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HANDGUN CONTROL: CONSTITUTIONAL AND CRITICALLY NEEDED

MAYNARD HOLBROOK JACKSON, JR.*

I. INTRODUCTION

The United States should move immediately to ban the import, manufacture, sale and possession of all handguns except in certain specified cases.

That flat statement is enough to set off long hours of emotional debate between gun control advocates and gun control opponents.¹ But when the obfuscating shrouds of emotionalism are removed, the light cast by the courts' interpretation of constitutional law on the issue reveals that the legal arguments for gun control clearly are upheld.

Central to the issue, of course, is interpretation of the second amendment to the United States Constitution.² That amendment reads as follows:

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.³

The amendment is the beginning and end of any discussion of the legal merits of gun control.⁴ Both sides claim it as evidence in their case. Analysis

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1. See generally C. BAKAL, *THE RIGHT TO BEAR ARMS* (1966) [hereinafter cited as BAKAL]; Krug, *Firearms Registration: Costs v. Benefits, A Survey of State Law Enforcement Agencies on Firearms Registration*, National Shooting Sports Foundation (1970); Krug, *Model Firearms Legislation: A Compilation of Model Firearm Bill for Use by Legislators, Government Agencies, Sportsmen and Conservationists*, National Shooting Sports Foundation (1970); Yeager, Alviani and Loving, *How Well Does the Handgun Protect You and Your Family?* U.S. Conference of Mayors (1976); *A Legislator's Guide to the Assessment of Criminal Justice Legislation*, Council of State Governments (1975); *Gun Control*, American Enterprise Institute for Public Policy Research (1976); Ford, *Gun Control and the Second Amendment: A Bibliography*, Los Angeles County Law Library (1976); Hays, *The Right to Bear Arms, A Study in Judicial Misinterpretation*, 2 WM. & MARY L. REV. 381 (1960) [hereinafter cited as Hays]; Horowitz, *Reflection on Gun Control: Does the Problem Have Solutions or Do the Solutions Have Problems?* 52 LAB J.208 (1976); Kates, *Why a Civil Libertarian Opposes Gun Control*, 3 CIV. LIB. L. REV. 24 (1976) [hereinafter cited as Kates]; Shields and Aspen, *Two Judges Look at Gun Control*, 57 CHI. B. REC. 180 (1976); Comment, *Shooting to Kill the Handgun: Time to Martyr Another American "Hero"*, 51 J. URB. L. 491 (1974); [hereinafter cited as *Shooting, to Kill the Handgun*]; Weiss, *A Reply to Advocates of Gun Control Law*, 52 J. URB. L. 577 (1974); Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD. 133 (1975); Comment, *Act 696: Robbing the Hunter, Hunting the Robber?* 29 ARK. L. REV. 570 (1976); Nore, *Criminal Law—Firearms Possession*, 3 FORDHAM URB. L.J. 375 (1975).

2. U.S. CONST. amend. II.

3. *Id.*

4. See generally, Caplan, *Restoring the Balance: The Second Amendment Revisted*, 5 FORDHAM URB. L.J. 31 (1976); [hereinafter cited as Caplan] Feller & Gotting, 61 Nw. U. L.

of that evidence, by either side, starts with the semantics of this seemingly straightforward provision and harkens back to the legislative intent of the drafters of the amendment when they proposed it in 1789.⁵

REV. 46 (1966); [hereinafter cited as Feller & Gotting] Levine & Saxe, *The Right to Bear Arms: The Development of the American Experience*, 7 HOUSTON L. REV. 1 (1969); [hereinafter cited as Levine & Saxe] Rohner, *The Right to Bear Arms: A Phenomenon of Constitutional History*, 16 CATH. U. AM. L. REV. 53 (1966) [hereinafter as Rohner] Sprecher, *The Lost Amendment*, 51 ABA L. J. 554 (1965); [hereinafter cited as Sprecher] Whisker, *Historical Development and Subsequent Erosion of the Right to Keep and Bear Arms*, W. VA. L. REV. 171 (1976); Comment, *Constitutional Limitations in Federal Firearms Regulation*, 1969 DUKE L.J. 773, 787-800 [hereinafter cited as *Constitutional Limitations in Federal Firearms Regulation*]; Comment: *Constitutional Limitation on Federal Firearms Control*, 8 WASHBURN L.J. 238 (1969).

