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Donna-Marie Korth

Candace Reid Gladston

ESSAY

THE SECOND AMENDMENT WAS NOT INTENDED TO JUSTIFY ARMING EVERY TOM, DICK AND HARRIET WITH AN ASSAULT WEAPON

DONNA-MARIE KORTH* AND CANDACE REID GLADSTON**

It is extraordinary that almost no one knows what the Second Amendment really says, not even our Justice Department. The Second Amendment 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."[1] Out of the four clauses in the Second Amendment one only hears the third, "the

* Donna-Marie Korth is a Partner at Certilman Balin Adler & Hyman, LLP, concentrating in appellate practice and real estate litigation. She is admitted to practice in New York State and before the United States District Courts for the Eastern and Southern Districts of New York and the United States Supreme Court. Ms. Korth is a magna cum laude graduate of St. John's University and holds a juris doctorate, with honors, from St. John's University School of Law.

** Candace Reid Gladston practices as a Partner in the Civil Litigation and Criminal Defense Departments at Certilman Balin Adler & Hyman, LLP. She is admitted to practice in the state of New York, as well as the United States Court of Appeals for the Second Circuit and the United States District Court, Southern, Eastern and Western Districts of New York.

[1] U.S. CONST. amend. II.

right of the people to keep and bear arms,"[2] always quoted alone and out of context. The importance of the lead phrases "A well regulated Militia, being necessary to the security of a free State"[3] has been lost to all but a few scholars and litigators engaged in debating what they believe the Second Amendment protects.

The Second Amendment was not intended to justify arming every Tom, Dick and Harriet with an assault weapon. Nor was it intended to justify an unchecked proliferation of guns that kill more than 38,000 people a year, 500 of whom are children, and kill more teens in the fifteen to nineteen year old age groups, "than natural causes, trailing only traffic accidents as the leading cause of death."[4] Rather, the Second Amendment was intended to provide a substitute for a standing army maintained by the federal government, which the colonists feared could be used to take away their newly won freedoms. The Second Amendment became superfluous with the advent of the United States Armed Forces and now only provides grist to the gun-toting mill.[5]

Why do so many intelligent people believe that the Second Amendment unconditionally guarantees individuals, including those with mental illnesses,[6] the right to possess arms when the

[2] U.S. CONST. amend. II; *see* David Harmer, *Securing a Free State: Why the Second Amendment Matters*, 1998 BYU.L. REV. 55, 57 (1998) (suggesting "[t]he right of the people to keep and bear arms is the ultimate guarantor of all their other constitutionally recognized rights"); Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57, 65 (1995) (arguing "[g]un-rights advocates manufacture many of the apparent endorsements of an expansive Second Amendment interpretation by stripping critical context from the original quotations").

[3] U.S. CONST. amend. II; *compare* U.S. v. Phipps, 2003 U.S. App. LEXIS 582, *16-17 (5th Cir. 2003) (noting "[m]any citizens exercise their Second Amendment rights by routinely using, carrying or possessing a firearm" (citations omitted)) *with* Silveira v. Lockyer, 312 F.3d 1052, 1056 (9th Cir. 2002) (holding "the Second Amendment does not confer an individual right to own or possess firearms"). *See generally,* Anthony J. Dennis, *Clearing the Smoke From the Right to Bear Arms and the Second Amendment*, 29 AKRON L. REV. 57, 64 (1995) (suggesting "[t]he debate concerning the meaning and scope of the Second Amendment largely revolves around whether the Amendment provides a collective or individual right to bear arms").

[4] Daniel J. French, Note, *Biting the Bullet: Shifting the Paradigm from Law Enforcement to Epidemiology; A Public Health Approach to Firearm Violence in America*, 45 Syracuse L. Rev 1073, 1075 (1995); *see* Herz, *supra* note 2, at 58 & 60 n.8 (explaining "[s]ince 1988, gunshot wounds have killed more teens in that age group than natural causes, trailing only traffic accidents as the leading cause of death;" and thirteen children are struck by bullets – "stray" and not-so-stray—each and every day.")

