

# THE MISCONCEPTION OF THE AMERICAN CITIZEN'S RIGHT TO KEEP AND BEAR ARMS

By

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"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."

On the front of the National Rifle Association headquarters In Washington, D.C., emblazoned are the words, "the right of the people to keep and bear arms, shall not be infringed." A Time Magazine article of March 27, 1989 (p. 39) about assault rifles stated. "When the framers of the Constitution provided Americans with the right to bear arms, they could hardly have imagined the development of high powered semi-automatic weapons capable of firing more than 30 rounds in a clip." In a paid advertisement by the National Rifle Association that appeared in the U.S.A. Today, The Wall Street Journal and other print media sources in 1989 the NRA claimed "The students of Beijing did not have a Second Amendment right to defend themselves when the soldiers came."

All the quotes in the preceding paragraph pertaining to the Second Amendment of the United States Constitution are erroneous. The National Rifle Association, in its publicity fallaciously interprets the Second Amendment of the American Constitution. When national magazines lead people to believe that the framers of the U.S. Constitution "provided Americans with the right to bear arms" they contribute to widespread ignorance concerning the Second Amendment. This ignorance becomes further entrenched into the public's mind when celebrities like Johnny Cash, the Country singer, reinforce this belief by stating on cable televi- sion their "right to bear arms." (Mr. Cash made this statement while being interviewed by Ralph Emory on the Nashville Station in December 1989).

There exists a misconception by a vast number of American citizens that they have the inalienable right under the Second Amendment "to keep and bear arms." The Second Amendment of the U.S. Constitution does not guarantee to American citizens "the right to keep and bear arms." In every case since the mid 1800s where people cited the second Amendment as giving them the right to keep and bear arms," the Supreme Court has said "no." An American citizen does not have the right to keep and bear arms." In 1876 the Supreme Court in *United States v. William J. Cruikshank* decided that the right to bear arms is not a right granted by the Constitution. The court interpreted the term "in- fringed" in the Second Amendment to mean that it shall not be infringed by Congress. Herman Presser on September 14, 1879, in Cook County, Illinois paraded as head of an unauthorized armed militia. Since Presser violated Illinois law by parading armed without a license he was found guilty and fined \$10.00. The U.S. Supreme Court in *Presser v. Illinois* decided in 1886 that the right of the people to keep and bear arms "Is not a right under the Constitution." The Supreme Court further stated, "A State may pass laws to regulate the privileges and immunities of its own citizens, provided that in so doing it does not abridge their privileges and immunities as citizens of the United States." Herman Presser was not a member of the State of Illinois Militia or a member of the United States Military therefore the Court interpreted that a citizen did not have the right to disobey a State law and parade and drill with arms in cities and towns.

The National Firearms Act of 1934 regulated and taxed the transfer of certain types of firearms such as sawed-off shotguns and firearms. Jack Miller and Frank Layton, in violation of the National Firearms Act, transported a 12 gauge Stevens shotgun having a barrel of less than 18 inches across state lines. The weapon was transported from Oklahoma to Arkansas and not regis-- tered as required by the law. The National Firearms Act was con-- tested on the grounds that it was not a revenue measure but an attempt "to usurp police powers reserved to the states" making the law unconstitutional. The Supreme Court, in the *United States of America v. Jack Miller and Frank Layton*, reaffirmed earlier court decisions that the Second Amendment does not guarantee citizens the right to keep and bear arms. This 1939 Supreme Court decision interpreted the original intent of the Second Amendment by the framers. According to the Court,

the popular opinion of the day was against standing armies. The view of this period was that adequate defenses could be maintained by a militia-civilians who occasionally would serve as soldiers. These men were expected to bring their own arms. This concept could be traced to the Assay of Arms in England when all adult male inhabitants had the obligation to possess arms and to defend their community when called upon to do so.

In 1971, the Sixth Circuit Court of Appeals in *Frank James Stevens v. United States* affirmed that congress had the authority to prohibit possession of firearms by convicted felons under its commerce power. The circuit court examined the constitutional questions. Its remarks: "Since the Second Amendment right 'to keep and bear arms' applies only to the right of the state to maintain a militia and not to the individual's right to bear arms, there can be no serious claim to any express constitutional right of an individual to possess a firearm." Another Court of Appeals case decided by the Eighth Circuit in 1971. *United States v. Audry Keith Decker*. The constitutionality of the Gun Control Act of 1968 and that the record keeping requirements of the Act Do not infringe "upon the Second Amendment right to bear arms. The Circuit Court quoted the Supreme Court decision of the *Miller* case to substantiate its decision.

