gun violence, or simply mothers who are concerned for the safety of their children and who want to put an end to gun violence. MMM chapter activists work locally in five different areas: federal legislation and elections, state legislation and elections, education and awareness campaigns, remembering victims, and community outreach. There are 75 MMM Chapters around the U.S. that work locally. ([bradycampaign.org/millionmommmarch.org](http://bradycampaign.org/millionmommmarch.org))

Brady Leadership Institute is an activists/leadership training program designed to develop Brady members, Million Mom March chapter leaders, as well as other activists interested in improving or developing their leadership skills. The idea behind this program is that in order to have a strong, successful, and unified organization, there needs to be strong leaders who are well equipped to lead.

Campaign partners works with The Brady Campaign's National Constituencies and Community Mobilization (NCCO) staff in implementing a plan to build new, and strengthen existing, relationships with national, state and local level allies, to enhance the organization's mobilization, legislative and political agendas on gun violence prevention. If politicians can be engaged in a way that will make them understand the severity of the gun violence in communities, than they too can make a positive change when it comes to

voting on gun-related bills. If the gun control coalition could get help from the individuals in the judicial system, the police force, and the legislative system more change would become possible. The NCCO's goal is to expand their network of supporters and allies, as well as collaborating with other like-minded organizations.

The Brady Campaign efforts also include Linking with Victims for Change Network (LVCN), a national coalition of individuals that have been directly impacted by gun violence. This program is designed to provide activists with a range of effective action and advocacy strategies for addressing the issue of gun violence at the local, state and national levels. LVCN members will be apart of a national network of victim/survivor and co-victim advocates, whose authentic voices will carry their message of creating a nation free from gun violence to legislators across the country.(bradycampaign.org/programs)

There are numerous programs that The Brady Campaign has organized which all serve different purposes. However, they have similar goals, and that is to make an impact, whether it be small or large, in eliminating the gun violence problem in the U.S. Take for example the STOP 2 program. It is not very well known, and yet the program continues to fund education for healthcare practitioners so that they in return can promote awareness of the dangers of guns in the home.

Based on The Brady Campaign's extensive research on gun violence in neighborhoods, they identified two ethnic groups that have been historically and disproportionately impacted by gun violence, and founded the Hispanic Latino Outreach Program and the African American Outreach Program. Both are designed to lessen gun

violence through material that is culturally relevant that aims to empower people in these communities about the effectiveness of sensible gun laws. Both programs focus on actively engaging community members, advocates and people of influence to serve as role models in these communities. The idea behind this program is that the greater the number of positive role models of the same ethnicity, the greater the chances are of reducing crime in these disproportionately affected communities.

([www.bradycampaign.org](http://www.bradycampaign.org))

God Not Guns Coalition addresses the issue of gun violence prevention from a faith-based position. GNG educates people from different faiths about gun violence in America, by seeing it as a spiritual and moral crisis. This program gives people the opportunity to serve God through lessening violence in communities.

([www.bradycampaign.org](http://www.bradycampaign.org))

As for the legislative successes of Handgun Control Inc./ Brady Campaign most of them have occurred around 1985 through 1991. These accomplishments include successfully lobbying Congress to ban Teflon coated armor-piercing, "cop-killer" bullets that could puncture bullet-proof vests worn by police officers. In Maryland they were able to pass a ban on the sale of so-called "Saturday Night Specials," (Stolberg, G. 2004). The Brady Campaign managed to get Congress to pass a bill to ban handguns that cannot be detected by airport x-ray machines, so-called "plastic" handguns. Much of the opposition and criticism The Brady Campaign has had to face is based on a belief that the laws their organization has supported are so-called "feel good laws," which really have no ability to protect anyone.

After the schoolyard massacre in Stockton, the California legislature passed the first assault weapons ban in the nation, the Roberti-Roos Assault Weapon Act. (Office of Attorney General, 2007) This act would later lead to the Violent Crime and Control Act of 1994, which included the first-ever federal Assault Weapons Ban, banning the future manufacture and importation of military-style assault weapons. If a gun looked dangerous or bad, it was included on the list.

Many say that one of the few meaningful and successful laws to come out of The Brady Campaign was The Brady Bill. The Brady Bill was implemented on February 28, 1994 (bradycampaign.org). This law established a national five business day waiting period for handgun purchases through licensed dealers. It also required local authorities to conduct background checks on handgun purchasers. The majority of Democrats voted for this bill and the majority of Republicans voted against it. In July of 1997, the Supreme Court ruled that it was unconstitutional for the federal government to require states to perform Brady Bill background checks (Stolberg, G. 2004) At that point, 27 states had laws requiring similar background checks and 23 states did not. As of December of 1998, an amendment to the Brady Bill replaced the five business day waiting period with a national instant felon identification system. Dealers are required to conduct this background check on all gun purchases, not just handgun purchases. This amendment was added to the Brady Bill before the law was voted out of Congress. The majority of Republicans voted for this amendment and the majority of Democrats voted against it. (bradycampaign.org)

During the first 17 months of the Brady Bill, 7 people were convicted of

illegal attempts to buy handguns (Bradycampaign.org). Between implementation of the Brady Bill in March 1994 and year end 1997, there were 242,000 background checks that have denied prospective purchasers permission to buy a handgun from licensed gun dealers. Out of these, 9 people have been convicted of illegal attempts to buy handguns. (bradycampaign.org/firearmfacts). In the early 1990's, the Bureau of Alcohol, Tobacco and Firearms reported that 7% of armed career criminals obtain firearms from licensed gun shops. The Brady Bill was implemented in February of 1994. In 1997, the number of violent crimes committed with firearms had fallen 25% since 1994, while the overall number of violent crimes had declined 14%. (FBI,2005).

## **HOUSEHOLDS AND GUNS**

The Brady Campaign has conducted extensive research in several different areas. One of these areas is on fire arm facts. According to their research an estimated 34.5 % of households have a gun, and 24% have a handgun. As of 2004 there were around 283 million privately owned firearms in the U.S. estimated 4.4 million guns, (bradycampaign.org,/issuebriefs,2007). It also estimates that 1 of 3 handguns change ownership through a secondary market, which is not regulated. Guns in the home are a greater risk to family and friends, as The Brady Campaign research found that for every time a gun is used in a home in a legally-justifiable shooting, there are 22 criminal, unintentional, and suicide-related shootings. The presence of a gun in the home triples the risk of someone being killed in there, and increases the likely hood of a suicide by five times (bradycampaign/gunfacts, 2005) .The research found that guns are not just in urban

and rural homes, they are in homes everywhere: cities, towns, suburbs and farms.

According to a survey conducted by The Brady Center to Prevent Gun Violence in 1998, there is a gun in 43% of households with children in America. There is a loaded gun in one in every ten households with children, and a gun that is left unlocked and just "hidden away" in one of every eight homes.(bradycampaign.org/issuebriefs,2007)

## **GUN DEATHS AND INJURIES**

Another research study conducted by The Brady Campaign was on gun deaths and injuries. According to their findings, the United States leads the world in firearm violence. In 2005, 30,694 people in the United States died firearms-related deaths: 12,352 were murdered, 17,002 killed themselves, 789 were accidents, 330 died by police intervention, and in 221 deaths the intent was unknown, (justicestatistics,2004). In 2004, firearms were used to murder 56 people in Australia, 184 people in Canada, 73 people in England and Wales, 5 people in New Zealand, and 37 people in Sweden. In comparison, firearms were used to murder 11,344 in the United States. In 2006, there were only 154 justifiable homicides by private citizens using handguns in the United States. (bradycampaign.org/facts& issues, 2006).

## **GUNS AND YOUTH**

Research was also conducted on gun violence and youth. The findings stated that in 2005 8 children and teenagers, ages 19 and under, were killed with guns everyday. In 2005, firearm homicide was the second leading cause of injury death for men and women

10-24 years of age - second only to motor vehicle crashes. In 2005, firearm homicide was the leading cause of death for black males ages 15-34. From 1999 through 2005, an average of over 1,000 children and teenagers took their own lives with guns each year. Each year during 1993 through 1997, an average of 1,621 murderers who had not reached their 18th birthdays took someone's life with a gun. (Bradycampaign.org/ Gun Violence Statistics and Studies children & guns, 2005)

The Brady Campaign's research revealed that having a concealed weapons is not a good idea. There are many reasons, but the reason that stands out the most is that the vast majority of the people who have a permit to carry have very limited training on how to adequately use a gun. The result is that people who are not qualified to carry a gun are now responsible for something they cannot manage. Even police officers who have extensive training with guns, when under pressure and stress, make big mistakes. If a person who is supposedly trained to work under stress at times does not perform as they should, then it does not make sense to allow an unqualified civilian to carry a weapon that has the potential to kill. The National Rifle Association frequently uses the fear of crime to promote the need for ordinary citizens to carry a concealed gun, but the likelihood of a person being in an ideal situation to fight off their offender is not very likely. What is meant by ideal is being collected enough to fire responsibly, and having enough time to physically prepare him or herself to use the gun. (bradyccampaign.org/ Dangers of Concealed Carry)

## **GUNS AND DOMESTIC VIOLENCE**

The research conducted by The Brady Campaign found that guns and domestic violence make a deadly combination. A 2003 study indicated that the presence of a gun in the home made it 6 times more likely that an abused woman would be murdered than abused women in homes without guns.(bradycampaign.org, 2003) In 2005 firearms were responsible for the murders of 1,791 women, including 1,089 white women, 636 African-American women, and 21 Native American/Alaskan Native, and 45 Asian-Pacific Islanders. In 2005, 1,181 women were killed by their intimate partners, accounting for over 30% of all murders of women. In 2005, 57 percent of women killed by their intimate partners were killed by guns. In 2005, 678 women were killed by intimates using guns compared to 147 men. (Bradycampaign.org/guns and domestic violence). These statistics are a clear example of why The Brady Campaign is working so hard to close the loopholes in current gun legislation and toughen the laws that currently are still allowing violent people to obtain a gun.

## **FIREARMS AND SUICIDE**

The research conducted by The Brady Campaign found that too many people are killing themselves with guns. In 2005, 17,002 U.S. residents killed themselves with a firearm, including over 2300 young people (ages 10-25). (bradycampaign.org-gun/violence statistics and studies, 2005) If suicide is attempted with a firearm, it is almost certain the person will die. Fewer people make it to the hospital than would be the case if another method were used. In 2005, only 3,190 people survived an attempt to kill themselves with a gun and made it to the hospital. Suicide by guns is taking the lives of

many young people. Almost 50 percent of youth suicides (ages 10-25) are committed with guns, making firearm suicide the 4th leading cause of death for this age group. Youth who commit firearm suicide usually get the gun from a parent. Eighty-five percent of youths under age 18 who died by firearm suicide used a family member's gun, usually a parent's. (bradycampaign.org-domestic violence and guns).

Many people argue that the Second Amendment gives people the right to own a gun, but what these gun advocates do not realize is that the guns they strongly advocate for are the very same weapons that are killing many people. Taking away guns may not take away the problem people have in wanting to take their own lives; however, if guns were not available, the chances of them surviving a suicide attempt would greatly increase, and those individuals might still be alive.

## **CONCLUSION**

The Brady Campaign is a controversial advocacy group. Detractors make numerous accusations against The Brady Campaign, including that it has a negative image of gun owners and guns, that their campaign is based on assumptions rather than facts, that they misconstrue the meaning of the Second Amendment to support their belief in the complete disarmament of American citizens, and that they undermine one of Americans' most basic freedoms and rights, the right to defend oneself. Supporters emphasize that The Brady Campaign is composed of victims of gun violence who just want to make this world a better place for all of us to live in. Maybe they have not had much legislative success, but at least they are waking up every day with the intention to

make a positive difference in society. The gun control issue is very controversial, especially in a society that has a strong gun culture. It is going to take more than just The Brady Campaign to change the pattern of violence in American society. In the next few years The Brady Campaign plans to continue working on a federal and state level to protect sensible gun laws from being weakened, and to pass new gun control legislation where it is needed. Their number one priority will continue to be getting illegal guns off the streets by strengthening law enforcement tools in order to bring down corrupt gun dealers. They also want to extend Brady background checks to all gun sales, stop large-volume gun sales that supply gun traffickers, legislatively working toward renewing the Assault Weapons Ban, legislating product safety standards for gun manufacturers, and lastly, work to educate and advocate about the dangers of gun violence.

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# THE NATIONAL RIFLE ASSOCIATION AND THE SECOND AMENDMENT

By Richard Russo

## ABSTRACT

*“These are times that try men’s souls. The summer soldier and sunshine patriot will, in crisis, shrink from the service of their country; but he that stands it now, deserves the love and thanks of man and woman. Tyranny, like hell, is not easily conquered.” (Paine, 1776, p.1)*

The above quotation of the words of Thomas Paine is used by current National Rifle Association (NRA) President John C. Sigler to rally the cause of the NRA. He claims that now, just as in the past, the rights of Americans are in jeopardy, specifically the “Right to Keep and Bear Arms.” (*The Voice of Freedom*, p.1). Presently the NRA believes that the Second Amendment and the gun ownership rights of American citizens are under fire. Because of the vague text of the Second Amendment, both the NRA and its opponents are constantly challenging its interpretation by various courts. This paper will discuss the history of the NRA and how it continues to influence the future of the United States’ understanding of gun control. It will elaborate on the long-armed reach of the organization and how their choices affect the lives of American citizens.

## METHODOLOGY

In preparation for this research, data was collected through a variety of different resources, including a literature review of online resources, an interview with a current

member of the NRA, William Chatterton of the New Jersey National Rifle Association, think-tank reports, and newspaper and magazine articles. Finally transcripts from the Supreme Court proceeding *District of Columbia vs. Dick Anthony Heller*, have been reviewed.

## **LITERATURE REVIEW**

*National Rifle Association*, by Sugarman is a detailed description of the NRA's history and perspectives. This book provides an in depth look at how the NRA came into existence and the battles it has fought to remain a major influence in defining gun ownership rights within the American society. It outlines, by decade, the changes the NRA has undergone and the major players within this organization. From its origin in 1871 to present day, Sugarman's history covers every major aspect of this organization.

*Does The National Rifle Association Affect Federal Elections?* In this study done by Kenny, McBurnett, and Bordua at the Independence Institute in Golden, Colorado they attempt to see if the NRA has any affect on federal elections. They use a mathematical equation to determine the impact that the organization has on elections. They also studied the affect of the NRA and its impact on both challengers and incumbents in large member NRA districts. The results from this study demonstrated that the National Rifle Association does have an affect on federal elections by approximately three to five percent.

*The Perils of Patronizing*, a Washington Post article, by Gerson, argues that Senator Barack Obama uses the issues of gun control and religion in a way that

negatively affects his support. Gerson argues “the only thing more insulting than being attacked is being explained.” What he means by this is that some people believe in welfare, gun control, and affirmative action, while Obama claims that these individuals should be forgiven for their beliefs. This article has been used in the analysis of this paper to get a perspective on the future political environment and how it may or may not affect the NRA.

The Supreme Court Case of *District of Columbia v. Dick Anthony Heller*, involves a security officer in Washington, D.C. and his obligation to carry a handgun at work. Wanting to protect his family, Heller sought the right to keep his firearm with him when he went home after work. Due to the ban on handguns in Washington, D.C. Heller has been denied this right. This court case will be decided in June of 2008. This is the first time a Second Amendment court case has been tried in seventy- five years. The verdict of this case will have a significant affect on the NRA and its lobbying efforts.

*The McCain Coalition* by Ken Blackwell provides insight into an upcoming speech by Sen. John McCain. In it McCain will attempt to reach out the swing voters and distinguish his position on the NRA from that of Senator Obama and Senator Hilary Clinton. Blackwell notes that the Democrats captured a substantial portion of the moderate vote in the Congressional elections of 2006. McCain’s intent, according to Blackwell, is to reach out to moderate Democrats and Republicans by re-affirming his support of the Second Amendment and to show that his opponents have adopted a very radical position on firearms.

*The Voice of Freedom*, by John C. Sigler, published in the *NRA Official Journal*,

makes a compassionate appeal to the NRA membership to strongly support the political initiatives the organization has launched to defend the rights of citizens to bear arms. He notes that both Democratic candidates will try to make a California-style gun ban mandatory for the entire country. This major NRA initiative is called *The Voice of Freedom* and is supported by the NRA's multi-million dollar war chest.

## **THE BACKGROUND**

The National Rifle Association (NRA) was founded in 1871 by two Union veterans of the Civil War, William Conant Church and George Wood Wingate. In the Civil War the Union forces had a large number of troops, with few capable riflemen. The South relied on its experienced marksmen to counter the larger Union Army. Even though the North defeated the South, Church recognized the need for good marksmanship. (Sugarmann, 1992, p.1)

Modeled after the National Rifle Association of Great Britain, the goal of the organization was to improve marksmanship and encourage participation of civilians. In the words of William Conant Church, "An association should be organized...to promote and encourage rifle shooting on a scientific basis. The National Guard is today too slow in getting about this reform. Private enterprise must take up the matter and push it into life." (Sugarmann, 1992, p.1) In order to reach their goal the two veterans sought help from the New York State Legislature. They sponsored legislation requesting \$25,000 dollars to purchase land for training and in return the NRA agreed to develop and manage the facility. To ensure the bills' passage the NRA began using the strategy that would

grow to be its biggest asset, the ability to influence legislation by using the voice of its supporters. They promoted letter- writing campaigns from citizens to the state assembly. When the bill passed, the State of New York awarded the National Rifle Association seventy acres of land in Long Island, New York, for their charter teaching institution. Civil War General Ambrose Burnside became the first president of the National Rifle Association.

Since its early days the NRA has demonstrated a commitment to providing firearms training not only to its members, but also to the law enforcement community and the military. This is best evidenced in World War I and World War II when the NRA allowed the U.S. government access to their ranges, produced educational programs, and asked their members to serve in homeland security positions. (*A Brief History of the NRA*, p.1). It is considered to be the premiere authority on gun certification, instruction and promotion. (*Law Enforcement Training*, p.1). The LEAD program (Law Enforcement Activities Division) was adopted in 1960 in order to provide law enforcement with a standard for instruction within the community. Over the course of forty-five years the LEAD program has trained more than 50,000 police firearms instructors. The main goal of the instruction is “to provide every law enforcement officer in the country with the knowledge, skills, and abilities to WIN a lethal encounter!” (*Law Enforcement Training*, p.1).

Initially the NRA exceeded its own expectations and it raised significant funds, most of it coming from the National Guard. However, in 1873 progress halted due to the election of Alonzo Cornell as governor of New York. It was Cornell’s belief that the

National Rifle Association served no concrete purpose, because the National Guard was not viewed as a fighting force and he maintained the position that it was strictly for show. “The only need for a National Guard is to show itself in parades and ceremonies. I see no reason for them to learn to shoot if their only function will be to march a little through the street.” (Sugarman, 1992, p.2)

Similar to many other organizations in their early stages, the NRA suffered setbacks. The most significant setback came in June of 1892, when the combination of a stagnant economy and opposition from Governor Cornell forced the organization to adopt a low profile. However, in 1900, with the increased interest in “competitive shooting,” the NRA made a solid comeback as a prominent organization in the United States. With the resurgence of the NRA, its powerful leadership vowed never again to let one man undermine the stature of the organization. (Sugarman, 1992 p.2)

For the better part of a century and a half the National Rifle Association has continuously been involved in many legal proceedings. Aside from these proceedings and court verdicts the NRA has faced serious repercussions from various historical events. These events include, but are not limited to, the assassination of President John F. Kennedy, and the death of Dr Martin Luther King Jr.

In the 1960’s the National Rifle Association split into two separate parts. The first faction consisted of sportsman and hunters. Adherence to the Second Amendment was by no means their primary concern. This group of individuals did not view the NRA as a protector of United States citizens, but more as a gun club.

The second faction included the Second Amendment fundamentalists, who can

best be described as people who believed in a strict interpretation of the wording of the Second Amendment. The champion of this division was Harlan Bronson Carter. Carter was adamant about opposition to gun control. He was asked if he would “rather allow those convicted violent felons, mentally deranged people, violently addicted to narcotics people to have guns, rather than to have the screening process for the honest people like yourselves?” (Sugarmann, 1992, p.14) Carter responded that such a sacrifice “was a price we pay for freedom.” At this point Harlon Bronson Carter became the “poster boy” for the NRA.

Today the National Rifle Association has over four million members. Members include men, women, and older adolescents of diverse backgrounds. In addition to being a source of information on gun laws and legislation, the NRA also has clubs, workshops and training facilities across the country. These programs and services focus on everything from gun safety and training to sports hunting. In addition, the NRA has established the U.S. Veterans Endowment “to train members of law enforcement agencies, the armed forces, the militia, and people of good repute in marksmanship and in the safe handling and efficient use of small arms and... to promote the public safety, law and order and the national defense.” (*The National Rifle Association and The NRA Salute America’s Veterans*, 2008, p.1).

Although its members are the real power behind the National Rifle Association, not everyone is eligible to join. The Association has strict regulations regarding who is allowed to become a member. It does not allow convicted criminals, illegal aliens, or mentally challenged people to join. The current mission of the NRA, in addition to

upholding the Second Amendment, includes “enacting laws that recognize the right of honest citizens to carry firearms for self protection; preemption bills to prevent a tax on gun owner rights by local anti- gun politicians, and fighting for legislation to prevent the bankrupting of America’s firearm industry through reckless lawsuits.” (NRA-ILA, 2008, p.1)

The National Rifle Association is headquartered in Fairfax, Virginia. Its staff consists of over eighty individuals with a significant contingent of lobbyists on Capital Hill. The NRA-ILA (Institute for Legislative Action), established in 1975, is the branch of the NRA concerned with lobbying for the rights of the association. Their mission is to protect the rights of law-abiding citizens stated in the Second Amendment. Their ability to protect Second Amendment rights comes largely from the more than 4 million members across the country. (NRA-ILA, 2008, p.1). “The National Rifle Association is America’s oldest civil rights and sportsman’s group. Four million members strong, the NRA continues its mission to stringently support Second Amendment rights and to advocate enforcement of existing laws against violent offenders. The Association remains the nation’s leader in firearm education and training for law-abiding gun owners, law enforcement and the military.”(*New York City Lawsuit Against America’s Firearm Industry Dismissed, 2008, p.1*)

## **LEGAL ISSUES**

**“A well regulated Militia, being necessary to the security of a free State, the right of people to keep and bear Arms, shall not be infringed.”**

As one can tell, the Second Amendment is not easily interpreted. Although there are numerous ways one can attempt to define what is meant in the language of the Amendment, two specific definitions are the most plausible. The first of these interpretations can be summed up simply by saying all United States citizens have the right to bear arms under the Second Amendment. The second interpretation is more complex because it requires one to define the word militia. At the time of its conception the militia was defined as any able bodied man who, at a moment's notice, could be summoned to fight to protect and defend the state. As time has progressed and as state militias have given way to a more robust National Guard, it is much more difficult to accept the original definition of militia. Due to the conflicting interpretations it was inevitable that the National Rifle Association would face opposition regarding their claim that every United States citizen, with minimal exceptions, has the right to bear arms.

## **ANALYSIS**

In the coming months The National Rifle Association may influence the shape of the U.S. political landscape for years to come. One example of this influence can be seen in how the organization disseminates information to the voting public. The NRA-Political Victory Fund grades prospective political candidates based on their voting tendencies, statements to the public and by their answers to NRA-PVF questionnaires. (*Mission Statement*, p.1). Traditionally many Republican candidates have attempted to align themselves with the NRA mainly because of its large voter base and strong political voice.

In the very near future, Republican Presidential candidate John McCain will give a speech to the National Rifle Association regarding who he believes will be the best nominations for the Supreme Court. It is not inconceivable that the next president may appoint two or three justices to the court. This influence is underscored by Blackwell's quote "...the Second Amendment is a critical issue in this Presidential election. Millions of swing voters are solid Second Amendment supporters. When a pro Second Amendment Republican is up against an anti-gun Democrat, that issue can decide the outcome of a close election. It certainly did in 2000 when President Bush beat Al Gore." (Blackwell, 2008, p.1) As evidenced by the previous quotation, the NRA carries much political clout in the Republican Party.

The NRA feels so strongly that a citizen's right to bear arms is protected under the Second Amendment that they will rally their constituency through multimedia avenues. For example, in 2004, the National Rifle Association's Political Victory Fund created and sent 6.5 million cards and letters, made 2.4 million endorsement phone calls, gave out 1.6 million bumper stickers, created fifty thousand television, radio and newspaper ads, and hoisted 510 billboards in support of their candidate.

In sharp contrast, the two main Democratic candidates in competition for the White House, Senator Hillary Clinton and Senator Barack Obama, vehemently oppose the NRA's interpretation of the Second Amendment. Senator Barack Obama's view on the Second Amendment, specifically gun control, differs greatly from Senator McCain's. In the April 19, 2008 edition of the Washington Times Senator Obama claimed that "'bitter' small-town voters hurt by the economy were not supporting him because they

‘cling’ to religion, guns and anti- immigrant views.” (*The Washington Post*, April 2008). Many pro gun constituents viewed this quote as Obama’s strong endorsement of stricter gun laws.

This coincides with Senator Ted Kennedy’s (the Senate champion of gun restriction legislation) strong endorsement of Senator Obama. “Obama was a state Senator in Illinois, where he supported increasing federal excise taxes on guns and ammunition by five-hundred percent, banning compact handguns, limiting the frequency of gun purchases, banning the sale of guns (except antiques) at gun shows, charging a person with a felony offense if his gun were stolen and used in a crime, prohibiting people under age 21 from possessing guns, increasing the gun licensing fee...and banning police agencies from selling old service firearms to generate funds to buy new firearms for their officers.” (Cox, 2008, p.3) In addition Senator Obama allocated millions of dollars to the Violence Policy Center, which at the time heavily supported tax-free funds to anti-gun groups and causes. As demonstrated by his legislation Senator Obama, if elected to the office of President of the United States, would come into conflict with the National Rifle Association and its lobbyists.