5. Unfortunately, the motivations behind the proposal and the Senate's passage of the second amendment are, for the large part, unrecorded, since the Senate met behind closed doors until the sessions were made public in 1794. B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 1145 (1972) [hereinafter cited as B. SCHWARTZ]. Nevertheless, a legislative history of the second amendment can be, and has been, structured.

By 1776, fear of England's standing army was a major grievance of the Colonists, and distrust of the independence of the military characterized the Colonists's other grievances. Caplan, *supra* note 4, at 35-36. Articles in a number of state Bill of Rights passed in 1776 reflected this distrust, and indicated support for the development of a common militia consisting of citizens of the various states. Virginia's Bill of Rights, one of the first to be ratified, included the following language:

That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural and safe defence of a free State; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that in all cases, the military should be under strict subordination to, and governed by, the civil power.

The meaning and intent of the words, "safe defence" of a "free state", became particularly relevant when compared to the words used by Pennsylvania to describe the use of arms by its people.

That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace and dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power (emphasis added).

The training in arms for the "defence of a free state", and the training of arms for the "defence of the people themselves" is one source of the controversy over whether the right to bear arms is a collective or an individual right. Delaware, Maryland, North Carolina and Massachusetts used words similar to Virginia in their bills, while Vermont incorporated Pennsylvania's language.

At the Constitutional Convention of 1787, debate and compromise resulted in the awarding of certain enumerated powers to Congress, including the organizing, arming, and disciplining of an army, control over that part of the army serving the country as a whole, and power to call out the army to enforce the law. U.S. CONST., Art. I, sec. 8, cl. 16. To the states were given the powers of appointing officers and training the militia (a special militia) according to a procedure prescribed by Congress. The debates were marked in particular by fighting between the Federalists, who were committed to a strong national government and a competent national militia and the Anti-Federalists, who favored a weaker Federal government, a state militia, and protection of individual rights. The following excerpt indicates the issues concerning the conventioners:

"Saturday, August 18: Mr. GERRY took notice that there was no check here against standing armies in time of peace. The existing Congress is so constructed, that it cannot of itself maintain an army. This would not be the case under the new system. He thought an army dangerous in time of peace, and could never consent to a power to keep an indefinite number . . .

Mr. LANGON saw no room for Mr. Gerry's distrust of the representatives of the people . . .
Mr. MASON moved, as an additional power—

to make laws for the regulation and discipline of the militia of the several states, reserving to the states the appointment of officers.

Mr. ELLSWORTH . . . thought the motion of Mr. Mason went too far. He moved—
that the militia should have the same arms and exercise, and be under no rules established by the general government when in actual service of the United States; and when states neglect to provide regulations for militia it should be regulated and established by the legislature of the U.S.

The whole authority over the militia ought by no means to be taken away from the States, whose consequences would pine away to nothing after such a sacrifice of power . . .

—Mr. PINCKNEY thought the power such a one as could not be abused, and that the states could see the necessity of surrendering it. He had, however, but a scanty faith in militia. There must also be a real military force . . .

—Mr. SHERMAN took notice that the States might want their militia for defence against invasions and insurrections, and for enforcing obedience to their laws. They will not give up this point. In giving up that of taxation, they retain a concurred power of raising money for their own use . . .” 5 J. ELLIOT, DEBATES OF THE ADOPTION OF THE FED. CONST. IN THE CONVENTION HELD IN PHILADELPHIA IN 1789, 442-444 (1845) [hereinafter cited as ELLIOT] “Thursday, August 23:

The report of the committee of eleven, made the 21st of August, being taken up, and the following clause being under consideration, to wit:

To make laws for organizing, arming and disciplining the militia and for governing such parts of them as may be employed in the service of the United States, reserving to the States, respectively, the appointment of the officers, and authority of training the militia according to the discipline prescribed.

