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## CONGRESS INTERPRETS THE SECOND AMENDMENT: DECLARATIONS BY A CO-EQUAL BRANCH ON THE INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS

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### I. INTRODUCTION: CONGRESS RECOGNIZES AND REAFFIRMS THE SECOND AMENDMENT RIGHT OF INDIVIDUALS "TO KEEP AND BEAR ARMS"

The Bill of Rights, including the Second Amendment right to keep and bear firearms, originated in the United States Congress in 1789 before being ratified by the States.<sup>1</sup> On three occasions since then—in 1866, 1941, and 1986—Congress enacted statutes to reaffirm this guarantee of personal freedom and to adopt specific safeguards to enforce it.<sup>2</sup> This Article (pg.598) analyzes the legislative movement to register firearms in the 1930s, and the swinging of the pendulum in the opposite direction in the 1941 legislation as a reaction to the worldwide growth of police states. This Article also analyzes the 1986 declaration and considers whether the judiciary should defer to expansive interpretations of constitutional rights by the legislative branch.

In 1789, Representative James Madison introduced what ultimately became the Bill of Rights, stating that the amendments "relate first to private rights."<sup>3</sup> A leading popular analysis

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<sup>1</sup> This author has previously analyzed the background to Congress' action in *Encroachments of the Crown on the Liberty of the Subject: Pre-Revolutionary Origins of the Second Amendment*, 15 U. DAYTON L. REV. 91 (1989), and *The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment*, 26 VAL. U. L. REV. 131 (1991).

Academic discussion of the Second Amendment has increased greatly in recent years. See, e.g., Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989); Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1162-73 (1991); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991).

<sup>2</sup> E.g., 14 Stat. 176-77 (1866). Interestingly enough, the Congressional declarations on the Second Amendment have been the subject of very little judicial or scholarly comment. However, the significance of the 1866 declaration to the intent of the Fourteenth Amendment is recognized in Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1245 n.228 (1992), and MICHAEL K. CURTIS, NO STATE SHALL ABRIDGE 104 (1986). A major study has been published on the subject. Stephen P. Halbrook, *Personal Security, Personal Liberty, and "The Constitutional Right to Bear Arms": Visions of the Framers of the Fourteenth Amendment*, 5 SETON HALL CONST. L.J. 341 (1995). Moreover, the 1941 and 1986 declarations have not been the subject of extensive scholarly study. See David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 CUMB. L. REV. 585 (1986-87) (discussing the 1986 statutory provisions).

<sup>3</sup> 12 JAMES MADISON JR., PAPERS 193-94 (1979).

endorsed by Madison explained that "civil rulers ... may attempt to tyrannize," and thus that "the people are confirmed ... in their right to keep and bear their private arms."<sup>4</sup> Accordingly, as proposed by Congress and ratified by the States, the Second Amendment 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."<sup>5</sup>

When the slaves were freed as a result of the Civil War, the Southern States reenacted the slave codes, which made it illegal for blacks to exercise basic civil rights, including the right to purchase, own and carry firearms.<sup>6</sup> Congress, in turn, responded by passing the Freedmen's Bureau Act of 1866, which provided:

the right ... to have *full and equal benefit of all laws and proceedings concerning personal liberty, personal security*, and the acquisition, enjoyment, and disposition of estate, real and personal, *including the constitutional right to bear arms*, shall be secured to and enjoyed by all the citizens of such State or district without respect to race or color or previous condition of slavery.<sup>7</sup>

Passing as a veto override, the Freedmen's Bureau Act was approved by over two-thirds of Congress.<sup>8</sup> The same two-thirds of Congress adopted the Fourteenth Amendment, which provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law ...."<sup>9</sup> Senator Jacob Howard, when introducing the amendment, explained that its purpose was to protect (pg.599) "personal rights," such as "the right to keep and bear arms," from State infringement.<sup>10</sup>

In the 1941 legislative effort, shortly before Pearl Harbor, Congress authorized the President to requisition property from the private sector on payment of fair compensation.<sup>11</sup> The Property Requisition Act included the following:

Nothing contained in this Act shall be construed—

- (1) to authorize the requisitioning or require the registration of any firearms possessed by any individual for his personal protection or sport (and the possession of which is not prohibited or the registration of which is not required by existing law), ... [or]
- (2) to impair or infringe in any manner the right of any individual to keep and bear arms ....<sup>12</sup>

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<sup>4</sup> *Id.* at 239-40, 257; *Remarks on the First Part of the Amendments to the Federal Constitution*, FED. GAZETTE, June 18, 1789, at 2.

