

## **Can the Second Amendment Survive?**

**by Ashley Halsey, Jr.**

+-----+  
| Reprinted by permission of:|  
| The American Rifleman |  
| March 1973 pp. 17-19. |  
+-----+

As of this moment, it is the official position of the Federal Government that the Second Amendment does not protect the right of individual citizens to keep and bear firearms.

The exact words used are that "the Second Amendment does not apply to private citizens as an individual right." Although that flat statement was made at a relatively low level - by an Assistant U.S. Attorney in Indiana this Jan. 5 - a spokesman for the U.S. Department of Justice in Washington, D.C. confirmed that it is the government's current stand.

The official declaration that the Second Amendment is a dead letter so far as individual gun owners are concerned, while shocking in its bluntness, came as no surprise to those in Washington long familiar with the legal situation. The government's position goes back, in fact, to a 1939 decision of the U.S. Supreme Court in an obscure case involving a sawed-off shotgun.

From a gun owner viewpoint, the big and burning question at present is whether the high court interpreted the Second Amendment wrongly nearly 34 years ago, and if it was wrong, what can be done about it now?

To many knowledgeable citizens including several Past Presidents of The National Rifle Association who are highly-regarded lawyers, the court appears to have made a grave mistake which now rises to plague the civil rights of 50 to 100 million law-abiding and well-intentioned American firearms owners.

The second Amendment which the Supreme Court undertook to interpret in 1939, is one of the briefest of 10 safeguards to individual American liberties which were written into the Constitution of the United States in the early days of the Republic. It says in its entirety:

**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.**

Due to the curious sentence structure and location of the three commas that punctuate this single important paragraph, its precise meaning has long been debated.

Back in 1939, in an even more curiously constructed sentence, the Supreme Court held in the language of Associate Justice James C. McReynolds that:

With obvious purpose to assure the continuation and render possible the effectiveness of such forces (as the militia) the declaration and guarantee of the Second Amendment were made. It (the Second Amendment), must be interpreted and applied with that end in view.

*(Note: The two phrases in parentheses above were not part of the original decision, but have been inserted to make clear what it is about.)*

In short, the court ruled that the Second Amendment was intended simply and solely to support the militia, which the court, in 1939, evidently regarded as the National Guard and perhaps a few state reserve units.

In writing the court decision, Justice McReynolds reviewed early American laws on the militia and stated that there was no evidence before the high court to show that a sawed-off shotgun, the firearm in question, "is any part of the ordinary military equipment or that its use could contribute to the common defense."

Despite its far-reaching effect, the case seems to have created little stir when it occurred. The NRA took no cognizance of it and *The American Rifleman* made no mention of the matter, perhaps because of its obscure origin.

The case arose under the National Firearms Act of 1934, originally passed to curb gangster shootings, when two men named Jack Miller and Frank Layton were charged with illegally transporting a sawed-off 12 ga. shotgun across State lines from Oklahoma into Arkansas. The Federal government alleged that the shotgun, a Stevens, had been chopped to a barrel length shorter than the 18" legal minimum then and still in effect.

The two defendants argued through counsel that the 1934 act violated their constitutional rights to bear arms under the Second Amendment. A U.S. District Judge agreed, and threw the case out of his court. The government then appealed to the Supreme Court, and Justice McReynolds wrote the decision holding that the right to bear arms under the Second Amendment applied only to the militia.

The only member of the 1939 court still on the bench, Associate Justice William Douglas, took no part in the 1939 decision but quoted that decision only last June in the case of Robert Williams, convicted in Connecticut of carrying an illegal handgun tucked in his waistband. (*Adams, Warden v. Williams, 407 US 143*)

"This problem is an acute one," Douglas said, "because of the ease with which anyone can acquire a pistol,...A powerful lobby dins into the ears of our citizenry that these gun purchases are constitutional rights protected by the Second Amendment." But, Douglas continued, there is no constitutional reason "why stiff State laws governing the purchase and possession of pistols may not be enacted ... There is no reason why all pistols would not be barred to everyone except the police."

