Relevance of the Second Amendment in the Twenty-First Century

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"All tyranny needs to gain a foothold is for people of good conscience to remain silent"
-- Thomas Jefferson

Since the Bill of Rights was ratified on December 15, 1791, American culture, people, and weapon technology have changed considerably. But the Second Amendment to the United States Constitution has not. The twenty seven word amendment is stated 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."

The premise of the Second Amendment was to enable citizens to use and keep firearms in order to protect themselves. In the late Eighteenth Century, many new Americans came from Europe where firearms were generally outlawed. The amendment gave Americans the freedom to protect themselves and their families in times when self-defense was needed.

The amendment implies the right of self-defense and access to means thereof. In Eighteenth Century America, this meant legalization of citizens holding firearms and having access to them. However, the American judicial system has been challenged numerous times in interpreting the Second Amendment and how far it extends. Some of the issues in the Twenty First Century include the following:

- What constitutes "self-defense"?

- How has the term "self-defense" been interpreted since 1791 and what does it mean for the Twenty-First Century?
- What were some of the major interpretations of the Second Amendment in Federal and State case law?
- Should the Second Amendment be extended to include other types of weaponry?

What Constitutes Self-Defense?

At the most basic level, Miriam-Webster defines the term "self-defense" twofold. The first definition is "a plea of justification for the use of force or for homicide". The second definition is "the act of defending oneself, one's property, or a close relative". [1]

While, self-defense is not explicitly defined in the US Constitution, on a Federal Level, *United States v. Peterson* (1973) defines it as "An affirmative, unlawful act reasonably calculated to produce an affray foreboding injurious or fatal consequences." [2] On a state level, self-defense laws are different because of the 10th Amendment, which enables each state to create it owns laws on topics not expressly covered in the US Constitution. For example, residents in California are required to have a special state license to own certain types of guns. Whereas residents in Florida need a concealed carry license to hold the same guns. Florida's concealed carry license is easier to get than California's state license. Each

[1]Merriam-Webster's Collegiate Dictionary (Merriam-Webster 2004), http://www.merriam-webster.com/dictionary/self-defense.
[2] United States v. Peterson, 483 F.2d 1222 (D.C. Cir. 1973), http://lawofselfdefense.com/law_case/united-states-v-peterson-483-f-2d-1222-dc-circuit-1973/ .

state has its own definition of a deadly force and a non-deadly force, as well as distinctions between the two.

But what results from the Federal Laws is the fact that someone with a firearm or weapon cannot use it for self-defense unless the person is in reasonable fear of serious injury or death. This is known as the Retreat Rule. A more formal definition of this rule comes from USLegal.com, which defines the Retreat Rule as "a principle of criminal law that a victim of a murderous assault can choose a safe retreat instead of resorting to a deadly force in self-defense, unless the victim is at home or in his or her place of business or the assailant is a person whom the victim is trying to arrest." [3]

Early Interpretations and New Doctrines

The United States was a young country in the Nineteenth Century. It was a country whose constitution and amendments were not thoroughly interpreted. The Second Amendment was no exception. Precedents regarding self-defense and protection laws were created, planting the seeds of modern public policy and newer acts. The Founding Fathers' constitution and vision were about to be put to the test in how the American judicial system would interpret the Second Amendment.

The first major case requiring an interpretation of the Second Amendment was 1806's *Commonwealth v. Selfridge (Mass 1806*.) In this case, Mr. Selfridge was charged for manslaughter after shooting Charles Austin, an 18-year old student attending

[3] http://definitions.uslegal.com/r/retreat-rule/ (last visited March 6, 2015).

