



January 28, 2013

The Honorable Dick Durbin
Chair, Subcommittee on the Constitution, Civil Rights and Human Rights
Senate Committee on the Judiciary
United State Senate

Re: President Obama's Proposals to Reduce Gun Violence and the Second Amendment

Dear Senator Durbin,

The Law Center to Prevent Gun Violence ("the Law Center") writes to you regarding the January 30, 2013 hearing of the Senate Committee on the Judiciary, "What Should America Do About Gun Violence." The purpose of this letter is to assist the Committee in understanding how the Second Amendment has been interpreted by the courts, and to explain that the Second Amendment is not an obstacle to President Obama's proposals to reduce our nation's epidemic of gun violence.

The Law Center was formed by lawyers, originally as Legal Community Against Violence, in response to a horrific assault weapons massacre at a law firm at 101 California Street in San Francisco. The Law Center provides free assistance to state and local governments seeking to adopt or defend laws to reduce the more than 100,000 gun-related deaths and injuries that devastate American communities each year. We track Second Amendment challenges to such laws and regularly file amicus ("friend of the court") briefs in support of state and local governments nationwide. We strongly support the types of laws proposed by President Obama in the wake of the Newtown tragedy, including those requiring universal background checks on all gun buyers, banning military-style assault weapons and large capacity ammunition magazines and punishing gun traffickers.

The Supreme Court Has Held That the Second Amendment is Consistent with a Variety of Common Sense Gun Laws, Including Those Proposed by President Obama

In 2008, in *District of Columbia v. Heller*, the U.S. Supreme Court held for the first time that the Second Amendment protects the right of a law-abiding, responsible citizen to possess a handgun in the home for self-defense. The Court made very clear, however, that the right is not absolute, and does not protect the right to "keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." 554 U.S. 570, 626-27 (2008).

In addition, the Court identified several examples of gun laws it considered "presumptively lawful," including those prohibiting firearm possession by felons and the mentally ill, and laws regulating the commercial sale of guns. The Court also noted that the Second Amendment is consistent with laws banning "dangerous and unusual weapons," such as those most useful in military service.

Nothing in the *Heller* decision suggests that President Obama’s proposals to reduce gun violence would violate the Second Amendment. On the contrary, the decision supports the constitutionality of those proposals because they are all presumptively lawful regulations as described by the Supreme Court. Assault weapons and large capacity ammunition magazines, for example, are “dangerous and unusual weapons” that are most useful in military service. Universal background checks, which typically require all firearm sales to be conducted by a licensed firearms dealer, are: 1) regulations on the commercial sale of firearms; and 2) necessary to enforce existing laws prohibiting firearm possession by felons and the mentally ill. Laws punishing gun traffickers (including “straw purchasers” who buy guns on behalf of prohibited persons) are also regulations on the commercial sale of firearms.

Even more fundamentally, the laws proposed by the President do not violate the Second Amendment because they in no way interfere with the narrow right established in *Heller*, i.e., the right of a law-abiding, responsible citizen to possess a handgun in the home for self-defense.

Lower Courts Interpreting *Heller* Have Overwhelmingly Rejected Challenges to Gun Laws and Upheld Bans on Assault Weapons and Large Capacity Ammunition Magazines

Although the *Heller* opinion opened the floodgates to lawsuits challenging federal, state and local gun laws, decisions of lower courts across the country have overwhelmingly rejected those challenges. The Law Center is aware of more than 650 such decisions.

Moreover, those courts that have specifically considered Second Amendment challenges to laws banning assault weapons and large capacity ammunition magazines have upheld the laws. In *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1262 the court rejected a Second Amendment challenge to Washington D.C.’s assault weapons and large capacity ammunition ban, finding that the ban did not substantially affect individuals’ ability to defend themselves. In *People v. James*, 94 Cal. Rptr. 3d 576, 586 (Cal. Ct. App. 2009), the court upheld California’s assault weapons ban, finding that it was consistent with the Second Amendment because assault weapons are “dangerous and unusual” weapons within the meaning of the Supreme Court’s *Heller* decision.

The Second Amendment is Also Not an Obstacle to Laws Requiring Universal Background Checks or Punishing Gun Traffickers

Significantly, the Law Center is unaware of *any* challenges to federal, state or local laws requiring background checks. As noted previously, however, any such challenges would inevitably fail under *Heller* because: 1) background checks qualify as regulations on the commercial sale of firearms; 2) they are necessary to enforce laws prohibiting the possession of firearms by felons and the mentally ill; and 3) they in no way hamper the ability of a law-abiding, responsible citizen to possess a handgun in the home for self-defense.

We are also unaware of any challenges to laws criminalizing gun trafficking. Courts would certainly reject any such challenges because those laws, too, fail to interfere with the ability of a law-abiding, responsible person to possess a handgun in the home for self-defense.

