

## **Gun Control Jeopardizes All Our Constitutional Rights**

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Today grave dangers threaten the individual rights of the people. Their rights are menaced from many directions. The most fierce assault is the erosion of rights by legal processes, a procedure most dangerous because it is so effective.

Those who don't own guns, as well as those who do, have become alarmed by the realization that an erosion of the individual right to have arms under Second Amendment spells dire peril for our other constitutional rights.

Their fears are well-founded by virtue of existing legal principles and historical precedents.

One of the favorite arguments disparaging the Second Amendment is that "the right of the people to keep and bear arms" is merely a collective right referring only to the people collectively as a common body.

In the consideration of the proposal for inclusion of the Second Amendment in the Bill of Rights, the U.S. Senate in 1789 soundly rejected a motion on the floor to add the restrictive words "for the common defense" after the words "to keep and bear arms." (As the British Parliament earlier had rejected an identical attempt to restrict the right to "have arms" in the English Bill of Rights of 1689.)

Moreover, those who think that "the right of the people to keep and bear arms refers only to a collective right confront a

serious threshold problem in their interpretation of the First and Fourth Amendments in our Bill of Rights:

Amendment I

"...the right of the people to assemble peaceably and petition the Government for a redress of grievances."

Amendment IV

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . ."

The phrase "the right of the people" thus occurs in these amendments in the same way as in the Second Amendment. Accordingly, any restrictive "collective right" interpretation, limiting the Second Amendment's "right of the people to keep and bear arms," by equal logic threatens the individual liberties otherwise thought to be secured by the First and Fourth Amendments regarding peaceable assemblies, and searches and seizures.

Moreover, there is judicial precedent for the U.S. Supreme Court to limit First Amendment rights in the same breath as Second Amendment rights. In the famous *Cruikshank* case, the Supreme Court in 1875 held that the right to bear arms was not a federally protected right under the federal Civil Rights Act because the Second Amendment did not protect that right against state or private interference. Accordingly, the Court further held that the disarming of blacks by whites gave rise to no federally recognizable claim by the black victims. The Court additionally held in that same case that the First Amendment's "right of the people to assemble peaceably and petition the Government for a redress of grievances" gave rise to a federally protected right only in those assemblies whose purpose was to petition the Government for a redress of grievances and no others; that is, neither picketing nor other "demonstrations" or marches were at all protected under the First Amendment.

This stingy approach to the constitutional rights guaranteed by the First and Second Amendments was reaffirmed by the Court in 1885, in the famous *Presser* case dealing with armed marches in public places. Thus, the close legal connection between narrow readings of private individual rights and liberties under the Bill of Rights is embedded in the constitutional history of Supreme Court adjudication: A restrictive reading by that Court of the Second

Amendment simultaneously entails a restrictive reading of other Amendments. Interestingly, this decision-making was done in the name of enabling the police "to disperse assemblages organized for sedition and treason, and . . . to suppress armed mobs bent on riot and rapine." (On the other hand, the court in the *Presser* case agreed that the Second Amendment guaranteed the common-law right to keep and bear arms: Armed marches could be banned at common law.)

Another facet in the delicate balance and weight of the totality of the Bill of Rights is the obvious consideration that the average citizen, as well as the judges themselves, may ask: "If the Courts have the legal power to destroy one constitutional right in the Bill of Rights by a process of erosive 'interpretation' then don't these same Courts have the same power to destroy another of these provisions in the same Bill of Rights, particularly a provision which seems to be socially or politically troublesome?"

Another illustration of the close connection between the various rights in the Bill of Rights was supplied by the suggestion of a most respected Judge on the federal appellate bench that the Fourth Amendment's guarantees against unreasonable searches and seizures should be suspended for the sake of mass searches for firearms. According to that learned judge, no gun control law can be enforced under the "exclusionary evidence rule." He wrote, "The exclusionary rule has made unenforceable the gun control laws we have and will make ineffective any stricter control which may be devised."

What is the exclusionary rule? The Fourth Amendment in our Bill of Rights forbids "unreasonable searches and seizures." The exclusionary rule "is a judge made rule of evidence which bars 'the use of evidence secured through an illegal search and seizure.'"

The distinguished judge is, perhaps, correct in his conclusion as to the right against unreasonable searches and seizures. If, for example, in order to make gun control laws effective we must accede to the use in court of evidence which has been obtained illegally, then we must equally be constrained to accept evidence which has been illegally obtained by the police in all other kinds of cases.

Much to the chagrin and apparent consternation of the "big press" in America, the U.S. Supreme Court has approved certain searching and information-gathering operations by police in newspaper offices. There is still, however, the exclusionary rule

which protects the press against evidence illegally obtained. How much longer would that protection for the press exist if the exclusionary rule were abolished for gun owners, not on the grounds that they had committed murder, rape, assault or robbery, but because they merely possessed the means to do so?

None other than Norval Morris, former Dean of the Law School of the University of Chicago, whose appointment to a top post in the federal Law Enforcement Assistance Administration was successfully opposed by the NRA in 1978, has also written of the need to install metal detectors along passages where people travel, in a mass search for guns. Professor Morris would have liked to have seen the development of "portable and discriminatory monitors capable of secretly searching anyone passing through a door or along a footpath to ascertain if he carried a concealed gun," hastening to add: "There are surely no 1984 fears in this. There can be no right of privacy in regard to armament." Perhaps he did not realize that such a cavalier disregard for the rights of one class of citizens cannot be divorced from a similar lack of regard for the same rights of other classes.