In addition to Senator Obama’s views on stricter gun control, it is also important to understand his views on small town America, citizens who make up a large portion of the NRA’s membership. It is his belief that small town Americans own guns as a source of security, he opposes the notion that one can own a gun because they choose or want to. According to the NRA, Senator Obama’s beliefs alienate a large portion of Americans. (*The Washington Post*, April 2008)

Similar to her opponent in the Democratic primaries, Senator Hilary Clinton also favors more stringent regulations on guns. “When she was first lady, Clinton endorsed a 25 percent tax on handguns, an increase in the federal gun dealer license fee to \$2,500, registration and licensing of handguns and their owners, and licensing for all new rifles and shotguns.” (Cox, 2008, p.3)

The 2008 election is of vital importance to the National Rifle Association and its leaders. If the election brings a Democratic President to the White House, the NRA will face strong opposition to its lenient attitude towards gun control. Conversely, if Senator McCain wins the 2008 election the NRA will have an easier time influencing policy geared towards gun control legislation. In a recent study conducted by the Independence Institute of Golden, Colorado examining the impact of NRA endorsements to elections to the U.S House of Representatives in 1994 and 1996, the authors came to the following conclusions: 1) NRA endorsement can increase a candidate’s votes by roughly three percent where there are 10,000 NRA members in the voting district, 2) the NRA has the ability to influence elections in areas with more members, and 3) challengers benefit more from NRA endorsement than incumbents by approximately two percent more. (*Does The National Rifle Association Affect Federal Elections?* 2006, p.1).

While the 2008 election will undoubtedly impact the power of the National Rifle Association in some manner, its policies are already being challenged at the Supreme Court level. On Tuesday, March 18, 2008, the Supreme Court of the United States heard the case of the *District of Columbia vs. Dick Anthony Heller*. This court case is the first in seventy years to attempt to define the meaning of the Second Amendment. The

catalyst for this case is a security guard by the name of Dick Anthony Heller. For his job as a security guard in the Capitol, Mr. Heller is allowed to carry a handgun while on duty. However, when off duty, security officer Heller must turn in his handgun before he leaves work and goes home. Wanting to protect himself and his family Heller wanted to keep his handgun for protection, however he has been denied this right. The issue surrounding this case stems from a handgun law passed in 1976, which banned handguns in Washington, D.C. A decision in this case is due in June of 2008, and the decision will have a great affect on the NRA.

On the state level, battles over the interpretation of the Second Amendment arise frequently. Policies on gun control, ammunition, and the sale of firearms are constantly changing. Currently the jurisdictions with the most stringent regulations are Washington, D.C., New York, and California. For example Mayor Bloomberg of New York City recently filed a lawsuit stating that gun manufacturers are responsible for criminal misuse of firearms. After strong opposition from the NRA the lawsuit was dismissed, but continues to show the lengths certain states will go to in order to promote their own policies or agendas.

## **BUDGETARY IMPACTS**

It is obvious that the costs associated with this legislation are very significant. Millions of dollars have been spent, by the NRA and its opponents to impact legislative efforts in this area. It should be noted however that the costs go far beyond the monetary costs associated with these efforts. As explained in the paragraphs below it comes down

to issues of what the NRA believes are peoples' fundamental rights and what its opponents believe was not the intent of the Second Amendment. According to the NRA mission statement, "The most important benefit of NRA membership, however, is the defense of your Constitutional right to keep and bear arms. NRA-ILA tracks the issues and alerts members about legislation involving firearms and hunting at the federal, state and local levels of government. Successful legislative action begins with you—the individual member." (*Your NRA Membership*, 2008, p.2) In summary NRA members have the resources to educate themselves on the direction of the country.

The aforementioned benefits of the National Rifle Association are each significant in their own right, however the most significant benefit of the NRA is the voice that it gives to its members in determining the direction of the country. Cost and benefits cannot be discussed without considering the impact an institution has on human life.

There are two sides to the story. Pro gun control advocates will say that stricter gun control will save more American lives. One such advocate is Tom Mauser who lost a son in the Columbine shootings. In his protest held at the NRA's Fairfax, Virginia headquarters he posed the question of why the NRA did not support legislation banning the type of assault rifle used in the Columbine shootings. On the contrary, organizations such as the NRA believe that limited restrictions on guns will not limit homicide rates in America, as evidenced by the Washington, D.C. ban on handguns in 1976. After the ban the city's murder rate increased, and for a time Washington, D.C. held the unenviable honor of having the highest murder rate in the country.

## **PUBLIC OUTREACH**

The National Rifle Association is arguably the most vocal and active non-government organization (NGO) in the United States today. Today it carries a membership that exceeds four million. On a consistent basis the NRA sends out mailers to its base in order to inform them of proposed legislation that will be acted on in the future. As stated earlier the NRA goes to great lengths to have an impact on the course of the nation. This political machine uses mediums such as television, radio, personnel correspondence, and magazines to spread the word of the organization.

There are also a large number of people who oppose both the NRA and its views on gun control. This active population believes there should be more strict regulations surrounding firearms. While this group proves to be large in numbers, they have yet to mobilize into a single unit that can rival the power and influence of the NRA.

Since its inception the National Rifle Association has split along party lines. Typically those who support the NRA, and interpret the Second Amendment as the right for all men, with few exceptions, to bear arms align themselves with the more conservative Republican Party. On the other hand those who believe in more strict regulations on gun control tend to favor the more liberal Democratic Party.

## **CONCLUSION**

Over the long- term the primary agenda of National Rifle Association is clear. They will continue to fight for the right to bear arms with few exceptions. In the short-term however, their overall effectiveness will depend on the political party in charge in

Washington. As indicated in this paper, the current balance of legislative power favors the NRA. Over the past eight years, with a Republican in the White House, and for most of that time a Republican controlled Congress, the NRA has maintained its position as a policy influencing body.

As the *District of Columbia v. Dick Anthony Heller* Supreme Court case concludes, and a verdict gets handed down this June, it is inevitable that both the National Rifle Association and those who oppose it will continue to be at odds with one another. Due to the fact that neither side is willing to compromise, this issue will undoubtedly be large part of American politics for years to come.

Research for this analysis of the NRA included a conversation with Mr. William Chatterton, a member of the NRA for the past fifty years. It is his feeling that if the NRA concedes any form of gun control, it opens the door for future regulations against their interpretation of the Second Amendment and the right to bear arms. When asked whether or not he believes the NRA is responsible for any of the gun violence that is prevalent today, he responded by saying that it is not the people who obtain firearms legally who are the problem, it is the ones who obtain them through illegal ways that are the cause of problem. He continued by claiming that the current regulations for obtaining a firearm are sufficient and the main concern should be taking the illegal weapons out of the hands of people who intend to use them in illegal ways. (Chatterton, William. 2008).

In summary, it can be stated that the controversy around the NRA and Second Amendment will be an issue that will be debated in the halls of Congress for many years to come. As shown in this paper people on both sides of the issue feel very strongly about

their positions and will continue to do so. In the end however, a vigorous examination of the issues and healthy debate is the only way forward.

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## Gun Regulations

# **NATIONAL FIREARMS ACT OF 1934**

By Spencer McKeivitt

## **ABSTRACT**

Most Americans can tell you very little on the topic of gun control, let alone the Act that started it all and the happenings surrounding that enactment. The National Firearms Act was the first piece of legislation in the 232 year history of this country dealing with the definition of the 2<sup>nd</sup> Amendment. This very important piece of legislation, brought about in turbulent times, upheld under false pretexts, and in response to the development of very lethal weapons, has been the source of the heated debate currently unfolding in the Supreme Court.

## **INTRODUCTION**

The United States of America declared its independence on July 4<sup>th</sup>, 1776 from the monarchy of England. War ensued and for the first few years the battles were fought with whatever arms the men of the colonies had with them at home. Since the end of that war, from the formation of the United States until 1934, the right to bear arms had never been altered on the federal level. There had been city wide ordinances against guns and restrictions in states, (Worsnop, 1994) and in 1919 Congress imposed the War Revenue Tax Act on the manufacture of firearms and ammunition, (Worsnop, 1994) but the federal government had never once tampered with the definition of the 2<sup>nd</sup> Amendment. 158 years passed with no federal regulation, but after prohibition in the roaring twenties, and the support of the American public for lawless men smuggling liquor, these groups began to be too well armed, and the violent clashes between gangs and police, as well as

gangs and other gangs, were becoming far too common. Law enforcement was doing what it could, but Congress felt more had to be done.

In this research paper the reasons for the National Firearms Act, as well as what this act meant for the country, will be analyzed. The history of the machine gun is an important part of the research because it exposes just how this very deadly piece of technology came to be, and because of the efficiency of this technology, shows why the National Firearms Act aimed to keep this technology out of the hands of the criminal population. The outcomes of two major Supreme Court cases further illuminate the importance of this legislation, as each case tests the reasons behind the enacting of the National Firearms Act: *Sozinsky v. U.S.* (1937) and *U.S. v Miller* (1939).

The National Firearms Act of 1934 was the first act of its kind, and the first step in federal gun control. Prior firearm bans, such as the Sullivan Act in New York prohibiting pistols and revolvers to all citizens without a license and just cause (Worsnop, 1994), and the early colony of Massachusetts which “...forbade the carrying of ‘offensive’ weapons in public places” (Warsnop, 1994), were already on the books in other states. These other bans and regulations gave the United States Congress the idea to prohibit certain guns throughout the nation.

The National Firearms Act put an excise tax on machine guns and other firearms. This was an attempt to make the price of buying one of these weapons high enough to ensure that common street gangs would not be able to afford the heavy firepower they easily had obtained before. This act also made the United States government’s future efforts to regulate firearms much easier.

## **METHODOLOGY**

This research was conducted using a literature review, including online resources, and an expert interview. The resources of the King Library were used, as well as scholarly journal databases. Expert information came from Alan Gottlieb, the Chairman of The Citizens Committee to Keep and Bear Arms, who described his point of view on fire arms regulation.

## **LITERATURE REVIEW**

*Gun Control*, by Worsnop is a very comprehensive compilation of past and present gun control issues, and past conflicts between political parties in this country. It provides the most comprehensive information relating to the earliest ban of firearms by Massachusetts. This article has served as a source of reference for further research. *Gun Control* contains a great overview of the National Firearms Act of 1934 and *U.S. v Miller*, but not many details.

*Gun Control Standoff*, by Jost is very much like Worsnop's compilation where both sides of the argument are clearly stated. In this article more modern day arguments and statistics are included, such as a background section on the National Firearms Act which is referenced and defined, as well as *U.S. v. Miller*.

*Whose Right on Bearing Arms*, by Reynolds is an excellent defence of the 2<sup>nd</sup> Amendment and specifically aims at the problems with the National Firearm Act. The opinions and facts quoted are very specific, which helped my research focus. This article

is a very one sided excerpt, pointing to the factors and opinions of the country and the government at the time the National Firearms Act was put into law.

*As Rambo Goes, So Goes the Nation*, by Sautter discusses the registration of machine guns before the 1986 legislation that would make all machine guns after that date illegal. This article states that up until 1986 with the passing of “The Firearms Owners Protection Act”, a bill to forbid the purchase of newly manufactured machine guns as well as limits the enforcement of the United States Bureau of Alcohol Tobacco and Firearms, only 122,000 automatic weapons had ever been registered under the National Firearms Act. In the forty day window of opportunity allowed by President Reagan before he signed the bill into law, an additional 100,000 machine gun registration applications were submitted. This statistic is impressive but it is understandable that many automatic weapons were unregistered. “. . . the Supreme Court in 1968 held in the *Haynes* case that a person prosecuted for possessing an unregistered NFA firearm had a valid defense to the prosecution – the registration requirement imposed on the possessor of an unregistered firearm violated the possessor’s privilege from self-incrimination under the Fifth Amendment of the U.S. Constitution.” (ATF National Firearms Act handbook)

The 1940 *Michigan Law Review*’s article on the 1934 National Firearms Act is another very insightful defense of the states’ rights. Through out the article it is pointed out that Congress’ “taxation” of machine guns and sawed off shot guns was nothing more than its attempt to regulate crime after the boom during prohibition. In cases such as *U.S. v Sozinsky* where the tax is being questioned, such a high tax on things can be considered

a regulation. The Supreme Court upheld that notion, and allowed Congress to keep the power to regulate commerce through taxation. The Supreme Court cases following this act have a strong influence on present day rulings in the field of Second Amendment rights.

*The Wisdom of Gun Prohibition*, by Kaplan is another very convincing work defending gun rights and showing how prohibition of firearms at this present day would not work. This could be combined with the statistic earlier about the automatic weapons in 1986, where even though it was illegal to possess these weapons 100,000 people came forth to register their weapons. It is this kind of thinking by the population and by responsible gun owners that would make a total prohibition of firearms impossible. The normally law abiding would ignore the law and become the lawless overnight, and hundreds of thousands of firearms would sit in lock boxes across the country not drawing any attention. Kaplan also introduces a comparison between marijuana use and guns in the US, if both were prohibited. Currently laws regarding cannabis are most effective against middle aged and older adults who have almost no interest in the drug, but have almost no effect in the high school aged kids or the poor. Those factions have no problem finding this banned substance and using it, even though they are most likely to harm themselves through its use.

The *University of Chicago's Law Review* 1964, in the article "Federal Regulation of Firearms Sales," is a very interesting and complete review of the intentions of firearm legislation and transport through the mail service. This article was written before the 1968 Gun Control Act and outlines what will be fixed and what this Act, which was

passed, hopes to accomplish. Some discussion of the National Firearms Act and *U.S. v Miller* are included, but most of this article is dedicated to the Gun Control Act.

*The Social History of the Machine Gun*, by Ellis and the *Pictorial History of the Machine Gun*, by Hobart both discuss the development of firearms and the technological advancements needed to develop a repeating gun capable of jumping from two or three shots a minute to over 1200 shots. The information contained provides background for the section on the history of the machine gun, and for understanding just how deadly these machines are compared to the common soldier. Both are feared in battle, but the machine gun is capable of decimating entire squads of men very quickly, whereas the common soldier before the machine gun needed a great deal of time to do any real damage to a large group of opposing soldiers.

*The Lawless Decade*, by Sann describes the prohibition era which lasted from 1920-1933. Mobsters and gangs ran this era with the help of crooked police officers and the general public. With the enactment of Prohibition, common citizens became small time criminals by visiting a speakeasy to enjoy an alcoholic beverage. It is through this alienating of the general public that the government lost control of the populations in many of the largest cities across the nation. Wars between liquor smuggling gangs ensued, and murder was evident throughout the cities. It was in response to this new lifestyle that the National Firearms Act was created. Congress was attempting to control the gang violence by making their favorite weapons too expensive for them to purchase.

*The Gun Control Movement*, by Carter describes the formation of the NRA and many of the reasons behind both sides of legislation. The coordination of the country in

the time of this Act is discussed, as well as the influence of the National Rifle Association in the final make up of this law.

*The Gun Control Debate*, by Abrams defines the 1934 National Firearms Act and has a long description of *U.S. v Miller*, as well as a few articles written by scholars years after regarding the outcome and the effects since that time.

The complete, revised *Bureau of Alcohol, Tobacco, and Firearms Handbook* is available online. It outlines the law as was set in 1934, as well as any amendments to the law, and a list of guns labeled machine guns or destructive devices under this act.

## **BACKGROUND**

What is a machine gun? According to the Bureau of Alcohol Tobacco and Firearms, the enforcers of the 1934 National Firearms Act, “The National Firearms Act, 26 U.S.C. 5845(b) defines ‘machine gun’ to include any combination of parts designed and intended for use in converting a weapon to shoot automatically more than one shot, without manual reloading, by a single function of the trigger.” (ATF website) Machine guns have drastically changed the face of warfare in the 20th century and forever. In every nation across the world currently, every soldier sworn to protect his country is given the ability to inflict massive casualties using his assigned machine gun.

A century ago the common “machine gun” was nothing but a dream in the minds of every military officer on the battle field. A machine that could deliver a large amount of continuous fire into opposing forces could change the outcome of any battle and save the lives of soldiers on the officer’s side. The development of such a device was largely

hindered by the lack of technology that is taken for granted in current day firearms.

Earliest records of any type of rapid firing gun date back to 1339 with the invention of the “Ribauld,” a device with multiple barrels placed close enough together so that the firing holes on the barrels could be ignited in rapid succession by one soldier. This creation was primarily used to penetrate the thick armor of pike men who defended the archers in battle. (Hobart, 1972, p.12) The advancement of self contained munitions and the moving away from original black powder allowed inventors to experiment with new designs leading to the development of what we now call the machine gun.

As firing mechanisms became more sophisticated, and ammunition became more easily handled, Organ guns began to spring up on battle fields across Europe. Organ guns are essentially multiple barreled guns all placed on a cart or dolly for movement, with the ability to fire all barrels at once. An example of such a weapon was used in the end of the 15<sup>th</sup> century under the command of Luis XII. His weapon consisted of fifty barrels capable of firing simultaneously. (Hobart, 1974, p. 12)

The first idea of continuous fire was brought about by James Puckle in 1718. Puckle’s gun, which he called “A defence,” (Hobart , 1974, p.13) was comparable to modern revolvers. This gun had a single barrel and a rotating, chambered cylinder. Pickle’s gun was fired by a single flint lock action repeated for every chamber after hand turning the cylinder and matching up with the barrel. This early rapid-fire weapon was recorded as firing 63 times in 7 minutes in the rain by a single man, quite a feat in comparison to the usual 4 or 5 times a common rifle could be discharged per minute.

The first automatic loading guns were developed in the United States just prior to

the Civil War, and used throughout its duration. With the development of self contained paper cartridges guns were built with the ability to be reloaded much quicker than the conventional loose powder designs. (Hobart, 1974, p. 16) The most notable gun of this period was a design by Richard Joseph Gatling, a doctor from North Carolina. Dr. Gatling developed a gun capable of feeding itself ammunition and cartridges, with an internal hammer to crush the firing cap inside the barrel, igniting the charge. This was all set in motion through the use of a hand crank, much less time consuming then relocking the hammer each time to fire.

The “Gatling Gun” was an enormous success and was adopted by the United States militaries, as well as other nations, with its just under 1000 round per minute firing rate and moderate accuracy at long ranges (Hobart, 1974, p. 19). A comparative test was conducted in 1869 by the Prussian military between 100 soldiers firing the same amount of ammunition as one Gatling gun at 800 meters. The results showed that the soldiers were able to hit the target 27 percent of the time, while the Gatling fired by one man was able to hit the target 88 percent of the time. (Hobart, 1974, p. 19) This was quite a demonstration of the ferocity and power an army carting a Gatling gun at that time in history would have.

The Gatling was not the first machine gun, but the best example of a universally accepted design in which one or two men could do the work of 100 soldiers. More modern machine guns are belt or magazine fed, increasing ammunition capacity to the hundreds. The development of brass-enclosed ammunition, all self contained and resilient to the elements or to travel, made the workings of future guns more reliable (Hobart,

1974, p. 22). It is much easier to create a machine capable of pushing one metal rod into the chamber, than it is to create one with a paper cartridge and bullet coming from separate compartments.

The machine gun is a relatively new invention based on wartime necessity, created only in the past one and a half centuries. This creation put the ability to fire multiple potentially deadly projectiles into the hands of one man. That ability drastically changed the way future wars were fought, and changed the deadly interactions domestically between criminals and police forces.

Machine guns, although designed only for the use in wars, quickly made their way into the hands of civilians. The passage of Public Law 149 authorized the sale of U.S military weapons at production costs to NRA-sponsored clubs (Carter, 1997, p.66). As warfare changed throughout World War I, thanks largely to the use of machine guns, smaller “light” machine guns were developed by firearms companies for a single soldier to be able to run and move individually, but still have the ability to fire many rounds in a short time. These light machine guns, such as the Thompson submachine gun, were designed to give soldiers the effectiveness of a machine gun but the mobility of a common rifle. These were available to military, police personnel, and private citizens, and could be ordered through mail by virtually anyone in the 1920s and 1930s.

January 16<sup>th</sup> 1920 was a sad day in the lives of many Americans living in that time. January 16<sup>th</sup> was the first day of the newly enacted Eighteenth Amendment, which made illegal the manufacture, sale, or transfer of alcohol, but with this prohibition opened the doors for lawless men to supply the alcohol starved masses (Sann, p.23). This was

great business and because of the general acceptability and the popular lust for alcohol, business for “rum-runners” soared, making men such as Al Capone millionaires by breaking a law that it seemed even the “Dry’s” were breaking at times (Sann p.24).

With big business comes big competition, and when the competitors are lawless men to begin with, armed conflict is likely to ensue. Soon after the bootleggers set up shop across the country, primarily in the largest cities of the time, gangs and rivalries began with each band of criminals wanting more than they had. This sentiment led to the rising of the most notorious gang figurehead in American history, Al Capone (Sann p. 208). With large organized rackets, and a public more than willing not only to accept this crime but to leap at the goods being offered, a well armed criminal force was not far off predictions. The machine gun or any automatic weapon is quite a force to be reckoned with, and for gang members they were just the tool needed to neutralize not only opposing gangs, but also the police. So for thirteen years, gang wars erupted and calmed with the sound of a Thompson sub machine gun, on both sides of the law. Word structure confusing?

The most violent use of these “gangster weapons” was displayed on February 14<sup>th</sup>, 1929 in what has become known as “the St Valentine Day Massacre.” At 10:30 am at 2122 North Clark Street in Chicago seven men were waiting inside a parking garage for their boss to show up and give orders (Sann p.204). Five of the men were gangsters allied to Bugs Moran, the other two were local men who knew a few of the boys, but none of that mattered soon enough. A black car pulled up looking very much like a police car, 4 men got out, two dressed like police, two in regular street clothes, and another

dressed like an officer waited in the car. The four men walked into the garage, confronted the seven men inside with two Thompson sub-machine guns and two sawed off shot guns. The seven victims were lined up facing the brick wall and mowed down by the barrage of lead those weapons were capable of firing. The four men calmly walked out, the two in uniform held the other two at gun point with their hands in the air, making it seem to neighbors and on-lookers as if the police were just rounding up some criminals. The real police would arrive soon after to discover the scene (Sann p.204).

This show of lawlessness and inability of the executive branch to control this violence prompted the legislative branch to take measures that some would find unconstitutional and a violation of the rights given to the states. 1933 was a busy year for legislation, and the US government commenced a large effort at breaking the gangs that had ruled the last decade. It is in this year that prohibition was finally revoked, largely cutting into the practices of the organized gangs where the largest majority of their funds came from bootlegging. The legalization of alcohol meant that citizens were no longer criminals and no longer had to support these gangs, and in the end of 1933 the National Firearms Act was being drafted to go into law in 1934.

The National Firearms Act of 1934 was the first federal piece of legislation having to do with gun control. There was one earlier bill passed in 1919 creating a manufacturing tax on ammunition and arms to create revenue during the war (Warsnop). The National Firearms Act, or “Machine Gun Act” as it had come to be known, placed a \$200 tax on the sale or transfer of any machine gun, shotgun or rifle with a barrel under eighteen inches long, silencer or muffling device, as well as any explosive device said to

be not commonly in use for a state militia (ATF website). Furthermore the NFA placed an additional \$200 yearly tax on the manufacturer and distributor of such weapons, and made the transport of weapons defined under this act across state lines illegal. This act also had the consequence of requiring a registration of the weapon; purchasers were identified upon payment of the tax. (Warsnop)

\$200 does not seem like a large amount in present day terms, and in fact this same tax still stands today. In 1934 when this bill was signed into law \$200 was an average working man's salary for five months. In comparison to today, California's average yearly wage, calculated over a three year average, is \$53,770, with a \$431 margin of error (Dept. of Census data). In these terms the tax to purchase a machine gun would be \$22,404. This tax was the same on sales of sawed off shot guns, silencers, or any device the Department of the Treasury felt was not useful to a common militia. At that time a sawed off shotgun cost the average consumer \$10, comparable to a week's work, and in today's currency (based on the provided data) that figure jumps to \$1,034. On top of this the purchaser had to pay the same tax imposed by the National Firearms Act of \$200, or in current dollar correlation, \$22,404. This was the reason so many gun buyers were outraged.

To fully understand why the National Firearms Act was so influential it is important to understand the events of the prior decade. Prohibition was in effect from 1920 till 1933, and throughout this thirteen year period the American public had been all the more eager to help gangs and criminals bring in illegal alcohol (Sann p.204). Criminal organizations began to spring up and take over entire cities. The most notorious was Al

Capone, who through his underhanded dealings and rum-running amassed a great fortune in Chicago, and even managed to buy off a few state representatives

The first trial of the validity of the National Firearms Act was *Sonzinsky v. U.S.* (300 U.S. 506) (1937). Sonzinsky was an arms dealer in Illinois who had been charged with not paying the \$200 dealer's tax prescribed by the 1934 National Firearms Act on two occasions. The argument made by Sonzinsky was, why should he have to pay a \$200 tax every year and then charge each customer an additional \$200 tax for the purchase of a sawed off shotgun that costs \$10? Sonzinsky was arguing the validity of the NFA of 1934, on the basis that this high a tax was not intended to produce revenue; rather, Congress had set this tax to regulate the sale of this commodity, which would be a usurpation of police power of states (Michigan Law Review).

The court's response was stern and absolute, stating that, "Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed. But a tax is not any less a tax because it has regulatory effect." (300 U.S. 506) This put into effect a precedent in which Congress was given the right to regulate commerce as it wishes through its right of taxation.

*U.S. v Miller* (307 U.S. 174) (1939) followed. This case was that of Jack Miller and Frank Layton, two men who were gang members and suspected bootleggers, traveling just into Arkansas, when Federal treasury officers stopped the duo on suspicion of boot legging. On the seat in Miller's truck was a sawed off shot gun, illegal to transport across state lines, and neither men had paid the federal tax on the weapon. First, trial courts sided with law enforcement, determining that the National Firearms Act was

constitutional. Second, the Federal Appeals Court struck down the ruling, stating that this gross taxation was set to be a restriction, not as a federal source of revenue (*Federal Regulations...*). Lastly the Supreme Court ruled in favor of the trial court upholding the National Firearms Act as constitutional.

This case was shaky at best from the start (Dizard, *et al*, p.493). The federal officers had been staking out Miller and Layton on suspicion of boot legging, and only took the men in after they did not find any alcohol on them, nor at their home. At the time of argument before the court in their defense, the men were scheduled to argue that a sawed off shot gun was an implement of a current day militia and had been used in the trenches of World War I by American forces. On the day of defense arguments, both men and their defense council were not present. Miller had been shot and killed, Layton was incarcerated and not released to testify, and the defense council merely disappeared (Dizard, *et al*, p.493). So on the day of argument the Supreme Court only heard one side, and ruled that without any proof otherwise a sawed off shot gun held no "... reasonable relationship to the preservation or efficiency of a well regulated militia." (Abrams p.62)

According to this ruling, there is no right of the individual to keep and bear the regulated arms; but as a militia, the public was able to provide for their own defense. This argument is complicated as in the ruling the court writes, "...the Militia comprised all males physically capable of acting in concert for the common defense." (Abrams p.62) An interesting conflict is introduced in this ruling: no citizen has an individual right to bear arms, but at the same time every able bodied man is a member of the militia and is required to provide his own arms and ammunition in case of dire national or state need.

