HOPKINSVILLE ATHENAEUM SOCIETY

Second to Gun

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Presented by:

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"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."

USCS Const. Amend. 2

So, it is with a combination of 27 words and punctuation that memorializes gun ownership as a protected right in our Country. Can we all agree that meaningful self-defense is a basic right in a free society? But as with any rights reserved to the people, the right to bear arms is subject to abuse. Does our individual freedom mean we must also fear that our community will be the next Columbine, Sandy Hook, Orlando or just recently Las Vegas? As with any protected right, it is the constant balance between freewill of the majority against the evil acts of a few that defines us.

Mr. President, Mr. Cavanah, my fellow presenter Mr. Martin, and gentlemen of the Athenaeum Society: I present you with my paper tonight entitled Second to Gun. A caveat: Obviously, the nature of this topic presents the opportunity to violate the Society's prohibition on political papers. This paper is not political, but is meant to shed light on the Second Amendment through key court decisions.

A brief word on my reasoning for tonight's paper. In light of my prior papers on various non-legal topics like chestnut trees and duck hunting, for once, I wanted to stay in my lane. Like all of you, I was horrified by the massacre of innocent people in Las Vegas. Aside from the tragedy itself, I was alarmed how the Second Amendment is presented on TV and social media. The media depiction suggests there are only two polarizing positions. On the right, the "Second Amendment" is an impenetrable shield against any government regulation. On the left, the Second Amendment is an ugly villain. In that camp, private gun ownership has no place in a

modern society. I hope with better understanding of what the Second Amendment protects, and what it does not, it will foster meaningful discussion instead of waddling in the extreme.

The Second Amendment to the United States Constitution was first introduced in the first session of Congress on June 8, 1789, as part of James Madison's initial proposal for a Bill of Rights. As introduced by Madison, the original text stated: "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." After a series of revisions made in the House and Senate, the final version passed on September 21, 1789. Just over two years later, the Second Amendment was ratified by three-fourths of the states in December of 1791. Maybe we should remind our Congress that their predecessors were able to pass 10 constitutional amendments in three months.

Remarkably, it was over 80 years before the Supreme Court first sought to weigh in on the Second Amendment. The case is the 1875 decision in *United States v. Cruikshank*. The case grew out of the Colfax Massacre, a bloody conflict over political power in the Reconstruction South. After a hotly contested election in Louisiana, a federal judge ruled that a Republican-majority state legislature be seated, but the white Southern Democrats refused to accept the ruling. On Easter Sunday in April of 1873, black Republican freedmen staged an armed, but peaceful protest of the hostile takeover. In response, the freedmen were brutally attacked with an estimated 103 black men and 3 white men murdered in the carnage. However, given the extreme racial discrimination present in the local politics, none of the white Democrats were charged for the murders in Louisiana state courts.

Instead, Cruikshank and some of the other killers were federally indicted and then convicted under federal law. The law was a federal reconstruction law that prohibited two or

more people from conspiring to deprive another of their constitutional rights. The convictions were secured based on the denial of the freedmen's right to assemble and to bear arms. On appeal to the Supreme Court, the convictions were reversed. The Court reasoned that the Constitution only restrains action by the federal government. In other words, the Court held that the Constitution does not restrict a private citizen from denying another citizen the right to bear arms, or for that matter, any other right secured by the Bill of Rights.

In the *Cruikshank* holding, the Court had the opportunity to address the Second Amendment by pointing out that the right of the people to keep and bear arms exists, but it is not dependent upon the Second Amendment for its existence. The *Cruikshank* Court would say that there was an inherent right to lawfully bear arms prior to adoption of the Constitution, so the Second Amendment only guarantees that the right will not be infringed by Congress. *Cruikshank* has later been cited as authority to authorize gun control regulations imposed by state or local governments.

As an after story, while *Cruiskshank* was legally correct in that the Bill of Rights does not regulate acts of private citizens, the decision was the end of meaningful federal protection for African Americans in the Reconstruction Era. The absence of meaningful federal protection quickly ushered in the era of Jim Crow laws as a means of continued oppression.

In this same period, it was actually a state court decision that sparked a divergence of thought on the Second Amendment that continued throughout the 20th Century. In the 1905 case of *Salina v. Blaksley*, the Supreme Court of Kansas rejected a claim testing the breadth of the firearms provision in the state constitution. The facts involved a man convicted for carrying a revolver while intoxicated, which was banned under local ordinance. The Kansas court ruled that the right to bear arms in defense refers to only the people as a "collective body," and not as

an individual right. The case drew attention by citing directly to the prefatory clause of the Second Amendment and observing: "the right of the people to keep and bear arms for their security is preserved, and the manner of bearing them for such purpose is clearly indicated to be as a member of a well-regulated militia, or some other military organization provided for by law." This is the first known case that launched a debate over whether the Second Amendment protects an "individual right" to bear arms verses a "collective right" theory.