—Mr. SHERMAN moved to strike out the last member, ‘and authority of training.’ He thought it unnecessary. The States will have this authority, of course, if not given up . . .

Mr. KING, by the way of explanation, said that by organizing, the committee meant, proportioning the officers and men—by arming, specifying the kind, size and calibre of arms—and by disciplining, prescribing the manual exercise and evolutions, . . .

—Mr. KING added to his former explanation, that arming meant not only to provide for uniformity of arms, but included the authority to regulate the modes of furnishing, either by the militia themselves, the state government, or the national treasury; that laws for disciplining must involve penalties, and every thing necessary for enforcing penalties . . .

—Mr. LANGDON said he could not understand the jealousy expressed by some gentlemen. The general and state governments were not enemies to each other, but different institutions for the good of the people of America. As one of the people, he could say, ‘The national government is mine, the state government is mine’ . . .

—Mr. MADISON. The primary object is to secure an effectual discipline of the militia. This will no more be done, if left to the states separately, than the requisitions have been hitherto paid by them. The States neglect their militia now . . . The discipline of the militia is evidently a rational concern, and ought to be provided for in the national constitution . . .

—Mr. GERRY. Let us at once destroy the state governments, have an executive for life, or hereditary, and a proper Senate, and then there would be some consistency in giving full powers to the general government: but as the states are not to be abolished, he wondered at the attempts that were made to give powers inconsistent with their existence. He warned the Convention against pushing the experimental too far. Some people will support a plan of vigorous government at every risk; others, of a more democratic cast, will oppose it with equal determination; and a civil war may be produced by the conflict.”

State ratifying conventions met in 1788. Several states discussed the possibility of developing amendments to the Constitution, including an amendment proclaiming the right of the people to bear arms in defense of their state. Maryland was the first to note its fear of Congress’s control of the militia. Pennsylvania was next, asserting the right of a concurrent state power to arm and discipline the militia if the federal government failed to do so or was arming against them. Virginia’s discussion of the issue appeared to be the most significant, since James Madison, a native of the state, used Virginia’s recommendations (as representative of what the states desired) in proposing the second amendment in 1789. Included in these recommendations was the concept that “each state shall have the power to provide for the organizing, arming and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the

For those who oppose gun control, the amendment's simplicity lends itself only to the most simplistic of interpretations. It says to them that each individual citizen of this nation has the right to own guns and that right legally cannot be taken away.⁶ Their argument is that "the people" in the second amendment is synonymous with "the people" in the first amendment's "right of the people peaceably to assemble and to petition the Government for a redress of grievances;"⁷ of the fourth amendment's "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures;"⁸ of the ninth amendment's right of privacy to be "retained by the people;"⁹ and of the tenth amendment's powers not delegated nor prohibited are reserved to the states or "to the people."¹⁰

In an effort to bolster this argument, the anti-gun control forces contend that there is evidence that the framers of the constitutional amendment believed the right of every citizen to bear arms to be a cornerstone of freedom.¹¹ The Senate of 1789 refused to limit the scope of the amendment

same." The recommendation was not finally included in the second amendment. It did however illustrate the fear of the states that the federal government's power to arm a militia on its own might lead to the destruction of the state's militia and other rights of the people. Lavine & Saxe, *supra* note 4, at 4-6. Madison's proposal read as follows:

That the right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person. (E. DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 11 (1957) [hereinafter cited as E. DUMBAULD].)

His proposal was submitted to a Committee of the House. The ensuing debate characterized it as a concurrent protection for the states from the arbitrariness and threat of a standing army. Several weeks later, the committee passed the bill out to the Senate. The Senate's final version stated that "[A] well regulated militia, being the best security of a free State, the right of the people to keep and bear arms shall not be infringed." *Id.*, at 45 n.6 (1957). The words, "composed of the body of the people, coming after "militia" in the House version, were deleted; also omitted was the language exempting men with religious scruples from martial duty. *Id.* These were the Senate's only changes.

