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Passing the Sword

Two summers ago, I blogged with great concern about a statement made by Justice Scalia in the Supreme Court's landmark Second Amendment opinion, *District of Columbia v. Heller*. Writing for the 5-4 majority, Justice Scalia found an individual right to keep and bear arms and opined that, "If...the Second Amendment right is no more than the right to keep and use weapons as a member of an organized militia ... If, that is, the organized militia is the sole institutional beneficiary of the Second Amendment's guarantee -- it does not assure the existence of a 'citizens' militia' as a safeguard against tyranny."

Regrettably, since the *Heller* decision, many gun rights commentators have used Scalia's construct to link the need for unfettered access to firearms with a right to engage in political violence against an administration that has been described as "a secular socialist machine [that] represents as great a threat to America as Nazi Germany or the Soviet Union once did." The past two years have seen several disturbing acts of politically-motivated violence and a dramatic increase in the number of threats against the president and Members of Congress. Equally troubling, gun rights activists have begun to openly carry firearms to political events and presidential speeches in a threatening manner.

The High Court's latest high-profile Second Amendment case, *McDonald v. City of Chicago*, was decided last week. The same five-justice majority as in *Heller* incorporated the Second Amendment through the Due Process Clause of the Fourteenth Amendment, thereby determining that the holding in *Heller* applies to the states.

In January, the Coalition to Stop Gun Violence's sister organization, the Educational Fund to Stop Gun Violence (Ed Fund), filed an amicus brief in the *McDonald* case calling attention to Justice Scalia's dangerous insurrectionist rhetoric in *Heller*. "Inherent in the logic of a right to possess firearms for the purpose of resisting a perceived threat of governmental tyranny is that, to some point, individuals are entitled to take the next step and use violence if the government refuses to yield," the brief stated. To express the Ed Fund's concern that "'tyranny' means many different things to many different people," we urged the Court to

"correct this misapprehension before incorporating the Second Amendment."

Justice Alito, writing for the majority in *McDonald*, did not openly refute Scalia's insurrectionist idea. He did, however, avoid the use of this rationale in explaining the Second Amendment, making it clear that the core purpose of the right is individual self-defense -- specifically, to defend "hearth and home" with a handgun.

The two dissents in the case -- written by Justices Stephen Breyer and John Paul Stevens --showed no reluctance in criticizing Scalia's insurrectionist reading of the Second Amendment. Justice Breyer made it patently clear that "the Civil War Amendments, the electoral process, the courts, and numerous other [democratic] institutions today help to safeguard the States and the people from any serious threat of federal tyranny."

Justice Breyer also wondered why the U.S. Congress would have supported a "substantive right to bear arms free from reasonable state police power regulation" in the wake of a bloody Civil War. "Why would those who wrote the Fourteenth Amendment have wanted to give such a right to southerners who had so recently waged war against the North, and who continued to disarm and oppress recently freed African-American citizens?" he asked. "The many episodes of brutal violence against African Americans that blight our Nation's history do not suggest that every American must be allowed to own whatever type of firearm he or she desires -- just that no group of Americans should by systematically and discriminatorily disarmed and left to the mercy of terrorists." As we noted in our amicus brief, "The defeat of the Confederacy cemented the Union's commitment to quell insurrection and rebellion."

Perhaps most importantly, however, Justice Stevens pointed in his dissent to a remarkable statement made earlier in the Court's Term by Chief Justice John G. Roberts. In the case in question, *Robertson v. United States ex rel. Wykenna Watson*, the Court decided not to examine the question of whether a private person can bring an action for criminal contempt in a Congressionally-sanctioned court. In his dissent, Chief Justice Roberts wrote, "Allegorical depictions of the law frequently show a figure wielding a sword -- the sword of justice, to be used to smite those who violate the criminal laws ... A basic step in organizing a civilized society is to take that sword out of private hands and turn it over to an organized government, acting on behalf of all the people. Indeed, 'The . . . power a man has in the state of nature is the power to punish the crimes committed against that law. [But this] he gives up when he joins [a] ... political society, and incorporates into [a] commonwealth.'"

Chief Justice Roberts' statement is of course a reference to Max Weber's axiomatic definition of a state. The German political economist proffered in the early 20th century that a political entity is not a state unless it possesses a monopoly of force (i.e., the power to enforce the law). The concept of a monopoly of force is anathema to those who embrace the insurrectionist idea because it forecloses the use of political violence; which rhetorically -- and in some cases in action -- seems to be all the rage on the political right. Nonetheless, Roberts was correct. America's Founding Fathers recognized that a State does not -- and cannot -- exist unless it upholds its claim to the monopoly on force. As the author of the Second Amendment, James Madison, put it at the Virginia Ratifying Convention: "There never was a government without force. What is the meaning of government? An institution to make people do their duty. A government leaving it to a man to do his duty, or not, as he pleases, would be a new species of government, or rather no government at all."

In the interest of domestic tranquility, let us hope that the Chief Justice's words are embraced by Newt Gingrich ("The Second Amendment is in defense of freedom from the State"), the Cato Institute ("Second Amendment protections are not *for* the state but for each individual *against* the state"), and others who are viewed as the intellectual leaders of the modern Conservative movement. They have a responsibility to make it clear to their admirers that under no circumstances can firearms be employed as "tools of political dissent."

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