

INTRODUCTION

The Second Amendment of the Constitution provides: “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.” You have asked for the opinion of this Office on one aspect of the right secured by this Amendment. Specifically, you have asked us to address the question whether the right secured by the Second Amendment belongs only to the States, only to persons serving in state-organized militia units like the National Guard, or to individuals generally. This memorandum memorializes and expands upon advice that this Office provided to you on this question in 2001.

As relevant to the question addressed herein, courts and commentators have relied on three different interpretations of the Second Amendment. Under the “individual right” view, the Second Amendment secures to individuals a personal right to keep and to bear arms, whether or not they are members of any militia or engaged in military service or training. According to this view, individuals may bring claims or raise challenges based on a violation of their rights under the Second Amendment just as they do to vindicate individual rights secured by other provisions of the Bill of Rights.¹ Under the “collective right” view, the Second Amendment is a federalism provision that provides to States a prerogative to establish and maintain armed and organized militia units akin to the National Guard, and only States may assert this prerogative.² Finally, there is a range of intermediate views according to which the Amendment secures a right only to select persons to keep and bear arms in connection with their service in an organized state militia such as the National Guard. Under one typical formulation, individuals may keep arms only if they are “members of a functioning, organized state militia” and the State has not provided the necessary arms, and they may bear arms only “while and as a part of actively participating in” that militia’s activities.³ In essence, such a view would allow a private cause of action (or defense) to some persons to vindicate a State’s power to establish and maintain an armed and organized militia such as the National Guard.⁴ We therefore label this group of intermediate positions the “quasi-collective right” view.

The Supreme Court has not decided among these three potential interpretations, and the federal circuits are split. The Executive Branch has taken different views over the years. Most recently, in a 2001 memorandum to U.S. Attorneys, you endorsed the view that the Second Amendment protects a “right of individuals, including those not then actually a member of any

¹ See, e.g., *United States v. Emerson*, 270 F.3d 203, 220, 260 (5th Cir. 2001).

² See, e.g., *Silveira v. Lockyer*, 312 F.3d 1052, 1060-61, 1086-87 (9th Cir. 2002), *cert. denied*, 124 S. Ct. 803 (2003).

³ *Emerson*, 270 F.3d at 219 (describing intermediate view); see also, e.g., *Cases v. United States*, 131 F.2d 916, 923 (1st Cir. 1942).

⁴ See, e.g., *United States v. Parker*, 362 F.3d 1279, 1283 (10th Cir. 2004).

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militia or engaged in active military service or training, to privately possess and bear their own firearms” but allows for “reasonable restrictions” designed “to prevent unfit persons from possessing firearms or to restrict possession of firearms particularly suited to criminal misuse.”⁵

As developed in the analysis below, we conclude that the Second Amendment secures a personal right of individuals, not a collective right that may only be invoked by a State or a quasi-collective right restricted to those persons who serve in organized militia units. Our conclusion is based on the Amendment’s text, as commonly understood at the time of its adoption and interpreted in light of other provisions of the Constitution and the Amendment’s historical antecedents. Our analysis is limited to determining whether the Amendment secures an individual, collective, or quasi-collective right. We do not consider the substance of that right, including its contours or the nature or type of governmental interests that would justify restrictions on its exercise, and nothing in this memorandum is intended to address or call into question the constitutionality, under the Second Amendment, of any particular limitations on owning, carrying, or using firearms.

This memorandum proceeds in four parts. Part I addresses the current unsettled state of the law in this area. Part II demonstrates that the text and structure of the Constitution support the individual-right view of the Second Amendment. Part III shows why this view finds further support in the history that informed the understanding of the Second Amendment as it was written and ratified. Finally, Part IV examines the views of commentators and courts closest to the Second Amendment’s adoption, which reflect an individual-right view, and then concludes by describing how the modern alternative views of the Second Amendment took hold in the early twentieth century.

I. THE UNSETTLED LEGAL LANDSCAPE

Recent interpretations of the Second Amendment have been characterized by disagreement and uncertainty. The Supreme Court has not decided the question that we address here, and at least three views prevail in the federal courts of appeals. The Executive Branch has taken varying positions, and the Amendment has been the subject of extensive academic debate for the past two decades.