<sup>5</sup> U.S. CONST. amend II.

<sup>6</sup> NORMAN CHACHKIN, PRACTICING LAW INSTITUTE, HISTORY OF CONSTITUTIONAL LITIGATION FOR HUMAN RIGHTS ISSUES—ESPECIALLY RACE ISSUES 5-7 (1994).

<sup>7</sup> 14 Stat. 176-77 (1866) (emphasis added).

<sup>8</sup> *See id.*

<sup>9</sup> U.S. CONST. amend. XIV, § 1.

<sup>10</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2764-65 (1866).

<sup>11</sup> Property Requisition Act, Ch. 445, 55 Stat. 742 (1941).

<sup>12</sup> *Id.*

Explaining the Property Requisition Act, the House Committee on Military Affairs provided the following statement:

In view of the fact that certain totalitarian and dictatorial nations are now engaged in the willful and wholesale destruction of personal rights and liberties, our committee deems it appropriate for the Congress to expressly state that the proposed legislation shall not be construed to impair or infringe the constitutional right of the people to bear arms.... There is no disposition on the part of this Government to depart from the concepts and principles of personal rights and liberties expressed in our Constitution.<sup>13</sup>

In 1986, Congress passed legislation supporting the right to keep and bear arms for the third, and most recent, time.<sup>14</sup> That legislation, the Firearms Owners' Protection Act of 1986, provides:

CONGRESSIONAL FINDINGS—The Congress finds that—

- (1) the rights of citizens—
  - (A) to keep and bear arms under the second amendment to the United States Constitution;
  - (B) to security against illegal and unreasonable searches and seizures under the fourth amendment;
  - (C) against uncompensated taking of property, double jeopardy, and assurance of due process of law under the fifth amendment; and
  - (D) against unconstitutional exercise of authority under the ninth and tenth amendments;<sup>(pg.600)</sup>

require additional legislation to correct existing firearms statutes and enforcement policies; and

- (2) additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968, that "it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap shooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes."<sup>15</sup>

Initially, this Article focuses on the constitutional debate in the twentieth century concerning firearms that resulted in the adoption of the Property Requisition Act of 1941.<sup>16</sup> This debate ensued in two phases. In the first, Congress utilized its taxation power to require the registration of a narrow

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<sup>13</sup> H.R. REP. No. 1120, 77th Cong., 1st Sess. 2 (1941).

<sup>14</sup> Firearms Owners' Protection Act § 1(b), 100 Stat. 449 (1986) (codified at 18 U.S.C. § 921 *et seq.*).

<sup>15</sup> *Id.*

<sup>16</sup> Property Requisition Act, Ch. 445, 55 Stat. 742 (1941).

class of firearms, such as machineguns, in the National Firearms Act of 1934.<sup>17</sup> In this debate, while realizing that it lacked the power to prohibit firearms, Congress recognized that it could regulate firearms through the exercise of an enumerated power.<sup>18</sup>

In the second phase of this debate, many members of Congress began to react strongly against proposals to register a wide class of ordinary firearms.<sup>19</sup> This reaction was strongly influenced by the rise of the totalitarian police states in Nazi Germany and Stalinist Russia.<sup>20</sup> By the time the Property Requisition Act was passed in 1941, Congress was prepared to declare a moratorium on registration and to again reaffirm the right of individuals to keep and bear arms.<sup>21</sup>

This Article also includes with an analysis of the Congressional declaration on the Second Amendment contained in the Firearms Owners' Protection Act of 1986.<sup>22</sup> The question is then raised whether the judiciary should defer to such a broad Congressional declaration concerning the meaning of a Bill of Rights guarantee.<sup>23</sup> After analyzing both sides of the issue, this Article concludes that such an expansive declaration, since it is made by the popular branch elected by the people, is entitled to great weight.<sup>(pg.601)</sup>