The juridical attitude taken by the Supreme Court in 1939 and by Justice Douglas in 1972 was echoed in connection with a lawsuit by NRA Life Member Lewis Gene Freeman, of 1509 Pontiac Dr., Kokomo, Ind. 46901. Freeman, acting as his own attorney at the time, sued last Aug. 10 as an individual gun owner to have the 1968 Federal Gun Control Act declared unconstitutional. He alleged that the act violated the First, Second, Fourth, Fifth, and Eighth Amendments, among others.

In his suit, Freeman, who incidentally relies on fellow gun owners for financial aid, contends that the refusals of gun dealers in other States to sell him rifle, shotgun and pistol because of GCA68 "impair" his efficiency as a member of the unorganized militia by withholding appropriate arms.

The government moved to throw out the suit, contending that it could not be sued without its own consent. Freeman amended his suit with some legal coaching from lawyer David I. Caplan, and NRA Member in New York City. In opposing this Assistant U.S. Attorney Richard L. Darst advanced the argument early this year that the Second Amendment does not apply to

individual citizens because of the 1939 decision *U.S. vs. Miller*, (307 U.S. 174-183).

That the position taken by the Assistant U.S. Attorney in Indianapolis represents the basic position of the Department of Justice was verified by a department spokesman in Washington who asked, however, that he not be quoted by name. The spokesman said almost apologetically that the 1939 Supreme Court decision left the Department of Justice no choice.

Viewed broadly, much of major significance on the right to bear arms appears to have gone overlooked or deliberately ignored through the years in all this prancing procession of legalism. Among other things apparently never fully considered are:

**1. The original concept and intent behind the Second Amendment.**

**2. Similar or stronger provisions in at least 35 State Constitutions.**

**3. Use of shotguns, sawed-off or not, as military arms in most U.S. wars.**

**4. A 1903 U.S. law defining the militia as not only the National Guard but all able-bodied males between 18 and 45.**

To take up these points one by one:

Where the purpose of any constitutional provision or law is vague, obscure or under deep question, a recognized procedure is to dig back to the thoughts and words of those who originally framed it.

To do this with the Second Amendment, one has simply to look up the wisdom of George Mason (1725-1792), the great Virginia constitutionalist. Mason wrote more safeguards of individual rights into the Virginia Constitution of 1776 than the original U.S. Constitution of 1787 contained. The first 10 Amendments of the "Bill of Rights", when added to the U.S. Constitution in 1791, were largely what Mason had written.

The papers of George Mason reveal quite clearly what he meant by "militia" and his definition is far broader than that of the Supreme Court as enunciated by Justice McReynolds. During a debate in Richmond June 16, 1788, Mason spoke rhetorically. "I ask who are the

militia?" he said, and then answered his own question with the words: "They consist now of the whole people, (emphasis added) except a few public officials."

(See *The Papers of George Mason*, "R. A. Rutland, editor, Chapel Hill, N.C., The University of North Carolina Press, 1970, Vol. III, pp. 1067-68, 1070-71, 1081, for fuller details.)

So there can be little doubt that George Mason, "Father of the Bill of Rights," never intended to restrict the right to bear arms to a relatively few men in uniform.

An often-identical line of thought is reflected in many of the State Constitutions adopted either during the early days of the Republic or in later years. In 35 of the 50 States, the rights of gun owners are defined by State Constitutions. If the Second Amendment does not extend to these States, certainly the State Constitutions would seem to be the highest law in such cases under the Ninth and Tenth Amendments, which reserve to the States and "the people" all rights and powers not spelled out in the U.S. Constitution. Justice Douglas appears to have ignored this when he asserted last June that he saw nothing to prevent "stiff State laws" against handguns, even to the point of prohibiting private ownership.

At least half of the State Constitutions go beyond the Second Amendment by spelling out that the right to bear arms is an individual right for personal protection or defense of home and property, and has nothing to do with a "well-regulated militia." These States are: Alabama, Arizona, Colorado, Connecticut, Florida, Georgia, Idaho, Indiana, Kentucky, Michigan, Mississippi, Missouri, Montana, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, Washington, and Wyoming.