Harvard University. One day, Charles' father had written a negative comment in the local newspaper about Mr. Selfridge, who became angry upon reading it. The next day, Mr. Selfridge saw Charles walking to school with a large cane. Thinking that Charles was going to hurt him, Mr. Selfridge shot Charles to death at arm's length. Mr. Selfridge was an attorney who defended himself in court, but he misapplied the law about self-defense because his argument was about preventing a crime from occurring. The court ruled in favor of Mr. Austin because of Mr. Selfridge's misapplication of the law. The ruling from this case created a precedent about the reasonableness of fear of serious injury or death.[4]

A major exception to the Retreat Rule is known as the Castle Doctrine. This doctrine states that a person with a firearm or weapon can attack as long as they are in their place of residence or on the premises thereof. The intention of the doctrine was to protect homeowners from being attacked by trespassers with an intention to commit a felony or inflict major injuries, both of which are criminal offenses. In essence, while people are allowed to bear arms under the Second Amendment, they cannot go onto another person's property and attack them. If such is the case, the owner of the property can legally attack the trespasser. [5]

[4] Vernellia R. Randall, *Stand Your Ground and Racial Minorities – History of SelfDefense*, http://racism.org/index.php?option=com_content&view=article&id=432:stand-your ground2012&catid=110&Itemid=155&showall=&limitstart=2(last visited March 21, 2015)(cached).

[5] http://definitions.uslegal.com/c/castle-doctrine/ (last visited March 6, 2015)

The notion of retreating was visited further in 1830's *Grainger v. State* (13 Tenn. 459) and 1876's *Erwin v. State (*29 Ohio St. 186.) The former case assessed the concept of reasonableness in self-defense. *Grainger v. State* permitted "cowardly and timid" people to kill, even though no danger of serious bodily harm existed. However, such permission was granted given that the defendant had moved away from the gunman-assailant who kept approaching him until his back was on the wall and he had nowhere to go. According to the Supreme Court of Tennessee, this situation was reasonable in that the defendant's risk of being shot and killed was high enough to where he needed to defend himself. *Grainger* created a precedent that an assailant retreating was not required for a defendant to shoot. The exception to the precedent was decided in Alabama in 1847. The Supreme Court of Alabama had decided that the plaintiff's retreat was required for the defendant to shoot.

The latter case further clarified previous rulings of retreat. For the first 100 years of America's history, common law as well as the rulings from the *Commonwealth* and *Grainger* cases were the main interpretations of the Second Amendment. In 1876, *Erwin v. State* had created a new precedent that expresses two types of self-defense. The first refers to a defendant trying to retreat from a fatal assault from an assailant. In this case, if the defendant kills the assailant, the killing is considered justified self-defense. The second type refers to the assailant being killed without the defendant trying to retreat. This is considered excusable self-defense. The distinction between the two types can be found on a contextual basis given the evidence in each case. In other words, what is considered to be a retreat by the defendant may vary by case.

In 1877, *Runyan v. State* **(**57 Ind. 80, 20 Am.Rep. 52) revisited the scenario from *Grainger.* However, the Indiana Supreme Court had used the precedent set in the previous year from *Erwin v. State* to decide the verdict. Like in *Grainger,* the defendant was not at home, but in public during the attack. In such case, the defendant had the right to stand his ground according to the Doctrine of Self-Defense. However, the court expanded the doctrine to permit one to stand his ground without an attempt to retreat so long as he is in a place where he has a right to be. 4 In essence, *Runyan* stated that a defendant may fire back without retreating as long as he is in a place that he has a right to be. If the assailant is killed, then the killing is considered justified self-defense. *Runyan* is one the earliest cases that establishes a law that gives individuals the right to initiate self-defense actions including and up to using a firearm or other lethal force against an assailant.

The Rise of the Firearm Industry, New Weapons, and New Acts

While the American judicial system had a focus on self-defense and civilian use of firearms in the Nineteenth and early Twentieth Centuries, the rest of the Twentieth Century saw a rise in the firearm industry and new technologies in weapons. Civilian use of firearms in the Twentieth Century had become more sophisticated with new technologies and a rising population of the United States. This meant that newer laws had a greater influence on more people including civilians, retailers, and manufacturers alike.