## II. REGISTRATION, THE POWER TO TAX, AND THE *NATIONAL FIREARMS ACT OF 1934*

Proposals to require registration or prohibition of firearms were from the beginning of the twentieth century laced with the rhetoric of prohibition, negrophobia, and anti-Communism.<sup>24</sup> Evincing the racism that was often behind efforts to establish gun control measures, an editor of Virginia's law review commented:

It is a matter of common knowledge that in this state and in several others, the more especially in the Southern states where the negro population is so large, that this cowardly practice of "toting" guns has always been one of the most fruitful sources of crime, and we believe the criminal statistics will bear us out in this statement. There would be a very decided falling off of killings "in the heat of passion" if a prohibitive tax were laid on the privilege of handling and disposing of revolvers and other small arms, or else that every person purchasing such deadly weapons should be required to register ....<sup>25</sup>

In 1926, Virginia succeeded in passing a registration requirement and a prohibitive tax on the possession of firearms.<sup>26</sup> Later, however, the Virginia law was declared unconstitutional.<sup>27</sup>

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<sup>17</sup> 48 Stat. 1236 (1934).

<sup>18</sup> *See infra* notes 66-75 and accompanying text.

<sup>19</sup> *See infra* notes 192-210 and accompanying text.

<sup>20</sup> *See infra* notes 193-96 and accompanying text.

<sup>21</sup> *See* 55 Stat. 742 (1941).

<sup>22</sup> 100 Stat. 449 (1986).

<sup>23</sup> *See id.*

<sup>24</sup> *See, e.g.,* Comment, *Carrying Concealed Weapons*, 15 VA. L. REG. 391-92 (1909).

<sup>25</sup> *Id.*

<sup>26</sup> 1926 Va. Acts 285-87.

<sup>27</sup> *Commonwealth v. O'Neal*, 13 VA. L. REG., N.S. 746 (Hustings Ct.-Roanoke 1928).

Meanwhile, Senator John K. Shields, a Tennessee Democrat, introduced a bill in the United States Congress designed to prohibit the shipment of pistols in interstate commerce.<sup>28</sup> With racism again at the forefront, Shields inserted into the record a report in support of his bill:

Can not we, the dominant race, upon whom depends the enforcement of the law, so enforce the law that we will prevent the colored people from preying upon each other? ...

Here we have laid bare the principal cause for the high murder rate in Memphis—the carrying by colored people of a concealed deadly weapon, most often a pistol....

It is unspeakable that there is public sentiment among the whites that negroes should not be disturbed in their carrying of concealed weapons....

Neither do we need pistols for the protection of our homes. If we need a firearm to repel a burglar, a sawed-off shotgun with its load of buckshot is far more deadly and surer than the pistol.<sup>29</sup> (pg.602)

In any event, while racism often laced the rhetoric of the era, proponents of gun control employed other rationales as well to support their position.

The debate on the National Firearms Act included rhetoric about armed bootleggers and further advocated a constitutional amendment applying the language of the Eighteenth Amendment to concealed weapons.<sup>30</sup> Such a proposal, and the stated basis of the bill in the constitutional power to establish post offices, exhibited a consciousness that Congress held no inherent power elsewhere in the Constitution to regulate firearms.<sup>31</sup> Opponents of the bill relied on the Second Amendment right to keep firearms in the home, and the fact that many rural persons could not obtain firearms other than through the mail.<sup>32</sup> Nevertheless, gun control proponents were unrelenting, even ridiculing one opponent of gun control for suggesting that the Second Amendment protected the right of women to use arms for self defense.<sup>33</sup> Finally, the rhetoric of the day prevailed, and the bill declaring it illegal to ship firearms through the mail became law.<sup>34</sup>

Violence caused by the prohibition against liquor, coupled with fear or paranoia about Communism, created the impetus for more comprehensive gun control.<sup>35</sup> Hearings were held in 1930 concerning bills to restrict interstate commerce in pistols, revolvers and machine guns.<sup>36</sup> This debate culminated in passage of the National Firearms Act of 1934 ("NFA"), the basis for which Congress found in the revenue power.<sup>37</sup> The NFA, through a system of taxation and registration, severely

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<sup>28</sup> 65 CONG. REC. 3945 (1924).

<sup>29</sup> *Id.* at 3946.