6. See Hardy & Stompoly, *Of Arms and the Law*, 51 *CHI.—KENT L. REV.* 62, 69-72 (1974) [hereinafter cited as Hardy & Stompoly]; Levine & Saxe, *supra* note 4; Weiss, *supra* note 1, at 580-81.

7. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I. See also Hardy & Stompoly, *supra* note 6, at 68-69.

8. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, or particularly describing the place to be searched and the persons or things to be seized." U.S. CONST. amend. IV.

9. "The . . . enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

10. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

11. See generally, Kates, *supra* note 1, at 24; 3 J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES*, 746 (1833); *Firearms Legislation: Hearings before the Subcomm. on Crime of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 100 (1974) (testimony by Hon. Steven D. Symms) [hereinafter cited as 1975 Hearings].

by insertion of the phrase “for the common defence.”¹² That rejection, the gun supporters say, indicates that the second amendment was conceived as a guarantee not only of a common, collective right to bear arms, but as a guarantee of the individual right to bear arms.¹³

Furthermore, the handgun proponents quote James Madison as saying that the United States would not be a tyranny such as the governments of Europe, because the young nation would “trust the people with arms.”¹⁴

The pro-handgun argument is overly simplistic in its substance and in its conclusion. The amendment and the history surrounding its enactment must be taken as a whole.¹⁵ The second amendment clearly refers to the “free state” needing protection and specifies that a “well-regulated Militia” is to give that protection.¹⁶ At the time of the amendment’s drafting, almost every citizen of this young and struggling nation was considered a front-line soldier—a member of the militia.¹⁷ Therefore, it was natural for the writers to assign the right to bear arms to “the people”—meaning “the people” of a “well-qualified Militia.”¹⁸

As for rejection of the term “for the common good,” it should be noted that this phrase was suggested after the substance of the amendment had been agreed to.¹⁹ At this point, only technical changes were being made: for example, substituting “necessary to the” in lieu of “the best” and renaming the article “the fourth” rather than “the fifth.”²⁰ While gun advocates argue that the clause was rejected because it would have the effect of restricting the right to bear arms,²¹ it is more plausible that it was rejected for a technical reason; that reason being that the phrase would have been redundant. The amendment *already* meant the right of the people of a well-regulated militia to bear arms for the security of a free state.²²

12. B. SCHWARTZ, *supra* note 5, at 1153-1154.

13. See *Nunn v. State*, 1 Ga. 243 (1846); *State v. Kerner*, 181 N.C. 574, 107 S.E. 222 (1921); *Andrews v. State*, 3 Heisk (1871); *Bliss v. Commonwealth*, 2 Litt. (Ky.) 90, 13 Am. Dec. 251 (1822); see generally, Hays, *supra* note 1, at 405-406; Goldwater, *Why Gun-Control Laws Don't Wash*, READER'S DIG. 184 (Dec. 1975); Caplan, *supra* note 4, at 48-49.

14. A. HAMILTON, J. JAY & J. MADISON, THE FEDERALIST PAPERS No. 46, 335 (1961) [hereinafter cited as Madison]; Caplan, *supra* note 4, at 40.

15. See Note, *Firearms Legislation*, 18 VAND L. REV. 1362, 1370 (1965), where the author discusses pre-constitutional, common law history.

16. See discussion at note 5 *supra* on Madison's recommendations. See also the oft-quoted statement of Congressman Elbridge Gerry of Massachusetts, in context in 1 ANNALS OF CONG. 778 (1789). B. SCHWARTZ, *supra* note 5, at 1107-8.

17. R. POUND, DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 90 (1957).

18. *Shooting to Kill the Handgun*, *supra* note 1, at 516-17.