The next major test of the Second Amendment came in the 1939 Supreme Court decision in *United States v. Miller*, 307 U.S. 174, 178, 59 S. Ct. 816, 818 (1939). The *Miller* case was a test of the first major federal gun control legislation known as the National Firearms Act of 1938. President Roosevelt pushed the measure primarily in response to public outrage from shootings by prohibition era gangs and an assassination attempt on Roosevelt in 1933. The National Firearms Act required "Title II" weapons to be registered and taxed, including machine guns, sawed-off shot guns, and explosive devises. In light of this new gun law, two washed up bank robbers, Jack Miller and Frank Layton, were arrested for possessing an unregistered sawed-off shotgun while traveling from Arkansas to Oklahoma. But it was Miller's unique criminal history that put an otherwise garden variety illegal weapon case on the fast track to the U.S. Supreme Court.

Jack Miller was a gambler and roadhouse owner from Claremore, Oklahoma, who eventually joined the infamous O'Malley Gang in 1934. The O'Malley Gang would execute some of the most notorious bank robberies in the Midwest during the height of the Great Depression. Eventually the Gang was arrested by the feds, but securing convictions was doubtful without eyewitness testimony. To save himself, Miller turned informant. On the morning of trial it was announced Miller would provide a truthful account of O'Malley's heists

in exchange for complete immunity. The O'Malley's went to jail and Miller walked. Thus, when Miller was arrested two years later for possessing a sawed-off shotgun, the local U.S. Attorney remembered him from the O'Malley Gang prosecution and quickly realized it was the perfect test case to show the National Firearms Act was constitutional.

After the federal charges were filed, both Jack Miller and Frank Layton pled guilty to one count for transportation of an untaxed short-barreled shotgun in interstate commerce. Shockingly, Judge Heartstill Ragon refused their plea and appointed defense counsel, Paul E. Gutensohn. Remember these names, as they are important in the post script. In any event, now with appointed defense counsel, Miller and Layton argued that the charges ought to be dismissed claiming that the National Firearms Act violates the Second Amendment. Judge Ragon did indeed dismiss the charges with the only explanation as follows: "[t]he court is of the opinion that this section is invalid in that it violates the Second Amendment to the Constitution of the United States."

The United States then invoked a procedure to appeal directly to the U.S. Supreme Court, bypassing the circuit court of appeals. In what is absolutely astonishing for a case of national importance, the attorney for defendants in *Miller* did not even file a brief or appear at oral argument. The government had absolute free reign to argue its case without opposition. Of course the Supreme Court reversed and found that the National Firearms Act did not violate the Second Amendment. The *Miller* holding is brief, but the operative part says: "[i]n the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument."

For over seventy years after the *Miller* case, it remained as the only Supreme Court opinion construing the Second Amendment. Given the vague opinion, lower courts struggled to decipher its meaning. Advocates for gun rights have claimed that *Miller* adopted a so-called "individual right theory." Proponents of gun control overwhelmingly relied upon *Miller* as supporting the proposition that the Second Amendment only protects the "collective right" theory, in that the right to possess a firearm only exists in connection with militia service.

The interesting backstory to the *Miller* case is how the prosecutors stacked the deck as the perfect test case. Remember I told you that Judge Ragon took surprising steps to reject Miller's guilty plea and then quickly dismiss the charges. As it turns out, Ragon colluded to help the government's test case. Judge Ragon was actually a staunch gun control advocate, publicly making his beliefs known as a member of Congress from 1923-1933. A prominent Democrat, Judge Ragon endorsed Roosevelt in 1932 and helped push the New Deal through the Ways and Means Committee. In return, Roosevelt made him a district judge. One scholar said this about Ragon's association in the *Miller* case: "the [National Fire Arms Act] was part of Roosevelt's New Deal program, enacted with broad support shortly after Ragon took the bench. But the Federal Firearms Act of 1938 was stirring up popular opposition, much of it based on the Second Amendment. The government needed to silence the complaints, and Miller was the perfect vehicle. Ragon had presided in an O'Malley prosecution, so he knew Miller was a crooked, pliable snitch, who wouldn't cause any trouble. Ragon's memorandum opinion presented no facts and no argument. With no defense muddying the waters, it was the government's ideal test case."

After *Miller* was decided in 1938, no Supreme Court case directly addressed the Second Amendment until the 2008 landmark decision of *District of Columbia v. Heller*. In *Heller*, six

citizens filed to suit to challenge parts of a 1976 Washington D.C. law that flatly banned possession of a handgun in one's home and a requirement that any gun – except one kept in a business – must be unloaded and dissembled or have a trigger lock in place. *Heller* was hotly contested by both sides of the political arena with 66 separate advisory briefs filed with the Court.