In *Charles F. Eckert v. City of Philadelphia*, a case decided in 1973, the Third Circuit Court of Appeals stated that Eckert was "completely wrong" in his claim that the Second Amendment entitled him to bear arms. In a case decided by the Sixth Circuit Court of Appeals in 1976, *United States v. Glen Ray Birmley*, the appellant contended that the statutes under which he was charged violated his Second Amendment right to bear arms. The Circuit Court agreed with the Supreme Court and the Ninth and Fifth Circuit Courts who have reviewed this question. The Court cited *United States v. Miller* decided in 1939, *United States v. Tomlin* decided by the Ninth Circuit in 1972, and *United States v. Williams* decided the fifth Circuit in 1971.

The Sixth Circuit Court of Appeals in 1976 in *United States v. Francis Narin* supported the congressional right to regulate firearms. Narin argues that to tax firearms transactions "would be to sanction a tax on an activity which is Constitutionally guaranteed and protected" by the Second Amendment. The Court wrote that there exists an erroneous supposition that the Second Amendment is concerned with the rights of individuals rather than those of the States. The United States Supreme Court denied certiorari.

This paper will review four cases that were reviewed by the United States Court of Appeals during the 1980s. The first, *Victor O. Quilici V. Village of Morton Grove*, was decided the Seventh Circuit in 1982. The Village of Morton Grove adopted a gun control ordinance which was contested that it violated the Illinois Constitution and the Second Amendment of the U.S. Constitution. The Circuit Court upheld the Morton Grove ordinance and reaffirmed and indicated that the Second Amendment right to keep and bear arms is not a right that states cannot regulate. The Court reiterated that the Second Amendment does not apply to the states. A 1984 case of *Jerome Sklar v. Jane M. Byrne* dealt with a challenge to the constitutionality of a Chicago City ordinance prohibiting registration of handguns after a specific date. The Seventh Circuit Court of Appeals held that the Chicago firearms ordinance does not infringe upon any federal constitutional right to bear arms. The last case decided by the Eighth Circuit, *United States v. Douglas John Nelsen*, the appellant contested that Congress did not have a right to pass the Switchblade Knife Act. The law was designed to stop their use by young gang members. In the court's opinion the Act did not violate the Second Amendment. Although Nelsen claimed he had a right to keep and bear arms the court responded that his right did not exist for at least 100 years. This can be traced back to the Supreme Court case of 1876 in *United States v. Cruikshank*.

For over 100 years, Federal Courts have rendered the legal opinion that the Second Amendment did not give citizens the right to bear and keep arms. Yet in the 1990's, there still exists the misconception of the American citizens' right to keep and bear arms. Under America's judicial process, legal precedents are important. They should not be overlooked nor responded to as if they never existed. In 1971, Supreme Court Justice William D. Douglas wrote, "A powerful lobby dins into the ears of our citizenry that these gun purchases are constitutional rights protected by the Second Amendment. . . ." Yet, why do so many American citizens hold the misconception of the belief of their right to gun ownership? Is it due to the

excellent publicity of the National Rifle Association? Is it due to the news media's unwillingness to provide correct information about this issue? Or perhaps the legal profession, law enforcement or educators have been remiss in making Americans aware of the appropriate legality concerning this controversial issue. Most assuredly the aforementioned cases and Justice Douglas' remarks clearly serve to dispel the image that the Second Amendment is the constitutional fountain from which springs the so-called illusion of the "right to bear arms." Legal opponents on both sides acknowledge that the Second Amendment did not serve to "grant" any right to keep and bear arms, but rather served to form the rights which pre-existed the Constitution to prevent government infringement.

That of course, effectively opens the door to the pro-gunners' arguments that the Fourth and Fourteenth Amendment guarantees against unreasonable seizure of property and the right to due process serve collectively to bolster their position. This area is particularly sensitive in light of the literal proliferation of claims brought under U.S. Code 42-1983. Any action by a government official performed "under the color of law" which serves to violate the Constitutional Rights of the individual gives rise to a plaintiff cause of action. Without a doubt the Fourth and Fourteenth Amendment clauses are by far the most common. A recent case in point, *United States v. Verdugo-Urquidez* (58 U.S. Law Week 4263, Feb. 28, 1990) focused on the issue of denial of the Fourth Amendment "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures". Specifically the legal issue on point addressed the Constitutional framers' intent in the terms "people" and "persons" as contained in the Constitution and its numbered Amendments. The majority opinion concluded that specific reference in the Second Amendment to "the people" meant essentially "enfranchised persons" rights as opposed to the concept of "we the people as a government or body." The court went on the suggestion that if the Second Amendment were framed with the intent of preserving governmental rights (the right of the states to keep a well trained militia), why did the authors immediately follow with the Fourth Amendment which clearly seems to limit governmental rights to prevent infringement on individual rights. This new interpretation indicates a possible new change in direction for the courts.