<sup>30</sup> 66 CONG. REC. 732 (1924).

<sup>31</sup> *See id.*

<sup>32</sup> *See id.*

<sup>33</sup> *Id.* at 728.

<sup>34</sup> *See* 18 U.S.C. § 1715 (1995).

<sup>35</sup> *See Firearms: Hearing on H.R. 2569, H.R. 6606, H.R. 6607, and H.R. 11325, before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 71st Cong., 2d Sess. 1-3, 7 (1930) [hereinafter 1930 House Firearms Hearing].*

<sup>36</sup> *See id.*

<sup>37</sup> National Firearms Act, ch. 757, 48 Stat. 1236 (1934).

restricted machineguns, short-barreled shotguns and rifles.<sup>38</sup> Additionally, the Federal Firearms Act of 1938 ("FFA") regulated commerce in all firearms.<sup>39</sup> Throughout this process, however, Congress recognized that it lacked the power to prohibit possession of firearms altogether because of the Second Amendment, and because Congressional powers were limited to enumerated powers such as taxation and regulation of interstate commerce.<sup>40</sup>

A hearing was held in 1930 on several bills, all of which were generally modeled on alcohol prohibition legislation.<sup>41</sup> These bills severely restricted interstate commerce in pistols, revolvers and machine guns, and allowed (pg.603) states to prohibit these types of weapons from entering their borders.<sup>42</sup> Representative John E. Nelson, a Maine Republican, referring first to prohibition-spawned gang violence, and then to the threat of communist insurrection, explained:

I know of no way to stop their securing these machine guns without absolutely restricting the sale of them or prohibiting interstate transportation.

There is also a danger of certain groups within this country, such as the communists acquiring machine guns, and establishing secret arsenals of them in certain cities, wherever they want, and using them whenever it suits their revolutionary plans. It has happened and is happening all the time in foreign countries; for instance, in Germany, storehouses of machines guns have been recently found, belonging to the German communists.<sup>43</sup>

Obviously, red-baiting as a method to avoid constitutional restraints did not begin with Joe McCarthy in the 1950s.

Proposing more limited restrictions, Representative Hamilton Fish Jr., a New York Republican, explained that his bill would restrict only machine guns, not handguns:

The possession of pistols would involve the right of private American citizens to arm themselves in self-defense, in certain cases.

I claim that this bill is entirely separate from those other bills referring to pistols and other small arms. I do not want to deprive American citizens of any of their rights of self-defense. This is intended simply to help protect American citizens from underworld criminals who are organized in big groups.<sup>44</sup>

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<sup>38</sup> *See id.*

<sup>39</sup> Federal Firearms Act, ch. 850, 52 Stat. 1250 (1938).

<sup>40</sup> U.S. CONST. art I, § 8.

<sup>41</sup> *See 1930 House Firearms Hearing, supra note 35, at 1-7.*

<sup>42</sup> *See id.*

<sup>43</sup> *Id.* at 14. In fact, the German Communists adopted the strategy that "arms are normally acquired in the course of the insurrection itself." A. NEUBERG, ARMED INSURRECTION 195, 269 (1970), reprint of *Der bewaffnete Aufstand* (1928). As in the Hamburg Uprising of 1923, the communists planned to seize most of their firearms, including machine guns, from the police. *Id.* at 89-103. Alarmist assertions about Communism, however, made grist for many a mill, not the least of which was German National Socialism. *See, e.g.,* ADOLF HITLER, MEIN KAMPF (1924) (making effective use of the anti-communist theme to show the need for strong governmental power). Indeed, England was partly disarmed after the British cabinet secretly determined in 1919 that the working class threatened a "Red Revolution." DAVID B. KOPEL, THE SAMURAI, THE MOUNTIE, AND THE COWBOY 74 (1992).

<sup>44</sup> *1930 House Firearms Hearing, supra note 35, at 15.*

Representative George Huddleson, an Alabama Democrat, was quick to object to these firearm restrictions on the grounds that the federal government (pg.604) has no constitutional function regarding to the preservation of public order:

That is reserved expressly to the States and is not granted to the Federal Government by our national charter. The Federal Government has nothing to do under the Constitution with the preservation of public order. To pass this bill is to pass a bill for an unconstitutional purpose, under the guise of regulating interstate commerce.<sup>45</sup>

As a result of Representative Huddleson's objections, the following exchange ensued:

MR. FISH. I admit that where you have 48 States, and the safety of all the people is involved, that you have a right to stretch the constitutional provisions to a considerable degree. But I for one am strongly in favor of it, even if it were aimed solely against the communists.