In this context how can the federal government deny the possession of machine guns, when the use of an automatic weapon against an invading force or unjust government would be more effective than a revolver? In current day wars what should stop the militia from possessing grenades or rocket launchers in the case that this force arrives in armored transport? In the end there was no Supreme Court ruling on this case, the court sided with the lower courts but never voted. The case was sent back to federal appeals court to determine if, "...possession and use of a sawed-off shotgun has some reasonable relationship to the preservation and efficiency of a well-regulated militia" (Worsnop, R. L.).

## **Conclusion**

My findings through out this process have been very straight forward and almost everything I read pointed to the same conclusions. Even in approaching this topic with no opinions or preconceived idea, the findings all point to the fact that Congress passed this bill primarily to flex what little power it has in the realm of judiciary. Even the handbook for the National Firearms Act, put out by the Federal Bureau of Alcohol Tobacco and Firearms (ATF), clearly states,

While the NFA was enacted by Congress as an exercise of its authority to tax, the NFA had an underlying purpose unrelated to revenue collection. As the legislative history of the law discloses, its underlying purpose was to curtail, if not prohibit, transactions in NFA firearms. Congress found these firearms to pose a significant crime problem because of their

frequent use in crime, particularly the gangland crimes of that era such as the St. Valentine's Day Massacre. The \$200 making and transfer taxes on most NFA firearms were considered quite severe and adequate to carry out Congress' purpose to discourage or eliminate transactions in these firearms. (ATF National Firearms Act Handbook)

This is stated in paragraph two in the introduction to the handbook and clearly shows the intentions of Congress, and the unwillingness of the Supreme Court to interfere. The only logical explanation would be that the Supreme Court, along with the public and other branches of government, knew why the Act was put into effect but was unwilling to strike it down due to the overwhelming gang problem.

This act gave law enforcement another angle to attack the larger rackets, but in the long run diminished the rights of law abiding gun owners, as the NRA argued

(Carter, p.67). The rights of every citizen to keep and bear arms against the oppression of any form should be a protected and sacred right, next to the right to freedom from oppression in speech or religion, but machine guns, as I have shown, are extremely deadly developments of technology. Keeping them out of the hands of criminals is worth the 10 day waiting periods and limitations on which weapons the public can obtain.

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# **THE GUN CONTROL ACT OF 1968**

By Jenna Musto

## **ABSTRACT**

This Article will examine the Gun Control Act of 1968, how this act changed previous gun control laws, and whether or not the passing of this gun control law decreased the amount of gun related crimes. Information was gathered through a literature review which included an interview with a local Attorney. The Gun Control Act of 1968 was an extremely influential act in helping form gun control laws to date, but this act had too many loopholes and was not properly enforced; therefore the act itself did not help decrease crime rates in the United States.

## **INTRODUCTION**

In 1968, the United States Congress signed a Gun Control Act, which was quickly passed in the heat of the moment, following the assassinations of Dr. Martin Luther King Jr. and Senator Robert Kennedy. This act created extensive limits and restrictions on the purchasing, importing, exporting, and manufacturing of firearms, and required records that were to be kept by gun manufacturers. As a result of these strict provisions, many citizens were found guilty of illegally distributing and obtaining firearms.

Since this act has been passed, crime rates involving firearms have not dropped as the government had hoped, rather crime rates are increasing. This act was created in an attempt to limit the type of people that could legally own a firearm. Even though there

are extensive limitations, law enforcement is still facing the problem of illegal distribution of firearms to people who are not legally allowed to own them. Many of the provisions created by the Gun Control Act of 1968 have been the backbone of gun control laws in the United States.

### **RESEARCH QUESTION**

The Gun Control Act of 1968 was one of the most influential gun control acts passed by Congress, although there has been much controversy over whether or not this act and its provisions violate the rights of law abiding citizens that own and manufacture handguns. Are the strict provisions within the Gun Control Act of 1968 violating the rights of gun owners and gun suppliers, and how have these stricter provisions been beneficial in lowering gun related crime rates?

### **THESIS STATEMENT**

The Gun Control Act of 1968 was created by Congress in an attempt to combat the distribution of illegal firearms both by private parties and manufacturers. The desired result of this act was to lower gun related crime rates, although after this act was passed gun related crime rates rose drastically.

### **METHODOLOGY**

Research for this paper was conducted using a literature review and an expert

interview. The Literature Review was based upon peer reviewed journal articles, government documents, and an interview conducted with Robert Cummings, Attorney at Law.

## **LITERATURE REVIEW**

Cook, P. (1973). The “Saturday Night Special”. *The Journal of Criminal Law and Criminology* explains the phenomenon of the gun called a “Saturday Night Special,” which is a name for a type of inexpensive handgun. A majority of these guns are sold to juveniles or felons that resort to buying these poorly made firearms because they could not legally buy a firearm from a store due to their background

The Gun Control Law of 1968, Public Law lists the provisions of the Gun Control Act of 1968. The Gun Control Act of 1968 was passed quickly after the assassination of Dr. Martin Luther King Jr. and Senator Robert Kennedy. This act was also known as the “Omnibus Crime Bill”.

Zimring, F.E. (1975). Firearms and Federal Law: The Gun Control Act of 1968. *The Journal of Legal Studies*, is a scholarly journal article that explains the Gun Control Act of 1968 which was passed by Congress in order to “provide support to Federal, State, and local law enforcement officials in their fight against crime and violence”. The increase in urban gun ownership paralleled the increase in urban crimes which were gun related; gun homicides had increased 89 percent.

Personal interview with Robert Cummings, Attorney at Law. Robert Cummings formerly worked for the Santa Clara District Attorney's Office, and now works as an independent attorney in Redwood City. Many of his clients are juveniles who are being tried for committing a crime where a firearm was involved.

## **BACKGROUND**

Prior to the Gun Control Act of 1968 the U.S. gun market was flooded with guns being produced in foreign countries that were being imported into the U.S. The production of guns was shifted from the creation of guns for the government's demand for war, to guns being created for civilians who used them for leisure activities. Guns were becoming more popular, and the National Rifle Association, which was created after World War I, promoted gun safety and training for adults and youth.

In 1958 gun dealers were required to keep all records for ten years and mark all legally manufactured guns with serial numbers. The exception was .22 caliber rifles, because these rifles were rarely used, and then only for hunting small game and target shooting (Gold, 2004, p.56).

Prior to 1968 the public was not really concerned with gun control laws, and the government did not introduce many new laws on gun control. With the mass importation of guns, the crime rates began to increase dramatically. Since the 1930s the violent crime rates had been declining, but according to FBI reports, murder rates rose

from 4.6 for every 100,000 people in 1950 to 7.9 per 100,000 in 1970 (Gun Law News). Not only were the crime rates increasing, but the number of young people responsible for these violent crimes soared.

Studies conducted by the Senate Subcommittee on Juvenile Delinquency in the 1960s showed that “criminals, immature juveniles, and other irresponsible persons” were able to obtain guns through mail order. When the government denied these people the rights to buy guns legally, they took it upon themselves to obtain guns illegally in other ways.

The United States was facing a huge problem with the mass importation of firearms. It is estimated that by 1968 America had imported more than 1.2 million handguns and 544,000 rifles and shotguns a year (Bijlefeld, 1997, p. 67). Guns being imported from other countries often were not marked with serial numbers, nor were they ever registered, because they were often brought to the United States by private vendors with the intentions of selling these firearms illegally on the streets. This created a large problem for law enforcement. With the mass importation of these firearms officers had to go out on the streets assuming that anyone they come into contact with might possess a concealed firearm.

Mail order guns were becoming a problem; supplying firearms and ammunition to people who were categorized by the government as not legally able to own guns. These mail order guns were extremely hard to track, and were often used in violent crimes. One

of the most well known crimes committed using a mail ordered gun was the assassination of President John F. Kennedy. On November 22, 1963, President Kennedy was killed in Dallas, Texas by Lee Harvey Oswald using an Italian rifle, which Oswald had obtained by mail order. As a result the government passed the Federal Firearms Act of 1963, which banned the sale of mail order handguns. President Lyndon B. Johnson then supported the Dodd Bill in 1965 which would raise gun dealers' fees, and bar the sales of handguns, rifles, and shotguns to any person under the age of twenty-one.

In 1968 gun control laws became the top priority of Congress and citizens due to two public assassinations of key leaders of the United States. In 1968 Dr. Martin Luther King Jr. was assassinated by James Earl Ray. On June 5, 1968, a Jordanian immigrant used a pistol to murder Senator Robert Kennedy as he was campaigning for president in Los Angeles, California. On June 6, 1968, Congress signed the Omnibus Crime Control Act which made it illegal to ship handguns to a different state.

## **LEGAL ISSUES**

The Gun Control Act of 1968 made history because it was the first major revision of the gun control law passed since 1938. Dealers could ship guns to dealers in other states, but they were not allowed to ship guns to private owners outside of their own state. The importation of guns from foreign countries could only be done by dealers, although this law completely banned the importation of military firearms. The law

increased the prison term for criminals convicted of using a gun while committing a crime.

This act amended the previous laws limiting interstate trading of firearms. As stated by Congress, the purpose of this act was to provide support to Federal, State, and local law enforcement. This law was not created to place a burden upon law abiding citizens, but to better combat the illegal distribution of firearms (Gun Law News). This act was still going to protect the ownership rights of those who used firearms in hobbies such as shooting, and also allowed citizens to own guns for personal protection of their homes and businesses. Citizen would only be prosecuted for being in the possession of guns which were not legally registered, or being in possession of a firearm if the citizen was a minor or previously convicted felon.

Loopholes in the Gun Control Act of 1968 undermined the government's attempt to decrease the number of hand guns being sold in the U.S. Citizens that had a FFL could still import guns legally throughout the U.S. as long as these guns were considered to be "particularly suitably adapted to sporting purposes". Congress had failed to clearly define "suitable for sporting purposes," so mass importations of firearms continued. Many people imported guns based on the justification that the guns were for sporting purposes, mostly shotguns and rifles. There were stricter restrictions on the importation of handguns. Arguments arose when dealers were told that they could not import handguns from outside of the United States. These dealers argued that many smaller guns were used for sporting purposes, such as target shooting. Although these small handguns were illegal to import, manufacturers in the United States could easily produce them, and

they could legally be sold. The government also failed to ban the importation of gun parts. Citizens could order small gun parts from other countries and have these parts shipped to the United States. When these parts arrived they used the components to make the small handguns that the government had banned from being imported.

## **ANALYSIS**

The Gun Control Act of 1968 mainly focused on limiting the number of firearms that were being imported to the United States from other countries. While much of the government's effort was focused on gun control on an international level, there were not enough law enforcement agencies in the United States to combat the gun control problems within the states. The same guns that were illegal to ship from outside of the country were being produced within the states, and being sold in bulk to citizens who did not have the right to own firearms.

When buying a firearm from a dealer, the person purchasing the gun is required provide their background information. At the time technology did not exist to support a central database of personal information, so it was very hard for dealers to know whether or not the information being disclosed was accurate.

Guns which were being illegally sold on the streets were known as "Saturday Night Specials." This term refers to poorly made, cheap pistols of low quality. It is estimated by the Bureau of Alcohol, Tobacco and Firearms that 54 percent of handguns manufactured in United States since 1974 would have failed manufacturing quality criteria (Cook). These guns were poorly made, and often as a result they would shoot off

unexpectedly, or the gun would blow up when it was fired. Saturday Night Specials have been an ongoing problem that law enforcement has encountered. These poorly made guns are often sold on the streets to convicted felons and minors who could not legally purchase a gun from a dealer.

Attorney Robert Cummings stated that there are not enough law enforcement officers in comparison to the population of the United States. Many of the clients Mr. Cummings has represented have been juveniles who come from low income backgrounds. These juveniles often fall into gangs where guns are sold and traded on the streets. It is extremely easy for these juveniles to obtain firearms because they are created in abundance or stolen, then illegally sold for an extremely low price. Studies conducted by the Bureau of Alcohol, Tobacco and Firearms have found that Saturday Night Specials firearms are often the weapons responsible for street violence and homicides. (Personal communication, Cummings)

In passing the Gun Control Act of 1968, Congress had hoped for an overall decrease in gun violence. Gun related crime rates never dropped after the passage of the 1968 law. Instead the rates began to climb over the years after the act passed. In the United States the rate of handgun homicides tripled over a five year period (Zimring). While this act may have been one of the strictest gun control laws, it had too many loopholes and there simply were not enough law enforcement officials to control the amount of guns that were being illegally sold and traded amongst people on the streets.

## **BUDGETARY IMPACTS**

The Bureau of Alcohol, Tobacco and Firearms was put in charge of enforcing the federal firearms laws. There was not enough money to employ the number of law enforcement officials that would be needed in order to accurately see to it that all of these laws were being enforced when it came to both the importation of guns and the manufacturing of guns. Research has estimated that there were over a half-million violations of the Gun Control Act because law enforcement agencies were not sufficiently staffed, and they did not have enough time to focus solely on gun control issues.

## **PUBLIC OUTREACH**

The passage of the Gun Control Act of 1968 was widely publicized by the media, due to the assassinations of Dr. King and Senator Kennedy. One criticism is that this act was passed in the heat of the moment following those assassinations. It was only six days after the assassination of Senator Kennedy that Congress passed the Gun Control Act of 1968. When this act was first passed it was widely supported by the public, although over time it became apparent that there were many loopholes in this act. These loopholes led to the declined of the public's support of this act. The Gun Control Act of 1968 has been criticized by gun owners and distributors, because many of the provisions within this act take away the opportunity for law abiding citizens to own firearms.

Both those who supported the Gun Control Act of 1968 and those who opposed the act found faults in the act and its provisions. Gun control proponents opposed the law

because it did not ban all cheap handguns that fell into the category of the Saturday Night Special, and it did not require registration of all firearms or licensing of all gun owners, two provisions they believed were crucial in gun control. Gun rights supporters argued that this Act was bad because it unfairly deprived citizens of their right to own guns.

## **CONCLUSION**

The Gun Control Act of 1968 was a landmark in strengthening the requirements for gun importation and manufacturing. Since 1968 many other gun laws have been proposed and passed, and many of these acts included provisions that were in the original 1968 act, and have added or altered the original provisions.

The United States is still faced with the mass production of “Saturday Night Specials”. There is still a problem in combating the illegal selling of firearms on the streets to people who are not legally allowed to purchase firearms. Gun related crime rates still continue to rise in urban areas. People continue to feel the need to supply themselves with guns as a form of protection, and these often illegally purchased guns continue to be responsible for a majority of homicides that occur in urban areas.

Over the years a major gun control issue has been with juveniles that obtain guns and use them in spur of the moment crimes. Studies have shown that those juveniles that carry concealed weapons usually do not have a premeditated plan to use these firearms, rather they end up using them in a spur-of-the-moment manner, not thinking of their actions before they carry them out.

The best solution to this problem would be for the government to hire more law

enforcement personnel. In order for this to happen there would need to be a substantial amount of money within each state to hire the adequate number of officers to balance the officer to citizen ratio.

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# **THE FEDERAL FIREARMS LICENSE**

By Sheila Mahmood

## **ABSTRACT**

This paper will illustrate how the Federal Firearms License came to be. Overtime, the public's concern for illegal uses and sales of firearms left Congress to take action and pass the Gun Control Act of 1968, and from then onwards firearms regulations have developed. Citizens should be aware of what issues led to the formation of the Bureau of Alcohol, Tobacco, Firearms and Explosives, which is part of the Department of Justice. The Gun Control Act of 1968 requires all firearms dealers, sellers, collectors, importers, manufactures, and pawn brokers to be Federal Firearms Licensee.

## **INTRODUCTION**

The Federal Firearms License process is designed to lessen gun-related crime and violence by controlling the ownership of guns among Americans. In order for someone to sell a gun he must obtain a federal firearms license. The Bureau of Alcohol, Tobacco, Firearms, and Explosives helps control illegal use and sale of firearms, and to enforce federal firearms laws. It is important to understand that events in history such as the assassination of Attorney General Robert F. Kennedy and Dr. Martin Luther King Jr. may have led Congress to pass the Gun Control Act in 1968.

## **BACKGROUND**

Guns have been around long before the formation of our nation, but gun control is quite recent. The Federal Firearms License process is designed to lessen gun-related crime and violence by controlling the ownership of guns among Americans. Before 1968, “handguns, rifles, shotguns, and ammunition were commonly sold over-the-counter and through mail-order catalogs and magazines to just about any adult anywhere in the nation.” (Gun Control Time Line, 1999, pg 1) The murder of Dr. Martin Luther King Jr. and the assassination of Senator Robert F. Kennedy increased the public’s awareness of gun control, and therefore led Congress to pass the Gun Control Act of 1968.

## **METHODOLOGY**

The principle research methodology used in this paper is a literature review including an internet search, which is supported by an expert interview.

## **LITERATURE REVIEW**

Brady Campaign (2008). The 1968 Gun Control Act site allowed me to be aware of what ideas led to the 1968 Gun Control Act. The Gun Control Act also established a set of rules and a set of guidelines that need to be followed for one to obtain a gun.

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necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." It addresses how firearms have been around throughout history and after World War II how efforts for gun regulation began.

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Federal Firearms Licensing Center: About explains what the Federal Firearms Licensing Center is. It also lists the services they provide and who they provide service to. Contact information was also available.

U.S. Department of Justice. Bureau of Alcohol, Tobacco, Firearms and Explosives. Federal Firearms License FAQs provides answers to the most frequently asked questions about obtaining a license.

U.S. Department of Justice. Bureau of Alcohol, Tobacco, Firearms and Explosives. Federal Firearms Licensing Center: Legal mtalks about the legal concerns that ATF has about who can and can not hold a Federal Firearms License.

U.S. Department of Justice. Bureau of Alcohol, Tobacco, Firearms and Explosives. Federal Firearms Licensing Center: History describes the history that is behind the formation of the ATF.

Vizzard, William J. (1997) *In the Cross Fire: A Political History of the Bureau of Alcohol, Tobacco, and Firearms* describes the formation of the Bureau of Alcohol, Tobacco, and Firearms.

## **BACKGROUND**

The Gun Control Act of 1968 did more than just start an awareness of issues surrounding gun possession and gun control. The Act prohibited interstate transfer of guns between people not holding a Federal Firearms Licenses (non-FFLs). The Act also prohibited shipping guns through the mail system, prohibited shipping ammunition through the mail system, established a minimum age for firearms purchasers, required that all firearms (domestic and imported) be affixed with a serial number, expanded the categories of prohibited persons and it enacted prohibitions on the importation of firearms 'with no sporting purpose'. Not only this, but the act also implemented the Form 4473

(yellow form) for purchases, attempted to address 'Saturday Night Specials' by prohibiting from import small handguns, and established some sentencing guidelines for firearm-involved crimes. (Gun Law News, 2005) The Gun Control Act also “ended the sale of firearms to minors, drug addicts, convicted felons, and the mentally incompetents”. (Bellesiles, 2001, p.179)

Prior to the passage of the gun control act there was a lack of control over possession of guns and gun sales in the United States. In addition, "firearms dealers' licenses had been mailed out by the IRS to every applicant without any screening or investigation." (Vizzard, 1997, p. 32-33). What this means is that the IRS did not go through an extensive background check on the people they were sending applications to. Thus, the Gun Control Act began limiting who could buy a firearm and how one could be purchased. “The crime control paradigm is essentially built on the assumption that easy access to firearms either encourages crime or exacerbates the level of violence associated with crime." (Vizzard, 1997, p. 20). This is basically saying that crime is committed with much more ease if the means of acquiring a firearm are simple. With the act in effect, handgun purchasers had to be at least 21 years of age or older, and long gun purchasers had to be at least 18 years of age or older. This would limit who could own certain types of firearms.

The Gun Control Act led to the formation of the Bureau of Alcohol, Tobacco, Firearms and Explosives in 1972. This Bureau was designed to help control the illegal use and sales of firearms and to enforce federal firearms laws. It was also formed to address the issue of, "firearms licenses and conduct firearms licensee qualification and

compliance inspections." (Gun Control Time Line, 1999) According to the Bureau, no person shall engage in the business of importing, manufacturing, or dealing in firearms, or importing or manufacturing ammunition, until he has filed an application with and received a license to do so from, the Department of Justice. This means that a person must complete an application for a firearm license and have it passed by the Department of Justice before that they engage in firearms sales.

According to the Bureau of Alcohol, Tobacco, and Firearms, the purpose of the Gun Control Act was to keep, "firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetence." (Gun Control Time Line, 1999) The Bureau was formed in order to keep communities and people safe by making sure that people that did own a firearm were not criminals or other wise disqualified. Another purpose of the act was to regulate imported guns, expand the gun-dealer licensing and record keeping requirements, and place specific limitations on the sales of handguns.(Gun Control Time Line, 1999) Those people convicted of any non-business related felony, found to be mentally incompetent, and users of illegal drugs were banned from purchasing a firearm.

Within the Bureau of Alcohol, Tobacco, Firearms and Explosives is the Federal Firearms Licensing Center which is "responsible for licensing firearms manufacturers, importers, collectors, and dealers, and implementing related legislation." (U.S. Department of Justice. Bureau of Alcohol, Tobacco, Firearms and Explosives [ATF] About, No date) The Federal Firearms Licensing Center is responsible for assisting in completing firearms applications, assisting in complying with applicable laws and

regulations, reviewing submitted applications for firearms licenses and determining the eligibility of applicants, issuing licenses to customers on approved firearms applications, and notifying other applicants of their ineligibility for a firearms license. It also coordinates field inspection of applicants and licensees, participates in the prosecution of violators of the firearms laws by testifying in court, verifies a license status to industry members and law enforcement agencies to ensure lawful transactions, assists in the tracing of firearms used in crimes by providing historical information on the licensee or permitted industry and securing records of business licensees, maintains the firearms license database, and responds to inquiries by phone, in writing, or via e-mail, on the application process and applicable regulations. (U.S. Department of Justice. Bureau of Alcohol, Tobacco, Firearms and Explosives [ATF] About, No date). The goal of the Federal Firearms Licensing Center is to make sure those who have a firearms license are responsible individuals and follow the rules of being licensed. Fines and imprisonment are used to enforce the licensing requirement.

The Federal Firearms Licensing Center is within the Bureau of Alcohol, Tobacco, Firearms, and Explosives which is an agency on the U.S. Department of Justice. The requirements of the Federal Firearms License include one to be "21 years of age or older, must not be prohibited from transporting, shipping, or receiving firearms or ammunition in or affecting interstate or foreign commerce, has not willfully violated any provision of the Gun Control Act, has not willfully failed to disclose any material information or made any false statement, has in a state premises from which to engage in business, and certify that the business will comply with State and local law, that local law enforcement

officials have been notified of the application." (U.S. Department of Justice. Bureau of Alcohol, Tobacco, Firearms and Explosives [ATF] About, No date) The standard application fee for the Federal Firearms License for non-destructive devices start from \$30 and range to \$200 depending on what type of license one desires, from collectors, dealers, importers, pawnbrokers or manufacturers licenses. (Markella, 2008, para 5) Once the licensee is approved the license is valid for three years, and after the three years the licensee needs to renew their license.

### **LEGAL ISSUES:**

Since guns could not be banned according to the Second Amendment, Congress passed the Gun Control Act of 1968. That required dealers to be licensed and set rules for who can and who can not purchased a gun and from then the regulation of firearms began. The Gun Control Act of 1968 was designed to make "State firearms laws more effective by channeling interstate commerce in firearms through federally licensed businesses and generally confining firearms transactions by non-licensees to their State of residence." (U.S. Department of Justice. Bureau of Alcohol, Tobacco, Firearms and Explosives [ATF] Legal, No date)

So after having been licensed, one is required to renew the license after a 3 year period. However, licenses can be revoked, or renewal applications denied, if the licensee has willfully violated any provision of the Gun Control Act. Licensees are also required to keep records of all the firearms they sell, including receipts and dispositions, including the name, age, and place of residence of a purchaser. (U.S. Department of Justice.

Bureau of Alcohol, Tobacco, Firearms and Explosives [ATF] About, No date) However, ammunition can only be bought by those who are 21 years or older, and ID verification will be done at the time of purchase. Records are kept of sales of ammunition in the database.

In addition, the Bureau of Alcohol, Tobacco, Firearms and Explosive has the right to inspect any licensee. Each licensee has an annual inspection which is done for the purpose to see if the licensee is following the rules and regulations. This inspection is done by the Department of Justice. However, they can also inspect records and inventory of licensees with an administrative inspection warrant. In addition, customs authorities have the authority to inspect any shipment of firearms or related items being imported into, or exported out of, the United States.

## **ANALYSIS**

The purpose of the Federal Firearms License is to keep track of those people buying and selling guns. Licensed dealers have an agreement with the Bureau of Alcohol, Tobacco, Firearms, and Explosives to sell guns to those who can legally purchase a firearm. The Federal Firearms License is designed to keep guns out of criminal hands. Firearms dealers are not allowed to sell certain guns like machine guns. Having dealers licensed also benefits law enforcements because the paperwork the purchaser and licensee and can help track guns and ammunition used in crimes. The Department of Justice has the right to inspect each licensee holder. If one refuses to be searched, his license can be revoked. In an interview, a manager of Big 5 Sporting Goods, said that the

“Department of Justice went around in search of a gun and ammunition that was purchased from any Big 5 Sporting Goods in Northern California, so they had the right to go through everything that dealt with firearms. However, I make sure my paperwork is always complete and up to date because the paperwork is the main component of selling firearms and firearm sales is a big part of the Big 5 Sporting Goods.” (Ken. D, personal communication, April 25, 2008)

### **BUDGETARY IMPACT**

The Bureau of Alcohol, Tobacco, Firearms and Explosives is a branch of the Department of Justice since January 24, 2003. It is also a “tax-collecting, enforcing and regulatory arm of the U.S. Department of the Treasury. (U.S. Department of Justice. Bureau of Alcohol, Tobacco, Firearms and Explosives [ATF] History, No date) ATF agents, inspectors and support staff are involved in investigating some of the most violent crimes in society, in regulating some of the most important and sensitive industries in America, and in collecting over \$13 billion in annual revenue. “The ATF’s FY 2008 budget request is \$1.014 billion, 5,032 positions (2,468 agents) and 4,988 FTE.” (Overview, Budget Fact Sheet, No date)

### **PUBLIC OUTREACH**

Since the Federal Firearms Licensing Center is part of the Bureau of Alcohol, Tobacco, Firearms, and Explosive which is then a branch within the Department of Justice, they support the Federal Firearms License. The Federal Firearms License has

permitted a standard limit on who can and can not purchase a gun, therefore helping the government keep track of firearms. Ken said, he supports being licensed “for it limits the amount of crime and allows us to sell guns which helps our business.” (Ken. D, personal communication, April 25, 2008)

However, those opposed to the Federal Firearms License include people who want to obtain a gun but are prohibited by law. They may be under the age of 18, felons or mentally ill. Firearm sellers also oppose the license, because of the paperwork burden, and the potential loss of sales during the waiting period. Gun owners in lawful possession of guns oppose government restrictions of their weapons, as they are concerned that registration of weapons can be used to create confiscation lists, as has happened in Great Britain.

