

23. Gun Control

Congress should

- prevent federal, state, and local governments from pursuing lawsuits that abrogate Second Amendment rights,
- repeal the Gun Control Act of 1968,
- stop the illegal compilation of gun-owner registration lists from the National Instant Check System.

Rein in Abusive Lawsuits

The legal arm of the anti-gun lobby, Handgun Control, Inc., has organized a national network of mayors, now joined by New York attorney general Eliot Spitzer, to bring meritless lawsuits against firearms manufacturers. At the behest of the U.S. Department of Housing and Urban Development, as many as 3,200 local housing authorities may file similar suits.

That abusive litigation is an assault on the principle of separation of powers—a cornerstone of the U.S. Constitution and a foundation of our republican form of government. Firearms laws should be enacted not by the courts but by lawmaking bodies: state legislatures and Congress. Even former secretary of labor Robert Reich, a strong advocate of gun control, has observed that government lawsuits against firearms manufacturers are a thinly disguised effort to end-run legislative decisions about gun laws.

Because the lawsuits are legally frivolous, it is unlikely that any plaintiff will be awarded a single dollar in a courtroom that honors the rule of law. Yet the cost of defending suits in multiple jurisdictions is prohibitive. Already, several gun dealers and manufacturers have been forced into bankruptcy by litigation costs. The effect is to ratchet up the pressure for an out-of-court settlement, thus using the judiciary to circumvent legisla-

tures that have been remarkably unresponsive to a variety of gun control proposals.

The principle that underlies the lawsuits was stated by Sarah Brady, head of Handgun Control and wife of former Reagan presidential aide James Brady, who was partially paralyzed by gunfire in the 1981 assassination attempt on the president by John W. Hinckley Jr. Quoted in the *Tampa Tribune* of October 21, 1993, Mrs. Brady insisted, “To me, the only reason for guns in civilian hands is for sporting purposes.” Apparently, self-defense is not, from Mrs. Brady’s perspective, legitimate justification for gun ownership. That would surely explain some of the arguments advanced by Handgun Control in the municipal litigation that it has instigated against gun makers.

For example, many of the lawsuits complain, in effect, that handgun manufacturers have improved their products too much. Indeed, during the last decade, the industry has responded to consumer demand by producing handguns that are smaller, have larger ammunition capacity, and have greater accuracy and firepower. If guns are to be used primarily at target ranges and not for protection, then it might make sense that large guns with long barrels should be the main kind of gun produced. Of course, that logic wholly disregards the self-defense motivation of many gun owners and the overwhelming evidence that defensive use of firearms materially reduces the incidence of gun-related violence.

It is both lawful and sensible to use guns for protection. And smaller guns with more firepower are of great use to law-abiding citizens. The rationale for carrying a small concealed handgun on one’s person or in a car is obvious. While compactness may be less important in the home, a smaller gun might still be easier to hold, store in a particular place, or keep concealed from children. Gun owners concerned about ease of use and ready availability for self-defense will not be persuaded by the claim of anti-gun advocates, as promoted in the latest rounds of lawsuits, that guns should be designed with “magazine disconnects” or “safety” devices that prevent the gun from working reliably in an emergency.

Finally, the charge that gun makers deliberately sell firearms to criminals and minors ignores the singular regulatory regime that governs gun manufacture and distribution. Guns are the most regulated consumer product in America: every retail sale must be sanctioned by the Federal Bureau of Investigation after the bureau determines that the buyer is not a criminal and is old enough to buy the gun legally.

Nonetheless, abusive litigation moves forward—showing contempt not only for the Second Amendment but for the First Amendment as well.

Among the defendants of the various municipal, state, and looming federal suits are firearms industry trade associations, like the National Shooting Sports Foundation, which do not sell guns at all but engage exclusively in protected First Amendment activities such as public education and lobbying.

As a first step, Congress should refuse to fund litigation against gun makers that is initiated or coordinated by the Department of Housing and Urban Development. Actually, if HUD secretary Andrew Cuomo was concerned about public housing's being unsafe because of gun-related violence, he should have sued his own agency. HUD is responsible for housing authorities—including their location, selection of tenants, eviction policies, even inadequate policing. But rather than admit the abject failure of public housing, Cuomo instructed his minions to plan lawsuits, modeled after those filed by cities and counties from coast to coast. Cuomo wants to compel gun makers to become police, judge, and jury—and deny to firearms dealers, without due process of law, the merchandise that they sell for a living.

Second, Congress should exercise its power under section 5 of the Fourteenth Amendment to stop those state and local governments that would violate First and Second Amendment rights. Whenever there is an actual or imminent transgression of core liberties guaranteed by the Constitution, Congress is authorized to enact remedial or prophylactic legislation that will prevent the states or their subdivisions from subverting the rights of their citizens. Nearly two dozen states have enacted their own bans on abusive municipal anti-gun suits, so there are plenty of models from which Congress can choose.

Third, Congress should eliminate all funding for the executive branch to implement its blackmail “settlement” of pending government litigation against Smith & Wesson. Lamentably, Smith & Wesson was too craven to defend its rights in court, but that does not justify the federal government's bullying tactics against other gun makers. Specifically, HUD secretary Cuomo has threatened an antitrust suit against Smith & Wesson's rivals on trumped-up charges, unsupported by evidence, that they helped to organize a boycott of Smith & Wesson's products. And the Clinton administration has announced a new policy that would permit federal agencies to favor Smith & Wesson in their procurement of firearms for police and other uses. Needless to say, federal military and police purchases should be based on standard price and quality criteria, not conditioned on the capitulation of a single manufacturer in return for political favoritism.