[5] *See* 131 CONG. REC. 2027 (daily ed. May 8, 1985) (discussing the April 22, 1985 acceptance speech of NRA President Garcelon, who stated the NRA's most important duty is to oppose gun control of all kinds and in all political jurisdictions).

[6] *See* H.R. 4757, 107th Cong. § 2 (2002) (finding "33 states do not automate or share disqualifying mental health records"); *see also* Rachana Bhowmik, et al., *A Sense of Duty: Retiring the "Special Relationship" Rule and Holding Gun Manufacturers Liable for*

debates in the Constitutional Convention, the constitutional ratification process and the Federalist Papers clearly show otherwise?[7] Placed in its historical perspective, the Second Amendment was intended to provide a means to protect the people from the threat of federal tyranny through a standing army by preserving the right of the states to arm their militias, nothing more.[8]

The first draft of our Constitution created a strong centralized government and specified what this centralized government could do. What the Constitution did not say became an obstacle to its ratification. Life under a despotic monarchy pervaded the debates pitting those who believed the Constitution should contain strong language prohibiting a powerful federal government from trampling hard won freedoms against those who believed such prohibitions were unnecessary. Those who wanted guarantees against a tyrannical government won the day and the state legislatures ratified ten amendments known as the Bill of Rights, the second of which gave assurance that the government would not maintain a standing army.[9]

The Second Amendment was intended to give the people assurance that the government would not maintain troops that could be used against them as had the forces of the monarchy.[10]

Negligently Distributing Guns, 4 J. HEALTH CARE L. & POL'Y 42, 47 (2000) (suggesting many of the guns that reach prohibited purchasers are sold at gun shows).

[7] *See* United States v. Miller, 307 U.S. 174, 179 (1939) (discussing the role of the militia and view toward standing armies during the Constitutional Convention).

[8] *See Silveira*, 312 F.3d at 1087 (holding "that the Second Amendment imposes no limitation on California's ability to enact legislation regulating or prohibiting the possession or use of firearms, including dangerous weapons such as assault weapons"). *But see* United States v. Emerson, 270 F.3d 203, 260 (5th Cir. 2001) *cert. denied,* 122 S. Ct. 2362 (2002) (adopting the theory that the Second Amendment permits individuals to possess firearms for personal use regardless of any relationship of the individual or weapon to militia service).

[9] *See* The Bill of Rights, National Archives and Records Administration, *available at* http://www.archives.gov/exhibit_hall/charters_of_freedom/bill_of_rights/bill_of_rights.html (last visited Apr. 8, 2003) (stating "[t]he conventions of a number of the States, having at the time of their adopting the constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution."); Bernard J. Bordenet, *The Right To Possess Arms: The Intent of the Framers of the Second Amendment*, 21 U. WEST L.A. L. REV. 1, 7 (1990) (explaining that the right to bear arms is not unconditional); Herz, *supra* note 2, at 65 (positing "the Second Amendment as a compromise between the Federalists' insistence on a strong federal government supported by a large standing army, and the Antifederalists' demand that the states maintain control over the existing state militias as a counter weight to the expanding federal power").

[10] *See Miller*, 307 U.S. at 179 (explaining "[t]he sentiment of the time strongly

It was intended that the federal government could, if needed, call together a militia[11] consisting of able bodied men between the ages of seventeen and forty-five,[12] who were expected to appear when called for duty bringing their own arms with them[13]—slow firing muskets and pistols in common use at the time.[14] The common belief was that the country could be adequately defended through this militia – "civilians primarily, soldiers on occasion."[15] As Elbridge Gerry of Massachusetts stated during the Constitutional debates: "What, sir, is the use of a militia? It is to prevent the establishment of a standing army, the bane of liberty."[16]

The Framers of the Constitution specifically rejected versions of the Second Amendment that provided for a right to bear arms unrelated to service in the Militia[17]—powerful evidence that the Framers did not intend for there to be any constitutional guarantee of an individual right to bear arms.

For more than fifty years, the Supreme Court and the Justice Department steadfastly maintained the view that the Second

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").