## **CONCLUSION**

In conclusion the Federal Firearms License mandates strict control on the sales of guns and ammunition by holding the licensee responsible for keeping records of sales. Licensees have to follow strict laws, rules and regulations in order to stay licensed, which prevents certain groups of people from purchasing a firearm. Due to unannounced annual audits, paper work is the biggest concern to Ken, a federal firearms licensee. Ken says “I do not want to lose my license because gun sales are a big part of my business.” (K. D, personal communication, April 25, 2008) As for Ken, his store has a weekly audit that takes place in addition to the unannounced annual audits. In brief, the Federal Firearms License helps limit legal firearms sales and has put a regulation on those who can and can not purchase firearms.

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# **THE FIREARMS OWNERS PROTECTION ACT (FOPA) OF 1986**

By Sanda Hadzisbic

## **ABSTRACT**

The Firearms Owners' Protection Act's (FOPA) main purpose was to eliminate unnecessary prosecutions by weakening some of the provisions in the Gun Control Act. When the FOPA became a law it created many loopholes that made it difficult for law enforcement and the Bureau of Alcohol, Tobacco and Firearm's to be able to enforce the new provisions of the FOPA.

## **INTRODUCTION**

Prior to the Firearms Owners Protection Act of 1986 (FOPA) there was the 1968 Gun Control Act (GCA) which failed to target criminals. Many times innocent men, women and gun dealers were convicted of felonies due to the act being extremely complex with many unnecessary restrictions. It failed to protect individuals' rights guaranteed in the Second Amendment of the Constitution. In many cases the 1968 Gun Control Act had focused on minor technical violations, such as accidental recordkeeping errors or occasional sale from the dealer's own collection of guns, which led to excessive felony prosecutions.

The Gun Control Act also had several requirements that did not help reduce crime, but were extremely burdensome to gun dealers, such as the law that stated that gun

dealers had to keep an ammunition record of all the ammunition sold. The enforcement of the Firearms Owners Protection Act was suppose to allow for a balance between the need to stop convicting law abiding citizens for making technical mistakes by eliminating a lot of the unnecessary restrictions and regulatory procedures that do not help deter crime, while still having the ability to enforce strict and effective laws that help convict criminals. However, while the FOPA's main purpose was to eliminate unnecessary prosecutions by weakening some of the provisions, the FOPA consequently created several loopholes in its provisions that created obstacles to law enforcement and the Bureau of Alcohol, Tobacco and Firearm's (AFT) ability to enforce the FOPA.

## **METHODOLOGY**

Research was conducted using a literature review based on library and internet searches to demonstrate the provisions of the Firearms Owners' Protection Act. Research shows the provisions of the FOAP and how several provisions created loopholes that ended up endangering the lives of law abiding citizens. The main focus is on the law enforcement officers and the ATF's inability to enforce the FOPA properly due relaxed gun laws that resulted from the FOPA. An expert's interview provides additional data on the Firearms Owners' Protection Act and how it has affected law enforcement.

## **LITERATURE REVIEW**

Braga, Anthony (2001). More Gun Laws or More Gun Law Enforcement?  
*Journal of Policy and Managment* is about gun trafficking and how the implementation

of the Firearms Owners Protection Act has made it difficult to prosecute gun traffickers for dealing without a license. This article mainly talks about the problems of enforcing gun laws due to the influence of the National Rifle Association.

Hardy, David (1986). *The Firearms Owners' Protection Act: A Historical and Legal Perspective*. *Cumberland Law Review* describes the Firearms Owners' Protection Act and all of its provisions. This article is the foundation of the research for this paper.

Robert, Dole (1986). *The Gun Control Controversy*. *Congressional Digest* is about the Gun Control Act of 1968, stating the Act has become too burdensome on the seller and purchaser of firearms used by law-abiding citizens. This article provides pro and con of enacting the Firearms Owners' Protection Act.

Butterfield, Fox Guns: The Law As Selling Tool. (Aug 13, 2000). *New York Times* depicts how gun laws help criminals get guns from licensed dealers. It depicts how under the FOPA when an individual is caught selling large numbers of guns without a license, the BAFT has to prove that the person selling the guns was doing so for 'livelihood and profit' to be able to prosecute the individual.

Bruce, J., & Wilcox, C. (1998). *The Changing Politics of Gun Control* demonstrates how politics has changed gun control throughout the year, especially in the case of the Firearms Owners' Protection Act. This book talks in detail about how the Firearms Owners' Protection Act got passed, what the purpose of the Act was, and how the ATF has been effected by anti gun control groups such as the NRA.

Daley, Richard (2000). *Gun Lobby Doesn't Really Mean "Enforce the Laws Already on Book"* talks about how gun lobbyists have weakened gun laws, particularly

the FOPA. The article states that the gun lobbyists have designed laws that keep the ATF from doing its job and it has succeeded. The article gives examples of how the ATF has been restricted from many much needed inspections.

## **BACKGROUND**

As soon as President Lyndon B. Johnson signed the Gun Control Act of 1968, efforts were initiated to change the provisions of the act to weaken regulation of firearms. Senators Ted Kennedy's "pivotal committee role—using the tactics of filibustering and the disappearing quorum—successfully prevented action to repeal the 1968 law," while Representative Peter Rodino routinely strangled the NRA's bills" (Bruce & Wilcox, 1998, p. 52). The Republicans' success in the 1980 election, "which placed Ronald Reagan in the White House, gave the Republicans a Senate majority, and renewed strengths in the growing membership and determination of the NRA precipitated repeal efforts" (Bruce & Wilcox, 1998, p. 52). The NRA's "grassroots lobbying and its contributions to the congressional campaigns of pro-gun candidates significantly influenced the voting member of Congress on the McClure-Volkmer bill" (Bruce & Wilcox, p. 54).

On May 19, 1986 the Firearms Owners Protection Act (FOPA) became a law. The FOPA was the "first comprehensive redraft of the federal firearms laws since 1968, FOPA was predictably lauded as necessary to restore fundamental fairness and clarity to our Nation's firearms laws" (Hardy, 1986, p. 1). The FOPA adopted the "positions long advocated by pro-gun groups such as the National Rifle Association and the Citizen's

Committee For the Right to Keep and Bear Arms” who have “continually criticized the Gun Control Act (GCA) for being incoherent and a hodge-podge of legislation” (Diaz, 1983, p. 409). To eliminate the shortcoming of the GCA the FOPA was enacted in order to focus on punishing criminal use of firearms instead of focusing on technical violations that law-abiding citizens make unknowingly. Controversies surrounding the FOPA stem from its provisions which have had a huge impact on a lot of court cases. The FOPA “effectively overrules six decisions of the United States Supreme Court” and negates “one-third of the total case law construing the Gun Control Act of 1968” (Hardy, 1986, p.1). The FOPA not only impacts the GCA and federal statutes, but by “expressly exempting interstate transportation of firearms from the reach of many state firearms law” it affects state proceedings as well (Hardy, 1986, p. 1).

The general philosophy that stems from the FOPA is that, according the Second Amendment, law-abiding citizens have the right to own guns, and that right should not be restricted because of criminals who break gun laws. Gun control laws “constitute a denial of rights,” therefore proponents of the FOPA believe that law enforcement activities should be “focused on those they perceive to be true criminals and protect those they see as law abiding firearms owners” (Diaz, 1983, p. 409). During the “course of the Senate hearings on the new bill, numerous citizens testified to the committee of early morning raids up on their homes, seizure of gun collections, and entrapment techniques” (Diaz, 1983, p. 410). In order to protect citizens from this type of treatment the FOPA made provisions that would limit encroaching on citizens’ right to bear arms.

In enacting the FOPA, “Congress sought to reaffirm that its objective was not to

place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms or to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes” (Brenner, 2008, p. 1056). In order to be able to give citizens back their constitutional rights, Congress repealed the 1968 law’s prohibitions on “sales of certain firearms to person from another state; allowing certain convicted felons to own guns if their crimes involved only business practices; legalizing ammunition’s purchase by mail and relaxed the ammunition record keeping required of dealers; prohibiting government from banning importation of sporting weapons; exempting gun dealers from recording firearms sales under certain circumstances; and constraining the power of the Bureau of Alcohol, Tobacco, and Firearms” (Bruce & Wilcox, p. 53).

The first provision of the FOPA that relaxed gun laws was the change in definition of “engaged in the business”. Prior to the FOPA the Gun Control Act of 1968 required anyone “engaged in the business” of dealing guns to have a federal firearm license and any illegal gun dealing “was a matter for a court or jury to determine on the basis of the facts presented by prosecutors” (Hardy, 1986, p. 12). Once the FOPA was passed the government had a much tougher standard to show proof that someone was “engaged in the business” without a license. To prosecute an individual for illegal gun dealing, the ATF had to show that the unlicensed person “engaged in a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms” (Hardy, 1986, p.12). The definition of ‘engaged in business’ excluded any “person who makes occasional sales, exchanges, or

purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms” (Hardy, 1986, p. 12). Under the FOPA four elements must be proven to establish “engaged in the business” of dealing firearms and these include: “devotion of time, attention and labor to such dealings; as a regular course of trade or business; with the principle objective of livelihood and profit; through the repetitive purchase and resale of firearms” (Hardy, 1998, p.13).

The FOPA also allowed licensed gun dealers to sell their guns at the gun show in their home state. Prior to the FOPA, the ATF allowed the sale of guns to occur only in the place of business of the licensed gun dealer. Dealers were allowed to exhibit their gun at the gun shows but not sell them because the actual sale by law had to be done in the dealer’s place of business. Once the FOPA changed this provision, gun shows flourished because gun dealers were legally permitted to sell their guns at the gun show. At the same time Congress relaxed the law that distinguished gun dealers from ‘occasional’ sellers which allowed more people to sell their guns at gun shows.

Even if the investigators determined that a dealer was violating a federal gun law it is almost impossible to prosecute the dealer because due the FOPA, which “limits regulatory actions and establishes a near-impossible evidentiary requirement for successful prosecution” (Viscusi, 2002, p. 73). Under the FOPA the ATF has to prove that the dealer was ‘knowingly and willfully’ violating the laws. The “willfully” was inserted to “require that penalties be imposed only for willful violations, those intentionally undertaken in violation of a known legal duty” (Hardy, 1986, p. 17). The division between “willful” for some offenses and “knowing” for others “originated in the

Treasury-NRA negotiations, and was specifically premised upon the understanding that proof of willfulness and required proof that the defendant knew of the illegality of his conduct” (Hardy, 1986, p. 17). Congress was “fully aware that its use of ‘willfully’ in FOPA would require proof that the defendant actually knew of the illegality of his acts” (Hardy, 1986, p. 18). On the other hand, the ‘knowingly’ requirement is not as well explained because the definition is perceived to be obvious. This leaves the bill vague because “the use of ‘knowingly violates’ leaves unresolved questions of whether knowledge is required of jurisdictional facts such as movement of the firearm in commerce or even of the existence of the violation itself, as well as the result of its interaction with the violation which themselves contain a different knowing, for example selling to a person whom the seller knows or should know is a felon” (Hardy, 1986, p. 18).

According to Professor Ken Nuger, “the willful and knowingly standard gives individuals a chance to defend themselves in court for breaking a law that they did not realize they were breaking” but at the same time “ignorance is no excuse for breaking the law” (K. Nuger, Personal Communications, April 29, 2008). With the “willful and knowingly” standard, it is difficult to prove if an individual is “intentionally or unintentionally doing harm and whoever bares the burden of proof is going to have a tough time” (K. Nuger, Personal Communications, April 29, 2008). Proponents of the bill assert “that the insertion of the scienter requirement would radically diminish the number of prosecutions of persons who are law-abiding citizens and would further force the BATF to concentrate its efforts on thwarting the use of firearms in criminal activities”

(Diaz, 1983, p. 409). According to Senator Quentin Burdick of North Dakota it is the “lack of intent requirement which has permitted the ATF to bring to many cases based on technical inadvertent violations of the Statue by totally honest, law abiding citizens” (Diaz, 1983, p. 409).

In response to reports of hunters being arrested for firearms law violation while passing through a state that has strict gun control law, the FOPA has a provision which protects people who are doing such travel. The FOPA states that “any provision of state or local law which prohibits or has the effect of prohibiting the transportation of a firearm or ammunition in interstate commerce through such state, when such firearm is unloaded and not readily accessible, shall be considered null and void” (Hardy, 1986, p. 25). To meet the “not readily accessible” standard the individual’s firearm must be “stored outside of the passenger’s compartment” (Hardy, 1986, p. 25). The FOPA also permits the “interstate sale of rifles and shotguns, provided: the transferee and transferor meet in person to accomplish the transfer; and sale, delivery, and receipt comply with the legal conditions of sale in both states” (Hardy, 1986, p. 13).

While the FOPA was directed at mainly relaxing the gun laws present in the GCA, it also affected other firearms law as well. The FOPA had an impact on the scope and restrictions of the National Firearms Act. The National Firearms Act “essentially requires Treasury permits for manufacturing, transferring, possessing, or transporting interstate any firearm, a term limited to machineguns, silencers, sawed off shotguns, and rifles and similar guns” (Hardy, 1986, p. 22). The FOPA changes the provisions of the National Firearms Act in two ways. First, the definition of the machinegun is “expanded

to include any parts designed and intended solely and exclusively for use in converting a weapon into a machinegun” (Hardy, 1986, p. 22). Secondly, the FOPA included an amendment that made it “unlawful for any person to transfer or possess a machinegun” (Hardy, 1986, p. 23). Controversy exists regarding the validity of the amendment due to the way it was passed. Many people believe that the amendment is not valid because it “came up on the House floor, time expired before it could be debated, and it passed on a voice vote of questionable propriety” (Hardy, 1986, p. 23). Also, the vote took place at night when many people who were opposed to the amendment were not present. As a result, “the House vote has no legislative history, aside from the frantic pleas of one Representative, moving for additional time and implying that it “banned” machine guns, which it clearly does not” (Hardy, 1986, p. 23).

## **TEXTUAL ANALYSIS**

The new definition of “engaged in business” poses a problem because it only demands responsible behavior from those who own a federal firearms license. The people who do not have a federal firearms license are left without any provisions or the need to act responsibly while at the same time this loophole in the definition encourages secondary markets for guns through gun shows, private sales, or internet. As a result of the new definition of “engaged in business” thousands of firearms are being sold every year by individuals who do not have a federal firearms license, therefore making it

impossible to track down where guns came from in the case of a crime scene, unless fingerprints are detected, making it more difficult for law enforcement officers to track down and arrest a criminal.

Once licensed gun dealers and “occasional” sellers where legally permitted to sell their guns at the gun shows a bigger variety of guns became available consequently attracting law abiding citizens and worst of all criminals. For example, in 1993 “an Ohio man named Thomas Lee Dillon pleaded guilty to shooting five people to death in a series of random attacks” (Andersons, 1998, p. 36). Dillon “purchased his guns at local gun shows, then began disposing of them at another show” (Anderson, 1998, p. 36). Gun shows have also been “the source of tragic shootings including that which occurred at Columbine High School in Colorado” where 12 students and a teacher ended up being shot by a gun that was purchased at a guns show (Legal Community Against Violence (LCAV), 2003). According to the ATF, felons who are prohibited from purchasing firearms have been able to do so at a gun show. The “lack of background checks and transaction paperwork in the secondary market makes it easy for prohibited persons to acquire firearms and very difficult for law enforcement agencies to prevent, detect, and prosecute illicit buyers and sellers who operate in the secondary market” (Braga, 2001, p. 546). In fact, “felons buying or selling firearms were involved in more than 46 percent of the investigations involving gun show” and “in more than a third of the investigations, the firearms involved were known to have been used in subsequent crimes” (LCAV, 2003). The “provisions of the 1994 Brady Violence Prevention Act do not apply to secondary firearms market transactions; therefore, criminal background checks of the

prospective buyer are not conducted during private transactions” (Braga, 2001, p. 546). Unlicensed sellers at the gun shows have no way of knowing who they are selling their guns to and many times those guns end up in the wrong hands.

The FOPA has relaxed the gun laws to such an extent that anyone can sell and buy a gun at a gun show. Prior to the FOPA, “the operating rule was that individuals who sold five guns or more per year were considered firearms dealers and were required to obtain a federal firearms license” (Braga, 2001, p. 547). With the FOPA individuals who make occasional gun sales, or who buy guns as a hobby, or sell firearms from their private collection are exempt from having to acquire a federal firearms license. The problem with the exemption is that “there is no defined limit to the number of guns sold or the profits made before an unlicensed seller is required to obtain a license” (Braga, 2001, p. 547). Gun traffickers “exploit this gaping hole in the licensing law to illegally divert guns to criminals and juveniles” (Braga, 2001, p. 547). Since there is no paperwork available for the unregulated transactions that happen at gun shows, “firearms traffickers operating in the secondary market can easily avoid prosecutions by claiming that they were selling only a handful of firearms from their private collection” (Braga, 2001, p. 547). According to Officer Brian Daley of the San Jose Police Department, “criminals who want guns are going to get them any way, but restrictive measures help more than hinder people because it is a way of making it more difficult for criminals to get guns” (B. Daley, Personal Communications, May 1, 2008).

Although there are “heavy penalties for individuals who make false statements on firearms transfer paperwork, it is similarly difficult for ATF agents to prove that straw

purchasers are falsifying paperwork by purchasing firearms for proscribed persons and not buying firearms for their personal collection and subsequently selling them on the unregulated secondary market” (Braga, 2001, p. 547). ATF agents reported that “dealing without a license and falsifying paperwork were occurring in cases accepted for prosecution, but the prosecutor was able to charge a defendant with these violations in less than 38 percent of the dealing-without-a-license cases, and less than 45 percent of the straw-purchasing cases (Braga, 2001, p. 547). Prosecuting licensed and unlicensed dealers for gun trafficking is a difficult task for the ATF investigators and prosecutors due to the FOPA.

While the FOPA relaxed gun laws so that law-abiding citizens would not be convicted for making technical mistakes in record keeping, it created a loophole that allowed corrupt licensed dealers to purposely and illegally “divert firearms through record-keeping violations such as making false entries and failing to keep the required transfer information” (Braga, 2001, p. 547). Although a corrupt licensed dealer “may illegally divert hundreds of guns to the street, FOPA reduced most of these record-keeping violations from felonies to misdemeanors” (Braga, 2001, p. 547). By turning record-keeping violations from felonies to misdemeanors it saved law-abiding citizens from being severely punished for making a technical mistake, but it also allowed licensed gun dealers who are associated with high-volume gun trafficking to get away with small penalties for a huge offense.

The FOPA relaxed gun laws making it difficult for the ATF and law enforcement officials to catch anyone who does not comply even with the relaxed laws. It is the

responsibility of the ATF, often working with state and local law enforcement, to investigate criminal firearms trafficking, arrest the perpetrators, and refer them to U.S attorney for prosecution” (Braga, 2001, p. 546). However, “ATF investigators are working with one hand tied behind their back because of the way the federal firearms laws are written” (Braga, 2001, p. 546). Before the FOPA became a law, the GCA “required licensees to maintain records of firearms acquisitions, dispositions, and inventories” (Hardy, 1998, p.11). The ATF was also permitted to inspect the inventory and records of a licensed importer, manufacturer or dealer for compliance with applicable laws “at all reasonable times” (Hardy, 1986, p.38). Once the Act was passed the ATF was restricted to one inspection once a year.

In general, “administrative inspections of licensee records now require a magistrate’s warrant, based on a showing of reasonable causes to believe evidence of a violation may be found” (Hardy, 1986, p.18). The reason for this provision has to do with the NRA belief that the ATF was repeatedly inspecting federal firearms license holder for the purpose of driving them out of business. According to the NRA, the ATF’s only purpose was to harass honest citizens. There are three exceptions to the warrant and reasonable cause criteria needed to inspect a licensed dealer. Neither a warrant nor a reasonable cause is needed for “a reasonable inquiry in the course of a criminal investigation of a person other than a licensee; an annual inspection for ensuring compliance with recordkeeping requirements; or tracing a firearm in the course of a bona fide criminal investigation” (Hardy, 1986, p.18). While these three requirements reduce “the application of the warrant and cause requirement, it remains effective for its primary

purpose in any event: to prevent inspections undertaken without immediate law enforcement need, or abuse for the purpose of harassment” (Hardy, 1986, p.18). To further limit the harassment potential the NRA warned about, the FOPA stated, “Only records material to a violation of law may be seized and even as to these, copies must be furnished the licensee within a reasonable time” (Hardy, 1986, p.18).

Although inspections of licensed firearms vendors can be a very effective way to uncover violations of firearms laws, limitations on inspections, allows criminal conduct by some federal firearms licensee to go unchecked and unpunished. With the annual inspection gun dealers who where for example, inspected in January do not have to worry about another inspection for the next eleven months giving the licensed dealer a lot of time to break the law and not having to worry about being caught.

Also, “law enforcement’s ability to curb illegal gun trafficking is constrained by limits on the number of ATF investigators, congressional restrictions on computerized records, and broad legal loopholes that make trafficking convictions difficult to secure” (Siebel, 1998, p. 2) A clear example is the ATF’s inability to prosecute Bill Dollar a FFL holder, and his sister Jean, who used “friends, strangers, homeless people, and drug addicts to fill out federal handgun applications, then watched as these people turned the weapons over to illegal dealers or gang members from Brooklyn” (Butterfield, 2004, p. 4). This was a classic case of straw purchasing. According the ATF, “Guns from the Dollars’ stores were used in at least 50 homicides and 901 violent crimes in 12 states, from Massachusetts to Texas” (Butterfield, 2004, p. 4). Despite the “bureau’s years of investigation, and witnesses willing to testify that they lied on the paperwork with the

Dollars knowledge, a federal judge dismissed all the charges against them” (Butterfield, 2004, p.4). These constraints became implemented due to the heavy gun lobbying by the gun industry and the NRA. The FOPA makes it extremely difficult for federal and local law enforcement agencies to enforce the nation’s gun laws because the bill has many loopholes that help criminals and gun manufacturers get away with crime while at the same time making it difficult for enforcement agencies such as the ATF to do anything about it.

## **BUDGETARY ANALYSIS**

The mission of the Bureau of Alcohol, Tobacco and Firearms (ATF) is to “reduce the criminal use of firearms and to assist other Federal, State, local and foreign law enforcement agencies in reducing crime and violence by effective enforcement of Federal firearms law” (Bruce & Wilcox, 1998, p. 23). To be able to effectively enforce firearms law the ATF has to have enough money, which it did not have when the FOPA was passed. Between “1980 and 1987 the number of ATF agents was slashed from 1,502 to 1,180 (-21.5%) “(Bruce & Wilcox, 1998, p. 26).

ATF lacks a sufficient number of inspectors to be able to perform its functions in a timely manner. The bureau has “250 gun control agents” who are responsible for “280,000 gun dealers” (Bruce & Wilcox, 1998, p. 26). The volume of licensees as compared to the amount of FFL holders clearly demonstrated that the bureau is not equipped to do all of the work it has to do. The ATF’s lack of funding can be attributed to the NRA which produced a film that demonstrated individuals who have been unfairly

targeted by the bureau. After the film the bureau lost over \$13 million of its \$159 million 1982 budget” (Bruce & Wilcox, 1998, p. 27).

Because the ATF is understaffed and overworked there is a substantial backlog in the microfilming of records, therefore a “substantial amount of records are stored in hard copy in the bureau’s Out-of-Business Records Section” (Bruce & Wilcox, 1998, p. 32). It was estimated that it would take \$3.5 million to eliminate the backlog, but every request for more funding was denied.

The Congress and the NRA have worked hard to make sure that the ATF does not have the tools to create a comprehensive database. In the federal budget it states that “no funds appropriated herein shall be available for salaries or administrative expenses in connection with consolidating or centralizing, within the Department of the Treasury, the records, or any portion thereof, of acquisition and disposition of firearms maintained by Federal firearms licensees” (Bruce & Wilcox, 1998, p. 32). Ultimately, those against the computerization of the firearms record prevailed when the “estimated \$ 4.2 million needed for implementation was cut from the ATF’s budget by Congress” (Bruce & Wilcox, 1998, p. 33). The ATF is not a powerful bureaucracy and this is clearly depicted by Congress’ lack of funding for the bureau. The bureaus’ lack of personnel and funding has allowed for the FOPA to not be enforced as efficiently as it should be enforced.

## **CONCLUSION**

While the FOPA was created to reduce the regulatory burden on law-abiding firearms owners without impeding the ATF’s ability to combat violations of the firearms

law, the act did the exactly the opposite. The FOPA relaxed gun laws which helped keep law abiding citizen from getting convicted of felonies for making technical mistakes, but consequently it created many obstacles to the ATF's ability to catch individuals who have violated the firearms laws. The FOPA focuses on tough penalties for criminals, in the hope that it will prevent other criminals from committing offenses, rather than trying to prevent guns from reaching criminals. The FOPA also made it much easier for criminals to get their hands on guns, consequently compromising the safety of law-abiding citizens.

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# **CALIFORNIA ASSAULT WEAPONS BAN OF 1989**

By Rupesh Saran

## **ABSTRACT**

California has some of the strictest gun laws in the nation, yet within the state there is great variance among regulations. There has been great debate regarding the Second Amendment and if it does guarantee an individual right to own a firearm. In 1989, California enacted the first ever regulation banning all assault weapons after a schoolyard shooting in Stockton, California. This research covers the history, purpose, and effect of the California Assault Weapons Ban or the Roberti-Roos Assault Weapons Act of 1989.

