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Our Core Second Amendment Rights

ROBERT A. LEVY

The Second Amendment to the United States Constitution secures an individual right to bear arms for self-defense. That was the holding in the landmark decision issued by the Supreme Court in *District of Columbia v. Heller*.

Furthermore, that protection now applies everywhere in the United States. At the time of the framing, the Bill of Rights applied only to the federal government. We soon learned, however, that the states can be every bit as tyrannical as the Feds, slavery being the obvious case in point. In a series of cases after the Civil War, the Fourteenth Amendment was used to “incorporate” the Bill of Rights—that is, to make most of its provisions enforceable against the states. For the first time, the federal government could intervene if the states violated our rights.



*Robert A. Levy is chairman of the Cato Institute and co-counsel in the landmark Supreme Court case, *District of Columbia v. Heller*. Levy spoke in the Institute's F. A. Hayek Auditorium in June.*

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Interestingly, it wasn't until *McDonald v. City of Chicago* in 2010 that the Supreme Court decided that the Second Amendment applies everywhere, to the states as well as federal jurisdictions like Washington, D.C.

The right to bear arms, however, is not absolute. Like other provisions of the Bill of Rights, it's subject to reasonable restrictions. Nevertheless, the Supreme Court declared in both *Heller* and *McDonald* that the right to bear arms is considered a "fundamental right." What does that mean? It means individuals enjoy a presumption of liberty. Government bears a heavy burden to justify any regulations that would compromise

to imagine multiple-victim killings—like the ones in Newtown—where innocent lives might have been saved if we had an effective ban on high-capacity magazines. The key word, of course, is "effective." An ineffective ban is worse than useless because it deters only law-abiding citizens. So what restrictions should be allowed?

That's where the burden of proof is critical. It is up to the government to compile data indicating whether the benefits of banning high-capacity magazines exceed the costs. If they do, and if the government can produce relevant evidence, I have little doubt that a ban on large magazines would survive a Second Amendment court challenge. But there are three related problems.

First, homemade magazines are very easy to assemble. They are essentially a box with a spring in it. Second, there is no way to confiscate the millions of high-capacity magazines that are currently in circulation. Third, existing semiautomatic handguns are typically configured to use magazines with 11 to 19

rounds. A ban on any size less than 20 would therefore make these weapons dysfunctional and encounter great resistance.

That said, I'm not aware of any situation where an actual or potential civilian victim has fired more than 20 rounds in self-defense. Weapons with more than 20 rounds have been used several times in these random mass killings. Evidence like that might be sufficient for government to justify a 20-round limit. There is a proposal

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our right to bear arms. That point was central to a ruling in December 2012 by the U.S. Court of Appeals in *Moore v. Madigan*, which overturned the Illinois ban on concealed-carry of firearms. The state, said the court, failed to meet its burden of proof.

With that as a brief background, let's look at some of the current gun control proposals that are pending before both Congress and state legislatures. Take, for instance, high-capacity magazines. It's not difficult

now in Congress which calls for a 10-round limit, and New York law has such a limit—with the added caveat that you can only have seven of those rounds actually loaded in the magazine. Those laws should both be rejected.

What about an assault weapons ban? This is once again a matter of empirical evidence. We had an assault weapons ban from 1994 to 2004. Seven months after it expired, the *New York Times*—no fan of gun rights—reported that “despite dire predictions that the streets would be awash in military-style guns, the expiration of the decade-long assault weapons ban last September has not set off a sustained surge in the weapons’ sales . . . [or] caused any noticeable increase in gun crime.”

We currently have millions of so-called assault weapons in circulation, used by Americans for everything from hunting and self-defense to target shooting and Olympic competition. Criminals do not typically use assault rifles. They use handguns. Assault weapons are expensive and very difficult to conceal. And even if we were to reinstitute the ban, we would be unable to deal with the huge number of these guns already owned.

Some people argue in favor of a buyback program. As you can imagine, that would be extraordinarily costly. Furthermore, who would the sellers be? They would be people who valued the money more than they valued the firearm, and that would be mostly low-income persons who need the money. These individuals often live in high-crime areas and

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obey the law, but they need a means to defend themselves. By the same token, who would keep their weapons under a buyback program? They’d be individuals who valued their weapons more than the money, which would include criminals and terrorists for whom guns are a tool of the trade.

In the *Heller* case, Justice Scalia suggested that the Second Amendment would pose no barrier to outlawing weapons that are either especially dangerous or not in common use. So it’s quite clear that certain firearms can be banned. Indeed, automatic weapons—those guns that continue to fire after pulling the trigger once—have essentially been banned since 1934. The task, therefore, in structuring an assault weapons ban is to cover only those firearms that are not commonly used, are not needed for self defense, and would improve public safety if banned. The 1994 assault weapons ban quite clearly went too far, but a much better crafted and more limited version might be justified.

