CATO HANDBOOK FOR CONGRESS

Policy Recommendations for the 108th Congress

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18. Restoring the Right to Bear Arms

Congress should

- use its constitutional authority over the District of Columbia to overturn D.C.'s handgun ban and enact a ''shall issue'' concealed carry licensing statute,
- repeal the Gun Control Act of 1968, and
- enact legislation that would authorize airlines to arm pilots who volunteer and complete appropriate training.

For decades, the Second Amendment was consigned to constitutional exile, all but erased from constitutional law textbooks and effectively banished from the nation's courts. But no more. Recent developments in the law and in political culture have begun the process of returning the amendment to its proper place in our constitutional pantheon. The 108th Congress now has a historic opportunity, not simply to stave off new gun-control proposals, but to begin restoring Americans' right to keep and bear arms.

Emergence from Exile

Ideas have consequences, and so does constitutional text. Though elite opinion reduced the Second Amendment to a constitutional inkblot for a good part of the 20th century, gun enthusiasts and grassroots activists continued to insist that the amendment meant what it said. And slowly, often reluctantly, legal scholars began to realize that the activists were right. Liberal law professor Sanford Levinson conceded as much in a 1989 *Yale Law Review* article titled ''The Embarrassing Second Amendment.'' UCLA Law School's Eugene Volokh took a similar intellectual journey. After a 1990 argument with a nonlawyer acquaintance who loudly maintained that the Second Amendment protected an individual right, Volokh concluded that his opponent was a ''blowhard and even a bit of a kook.''

But several years later, as he researched the subject, he discovered to his ''surprise and mild chagrin, that this supposed kook was entirely right'': the amendment secures the individual's right to keep and bear arms.

That's also what the Fifth Circuit Court of Appeals concluded in October 2001 when it decided *United States v. Emerson*. It held that the Constitution ''protects the right of individuals, including those not then actually a member of any militia . . . to privately possess and bear their own firearms . . . that are suitable as personal individual weapons.''

U.S. Attorney General John Ashcroft has endorsed the *Emerson* court's reading of the amendment. First, in a letter to the National Rifle Association, Ashcroft stated his belief that ''the text and the original intent of the Second Amendment clearly protect the right of individuals to keep and bear firearms.'' That letter was followed by Justice Department briefs before the Supreme Court in the *Emerson* case and in *United States v. Haney*. For the first time, the federal government argued in formal court papers that the ''Second Amendment . . . protects the rights of individuals, including persons who are not members of any militia . . . to possess and bear their own firearms, subject to reasonable restrictions designed to prevent possession by unfit persons or . . . firearms that are particularly suited to criminal misuse.''

The Right of the People

What's driving the new consensus? Let's look at the amendment's text: ''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 operative clause (''the right of the people to keep and bear Arms, shall not be infringed'') secures the right. The explanatory clause (''A well regulated Militia, being necessary to the security of a free State'') justifies the right. That syntax was not unusual for the times. For example, Article I, section 8, of the Constitution gives Congress the power to grant copyrights in order to ''Promote the Progress of Science and useful Arts.'' Yet copyrights are also granted to *Hustler*, to racist publications, even to literature that expressly seeks to retard science and the arts. The proper understanding of the copyright provision is that promoting science and the arts is one justification—but not the only justification—for the copyright power. Analogously, the militia clause helps explain why we have a right to bear arms, but it's not necessary to the exercise of that right.

As George Mason University law professor Nelson Lund puts it, imagine if the Second Amendment said, ''A well-educated Electorate, being neces-

sary to self-governance in a free state, the right of the people to keep and read Books shall not be infringed.'' Surely, no rational person would suggest that only registered voters have a right to read. Yet that is precisely the effect if the text is interpreted to apply only to a well-educated electorate. Analogously, the Second Amendment cannot be read to apply only to members of the militia.

The Second Amendment, like the First and the Fourth, refers explicitly to ''the right of the people.'' Consider the placement of the amendment within the Bill of Rights, the part of the Constitution that deals exclusively with rights of individuals, not powers of the state. No one can doubt that First Amendment rights (speech, religion, assembly) belong to us as individuals. Similarly, Fourth Amendment protections against unreasonable searches and seizures are individual rights. In the context of the Second Amendment, we secure ''the right of the people'' by guaranteeing the right of each person. Second Amendment protections are not *for* the state but for each individual *against* the state—a deterrent to government tyranny.

And not just against government tyranny. The Second Amendment also secures our right to protect ourselves from criminal predators. After all, in 1791 there were no organized, professional police forces to speak of in America. Self-defense was the responsibility of the individual and the community, and not, in the first instance, of the state. Armed citizens, responsibly exercising their right of self-defense, are an effective deterrent to crime.