MR. HUDDLESTON. You stretch the Constitution this way and then somebody else stretches it the other way—what is the use of a constitution, anyhow?<sup>46</sup>

Representative Fish proceeded to argue that his bill was valid because "it is copied word for word from the prohibition law, which has been held constitutional by the Supreme Court."<sup>47</sup> Left unsaid in this debate was the fact that in order to make a prohibition on commerce in alcohol constitutional, it was deemed necessary to pass an explicit amendment.<sup>48</sup>

Pistols, revolvers, short-barrelled rifles, shotguns and machine guns all would have been prohibited from interstate commerce under the bill proposed by Representative Joe Crail, a California Republican.<sup>49</sup> In supporting his bill, Crail also appealed to counterrevolutionary themes:

I was down in Cuba during the Spanish-American War .... The revolution had been going on [sic] there for 25 years. It was a great problem to establish peace and law and order, and our Government directing affairs down in Cuba issued a proclamation forbidding the use of rifles and deadly weapons and giving a bounty in gold, American money, (pg.605) to everybody that would bring in a firearm. The Cubans brought them in there by the thousand and thousands ....

... There was nothing that helped to regulate and make possible the peace of Cuba as did that one act upon the part of the Government of the United States, the absolute putting away of these firearms, putting them out of the reach of the people, and leaving the only

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<sup>45</sup> *Id.* at 16.

<sup>46</sup> *Id.* at 17.

<sup>47</sup> *Id.* at 18.

<sup>48</sup> U.S. CONST. amend XVIII. The Eighteenth Amendment, which was ratified in 1919 and repealed in 1933, provided:  
Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

*Id.*

<sup>49</sup> 1930 *House Firearms Hearing*, *supra* note 35, at 2, 28.

firearms in the island those that were in the possession of the peace officers of the government.<sup>50</sup>

The 1930 bills failed to become law, but the great debate over the registration of different types of firearms continued in hearings preceding passage of the NFA.<sup>51</sup> Once enacted, the NFA required registration of machine guns, short-barreled shotguns, rifles, and other selected firearms.<sup>52</sup> Pistols and revolvers were included in the original bills, but were removed as a compromise measure.<sup>53</sup>

The constitutional basis for the NFA was extensively discussed in Congressional hearings prior to its enactment in 1934.<sup>54</sup> Congress was acutely aware that it had no constitutional authority to prohibit possession of machineguns and other firearms altogether.<sup>55</sup> Initially, the registration bills relied on both the interstate commerce and the taxation powers.<sup>56</sup> As adopted, however, the NFA was passed solely as a tax measure.<sup>57</sup>

The leading spokesman for the bill was Homer S. Cummings, U.S. Attorney General, who spoke to the House Ways and Means Committee early in its hearings:

Now we proceed in this bill generally under two powers—one, the taxing power and the other, the power to regulate interstate commerce. The advantages of using the taxing power with respect to the identification of the weapons and the sale, and so forth, are quite manifest. In the first place, there is already in existence a certain machinery for dealing with the collection of taxes of this kind, and these powers are being preserved in this particular act. In addition to that, it is revenue-producing....(pg.606)

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... We have followed, where we could, the language of existing laws as to revenue terminology; and we have followed the Harrison Anti-Narcotic Act in language so as to get the benefit of any possible interpretation that the courts may have made of that act.<sup>58</sup>

Noting that Congress had no power to prohibit firearms altogether, Cummings stated: "[W]e have no inherent police powers to go into certain localities and deal with local crime. It is only when we can reach those things under the interstate commerce provision, or under the use of the mails, or by the power of taxation, that we can act."<sup>59</sup>

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<sup>50</sup> *Id.* at 29. As Crail spoke, Cuba was suffering under the Machado dictatorship, one of several which ruled by corruption and terror. *See* GEORGE PENDLE, A HISTORY OF LATIN AMERICA 172-75 (1967). The disarming of the people—along with American military intervention and economic domination—set the stage for a succession of such tyrants. *See id.*

<sup>51</sup> *See, e.g., National Firearms Act: Hearings on H.R. 9066, Before the House Committee on Ways and Means, 73d Cong., 2d Sess. 6 (1934) [hereinafter 1934 House Firearms Hearings].*

<sup>52</sup> National Firearms Act, ch. 757, 48 Stat. 1236 (1934) (codified as amended at 26 U.S.C. §§ 5801-72 (1988)).