Arizona's Constitution, for example, says "the right of the individual citizen to bear arms in defense of himself or the State shall not be impaired...: Michigan's says, "every person has a right to keep and bear arms for the defense of himself and the State." Pennsylvania's is emphatic: "The right of the citizens to bear arms in defense of themselves and the State shall not be questioned." (*Emphasis added.*)

How, in the light of such ringing declarations, some may ask, can Justice Douglas assert that such States can prohibit the private ownership of handguns or, for that matter, any other arms?

When Justice McReynolds could find nothing of

record on the use of sawed-off shotguns by the military, he obviously had not looked far or thoroughly. Perhaps the Supreme Court was compelled to confine its consideration of the facts, as differentiated from points of law, to whatever facts were presented in the lower court. But the indisputable truth of the matter is that short-barrel shotguns have been widely used in war.

The U.S. Government has bought more than 125,000 12-ga. pump guns, usually with 18" or 20" barrels, for military purposes during the present century. It purchased 100,000 Ithaca Model 37's under a single government contract in the 1960's to arm South Vietnamese village defense forces. During World War I, it bought some 30,000 Winchester and Remington 12-ga. pumps for use primarily as "trench guns" in France.

So deadly were the "trench guns," throwing loads of nine 00 buckshot, that the German Foreign Office formally protested against this "barbarous" American weapon Sept. 15, 1918, via the Swiss Government and threatened to execute any Americans caught armed with it.

The U.S. stuck to its shotguns. It based its reply on a legal opinion of the Judge Advocate General of the U.S. Army which should be of profound interest in any future legal issue over whether a shotgun can serve as a military arm. The Judge Advocate General affirmed that it certainly could, although developments of modern warfare limited its use tactically.

". . . Gen. John J. Pershing, commander-in-chief of the American Expeditionary Force (in France in 1917-18) was thoroughly sold on the use of shotguns, and if the war had continued they no doubt would have been used in great numbers on all fronts," writes Col. Robert H. Rankin, USMC (Ret'd), in his new book entitled *Small Arms in the Sea Services*, (N. Flayderman & Co., Inc., New Milford, Conn., 06776, 227 p. \$14.50). Rankin continued:

Incidentally, shotguns were found to be most effective in the jungle fighting in the South Pacific and they were found to be very useful in repulsing the human wave attacks launched by the Chinese Communists in Korea. They have also been used with success in Viet Nam. Battle-wise veterans will be quick to tell you that it is a mighty useful piece of ordinance to have around.

The final touch to the sawed-off shotgun controversy is an official World War I report (see below) which refers to the arms as "sawed-off"--leaving little or no question of the status of a short-barrel shotgun as military arm.

As for who constitutes the "militia" under the Second Amendment, Congress has spoken firmly on the subject. On Jan. 21, 1903, Congress defined the militia as consisting of all able-bodied male citizens "more than 18 and less than 45 years of age," and divided them into two classes, "the organized militia, to be known as the National Guard of the State, Territory or District of Columbia, and **the remainder to be known as the Reserve Militia.**" (*Emphasis added.*)

Thus the Congress classified all able males between 18 and 45, not in the National Guard, as members of the militia. These men would now seem to be the "people to keep and bear arms" whose right to firearms "shall not be infringed" under the Second Amendment. Further, under the broad doctrine of equal rights, it would appear that women also should be included if they fall into age groups eligible for military service. Nor, to judge by some recent court decisions, should there be discrimination due to age.

**So, in summation, a sawed-off shotgun IS a military arm notwithstanding the 1939 decision; the militia includes not only the National Guard but all able-bodied young and middle - aged males and perhaps many more; the Second Amendment was not intended to apply only to militia, anyhow, but to the "whole people," and where it does not protect the rights of individual gun owners, State Constitutions in 50% of the States do so.**

**The next time a firearms case that does not involve the Federal government arises, it would be interesting to see the U.S. Department of Justice intervene as a "friend of the court" on behalf of the rights of individual gun-owning citizens. It has done so in recent years for almost every other minority element of our citizenship. Why shouldn't it act to protect the largest minority, the law-abiding American gun owners?**