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Podium

**MILITIAS MISINTERPRET CONSTITUTION**

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THE OKLAHOMA CITY bombing has focused public attention on an alarming development: the formation of well-armed private "militias" claiming a right to engage in violent resistance to federal authority. The organizing ideology of these paramilitary groups is a perverse, and potentially dangerous, interpretation of the Second Amendment to the Constitution.

These groups assert that the reason for the presence of the "right to keep and bear arms" in the Second Amendment is to provide the people with the means to resist the government when it becomes a "tyranny." The federal ban on military-style assault weapons, enacted last year as part of the crime bill, is anathema to these self-described patriots. In their view, assault weapons are needed to match the firepower of the federal government.

The argument that the Second Amendment is about resistance to government tyranny is not confined to the newly formed militias. Indeed, the rhetoric of the militias echoes the message heard for many years from officials of the National Rifle Association.

Loaded Gun

In a 1991 article in the Howard Law Journal titled "The Second Amendment Ain't About Hunting," Vol. 34, No. 4, an NRA lawyer wrote, "The Second Amendment was directed at maintaining an armed citizenry for mutual defense, and perhaps most significantly, to protect against the tyranny of our own government."

Or, as an NRA field representative told the New York Times on Dec. 24, 1990, "The Second Amendment...is literally a loaded gun in the hands of the people held to the heads of government."

The NRA's constitutional theory has chilling implications. After all, if the purpose of the Second Amendment is to keep the government in line through the

threat of armed resistance, why should there be any limitation on the kinds of arms people may keep and bear?

Following this line of thought, the NRA has argued in court that private possession of military arms, such as assault weapons and machine guns, is constitutionally protected. The NRA theory also implies that citizens should have the right to join together to prepare for resistance to government authority. If the prospect of a solitary armed citizen can give second thoughts to potential tyrants in federal agencies, imagine the effect of an entire private army.

Not surprisingly, the NRA has stated that it has not discouraged "nor would [it] contemplate discouraging" the formation of "citizen militia units." And, under the NRA's theory, if the possession of arms is constitutionally protected to provide the means for resistance to oppression, why is not the use of arms against government agencies (say, by the Oklahoma City bomber) also protected, if such use arises from a sincerely held belief that the government has become a tyranny?

#### Warped Interpretation

The NRA grossly distorts the history and meaning of the Second Amendment. The amendment reads: "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 gun lobby fails to understand that the "well regulated Militia" of the late 18th century was not a private army formed to resist the government; the militia was an instrument of the government.

As former Chief Justice Warren Burger has explained, the militia was a "state army." While it is true that much of the adult male population was enrolled in the militia, these militiamen were subject to rules enforced by the state requiring, for example, periodic "mustering" for military training.

The genesis of the Second Amendment was the belief that the Constitution had given the federal government excessive power over the state militias. The Anti-Federalists who argued for the amendment distrusted the federal "standing army" of professional soldiers. They saw effective state militias as a way to prevent federal monopoly of military power.

Thus, the Second Amendment affirmed that the keeping and bearing of arms in a "well regulated Militia" of the states is a "right of the people," not dependent on the whim of the central government.

#### Court Interpretation

As the U.S. Supreme Court wrote in [U.S. v. Miller, 307 U.S. 174 \(1939\)](#), the "obvious purpose" of the amendment was "to assure the continuation and render possible

the effectiveness of [the state militia and that] it must be interpreted and applied with that end in view."

Universal military service in state militias long ago disappeared, replaced in the early 1900s by the National Guard system. In *Maryland v. U.S.*, 381 U.S. 41 (1965), the Supreme Court unequivocally stated that "the National Guard is the modern militia." The courts consistently uphold gun control laws because they typically exempt the National Guard, and thus do not interfere with the modern militia. Never in our history has a gun control law been struck down by the federal courts on Second Amendment grounds.

As stated in *U.S. v. Nelson*, 859 F.2d 1318 (8th Cir., 1988), the courts "have analyzed the Second Amendment purely in terms of protecting state militias, rather than individual rights." Noting the NRA's purposeful distortion of the case law, former Chief Justice Burger has accused the gun lobby of a "fraud on the American public."

#### Violent Dissent

Perhaps the unspeakable tragedy of Oklahoma City will cause us to reflect on the limits of dissent in our society. Our system vigilantly protects the right to dissent by peaceful means from our government's policies and actions. But no democracy can tolerate violent dissent; the anarchy of violence is the enemy of freedom.

As Dean Roscoe Pound prophetically wrote more than 35 years ago in "The Development of Constitutional Guarantees of Liberty":

"In the urban industrial society of today a general right to bear efficient arms so as to be enabled to resist oppression by the government would mean that gangs could exercise an extra-legal rule which would defeat the whole Bill of Rights."

For transforming the Framers' Second Amendment protection of state militias into a charter for violent resistance to government, the NRA should be ashamed.

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