## **INTRODUCTION**

The times are changing and as they change, so must laws change to fit into societal standards. California set the trend when it enacted the Roberti-Roos Assault Weapon Act of 1989 banning all semi-automatic weapons from individual ownership. In order to understand the history, purpose, and effect of the law the issue of the fundamental right of an individual to own a firearm must be addressed. Does the California law which bans assault weapons infringe on the constitutional right to own a gun?

The conflict between proponents and opponents of gun regulations has intensified over the years. In the 2007-2008 session of the United States Supreme Court it will

decide if private individual gun ownership is a constitutional right and if that freedom is protected under the Second Amendment. This would only further intensify California's controversy over gun regulations. Their decision will either affirm or strike down California's gun laws.

## **METHODOLOGY**

The research for this paper, based on a literature review, including on-line sources, and an expert interview examines the California's Assault Weapons Ban of 1989 purpose, history, and effect. The research focused on determining if the ban on assault weapons had a significant effect on reducing gun violence, and the different views on whether or not this ban should upheld. This paper includes an interview with Assistant District Attorney Brian Cota of Santa Barbara, and his intern Ray Johal, who specializes in gang violence. Furthermore, the paper will determine the Constitutionality of the assault weapons ban with regards to the Second Amendment.

## **LITERATURE REVIEW**

Fox, K., & Shah, N. (1994). Natural Born Killers: The Assault Weapons Ban of the Crime Bill – Legitimate Exercise of Congressional Authority to Control violent Crime or Infringement of a Constitutional Guarantee? *St. John's Journal of Legal Commentary* examines whether there is a Constitutional infringement on the Second Amendment by banning assault weapons. The article states that a federal assault weapons ban does not violate the Constitution under the Tenth Amendment, and

separates state versus national rights.

Kopel, D. (1994). *Rational Basis of Analysis of "Assault Weapons" Prohibition* states that under the rational basis test, used by the Supreme Court to justify certain cases, the ban on assault weapons is illegitimate and unconstitutional under the Equal Protection of the laws doctrine.

Kopel, D., & Morgan E. (1991). The Assault Weapon Panic: "Political Correctness" takes aim at the Constitution. *Independence Issue Paper* shows that while public safety is important, such a ban will not reduce violence but only infringe on people's civil liberties. The article claims that the only way to alleviate gun violence in America is not to ban guns but to create rational effective measures that will be more costly, but will protect our constitutional rights.

Lenett, M. (1995). Taking a Bite Out of Violent Crime. *University of Dayton Law Review* states that the ban on assault weapons was never created to drastically reduce crime; it was only intended to reduce a type of violent crime. The author also states that such military types of weapons would be not needed for civilian uses.

Slaughter in a School Yard. (1989, January 30). *Time* examines the Stockton schoolyard shooting by Patrick Purdy and shows that this event prompted the Roberti-Roos Assault Weapons Ban of 1989.

United States Department of Justice. (1999). Impacts of the 1994 Assault Weapons ban: 1994-9. *National Institute of Justice* examines the short term impact of the federal assault weapons ban on gun markets and gun related violence. It was determined, in a short term effect, that criminal use of the guns declined and that the murder rate and

murders of police officers by assault weapons had decline. The study also showed that the ban failed to reduce the average number of victims per gun and had failed to reduce multiple gunshot wound victims.

United States Department of Justice. (2004). An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994-2003. *National Institute of Justice* is an updated version to determine the long term effects of gun related violence after the Federal assault weapons ban of 1994. The study concludes that the bill reduces assault weapon crimes but it is outweighed by the steady increase of non-banned semi-automatics violence. So the ban cannot be easily determined to have a significant impact in reducing gun violence, but there is a small impact.

United States Department of Justice – Firearm Division. Office of the California Attorney General. (2001, November). 3<sup>rd</sup> Edition. *Assault Weapons Identification Guide* states what the Roberti-Roos Assault Weapons Ban of 1989 does, and individually shows and classifies which guns are prohibited in California.

## **BACKGROUND**

The question of whether or not there is a fundamental right to owning a gun has only recently arisen in America's history. After the Constitution was ratified there was no question regarding whether people could own guns. Because many of the men were in the militia and were required to provide for their own arms, it was inferred that there was a right to own guns. Now with the use of a militia slowly dwindling in the

technologically driven society, the Courts know that owning a gun is a right for the militia, but the question that now the Courts face is whether such a right is only regulated by Congress, or whether the Second Amendment also applies to the states?

Firearms regulation affects all individuals from the law-abiding gun owner to the average citizen in a community. To simply ban all guns as a form of deterrence is erroneous, and to allow all guns as a form of a laissez-faire market is too naive. There needs to be some middle ground between responsible restrictions and regulations and a ban.

According to United States law, an assault weapon may be classified in different ways. Classifications that define a weapon as an “assault weapon” include when it is capable of firing large numbers of bullets in a short amount of time, and the more common definition is that assault weapons are rifles that are select-fire, meaning that they can either be fully-automatic or semi-automatic, firing intermediate-powered rounds. Usually assault weapons denote semi-automatic weapons that when fired automatically extract the spent casing and load the next round into the chamber, ready to be fired again.

On January 17, 1989, Patrick Purdy killed six, including himself, and wounded thirty others at the Cleveland Elementary School in Stockton, California. A former resident of Stockton, Purdy opened fire using a Chinese-made type 57 weapon, or a Chinese made imitation of the AK-47, sparking the California federal assault weapons ban, and ultimately the United States federal ban on assault weapons.

It was known that Patrick Purdy was an alcoholic drifter who suffered from minor mental retardation according to a 1987 police report. (Slaughter in a School Yard, 1989)

“It was found out that Purdy, who had been arrested for such offenses as selling weapons and attempted robbery, had bought the AK-47 in a gun shop in Sandy, Oregon.”

(Slaughter in a School Yard, 1989) The assault lasted two minutes leaving over a hundred shell casings scattered across the school.

California has some of the strictest gun laws in the United States of America. (California Firearms Laws, 2007) In 1989 they passed the Roberti-Roos Assault Weapon Act banning all semi-automatic rifles that has a detachable magazine, can accept more than 10 rounds, has an overall length less than 30 inches, and any shotgun with a revolving cylinder. This law was reaffirmed by *Kasler v. Lockyer* (2000) but the California Supreme Court stated that there has to have clear and specific identification guidelines for assault weapons.

In *Harrott v. County of Kings* (2001) the courts set specific guidelines in identifying assault weapons causing them to be specifically listed by make and model. Only those who have had their make and model in the penal code are banned. The California Department of Justice found out that many individuals could buy AR or AK rifles and modify them with other parts of assault weapons as long as certain “characteristic features” were not present which allowed them to bypass the ban on assault weapons. Features that were banned could range from a pistol grip to a flash suppressor.

Due to California setting the trend, the national government soon followed, passing the Brady Handgun Violence Prevention Act of 1993 and the Violent Crime Control and Law Enforcement Act of 1994. These laws added to California’s previous

laws, only strengthening them even more. The California Assault Weapons Ban was to reduce violence. “The point behind the legislation was not that banning assault weapons will reduce a major portion of violent crime, but that these military-style weapons, which are designed specifically to kill people, have no place in a civilized society.” (Lenett 1995, 616) Lenett argues that government has an interest in protecting civil society, and that interest for preserving life outweighs the interests of law-abiding citizens to own guns.

## **LEGAL ISSUES**

California came under much scrutiny when it decided to enact the California Assault Weapons Ban of 1989 because they were restricting a freedom guaranteed by the Constitution. The struggle between states versus national sovereignty plays out when restricting firearms. Brian Cota, the Assistant District Attorney for Santa Barbara stated that the Second Amendment only applies to Congress, and that Congress cannot restrict private gun ownership. He stated that states can restrict such guns because they are not included in the Second Amendment.

There is no doubt that restricting assault weapons infringes on the right to own a gun, but the question remains whether it is okay to restrict such rights if it will protect the general population. These are the legal issues raised when dealing with regulations on firearms because there needs to be some operationalized method to deal the rights of the individual against the rights of the overall society.

One of the main concerns of both parties is that the law is too complex for the

average individual to determine what firearm is legal or illegal. Many gun advocates stated that the Tenth Amendment is a rant of states' sovereignty being undermined by federal legislation under the Commerce Clause, but the Courts have upheld the federal legislation on gun control. (Fox, 1994) There is a lack of uniformity when it comes to gun laws in different states. The "inability of the states to properly address the growing abuse of assault weapons with the federal government's compelling and legitimate interest to protect the citizenry, congressional intervention was mandated." (Fox, 1994)

Government has a strong interest in letting its people live because its legitimacy is based upon the people's consent. By banning such destructive weapons, government can then ensure its legitimacy is maintained. "When California's 'assault weapon' prohibition was challenged as violating the Second Amendment, the federal trial court, relying on *United States v. Cruikshank* 92 U.S. 542 (1875), ruled that the Second Amendment could not be violated by state-level gun control, since the Second Amendment only restricts the federal government." (Kopel, 1991) The Constitutional argument that states cannot regulate guns becomes invalidated because the Fourteenth Amendment does not apply to the Second Amendment, according to the opinion of the Court authored by Chief Justice Waite. The Supreme Court stated that states can ultimately rule for themselves on gun regulation, but states cannot forbid all private gun ownership because it would be a violation of the Second Amendment.

Many gun-regulation opponents, such as David Kopel, state that gun-regulation laws on assault weapons are unconstitutional in that it violates the government's rational basis test. (Kopel, 1994) Kopel also stated that "The ban would also violate the equal

protection clause of the Fourteenth Amendment, which requires that legislative classifications be rational, and based on real differences, rather than on hysteria or misinformation,” because it is based on looks, not rational empirical evidence that they are nearly the same when it comes down to the mechanics of the gun. (Kopel, 1991) The Second Amendment was enacted to give individual the right to “bear” guns because James Madison wanted an ultimate check on the government for fear that it may become too tyrannical.

## **ANALYSIS**

The political situation is ripe for change when it comes to gun ownership in California. There is a fierce debate on whether or not such regulations are even doing what they were supposed to be doing. There has been constant criticism that gun violence is not drastically reducing and that the only people suffering are law-abiding citizens. According to Lenett, “The ban on semiautomatic assault weapons will not drastically reduce violent crime in America. The ban is not, and never was intended to be, a major piece of firearm regulation or anti-crime legislation. It was designed merely to take a bite out of a particularly offensive type of violent crime.” (Lenett, 1995, 166) Statistics show that violence has not been drastically decreased. Lenett goes on to say that this is not why the ban was enacted, it was enacted to reduce the capability of widespread killing and to reduce the availability of military weapons that were deliberately made to kill.

Societal concerns are strong when it comes to gun regulation. Many believe, like

Lenett, that it is government's job to protect its citizens, by ensuring that irresponsible people do not have guns. One of the main societal concerns was to reduce aggressive violence using firearms to maintain a civil society.

According to a Department of Justice study, this may happen in the short term, but over the long term the stockpiled weapons might begin flowing into criminals' hands, through straw purchases, thefts, or "off-the-books" sales that dealers or speculators falsely report to insurance companies and government officials as thefts. (Koper, 1999, 2) As California pondered its ban of 1989, many assault weapon crimes were reduced, and many pointed the higher prices and speculative stockpiling as making the guns less available to criminals. (Koper, 1999, 5) While it may appear that the ban drastically reduces gun violence in California, it is shown that such an effect is insignificant on a national scale. The government states that such policies are inefficient and the cost-benefit is not proven.

The Department of Justice had also done a long term study which showed that "Most of the AWs used in crime are assault pistols rather than assault rifles." (Kopel, 2004, 3) The study also showed that there was a decline in the assault weapon crime rate across localities, but such declines can be attributed to the decline of assault-pistols as weapons and the rise of large capacity magazines, or LCMs. (Kopel 2004, 3) In California assault weapons only constituted 3.7% of all gun-related crimes, according to the California Department of Justice.

## **BUDGETARY IMPACTS**

While it is not known how much money has been spent by California in maintaining the Roberti-Roos Act of 1989, the societal value and benefits of the ban are known. However, such benefits are difficult to measure when there is no statistic stating that by banning assault weapons, government is drastically reducing violent crimes that pertain to assault weapons. However, when even a small amount of lives are saved there is some benefit. However, legislation does nothing to curb the real violence and does nothing to remedy the causes and effects of the violence.

## **PUBLIC OUTREACH**

Pro gun advocates have powerful lobbies called the National Rifle Association, or NRA, and the California Rifle and Pistol Association, or CRPA, both of which opposed the Roberti-Roos Assault Weapons Act of 1989 from its conception. CRPA states that the ban by California on assault weapons is simply based on their looks, is a constitutional infringement, and that based on their modifications there is relatively little difference between handguns and assault weapons. (CRPA, 2008)

Those who believed guns should be regulated include the Brady Center and the Legal Community Against Violence who believe that it is more important to reduce gun violence than banning all guns. Their main goal is to reduce the violence caused by guns, and one of the ways it can be done, according to these groups, is by regulating and restricting certain guns that have the capability of causing mass destruction.

Gun regulation is often split along partisan lines. The media has their own bias. It is true that partisan politics interferes with gun regulations, but many see such

regulations as a way of protecting the public and such a task goes to all parties.

## **CONCLUSION**

No one knows where gun regulation policies could end up in the near future. Yet, soon enough the Supreme Court of the United States will decide in *D.C. v. Heller*, and rule if there is a constitutional right for individual gun ownership, for the seventh time in the Court's history. It is a long awaited decision by both sides of the debate. The purpose of the California assault weapons ban of 1989 was to reduce gun violence in California and reduce the possibility of massacres by semi-automatic weapons. There is not much history to go on, because it has been a less debated topic in the past, because it was always inferred that individuals do have a right because these individuals make up the militia. It is also known that California set the trend by becoming the first state to ban assault weapons. Since passage of this law there has been a minute affect on reducing gun-related violence with assault weapons.

It is difficult to make such regulations because both sides have valid points. Citizens must be able to protect themselves not only from other individuals, but from corrupt police authority in certain cases, or even the government itself. This was the whole reason why Madison wanted the Second Amendment, to protect the individuals from the tyranny of government. It is also important to note that preventing loss of civilian life is a top priority for governments and that for them, backed by the Courts; such a task outweighs the right to own assault weapons under federal and state law in California. The political deadlock has created instances where the civilian suffers from

partisan politics. Without compromising and coming to new agreements, the civilian will always suffer. There are better ways to reduce violence than barring gun ownership for individuals.

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## **BRADY HANDGUN VIOLENCE PROTECTION ACT OF 1993**

By Kamran Johal

### **BACKGROUND**

The Brady Handgun Violence Protection Act was spearheaded by Sarah Brady, her husband James Brady was shot in the head during an assassination attempt on President Regan. The man that fired the gun was later found to have been mentally ill. "The man who shot him, John W. Hinckley Jr., had a history of mental illness but had easily bought his handgun in Texas after lying on the registration form. It is this kind of criminal use of firearms that the proposed legislation—also known as the Brady bill—is designed to deter."(Congressional Digest) This tragedy was a result of lax gun control at the time. In fact before the Brady Act "Firearms were sold, even by Federal Firearms Licensees (FFLs) on the 'honor system'. Virtually the only recourse that Federal law enforcement had against felons and other prohibited people who sought to purchase firearms was to prosecute them after they gained illegal possession of the firearm." (Congressional Digest)

The Brady Act changed this. It revolutionized the system which is used to register and purchase handguns. It consisted of "two phases: From February 28, 1994, until November 30, 1998, the provisions of 'Permanent Brady' have been in place" (Congressional Digest). The first part of the Brady Act required 5 business days to complete background checks, which also provided a cool down period to help prevent crimes of passion. The Congressional Digest states that "The Interim Brady system was

extremely effective, preventing more than 310,000 felons, fugitives, and other prohibited people from getting hand guns". This shows that the act is a success in what it was intended to do, which is to prohibit unfit individuals from legally obtaining a fire arm. The act was not created to address ways to stop people from illegally obtaining guns, which is crucial to consider when determining how successful the act is.

After the sunset period of the initial part of the Brady Act, there was to be a national institution which was to implement a computerized instant check (background) for purchases. The system which is currently used to do background checks consists of using three different databases: "The National Crime Information Center (NCIC), which contains approximately 700,000 records on wanted persons and subjects of protective/restraining orders"; "The Interstate Identification Index (III), which contains approximately 34.7 million criminal history records" and "The National Instant Criminal Background Check System (NICS) index, which contains about 940,000 records of prohibited persons, as outlined in the Brady Act."(Congressional Digest)

The system works as follows: "Permanent Brady prohibits an FFL from transferring a firearm until the FFL has contacted the NICS and either the transfer has been allowed or three business days have passed without an indication from the NICS that the prospective purchaser is prohibited from possessing a firearm." The people that take longer than three days to be reviewed are the people that the FBI deems is in need of further scrutiny, so allowing them to purchase guns is problematic. For those that have concerns over the burden this may put onto the average person: "Ninety-five percent of all NICS checks are completed within two hours." (Congressional Digest).The instant

check system is therefore efficient when a person with no criminal history decides to purchase a gun.

However criminals are not the only people affected by the restrictions of the Brady Act. The following is a list of all people prohibited from purchasing a handgun by the Brady Act: "convicted felons and people under indictment for a felony, fugitives from justice, unlawful drug users or drug addicts, individuals who have been involuntarily committed to a mental institution or determined to be mentally incompetent, illegal aliens and legal aliens admitted under a nonimmigrant visa, individuals who have been dishonorably discharged from the military, persons who have renounced their citizenship, persons subject to certain domestic violence restraining orders, and persons convicted of misdemeanor crimes of domestic violence."(Congressional Digest). There is no doubt that the majority of the people listed are a menace to society, however it is interesting to note that nonimmigrant legal aliens are not allowed to purchase a handgun in the United States. While many of these people are not seen as a threat to American society, they certainly owe no allegiance to the United States and therefore it is inherently acceptable to restrict what they may and may not purchase.

The Congressional Digest further explains the effectiveness of the Brady Act. "In the first seven months of operation, there were 4,726,078 checks run through the NICS. Of these, 2,295,013 were handled by the FBI while 2,431,065 were handled by state POCs." POCs are essentially liaisons to the FBI that help do the background checks in states that are supportive of the Brady Act. "Of the total 2,295,013 checks handled by the FBI, 1,665,232 (73 percent) resulted in an immediate 'proceed' determination to the

FFL...average amount of time it takes for NICS to provide an immediate proceed after information is entered into NICS is 30 seconds."(Congressional Digest) "

In the first seven months of NICS operation, the FBI blocked 49,160 illegal gun sales, a denial rate of 2.13 percent. Based on the information received from individual states, the FBI estimates that a comparable number of denials have been issued by the State POCs, for an estimated total of 100,000 denials under Permanent Brady" Congressional Digest). Although there are 1999 statistics in The Congressional Digest, the NICS website shows a table which shows that the percentage of people denied has gone down, however this does correlate with the downward trend in people accessing the database since 1999, because the people denied has remained fairly consistent over time.

## **THE BRADY ACT IN THE COURTS: THE CONSTITUTIONAL CONTROVERSY**

While the implementation of the Brady Act was not at all in regards to the Second Amendment, there is some issue with the Tenth Amendment. "The 5-4 ruling in the combined cases of *Mack v. United States* and *Printz v. United States* struck down a portion of the law that required local law enforcement officials to conduct background checks on prospective handgun purchasers. The court concluded that Congress had no authority to require such checks" (CQ almanac). The claim is that smaller counties in rural areas do not have the manpower to conduct their duties as well as the added burden of the federal mandate. "The federal government may neither issue directives requiring the states to address particular problems, nor command the states' officers, or those of

their political subdivision, to administer or enforce a federal regulatory program,” Justice Antonin Scalia said in the majority opinion.(CQ Almanac). Therefore the court has made this case an issue of state rights versus federal government rights. ““We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program,’ Scalia wrote in the majority opinion, which was joined by Chief Justice William H. Rehnquist and Justices Sandra Day O'Connor, Anthony M. Kennedy and Clarence Thomas. ‘Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly.’”(CQ almanac). The outcome of this court case had more to do with a conservative court enforce the states’ Tenth Amendment rights than it did on the Second Amendment.

In fact, the decision was handed down in 1997, one year before the NICS was to become operational.

### **ANALYSIS: WAS IT NEEDED, WAS IT EFFECTIVE?**

When examining the Brady Act, the first thing that needs to be analyzed is the initial public response to the idea of a background check. “There is evidence that the NRA does not represent the views of most Americans—even the estimated 45 percent who own guns. According to a recent Gallup Poll, 78 percent of the public favors stricter laws covering the sale of firearms, up from 60 percent in 1986. An earlier Harris Poll found that 73 percent of gun owners—and 53 percent of NRA members—favored some federal law to control the sale of firearms.”(CQ researcher). Gallup is a credible polling institution so their statistics can be trusted, reflecting that there was clearly public

sentiment for regulation of the sale of fire arms, and this is exactly what the Brady Act does.

Handgun Control Inc. is the interest group run by Sarah Brady. Her organization respects the right to bear arms as noted in the Second Amendment, however she does believe that there should be restrictions on the purchase of handguns, if only to insure that legal guns end up in the hands of competent citizens. "Between 1979 and 1987, the Justice Department reports in a survey of victims of handgun crimes, offenders used their weapons to kill an average of 9,200 Americans each year and to wound 15,000. Even more deaths caused by handguns were not murders. According to Handgun Control Inc., 1,200 people die each year from handgun accidents, and handguns were used by 12,701 Americans to take their own lives in 1987. Of the more than 30,000 total deaths from all kinds of firearms each year, the organization reports, more than 23,000 are caused by handguns, the weapons targeted by the Brady Bill." (CQ researcher). The survey data suggests that the average American was tired of handgun violence in the 1980s, and was willing to restrict the purchase of handguns if it led to a decline in the amount of violence caused by handguns.

When examining the statistics gathered after the implementation of the Brady Act it is imperative to understand that the Brady act was broken up into two parts of implementation, the first having a 5 day cool off/background check period which was to be implemented at the state level by federal law. The second part is the NICS which was implemented in 1998, and allows for the purchase of a handgun if a person is immediately approved, or if there is no response back after a three day waiting period.

"When the Bureau of Justice Statistics released the official data on the Clinton- backed Brady Law in June, the Justice Department proclaimed that the law 'had stopped 536,000 felons, fugitives, domestic abusers,' and other undesirables from getting a gun. But such statistics tell only part of the story about assessing the effectiveness of the 1993 law. While it's true that the Brady Law has blocked hundreds of thousands of retail gun purchases, it's unclear how many thwarted buyers went on to obtain weapons from other sources. For instance, Professor James D. Wright of Tulane University conducted interviews with approximately 1,800 felons and asked them how they had obtained the guns they used in crimes. He found that 'four out of five used the secondary firearm market, which is comprised of friends, family members, drug dealers, and street sources.'" (Frater)

The issue here is irrelevant to the purpose of the Brady Act because the Brady act was simply created to stop the legal purchase of handguns by people who have been deemed undesirable to own a handgun, and 536,000 such transactions were prevented.

The next issue raised by critics of the law is the three day waiting period.

"When background checks can't be completed within three business days, the gun purchase is allowed to proceed. The FBI estimates that between November 1998 and June 2000 it failed

to complete about 180,000 background checks within three days, roughly 1.4 percent of the 13.3 million checks conducted. The reason? The national database had incomplete state arrest and conviction records--caused by strains on state resources. The Treasury Department and FBI officials who were charged with implementing the law, however, concede that they have no idea how many of those 180,000 applicants were felons or fugitives, or how many of them walked out with a gun. More frightening is their admission that they may not have the law enforcement resources necessary to get the guns back."(Frater).

Ninety-five percent of applicants are cleared within a matter of minutes. Therefore out of the five percent remaining people seeking to purchase a gun, only a small percentage are not cleared within the three day waiting period. However, this percentage could account for individuals in precluded categories, yet they might get guns legally. This is also coupled with the fact that most handgun crimes come from illegally obtained weapons.

People who make the claim that this small percentage of people who make it past the system is intolerable would cite the following argument.

On June 21, David R. Loesch, the assistant director in charge of the NICS for the FBI, testified before the Senate Judiciary Committee that of those 180,000 cases, there were 6,084 confirmed illegal gun purchasers who slipped through the

three-day crack. Tragically, one of these was a Colorado man under a restraining order; he used the gun he purchased to kill three children.(Frater)

However, what is not addressed in this is that the 6,084 are about three percent of the people that get by the system and about one-thousandth of the amount of people that apply. While it is unfortunate that this incident occurred, it is still an isolated incident and therefore not representative of what happens with most people that go through the NCIS system.

However, "Some failures in Brady implementation should not be surprising, given the sheer volume of applications received by the FBI and local law enforcement agencies since 1994: 22 million. More than half of all these background checks were performed directly by the FBI; state law enforcement agencies handled the rest."(Frater). The fact that there were 22 million people applying to purchase handguns after the implementation shows that there is no affect upon the right of people to have handguns. While it was never intended to chill the ability of responsible people to purchase hand guns. there was always a possibility of this happening as a side effect. There are some that would prefer to allow gun control to remain a state right, and they believe that the Brady Act is a clear violation of that right The court ruling in *Printz v United* upheld the background check, but not the implementation through states. "Georgia, a state that does its own background checks, had the second-highest rate of disqualified buyers among the states in 1999, according to the Bureau of Justice Statistics, and yet, before the Brady Law, the state had no gun control laws at all. Paul Heppner, the deputy director who oversees the Georgia

Bureau of Investigation Crime Information Center, says that mistakes are rare in approving or denying retail gun transactions."(Frater). The Georgia demonstrates the notion that states are more effective at regulating their own citizens.

There is evidence that the Brady Act has been a success, although it is not very conclusive.

Gun control laws take years to show their effects, because injury and mortality data generally lag two to three years behind new laws, according to a report by the Open Society Institute, a George Soros-funded project to reduce gun violence. Douglas Weil, research director at the Center to Control Handgun Violence, the research affiliate of Handgun Control, studied the effect of the Brady Law in reducing the number of robberies committed with a gun that resulted in a fatality. He estimated that between 1994 and 1998, the Brady Law resulted in 9,368 saved lives. In addition, he told National Journal, "regulating the retail market disrupted gun trafficking dramatically." (Frater).

While this is just evidence from the pre-NICS era it does show that the background checks were able to significantly reduce the number undesirable people being able to purchase a handgun.