[11] *See* U.S. CONST., art. 1, §8, cl. 15 (stating "The Congress shall have Power. . .[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel invasions."); *Miller*, 307 U.S. at 179 (noting "the Militia compromised all males physically capable of acting in concert for the common defense").

[12] *See* 10 U.S.C. §311(a) (1988) (specifying "[t]he militia of the United States consists of all able-bodied males at least 17 years of age and, except as provided in section 313 of title 32, under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard").

[13] *See* Militia Act of 1792, 1 Stat. 271 (1792) (clarifying "that every citizen so enrolled and notified, shall . . . provide himself with a good musket or flintlock . . .").

[14] *See Miller*, 307 U.S. at 182, n.3 (comparing the 'arms' of the 1700's, slow firing muskets "to the rapid firing, high ammunition capacity firearms of today"); *see also* Herz, *supra* note 2, at 97 (discussing the necessity of owning firearms in colonial times).

[15] *Miller*, 307 U.S. at 179 (noting militias were preferred to standing armies). *See generally,* David W. Hogan, Jr., *225 Years of Service The U.S. Army, 1775-2000*, CENTER OF MILITARY HISTORY UNITED STATES ARMY, 2000, *available at* www.army.mil/cmh-pg/books/225/3.9.htm, (last visited Feb. 20, 2003) (discussing the history of the Armed Forces and its evolution).

[16] 1 ANNALS OF CONG. 777, 778 (Joseph Gales ed., 1789).

[17] *See* Bordenet, *supra* note 9, at 21-22 (outlining how the Pennsylvania Minority's proposed version of the Second Amendment would include the right to bear and possess arms "for the purpose of killing game" and for personal defense and that no individual should be disarmed "unless for crimes committed" or threat of "real danger of public injury;" and the Massachusetts minority argued that "the said Constitution be never construed to . . .prevent the people of the United States, who are peaceable citizens, from keeping their own arms"); Herz, *supra* note 2, at 65; Silveira v. Lockyer, 312 F.3d 1052, 1072, n. 28 (9th Cir. 2002) (noting that the view espoused in the Pennsylvania Minority Report was rejected both by the Pennsylvania convention and by the First Congress).

Amendment must be interpreted and applied in connection with contributing to the common defense as contemplated in Article I, section 8, of the Constitution, which provides for "calling forth the Militia to execute the Laws of the Union."[18] It is this view that has provided support for over 20,000 local, state and federal laws regulating the sale, possession and use of firearms by individuals.[19]

Now, the government has done an about-face and speaks "of banning certain types of guns, of licensing and registration," as "political cyanide."[20] In two briefs filed in the United States Supreme Court by the Department of Justice,[21] the government has taken the unprecedented position that the Second Amendment unconditionally guarantees an individual the right to possess and bear arms.[22] Since the Justice Department is

[18] *See* Presser v. Illinois, 116 U.S. 252 (1886) (finding no grant of an individual's right to possess arms under the Second Amendment and upholding the constitutionality of an Illinois statute that prohibited any group of men other than an organized militia from associating as a military organization); *Miller*, 307 U.S. at 178 (discussing the extent of the Second Amendment's limitation on the federal government's exercise of power as addressed in *Presser*, and upholding the indictment of two individuals for transporting an unregistered sawed-off double barrel 12-gauge shotgun in interstate commerce because, among other things, there was no evidence that the sawed-off shotgun "is any part of the ordinary military equipment or that its use could contribute to the common defense"); Lewis v. United States, 445 U.S. 55, 65 n.8 (1980) (reaffirming the holding in *Miller*, applying rational basis scrutiny to the firearm regulatory scheme contained in the Omnibus Crime control and Safe Streets Act of 1968, and finding that the Second Amendment does not guarantee a right to bear arms unless it has "some relationship to the preservation or efficiency of a well-regulated militia.").

[19] *See* French, *supra* note 4, at 1079 (listing anti-gun statutes); *see also Silveira*, 312 F.3d at 1065 (observing the "reversal of position of the Justice Department has caused some turmoil in the lower courts, and has led to a number of challenges to federal statutes relating to weapons sales, transport, and possession, including a heavy volume in the district courts of this circuit").