Registration of firearms poses still another threat to liberty in an orderly society. A requirement by law to register a thing lawfully to be kept in the precincts of one's own home is offensive not only to elemental privacy but also to essential liberty in a free society governed by a Constitution. This is especially true if the acquisition and possession of the thing that must be registered have constitutional ramifications. For example, according to a definitive U.S. Supreme Court ruling in 1955, a requirement to register the purchaser of a newspaper or magazine is constitutionally defective and odious in the extreme, even if such a registration requirement be aimed only at foreign communist political propaganda. The mere existence of such a requirement itself, under the guise of governmental sovereignty and order, casts a constitutionally impermissible shadow of doubt on the loyalty, integrity and responsibility of the purchaser and reader of that newspaper or magazine, regardless of his particular purpose in purchasing or reading it. Registration of firearms, therefore, would lend dignity to otherwise unacceptable laws, such as those requiring the registration of suspect literature.

The registration of firearms, moreover, is of little or no value in solving crimes of violence since the only person to whom the firearm can be traced is the last honest gun owner in the chain of registered ownership. Virtually no one thinks guns would be

registered by criminals. It is the honest person upon whom the suspicion of guilt is cast by the tracing process. Yet, in a society which prides itself on any modicum of freedom, a person is presumed innocent until proven guilty beyond a reasonable doubt and is not required to give any evidence against himself.

These principles, according to latest U.S. Supreme Court rulings, are the substance of our Fifth Amendment's guarantees of due process of law and against compulsory self-incrimination. The guarantee against compulsory self incrimination, in particular, is so basic that it may not be legally counterbalanced in any criminal case today by any competing societal interest, no matter how strong that competing interest may be. On the other hand, registration of politically suspect objects, particularly firearms, contravenes these constitutional guarantees by reversing the presumption of innocence. It is thus neither politically nor socially comforting to contemplate the erosion of fundamental rights by governmental registration fiats promulgated under the guise of governmental convenience or public safety.

Another aspect of the impact of gun control legislation is women's rights. Women are increasingly attracted to firearms ownership for self-protection and marksmanship because of skyrocketing criminal violence directed against them. Barriers against the individual's right to possess firearms therefore constrict women's rights of self-defense, whether such barriers be governmentally or privately imposed, as by restrictive licensing or gun club membership regulations or policies. To leave a woman only her fists or voice for self-defense seems the veriest discrimination against women.

The common law of England, for example, created what are called "common law crimes," such as murder, rape, arson, robbery, larceny and assault. These common law crimes formed the body of criminal law in the American colonies without any legislation both before and after the Revolution, until modern legislatures wrote criminal codes mostly in the latter half of the 19th century. Moreover, the common law also recognized and enforced what the great 18th century British jurist Sir William Blackstone called the "absolute rights of individuals."

Among these absolute rights of individuals, Blackstone proudly listed "the right of petitioning the king and parliament for redress of grievances; and lastly, to the right of having and using arms for self-preservation and defense." It should be stressed at this point that Blackstone was not creating any new rights, but was merely listing the rights already secured to the British subject under the common law.

In speaking of the right of self-defense under the common law, Blackstone made the telling point:

(Self-defense) considers that the future process of law is by no means an adequate remedy for injuries accompanied with force; since it is impossible to say to what wanton lengths of rapine or cruelty outrages of this sort might be carried, unless it were permitted a man immediately to oppose one violence with another. Self-defense, therefore, as it is justly called the primary law of nature, so it is not neither can it be in fact, taken away by the law of society.

Echoing Blackstone, a New York City judge once wrote: "The right of self-defense is an inherent right of man, older than states or Constitutions."

Thus, any prior restraints on such a fundamental moral right of self-defense, as by licensing in a restrictive way the possession of firearms, violates the fundamental wisdom of the ages as well as the common law and the Constitution.

The common law sets the minimal standards to this day for the various provisions of the Bill of Rights as interpreted by our Supreme Court. Thus, Blackstone's words are very important, not only because they show how strongly the common law protected the absolute right of individuals to arms for self-defense, - so long as not in such manner or of such unusual type as to terrorize "the good people of the land," - but also because Blackstone's words have been so often used by the U.S. Supreme Court to this day as the definitive statement on the common law and as the basis for minimal standards of our own constitutional rights.

Indeed, the great work by Blackstone *Commentaries on the Laws of England*, was also widely used by the Founding Fathers in drafting our Constitution and Bill of Rights. Blackstone's *Commentaries* was respected as the definitive

authority on the common law, including the fundamental common law rights which were to be preserved under the new Constitution in 1789.

Only by using the common law as setting minimal standards for constitutional rights can judges avoid gradual, if not precipitous, deterioration of all constitutional rights by a process of narrow and restrictive "interpretation," not only of the Second Amendment, but also of all the others.

On the other hand, it is important to remember also that the Congress not only is able to enact legislation encroaching on fundamental rights, but also is legally presumed by the Courts to have acted in accordance with the Constitution. As a consequence, anyone who attempts to challenge in court any act of Congress on constitutional grounds has a correspondingly heavy burden of proof in the face of that strong legal presumption of constitutionality of all congressional acts.

Such a presumption becomes even stronger when legislators who vote for legislation eroding a constitutional right keep winning elections - Courts follow the election returns. Accordingly, it is clear that the legislative process can erode or even abolish constitutional rights of all kinds. That is why it is important to realize that any restrictive or prohibitory "gun control" legislation threatens the Second Amendment and hence similarly threatens the rest of the Bill of Rights.

Therefore, those who cherish liberty under the Constitution must oppose any restrictive "gun control" legislation - whether past, present, or future - as well as any other legislation encroaching on constitutional rights. All free men should proudly support legislation appealing any or all restrictive aspects of previously enacted "gun control" legislation.