Repeal the Gun Control Act of 1968

The Gun Control Act of 1968, with subsequent amendments, is bad law and bad public policy. It ought to be repealed. Full repeal is not a radical step; Ronald Reagan endorsed it in 1980. But until that can be accomplished, Congress should, at a minimum, repeal the most oppressive sections:

- The 1994 ban on so-called assault weapons. Those guns do *not* fire faster than other guns, nor are they more powerful. Indeed, they fire smaller bullets at lower velocities than do most well-known rifles used for hunting big game. The assault weapon statute is purely cosmetic—banning guns because of politically incorrect features such as bayonet lugs (as if drive-by bayoneting were a problem) or a rifle grip that protrudes “conspicuously” from the gun’s stock. Police statistics from around the nation show that such guns are rarely used in crime. The federal ban will sunset in 2004, but Congress should repeal it immediately.
- The 1994 ban on possession of handguns by persons under 18. Assuming that such a ban could survive Second Amendment scrutiny, it is a topic that should be addressed by state, not federal, law. The statute does include some exceptions—for example, a parent may take a child target shooting—but, even if the child is under direct and continuous parental supervision, the parent commits a federal crime unless she writes a note giving the child permission to target shoot and the child carries the note at all times. The 1994 prohibition usurps traditional state powers, is overbroad, and encroaches on parental rights, despite a paucity of empirical evidence that the ban will reduce gun accidents or gun-related violence.
- The ban on gun possession by specified adults. When adult behavior is regulated, the Second Amendment weighs more heavily than when restrictions are imposed on minors. Even if Second Amendment constraints are somehow satisfied, the federal government has no constitutional authority in this area. Particularly unfair, whether imposed by federal or state law, is the ban on gun possession by anyone who is subject to a domestic restraining order, routinely issued by divorce courts without any finding that the subject of the order is a danger to another person. Likewise, the 1996 gun ban applicable to anyone convicted of a “domestic violence” misdemeanor is far too sweeping in its coverage and, in many instances, retroactive.

Consider two brothers who pleaded guilty to misdemeanor assault 20 years ago after they got into a fistfight on the front lawn. As a result of their “domestic violence,” the brothers are now barred from gun possession forever.

Stop Illegal Gun Registration

In 1993 Congress enacted the Brady Bill, which mandated a waiting period and background check on all persons buying a firearm from a federally licensed dealer. The initial waiting period was replaced by the National Instant Check System. Under the NICS, when a firearm purchase is made from a licensed dealer, the dealer must submit detailed information about the prospective purchaser to the FBI before the firearm can be sold.

Section 103(i)(2) of the NICS statute provides explicitly that the names of firearm purchasers are not to be retained in the system: “No department, agency, officer, or employee of the United States may . . . use the system established under this section to establish any system for the registration of firearms [or] firearm owners.” The same prohibition against federal gun registration also appears in the 1986 Firearms Owners Protection Act.

Nevertheless, the FBI has been retaining firearm owner registration information. The bureau claims that the information is destroyed after six months. Yet, thanks to the use of computer backup tapes, files that are erased from a computer’s hard drive may exist on tape indefinitely. There is no legitimate reason why records of approved firearms purchasers should be retained beyond a minimal period—certainly not for six months or longer.

The experience of Canada, Great Britain, and Australia shows quite plainly that gun registration precedes gun confiscation. The late Nelson T. “Pete” Shields, the founding chair of Handgun Control, Inc., put it this way:

The first problem is to slow down the number of handguns being produced and sold in this country. The second problem is to get handguns registered. The final problem is to make possession of all handguns and all handgun ammunition—except for the military, police, licensed security guards, licensed sporting clubs, and licensed gun collectors—totally illegal (quoted in Richard Harris, “A Reporter at Large: Handguns,” *New Yorker*, July 26, 1976).

Even Bill Clinton and Al Gore professed, episodically, their respect for the Second Amendment right to keep and bear arms. Reasonable people

can differ about the precise scope of that right, but it is not reasonable for the U.S. Department of Justice to nullify the Constitution by claiming that the Second Amendment poses no barrier to the confiscation of every privately owned gun from every citizen of the United States. That outrageous argument was in fact advanced by the Justice Department in June 2000 before the U.S. Court of Appeals for the Fifth Circuit in *United States v. Emerson*.

Congress should hold hearings to determine why the Justice Department is maintaining an extremist, anti-constitutional position that contradicts the text of the Second Amendment, its legal history, and the overwhelming consensus of modern legal scholarship. And more important than hearings, Congress should promptly terminate the illegal FBI gun registration program and order the immediate destruction of all registration records possessed by any federal agency.

Suggested Readings

- Kleck, Gary. *Targeting Guns: Firearms and Their Control*. Hawthorne, N.Y.: Aldine De Gruyter, 1997.
- Kopel, David B. *The Samurai, the Mountie, and the Cowboy: Should America Adopt the Gun Controls of Other Democracies?* Amherst, N.Y.: Prometheus Books, 1992.
- Kopel, David B., ed. *Guns: Who Should Have Them?* Amherst, N.Y.: Prometheus Books, 1995.
- Lott, John R. Jr. *More Guns, Less Crime: Understanding Crime and Gun-Control Laws*, 2d ed. Chicago: University of Chicago Press, 2000.
- Malcolm, Joyce Lee. *To Keep and Bear Arms: The Origins of an Anglo-American Right*. Cambridge, Mass.: Harvard University Press, 1996.
- Snyder, Jeffrey R. "Fighting Back: Crime, Self-Defense, and the Right to Carry a Handgun." Cato Institute Policy Analysis no. 284, October 22, 1997.

—*Prepared by David B. Kopel*