19. B. SCHWARTZ, *supra* note 5, at 1154. On Friday, September 4, 1789, after the House had sent its list of approved amendments to the Senate, the Senators adopted the House's amendment concerning the right to bear arms. *Id.* at 1146. On Monday, the 7th, motions were made for striking certain words and substituting other words in the amendment. *Id.* at 1154. The amendment was not discussed again, until its approval by both House and Senate on September 25. *Id.* at 1163-64.

20. *Id.* at 1154.

21. Caplan, *supra* note 4, at 42-43.

22. *Supra* note 2.

Madison's statement that the United States would "trust the people with arms"²³ argues the pro-handgun position only when taken out of the context of Madison's argument. Madison was, in fact, arguing that the state government would protect the citizenry from a too powerful federal government. A more extensive quotation of this argument illustrates this point in THE FEDERALIST PAPERS:

Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resource will bear, the governments are afraid to trust the people with arms. And it is not certain, that with this aid alone, they would not be able to shake off their yokes. But were the people to possess the additional advantages of local governments chosen by themselves, who could collect the national will, and direct the national force, and officers appointed out of the militia, by these governments, and attached to both them and the militia it may be affirmed with greatest assurance, that the throne of every tyranny in Europe would be speedily overturned in spite of the legions which surround it.²⁴

Clearly, Madison's thrust was that the citizens of the United States would be free from tyranny by the federal government because the people could unite through their strong, elected, local governments, which the people of Europe did not have. Further, the citizens of the United States could unite with the armed people of the militia, which Europeans did not have either, and oppose the tyranny of a despotic federal government and its standing army.

A review of constitutional case law involving the second amendment shows the weight of court decisions falling heavily on the side of those who favor government regulation of firearms.²⁵ Federal court rulings have construed the second amendment to be something less than an absolute guarantee of the right of every citizen to keep a gun.²⁶

23. *Supra* note 14.

24. MADISON, *supra* note 14.

25. See Barrett v. United States, 96 S.Ct. 498 (1976); Huddleston v. United States, 415 U.S. 814 (1974); Adams v. Williams, 407 U.S. 143 (1972); United States v. Miller, 307 U.S. 174 (1939); United States v. Cruikshank, 92 U.S. 542 (1876); United States v. Birmley, 529 F.2d 103 (6th Cir. 1976); United States v. Johnson, 497 F.2d 548 (4th Cir. 1974); United States v. Petrucci, 486 F.2d 329 (9th Cir. 1975), *cert. denied* 416 U.S. 937 (1971); United States v. Nelson, 458 F.2d 556 (5th Cir. 1972); United States v. Tomlin, 454 F.2d 176 (9th Cir. 1972), *cert. denied* 406 U.S. 924 (1972); United States v. McCutcheon, 446 F.2d 133 (7th Cir. 1971); Varitimo v. United States, 404 F.2d 1030 (1st Cir. 1968), *cert. denied* 395 U.S. 976 (1968); Eckert v. St. of Pennsylvania, 331 F. Supp. 1361 (E.D. Pa. 1971). *aff'd* 474 F.2d 1339 (1973), *cert. denied* 410 U.S. 989 (1971), and 411 U.S. 920 (1971); United States v. Gross, 313 F. Supp. 1330 (S.D. Ind. 1970), *aff'd* 451 F.2d 1355 (7th Cir. 1971); United States v. Adams, 11 F. Supp. 216 (S.D. Fla. 1935).

26. See generally, United States v. Warin, 530 F.2d 103 (6th Cir. 1976) *cert. denied* 96 S. Ct. 3168 (1976); United States v. Swinton, 521 F.2d 1255 (6th Cir. 1975); United States v. Romero, 484 F.2d 1324 (10th Cir. 1973); Eckert v. City of Philadelphia, 477 F.2d 610 (3rd Cir. 1973); United States v. Day, 476 F.2d 562 (6th Cir. 1973); Cody v. United States, 460 F.2d 34 (8th Cir. 1972), *cert. denied* 409 U.S. 1010 (1972); Stevens v. United States, 440 F.2d 144 (6th Cir. 1971).