⁵ Memorandum for United States Attorneys from the Attorney General, *Re: United States v. Emerson* (Nov. 9, 2001) (quoting *Emerson*, 270 F.3d at 260), *reprinted in* Brief for the United States in Opposition, app., *Emerson v. United States*, 536 U.S. 907 (2002) (denying certiorari). You added that the Department of Justice “can and will continue to defend vigorously the constitutionality, under the Second Amendment, of all existing federal firearms laws.”

Whether the Second Amendment Secures an Individual Right

The Supreme Court's most important decision on the meaning of the Second Amendment, *United States v. Miller*,⁶ grew out of the enactment of the National Firearms Act of 1934.⁷ That Act was the first federal regulation of private firearms.⁸ It taxed (and thereby registered) transfers of sawed-off shotguns or rifles capable of being concealed, machine guns, and silencers. It also taxed dealers in such weapons and required anyone who possessed such a weapon acquired before 1934 to register it with federal tax authorities.

A Second Amendment challenge to this Act produced *Miller* in 1939, the closest that the Supreme Court has come to interpreting the substance of the Amendment. *Miller* and a co-defendant were indicted for transporting an unregistered sawed-off shotgun in interstate commerce from Oklahoma to Arkansas, and the district court sustained their Second Amendment challenge to the indictment. On appeal by the Government, neither defendant appeared or filed a brief.⁹ The Court, in reversing and remanding, held that the sawed-off shotgun was not among the "Arms" protected by the Second Amendment absent "evidence tending to show that" its use or possession "at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia." Citing an 1840 decision of the Tennessee Supreme Court, *Aymette v. State*, the Court concluded that it was not "within judicial notice" that a sawed-off shotgun was a weapon that was "any part of the ordinary military equipment" or whose use "could contribute to the common defence." Absent evidence, therefore, the Court could not "say that the Second Amendment guarantees the right to keep and bear such an instrument."¹⁰

After this one-paragraph discussion, the Court quoted the powers that Article I, Section 8, Clauses 15 and 16 of the Constitution grant to Congress to provide for calling forth, organizing, arming, and disciplining "the Militia," and stated that the Second Amendment's "declaration and guarantee" were made "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of" the militia, and that the Amendment "must be interpreted and applied with that end in view."¹¹ The Court then added a historical discussion

⁶ 307 U.S. 174 (1939).

⁷ Ch. 757, 48 Stat. 1236.

⁸ See *National Firearms Act: Hearings on H.R. 9066 Before the House Comm. on Ways and Means*, 73d Cong. 90 (1934) (statement of Ass't Atty. Gen. Keenan); *United States v. Lopez*, 2 F.3d 1342, 1348 (5th Cir. 1993), *aff'd*, 514 U.S. 549 (1995).

⁹ 307 U.S. at 175-77.

¹⁰ *Id.* at 178 (citing *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 158 (1840)). We discuss *Aymette* below in Part IV.B.2.

¹¹ *Id.*

demonstrating that “the term Militia” as used in various provisions of the Constitution, including the Second Amendment, referred to a body that “comprised all males physically capable of acting in concert for the common defense,” who “were expected to appear” for occasional training “bearing arms supplied by themselves and of the kind in common use at the time,” which in the 1700’s usually meant a “good” musket of proper length.¹²

Miller did not resolve the question addressed in this memorandum. Although the meaning of the decision is much debated, three points appear evident. First, the holding was limited to the meaning of “Arms” in the Second Amendment and whether a sawed-off shotgun is among the arms protected. In determining that meaning, the Court also interpreted the term “Militia” as used in the Constitution. Second, the Court did not categorically reject *Miller*’s Second Amendment challenge. The Court’s decision to address the substance of this challenge to his indictment, as opposed to concluding that only States could bring such a challenge, appears to be inconsistent with a collective-right view.