<sup>53</sup> *See* H.R. REP. No. 1780, 73d Cong., 2d Sess. 1-2 (1934).

<sup>54</sup> *See, e.g., 1934 House Firearms Hearings, supra* note 51, at 6.

<sup>55</sup> *Id.* at 19.

<sup>56</sup> *Id.* at 86.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 6.

<sup>59</sup> *Id.* at 8.



The amount of the transfer tax was discussed, and \$200.00 was suggested because that amount represented the average cost of a machinegun, thus imposing a 100-percent tax.<sup>60</sup> No constitutional power could be found, however, to require registration of existing machineguns.<sup>61</sup> Attorney General Cummings stated to Congress that such a measure would be unconstitutional.<sup>62</sup>

Representative Harold Knutson, a Minnesota Republican, asked why Congress should permit the sale of machine guns to anyone other than the Government.<sup>63</sup> In response, Congressman Hatton W. Sumners, a Texas Democrat, suggested "that this is a revenue measure and you have to make it possible at least in theory for these things to move in order to get internal revenue."<sup>64</sup> Attorney General Cummings agreed, stating: "That is the answer exactly."<sup>65</sup>

In perhaps the most significant discussion of the hearings, Congressman David J. Lewis asked how the bill could be reconciled with the Second Amendment right to keep and bear arms:

MR. LEWIS: Lawyer though I am, I have never quite understood how the laws of the various States have been reconciled with the provision in our Constitution denying the privilege to the legislature to take away the right to carry arms. Concealed-weapon laws, of course, are familiar in the various States; there is a legal theory upon which we prohibit the carrying of weapons—the smaller weapons.

ATTORNEY GENERAL CUMMINGS: Do you have any doubt as to the power of the Government to deal with machine guns as they are transported in interstate commerce?<sup>(pg.607)</sup>

MR. LEWIS: I hope the courts will find no doubt on a subject like this, General; but I was curious to know how we escaped that provision in the Constitution.

ATTORNEY GENERAL CUMMINGS: Oh, we do not attempt to escape it. We are dealing with another power, namely, the power of taxation, and of regulation under the interstate commerce clause. You see, if we made a statute absolutely forbidding any human being to have a machine gun, you might say there is some constitutional question involved. But when you say, "We will tax the machine gun," and when you say that "the absence of a license showing payment of the tax has been made indicates that a crime has been perpetrated," you are easily within the law.

MR. LEWIS: In other words, it does not amount to prohibition, but allows of regulation.

ATTORNEY GENERAL CUMMINGS: That is the idea. We have studied that very carefully.<sup>66</sup>

Thus, Cummings conceded that Congress has no power to prohibit possession of machine guns for two reasons.<sup>67</sup> First, the Second Amendment guarantees an individual right to possess arms; that

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<sup>60</sup> *Id.* at 12.

<sup>61</sup> *Id.* at 13.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 13-14.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 14.

<sup>66</sup> *Id.* at 19.

<sup>67</sup> *See id.*

right may be regulated but not prohibited.<sup>68</sup> Second, even without the Bill of Rights provision, Congress has no authority to ban possession *per se*, but may regulate through its revenue and commerce powers.<sup>69</sup>

Congressman Samuel B. Hill, a Washington Democrat, noting that the commerce power could be invoked to regulate sales of machine guns imported or shipped across state lines, asked how intrastate sales could be regulated: "Now if the person receiving that gun ... sells it to some other person within the same State as he is, does the interstate commerce character still obtain?"<sup>70</sup> Attorney General Cummings replied: "Well we would get that person, if he is a criminal, under the taxing provision."<sup>71</sup>