The earliest United States Supreme Court decision concerning the scope of the second amendment is found in *United States v. Cruikshank*.²⁷ The Court addressed itself to the question of whether there existed a right to bear arms for a lawful purpose. Mr. Chief Justice Waite, speaking for the majority, wrote that this right to bear arms is neither a right granted by the Constitution, nor is it dependent upon the Constitution for its existence—the second amendment imposed limitations only upon the federal government.²⁸ “The Second Amendment declares that . . . this, as has been seen, means no more than it shall not be infringed by Congress.”²⁹ Hence, individual states may enact gun control legislation without transgressing the second amendment.

This interpretation of the scope of the second amendment was supported in *Presser v. Illinois*³⁰ where the Court once again stated that the second amendment is not a limitation upon the states. In that case, the Court went a step further in their rationale. Mr. Justice Woods wrote that the states could be prevented from prohibiting the right to bear arms only if it could be demonstrated that, in doing so, there was an attempt to “deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.”³¹ This is clearly neither the intent nor the result of gun control legislation.³² The most important consideration, is the preservation of public peace and the protection of the people against violence, which are also constitutional duties.³³ When examining the right to keep and bear arms, this must be kept in mind.

In a lower court decision, *Aymette v. State*,³⁴ Judge Green indicates the inherent danger of a very narrow reading of the second amendment. “To hold that the legislature could pass no law upon this subject to preserve public peace, and to protect our citizens from the terror which a wanton and unusual exhibition of arms might produce . . . would be to pervert a great political right to the worst of purposes and to make it a social evil of

27. 92 U.S. 542(1876).

28. *Id.* at 553.

29. *Id.* “This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes to what is called . . . the ‘powers which relate to merely municipal legislation, or what was, perhaps, more properly called internal police,’ not surrendered or restrained by the Constitution of the United States.” *Id.*

30. 116 U.S. 252 (1886).

31. *Id.* at 265. “It is undoubtedly true that all citizens capable of bearing arms constitute the reserved force or reserved militia of the United States as well as of the States, and, in view of this prerogative of the general government, as well as of its general powers, the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms.” *Id.*

32. *Biffer v. City of Chicago*, 278 Ill. 562, 116 N.E. 182 (1917).

33. *State v. Dawson*, 272 N.C. 535, 159 SE2d 1 (1967).

34. 2 Humph. 154 (1840).

infinitely a greater extent to society [than] would result from abandoning the right itself."³⁵

The United States Supreme Court has also interpreted the second amendment in terms of the need for a well established militia. Article 1, section 8, clause 16, of the United States Constitution gives Congress the power to provide for the organizing, arming and disciplining of the militia.³⁶

In *United States v. Miller*,³⁷ the court determined that section 11 of the National Firearms Act, which required registration to possess, to ship, or to deliver any firearm, did not violate the second amendment. By recognizing the constitutionality of this Act, the Court reiterated that the second amendment is not absolute. This decision by the Court is consistent with past interpretations of the second amendment.³⁸ In *Miller*, Mr. Justice McReynolds stated that the second amendment must be interpreted in relation to this power.³⁹ The purpose of the second amendment is to maintain the effectiveness of the militia as a whole. The second amendment as interpreted within this context refers to a collective right and not an individual right.⁴⁰

United States v. Miller also makes reference to the types of weapons to which the second amendment addresses itself. In that case, the Court ruled that a sawed-off shotgun did not contribute to the preservation of a well-regulated militia.⁴¹ "Certainly it is not within judicial notice that this weapon is in any part of the ordinary military equipment or that its use could contribute to the common defense."⁴² Since the purpose of this amendment, as noted previously, is to render effective the military, the logical conclusion is to prohibit those weapons which do not contribute towards this goal.⁴³ *English v. State*⁴⁴ is much more specific on this point. This lower court decision stated that "the word 'arms' in the connection we find it in the constitution of the United States, refers to the arms of a militiaman or

35. *Id.* at 123-124.