Finally, the Court did not clearly decide between the individual-right and quasi-collective-right views. Its holding regarding the meaning of “Arms” is consistent with either view: The Court’s limitation of “Arms” to those weapons reasonably related to the preservation or efficiency of a well-regulated militia (such as those that are “part of the ordinary military equipment” or that “could contribute to the common defense”) could be consistent with a right to “keep and bear” such arms that is restricted to service in an organized military unit such as the National Guard; but that holding is also consistent with an individual right to keep and bear whatever “Arms” the Amendment protects. Similarly, the Court’s reference to the need to interpret the Second Amendment’s “declaration and guarantee” with the “end in view” of furthering “the continuation and render[ing] possible the effectiveness of” the militia could be consistent with a quasi-collective-right view; but it is also consistent with the understanding of the relationship between an individual right to keep and bear arms and the “Militia” that prevailed at the time of the Founding, an understanding confirmed by early authorities’ discussions of the Second Amendment’s preface.¹³

Even so, absent from the Court’s opinion in *Miller* was any discussion of whether the defendants were members of the National Guard or any other organized military force, whether they were transporting the shotgun in the service of such a force, or whether they were “physically capable of” bearing arms in one and thus even eligible for service. The nature of the weapon at issue, not of the defendants or their activities, appeared to be the key fact, and this aspect of the opinion tends to point toward the individual-right view rather than the quasi-

¹² *Id.* at 179; *see id.* at 179-82 (describing militia regulations, including arms requirements).

¹³ *See* below, Parts II.C (discussing Second Amendment’s preface), III.B-C (discussing Founders’ recognition that the individual right to arms furthered the citizen militia), IV.A (discussing early commentators), IV.B.2 (discussing early cases), IV.D (discussing views of Thomas Cooley soon after Civil War).

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collective-right view. In addition, *Miller*'s broad reading of "Militia" is most consistent with the individual-right view, as we explain below in Part II.C.2, and is in tension with the quasi-collective-right view, under which the militia is understood to refer to select military units, akin to the modern National Guard, organized and armed by the States.¹⁴

Three years after *Miller*, in *Cases v. United States*, the First Circuit read *Miller* to turn solely on the type of weapon at issue and to suggest an individual-right view of the Second Amendment: "Apparently, then, under the Second Amendment [as interpreted in *Miller*], the federal government . . . cannot prohibit the possession or use of any weapon which has any reasonable relationship to the preservation or efficiency of a well regulated militia." But the court doubted that *Miller* "was attempting to formulate a general rule applicable to all cases," warned of the consequences of such a view, and asserted that it was "unlikely that the framers of the Amendment intended any such result."¹⁵ The court, instead, adopted what amounted to a quasi-collective-right view: A person has no right under the Second Amendment unless he is "a member of a[] military organization" or uses his weapon "in preparation for a military career," thus "contributing to the efficiency of the well regulated militia."¹⁶ Neither in support

¹⁴ Later opinions of the Supreme Court appear to accept the individual-right view, at least in *dicta*, although none is dispositive. In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Court rejected a claim that the Fifth Amendment's criminal-procedure protections applied to nonresident enemy aliens by pointing out, among other things, that a contrary view would require also applying the "companion civil-rights Amendments" in the Bill of Rights, including the Second Amendment. *Id.* at 784 ("[D]uring military occupation irreconcilable enemy elements, guerrilla fighters, and 'werewolves' could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against 'unreasonable' searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments."). In *Konigsberg v. State Bar of Cal.*, 366 U.S. 36 (1961), the Court, citing *Miller*, again equated the Second Amendment right with the rights secured by the First Amendment. *Id.* at 49 n.10. More recent cases have assumed an individual right in *dicta* by listing the Second Amendment right among the personal rights composing the "liberty" that the Constitution's due-process provisions protect. See *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992); *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977) (plurality opinion) (quoting *Poe v. Ullman*, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting)); *id.* at 542 (White, J., dissenting) (same as plurality). But see *Adams v. Williams*, 407 U.S. 143, 150 (1972) (Douglas, J., dissenting) ("A powerful lobby dins into the ears of our citizenry that these gun purchases are constitutional rights protected by the Second Amendment," but "[t]here is no reason why all pistols should not be barred to everyone except the police."). The Court in *Lewis v. United States*, 445 U.S. 65 (1980), rejected an equal-protection challenge to a prohibition against felons possessing firearms. In a one-sentence footnote explaining why it was applying rational-basis review, the Court stated that such a prohibition is not "based upon constitutionally suspect criteria" and does not "trench upon any constitutionally protected liberties." *Id.* at 65 n.8. Although this language is consistent with the view that the Second Amendment does not secure a right of individuals, it is also consistent with the traditional understanding of the individual-right view that the liberty protected by the Second Amendment does not extend to convicted felons. See *infra* notes 19 & 29, and the discussions referenced therein.