There has been progress made on prosecuting the people who have infringed the Brady Act. "Treasury Secretary Lawrence H. Summers held a press conference to tout a

report saying that from July 1996 through December 1998, ATF agents submitted 1,090 firearms cases to state and federal prosecutors. And from these cases, 439 people were prosecuted for making a false statement on the Brady application form."(Frater) While this is not a high percentage of the people that violate the act, it does show that offenders are being prosecuted.

According to a BJS special report on federal firearms offenders, 135 Brady-disqualified persons were convicted for purchasing or attempting to purchase a firearm in 1998, a year in which a total of 6,397 defendants were prosecuted for a federal firearms offense. Queried whether that was a paltry number, Bea Witzleben, the Justice attorney responsible for supervising the firearms policy, replied that it reflects a prioritizing of cases. 'We're not trying to measure success by counting scalps.' She explains that NICS has given the government instant information about who may be trying to obtain a gun, but with over 200,000 denials, the system can handle only the cases against those who pose the greatest risks to the public. (Frater)

This once again re-affirms the idea that the sole goal of the Brady Act is to simply restrict undesirables from legally obtaining guns. It is comforting to know that because of this the government is also able to keep track of undesirables that have shown intent to purchase a gun. The idea that the most serious of criminals are being tracked is

comforting because it shows that the government is taking as proactive a role as it can in protecting its citizens.

### **BUDGETARY IMPACTS**

"The compromise bill established a waiting period of five business days to let police check criminal records. It authorized \$200 million per year to help states computerize their records. The waiting period was to end five years after enactment, with no provisions for the attorney general to replace it with the computerized instant-check system before then."(CQ almanac). This is the only federal funding provided for the NCIS, and it is the only part of the Brady Act that requires a budget. This was not a terrible burden onto the economy, especially since the NCIS was put into place in the middle of what is now referred to as the "dot com boom". The bill also raised the price for licensing fees. However budgetary impacts on the individual states have not been calculated.

### **PUBLIC OUTREACH: THE BRADY ACT IN CONGRESS**

The Brady Act was a work in progress that was surrounded by political intrigue.

After seven years of debate and a harrowing final week of political maneuvering, the Senate on Nov. 24 cleared the so-called Brady Bill (HR 1025) requiring a five-day waiting period for the purchase of a handgun. It was the first major gun control legislation to pass Congress since 1968, when

lawmakers approved restrictions in response to urban violence and the assassinations of Robert F. Kennedy and the Rev. Dr.

Martin Luther King Jr." (CQ almanac)

Congress deciding to further regulate guns has historically been a bad move politically, but in the 1980s rising crime rates involving guns seemed to be pushing Congress into action as they received pressure from their constituents.

One of the most controversial parts of the bill was the waiting period. There were many people who accepted the waiting period introduced in the Brady Act, however the length for such a waiting period seemed to be controversial.

The bill instituted a waiting period of five business days for all handgun purchases, providing a cooling-off period for impetuous gun buyers as well as time to check the purchaser's background. The bill also raised licensing fees for gun dealers and required that police be notified of any multiple gun purchases. House-Senate conference negotiators agreed to phase out the waiting period within five years and replace it with a national "instant-check" system that would scan computerized criminal records to prevent the selling of weapons to felons."(CQ almanac)

It is interesting to note that the bill was not created specifically to deter crime.

Many on both sides described the bill as a modest measure that at best would make only a small dent in crime. But the well-

publicized legislation took on gigantic political dimensions, as evidenced by an exhausting week of brinkmanship in the final days of the session. The vote was the first major setback for the National Rifle Association (NRA), which had thwarted past gun control efforts and had endorsed the instant-check system."(CQ almanac)

One could say that the passage of the bill became a clash of interest groups, with the NRA being against any regulation and Handgun Control Inc. being for the regulations, even if they were only going to cause a small benefit.

The Brady Act was delayed many times by political intrigue in both the House and the Senate. This is due largely to the efforts of the Republican Party and the NRA. It was not until a Democrat came into the Oval Office that the bill was able to get through.

In 1988, Congress cleared an anti-drug package, but a handgun waiting period provision — named that year after Brady — died on the House floor. In 1989, Democrats in both chambers introduced the Brady bill as separate legislation, but it got no further than Senate Judiciary subcommittee hearings. In 1990, the House Judiciary Committee approved a Brady bill with a seven-day waiting period, but it never reached the House floor." (CQ almanac)

This is just a sign of how opposed the leadership of Congress was to the regulation.

The next time the Brady Act came into consideration it included a plan to be phased out, and a discussion of how long the waiting period should be after the instant electronic check was implemented.

Like the original, sponsored by Sen. Howard M. Metzenbaum, D-Ohio, the substitute established a five-day waiting period for handgun purchases to give local law enforcement agencies time to conduct a background check on would-be buyers. The Mitchell-Dole version authorized \$200 million per year to help create a national computerized network of criminal records; the waiting period would phase out once this instant-check system was in place. (CQ almanac)

The whole idea of states' rights was in fact taken into consideration when the bill was in the Senate. "The first, and most controversial, pre-empted state and local waiting periods once the national instant-check system was in place. Proponents said waiting periods would be unnecessary at that point. "Mitchell promptly offered an amendment to strike that provision, saying it was an affront to states' rights and that he had included it only to let debate move forward. His amendment prevailed, 54–45"(CQ Almanac). This is curious because of the court case that occurred in 1997, however it is clear that the senate did what was necessary to get the bill enacted into law.

The end result of the whole ordeal is known as the compromise bill, and after

much deliberation in both the House and the Senate this is the end result. "The compromise bill established a waiting period of five business days to let police check criminal records. It authorized \$200 million per year to help states computerize their records. The waiting period was to end five years after enactment, with no provisions for the attorney general to replace it with the computerized instant-check system before then." (CQ Almanac) It seems odd that Congress as a collective would have so much concern over something as mundane as a waiting period, or something as prudent as a background check on people that wish to purchase a firearm, however the Brady act can be deemed a success simply because it reduced the ability of undesirable people to legally purchase a handgun.

### **CONCLUSION: IS IT WORTH IT?**

The Brady Act is a simple piece of legislation, and the initial controversy surrounding it in Congress seems hard to understand. However, one of the most important things about the Brady Act is that it was the first major piece of legislation since 1968 that restricted guns in any way. The Brady Act was also controversial because the initial part of the bill had state officials being commandeered by the federal government in to carry out the mandate of a federal act. The Supreme Court did decide that the federal government did not have the right to force state employees to do the bidding of a federal agency. So it was enforcing the Tenth Amendment while not commenting on the Second Amendment.

The statistics of the time show that there was a problem with handgun violence

occurring in the United States, and because the government did not wish to infringe upon the rights of the individual to bear arms, the Brady Act was created to keep undesirables from legally purchasing guns. The initial waiting period was convenient as a cool down time to prevent crimes of passion, but it also allowed for the FBI to conduct their background checks. There is also evidence to suggest that the number of undesirables obtaining a hand guns is slowly but steadily declining. There is some controversy regarding the small number of people who manage to squeak past the 3 day background check period that was instituted with the NCIS, but this is only a thousandth of a percentage of all the people who go through the system. Another benefit to the Brady Act is that it allows the FBI to keep track of all the people that pose potential threats that are trying to purchase handguns. The only criticism that comes against the Brady act is that it has not significantly reduced the amount of crime committed with guns. A response to this is that the act never intended to prevent gun violence but, to merely ensure that it is difficult for undesirables to legally purchase handguns.

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# **THE EFFECT OF SEPTEMBER 11, 2001 ON AVIATION SECURITY**

By Sabahat Adil

## **ABSTRACT**

The hijackings of multiple planes on September 11, 2001 lead to changes in aviation security. These changes included the Congressional Bill “Arming Pilots Against Terrorism Act,” the establishment of the Department of Homeland Security and the creation of the Federal Air Marshal Program. The intent of these acts is to make flying safer for the American people by training and arming pilots and having armed air marshals on flights. However, there is a massive shortage of air marshals seven years after 9/11.

## **INTRODUCTION**

On September 11, 2001, nineteen terrorists that crashed and brought an end to the lives of nearly 3,000 people, hijacked four commercial passenger jet airliners. This event changed how Americans viewed their safety on board a flight because the pilots were not armed and therefore, could not defend the passengers. 9/11 changed the opinion of many Americans regarding gun control and the demand for better security in the sky.

As a result, the Congress passed the “Arming Pilots Against Terrorism Act” in 2002, which allowed pilots, on a voluntary basis, to be trained and armed to defend themselves and their aircraft with a gun in case of a hijacking. Another important step in passenger security is the expansion of the Federal Air Marshal Service that allowed air

marshals to be armed on a flight to prevent hijackings.

## **RESEARCH QUESTION**

The events of September 11, 2001 changed the American perspective of Homeland Security and the steps that had to be taken to protect Americans. Pilots are now allowed to carry hand guns during a flight, but does that make flights safer? Do armed air marshals have the ability to protect passengers from hijackers?

## **THESIS**

September 11, 2001 created a new awareness of the need for homeland security. One new step taken following the airplane hijackings is that pilots are now able to volunteer to be trained and armed with firearms. Trained air marshals fly on commercial flights in the United States but more flights need be protected.

## **LITERATURE REVIEW**

Allen, C. (2003). *The Second Amendment is Homeland Security* analyzes how gun rights activists have incorporated the events of September 11, 2001 and the War on Terror into their narrative and activism.

Elias, B. (2003). *Arming Pilots Against Terrorism: Implementation Issues for the Federal Flight Deck Officer Program* describes several implementation issues within each of these areas that may require continued legislative oversight and possible clarification regarding the intent of the legislation.

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Want to Carry Guns examines certain methods of defense that were placed in US commercial airlines in the post-9/11 period.

Griffin, D. (2008, March 25). Air marshals missing from almost all flights. *CNN.com* emphasizes the fact that the Transportation Security Administration is not providing enough safety on board American flight.

House Committee on Transportation and Infrastructure. (2002). *Congressional Budget Cost Estimate to Implement H.R. 4635* estimates the cost for the implementation of the Arming Pilots Against Terrorism Act.

## **METHODOLOGY**

Research for this article began with a literature review, including access to on-line resources. It included an expert interview with Robert French, a FAA gold seal flight instructor who has been flying since 1997. Finally, data on the Congressional Bill H.R. 4635 and the statistics for hijackings were collected through the consulted sources and were analyzed for its impact on public opinion regarding gun control on board an aircraft.

## **PRE-9/11 SITUATION**

The Cuban Revolution in the 1960's led to a very important rule in aviation security. Hijackings on American airline flights to and from Cuba started in the 1950's and have been caused by terrorism, extortion, political asylum and transportation between

the two countries. Aircraft hijackings on flights between Cuba and the United States reached their peak in 1968-1969 with a total of 48 major and minor hijackings (Rider, 2003). During the height of the Cuban hijacking crisis, the Air Line Pilots Association (ALPA) called for strengthening flight deck doors and arming pilots, among other measures (Rider, 2003). The Federal Aviation Administration adopted an armed pilot rule in 1961 to help prevent hijackings of American airliners. The FAA, with congressional support, also amended the federal aviation regulations to permit pilots to be armed with the consent of their airline (Dougherty, 2002).

This ruling was a landmark act because pilots could for the first time be armed on an aircraft to defend themselves and the passengers on board. However, in July 2001 – two months before September 11, 2001 - the FAA repealed the armed pilots ruling (Dougherty, 2002). Speaking to the press, Federal Aviation Association spokesperson Paul Takemoto said, “In the past, FAA regulations permitted pilots to carry firearms in the cockpit provided they completed an FAA-approved training program and were trained properly by the airlines. That was never put into effect because no requests for those training programs were ever made” (Dougherty, 2002). Takemoto added that the rule required airlines to apply to the agency for their pilots to carry guns in cockpits and for the airlines to put pilots through an agency-approved firearms training course. However, the airlines never applied for the training programs and the ruling had been underutilized for 40 years.

In July 2001, before rescinding the armed pilots ruling, the FAA received classified briefing that Osama bin Laden's al-Qaeda network might be planning

hijackings of U.S. airliners. However, it is still unclear why FAA officials, after receiving such information that U.S. planes could be hijacked, still moved to repeal a rule allowing pilots to be armed. Even though the rule was underutilized, the FAA could have warned airlines enough to start the training process. Leading aviation security experts lay at least some of the blame for the tragedy of September 11, 2001 at the feet of airlines.

According to the experts, the airlines never took advantage of the privilege of the arming pilots ruling while the ruling was still in effect. However, the United States gets a lot of threats and no one could have predicted these attacks. Another reason the airlines did not take advantage of the ruling may have been the fact that the United States civil aviation was experiencing a relatively peaceful period before September 11, 2001 (Miller, 2007, p. 209).

Another result of the hijackings by Cuban nationals was the creation of the Federal Air Marshal Service (FAMS), which began in 1968, as the Sky Marshal Program (Arasly, 2004). The FAA was originally responsible for the Federal Air Marshal Program, designed to stop hijackings to and from Cuba. The stated role of the air marshals is to “detect, deter and defeat hostile acts targeting the United States’ air carriers, airports, passengers and crews.” The program started with six volunteers from the FAA and expanded relying mainly on volunteers. As a result of a high profile hijacking in 1985, President Ronald Reagan directed the Secretary of Transportation to consider an expansion of the Federal Air Marshal Program to international flights for U.S. air carriers. Soon, the Congress enacted the International Security and Development Cooperation Act, which provided the explicit statutory basis for the Federal Air Marshal

program. The expansion of the program gradually slowed through the period of relative safety before September 11, when there were as few as 33 air marshals in the skies (Ahlers, 2006).

### **SEPTEMBER 11, 2001**

It had been a decade since a hijacking on an American flight before 2001. But hijackings taking place on the global front threatened the American security. Pilots were not armed for most of 2001 and there were as few as 33 air marshals active on September 11, 2001 (Ahlers, 2006). On 9/11, Americans realized that the threat had been brought home and that hijacking was a constant and an effective threat.

### **THE TRANSPORTATION SECURITY ADMINISTRATION**

In the immediate aftermath of the event on September 11, 2001, the 107<sup>th</sup> United States Congress enacted the Aviation and Transportation Security Act (ATSA). This legislation was co-sponsored by Republican Senator John McCain and Democratic Senator Fritz Hollings. The ATSA led to the development of the Transportation Security Administration (TSA). The TSA is a U.S. government agency that was signed into law by President George W. Bush on November 19, 2001 as a direct response to the attacks on September 11, 2001. The TSA's stated goal is to ensure freedom of movement for people and commerce. The main function of the TSA is aviation security for which they have hired around 43,000 transportation security officers. They state that airport security and the prevention of aircraft hijackings are two of its main goals. However, while the

effectiveness of the TSA in accomplishing these goals has been questioned it is clear that these goals cannot be achieved without the TSA. The directs the Flight Deck Officers and the Federal Air Marshal Program, both of which are important for the safety of passengers on an aircraft (TSA, 2008).

### **ARMING PILOTS AGAINST TERRORISM ACT**

The Air Line Pilots Association (ALPA) states that the ALPA was the first to recommend to Congress in September 2001 that flight crews be armed. The ALPA applauded the Congress “for passing the Aviation and Transportation Security Act, which contained a provision for arming pilots.” They added, “However, more than five months have passed since the bill was signed into law, and neither the airlines nor the Administration has taken any action to implement this important provision.” Representatives Don Young and John Mica introduced the legislation H.R. 4635 in May 2002, which sought to arm pilots in case of an emergency such as a hijacking. The House of Representatives passed the Arming Pilots Against Terrorism Act in July 2002 by a vote of 310 to 113 (Elias, 2003).

The H.R. 4635 act, which would make armed pilots federal Flight Deck Officers, states that,

The Under Secretary of Transportation for Security shall establish a program to deputize volunteer pilots of air carriers providing air transportation or intrastate air transportation as Federal law enforcement officers to defend the flight decks of

aircraft of such air carriers against acts of criminal violence or air piracy. Such officers shall be known as `Federal flight deck officers.

This act would allow 70,000 eligible pilots to volunteer for the Flight Deck Officer training. The act directs the TSA to designate armed pilots as federal Flight Deck Officers, which gives the pilots who volunteer limited law enforcement authority, and protection from lawsuits in state and federal courts. Under the program, the federal Flight Deck Officers would also be authorized to use force, including lethal force, when they judge the security of the aircraft is at risk (Elias, 2003).

There are two positions both for and against arming pilots. According to the United State General Accounting Office the reasons provided in favor of arming pilots include the fact that there needs to be a last line of defense if all other security measures fail. Firearms are a highly effective means of permanently disabling one or multiple attackers and are the best deterrent to hijackers. The risk to aircraft integrity, including depressurizing aircraft or damaging vital flight components, is very small. The risk to passengers onboard is very small, particularly if the firearms are used only in the cockpit and the pilots are well trained. Also, pilots are trained to do several tasks at once and would be able to incorporate the use of a firearm into their other tasks (USGAO, 2002).

Opposing views include the belief that current security enhancements, such as improved screening, increases in the number of federal air marshals, and cockpit door reinforcement, are sufficient for safety on an aircraft. Another important point is that firearms are not sufficiently effective compared with the risks they present. Trained law

enforcement officials have only an 18 to 22 percent hit ratio in armed confrontation and the cramped quarters of a cockpit do not lend themselves to success. Also, the risk to other people is significant as the firearm could be used against a pilot or other passengers. Accidental weapon discharge and pilot mishandling of the weapon are also risks. In case of an emergency, pilots are trained to land the aircraft quickly and in an emergency this should be their primary task. However, firearms could distract pilots from their critical mission of flying and landing the aircraft (USGAO, 2002).

Clearly, seven years after the passage of the H.R. 4635, there are still a lot of mixed opinions regarding the bill. Mr. Robert French, a FAA Gold Seal flight instructor stated his opinion that, “The arming pilots act really was not done well. It requires pilots to pay for their own training, and take their own vacation time to do the training. Even with those tremendous time and money barriers, many pilots have taken the time to be trained. That said, I don't think it really adds that much to the safety of the flight (R. French, personal communication, May 5, 2008).” Clearly, pilots do not have much incentive to pay for their own training. Either the FAA or the airlines should provide the training for pilots. He also added that, “These days the pilots simply keep the cockpit door closed and locked, and that is much safer for everyone than having the pilot cockpit door open and the pilots possibly in jeopardy.”

## **ANALYSIS**

The enactment of the Arming Pilots Against Terrorism Act has led the legislators to focus on the implementation of this bill. However, there are many implementation

issues regarding this act. One of the issues pilot selection and screening to be a Flight Deck Officer (Elias, 2003). Captain Stephen Luckey, chairman of the National Flight Security Committee of the Air Line Pilots Association (ALPA) noted that, “Pilots are undoubtedly the most highly scrutinized employees in the work force, submitting to a battery of pre-employment evaluations, a flight physical every six months, random drug and alcohol testing, and a criminal history records check, among other formal examinations.” Volunteering to be a Flight Deck Officer potentially means additional security and background checks (ALPA, 2002).

Another issue is the firearms equipment on board an aircraft. The firearm used on board has to be effective yet not be a risk to the aircraft. Opponents of arming pilots have argued that a stray bullet could cause serious damage to aircraft systems and structures and jeopardize flight safety. The law provides for temporary suspension of the program if the firearm of a federal flight deck officer accidentally discharges due to a shortcoming in standards, training, or procedures until the shortcoming is corrected (Elias, 2003).

Another issue regarding the Flight Deck Officers is their training. The Act specifies that the training of a Flight Deck Officer shall include:

- Training to ensure that the Federal flight deck officer attains a level of proficiency with a firearm comparable to the level of proficiency required of federal air marshals;
- Training to ensure that the officer maintains exclusive control over the officer’s firearm at all times, including training in defensive maneuvers; and
- Training to assist the officer in determining when it is appropriate to use the officer’s firearm and when it is appropriate to use less than lethal force.

The implementation of these factors have been important issues as it is a long procedure

and costly. In a report by the House Committee on Transportation and Infrastructure (2002), the estimated cost of implementing the Arming Pilots Against Terrorism Act is \$47 million over the 2003-2007 period (Elias, 2003).

### **FEDERAL AIR MARSHAL SERVICE**

The Federal Air Marshal Service (FAMS) is a law enforcement agency under the supervision of the Transportation Security Administration of the Department of Homeland Security. The role of the air marshals is to “detect, deter and defeat hostile acts targeting U.S. air carriers, airports, passengers and crews.” Prior to the attacks on the World Trade Center in New York City there were as few as 50 air marshals in the sky and on the day of September 11, 2001 there were only 33 air marshals on duty (Ahlers, 2006). As a result of the 9/11 attacks, President Bush ordered the rapid expansion of the Federal Air Marshal Service. A classified number of applicants were hired, trained and deployed on flights including many new hires from other federal agencies.

Currently, the United States Department of Transportation has primary authority for airplane security. With the approval of the Attorney General and the Secretary of State, the Secretary of Transportation may authorize a marshal or other government employee who carries out air transportation security to carry a gun. A marshal is also empowered to make warrantless arrests. The only state of mind that is required for such an arrest to be legal, is the marshal's reasonable belief that the arrestee is committing, or has committed, a federal felony offense, including an offense against the United States (BBC, 2002).

## **THE CONTROVERSY REGARDING THE NUMBER OF AIR MARSHALS**

Although the information is classified, as of August 2006, the number of air marshals is said to be in the “thousands”. The number of air marshals peaked after the attacks on 9/11 but are said to have dwindled in the last seven years. A recent nationwide investigation by CNN found that armed federal air marshals protect less than 1% of commercial flights. There are an average of 28,000 commercial flights per day in the United States and with 1% of flights protected, there are only 280 flights that would be defended by a federal air marshal (Griffin, 2008). This leaves many flights vulnerable to hijackings or terrorism. One pilot who crisscrosses the country and flies internationally told CNN he hasn't seen an air marshal on board one of his flights in six months.

A federal law enforcement officer, who is not affiliated with the air marshal service and who travels in and out of Washington every week, said he has gone for months without seeing a marshal on board. However, the TSA has denied the numbers reported by CNN but refuses to release the actual numbers. In an email from Greg Alter, assistant special agent in charge of the federal air marshal program, he stated that, “Since the Federal Air Marshal Service post-September 11, 2001, the expansion, the volume of risk-based deployments has consistently remained at, near or exceeded target levels.” He added, “Today, many thousands of dedicated and highly trained Federal Air Marshal Service [sic] work diligently around the globe to make air travel safer than it’s ever been.” However, those inside the marshal program service say that the number of “thousands” of air marshals working the skies is overestimated (Griffin, 2008).

## **IMPLEMENTATION OF THE FEDERAL AIR MARSHAL PROGRAM**

Implementing the Federal Air Marshal program has been problematic for the TSA because there are just not enough air marshals to protect every flight. There are 28,000 flights per day on average in the United States (Griffin, 2008). In order to protect all these flights with two air marshals on each flight, there would have to be 90,000 trained air marshals. The TSA has not released any official numbers because that might endanger the marshals but according to pilots and air marshals, who choose not to identify themselves, there are less than 1% flights that are protected (Griffin, 2008). Air marshals are required to be undercover law enforcement officers on board an aircraft to counter aircraft hijackings. Therefore, another policy that has been controversial is the ruling that air marshals dress in plain clothes in order to attract little attention to themselves and to blend in with the rest of the passengers. However, air marshals believe that this ruling makes them recognizable and endangers them (BBC, 2002).

Recently, there have been criticisms regarding the training and hiring of air marshals. The FAA claims that it “sets a premium on the selection, training and discipline of this elite corps of employees.” However, critics such as the American Civil Liberties Union disagree and urge the Congress to begin an investigation of the training and conduct of air marshals aboard civilian aircrafts. The ACLU believes that because of the rapid expansion of the air marshal program following the attacks on 9/11, the TSA is hiring persons who are not qualified enough to fulfill their responsibilities so that they can increase the number of air marshals. The TSA itself has acknowledged that it no

longer requires the more difficult shooting test as a condition of employment. It is unrealistic for air marshals to protect every commercial flight in the United States but certain precautions do have to be taken to make sure that the air marshals are effective in their role (Arasly, 2004).

## **CONCLUSION**

The events of September 11, 2001 have forced the government to reevaluate the effectiveness of the security measures on aircrafts. New laws such as the Arming Pilots Against Terrorism Act and the expansion of the Federal Air Marshal program have without doubt improved the chances of security. However, the Federal Air Marshal program needs to be more efficient in their hiring and training. Since there cannot be air marshals on every flight in the sky, training pilots is imperative to the security of an aircraft.

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## Landmark Cases

## **SECOND AMENDMENT: MILLER V. UNITED STATES (1939)**

By Deanna Talavera

### **ABSTRACT**

Before 1939 the Supreme Court had never decided on how and where the Second Amendment would be applicable. The Supreme Court decision in the case of *Miller v. United States* (1939) is an important decision because it is the first time the court wrote an opinion directly relating to the Second Amendment. The case deals specifically with the National Firearms Act of 1934 and its constitutionality. Questions surrounding the *Miller* decision are, did the framers of the Constitution mean when they referred to the term “militia,” and whether or not the federal government make laws concerning guns. Subsequently, the Supreme Court has used *Miller* as the standing precedent for the collective rights view of the Second Amendment.

### **INTRODUCTION**

The Supreme Court decision in the *Miller v. United States* (1939) case prohibited the private ownership of a gun unless “some reasonable relationship to the preservation or efficiency of a well regulated militia” existed. (Hardy, p. 94) However the decision handed down by the Supreme Court did not evaluate the second clause of the Second Amendment which outlined “the right of the people to keep and bear arms.” The Supreme Court’s oversight of that second statement would create future debates as to what a citizen’s rights under the Second Amendment actually are. Although the *Miller v.*

*United States* decision did not guarantee an individual's right to keep and bear arms, it would eventually have an impact on the way citizens can possess and transport firearms today. The limitations, laws, policies, and rights of an individual to bear arms are evolutionary decisions derived from the *Miller v. United States* decision.

## **METHODOLOGY**

The research was conducted using internet and library resources which included access to primary sources on the *Miller* case. One example is a story written in the *New York Times*, the day the decision was handed down, and the reaction to the decision. The research included an interview with Professor James Brent, the Chair of the Political Science Department at San Jose State University, and his interpretation of the opinion written about the Miller case. Scholarly journal articles are included as well and provide both a historical and constitutional prospective on the Miller decision.

## **LITERATURE REVIEW**

Bogus, C. (Ed.). (2002). *The Second Amendment in Law and History: Historians and Constitutional Scholars on the Right to Bear Arms* examined the historical and constitutional issues surrounding gun ownership and the right to bear arms. It also analyzed the theory of "collective rights" and its role in the *Miller v. United States* decision.