36. "To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of officers, and the Authority of training the Militia according to the discipline prescribed by Congress."

37. 307 U.S. 174 (1939).

38. *Supra* note 27 and 30 and accompanying text.

39. 307 U.S. at 178.

40. *Id.* at 179-182.

41. *Id.* at 178.

42. *Id.*

43. See for example, *Rinzler v. Carson*, 262 So.2d 661, (1972); *State v. Lee*, 277 N.C. 242, 176 SE2d 772 (1970); *Morrison v. State*, 170 Tex. Crim. 218, 339 Sw2d 529 (1960); *Fall v. Esso Standard Oil Co.*, 297 F.2d 411 (5th Cir. 1961), cert. denied 371 U.S. 814 (1962); *State v. Kerner*, 181 N.C. 574, 107 S.E. 222 (1921); *State v. Godfrey*, 17 Or. 300, 20 P.625 (1889); *Hill v. State*, 53 Ga. 472 (1874); *English v. State*, 35 Tex. 476 (1871-2); *In re Brickey*, 8 Idaho 597, 70 P. 609 (1902); 79 AM. JUR. 2d *Weapons and Firearms*: §§ 7-23 (1975).

44. 35 Tex. 476 (1871-2).

soldier, and the word is used in its military sense."⁴⁵ This indicates that the right to bear a handgun would not fall within the purview of the second amendment.⁴⁶

The most definitive gun control case, *United States v. Miller*,⁴⁷ was decided in 1939. In 1972, the right to bear arms was a tangential issue in the case of *Adams v. Williams*.⁴⁸ Mr. Justice Douglas gave *clear indication* that the right to bear arms is not absolute:

There is under our decision no reason why stiff state laws governing the purchase and possession of pistols may not be enacted. There is no reason why pistols may not be barred from anyone with a police record. There is no reason why a State may not require a purchaser of a pistol to pass a psychiatric test. There is no reason why all pistols should not be barred from everyone except the police.⁴⁹

The reasoning for this, as indicated by Mr. Justice Douglas, is quite simple: the purpose of the second amendment is to maintain or "keep alive" the militia.⁵⁰ Accordingly, it is not consistent with these various case interpretations that there is any individual and absolute right to bear arms.⁵¹

CONCLUSION

Having reached the conclusion that the control of the sale and possession of handguns constitutionally is within the purview of government, the next step is the call to action. What must the government do to accomplish this vital goal?

The elimination of the handgun menace cannot be accomplished on a national level simply by the passage of laws on the federal level.⁵² There must be a coordinated effort involving all levels of government. Along with the federal government, state and local governments must take part in legislative initiatives and, more important, in the enforcement aspects of handgun control efforts.⁵³

45. *Id.* at 477.

46. The issue of whether a certain type of weapon is or is not related to collective security can depend upon whether constitutions of individual states favor the absolute-right-to-arms or the collective-security-right-to-arms interpretation of the second amendment. Rohner, *supra* note 4, at 70-72. Compare *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822) with *People ex. rel. Darling v. Warden*, 154 App. Div. 413, 139 N.Y.S. 277 (1913). Recently, the problem of defining what weapons are necessary for protection in a military, collective sense can be also traced to the lack of proper defining of what weapons would be "suitable for military use" by the federal courts (as well as by the Supreme Court). *Constitutional Limitations on Federal Firearms Regulation*, *supra* note 4, at 799-800. See also *Hill v. State*, 53 Ga. 472 (1874).

47. *Supra* note 37.

48. 407 U.S. 143 (1972).

49. *Id.* at 150 (Douglas, J., dissenting).

50. *Id.* at 151 (Douglas, J., dissenting).

51. *Constitutional Limitations on Federal Firearms Regulations*, *supra* note 4, at 799; see *United States v. Miller*, 307 U.S. at 178; *United States v. Warin*, 530 F.2d at 106.

