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JUNE 26, 1981

NATIONAL COALITION TO BAN HANDGUNS

STATEMENT

ON THE

SECOND AMENDMENT

John Levin. "The Right to Bear Arms: The Development of the American Experience." Chicago - Kent Law Review, Fall-Winter 1971.

1975 American Bar Association Gun Control Policy

Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment

Gun Control Legislation
By The Committee on Federal Legislation

By: Michael K. Beard, Executive Director

and

Samuel S. Fields, Legal Affairs Coordinator

participating organizations

American Civil Liberties Union

American Ethical Union

Americans for Democratic Action

American Jewish Congress

American Psychiatric Association

American Public Health Association

Black Women's Community Development Foundation

B'nai B'rith Women

Board of Church & Society, United Methodist Church

Center for Social Action, United Church of Christ

Church of the Brethren, Washington Office

Disarm Educational

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Friends Committee on National Legislation

International Ladies' Garment Workers Union

Jesuit Conference--Office of Social Ministries

National Alliance for Safer Cities

National Association of Social Workers

National Council of Jewish Women, Inc.

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National Jewish Welfare Board

Political Action Committee, Woman's National Democratic Club

The Program Agency, United Presbyterian Church in the U.S.A.

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Congregations

Unitarian Universalist Association

United States Conference of Mayors

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United Synagogue of America

Women's Division Board of Global Ministries, United Methodist Church

Women's League for Conservative Judaism

Young Women's Christian Association of the U.S.A., National Board

(partial listing)

(p.28)

There is probably less agreement, more misinformation, and less understanding of the right to keep and bear arms than any other current controversial constitutional issue. The crux of the controversy is the construction of the Second Amendment to the Constitution, which reads: "A well-regulated militia, being necessary to the security of a free State, the right to keep and bear arms shall not be infringed." In addition to the five decisions in which the Supreme Court has construed the Amendment, every Federal court decision involving the Amendment has given the Amendment a collective, militia interpretation and/or held that firearms control laws enacted under a state's police power are constitutional. Thus arguments premised upon the Federal Second Amendment, or the similar

provisions in the thirty-seven state constitutions, have never prevented regulation of firearms.

--American Bar Association
Background Report on
Firearms Control

The Union agrees with the Supreme Court's long-standing interpretation of the Second Amendment that the individual's right to keep and bear arms applies only to the preservation or efficiency of a "well-regulated militia." Except for lawful police and military purposes, the possession of weapons by individuals is not constitutionally protected.

--American Civil Liberties Union
Policy #43(p.29)

The Second Amendment to the United States Constitution 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." While NRA takes the firm stand that law-abiding Americans are constitutionally entitled to the legal ownership and use of firearms, the Second Amendment has not prevented firearms regulation on national and state levels. Also, the few federal court decisions involving the Second Amendment have largely given the Amendment a collective, militia interpretation and have limited the application of the Amendment to the Federal Government.

--National Rifle Association
"NRA Fact Book on Firearms Control"(p.30)

YOU DO NOT HAVE A CONSTITUTIONAL RIGHT TO OWN A HANDGUN.

The Second Amendment to 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." Some people claim that this amendment prohibits the federal government from interfering with their private "right to bear arms." However, in every instance where the Supreme Court has ruled on the Second Amendment or discussed it in a footnote or dicta their position has been uniformly in favor of interpreting the Second Amendment as a collective right of the several states and not as an individual right.

While the American "right to bear arms" developed at the time of the revolution, it grew out of the duty imposed on the early colonists to keep arms for the defense of their isolated and endangered communities. This duty was limited, however, by the colonial governments in order to prevent the use of firearms for harmful purposes. To prevent civil disturbances the colonial

governments were careful to keep arms from falling into the "wrong hands" and passed regulations concerning the conditions under which arms could be used.

