The Second Amendment to the

United States Constitution

Ratified on December 15, 1791

Presentation by Attorney Ken Bernhard

Read more about Ken at the bottom of this document.

What does the Second Amendment say?

"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"

While I have taught the U.S. Constitution to law students abroad for more than ten years, during none of my classes did I ever mention, much less discuss, the Second Amendment (other Amendments, yes: the First, the Fourth, the Fifth, the Sixth, but never the Second). I don't fault myself, however, because as I found while preparing this talk – neither did the Courts, legal scholars, or lawyers for the better part of 200 years, since the adoption of the Constitution.

To the extent there were any cases on the subject of the 2nd Amendment, they pretty much fell in line with, or were limited to, the notion that it applied to the arming of militias. The amendment seems to be pretty clear on that point. It has only been during the past 30 years (with the transformation of the NRA from a small, not-for-profit organization focusing on gun safety and marksmanship, into a multi-million dollar, take-no-prisoners, lobbyist organization) that the Second Amendment reared its "head" and made itself the subject of national attention, and the beginning of the ensuing controversy in today's news.

The on-going legal debate is the direct result of passionate advocacy and intense political pressure, more than it is a reenactment of the original interpretation of what our Founding Fathers, or at least the majority of them, envisioned or even wanted. I find no fault with this, however, because the Constitution's greatness lies with it being a "living document" and that its provisions allow for reinterpretation as time and circumstances change. But I do suggest (most emphatically) that the Supreme Court's most recent interpretation of the Second Amendment in 2008, and most recently, is different from what James Madison intended when he crafted it, or what most states thought they were approving when they ratified the Constitution between 1787 and 1791.

When drafting the amendments, Madison had no objections to allowing the states the right to maintain their "well-regulated militias." However, at the same time, given the lack of support for individuals to bear arms, a majority in Congress rejected calls to include this in the Constitution. As Supreme Chief Justice Warren Burger suggested in 1990, "The Amendment must be read as though the word 'because' was the opening word," for the simple reason that the founding fathers believed that military preparedness had to be based on well-trained ("well-regulated") citizen soldiers in local and state militias, and that was the sole reason for its inclusion in the Bill of Rights.

With my research, (and I did a lot of it), I have no reason to believe that the Second Amendment created a Constitutional right of an individual to own and possess a gun. In fact, just the opposite. During the Congressional debates of 1787-88, the issue of gun ownership by private persons was frequently discussed and was rejected by the voting majority. What I find to be problematic, and even disingenuous by the modern-day jurists who found otherwise, is that they quote the losers in the debate. What these judges fail to

say to us, the press, and most importantly in their opinions, is that the Federalists, the winners in the debate, rejected most everything they cite as support for their position.

Indeed, in the entire history of the United States, no nationally based political faction or party was more decisively defeated than the Anti-Federalist Founding Fathers. Their goal had been to defeat the ratification of the Constitution, and they failed miserably. In the end, every state ratified the document, thus the Anti-Federalists were beaten 13 times.

As further support that there was no original intent in the drafting of the Constitution to protect gun ownership, I make the observation that if the Bill of Rights did protect the right of individuals to own weapons, why then did so many state legislatures, like Virginia, feel the necessity to re-write their own Constitutions to establish such a right. The Virginia Constitution reads, in part, and emphatically as follows: "The people have a right to keep and bear arms," In 1818, Connecticut adopted a Constitutional provision in Article 1, Section 15, "Every citizen has a right to bear arms in defense of himself and the state. If Thomas Jefferson, Patrick Henry and other Anti-Federalists had prevailed at the Constitutional Convention, there would have been no need to protect those same rights under state law.

As still further support, I can point to historical, judicial precedent. Over a period of 230 years, there are only three truly relevant Supreme Court cases on the subject prior to 2008 and each of them reject the conclusion that the Framers intended to create a right of individual gun ownership.

So, what changed?

In my opinion there were two events: The first was the civil unrest in the 1960s together with the assassination of President Kennedy, Malcolm X, Robert Kennedy and Martin Luther King.

The second was the transformation of the NRA from an organization that supported gun restriction legislation for the first 100 years of its existence to one that opposed all forms of government controls over gun ownership.

I suspect some of you remember the 1960s and the tragedies that unfolded during those years. There was widespread concern about rising crime rates and deadly riots that flared in the nation's major cities. Citizens were concerned about their safety and turned to gun purchases for their personal protection.

And many NRA members wanted their organization to get out in front of the issue. In 1971, agents of the Federal Bureau of Alcohol, Tobacco and Firearms killed an NRA member who was hiding many illegal weapons. This stirred a restive reaction within the NRA rank and file (called the Cincinnati Revolt) who became frustrated with restrictions of the 1968 Federal Gun Control Act. They then looked to the Second Amendment for overturning the government's power to restrict gun ownership. They wanted the Supreme Court to take a fresh look at its provisions.