In committee, the NFA was altered to delete the interstate commerce provisions and to require registration of existing firearms.<sup>72</sup> Assistant Attorney General Joseph B. Keenan explained that:

[T]he bill as originally drafted exercised two powers, one under the taxation clause and the other under the commerce clause. Under the bill as now submitted, it follows the theory of taxation all the way through, and it contains this one affirmative change of extreme importance in that it calls for a registration of all firearms within a prescribed period.<sup>73</sup> (pg.608)

Assistant Attorney General Keenan explained the constitutional basis of the registration requirement to Congressman Fred M. Vinson, a Kentucky Democrat, as follows:

MR. VINSON: As to those weapons now owned, is it not the taxation power which provides the basis for requiring the registration of the firearms now owned and possessed?

MR. KEENAN: Yes. In executing or administering the taxation provision it is important to be able to identify arms to see which possessors have paid taxes and which firearms have been taxed and which have not.<sup>74</sup>

Even then, however, the constitutionality of requiring registration of existing firearms was doubted, and no penalty was included for failure to register.<sup>75</sup> The new provision was further explained as follows:

MR. VINSON: In fact, the entire interstate commerce basis is withdrawn from the bill?

MR. KEENAN: The permit, as such. Of course, I have not come to that part yet, but it is made unlawful for anyone to transport any firearm described in this act in interstate commerce unless he has registered, as provided under the registration clause, the existing

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<sup>68</sup> *See id.*

<sup>69</sup> *See id.*

<sup>70</sup> *Id.* at 24.

<sup>71</sup> *Id.*

<sup>72</sup> *See id.* at 86.

<sup>73</sup> *Id.* at 86.

<sup>74</sup> *Id.* at 87.

<sup>75</sup> *Id.*

firearms, or unless he has complied with the provisions, that is, the fingerprinting, and so forth, relative to acquiring firearms after the passage of the act.

MR. VINSON: I think you stated originally that [the NFA], as introduced on April 11 of this year, had as its foundation taxation and interstate commerce, but that the interstate commerce feature had been withdrawn and that it was presented purely with the taxation feature.

MR. KEENAN: I meant by that statement, that now you are not required to get a permit to bring a firearm from one State to another. You are required to register all existing arms, and you are required to observe all the formalities for the purchase of arms described in the act, after its passage.<sup>76</sup>

To clarify the issue, General Keenan reiterated: "The purpose [of registration] is to determine whether or not a gun in a certain instance was purchased before or after the passage of this act, to determine whether or not the tax has been properly paid upon it."<sup>77</sup> He nonetheless conceded that no gangster would register a firearm.<sup>78</sup>

The issue of why Congress could not simply ban possession of machine guns was again raised, this time by Congressman Allen T. Treadway, a Massachusetts Republican:<sup>(pg.609)</sup>

MR. TREADWAY: What benefit is there in allowing machine guns to be legally recognized at all? Why not exclude them from manufacture?

MR. KEENAN: We have not the power to do that under the Constitution of the United States. Can the Congressman suggest under what theory we could prohibit the manufacture of machine guns?

MR. TREADWAY: You could prohibit anybody from owning them.

MR. KEENAN: I do not think we can prohibit anybody from owning them. I do not think that power resides in Congress.<sup>79</sup>

Originally, the bill would have treated pistols and revolvers the same as machine guns, but a compromise removed the coverage of pistols and revolvers.<sup>80</sup> Congressman Claude A. Fuller, an Arkansas Democrat, asked why pistols could not simply be banned:

MR. FULLER: What would you think of a law which prohibits the manufacture or sale of pistols to any person except the Government or an officer of the law?

MR. KEENAN: I think that would be an excellent provision if the Congress had power to enact such legislation.... The way that can be attacked, naturally, is by some action of the State assemblies.

MR. FULLER: We could enact a law declaring it a felony to sell them.

MR. KEENAN: I do not think that power resides in the Congress. The Federal Government has no police powers.

MR. FULLER: It could require them to be registered and pay them full value and then destroy the weapons.

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<sup>76</sup> *Id.* at 93-94.

<sup>77</sup> *Id.* at 94.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 100.

<sup>80</sup> *See* H.R. REP. No. 1780, 73d Cong., 2d Sess. 1-2 (1934).

MR. KEENAN: I do not think that power resides in Congress.