Today, states' incompetence at defending citizens against criminals is a more palpable threat to our liberties than is tyranny by the state. But that incompetence coupled with a disarmed citizenry could well create the conditions that lead to tyranny. The demand for police to defend us increases in proportion to our inability to defend ourselves. That's why disarmed societies tend to become police states. Witness law-abiding inner-city residents, many of whom have been disarmed by gun control, begging for police protection against drug gangs—despite the terrible violations of civil liberties that such protection entails, such as curfews and anti-loitering laws. The right to bear arms is thus preventive—it reduces the demand for a police state. George Washington University law professor Robert Cottrol put it this way: ''A people incapable of protecting themselves will lose their rights as a free people, becoming either servile dependents of the state or of the criminal predators.''

Over the years, our elected representatives have adopted a dangerously court-centric view of the Constitution: a view that decisions about constitu-

tionality are properly left to the judiciary. But members of Congress also swear an oath to uphold the Constitution. Congress can make good on that oath by taking legislative action to restore our right to keep and bear arms. To that end, Congress should take the following steps.

Repeal D.C.'s Handgun Ban and Enact Concealed Carry

No jurisdiction in the United States works as doggedly to disarm citizens as does the District of Columbia, our nation's capital and on-again, off-again murder capital. Yes, the city council grudgingly legalized pepper spray in 1993 (provided, of course, that it's properly registered), but that brief concession to self-defense hasn't led to any revision of the District's gun laws, which are still among the most restrictive in America. D.C. bans the possession of unregistered handguns and prohibits, with very few exceptions, the registration of any handgun not validly registered in the District prior to 1976.

In the wake of the *Emerson* decision and Attorney General Ashcroft's endorsement of the individual right to keep and bear arms, the District's federal public defender decided that D.C.'s sweeping gun ban was vulnerable. In May 2002, the *Washington Post* reported that D.C.'s federal defender had filed motions challenging the gun ban on behalf of several clients accused of violating the ban and the District's law against carrying firearms. In all, roughly three dozen challenges to the D.C. law have been filed thus far.

Because the District is not a state, felonies under D.C. law are prosecuted by the U.S. attorney for the District of Columbia, an employee of the Justice Department—the same Justice Department that is now on record as favoring an individual rights theory of the Second Amendment. To be sure, Ashcroft had declared in an internal memorandum that the Justice Department ''will continue to defend the constitutionality of all existing federal firearms laws.'' But D.C. law, although enacted pursuant to congressional delegation, is not federal law. Therefore, the U.S. attorney might have been expected to support a motion to drop the handgun possession charges pending in these cases.

Instead, the U.S. attorney argued that the D.C. handgun ban must be upheld in light of binding precedent from the D.C. Court of Appeals in a 1987 case, *Sandidge v. United States*. That case flatly repudiates the individual right to bear arms. The *Sandidge* court stated baldly that ''the right to keep and bear arms is not a right conferred upon the people by the federal constitution''—a statement that's rather hard to square with

the Second Amendment, which speaks of the ''right'' of the ''people'' to ''keep and bear arms.''

It's one thing for Attorney General Ashcroft to endorse the individual right to bear arms in a letter to a friendly interest group, or to affirm it in a footnote in a legal brief. It's quite another to follow up words with action. As Julie Leighton of the District's Public Defender Service puts it, Ashcroft's Justice Department ''is currently prosecuting individuals solely for 'bearing' a pistol, even though many of those individuals have no prior convictions and are adult citizens of full mental capacity. Thus the United States persists in prosecuting District of Columbia residents for conduct that the Attorney General has expressly deemed protected by the United States Constitution.''

Whatever the reasons for Attorney General Ashcroft's perplexing decision to continue prosecuting gun-ban violations, Congress has the constitutional authority to protect District residents' right to bear arms. Article I, section 8, clause 17, of the Constitution gives Congress the power ''to exercise exclusive legislation in all cases whatsoever'' over the District of Columbia. Congress can and should use that authority to repeal the District's gun ban and enact a ''shall-issue'' concealed carry licensing statute. Such statutes mandate that handgun permits be issued to citizens who satisfy certain objective criteria such as citizenship, mental competence, lack of a criminal record, and completion of a firearms training course. Thirty-one states have shall-issue laws, and, as exhaustive research by American Enterprise Institute scholar John R. Lott Jr. has shown, they deter crime. Lott found that ''the reductions in violent crime are greatest in the most crime prone, most urban areas. Women, the elderly and blacks gained by far the most from this ability to protect themselves.''

In contrast, for more than 25 years, D.C. residents have served as guinea pigs in a public-policy experiment in near-total gun prohibition. That experiment has failed catastrophically. Congress can and should end that illegitimate experiment and restore District residents' right to keep and bear arms.

Repeal the Gun Control Act of 1968

The Gun Control Act of 1968, with subsequent amendments, is bad law and bad public policy. It ought to be repealed. Full repeal is not a radical step; Ronald Reagan endorsed it in 1980. But until that can be accomplished, Congress should, at a minimum, repeal the most oppressive sections:

The 1994 Ban on So-Called Assault Weapons

Those guns do *not* fire faster than other guns, nor are they more powerful. Indeed, they fire smaller bullets at lower velocities than do most well-known rifles used for hunting big game. The assault weapons statute is purely cosmetic—banning guns because of politically incorrect features such as bayonet lugs (as if drive-by bayoneting were a problem) or a rifle grip that protrudes ''conspicuously'' from the gun's stock. Police statistics from around the nation show that such guns are rarely used in crime. The federal ban will sunset in 2004, but Congress should repeal it immediately.