Following the revolution the founders of the nation lacked confidence in the newly formed federation. Having just waged a revolution against an oppressive colonial ruler, they felt the need to protect their collective right to rise up and defend themselves against the new federal government. The founding fathers wanted to be sure that a people's militia could (p.31)continue to exist in case the states needed to protect themselves from abuses by the new federal government.

Records of the debates over the passage of the Second Amendment clearly show that the intent of Congress was to prevent the federal government from destroying the state militias. The "right to bear arms" was a corporate right used to insure that a balance between liberty and authority within the union would be maintained. Personal self-protection was not the issue. While some attempts were made to include a personal right to have arms in the Bill of Rights, these provisions were never adopted.

Many court decisions and virtually every leading legal scholar and constitutional expert in the country agree that the intent, wording and meaning of the Second Amendment in its full context, refer only to the people's collective right to bear arms as members of a well-regulated and authorized militia. Moreover, no serious student of law believes that the amendment prevents the reasonable regulation of firearms. This is evidenced by the many unchallenged laws on the books which require licenses and permits or prohibit the carrying of concealed weapons.

While the Second Amendment does not guarantee an individual a right to bear arms, the rights and responsibilities of self-protection are implicit in much of the constitution and in the vast body of law that rules our political and social life. Members of the pro-handgun lobby sometimes cite common (p.32)law to support their arguments against handgun control. According to these arguments the individual has a Common Law right to keep and bear arms for self-defense and to defend one's country. It should be noted, however, that England, the country which is the source of all U.S. Common Law, has enacted some of the most stringent handgun control laws in the world and thus does not feel that they are in violation of Common Law rights.

Attached to this submission are four scholarly articles on the origins and meaning of the Second Amendment. An analysis by the U.S. Federal Courts follows immediately.

What the Courts Say

The "right to bear arms" question has been brought into the courts many times since the Constitution was written. The courts have consistently ruled that the Second Amendment does not guarantee a personal right to own firearms.

Supreme Court decisions on the "right to bear arms" have repeatedly stated that the Second Amendment was conceived of as a restraint on the power of the federal government over the state militias. In *U.S. v. Cruikshank, 95 U.S. 542 (1874)*, the Court held that while there may be an individual right to possess arms, it existed independently of the Second Amendment.

Subsequent decisions elaborated on the scope of the Second Amendment's guarantee. In *Presser v. Illinois, 116 U.S. 252 (1886),* the Court upheld an Illinois statute forbidding bodies of men to associate in military organizations or to drill or parade with arms in cities or towns. The court also ruled (p.33)that the states had the power to regulated firearms as was necessary for the common good.

The third and least important of the Second Amendment cases was *Miller v. Texas, 153 U.S. 535 (1894),* in which a convicted murderer asserted that the state had violated his Second and Fourth Amendment rights. The Supreme Court unanimously dismissed the claim saying that the Second Amendment did not apply to the states citing, Cruikshank and other cases.

The most frequently discussed case on the issue of the Second Amendment is *U.S. v. Miller 307 U.S. 174, 59 S. Ct. 816, 83 L.Ed. 1206 (1939).* At issue is the so-called "ordinary military equipment" question. Proponents of the Second Amendment as an individual right insist that the Miller Court was attempting to dichotomize "militia" and "non-militia" weapons, the latter being subject to legislative control while the former is not. The argument then goes on to state that the court was unaware that Miller's weapon, a sawed-off shotgun, had in fact been used in World War I. Therefore, the argument continues, if the Court had only been made aware of this historical fact it would have overturned Miller's conviction and ruled the 1934 National Firearm Act unconstitutional.

The problem with this argument is twofold. First, the Court was not creating the "militia" versus "non-militia" dichotomy for the purposes of identifying individual right versus collective right weapons. Second, and probably more important, the Court was probably not attempting to formulate (p.34)a rule at all. See: *Cases v. U.S. 131 F.2d 916 (1 CCA, 1942) cert. denied 319 U.S. 770, 63 S. Ct. 1431, 87 L.Ed. 1718 (1942).* [**Note:** in the certiorari denial the defendant is referred to as Velazquez v. U.S. His full name was Jose Cases Velazquez, hence, this has been a source of some confusion.]