[20] See Jim Oliphant, *How the Gun Debate Died*, LEGAL TIMES, Oct.21, 2002, at p.1 (discussing shift in policy concerning the Second Amendment).

[21] *See* Brief for the United States in *Emerson v. United States*, 122 S.Ct. 2362 (2002), *available at* http://www.usdoj.gov/osg/briefs/2001/0responses/2001-8780.resp.html (May 2002); Brief for the United States in *Haney v. United States*, 122 S.Ct. 2362 (2002), *available at* www.usdoj.gov/osg/briefs/2001/0responses/2001-8272.resp.html (May 2002).

[22] *See* sources cited *supra* note 21; Memorandum from Attorney General John Ashcroft to All United States' Attorneys Regarding United States v. Emerson, *available at* www.usdoj.govg/osg/briefs/2001/0response/2001-8780.resp.html (Nov. 9, 2001) (explaining that the Second Amendment "protects the right of *individuals*, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms . . ." subject to reasonable restrictions designed to prevent possession by unfit persons or to restrict the possession of types of "firearms that are particularly suited to criminal misuse"); Bob Herbert, *More Guns For Everyone!*, N.Y. TIMES, May 9, 2002 at A39 (quoting Department of Justice briefs for *Emerson* and *Haney* while noting shift in stance toward Second Amendment); Anne Gearan, *Justice Department Reverses Stance on Right to Bear Arms*, THE ASSOCIATED PRESS NEWSWIRES, May 8, 2002 (commenting on policy shift in interpretation

defending federal gun laws in both of those cases, this policy statement is inexplicable, unless one considers that Attorney General John Ashcroft expressed the same view in a letter to the National Rifle Association (NRA).[23]

There is no denying the power of the NRA and its lobbying efforts. In 1972, Justice William O. Douglas observed:

> 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." . . . the Second Amendment . . . was designed to keep alive the militia.[24]

Furthermore, Chief Justice Warren Burger, after his retirement, stated that the traditional individual rights view of the Second Amendment as recently espoused by the Justice Department was:

> one of the greatest pieces of fraud, I repeat the word 'fraud,' on the American public by special interest groups that I've ever seen in my lifetime. The real purpose of the Second Amendment was to ensure that state armies – the militia – would be maintained for the defense of the state. The very language of the Second Amendment refutes any argument that it was intended to guarantee every citizen an unfettered right to any kind of weapon he or she desires.[25]

of the Second Amendment); *see also* Tony Mauro, *Behind the U.S. Switch on Gun Rights Aschroft is Seen as the Moving Force*, 24 NAT'L L. J., May 12, 2002, at A1 (suggesting Ashcroft's culpability for government's new Second Amendment stance).

> [23] Let me state unequivocally my view that the text and the original intent of the Second Amendment clearly protect the right of individuals to keep and bear firearms. While some have argued the Second Amendment guarantees only a "collective right" of the states to maintain militias, I believe the amendment's plain meaning and original intent prove otherwise.

Fox Butterfield, *Broad View of Gun Rights is Supported by Ashcroft*, N.Y. TIMES, May 24, 2001, at A19 (quoting Ashcroft's letter to the NRA); *see also* Herbert, *supra* note 22 (asking "How weird is it that in this post-Sept.-11 atmosphere, when the Justice Department itself is in the forefront of the effort to narrow potential threats to security, the attorney general decides it would be a good idea to throw open the doors to a wholesale increase in gun ownership?"); Gearan, *supra* note 22 (noting devastating *reversal in "decades of Justice Department policy" toward the right to bear arms due to Ashcroft and Bush administration).*

[24] *Adams v. Williams*, 407 U.S. 143, 150-51 (1972) (Douglas, J. dissenting).

[25] *Silveira*, 312 F.3d at 1063 (*quoting* Warren E. Burger from *The Right to Bear Arms*, PARADE MAGAZINE, Jan. 14, 1990 at 4).