¹⁵ 131 F.2d 916, 922 (1st Cir. 1942).

¹⁶ *Id.* at 923.

of its assertion about the Framers' intent nor in its paragraph fashioning this rule did the court cite any text or other authority.

Also in 1942, the Third Circuit in *United States v. Tot* applied *Miller's* definition of "Arms" to affirm the conviction of a defendant who received a pistol in interstate commerce after having been convicted of a felony involving violence.¹⁷ Alternatively, the court rested its affirmance on the ground that the Government may prohibit such a convict from possessing a firearm.¹⁸ Although either of these views is consistent with an individual right,¹⁹ *Tot* added, in apparent *dicta*, a one-paragraph historical discussion in support of the view that the Amendment "was not adopted with individual rights in mind, but as a protection for the States in the maintenance of their militia organizations against possible encroachments by the federal power."²⁰ The court did not address the Amendment's text but instead chiefly relied on the *Aymette* case's account of the right that emerged from the English Revolution of 1688-1689.

Over the past few decades, the Executive Branch has taken differing views of the right secured by the Second Amendment.²¹ In 1941, President Roosevelt signed legislation authorizing requisitions of private property for war use that prohibited requisitioning or new registration "of any firearms possessed by any individual for his personal protection or sport" and, moreover, any impairing or infringing of "the right of any individual to keep and bear arms."²² In 1959, this Office reviewed a bill that would have secured the custody and disposition of missiles, rockets, and earth satellites. We questioned its definition of "missile," which included "projectile" and "seems to include conventional ammunition," and we

¹⁷ 131 F.2d 261, 266 (3d Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943).

¹⁸ *Id.* The same ground appears to have been available in *Cases*. See *Cases*, 131 F.2d at 919 n.1.

¹⁹ Regarding violent felons, although the case involved possession, the court relied on authority for regulating the *bearing* of arms (banning carrying weapons concealed or to the terror of the people). For more on-point authority, see proposals made during the ratifying conventions, discussed below in Part III.C.1, and *Emerson*, 270 F.3d at 226 n.21; *cf. Lewis*, 445 U.S. at 65 n.8 (rejecting equal-protection challenge to prohibition of felon possessing a firearm); *Richardson v. Ramirez*, 418 U.S. 24, 53-55 (1974) (holding constitutional the disenfranchisement of convicted felons who had completed their sentences and paroles).

²⁰ 131 F.2d at 266. The court cited some history from the Founding Era, which we address in Part III.C.1.

²¹ We have not conducted a review of the Government's litigating positions in the numerous firearms cases since *Miller*. In its brief in *Miller*, the Government made two alternative arguments. The first was consistent with a quasi-collective-right view. See Brief for United States at 9-18, *United States v. Miller*, 307 U.S. 174 (1939) (No. 696). The second (which the Court adopted) was consistent with either a quasi-collective- or individual-right view. See *id.* at 18-20. Its present litigating position appears to be consistent with your 2001 memorandum to U.S. Attorneys endorsing the individual-right view. See, e.g., *United States v. Lippman*, 369 F.3d 1039, 1045 (8th Cir. 2004) (Colloton, J., concurring in part and concurring in the judgment).

²² Property Requisition Act, ch. 445, § 1, 55 Stat. 742, 742.