Denning, B. & Reynolds, G. (2002). Telling Miller's Tale: A reply to David Yassky. *Law and Contemporary Problems* is a rebuttal to a previous article written by

David Yassky, where Yassky claims the Supreme Court has failed to enforce the Second Amendment, and states the Miller decision says very little about what an individual's rights under the Second Amendment are. Authors Denning and Reynolds analyze Yassky's argument and state that his conclusion is wrong for several reasons, which they outline throughout the article.

Lund, N. (1999). The ends of Second Amendment jurisprudence. *Texas Review of Law and Politics* assesses jurisprudence on the citizens' right to bear arms protected under the Second Amendment of the U.S. Constitution by examining several court cases. It bases its assessment on the definition of the Second Amendment issued by the United States Supreme Court in the case *United States v. Miller*.

Sellin, J., & Sellin, T. (1972). *Research Memorandum on Crime in the Depression* examines factors that led to an increase in crime during the era of prohibition. It uses statistical evidence and analysis to draw conclusions about the correlation between the status of the economy and its effect on criminal activity. This article serves as supplemental information used to establish the need for the National Firearms Act of 1934 and the subsequent ruling in *Miller v. US*.

Special to the New York Times. (1939). Supreme Court Bars Sawed-off Shotgun: Denies Constitution gives right to carry this Weapon. *New York Times* (1857- Current File). This newspaper article was written the day the Supreme Court decision in *Miller v. United States* was handed down. It provided some more background on why the decision was so important in that particular era. It provided insight on how the decision would be a new instrument with which to fight criminals.

## **BACKGROUND**

The 1930s was a transitional period in American history. The United States was struggling through a depression and heading toward a Second World War. The depression was an era that included the Temperance Movement, and an increase in organized crime revolving around prohibition. A research memorandum done on crime during the depression found that “an economic crisis affected social norms of conduct leading to new conflicts or the intensification of conflicts with established legal norms” (Sellin, 1972, p.10). This is exactly what would happen when prohibition came into effect in the early 1920s and followed by an economic depression.

The amendment proved successful in the beginning as the reduction in consumption, and alcohol related arrests dropped dramatically. However, there was a growing disobedience toward the law, and enforcing Prohibition was too large a task for the national government to take on. The demand for alcohol was outweighing the demand for sobriety. People found clever ways to evade Prohibition agents. “As a result, neither federal nor local authorities would commit the resources necessary to enforce the Volstead Act. For example, the state of Maryland refused to pass any enforcement issue” (The National Archives, n.d.). Prohibition made life in America more violent, with open rebellion against the law, and a growth in organized crime.

Prohibition had led to lucrative bootlegging operations amongst several organized crime gangs throughout the country. However, it was also the source of much conflict between the organizations. One event in particular would have a profound effect on gun

control policies during the 1930s. On February 14<sup>th</sup> 1929 an event that soon came to be called the Saint Valentine's Massacre took place. It involved two rival gangs headed by Al Capone and Bugs Moran and a dispute they had over bootlegging profits. Seven men were killed as a result of a gun fight that took place that afternoon.

Public outcry over the increased violence, and most importantly, of the massacre led Congress to begin drafting the National Firearms Act (NFA), which was passed on June 6, 1934. The NFA required a "\$200 dollar tax and registration fee before transfer of a machinegun or sawed-off shotgun. Further, the National Firearms Act made it illegal to possess a gun with barrel shorter than eighteen inches long" (National Firearms Act, 1998). It was a violation of the NFA that led to the Supreme Court's Decision in *Miller v. United States*.

The case of *Miller v. United States* involved two men, Jack Miller and Frank Layton who were arrested for taking an unregistered sawed-off shotgun across state lines. Their act violated the NFA. When the case was brought to trial their attorneys argued that the NFA violated their Second Amendment rights. "The District Court held that section eleven of the Act violates the [Second Amendment](#). It accordingly sustained the demurrer and quashed the indictment" (United States v Miller, 1939). Not satisfied with the verdict by the district courts, the case was appealed from an Arkansas court to the Supreme Court.

Miller was too poor to retain an attorney for the appeal so the appeal was presented on the government's brief only.

## ANALYSIS

Once the hearing was over Justice McReynolds wrote the opinion for the case. The opinion did not hold that Miller had no second amendment argument, it did instead focus on the arm involved and whether it had “some reasonable relationship to the efficiency of a militia” (Miller, 1939). The opinion went on to state that “it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense” (Miller, 1939). McReynolds opinion used the historical context of the eighteenth century period in which the Second Amendment was drafted.

Taking into account the historical perspective, McReynolds adopted the collective rights view that the “Second Amendment was a modest concession to moderate Antifederalists who feared the power of the new federal government. By affirming the rights of the people to bear arms as part of a well-regulated militia, Federalists assuaged lingering Antifederalist qualms about the future of state militias” (Cornell, 2004). This theory dispels the idea that an “individual” right to keep and bear arms exists. However, in its extremity, the collective right theory gives power “to the national government to regulate- to the point of prohibition- private ownership of guns, since that has, by stipulation, nothing to do with preserving state militias” (Levinson, 1989). Justice McReynolds based his opinion on what the framers of the Constitution intended but, this has left a precedent that is both vague and ambiguous.

Individual rights supporters view the opinion much differently. Their argument is that *Miller* might suggest a negative precedent: “if the sawed off shot-gun had been a

military weapon, then,” on this reading, the defendants “would have had a constitutional right to possess it” (Bogus, 2002). The individual rights supporters make the claim that any weapon that can be used by the military are allowed to be used by citizens under the Second Amendment. They also acknowledge historical contexts to support their theory. Supporters argue that when citizen militias are not called to serve, they are entitled by the terms outlined in the Second Amendment, to keep their weapons. The meaning of a militia and how it was understood to act, respond, and serve in the eighteenth century are important to consider as well.

Who is the militia? The militia was intended to include all able men considered full citizens of the community. A militia was an important aspect of establishing a government. Many early republicans viewed a standing army as a threat to freedom that needed to be avoided. Thus, they felt a “militia is the only safe form of military power that a popular government can employ; and because it is composed of the armed yeomanry, it will prevail over the mercenary professionals who man the armies of neighboring monarchs” (Levinson, 1989). By all accounts the justices involved in the *Miller* decision looked at each word of the Second Amendment text very carefully. They especially reviewed the meaning and applicable use of a militia. McReynolds noted, “the sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia- civilians primarily, soldiers on occasion” (Levinson, 1989). After taking into account the history of militias, society, and the intentions of the framers, McReynolds came to a decision that would largely do nothing to further gun rights or restrictions.

The argument that an individual right exists is legitimized by the fact that the courts rejected the collective rights argument made by the United States Government in its brief. The court did not mention this in its opinion, but it did adopt another portion of the United States argument which was:

Assuming *arguendo* that the Second Amendment protects an individual right to keep and bear arms, the government argued, the only arms protected were those suited for military purposes, as opposed to weapons- like sawed-off shotguns- that constitute “ the arsenal of the ‘public enemy’ and the gangster” and that the National Firearms Act was intended to regulate. The *Miller* court said merely that it was presented with no evidence of, and could not take notice of, a sawed off shotgun’s military utility (Denning, 2002).

The court did not implicitly rule out collective rights in favor of individual rights, rather it made no decision one way or another. The only substantial evidence there is to suggest that the court might have ruled differently would have come if sufficient evidence on behalf of the defense would have been submitted. However, the government was the only party at oral argument, and the only party to submit a brief, therefore the court based its decision on the only evidence it had.

## **INTERVIEW**

Professor James Brent of San Jose State University commented on specific

questions regarding the way the Supreme Court looked at the case and why. When asked why he thought it was important for the justices to apply the historical context of when the amendment was written he said that “no judge wants to be criticized for reaching a decision simply because he wanted it to be that way. Justices are supposed to set aside their own personal belief system and apply another set of criteria and data when deciding a case.” He went on to say that “there are many theories about where to look when deciding a case, but one is to look back and attempt to figure out what the framers thought when they wrote the amendment. History is not the only thing the justices should consider, but it is an important element in figuring out the original purpose of the law” (personal communication, May 5, 2008).

The opinion written by Justice McReynolds has been criticized for being very vague and providing no meaningful Second Amendment doctrine. When asked why that might be, Brent also went over the reasons why a Supreme Court Justice would write an opinion that was so vague. He said that there are a variety of reasons justices write vague opinions some of which are that the justice may be a bad writer. Another reason may be the behind the scenes politics. The more vague an opinion the less people it will offend. That is one way to gather votes and have a unanimous decision. He explained that the Supreme Court tries to keep the scope of a case as narrow as it can, in order to avoid ruling on a broad area of law. This way the justices can avoid changing a constitutional amendment. He said that given two choices to decide a case, the Supreme Court will decide on any other grounds besides constitutional grounds.

## **MILLER IN THE CURRENT DEBATE**

Beginning with *Cases v. United States* in 1942, the court system conducted a steady degradation of the Second Amendment that was often based on misinterpretations of the *Miller* case. Each time the *Miller* opinion was distorted by a lower court, the new opinion became part of case law and made it easier for the next case to further erode Second Amendment protections (Brown, 2001). In over forty cases since *Miller v. US*, federal courts of appeal have analyzed the Second Amendment purely in terms of protecting state militias, rather than individual rights. Of those, the Supreme Court has declined to hear appeals in nearly half of these cases, thus letting the lower court ruling stand.

Gun support advocates have repeatedly sought court judgments in recent decades that would support incorporation of the Second Amendment and an interpretation expanding it beyond the realm of a “well- regulated militia”(Spitzer, 2008). Up until recently, at the federal level it was unsuccessful. However, in recent months the Supreme Court is revisiting its opinion in the *Miller v. US* case that has been the precedent for nearly 70 years. The Supreme Court will examine whether or not the U.S. District Court ruling on the District of Columbia ban on functional firearms is unconstitutional. People are intrigued by the case because of the possible effect it might have on gun regulations at the federal level. The court will inevitably review the *Miller* case and re-examine its position on state “militias” and whether or not the Second Amendment allows for an individual right to bear arms.

During the *DC v. Heller* hearing, “five of the justices, a bare majority, signaled

that they thought the amendment gave individuals a right to have a gun for self-defense. It was not limited to arms for ‘a well-regulated militia,’ they said” (Savage, 2008). Chief Justice Roberts has already stated that he favored a “narrow ruling, one that would not cast doubt on an array of gun control laws across the nation” (Savage, 2008). Some of these laws would include a ban on the sale of new machine guns, the requirement of background checks for new and potential buyers of handguns, and state licensing rules for those who wish to carry concealed weapons.

A decision in the *Heller* case is not expected to be handed down until June, however the decision will answer some of the important questions raised by the Second Amendment such as: Does the 2nd Amendment protect an individual right? Is this right subject to reasonable restrictions by the government? And is the District of Columbia's law unconstitutional because it forbids the private possession of handguns? All in all, the relevance of the *Miller* case, and the constitutional understanding that its decision was based upon, will come into question while the *Heller* case is under review. The upcoming decision will have a profound effect on society and its relationships with guns.

## **CONCLUSION**

The *Miller* case is important because it took into account the original intentions of the framers of the Constitution in reaching its decision. Although society in the time the constitution was drafted was radically different from society in 1939, the idea of a militia remained firm, as did the Supreme Courts decision in the *Miller* case for nearly 70 years. History plays an important role in the debate surrounding the Second Amendment, and

advocates on both sides use it to further their agendas. For example, the restrictions on firearms, like the National Firearms Act of 1934, came in the wake of increased violence during the 1920s and 1930s. Further, major tragedies involving guns have intensified the debate over gun control and stricter legislation. Events such as the St. Valentine's Massacre, as well as modern day tragedies such as the Columbine High School shooting, as well as the Virginia Tech shooting have given both sides the opportunity to show the need of citizens to arm themselves in defense, or on the other hand, restrict who can obtain guns. Just as the National Firearms Act of 1934 was a response to the St. Valentine's Day Massacre, stricter gun laws in New York and the District of Columbia are obvious responses to the recent surge of gun violence.

Just as history plays an important role, so does the dynamic on the Supreme Court. The Supreme Court that ruled on the *Miller* case was vastly different than the Court today. Political views and a lack of diversity on the court play an important, and often overlooked role in the decisions. The Supreme Court's vagueness in its opinion regarding *Miller* offers little to further either individual or collective rights under the Second Amendment, however it did leave open the option for states to regulate firearms. This is important because it is an example of the federal government ruling on the narrow scope of the case, thus allowing individual states to make policies, restrictions, and regulations regarding firearms in their respective states (Bogus, 2002).

The *Miller* decision, although criticized for making no clear doctrine regarding the Second Amendment, raised interesting questions about the intentions of the framers and the idea of modern day militias. It is a decision that has stood for nearly

seven decades, and in just weeks the argument over the Second Amendment might soon be over. Regardless of the outcome of the *Heller* case, it was the *Miller* case that first raised the question of individual rights, and how those rights can be infringed, restricted, and perhaps expanded depending on which end of the spectrum one might sit. It will be interesting to see if the [language the Court's majority will use](#) in forming their opinion, which will be the legal standard that will govern review of gun control legislation, will be as heavily debated as the *Miller* opinion had been.

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**WARREN V DC CASE IN RELATION TO THE SECOND AMENDMENT  
AND POLICE PROTECTION**

By Virgilio Solis

**ABSTRACT**

District of Columbia's gun law is one of the most stringent gun laws in the nation. Due to the implementation of this law in the late 1970s, statistics show that crime rates have gone up. One such case is the *Warren v DC*. Presently, the Supreme Court is hearing another case on the District of Columbia's Firearms Regulation Act of 1975. Unless the act is repealed, or the resources or number of law enforcement authorities are improved, crimes - and cases such as *Warren v DC* - will keep on happening.

**INTRODUCTION**

In attempting to understand both sides of the story regarding the *Warren v DC* case, one must go back to the time when the District of Columbia's Court of Appeals upheld the district's gun laws. The District of Columbia's Firearms Control Regulation Act of 1975 went into effect on the 24<sup>th</sup> of September 1976. (Jones, E. III 1981). The birth of the 1976 gun law was the outgrowth of three more restrictive legislative proposals that had been introduced in 1975 and had two legislative objectives: (1) to reduce the potential of firearms- related crimes and (2) to monitor more effectively firearms trafficking.(Jones, E III 1981).

The *Warren v DC* case came about the same time as the Firearms Act. Because of

this newly enacted law, citizens within the District, including Carolyn Warren and her roommates, were left defenseless at home. When they were attacked by two criminals, they had to rely on the authorities, whom they felt neglected them and failed to do their job, which is to protect them.

This paper will analyze the *Warren v DC* case in regards to the district's gun law and the Second Amendment. The case serves as a vital example for the citizens of D.C. showing that they are defenseless at home and are vulnerable to threats. However, the blame should not be centered on the police, but on the politicization that is going on regarding D.C.'s Firearms Regulation Act of 1975.

## **METHODOLOGY**

Information was gathered through a literature review, including on-line sources. In addition, data analysis was applied to the sources gathered. Furthermore, an interview with a professor from SJSU Political Science Department provided expert opinion regarding the right to self- protection, police protection, as well as police duty.

## **LITERATURE REVIEW**

Geisel, M. S., Roll, R., Wettick, Jr., R. S. (1969, August). The Effectiveness of State and Local Regulation of Handguns: A Statistical Analysis, *Duke Law Journal* reviews the arms control acts of the nation to determine if they are truly reducing crimes. The authors employ data analysis techniques to examine the efficacy of state regulations.

Jones, E. III (1981) The District of Columbia's "Firearms Control Regulations Act

of 1975" The Toughest Handgun Control Law in the United States -- Or Is It? *Annals of the American Academy of Political and Social Science*, Vol. 455, Gun Control analyses the provisions and legislative history of the DC Act, analyses the deficiencies in the Conference of Mayors' report research methods and assumptions, and also discusses any beneficial effects and weaknesses of the act.

Kopel, D. B., Halbrook, S. P., Korwin, A. (2003). *Supreme Court Gun Cases* showcases gun cases starting with the 1930s (Miller v US) up to the present. It also describes how the Second Amendment came to be. Supreme Court opinions are made easy to read by the author's simple language.

Norell, J. (2003) *Defenseless in D.C.* National Rifle Association Institute for Legislative Action provides a brief overview of how the District of Columbia's firearm act came to be. In addition, it shows how defenseless the people of D.C. are with this stringent gun law in place.

NRA-ILA. (2008) *More Proof that Americans Support the Right To Keep and Bear Arms* provides results from a survey done by Gallup Poll making it clear that the majority of Americans continue to believe what other polls have consistently shown: Americans overwhelmingly support firearm rights and ownership.

Reynolds, J. D. D. (2003). *A People Armed and Free: The Truth about the Second Amendment* is a comprehensive, unbiased, well-researched look at all arguments, both for and against, the individual right to keep and bear arms, including an analysis of the text of the Second Amendment, its history, case law on the subject, public policy, the effect of the 14th Amendment in applying the Second Amendment to the states, and the current

and proposed gun control laws. (Amazon.com)

Stevens, R. W. (1999). *Dial 911 and Die*. Jews for the Preservation of Firearms Ownership, Inc. offers a perspective on the need for self-protection. Although it is not the author's intention to criticize the 911 system and the police, this book illustrates how dangerous it is for the person in need if the police failed to respond. This book also shows how the police and the government as a whole defend their response when people sue for failure of the police response to save them from injury or harm. The justice system most of the time will go in favor of the government. The main theme of the book is, if you ask for help from the authorities and they failed to respond, you can sue them, but the justice system will most likely deny your case.

Terris, B. J. (1967). The Role of the Police, *Annals of the American Academy of Political and Social Science: Combating Crime* studies the relationship of the people in the community with the police. The author states that police officers must be seen as one of many different groups in our society dealing with human problems and serving the public, such as teachers, gang workers, and correctional officers. Such a vision will require that police personnel and policies be substantially changed.

## **BACKGROUND**

In the mid-1970s, two events changed the legal rights of the residents of the District of Columbia. (Norell 2003) First, was the enactment of the D.C. gun law which took effect on September 24, 1976. This law prohibited outright any private ownership of handguns that had not been registered prior to that date. (Norell 2003) The second was a

tragic case involving four innocent women who were repeatedly raped and brutalized. As a result, the court ruled that the police had no duty to a specific individual, but only to the society as a whole. A publicly maintained police force constitutes a basic governmental service provided to benefit the community at large by promoting peace, safety and good order. (Westlaw 2008)

The District of Columbia's gun law is one of the most stringent in the nation. (Jones 1981) Proponents say it is beneficial, while critics say otherwise. In June 1976, eighteen months after Congress established home rule for the District, the D.C. Council voted 12 to 1 in favor of a bill restricting city residents from acquiring handguns. (Smith 2007) Under the law, only the guards, police officers and owners who had registered their handguns before it took effect had the privilege of owning a gun. Under the bill, all firearms (including rifles and shotguns, which were not restricted by the law) must be kept unloaded and disassembled, except those in business establishments. (Smith 2007) In September 1976, however, the Congress failed to stop this bill. In addition, a House bill carrying an amendment that would have allowed "law-abiding citizens" to own and carry guns in the District was defeated. (Smith 2007). In 1978, the D.C. Superior Court ruled that "a government and its agents are under no general duty to provide public services, such as police protection, to any particular individual citizen." (Norell 2003) Presently, the Supreme Court is hearing the Parker case that contends the D.C. gun law.

The sale of handguns in the district is prohibited. However, a person may buy or sell rifles and shotguns but only from or to a licensed dealer in the district (NRA-ILA 2002) Also, for possession of firearms, all rifles and shotguns must be registered with the

Metropolitan Police. In addition, no handgun can be legally possessed in the district unless it was registered prior to September 24, 1976. (NRA-ILA 2002). Finally, carrying a handgun in the district is strictly prohibited. All firearms are to be kept at one's home or place of business. In addition, all firearms must be unloaded and disassembled or locked with a trigger lock except when kept at a registrant's place of business while being used for recreational purposes. Self defense in one's home with a firearm is therefore legally precluded. (NRA-ILA 2002)

After the D.C. gun law was enacted in 1976, the *Warren v DC* case was a vital example of how Washingtonians had been left even more defenseless in the wake of the gun ban. In the early morning of March 16, 1975, the four victims were peacefully sleeping in their house. Appellants Carolyn Warren and Joan Taliaferro were in the same room on the second floor while Miriam Douglas was on the first floor with her daughter. The women were awakened by the sound of the back door being broken down by two men later identified as Marvin Kent and James Morse. (Westlaw 2008) When Carolyn and Joan heard scream from below, they immediately called the police and then crawled from their window to a roof, waiting for the police to arrive. The call was received at Metropolitan Police Department Headquarters at 6:23 a. m., and was reported as a burglary in progress. Four police cruisers responded to the broadcast; three to the Lamont address and one to another address to investigate a possible suspect. (Westlaw 2008) The police tried knocking on the door but when nobody answered, they left. The three officers departed the scene at 6:33 a. m., five minutes after they arrived. (Westlaw 2008) Carolyn and Joan entered their rooms but immediately tried to call the police again when they

heard Miriam's continuing screams. However, the call was recorded merely as "investigate the trouble" - it was never dispatched to any police officers. (Westlaw 2008)

Believing the police might be in the house, Carolyn and Joan called down to Miriam thereby alerting the intruders. For the next fourteen hours, the women were held captive, raped, robbed, beaten and made to submit to the sexual demands of Kent and Morse. (Westlaw 2008)

Suits against District of Columbia and individual members of the Metropolitan Police Department were filed for negligence and failure to provide adequate police services. However, this case was dismissed by the Superior Court under Joseph M. Hannon and William C. Pryor (Westlaw 2008). In turn, the plaintiffs appealed to the Court of Appeals, wherein Judge Nebeker, held that police who answered the call and arrived outside the premises which were scene of burglary and assaults did not give rise to special duty on part of police toward victims therein, and police officers were not answerable in damages for failing to ascertain that assaults were continuing upon victims therein, or for leaving premises without so ascertaining. (Westlaw 2008).

What can be taken from the data aside from the history is the reality that haunts the government as well as the citizens. Even though the District of Columbia is home to the three branches of the national government, several military bases and the FBI (Stevens 199), the district still finds it impossible to protect every citizen. The ratio of police to citizens in Washington, D.C. is about 1:153. (McArdle 2007) In addition, the people of D.C. are stuck in a "prisoner's dilemma" where they can not own guns to protect them from criminals due to the stringent gun law of the district and at the same

time cannot fully rely on the law enforcers to protect them in times of trouble.

This case serves as a mirror of what the citizens might experience under the stringent gun law of “a state who is among the highest in the nation for violent crimes”. (Stevens 1999)

## **LEGAL ISSUES**

The case raises a civil liability matter for the police. The superior court where the plaintiffs’ case was heard first dismissed the case. The plaintiffs in turn, appealed to the Court of Appeals where Judge Nebeker and the respective judges affirmed that police were under no specific legal duty to provide protection to the individual appellants, thus making the police not liable for the damages. However, in a split decision, a three judge division of this court determined that appellants Warren, Taliaferro and Nichol were owed special duty of care by the Metropolitan Police. (Westlaw 2008). In addition, the court unanimously concluded that appellant Douglas failed to fit within the class of persons to whom a special duty was owed and affirmed the lower court’s dismissal of her complaint. (Westlaw 2008)

In addition, the case also raises a legal issue regarding a special relationship that should exist for the police to be held liable in case of proven negligence. According to the Court of Appeals, the general duty owed to the public may become a specific duty owed to an individual if the police and the individual are in a special relationship different from that existing between the police and citizens generally. (Westlaw 2008) Plaintiffs in this regard, contend that they have established a special relationship with the police when

they made the 9-1-1 phone call. Courts which have had the opportunity to consider comparable situations have concluded that a request for aid is in itself sufficient to create a special duty.

In relation to the Second Amendment, due to the stringent gun law which forbid the victims from owning a gun, the case raises a legal issue as to whether an individual's rights for self preservation as stated in the Fourteenth Amendment is violated. Part of the Fourteenth Amendment, section one states that "nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (US Constitution). In addition, this is where the debate on the proper interpretation of the Second Amendment comes in. The anti-gun lobby asserts that the founding fathers never meant that individuals should be armed; they only intended for the Second Amendment to apply to militia, such as the National Guard. (LaPierre 1994) On the contrary, the opposition claims that the individuals have the right to keep and bear arms as clearly stated in the Second Amendment.

## **ANALYSIS**

By deciding in November of 2007 to hear the District of Columbia's appeal of the federal court ruling that overturned D.C.'s gun ban, the Supreme Court has ensured that gun control and gun rights will play a major role in the coming election - and perhaps in the high court's future, too. *Warren v DC*, therefore, which can be inferred as a product of the stringent gun law of the district puts strain on the Supreme Court regarding their decision on the gun law issue.

In addition to the court's upcoming decision, the case serves as a reminder for the citizens of what they could experience, therefore making their push for the abolition of the gun law even stronger. According to the National Rifle Association, this push for the right to keep and bear arms for the citizens is being supported by most Americans. According to a Gallup Poll, overwhelmingly majority of the United States public—73%-- believes that the Second Amendment guarantees the right of individual Americans to own firearms. (NRA-ILA 2008)

There is an obvious polarization between the citizens and the government of D.C. The citizens want to have a tool that would enable them to defend themselves in case something similar happens like the *Warren v DC* assault. Guns have been proven to serve as a deterrent against crime. Every day, 550 rapes, 1,100 murders, and 5,200 other violent crimes per day are prevented just by showing a handgun. In less than 0.9% of the time is the gun ever actually ever fired (Reynolds 2003). In addition, every year people in the United States use a gun to defend themselves against criminals an estimated 2,500,000 times- more than 6,500 people a day, or once every 13 seconds. (Reynolds 2003)

Going back to the *Warren v DC* in relation to police liability, a professor at SJSU Political Science Department named Ishmael Tarikh was interviewed to provide a professional statement. The professor was asked whether the police should be held liable or not for the damage that was done. His response was the same as the decision of the court that the police had no specific duty to the victims. In addition, he believes that by responding, the police did their job. The police did not commit negligence and should not be held liable, because they did the job by following the procedures.

When asked about the victims, he claimed that the victims made a mistake by failing to think critically. They should have yelled when the police knocked on the door or thrown something out to get the police's attention. In addition, Professor Tarikh claims that one woman being raped is better than three being raped. Having knowledge of the law, he thinks that based on the rules of civil procedure, the appellants did not have a case.

