



The Real Second Amendment

Guest: Stephen Halbrook

January 29, 2014

Stephen Halbrook is the author of numerous books, including *Gun Control in the Third Reich: Disarming the Jews and “Enemies of the State”*, *The Founders’ Second Amendment: Origins of the Right to Bear Arms*, and *That Every Man Be Armed: Evolution of a Constitutional Right*;

A research fellow at the Independent Institute, Halbrook has won three cases before the U.S. Supreme Court: *Printz v. United States*, *United States v. Thompson/Center Arms Company*, and *Castillo v. United States*.

WOODS: Over the past 20 years or so, it seems as if there has been a scholarly convergence on this subject, where even people who might not in their heart of hearts be super interested in the right to bear arms, nevertheless have had to admit that the gun rights people are more or less correct about the Second Amendment. Am I right about this?

HALBROOK: Yes, you are. There’s an interesting history about that subject, mainly that when the Second Amendment was adopted, the Bill of Rights was ratified in 1791, there was never any controversy about the meaning of the words. And it combines two different thoughts. It’s got the militia clause and then the arms clause. The militia clause states the principle of political philosophy—a well-regulated militia would be necessary to the security of the free state—and then the arms guarantee, the right of the people to keep and bear arms shall not be infringed. That was never controversial until about the 1950s or ‘60s, particularly in the 1960s. And at that time there was a big push nationwide to pass all kinds of firearms prohibitions and registration of handguns at the national level, things like that. So the idea was invented that “the people” means the National Guard and “to bear arms” doesn’t mean to carry arms, it means only to have them in the military. One word was converted after another. The term “right,” instead of being the right of the people, really became a right or power of the state to maintain militias. And then you had a number of federal courts actually adopt this nonsense. It was only in 2001, actually, the first federal appellate court, the Fifth Circuit, in a Texas case, basically held that the Second Amendment does mean what it says and finally the Supreme Court did that in *Heller* in the 2008 case.

WOODS: So let’s go into what exactly it does say. And I know that you take the Jeffersonian view that the Constitution and the amendments are written in a way that the average person is supposed to be able to understand. You’re not supposed to need years and years of legal training. And in fact, to the contrary, years and years of legal training seem to impair people’s ability to understand the Constitution.

I think the difficulty people have is that there is a bit of a philosophical preamble to the Second Amendment. I think when it talks about the militia, this for some people colors the whole amendment, that the whole amendment therefore has to do with the militia. So can you separate that for us? What is the role of the militia in the Second Amendment, and why does the presence of the militia in the Second Amendment not deny that we’re talking about an individual right to bear arms?

HALBROOK: First, let me go back to one thing you said, which was right on point, that years of legal training seem to disqualify people from knowing what the Second Amendment meant. You had the ridiculous situation back in I think about 1991, when the Bill of Rights Bicentennial was being celebrated, there was an American Bar Association report that smugly said that more than half of the American people wrongly think that the Second Amendment protects their right to possess a handgun. Lawyers are the only people who could say without laughing that the people doesn’t mean the people.

WOODS: I know.

HALBROOK: So that was the original meaning. But there’s no problem with having more than one thought in the amendment. Just like the First Amendment covers a whole bunch of subjects. Establishment of religion, freedom of religion, freedom of the press, freedom of speech, assemblies and to petition the government for address of grievances. The idea that there can be more than one thought in one of the amendments is pretty simple. The Second Amendment combines only two, instead of about six like the First Amendment. So you have a well-regulated militia being declared to be necessary for the security of a free state. That had to do with our bad experiences with the British standing army, and there was quite an aversion to these professional armies, mercenary armies, what have you. And the idea was that a militia would be, in the first instance, the true guarantor of liberty in a free state, and if you

don't have a well-regulated militia— And by the way, composed of the body of the people trained to arms, that was the use of those terms in the Virginia Declaration of Rights in 1776. In fact, when Madison first proposed the Second Amendment to the House of Representatives, he didn't have that clause, but it was put in there by a House committee composed of the body of the people, defining the militia. And then that was taken out to be more concise in the Senate. So everybody understood a well-regulated militia to mean the body of the people trained to arms, basically. It didn't mean over-regulated by government. It meant that they knew how to shoot well and they could cooperate together for mutual defense.

WOODS: But today, of course, we don't live that way. Right? We don't have the militia, except in a trivial sense. So somebody could, I think, argue, and they have tried to argue, that the premise of the Second Amendment is that there is a tie between the right of the people to bear arms and the militia. How can we connect the Second Amendment to somebody who just wants a handgun for personal protection when the Second Amendment's text seems to have so much to do with the militia, which doesn't seem to have anything to do with any of that?