The United States Supreme Court decided *Bad Elk v. United States* in 1900. This case involved a Native American police officer (Bad Elk) who shot and killed another police officer who was trying to arrest Bad Elk without a warrant or any legal authority. English common law had recognized the right of an

individual to resist with reasonable force an attempt of a police officer to make an unlawful arrest. If a non-lethal force was used in self-defense, then the defendant had a complete defense. Furthermore, if there was a death, a murder charge would be downgraded to a manslaughter charge. After the South Dakota Supreme Court had sentenced Bad Elk to death, he brought the case to the Supreme Court of the United States. The Supreme Court reversed the lower court's opinion on the basis of common law and the fact that the deceased police officer had no warrant for Bad Elk's arrest. *Bad Elk* fundamentally stated that an individual has the right to use force to resist an unlawful arrest and was entitled to a jury instruction to that effect. [6]

In 1934, Congress passed the National Firearms Act (NFA), which was designed to prevent interstate transportation of certain firearms and weapons. The act essentially increased the power that the United States government had to regulate weapons. Five years later, *United States v. Miller* reached the Supreme Court. Defendant Miller had been "indicted for transporting in interstate commerce a 12-gauge shotgun with a barrel less than 18 inches long without having registered it and without having in his possession a stamp-affixed written order for it". [7] The NFA stated that different states have the right to have different laws concerning weapons sizes and that having a shotgun of the predetermined size is not a violation of the Second Amendment. When Miller went to his US District Court, the court held that the Second Amendment does not guarantee the right to hold a shotgun

[6] John Bad Elk v. United States, 177 U.S. 529 (1900), http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=CASE&court=US&vol=177&page=529.
[7] United States v. Miller, 307 U.S.174 (1939), https://supreme.justia.com/cases/federal/us/307/174/case.html.

of such proportions. The District Court also held that Miller knowingly and deliberately transported the oversized shotgun into another state, violating the NFA. The US Supreme Court had reversed the District Court's ruling and sent it back to the District Court for the same violations of the NFA. [8] In essence, the Supreme Court ruling stated that the law from the District Court's ruling was unconstitutional. Miller had, after all, violated the NFA, despite having tried to build a case with the Second Amendment superseding the NFA.

Congress passed the Federal Firearms Act (FFA) of 1938 not long before *Miller* been decided. This act imposed a federal licensing requirement for all firearm and gun manufacturers. It singlehandedly affected the firearm industry, creating a barrier to entry just from a license with the Federal Government. The FFA also required those who sold firearms to maintain records of each transaction and made the illegal sale of a firearm to certain prohibited groups of people (such as convicted felons) a crime. Thirty years later, Congress passed the Gun Control Act (GCA) of 1968, which repealed the Federal Firearms Act. However, certain provisions of the former act were reenacted in the latter act. The GCA also established new regulations on firearm sales such as a minimum age (which was designed to protect minors), the creation of new groups of prohibited people, and the requirement for all firearms to have a serial number affixed to facilitate tracking and protection.[9]

More than 40 years after *Miller*, the City Council of Washington DC passed the Firearms Control Regulations Act

[8] United States v. Miller, 307 U.S.174 (1939),, http://www.oyez.org/cases/1901-1939/1938/1938_696.

[9] Law Center to Prevent Gun Violence (May 21, 2012), http://smartgunlaws.org/key-federal-acts-regulating-guns/

(FCRA) of 1975. This act "required that firearms kept at home be rendered useless for protection by being "unloaded, disassembled, or bound by a trigger lock or similar device." It required that all privately owned firearms be registered, and prohibited possession of a handgun not registered with city police prior to Sept. 24, 1976, and re-registered by Feb. 5, 1977." Upon the passing of this act, the firearm laws in the District of Colombia became some of the strictest in the entire country. The act paved the way for current debates about firearm law and possible alterations of public policy. Between 1976 and 1991, Washington DC's murder rate increased more than 200% (the murder rate for the entire United States had increased only nine percent during that time period). [10]

In 1986, the Firearms Owners' Protection Act (FOPA) revolutionized the firearm industry by removing some of the barriers to entry created by the FFA and amended by the GCA. Most importantly, FOPA lifted the ban on interstate transportation of certain guns as passed in the NFA of 1934. The requirement of maintaining records and licensed sale of ammunition was lifted as well. Overall, FOPA strengthened the original notions of the Second Amendment, enabling more people to have access to weapons through an increased supply due to more sellers and manufacturers entering the industry.