52. See C. BAKAL, *supra* note 1, at 166-187, 1975 *Hearings*, *supra* note 11, at 194-199 (testimony of John R. Jensen).

53. *Id.* at 133-136.

There is a need for strong, new local handgun control laws on the books in every state.⁵⁴ It is my opinion that existing handgun controls in the few states that have such laws fail to do what is needed because of their limited scope.⁵⁵ State legislation should ban the import, manufacture, sale or possession of handguns and handgun ammunition, except in specified cases under certain controlled conditions.⁵⁶ The exceptions would be: use of handguns by the military, the police, "sporting clubs" and "collectors." In the case of sporting clubs, strict legislation and security procedures, which ensure that weapons will be used only under controlled conditions at the club, must be spelled out in the law. In the case of collectors, it must be required that all handguns be certified to be incapable of being fired and that they are for collection and display purposes only.

It is essential to note in this context that simply turning-off the water does keep the bucket from continuing to overflow. Once the massive annual increase in handguns has been stopped, it will be possible to work more effectively with reducing the handgun menace in our nation.⁵⁷ While governmental confiscation from private individuals is not realistic, we should confiscate and destroy all illegal guns obtained by law enforcement officials, in the legal performance of their duties.⁵⁸ This loss of property is a necessary additional penalty for law breakers and eventually will act to reduce the estimated forty million handguns in this country and the ease of access to them.⁵⁹

54. *Firearms and Violence in American Life, A Staff Report, National Comm. on the Causes and Prevention of Violence* 94-5 (1969).

55. C. BAKAL, *supra* note 1, at 149-165. See for example, ARIZ. REV. STAT. § 13-911 et. seq. (1976-77); ARK. STAT. ANN. § 41-3101—§ 41-3175 (1976); COLO. REV. STAT. § 12-26-101—§ 12-26-104, § 12-27-101-§ 12-27-104, § 18-12-108 (1975); CONN. GEN. STAT. ANN. § 53-206 (West 1975); FLA. STAT. ANN. § 790.011-§ 790.26 (1975); GA. CODE ANN. § 26-9910a-§ 26-9916a, § 92A-901- § 92A-911 (1972); IDAHO CODE § 18-3301-§ 18-3315 (1976); KAN. STAT. ANN. § 48-1901-§ 48-1905 (Supp. 1976); KY. REV. STAT. § 527.010-§ 527.060 (1975); ME. REV. STAT. tit. 25 § 2031 et. seq. (1964) tit. 17a § 1051-1055 (1976); MONT. REV. CODES ANN. § 94-8-201 et. seq. (1975); NEB. REV. STAT. § 28-1001-§ 28-1011.34 (1975); NEV. REV. STAT. § 202.250 et. seq. (1967); N.M. STAT. ANN. § 40a et. seq. (1975); N.C. GEN. STAT. § 14-402 et. seq. (1975); OKLA. STAT. ANN. tit. 21, § 1272.1-§ 1289.17 (West 1976-77); VA. CODE § 18.2-279-§ 18.2-311.1 (1976); WIS. STAT. ANN. (generally) (West 1976-77).

56. South Carolina did possess a statute (S.C. CODE § 16-144 (1962))which had made it unlawful for any "person to manufacture, sell, offer for sale, lease, rent, barter, exchange or transport for sale into this State, any pistol of less length and weight (than twenty inches and three pounds in weight)." That law has been repealed and replaced by S.C. CODE § 16-129-§ 16-129.7 (1975). Massachusetts voters recently defeated a referendum which would have banned the private ownership of handguns. Charlton, *New England Returns Incumbents In Contest for Senate and House*, N.Y. Times, Nov. 4, 1976, at 23, col. 3.

57. 1975 Hearings, *supra* note 11, at 2640-2643.

58. For an example of what has been accomplished in this area, see 1975 Hearings, *supra* note 11, at 500 (testimony of Francis Kane).

59. *Id.* at 7 (statement of Hon. Abner J. Mikva); *Id.* at 265, 266 (testimony of Rex D. Davis).