To put this in perspective, however, there were almost 13,000 people murdered with a weapon in 2011. Of those, 1,700 were killed with knives; 500 were killed with hammers, bats, and clubs; and 728 by someone’s bare hands. How many of those were

killed with rifles—not just assault rifles, but rifles of all types? Three hundred and twenty-three. I don't mean to trivialize 323 deaths, but banning popular semiautomatic rifles merely because they come equipped with a pistol grip or another feature that has no effect on the weapon's lethality makes no sense whatsoever.

What about the clamor to extend background checks to private sales, which includes purchases at gun shows, over the Internet, and through published ads? Survey data indicates that less than 2 percent of guns used by criminals are bought at

gun shows and flea markets—a figure that includes sales through licensed gun show dealers, which are already subject to background checks. Yet the *New York Times* still editorializes that background checks “prevented nearly 2 million gun sales over a 15-year period.” This is an incredible claim. There is no way for the *Times* to know how many sales were prevented from occurring. Violence-prone buyers who don't pass a background check will purchase elsewhere or steal a gun. Peaceful buyers who don't pass their background check, however, might be unable to defend themselves with an appropriate firearm.

In 2010 the National Instant Criminal Background Check System (NICS) denied 76,000 would-be buy-

ers. How many of those individuals were prosecuted? Forty-four out of 76,000. How many convicted? Thirteen out of 76,000. That is a conviction rate of 0.02 percent, which suggests two possibilities. Either the remaining denials were legitimate purchases that were unjustly blocked

by the NICS system or, if the denials were proper, then somehow 99.98 percent of those 76,000 rejected applicants escaped punishment. Most likely both factors were at work. But neither of those possibilities offers much hope for an expanded system of background checks. We would do much better

to improve the existing system.

I have two further points regarding background checks. First, if they actually promoted public safety, then taxpayers should foot the bill, not law-abiding gun owners. Second, the claim that background checks just take a few minutes is disingenuous. Many of the checks take up to 72 hours. Most gun shows are two-day events. In some cases, the real goal of the expanded checks was to drive gun shows out of business. That strategy has been partially successful. Yet its advocates know that if they tried to implement a law banning gun shows, it would be deemed unconstitutional.

You have to remember that the “I” in NICS stands for “instant.” If technology could facilitate truly rapid



background checks—with a 24-hour maximum—I'd have no objection to extending NICS checks to cover selected private sales. But I have no illusions that this would curb violence. Rather, I believe that accepting rapid checks—as proposed in the Manchin-Toomey compromise bill earlier this year—would have conferred significant benefits on gun-rights advocates in return for modest concessions. In short, the compromise bill would have been superior to the legal regime we have now.

That said, what policies would actually be effective? The most effective option, which is rarely considered, is to legalize drugs. This would result in a huge reduction in gun violence. There are 1.5 million drug arrests each year, with more drug inmates than all violent criminals combined. Because drugs are illegal, participants in the drug trade cannot go to court to settle their disputes. Those disputes are instead resolved on the streets with guns. The Drug Enforcement Agency currently has about 10,000 agents, analysts, and support staff, men and women who could be involved in fighting real crime or terrorism instead.

Another alternative suggested by the National Rifle Association is arming guards at school. Israel has done that and school violence is effectively zero. Keep in mind that about 28 percent of our public schools already employ security officers who carry guns, so this isn't a new idea. For the remaining schools,

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retired military and police personnel make for obvious recruits. The focus should be on entrance security, which would involve less manpower. We don't need an armed guard in every classroom.

It's true, of course, that an armed guard didn't prevent Columbine. But neither did the ban on assault weapons or the ban on high-capacity magazines that were also in effect at that time. In fact, gun-free school zones have been a magnet for the mentally deranged. We have armed guards at banks, airports, power plants, courts, stadiums, government buildings, and of course on planes. There's no reason why we couldn't have armed guards at those schools that decided they need them.

In the aftermath of this heart-wrenching tragedy at Sandy Hook, we need to evaluate our gun laws by all means. But I am skeptical about the efficacy of gun regulations, mostly because they are imposed almost exclusively on those who are not part of the problem. We need to remember that our core Second Amendment rights are at risk. We therefore need to be absolutely certain that the ends justify the means. ■



Cato Scholar Profile: JIM HARPER

As director of information policy studies, JIM HARPER works to adapt law and policy to the unique problems of the information age, in areas such as privacy, telecommunications, intellectual property, and security. Harper was a founding member of the Department of Homeland Security's Data Privacy and Integrity Advisory Committee, and he recently co-edited the book *Terrorizing Ourselves: How U.S. Counterterrorism Policy Is Failing and How to Fix It*. He holds a JD from UC Hastings College of Law.

What have we learned about the National Security Agency over the last few months?