The 1994 Ban on Possession of Handguns by Persons under 18

Assuming that such a ban could survive Second Amendment scrutiny, it is a topic that should be addressed by state, not federal, law. The statute does include some exceptions—for example, a parent may take a child target shooting—but, even if the child is under direct and continuous parental supervision, the parent commits a federal crime unless she writes a note giving the child permission to target shoot and the child carries the note at all times. The 1994 prohibition usurps traditional state powers, is overbroad, and encroaches on parental rights, despite a paucity of empirical evidence that the ban will reduce gun accidents or gun-related violence.

The Ban on Gun Possession by Specified Adults

When adult behavior is regulated, the Second Amendment weighs more heavily than when restrictions are imposed on minors. Even if Second Amendment constraints are somehow satisfied, the federal government has no constitutional authority in this area. Particularly unfair, whether imposed by federal or state law, is the ban on gun possession by anyone who is subject to a domestic restraining order, routinely issued by divorce courts without any finding that the subject of the order is a danger to another person. Such provisions ought not to be allowed to stand.

Arm the Pilots

Just as armed citizens can deter aggression on our city streets, they can do so in our nation's skies. On September 11, 2001, a few hijackers armed with box cutters were able to hold scores of airline passengers at bay, secure in the knowledge that American airplanes are gun-free zones. But when we turn planes, airports, schools, and workplaces into gun-free zones,

we also turn them into criminal-safe zones. If on the other hand we make it nearly certain that someone will be armed on every commercial flight, the enemies of liberty will have second thoughts about using American aircraft as weapons of mass destruction.

Imagine that you are a terrorist deciding whose plane to use as your next weapon. One airline boasts in its ads, ''Our Planes Are Gun-Free Zones.'' A second, with somewhat less self-righteousness, admonishes that ''One or More Employees Will Be Armed on Every Flight.'' Not much question which one you'd fly. Now picture yourself as a safety-conscious passenger. Still not much question, but the choice won't be the same. That's the case in a nutshell for armed sky marshals and armed pilots.

Let's start with sky marshals. Having an armed federal marshal on every flight would certainly deter terrorists. But the problem is cost. Just one marshal per daily flight would require 35,000 officers—more than twice the number employed by the Federal Bureau of Investigation, the Secret Service, and U.S. Marshals Service combined. Yes, a marshal might be able to average three to four flights each day. Then again, most proposals call for more than one marshal per flight. Put it all together and we're talking about roughly 15 thousand to 20 thousand new employees, salaried at $30,000 and up per year, plus the cost of training.

Transportation Secretary Norman Mineta, hostile to the idea of anyone but federal marshals carrying firearms on U.S. flights, has worked to greatly expand the federal air marshal program. About 6,000 new marshals have been hired since September 11. That rapid expansion has reduced the quality of new hires and left the air marshal program in disarray, according to an August 2002 *USA Today* exposé. According to one disillusioned former marshal, the program has become ''like security-guard training at the mall.''

Instead of going on a federal hiring binge, why not rely on the talented people the airlines already have? Why not allow pilots to be armed? ''These men and women operate $100 million pieces of equipment. They can sure learn to operate a .38 snub-nose if they want to,'' says aviation consultant Michael Boyd. The Airline Pilots Association, with overwhelming support from its members, wants armed pilots in cockpits. So do the public and Congress. The airlines are opposed only because they fear the trial lawyers.

''Under the old model of hijackings,'' said a union spokesman, the ''strategy was to accommodate, negotiate and do not escalate. But that was before. The cockpit has to be defended at all costs.'' In a crisis, a

pilot's gun would never leave the cockpit because the pilot never would. And if a terrorist were able to penetrate the cockpit, shooting him within the cockpit's door frame would not require a sniper's skill.

An armed pilots program would be strictly voluntary. It would require extensive background screening and psychological testing, as well as classroom and practical training, roughly equivalent to what sky marshals would receive. After all, we now allow weapons on planes if they're carried by sheriffs, FBI and Secret Service agents, postal inspectors, and bodyguards of foreign dignitaries. If those risks are acceptable, then let's arm pilots who can protect *all* passengers' lives. Better yet, leave it up to the individual airlines. They own the property and they can set the rules.

The broader principle is this: On September 11, the United States government failed at its single most important function—protecting American citizens against foreign aggression. Armed civilians can deter aggression. That means safer planes, shopping malls, schools, and other public places. Law enforcement officers can't be everywhere, but an armed, trained citizenry can be.

For too long, elite opinion in America has been implacably opposed to armed self-defense. The underlying philosophy, expressed by Pete Shields, former president of Handgun Control, is that ''the best defense is . . . no defense—give them what they want.'' After September 11, that philosophy is no longer valid, if it ever was. It's time for the 108th Congress to repudiate it.

Suggested Readings

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United States v. Emerson, 270 F.3d. 203 (5th Cir. 2001).

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