In rejecting the military character of the shotgun the Miller court wrote:

> In the absence of any evidence tending show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees for the right to keep and bear such an instrument [emphasis added].

What we have then is two tiered test: first for the weapon and second for the weapon holder. Even assuming that clear convincing proof had shown that sawed-off shotguns were not merely part of the military arsenal but in fact were standard issue as common as K-rations and helmets and furthermore it was a court martial offense to be found without it, it still would not have done Mr. Miller a whit of good. Mr. Miller fails miserably in the weapon holder test. He was not acting in the role of the member of "militia," much less a "regulated militia," and least of all the "well regulated militia," described by the Court and the Second Amendment.

The most that can be said for whose right emerged in Miller is that of the state militia's and their own arsenals. But even here common sense tells us there are clear parameters on state militia arsenals. If not, it would logically follow (p.35)that the several states could, at will, establish independent nuclear strike forces. If nothing else, such a development would certainly enliven the annual Governor's conference.

But, of course, shortly after the Miller court ruled, the idea of a "militia/non-militia" test was put to a well needed rest. In Cases [a.k.a. Velazquez] the Court of Appeals not only rejected the idea that individuals were part of the militia/non-militia weapons dichotomy but insisted that no such dichotomy was intended:

> we do not feel that the Supreme Court in this case was attempting to formulate a general rule applicable to all cases. The rule which it laid down was adequate to dispose of the case before it and that we think was as far as the Supreme Court intended to go.

Since Miller the Supreme Court has on at least two occasions spoken on the subject of the Second Amendment. In *E. Adams v. Williams 407 U.S. 143, 92 S. Ct. 1921, 322 Ed. 612 (1972)* Justice Douglas discussing search and seizure problems wrote:

> A powerful lobby dins into the ears of our citizenry that these gun purchases are constitutional rights protected by the Second Amendment, which reads, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."
>
> There is under our decisions no reason why stiff state laws governing the purchase and possession of pistols may not be enacted. There is no reason why pistols may not be barred from anyone with a police record. There is no reason why a state may not require a purchaser of a pistol to pass a psychiatric test. There is no reason why all pistols (p.36)should not be barred to everyone except the police.
>
> The leading case is *United States v. Miller, 307 U.S. 174, 59 S.Ct . 816, 83 L.Ed. 1206*, upholding a federal law making criminal the shipment in interstate commerce of a sawed-off shotgun. The law was upheld, there being no evidence that a sawed-off shotgun had "some reasonable relationship to the preservation or efficiency of a well regulated militia." *Id., at 178, 59 S.Ct. at 818*. The Second Amendment, it was held, "must be interpreted and applied" with the view of maintaining a "militia."
>
> "The Militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without the consent of Congress. 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." *Id., at 178-179, 59 S.Ct., at 818.*

> Critics say that proposals like this water down the Second Amendment. Our decisions belie that argument, for the Second Amendment, as noted, was designed to keep alive the militia.

Douglas and Marshall's opinion on the Second Amendment is unequivocally clear: the Amendment is a collective right of the state.

Most recently in *Lewis v. United States 445 U.S. 95, 100 S. Ct. 915 __ L.Ed. ____ (1980)* Justice Blackmun, writing for the majority, upheld the 1968 Gun Control Act and noted in a critical footnote:

> 8. These legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties. See *United States v. Miller, 307 U.S. 174, 178, 59 S. Ct. 816, 818, 83 L.Ed. 1206 (1939)* (the Second Amendment guarantees no right to keep and bear a firearm that does (p.37)not have some reasonable relationship to the preservation or efficiency of a well regulated militia"); *United States v. Three Winchester 30-30 Caliber Lever Action Carbines, 504 F.2d 1288, 1290, n. 5 (CA7 1975)*; *United States v. Johnson, 497 F.2d 548 (CA4 1974)*; *Cody v. United States, 460 F.2d 34 (CA8), cert. denied, 490 U.S. 1010, 93 S.Ct. 454, 34 L.Ed.2d 303 (1972)* (the latter three cases holding, respectively, that *Sec. 1202(a)(1), Sec. 922(g),* and *Sec. 922(a)(6)* do not violate the Second Amendment).