HALBROOK: Well, looking at it from a founder's perspective, it wouldn't have been saying something like, duck hunting being really fun, the right of the people to keep and bear arms shall not be infringed. Now granted, self-defense is more important than duck hunting. But what they felt was that by recognizing that the people have a right, the people at large have a right to bear arms, that would promote a well-regulated militia. If well-regulated militia would be impossible unless the people could keep and bear arms, anytime you would have a military force armed by the government, it could be disarmed by the government. And their thought was that we've had enough of this omnipotent government with the British that were thrown out of the colonies in the revolution, that the whole idea was that by recognizing this right, you have people exercising the right, they would have their own guns. They would be ready to be called out in an emergency to overthrow tyranny, defend against invasion, defend against insurrection, all of those things. So that's what the founders were thinking about. That's how they tied the two thoughts together in one amendment.

WOODS: Now we can't necessarily glean from the text of the Second Amendment everything we might want to know about it. We might have to find out what the intentions were, etc., of the people who ratified it. But what can we figure out, based on the contemporary sources, would have been considered to be the limits on people's right to bear arms? For example, were they envisioning that everybody would have the right to have the most advanced technology of the time? In other words, could everybody today have a tank and then point to the Second Amendment as justification? Was there any type of limitation envisioned in the Second Amendment?

HALBROOK: Well, I think the text of the Second Amendment itself does that. It says keep and bear arms. Bear arms means to carry arms, and so if you're a person carrying an arm, you're not driving a tank or having a jet fighter. So I think that's inherent in the text. Although at the time this was discussed, there never was any prohibition then of, like of an individual possessing a cannon or anything. That was really common in some places. In fact, where you had independent militia companies, for example, it wasn't until the 1968 federal gun control law that things like cannons and mortars and whatnot were actually regulated federally. So you had a lot of veterans bringing all kinds of stuff back from World War II. But it never really led to any harm. At this point in history, these kinds of things are highly regulated and nobody argues that there is a Second Amendment right to them. But at the founding, there was no regulation of that type.

WOODS: Now you've got quite a bit of material in your book *The Founders' Second Amendment* that starts off in the years before independence. What kind of light is shed on this overall subject by studying that history and beginning there instead of just beginning with the drafting of the Second Amendment?

HALBROOK: Well, you have to know what led to the Second Amendment, why it was considered a problem, the idea of the populace being disarmed, and also the antecedents to the Second Amendment. You start with the idea, well the English Declaration of Rights in 1689 declared that the Englishmen have a right to bear arms, or to have arms was the term. Blackstone talks about that right as meaning a right to personal defense and a right to resist oppression. So it was very well ingrained in the minds of the colonists. And then that right got stepped on by the Crown because at the same time the Crown is attempting to force the various impositions of taxation and closing Boston Harbor and seizing merchandise, things like that, in order to enforce those things, they had to send a standing army to Boston. And they had to start taking measures to put the squeeze on gun possession and finally to try to deprive the colonists of arms. So you have things gradually happening like a ban on importation of firearms and ammunition into the colonies. Back in those days they had large powder houses where large amounts of gunpowder were stored. And that was black powder, which was a lot more volatile in those days. Like a gun shop wouldn't have more than two cans of black powder, and the rest would be in the public storehouse. Though General Gage, who was the head of the British forces in the Americas, made it where people couldn't get gunpowder out of these powder houses. That was called the powder alarm. And then things start happening like militias starting to be disarmed, and you had finally the searches and seizures of people going in and out of Boston to deprive them of, to search for guns and then to take them away. And finally all hell broke loose when the Brits sent troops to Lexington and Concord to take away the militia arms that were there, and they got beat.

Not many people know what happened after that, though. General Gage—who, as I said, was actually governor of Massachusetts colony, as well as general of the British forces—declared that everybody in Boston had to surrender their arms if they wanted to

leave town. Everybody wanted to leave town then and so they all, on their designated day, it was a few days after Lexington and Concord, turned in their arms at Faneuil Hall—which is still there, of course; that was the meeting place for the town—and they took your name down and what you gave them, and they were supposed to get them back. And then the British soldiers came and seized them. And that was considered an active perfidy by General Gage. So there you had the first seizure of civilian arms of people who had nothing to do even with the resistance activities at Lexington and Concord. So from that point, it became a question of arms revolution that was sparked, 1775, the War of Independence was underway and basically at that point, it was, the rules of war applied, as opposed to the normal rules of respecting others' rights to free speech and to have arms. Well, both sides were busting up each other's presses and seizing each other's arms and things like that. That was the impetus for the Second Amendment.