All of this brings us to the crux of the matter: Does the Second Amendment serve any purpose today, because it must be interpreted "in our time."[26] "For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs."[27] "The gun lobby's broad-individual-right view falls apart in our time. The passage of two centuries has brought wholesale changes in the composition of the well-regulated militia, and in the role of firearms in American society."[28]

Nowadays, the United States has a large, well-disciplined standing army and those called for duty are not expected to have on hand, let alone appear with, submachine guns, hand-held rocket launchers and grenades—the type of arms commonly used in warfare today.

Those touting the Second Amendment as a justification for relaxing or eliminating gun control laws should take their heads out of the sand and face the facts.[29] Guns do kill people.[30] That someone is injured or killed by a handgun every twenty seconds should not be surprising when an "estimated 222 million firearms are in circulation in a population of 260 million" - in our homes, in our schools, and on our streets - and when one handgun rolls off an assembly line every ten to twenty seconds.[31] Nor should it be surprising that guns kill more than 500 children

[26] William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 438 (1986).

[27] *Id.*

[28] Herz, *supra* note 2, at 67.

[29] *See* Margaret Cronin Fisk, *Kmart to Pay $3 Million for Selling Gun to Suicidal Teen*, 24 NAT'L L.J. 6, Oct. 1, 2001, at B1 (illustrating the unbelievable state of gun control where Kmart would be selling guns, especially to a suicidal teenager who was on "a heavy dose of the psychotic Clozaril" and was reportedly "drooling" in front of the sales personnel).

[30] *E.g.*, Cerisse Anderson, *Homicide Charges Stand for Adult whose Gun Causes Child's Death*, N.Y.L.J., June 11, 2001, at 17 (summarizing how court upheld felony charges a against Wayne Heber based upon the death of his 4-year old nephew, " who shot and killed himself after finding a loaded pistol under a chair cushion in the defendant's living room" where he was watching cartoons on television).

[31] Herz, *supra* note 2, at 58, 59 & n.4 (noting "ATF estimates that 7.5 million new and used guns are sold at retail each year" (about 20,000 sales a day if open 7 days a week)); French, *supra* note 4, 1075 & 1084 n.69 (explaining that in 1995, there were 200 million guns in our homes, on our streets and in our schools and "Every ten seconds, a new firearm rolls off an American assembly line; every eleven seconds, a foreign made firearm clears customs; and every thirteen seconds, someone in this country purchases one of these weapons.").

a year[32] and that an estimated 13 children are struck by bullets – "stray and not-so-stray—each and every day."[33]

The Second Amendment has simply outlived its purpose. Those of us who revere the protections guaranteed to individuals by the Bill of Rights should not fear its repeal. It should be repealed.[34] It does not protect any individual rights. What we should fear however, is the retention of a misunderstood and obsolete amendment that is itself being used as a weapon against our ability to control the proliferation of lethal arms in our society.[35]

[32] French, *supra* note 4, at 1075 (stating the magnitude of the gun control problem).

[33] Herz, *supra* note 2, at 60 (commenting on chilling statistics of child mortality due to gun violence). *See Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, n.1 (2001) (citing U.S. Census Bureau's Statistical Abstract for the U.S., "there were 7,402 murders by handguns in 1998" and "[i]n 1997 there were 39,400 gunshot wounds treated in hospital emergency rooms.").

[34] H.R.J. Res. 438, 102d Cong., 2d Sess. (1992), 138 CONG. REC. H1168-69 (daily ed. Mar. 11, 1992) (Representative Major Owens, D-N.Y.) (proposing the repeal of the Second Amendment and stating, "[a]s a result of the notion being promulgated that we cannot regulate the sale and distribution and manufacture of guns, we have a paralysis by legislators across the country and by the Congress. . .").

[35] Herz, *supra* note 2, at 84-93 (explaining the NRA wages a national battle against virtually all measures regulating access to firearms); *see* Oliphant, *supra* note 20, at p. 2 (stating "[g]uns are the only unregulated consumer product in this country. . .").