The GCA was further amended by the Brady Act of 1993 and the Federal Assault Weapons Ban of 1994. The former act required background checks of potential handgun buyers to assess their fitness for using a weapon (by requiring applicants for the license to complete a three hour course). These checks would run

[10] Richard Miyasaki, *Looking for a Third Option: An Alternate Solution in the Gun Debate*, Golden Gate University School of Law, GGU Law Review Blog (2014), http://www.nraila.org/news-issues/fact-sheets/2007/the-case-for-reforming-the-district-of.aspx?s=washington+dc&st=&ps=.

through the Federal Government and would require prospective buyers to wait five days before getting approved. The latter act banned 19 different types of assault weapons and some military grade semi-automatic weapons from being transported across the country. Congress eventually let the ban expire in 2004.

The Amendment Today

The early Twenty-First Century so far has been a mixture of court cases and new acts being passed. Never before has the American judicial system been so concerned about firearms. With new technologies, an ever-increasing population, and an increasing number of significant events occurring in modern America, the seeds for public policy have been sown.

One of the most recent and controversial cases regarding the Second Amendment was the 2012 killing of Trayvon Martin, a Florida teenager who had knocked George Zimmerman to the ground. Defendant Zimmerman shot and killed an unarmed Martin in a public street after getting knocked to the ground. Zimmerman was initially indicted for second-degree murder and manslaughter. But he took his case to the Seminole County Court (formally known as *State v. Zimmerman*), where he was acquitted of both charges. Zimmerman's case consisted of the stand your ground laws and Florida state self-defense laws, which generally gives the assailant-defendant the benefit of the doubt. *Zimmerman* was similar in nature to 1877's *Runyan* as well as 1830's *Grainger* in that the Doctrine of Self Defense was used and applied, the defendant was in a public location (voiding the Caste Doctrine exception), and that the defendant shot and killed his aggressor in justified self-defense. The precedent set in *Grainger* and held in *Runyan* was accepted and expanded in the Seminole County Court

in 2013. [11] Because of this precedence, Zimmerman's case portrayed the significance and relevance of the Second Amendment as well as the unbiased nature of the American judicial system. As the entire country watched Mr. Zimmerman walk free, most people were surprised about the verdict because Mr. Zimmerman was Caucasian and Mr. Martin was African American. Critics of the verdict, especially many African American based organizations, stated that the ruling was racially biased. However, the judicial system treats all people fairly and without bias under the name of the law. The precedence from *Runyan* and *Grainger* have nothing to do with race, but rather the Second Amendment. Zimmerman won simply because of his solid defense.

In 2014's *State v. Deciccio*, the Connecticut Supreme Court ruled that police batons and dirk knives were protected under the Second Amendment in a similar fashion to a typical firearm. Deciccio was a man from Connecticut who was moving to Massachusetts. When driving over, he was arrested for carrying a police baton and a dirk knife in his car. Deciccio went to the state Supreme Court, which ruled that "under the 2nd Amendment, citizens indeed had to the right to own these items as they are protected rights." [12] The court referred back using whatever means possible for self-defense, which in this case included police batons. In *Deciccio*, the Connecticut Supreme Court altered their ruling from prior interpretations of the Second Amendment, including a total ban on keeping weapons in cars. The court ruled that police batons and dirk knives were much less lethal than a handgun and

[11] Lizette Alvarez & Cara Buckley, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. Times, July 13, 2013, http://www.nytimes.com/2013/07/14/us/george-zimmerman-verdict-trayvon-martin.html?pagewanted=all&_r=0

[12] State of Conn. v. DeCiccio, 315 Conn. 79 (2014), http://jud.ct.gov/external/supapp/Cases/AROcr/CR315/315CR113.pdf.

that they should be protected under the Constitution. [13]

Conclusion

Since the founding of our country, the Second Amendment has paved the way for Americans to defend themselves and their families. Self-defense, continues to be relevant today. However, Congress should move to update the amendment to reflect these changes in technology, new processes, and new weapons. Considerations should include case law, common law, and interpretations of the history of the country as well as modern public policy. It is unknown whether Congress will do this, but it is a necessary move for the future of the American people.

[13] Eugene Volokh, *Second Amendment Protects Dirk Knives and Police Batons*, The Washington Post, (Dec. 16, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/16/second-amendment-protects-dirk-knives-and-police-batons/.