When the National Security Agency (NSA) scandal erupted, we saw something that hasn't been seen on the American continent in more than 200 years: a general warrant. The Fourth Amendment flatly bars general warrants, but the NSA has cajoled the Foreign Intelligence Surveillance Court into giving it access to data about every American's communications without regard to suspicion.

At first, the best speculation about this mass surveillance was that it must be for data mining. Data mining has almost no chance of catching terrorists, as I showed in a 2006 paper with IBM scientist Jeff Jonas. More recently, it seems that the plan is to collect and store both phone and internet data so that, in the future, when suspicion arose about somebody, the agency could investigate that person, their contacts, and their communications.

Is it *Minority Report* or Orwell's *Nineteen Eighty-Four*? No, it's America today. Information about every phone call you make or receive is going in your permanent government record.

What is the significance of these findings?

Reform of government secrecy policy has long been overdue, but now the problem is urgent. A secret court has issued secret rulings using secret interpretations of law, an attack on every American's privacy and constitutional rights. Leaders of the intelligence community equivocated in public statements and—I think it's fair to say—lied to Congress about what they were doing. These

are frontal assaults on the rule of law.

We also need more people to take to heart the lessons that Chris Preble, Ben Friedman, and I collected in the book *Terrorizing Ourselves*. Many people shrug their shoulders in the face of liberties violations and say, "Well, if it helps secure the country. . . ." Mass surveillance does not, but they believe that terrorism is an existential threat. Media and government continually push fear because that causes people to buy what they're selling. We don't, and we need more people to insist on America's indomitability.

What exactly is the PRISM program?

In ways that are still unclear, the PRISM program allows NSA agents to access information from major communications and computing providers, including Microsoft, Google, YouTube, Apple, and others—Twitter being a notable exception. It's probably a system for weaving together data collected in lots of places to get a better view of interesting persons. That's fine when it's a legitimate investigation, and it's not fine when it's not. That's why these programs need true congressional and public oversight.

There's a lot more we may learn. Sens. Ron Wyden (D-OR) and Mark Udall (D-CO), both members of the Senate Intelligence Committee, said in a recent statement that the current justifications for surveillance could be used to collect information on everything from credit card purchases and medical records to financial information and firearm sales. Lots more data might be in your permanent government record. ■

Planned Giving: Many Options

Many of us make a careful habit of annual charitable giving: each year we give a generous amount of cash or marketable securities to our favorite charities. But we shouldn't neglect planned giving—which refers to making a gift from assets accumulated over a lifetime. When it comes to planned giving there are many options and, in this piece, we'll do a quick overview of some of the best options. Our aim is to make you aware of the broad array of possibilities. However, please bear in mind that all of the planning vehicles we'll be talking about are complex and subject to a myriad of IRS rules. So make sure you consult with your attorney or other advisers.

Many people prefer the simplicity of a bequest. With a bequest, your will (or will substitute) simply directs that Cato, or another charity, receive a certain amount of assets or a percentage of your assets. For example, your will might say, "I give the sum of \$100,000 to the Cato Institute."

However, other people might prefer the idea of making a lifetime gift, but with a retained flow of income. For these individuals, charitable remainder trusts work well. With a charitable trust you transfer property irrevocably to a trust: the trust then pays you or your designated beneficiary a flow of income for life or a term of up to 20 years. When the trust terminates, the remaining assets pass to the named charity.

The flow of income can be in the form of an annuity: that is, a percentage of the value of the assets at the time of transfer. For example, a \$100,000 CRAT (charitable remainder annuity trust) with a 5 percent payout would pay you \$5,000 a year for life. The lifetime

flow of income can also take the form of a "unitrust" interest; this is a percentage of the value of the assets as revalued each year. For example, let's consider a CRUT (charitable remainder unitrust) with a 5 percent payout—the trust was initially funded with \$100,000 but the value has risen to \$125,000. In this case, the annual flow would be \$6,250 (5 percent times \$125,000).

When established during life, both annuity trusts and unitrusts generate an income-tax deduction. Given the inherent protection they offer against inflation, unitrusts are the more popular of the two options.

Charitable lead trusts are another popular planning device. These work for people who want to make a gift to charity but who also want to ensure that their assets ultimately go to family members. So in this case, assets are transferred to a trust whose terms specify that for a term of years—say 5, 10, or 20 years—all income from the assets is to be paid to charity. At the end of the term, the assets will go to family members (or others) as directed by the trust. Lead trusts can be established during life or at death via your will.

Finally, don't forget about your retirement assets, such as rollover IRAs and the like. Charities can be the designated beneficiaries of these assets. Indeed, this is often a highly tax-effective choice, as retirement assets pass to charity free of income taxes. By way of contrast, when retirement assets pass to family members, they are always subject to income taxes—and possibly estate taxes.

For more information about these and other planned gifts, please contact Cato's director of planned giving, [Gayllis Ward](mailto:Gayllis.Ward@cato.org), at gward@cato.org or at (202) 218-4631. ■



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