In sum, those who would argue that the Second Amendment guarantees the right to possess assault weapons and large capacity magazines – like those used to slaughter first graders at Newtown, moviegoers at Aurora, teenagers at Columbine and lawyers at 101 California Street – cannot point to any precedent in the Supreme Court or lower courts to support their claims, and ignore precedents that clearly contradict their claims. Any assertions that laws requiring universal background checks and penalizing gun traffickers violate the Second Amendment are equally without legal support. Congress should rest assured that the common sense laws proposed by President Obama are – in addition to being vitally important to public safety and widely supported by the American public – constitutionally sound.

Please let me know if we can be of further assistance.

Very truly yours,

Juliet A. Leftwich
Legal Director

Statement of Professors of Constitutional Law: The Second Amendment and the Constitutionality of the Proposed Gun Violence Prevention Legislation

January 30, 2013

Several proposed reforms to the nation's gun laws, including universal background checks and restrictions on high-capacity ammunition magazines and assault weapons, are now pending before Congress. Concerns have been raised that these measures might violate the Second Amendment. We, the undersigned professors with expertise in constitutional law, write to address those concerns.

In 2008, the U.S. Supreme Court held that the Second Amendment, which 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," guarantees an individual's right to have a functional firearm in the home for self-defense. The Court's decision in that case, *District of Columbia v. Heller*, struck down a D.C. law that effectively barred the use of any firearm for self-defense. The law is now clear that the government may not completely disarm law-abiding, responsible citizens. The Court also made clear, however, that many gun regulations remain constitutionally permissible. "Like most rights," the Court explained, "the right secured by the Second Amendment is not unlimited." Writing for the Court, Justice Antonin Scalia explained that restrictions on "dangerous and unusual" weapons are constitutional and that "nothing in our opinion should be taken to cast doubt" on laws that prohibit "the possession of firearms by felons or the mentally ill" or laws that impose "conditions and qualifications on the commercial sale of arms."

In this sense, Justice Scalia recognized in *Heller* that, like other constitutional rights, the Second Amendment is not an absolute. The First Amendment, for example, provides that "Congress shall make no law . . . abridging the freedom of speech," but the Supreme Court has long and consistently held that some types of speech – for example, defamation, obscenity and threats – can be regulated; that some people – for example, public employees, members of the military, students and prisoners – are subject to greater restrictions on their speech than others; and that the government can reasonably regulate the time, place and manner of speech. As Justice Scalia explained in *Heller*, the rights guaranteed by the Second Amendment are likewise subject to appropriate regulation in order to enhance public safety.

In acknowledging the presumptive constitutionality of laws designed to prevent gun violence, including restrictions on who has access to firearms and what types of

firearms they may have, *Heller* is consistent with the history of the right to keep and bear arms. The founding fathers who wrote and ratified the Second Amendment also had laws to keep guns out of the hands of people thought to be untrustworthy. Such laws were necessary to ensure that the citizen militia referenced in the Second Amendment was “well regulated.” In the 1800s, many states restricted the sale or public possession of concealable firearms. In the early twentieth century, the federal government restricted access to unusually dangerous weapons, such as machine guns, and states barred people convicted of certain felonies from possessing firearms. Laws such as these were routinely upheld by the courts, which recognized the legitimacy of legislative efforts to keep the most dangerous weapons out of the hands of the most dangerous people.

While the permissibility of any particular reform depends on its details, the reforms currently being considered by Congress are clearly consistent with the Second Amendment. We express no view on the effectiveness or desirability of the policies reflected in the various proposals, but we all agree that none infringes the core right identified by the Court in *Heller*.

Universal background checks, especially those conducted instantaneously through the National Instant Background Check System, do not impose a significant burden on law-abiding citizens. Yet background checks may provide an important safeguard against easy access to guns by members of criminal street gangs, other felons, and the mentally ill. As with other rights that have eligibility criteria, such as the right to vote, the right to keep and bear arms is not offended by neutral measures designed to ensure that only eligible, law-abiding citizens exercise the right. Moreover, background checks imposed at the point of sale are typical of the “conditions and qualifications on the commercial sale of arms” recognized by the Supreme Court in *Heller*.

Restrictions on the manufacture and sale of high-capacity ammunition magazines and assault weapons are also consistent with the Second Amendment. In a recent opinion authored by Judge Douglas Ginsburg and joined by Judge Karen Henderson, the U.S. Court of Appeals for the District of Columbia Circuit held that such regulations are consistent with the Second Amendment and with the Supreme Court’s decision in *Heller*. The court of appeals recognized such weapons and magazines are not necessary for individual self-defense – what *Heller* called the “core lawful purpose” of the Second Amendment. Restrictions on high-capacity magazines and assault weapons, the court of appeals held, do “not effectively disarm individuals or substantially affect their ability to defend themselves.” The Second Amendment, like the First Amendment, does not prevent lawmakers from enacting reasonable regulations that do not seriously interfere with the core right guaranteed by the Constitution.

The Supreme Court has clearly held that the Second Amendment preserves the right of law-abiding citizens to have a firearm in the home for self-defense. As both the historical tradition of the right to bear arms and the Court’s decision suggest,

reasonable and limited measures to enhance public safety that do not unduly burden that right are consistent with the Second Amendment.

Signed,

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