So, what did the NRA do to convince the politicians and ultimately the courts to overturn the settled law?

In 1975, the NRA created the group's first lobbyist organization to pressure the Washington establishment that the courts had incorrectly interpreted the sentiments of the Founding Fathers. Thereafter, they poured hundreds of millions of dollars into supporting friendly political candidates, lobbying state and federal legislatures, and mobilizing pro-gun voters. But no NRA program has been conducted more intensively—and successfully—than the effort to convince federal courts to reinterpret the meaning of the Second Amendment.

In 1970, the entire body of legal literature devoted to the Second Amendment (at least that I could find) consisted of just 15 articles. There was little academic interest in a subject that had been settled

law since 1875. It became apparent to the new NRA leadership that the absence of modern scholarship offered an opportunity to provide conservative federal justices with a rationale for finding that the intent of the Second Amendment was to grant individual citizens an inalienable right to own firearms.

In the 1990s, the NRA dispensed over a million dollars to writers of law review articles that supported the position that the Second Amendment applied to individuals, not to states, for the purpose of maintaining militias. By 2000, it was one of the most powerful lobbies in Washington. At least 58 law review articles endorsing the individual rights view would be published during this time, many of them written by lawyers who were either employees or representatives of the NRA or other gun rights organizations.

Prominent among the latter group were Stephen Halbrook and Don Kates, two lawyers in private practice representing gun manufacturers and gun-rights activists, who between them -- and get this -- wrote or edited eight books, 23 law review articles and innumerable op-ed pieces advocating the Constitutional right of individuals to bear arms. In 1992, the NRA was a principal funder of an organization called Academics for the Second Amendment, which was a group of law professors that advocates for the new interpretation of the Second Amendment.

Warren Burger Quote

Upon witnessing these efforts of the NRA, Chief Justice Warren Burger publicly stated in 1991: "The idea that the Second Amendment prohibits gun regulation is one of the greatest pieces of fraud - I repeat the word fraud - on the American public by special interest groups that I have ever seen in my lifetime." And he was not alone. Robert Bork, a famous conservative originalist, said publicly and frequently when asked about the Second Amendment that it related to the formation of militias and not to individual rights.

District of Columbia V. Heller

This brings us to the landmark case of District of Columbia v. Heller decided in 2008, which remains one of the most far-reaching and controversial decisions of the Supreme Court. (While individuals were always permitted to own "arms" regulated by the states, the issue before the Court in Heller was whether individuals had a Constitutional right to do so.)

The plaintiffs were challenging the provisions of a District of Columbia law restricting residents from owning handguns. In that year, 2008, the NRA spent more than $40 million on elections and backing Republican candidates.

Heller Ruling. Here's the Second Amendment language again: 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."

In a 5-4 court ruling the Supreme Court concluded that "The Second Amendment protects an individual's right to possess and carry weapons in cases of confrontation in the home where the need for defense of self, family and property is most acute; and that, above all other interests, the Second Amendment elevates the right of law-abiding, responsible citizens to use arms in defense of hearth and home".

Justice Anthony Scalia, who authored the opinion, separated the prefatory clause of the Amendment: A well-regulated militia being necessary to the security of a free State," and focused exclusively on the operative provisions, "the right of the people to keep and bear arms shall not be infringed." As the dissenters, Justices Breyer and Stevens, vigorously pointed out, the majority had discarded historical fact and 230 years of judicial precedence.

Justice's Stevens dissent

Justice Stevens specifically wrote that the court's judgment was a strained and unpersuasive reading of the Constitution, which overturned long standing precedent, and that the court had bestowed a dramatic upheaval in the law. Many legal theorists and practitioners continue to argue that the Heller ruling is counter to the plain meaning of the Second Amendment text and undermines virtually all of the historical scholarship.

Even as the Court created for the first time in 230 years that persons have a Constitutional right to have handguns in their possession, the majority also concluded that the states have the right to reasonably regulate a citizen's access to weapons, the types of arms a citizen can possess, and the methods of transporting guns away from home.

In June, 2022 (only 14 years later, and with the addition of Justice Kavanaugh and pressure from the NRA), the Court decided to throw out the restrictions it placed on gun ownership in the Heller decision (i.e. that the states have the right to reasonably regulate a citizen's access to weapons, the types of arms a citizen can possess, and the methods of transporting guns away from the home). The Supreme Court in NY State Rifle and Pistol Association v. Kevin Bruen considered the constitutionality of New York's "may issue" concealed gun carry rule, which requires "proper cause" before a license will be issued. In a 6-3 decision, the court struck down the rule as unconstitutional.