WOODS: You know, Stephen, when you mentioned the right of individuals to have a weapon for self-defense as being a historic right of Britons, it put me in mind of an argument that says that even if we didn't have the Second Amendment, then the right to keep and bear arms would be preserved in the Ninth Amendment, because it's a traditional right. I was going to run that by you, and then as I'm sitting here, I'm thinking, you know what? I think I got that argument from you years ago! Am I wrong? Have you ever made that claim? That the Ninth Amendment would already contain the right to keep and bear arms because it is a traditional right?

HALBROOK: Well, there were certainly commentators in the early nineteenth century who basically said that, like the self-defense is unenumerated right. And so you could certainly make an argument that you have a right to have guns. There's never been, in modern times, any court would admit that. You have courts, and of course denying that the Second Amendment means what it says and also saying that the Ninth Amendment doesn't really protect anything. So unfortunately, the Ninth Amendment has never been recognized very much by courts for anything, and it was intended that people had all kinds of rights, they were talked about during the time of the founding, and the idea was you couldn't put them all on paper, so let's use the language in the Ninth Amendment.

WOODS: How did you get interested in this issue, such that you would devote so much scholarly work to this subject? Were you already interested in gun rights and then you thought, I'll check out the history? Was it that you thought that the current crop of historians or legal scholars was just all wrong? Was it a combination of these motives?

HALBROOK: Well, when I was an undergraduate in college, a couple of things. One, I was interested in the Second Amendment anyway and I went to the state supreme court library in Florida and found that there were no law review articles on the subject, other than a couple that weren't very good and were very old. And at that time, there was a lot of discussion about it because the federal Gun Control Act was working its way through Congress. This is in the mid-to-late '60s. And also I started reading the various debates on the Constitution—not just the *Federalist Papers* and things like that, but the debates in the state conventions, where you had Patrick Henry making predictions about some things that really did come true, virtually everything they predicted that was adverse has come true, not just on this topic. But the swarms of tax collectors throughout the country and just all kinds of things that are probably worse than they ever conceived they would be. But at any rate, there was nothing published on it. Nobody was speaking up for the right very much and so it was something I felt was worthy of being devoted to.

WOODS: These days, it seems that even when you get one of these very high-profile tragedies involving a crazed shooter and innocent victims, etc., the politicians by and large are finding that there is just no traction for gun-control measures. So do you think it's safe to say that in effect, gun control, the whole movement, is more or less dead in the United States?

HALBROOK: Well. no. It ebbs and flows, just like on any other topic. Back in the '20s and '30s, you had a big push for controls, things like proposed handgun bans, and you had a lot of prejudice against—well, this was the Jim Crow era, for example. In an era where immigrants weren't thought of as being respectable people. And so you had a lot of people fanning the flames of racism to ban guns basically. And finally, you get some federal controls in the '30s. There was some controls at the state level. That all went away when Pearl Harbor was bombed because then it became so irrelevant. The idea was, we need as many people trained to arms as possible. I mean, banning guns is ridiculous. So then the idea didn't come back until the '60s. And so you had a huge push and a tidal wave of gun-control thought at the time and disrespect for Second Amendment rights. Well, during the '90s when Clinton got his Brady Act passed and the so-called assault weapon ban passed, the Congress changed after that and the Republicans took over Congress. So they learned a lesson from that. Bill Clinton wrote in his memoirs that the NRA was to blame, because of this gun issue, for the Democrats losing control of Congress.

WOODS: I didn't know he said that. Interesting.

HALBROOK: Yes, he did. So I think a lot of Democrats have learned from that. And also, just generally speaking, this is not a partisan issue. It's not a Democrat-Republican thing. At bottom, I mean it's a question of you respect the rights of your constituents and I think that's equal in both parties who do. And then they're just not going to pass this sort of stuff, especially knowing that it doesn't do anything for the problems that we've encountered.

WOODS: Stephen, if people want to find out more about your work and your books and what you're up to, how can they find you online?

HALBROOK: Just my website, StephenHalbrook.com. I have my latest book, it's called *Gun Control and the Third Reich: Disarming the Jews and Enemies of the State*. There's a lot of stuff on the website if you're interested in Second Amendment issues, and you can just Google my name and find books on Amazon or whatever. So it's a topic that's really made a lot of progress since 20, 30 years ago, and the Supreme Court agrees with our position now, so that's really a step forward.