## **PUBLIC OUT REACH**

The National Rifle Association and the Jews for Preservation of Firearms Ownership are some of the organizations that are making a strong case for the right for people to keep and bear arms. Author and lawyer Richard Stevens states in his book *Dial 911 and Die* that people should have the means to protect themselves because they can not count on the police to protect them. The general "no duty" rule in DC remains in the District. In addition to that, the police have limited people and resources to try to watch over every citizen.

The NRA on the other hand, has been battling for gun rights for a long time. They use cases such as *Warren v DC* to show the consequences of having such a stringent law.

The Supreme Court will hear the Parker case on the gun law of D.C. this season. The outcome is unknown, but one thing is certain; the whole thing will be based on how the political actors play the game. In addition, the politicization of legislation such as this makes things complicated. Furthermore, this issue has acquired much attention due to

the upcoming election.

## CONCLUSION

In 1976, the District of Columbia passed one of the most stringent gun law in the nation; a law that has, as shown by various researches, has not been productive and has led to gruesome cases such as *Warren v DC*. Despite the negative effects, one can infer that because of this, the government as well as the police had shown many flaws that should be remedied. The government should stop playing political tactics and start thinking of ways to try to improve the district's crime rate. Politicians would rather talk all day than do something to change the gun laws.

Carolyn Warren, Joan Taliaferro, Miriam Douglas and daughter Nichol are some of the unlucky people who got whipped by the painful consequence of D.C.'s Firearms Regulation Act of 1975.

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# UNITED STATES V. TIMOTHY EMERSON: LAWFULLY ILLEGAL

By Nicholas Ochoa

## INTRODUCTION

The Second Amendment of the United States Constitution has been the basis for argument for advocates of firearms. Second Amendment advocates argue that the amendment grants individuals the absolute right to keep and bear arms, while those in favor of gun regulation have taken the position that the Second Amendment only grants states the right to arm their citizens as a militia, referring to a collective right. These two opinions are exactly what the debate over the Second Amendment is about.

Laws and regulations must fall within constitutional guidelines. The United States Supreme Court ultimately has the final say over what the Constitution means, but up to this day they have only ruled on one case involving the Second Amendment's right to bear arms. With so little legal precedent regarding the Second Amendment, the lower courts are left to come to their own conclusions when confronted with a case involving the Second Amendment.

In the case of the *United States of America v. Timothy Joe Emerson*, (*US v. Emerson*) the U.S. District Court ruled that certain governmental firearms regulations were unconstitutional. However, the United States Fifth Circuit Court of Appeals overruled that decision and stated that the Second Amendment does grant individuals the right to bear arms, but government regulations are constitutional. The *Emerson* case originally started out as a domestic issue, but it grew into one of the most important gun-

control cases in recent history. *US v. Emerson* was based on a legal provision that was not well explained to the defendant, and lead to the prosecution of a lawful gun owner.

## **METHODOLOGY**

This research paper is primarily based on a literature review based on library research and the use of internet sources. Various news, journals, and reviews were cited in this paper, as well as the actual opinions and rulings handed down by the United States District Court and the United States Fifth Circuit Court of Appeals. It is also based on an expert interview with a man who is a lawful gun owner for fifteen years. He provided the perspective of a gun owner, husband, and father. Timothy Emerson matched those three criteria.

## **LITERATURE REVIEW**

Associated Press. (1999, April 3) Judge's Decision Sets Precedent That May Imperil Curb on Guns. *New York Times* discusses the significance of Judge Sam Cummings' ruling in U.S. District Court to dismiss the charges against Timothy Emerson. No federal court judge had ever dismissed a case based on the constitutionality of a law based on the Second Amendment prior to this ruling. This article provides insight to the events that lead up to the U.S. Fifth Circuit's ruling in *U.S. v Emerson*.

Baldauf, S. (2000, June 20) Texas Case Could Redefine Gun-Control Laws. *Christian Science Monitor* gives great insight into how the Second Amendment became an issue in the *Emerson* case. It discusses how over time more and more laws were

passed restricting firearms possession, which has led to an interpretational conflict as to what the Second Amendment actually means.

Busch, M. (2003, Spring) *Is the Second Amendment an Individual or a Collective Right?: United States v. Emerson's* revolutionary interpretation of the right to bear arms. *St. John's Law Review* examines the interpretations made by the Fifth Circuit Court of Appeals of the Second Amendment during the *Emerson* case. It also gives historical information relating to the evolution of the right to bear arms, individual and collective.

Cummings, S. R. (1999, March 30) *Memorandum Opinion: United States of America v. Timothy Joe Emerson*. The United States District Court For The Northern District of Texas San Angelo Division is the actual court order issued by District Court Judge Sam R. Cummings which originally dismissed the charges brought against Timothy Emerson on grounds of Second and Fifth Amendment violations.

Equal Justice Foundation. (2003) *The Emerson Case* offers a unique perspective on the Emerson case. The website offers a Second Amendment view from the perspective of gun rights advocates.

U.S. Court of Appeals For the Fifth Circuit. (2001, October 16) *U.S. v Timothy Joe Emerson*. No.99-10331.is the actual text of the ruling and opinion that was handed down by the U.S. Fifth Circuit Court of Appeals in *U.S. v. Emerson* 2001. The text gives the technical basis for the decision by the court to overturn the dismissal of Timothy Emerson's conviction by the District Court. This article will serve as the foundation of the journal article as it provides detailed information about the ruling.

Yassky, D. (2000, December) The Second Amendment: Structure, History, and Constitutional Change. *Michigan Law Review* describes the wording, history, and evolution of the Second Amendment, including many court cases related to the Second Amendment.

## **BACKGROUND**

The case of *US v. Emerson* is considered one of the most important court cases dealing with the Second Amendment in recent history. However, it began as a domestic issue between Timothy Emerson, and his wife Sacha Emerson. To better understand this complex case, one must understand the circumstances behind the case. While being married to Sacha, Emerson had always been a lawful gun owner, and in fact his prosecution in *U.S. v. Emerson* was based on the fact that he was a gun owner. The last sentence seems contradictory in stating that he was a “lawful” gun owner, and was “prosecuted” for being a gun owner. The contradictory statement is factual, and is exactly what occurred; however the circumstances behind the case are very critical.

On August 28, 1998 Sacha Emerson filed a petition for divorce in the 119<sup>th</sup> District Court of Tom Green County, Texas (U.S. Court of Appeals). Mrs. Emerson’s petition stated no specific reason for seeking a divorce other than the minimal requirements set forth by the Texas Family Code (Cummings). Simultaneously Sacha Emerson also filed for a temporary restraining order to be placed on her husband; the restraining order would be put into affect a couple weeks later and would have huge significance in Emerson’s eventual prosecution. The following week, on September 4,

1998, the hearing took place in Texas District Court presided over by Judge Sutton. It was here that Sacha Emerson alleged that her husband had threatened to kill the man who she was having an affair with. It should be noted that no formal evidence was presented to support her claim. Her allegations gave authorities the right to search Emerson's home for weapons and other items that would aid him in carrying out the alleged threats. On September 14, 1998, Judge Sutton issued a temporary injunction against Emerson (U.S. Court of Appeals). The injunction was a restraining order that typically comes standard in Texas divorce cases; the order prohibited Emerson from engaging in certain acts that would be deemed a threat to his wife, these acts include communication, assault, and certain financial transactions. The order would be enforced until the final signing of divorce, or until ordered otherwise by the court. The search led to the discovery that Emerson unlawfully was in possession of a Beretta pistol because of the court restraining order. Federal law under section 18 U.S.C. § 922(g)(8)(C)(ii) states that it is illegal for anyone to be in possession of a firearm while under a court order that poses a potential threat to an intimate partner.

On December 8, 1998 the U.S. District Court for the Northern District of Texas, San Angelo issued a five-count indictment against Timothy Emerson. Most of the counts were thrown out except for count 1, which alleged that on November 16, 1998, Emerson unlawfully possessed a Beretta pistol while under a court order, thus bringing in to question the constitutionality of an individual's right to bear arms (U.S. Court of Appeals).

Emerson was tried in U.S. District Court for the Northern District of Texas at San

Angelo. Emerson's defense was comprised of two main arguments: one, that section 922(g)(8) was in violation of the Second Amendment and the Due Process Clause of the Fifth Amendment; and two, that section 922(g)(8) was an improper exertion of federal power under the Commerce Clause, and that in any case, the law unconstitutionally usurps power reserved to the states by the Tenth Amendment (U.S. Court of Appeals).

On March 30, 1999, Judge Sam R. Cummings issued his ruling on the case. The two arguments presented by Emerson raised the constitutionality of his prosecution under four components of the U.S. Constitution: the Due Process Clause of the Fifth Amendment, the Commerce Clause, the Tenth Amendment, and the Second Amendment. Judge Sam R. Cummings, the Judge who presided over the *U.S. v. Emerson* on the District Court level, addressed all four of these issues in his March 30, 1999 ruling. First, Judge Cummings ruled that prosecuting Emerson for violating 922(g)(8) would deprive him of his Fifth Amendment right to Due Process because he did not know that possession of a firearm while being subject to a court order was a crime. The judge stated that section 922(g)(8) was an "obscure criminal provision" that would be difficult for Emerson to discover, that there is nothing inherently evil about possessing a firearm, and finally that Emerson had no reason to suspect that being subject to a court order would criminalize otherwise lawful behavior (Cummings).

Judge Cummings threw out Emerson's Commerce Clause defense argument, stating that 922(g)(8) only criminalizes the possession of firearms or ammunition in or affecting commerce. The brief that Emerson had filed contained no reference to the Tenth Amendment claim Emerson had previously mentioned, so that argument was thrown out.

However, the most significant piece of Judge Cummings' ruling came in reference to the Second Amendment and Emerson's claim that it grants individuals the absolute right to bear arms. In his March 30, 1999 memorandum opinion and ruling, Judge Cummings declared that 922(g)(8) was unconstitutional on its face because it required citizens to be disarmed simply because of being subjected to a "boilerplate order with no particularized findings" (U.S. Court of Appeals).

This ruling marked the first time that a Federal Court Judge dismissed a case based on the constitutionality of the Second Amendment (Associated Press). Prior to this ruling no law regulating firearms had ever been struck down based on a perceived right to bear arms granted by the Second Amendment. Judge Cummings said that his ruling was based on a historical examination of the right to bear arms. The ruling was a huge victory for Second Amendment advocates, but it would not last long, as federal prosecutors appealed the case to the United States Fifth Circuit Court of Appeals.

In 2001, the United States Fifth Circuit Court of Appeals overruled Judge Cummings' District Court ruling. First, they ruled that the lower court was correct in its refusal to dismiss the case on Commerce Clause grounds (U.S. Court of Appeals). The Fifth Circuit did reverse the lower court's decision to dismiss the case based on Fifth Amendment grounds. The most significant part of this ruling came from their decision to reverse Judge Cummings' ruling stating that section 922(g)(8) is unconstitutional. The Fifth Circuit Court of Appeals recognized that the Second Amendment does recognize an individual right to bear arms, but certain regulations such as the ones specified in 922(g)(8) are consistent with the Constitution, thus making section 18 U.S.C. §

922(g)(8)(C)(ii), constitutional once again. The following is a passage from the Fifth Circuit Court of Appeals' ruling on the Emerson Case.

*We conclude that Congress in enacting section 922(g)(8)(C)(ii) proceeded on the assumption that laws of the several states were such that court orders, issued after notice and hearings, should not embrace the prohibitions of paragraph (C)(ii) unless such either were not contested or evidence credited by the court reflected a real threat or danger of injury to the protected party enjoined.*

(C)(ii) is the part of the law which states that a person cannot possess a firearm when under a court protective order. As stated above, the Fifth Circuit said that the intent of (C)(ii) was only to be applied in cases where a credible threat existed. In the *Emerson* case, they agreed with Judge Cummings in that there existed no credible evidence to support the idea that Emerson was a threat to his wife, his daughter, or to the man with whom Sacha Emerson was having an affair. What makes 18 U.S.C. § 922(g)(8)(C)(ii) constitutional is the fact that it is not an absolute ban on firearms, but rather a ban only on people who pose a credible threat to the opposing party.

Many have weighed in on this controversial decision. In “Is the Second Amendment an Individual or a Collective Right: *United States v. Emerson*’s revolutionary interpretation of the right to bear arms,” a journal article from *St. John’s Law Review*, Michael Busch argues that the Fifth Circuit’s ruling in *U.S. v. Emerson* will ultimately lead to a contradiction of federal law across the United States. When a Circuit makes a ruling, it establishes a precedent, but only in courts under that circuit’s

jurisdiction. (Busch) It is possible, and according to Busch likely, that another circuit will rule on a similar case and issue a ruling that states that the Second Amendment does not protect an individual right to bear arms, thus creating a contradiction within federal law. If this were to happen, the Supreme Court would have no choice but to make a ruling that would finally clarify whether the Second Amendment refers to an individual or a collective right to bear arms.

Busch makes a prediction that the Supreme Court will eventually rule that the Second Amendment refers to a collective right to bear arms, based on the high court's decision in *Miller v. United States*, applicability of the Fourteenth Amendment, and social concerns. Busch argues that a Supreme Court ruling like this would make for a safer society, as it would clearly lay a foundation for standard federal firearm regulations that would be consistent in every State. Under this scenario, people would no longer have a right to bear arms, and the federal government could regulate firearms as much as they wanted.

The Equal Justice Foundation (EJF) has also weighed in on the *Emerson* case. The EJF is a nonprofit organization that works for the defense of human and individual rights as secured by law, to eliminate or reduce prejudice and discrimination, and to promote equal treatment of both sexes in custom and under the law. This organization has been very adamant about the Emerson case. This group is not concerned with a particular interpretation of the Second Amendment, but rather with justice. The EJF feels very strongly that the legal system has done a great deal of injustice to Emerson, and there is an entire section dedicated to Emerson and his case on the EJF website. Relating to U.S.

v. Emerson 2001, EJF claims that the case should have been dismissed under the Fifth Amendment right of due process (Equal Justice Foundation). The Foundation argued that since neither the original court order nor the state judge who issued it mentioned to Emerson that it would constitute a federal crime if he possessed a firearm while under the restraining order, his right to due process was ignored.

## **ANALYSIS**

In order to appropriately understand what the Second Amendment means in today's society, there must be an understanding of what it meant to the framers in their society. According to David Yassky who wrote, "The Second Amendment: Structure, History, and Constitutional Change," and article published in the *Michigan Law Review*, the Second Amendment was not about an individual right to bear arms, but rather about the allocation of military power (Yassky). The Constitution was only ratified under the impression that a Bill of Rights would be put in shortly after. The Bill of Rights is a list of ten rights that the government cannot infringe upon. The intent of the Bill of Rights was to protect the citizens from oppression by a tyrannical government. Yassky argues that one of the framers' greatest fears was the presence of a strong national army. A strong national army left unopposed could easily trample the rights of citizens and impose their will on society. To protect citizens as a whole from this potential tyranny, the Second Amendment was put into the Bill of Rights. The original intent of the Second Amendment was to protect the right of States to maintain militias as a defense mechanism against a strong national army.

The framers were adamantly apposed to strong national armies and preferred the militia style of defense, and wanted to preserve that style with the Second Amendment. Yassky suggests that the original meaning has been lost over the years. The Civil War showed the nation that the framer's style of defense was not effective, as it turned out that a strong national army was needed to protect, and ultimately maintain the Union. In *Miller v. U.S.*, the only other Second Amendment court case up to today that the United States Supreme Court has ruled on, very little was said about what the Second Amendment means. Yassky is very critical of the court in that regard. He feels that the Second Amendment is dead, and those who seek to revive it are too lost in the political arena to properly know how to revive it.

The issue of whether the individual's right to bear arms is protected by the Second Amendment has gone on for about a century. Any ambiguity left in the law is supposed to be clarified by the courts, but the nation's highest court, the U.S. Supreme Court, has only ruled on one case pertaining to this issue, *United States v. Miller*, but that ruling revealed very little, and because of that, the debate continues even to this day.

In the *Emerson* case, two federal courts openly recognized that the Second Amendment refers to an individual right to bear arms. However, as the legal process followed through, Emerson was still prosecuted for having a firearm because the higher of the two federal courts stated that federal regulations were legal and within constitutional guidelines. The *Emerson* case seems to be a loss for Second Amendment advocates, in the sense that the courts are conceding that the Second Amendment does refer to an individual right, but they also assert that the right could be regulated.

Donald Hedges is a lawful gun owner of about 15 years. Upon reviewing the *Emerson* case he agreed that the Fifth Circuit's ruling was a huge blow for Second Amendment advocates, as it could pave the way for even greater regulation. This man is a personal friend to my father who agreed to answer a few question for my research paper. I knew his perspective on the Emerson case would provide me first hand insight as he, like Emerson, is a lawful fun owner, a husband, and a father. On Sunday May 4, 2008, he agreed to meet with me at his house in Hayward, California. Hedges is not a member of any gun association, but enjoys going out on weekends to gun ranges and shooting. He felt the whole case was tremendously unfair to Emerson. Hedges made the point that any person could make allegations against their spouse, and court restraining orders are not very difficult to get, thus giving tremendous power to the spouse of a gun owner. The law does not seem to require any solid evidence to support the allegations, and lawful gun owners have to forfeit their firearms after a court order, which does not seem fair, Hedges explained.

## **CONCLUSION**

Emerson was prosecuted for possessing a firearm while under a court restraining order. Emerson, who lawfully owned firearms, was arrested and prosecuted under a federal statute that is ambiguous. Emerson was tried on a technicality that he owned a gun during a court order, but as the U.S. Fifth Circuit Court of Appeals has stated, the original statute that he was prosecuted for was intended for those who posed a threat. Based on evidence, or lack of evidence, observed from court documents, Emerson posed no threat to his wife.

Emerson's case shows how technicalities in the law can lead to a law biding citizen being prosecuted for obeying the law, or the part of the law he know about.

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## **AFTERWORD: D.C. V. HELLER**

By Laura Williams

### **ABSTRACT**

The upcoming Supreme Court decision regarding the Second Amendment “right to keep and bear arms” clause is a major decision that will affect the way Constitutional rights are interpreted and enforced. To some, the Second Amendment gives Americans the individual right to own a gun, whether or not they are active members of the United States military or militia. To others, the right to own a gun is seen as reserved for the few in the organized militia, in order to cut crime and homicide rates in America. *Parker v. District of Columbia* and *District of Columbia v. Heller* are landmark cases in the argument over the application of the Second Amendment to the American people as the courts define the rights of the American citizen.

### **INTRODUCTION**

In 1976 the District of Columbia passed the Firearms Control Regulation Act (FCRA), which banned the licensing of guns to individuals who lived in the area. The ban made it illegal to own an unregistered firearm, banned the registration of all automatic firearms, handguns, and high capacity semi – automatic firearms. (See Section II article on Washington, D.C. for a complete description.) In the case of *Parker V. District of Columbia*, six residents sued D.C., arguing that the Firearms Control Regulation Act violated their individual rights under the Second Amendment. Initially the

courts ruled in favor of the District of Columbia, however, the decision was overturned in favor of those representing Parker in the appeals court. The case was then taken to the Supreme Court, which has heard oral arguments from both sides, and is expected to make a decision in June of 2008.

## **TAKING THE SECOND AMENDMENT TO COURT**

Six District of Columbia residents sued the District of Columbia in *Parker v. D.C.*, believing they had the right to possess functional firearms, including handguns, for self-defense in their homes, and sought an order permanently enjoining the District from enforcing the provisions of the FCRA. The District Court dismissed the complaint, rejecting “the notion that there is an individual right to bear arms separate and apart from service in the Militia” and concluding that “because none of the plaintiffs have asserted membership in the Militia, plaintiffs have no viable claim under the Second Amendment of the United States Constitution” (Rose).

The six individuals appealed, and the United States Court of Appeals for the District of Columbia became the first federal appeals court to rule that a [firearm](#) ban was an unconstitutional infringement of the [Second Amendment to the United States Constitution](#), and the second to expressly interpret the Second Amendment as protecting an individual right to possess firearms for private use. The District of Columbia and Mayor Adrian Fenty have appealed the case on the grounds that the court’s decision “creates inter and intra jurisdiction decisional conflict and because the proceeding involves questions of exceptional importance.” (Rose)

The Supreme Court of the United States has heard oral arguments from both the District of Columbia and Heller, and is expected to make a ruling on the case in June. The ruling of the Supreme Court will be very important to the United States, as it will set forth a decision that will likely define whether the Second Amendment confers rights to an individual or to a state. Is the right to bear arms a thing of the past, due to the fact that the average citizen is no longer a member of the organized militia, or does the Second Amendment guarantee our rights as individuals to have a gun for protection? Needless to say the historic decision in *Heller V. District of Columbia* will set forth the interpretation of guns rights that will control the law for years to come.

## **ANALYSIS**

Within the United States today there are states like California that come close to a ban on gun ownership (see Chapter 7), and others like Texas (see Chapter 10) that permit almost universal ownership and concealed carrying of a handgun. *Warren v. D.C.* has warned citizens that the police have no duty to protect any individual, only to preserve the peace of the community. (Chapter 23). Statistics from Switzerland (Chapter 5), Israel (Chapter 6), and Texas (Chapter 10) seem to suggest that an armed citizenry is a bulwark against gun related violence. But The Brady Campaign (Chapter 11) provides data that suggest that gun violence is on the rise. Data from federal sources suggest that most gun-related crime is perpetrated with unlicensed weapons, so there is a question whether more gun regulation will lessen gun-related crime.

## CONCLUSION

The June 2008 decision by the Supreme Court will provide guidance for the states and cities on their right to control weapons within their jurisdictions. It will define whether the right to possess arms is an individual right, or one designed to protect the states from federal oppression. Having an understanding of the laws and cases that have led up to *D.C. v. Heller* will make the decision more meaningful.

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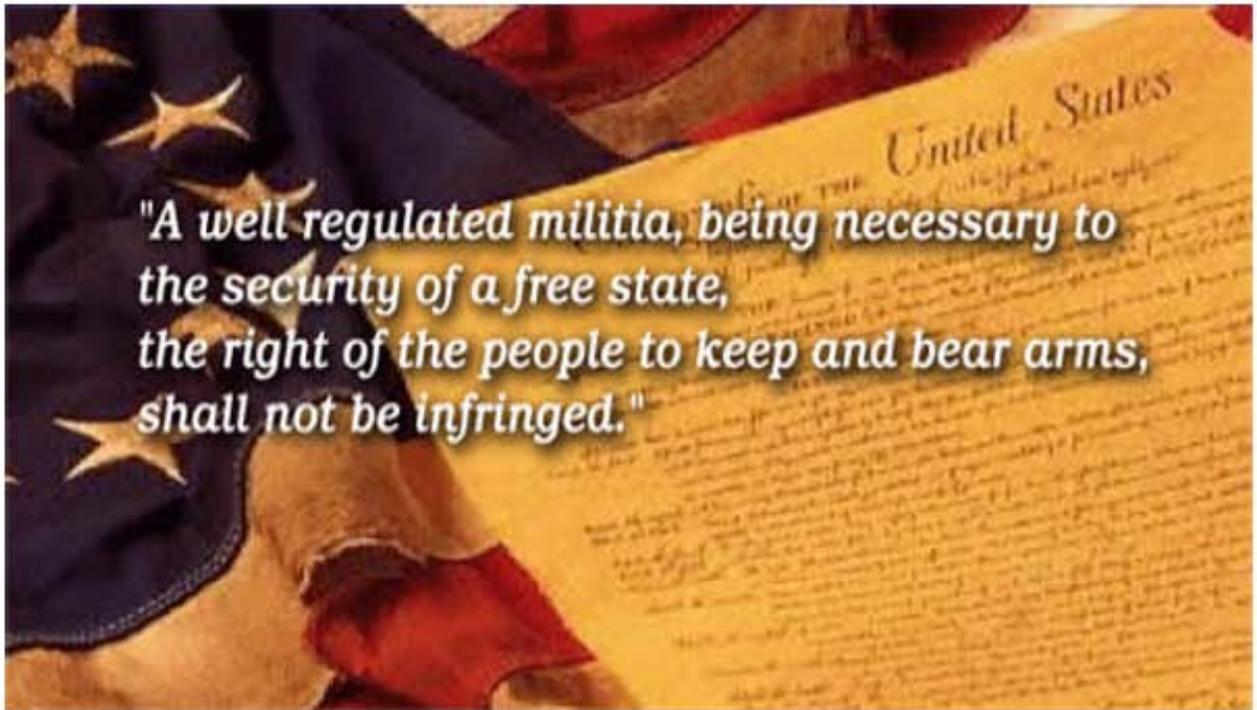
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## Conclusion

## CONCLUSION

By Andrew Siegler

The debate wears on over whether or not the 2<sup>nd</sup> Amendment applies to individual citizens and where exactly its protective power lies. However, from the collective research and findings, there are several points the authors would like to make. First, historically the 2<sup>nd</sup> Amendment was designed to create an armed populace to act as the protectorate of the nation. While this is termed a “militia,” it also presents the idea that a militia cannot exist without armed and trained individuals. Second, nations and states that reduce firearm ownership regulations have dramatically lowered crime rates, whereas regions with increased firearm regulations may be clamoring to quell the violence, but unsuccessfully. Third, the lobbies and legislative movements on both sides of the debate may be polarizing at a time where the parties should be working towards a consensus, working through compromise to create effective firearm legislation. The shaping of policy and legislation through compromise and attention to the intricacies of the debate could work to address the issues and preserve the constitutionality of firearm ownership, rather than create further controversy and factions.

This second edition of *Current Controversies* is the collective product of the Spring 2008 Political Science 100W students at San José State University. The entirety of the journal was researched, written, and edited over the course of the spring semester of 2008 and directed under the expert tutelage of Professor Frances Edwards. Putting together this project would have been a daunting task without Dr. Edwards’ enthusiasm,

keen insight, and dedicated instruction—and we can not thank her enough for her guidance. She introduced the subject of the 2<sup>nd</sup> Amendment at the beginning of the semester and then allowed each of us to choose a topic to research in depth. In addition, Dr. Edwards gave us informative lectures on research methods, writing and editing techniques, and a wealth of information on 2<sup>nd</sup> Amendment issues. This journal is the product of what we have learned from her instruction and its application to our own research, and the authors hope that this will give readers a fairly comprehensive analysis of the controversies surrounding in the 2<sup>nd</sup> Amendment.