Now, individuals have a Constitutional right to carry a weapon in public, dramatically expanding Justice Scalia's opinion in Heller of only 14 years earlier, which limited the right to possess a gun in the home. Justice Thomas, writing for the majority, stated that all restrictions on the right to "armed self-defense" are presumptively unconstitutional. The only gun safety laws that pass legal muster, Thomas declared, are those with historical analogues from 1791,

when the Second Amendment was ratified, or 1868 when it was applied to the states.

This sea change in the law created a flood of litigation in the lower courts as litigants tried to prove that modern gun restrictions were not deeply rooted in American history. Courts have been receptive, relying on Bruen to strike down a slew of laws targeting the criminal use of firearms.

Just as the Court is expanding gun access in the United States, our country is experiencing more and more high-profile mass shootings, which in turn is spurring law enforcement officials and many lawmakers to push for more gun control measures.

Notwithstanding, a short while later, the Supreme Court ruled against the federal government overturning the federal ban on bump stocks announced by the Trump administration after the devices were used in a 2017 mass killing on the Las Vegas Strip. In its 6-3 ruling, the majority said bump stocks, which allow guns to fire bullets in rapid succession, do **not** qualify as machine guns under a 1986 law that barred civilians from owning the new versions of the weapons.

Changing Public Support for Gun Control

Ironically, the Supreme Court's appetite for expanding the Second Amendment is wildly out of sync with the mood of the country. As *The New York Times* recently reported: the public's support for gun-control measures is surging. Does it matter if the public and the Supreme Court are running in opposite directions? It can't be good news if you worry about the collapse of the public's confidence in the institutions of government.

Since the Kevin Bruen decision was decided last year, when the Supreme Court ruled that the Second Amendment creates a Constitutional right of citizens to carry guns in public, state legislatures and courts have been thrown into a sea of confusion. The case created a new national standard as to whether there is

anything legislators can do to impose even reasonable restrictions on gun access. The ruling threatens to permanently upend regulation even as the United States grapples with gun violence, including more than 80 mass shootings in 2023 alone. Justice Thomas wrote in the Bruen case that there is some possibility of restrictions on the right to carry handguns in public, **but**, as I said, only if those restrictions were in place in early American history.

Since the Bruen decision, more than 100 federal court decisions have been issued as judges around the country attempt to determine whether new or old laws alike meet the new standard. Laws have come under scrutiny in more than 25 states where a federal judge wrote that the Supreme Court has made a felon's possession of a firearm presumptively constitutional. A judge in West Virginia found that a state law against carrying guns with "altered, obliterated or removed" serial numbers is unconstitutional. In NY state, its Supreme Court found that the legislature's effort to bar guns at health care centers, summer camps and zoos is unconstitutional. Also, it blocked legislative restraints on carrying guns into places of worship because it could not find, as Justice Thomas required, an "American tradition" that supported it.

In the meantime, Americans have continued to test the limits of where they can carry their guns. Just recently, the Transportation Security Administration said that it had found a record 6542 firearms at 262 different airport checkpoints, up significantly from 2021 and 2019.

Several judges have expressed concerns about the effects of the Supreme Court's decision. In Indiana, a judge wrote an opinion in which he expressed "earnest hope" that he had misunderstood the Supreme Court ruling. If not, most of the body of law Congress has developed to protect both public safety and the right to bear arms might well be unconstitutional.

About Ken Bernhard

Ken has decades of practical experience representing individuals and a wide range of businesses in litigation, real property issues, and transactional matters. Having served as the Town Attorney for three Connecticut municipalities under 11 different administrations, Ken is acknowledged by his peers as experienced in matters involving land use, administrative appeals, condemnations, foreclosures, contracts, and the drafting of regulations and legislation. He has been listed in **The Best Lawyers in America©** for his work in the areas of Municipal Law and Real Estate Law.

Ken previously served in the U.S. Army in the Judge Advocate General's Corps as an associate professor of law at the U.S. Military Academy at West Point, where he taught both criminal and constitutional law. Ken is a Senior Attorney with the Center for International Legal Studies located in Salzburg, Austria, and under its auspices, he has taught United States Constitutional Law at nine different law universities in foreign countries from Latvia to Mongolia.

Education

New York University School of Law, LL.M., 1970

New York University School of Law, J.D., 1969

Yale University, B.A. 1966

Admissions

- Connecticut
- U.S. Court of Military Appeals
- U.S. District Court District of Connecticut
- U.S. Supreme Court

Honors & Awards

Best Lawyers in America®, Municipal Law, 2013-2025

Best Lawyers in America®, Real Estate Law, 2018-2025

Martindale-Hubbell, AV® Preeminent™ Peer Rating

Westport-Weston Chamber of Commerce, First Citizen Award, 2019

Westport First Award, 2011

Distinguished Citizen Award, Boy Scout's Connecticut Yankee Council, 2010

Rotary Paul Harris Fellowship Award

* * *