Writing for a slim five to four majority, Justice Scalia answered the 217 year old debate by holding that the Second Amendment does protect an individual right to keep and possess a handgun, at least in one's home. In a 64 page majority decision, Scalia reviews the history of the adoption of the Second Amendment and concluded that the words of the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." Justice Stevens and Justice Breyer filed scathing 46 and 44 page dissenting opinions arguing that the Second Amendment does not protect the right of individual gun ownership. The landmark case thus ended the debate: the Second Amendment does protect an individual's right to bear arms unrelated to any service in the militia.

Since *Heller* was the first Supreme Court case to extensively review the meaning of the Second Amendment, it did not attempt to answer all of the questions. The Court did emphasize that the decision was not casting doubt on long-standing bans on carrying a concealed weapons, or possession of guns by felons or the mentally retarded, or laws barring guns from schools or government buildings, or laws putting conditions on gun sales.

Finally, the *Heller* decision took no position on whether the Second Amendment right restricts only federal government powers, or also curbs the power of states to regulate guns. But this question was answered by the Court only two years later in the case of *McDonald v.*

Chicago, where the protection of the Second Amendment was expanded nationwide by deciding the Second Amendment was incorporated by the Fourteenth Amendment.

The only other Supreme Court case on the Second Amendment decided in the post-*Heller* era is *Caetano v. Massachusetts.* The case was decided in 2016 as a *per curium* opinion for the entire Court. Ms. Caetano was a domestic violence victim who had obtained several restraining orders against her ex-boyfriend. After the ex-boyfriend continued to make threats, a friend let her borrow a stun gun for self-defense. When the ex-boyfriend confronted Ms. Caetano as she was leaving work, you can imagine what happened. Unfortunately for Ms. Caetano, the stun gun was illegal under Massachusetts law so she was arrested and convicted for carrying an illegal weapon. On appeal to the Massachusetts Supreme Court, her conviction was upheld. The state court reasoned that a "stun" gun was not the type of weapon eligible for protection under the Second Amendment, since it was not in existence at the time of enactment. Ms. Caetano then appealed to the Supreme Court of the United States, claiming the law violated her Second Amendment rights. The Supreme Court reversed, but offered little new analysis. The Court essentially held that the state court had gone astray of the *Heller* decision. To be clear, the *Caetano* decision did not rule that a stun gun is actually protected by the Second Amendment, it simply said the reasons offered by the Massachusetts Supreme Court were in conflict with its decision in *Heller*. On remand to state court, Ms. Caetano was found not guilty by an agreement with the prosecution. The commonwealth likely did not want to set adverse precedent.

As the law continues to evolve, we can all acknowledge that there are too many senseless acts of gun violence in the United States. The burning question is what types of gun regulation are constitutionally permissible in 2017 and beyond? Who is allowed to carry weapons, what type of weapons, and in what circumstances or locations, are the key questions. As correctly

observed by the Sixth Circuit Court of Appeals in a 2016 decision, "[s]ince 2008, the lower courts have struggled to delineate the boundaries of the right recognized by the Supreme Court in [Heller]." *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 681 (6th Cir. 2016). But this is what we do know. Without doubt, we know that a sweeping ban on handguns is now off the table. We also know that self-defense is a key lynchpin of the right to keep and bear arms. We also know that, at some level, the types of weapons protected by the Second Amendment bear some relationship to the extent to which they are in common use. Similarly, we know that the Court views certain types of laws as likely valid, such as laws prohibiting possession of firearms by felons or the mentally ill, or in school and government buildings. Yet these are hardly the laws that proponents of gun control are usually talking about when they refer to "reasonable" laws. Typically, proponents of "reasonable" gun laws mean something more aggressive. The vast gap between "ban on handguns" and "ban on felons with handguns" is fertile ground for decades of litigation.

Even with many differences of opinions how to address gun issues, I contend that it is possible to be a vehement supporter of the rights protected under Second Amendment while still recognizing that all of our freedoms have their limits. Regardless of what other modern countries have done to ban firearms as a public safety measure, as American citizens, we do have a constitutionally protected right to bear arms and it should be protected. Some argue that the Second Amendment should be repealed. I suppose they forget that a constitutional amendment requires a two-thirds majority of the Congress to *actually* agree and never mind the 38 state legislatures needed to ratify the amendment. (Good luck!) On the other hand, it is universally accepted that free speech has its limits. While the First Amendment does not protect yelling "fire" in a crowded theater, surely the Second Amendment also must allow reasonable measures

in the interest of public safety. If you are wondering what gun control measures we should take, I cannot tell you: it's political.

In conclusion, as members of this honored society, I hope the next time you are engaged in a Second Amendment debate with a colleague or friend you will be able express your own position, now sufficiently *armed* with knowledge.