The Miller standard has once again been vindicated to be a collective right of "a well regulated militia."

The Court of Appeals on Various Aspects of the Second Amendment

U.S. v. Wilbur 545 F.2d 7641 (1st 1976)

In prosecution for violation of the Gun Control Act of 1968, trial court action in curtailing defense counsel's argument on Second Amendment was proper as preventing confusion lest jury believe that United States Constitution provided defendants with legal defense.

Eckert v. City of Philadelphia 477 F.2d 610 (3rd 1973)

Appellant's theory in the district court which he now repeats is that by the Second Amendment to the United States Constitution he is entitled to bear arms. Appellant is completely wrong about that.

U.S. v. King 532 F.2d 505 (3rd 1976)

We firmly disagree with the argument that the statute violates appellant's right to keep and bear arms. He was (p.38)neither charged with nor convicted of keeping and bearing arms. He was charged with and convicted of engaging without a license in the business of dealing in firearms and of conspiring with others so to do.

U.S. v. Graves 554 F.2d 65 (3rd 1977)

The courts consistently have found no conflict between federal gun laws and the Second Amendment, narrowly construing the latter to guarantee the right to bear arms as a member of a militia. Graves has not attempted to invoke the Second Amendment as a defense in the present prosecution. Even if he had, we would deem controlling the interpretation adopted in Miller and the cases following it.

U.S. v. Johnson 497 F.2d 548 (4th 1974)

The statute prohibiting the transportation of a firearm in interstate commerce after having been convicted of a felony is not unconstitutional as violative of defendant's Second Amendment right to keep and bear arms since the Second Amendment only confers a collective right of keeping and bearing arms which must bear a reasonable relationship to the presentation or efficiency of a well-regulated militia.(p.39)

U.S. v. Snider 502 F.2d 645 (4th 1974)

Dissent (not in conflict with the majority view on this issue):

Although thousand of perfectly well intentioned persons doubtless believe with all sincerity that the Second Amendment protection of the right to bear arms is violated by the Gun Law e.g. *18 U.S.C. Appendix (201 et seq.)*, such a contention would be frivolous.

U.S. v. Johnson 441 F.2d 1134 (5th 1971)

Appellant's remaining contention, that his constitutional right to bear arms has been infringed by the Act, misconstrues the Second Amendment. The Supreme Court dealt with such a constitutional attack directed against the National Firearms Act of 1934 in U.S. v. Miller.

U.S. v. Williams 446 F.2d 4b (5th 1971)

Statutes proscribing offense of and penalty for possession of an unregistered firearm are not violative of the right to bear arms as guaranteed by Second Amendment.

McKnight v. U.S. 507 F.2d 1034 (5th 1975)

Appeals Court upholds lower court's rejection of defendant's motion for relief on the basis that the firearms charge under which he was convicted violated his Second Amendment rights.(p.40)

U.S. v. Forgett 349 F.2d 601 (6th 1965)

Upholds Miller ruling regarding the National Firearms Act as not violating the Second Amendment.

Stevens v. U.S. 440 F.2d 144 (6th 1971)

Constitutional right to keep and bear arms applies only to the right of the state to maintain militia and not to individuals' rights to bear arms. Congress had authority under commerce clause to prohibit possession of firearms by convicted felons, based upon congressional finding that such possession passes threat to interstate commerce.

U.S. v. Day 476 F.2d 562 (6th 1973)

As to the alleged right to bear arms, Day's claim is meritless. There is no absolute constitutional right of an individual to possess a firearm.

U.S. v. Birmley 529 F.2d 103 (6th 1976)

Statute under which defendants were convicted of possession of unregistered firearms did not violate defendants' right to bear arms.

U.S. v. Warin 530 F.2d 103 (6th 1976)

It is clear that the Second Amendment guarantees a collective rather than an individual right. The fact that the defendant Warin, in common with all adult residents and citizens (p.41)of Ohio, is subject to enrollment in the militia of the state confers on him no right to possess the submachine gun in question.

U.S. v. Pruner 606 F.2d 871 (6th 1979)

Upholds Justice Douglas' concurring and dissenting discussion on the proposition that the purchase of guns is a constitutional right protected by the Second Amendment in Adams v. Williams.

Witherspoon v. U.S. 633 F.2d 1247 (6th 1980)

Appellant contended that the Second Amendment afforded him protection from the federal firearms statutes because he was on his own business premises. There is, of course, no such specific proviso in the Second Amendment nor is there any Supreme Court interpretation to that effect.

U.S. v. Lauchli 444 F.2d 1037 (7th 1971)

We reject defendant's argument that the Gun Control Act of 1968 is violative of the Second Amendment guarantee of the right to bear arms.

U.S. v. McCutcheon 446 F.2d 133 (7th 1971)

Statute requiring one who makes firearm to file with Secretary of Treasury or his delegate written application to make and register firearm and pay any applicable tax thereon and (p.42)statute requiring registration of such firearm by maker thereof did not infringe Second Amendment right to keep and bear arms.

U.S. v. Three Winchester 30-30 Caliber Lever Action Carbines 504 F.2d 1288 (7th 1974)

Statute prohibiting possession of firearms by previously convicted felon does not infringe on Second Amendment's protection of right to bear arms.

U.S. v. Synnes 438 F.2d 764 (8th 1971)

While the Court in Miller dealt with the prohibited possession of a sawed-off shotgun, the reasoning and conclusion of that case has carried forward to other federal gun legislation. We think it is also applicable here. Although *Sec. 1202(a)* is the broadest federal gun legislation to date, we see no conflict between it and the Second Amendment since there is no showing that prohibiting possession of firearms by felons the maintenance of a "well regulated militia."

U.S. v. Decker 446 F.2d 164 (8th 1971)

The record-keeping requirements at issue here bear an even more tenuous relationship to the Second Amendment than did the statute involved in Miller. Thus, in light of the defendants failure to present any evidence indicating a conflict between the requirements of *Secs. 922(m)* and *923(g)* and the maintenance of a well-regulated militia. We decline to hold that the statute violates the Second Amendment.(p.43)

Cody v. U.S. 460 F.2d 34 (8th 1972)

Second Amendment right to bear arms is not an absolute bar to Congressional regulation of the use or possession of firearms and its guarantee extends only to use or possession which has some reasonable relationship to the presentation or efficiency of a well-regulated militia.

U.S. v. Turcotte 558 F.2d 893 (8th 1977)

We find no reason to reconsider the decision in Cody that the prohibition of section 922 does not obstruct the maintenance of a well-regulated militia, and therefore is not violative of the Second Amendment.

U.S. v. Wynde 579 F.2d 1088 (8th 1978)

Upholds U.S. v. Turcotte, which declared that *Sec. 922(h)* does not violate the Second Amendment right to bear arms.

U.S. v. Tomlin 454 F.2d 17b (9th 1972)

Statutes requiring registration of firearms and making it unlawful for any person to receive or possess unregistered firearms are not unconstitutional as infringing on right to bear arms under Second Amendment.

U.S. v. Oakes 564 F.2d 384 (10th 1977)

Purpose of the Second Amendment guaranteeing the right of the people to keep and bear arms, was to preserve the (p.44)effectiveness and assure the continuation of the state militia. To apply the Second Amendment so as to guarantee defendant's right to keep an unregistered firearm which was not shown to have any connection to the militia, merely because defendant was technically a member of the Kansas militia, would be unjustified in terms of either logic or policy; and his membership in "Posse Comitatus," an apparently non-governmental organization.