MR. VINSON: It is because of that lack of power that you appear in support of the bill to do something indirectly through the taxing power which you cannot do directly under the police power?

MR. KEENAN: I would rather answer that we are following the Harrison Act, and the opinions of the Supreme Court.<sup>81</sup>

Discussing the state police power to regulate firearms, Assistant Attorney General Keenan recalled that "the State of Illinois through its legislature had refused to pass an act making it unlawful to possess machine guns without a permit."<sup>82</sup> Keenan noted that "even though [the states] have the power, they do not do those things always."<sup>83</sup> Congress is unlike the British Parliament, which does "not have the same constitutional limitations and constitutional questions that we have.... [W]e are struggling (pg.610) with a difficult problem, with limited powers of the Federal Government."<sup>84</sup>

Charles V. Imlay, of the National Conference of Commissioners on Uniform State Laws, testified extensively on the constitutional issues involved in the dispute, stating that:

I am not opposed to a form of Federal regulation that stops where the Mann Act stops, confining itself to interstate commerce, or which goes as far as some of the acts passed in the State prohibition history, which were in aid of the State, an act which would make it unlawful to transport weapons that would be in violation of State laws on the subject.<sup>85</sup>

Moreover, in the following discussion with Representatives Allen T. Treadway and Daniel R. Reed, Imlay explained why Congress could not prohibit the manufacture of machine guns:

MR. IMLAY: I am in favor of State laws that forbid the manufacture of machine guns except for those few uses.

MR. TREADWAY: You cannot go so far as to say that we can sidestep the Constitution sufficiently to prevent their manufacture?

MR. IMLAY: I think not. I think you can pass a bill which says you cannot ship machine guns across State lines. That is as far as the Mann Act goes.

MR. REED: ... Do you know of any power other than the taxing power and the power to regulate interstate commerce by which we could prevent the manufacture of firearms?

MR. IMLAY: I know of no other power.<sup>86</sup>

The final constitutional point discussed in the above hearing concerned the proposed requirement that persons, other than those liable to pay the tax, nonetheless register their firearms.<sup>87</sup>

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<sup>81</sup> *1934 House Firearms Hearings*, *supra* note 51, at 101-02.

<sup>82</sup> *Id.* at 119.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 134.

<sup>85</sup> *Id.* at 143.

<sup>86</sup> *Id.* at 150.

<sup>87</sup> *See id.* at 16.

Keenan analogized to *Nigro v. United States*,<sup>88</sup> in which the Court considered the constitutionality of Section 2 of the Harrison Narcotic Act, which required that morphine be sold only pursuant to an order on an Internal Revenue form.<sup>89</sup> The Court recalled having upheld the requirement of Section 1 that narcotics be sold only with a tax stamp, because it thereby "did not absolutely prohibit buying or selling [and because] it produced a substantial revenue and contained nothing to indicate that by colorable use of taxation Congress was attempting to invade the reserved powers of the states."<sup>90</sup> The Court in *Nigro* held:<sup>(pg.611)</sup>

In interpreting the act, we must assume that it is a taxing measure, for otherwise it would be no law at all. If it is a mere act for the purpose of regulating and restraining the purchase of the opiate and other drugs, it is beyond the power of Congress, and must be regarded as invalid .... Everything in the construction of Section 2 must be regarded as directed toward the collection of the taxes imposed and Section 1 of the prevention of evasion by persons subject to the tax.<sup>91</sup>

Criminal penalties were imposed to secure evidence of the transaction in order that it may be taxed, not to punish perceived evil in society.<sup>92</sup> "Congress by merely calling an act a taxing act can not make it a legitimate exercise of taxing power under Section 8 of article 1 of the Federal Constitution, if in fact the words of the act show clearly its real purpose is otherwise."<sup>93</sup> The requirement of order forms was not "void as an infringement on state police power where these provisions are genuinely calculated to sustain the revenue features."<sup>94</sup>

In the Senate, the brief hearings that took place in subcommittee contained little discussion of the constitutional basis of the bill.<sup>95</sup> When Maryland Adjutant General M.A. Reckord stated that the bill sought to regulate firearms "under the subterfuge of a tax bill," Senator Royal S. Copeland, a New York Democrat, replied: "Is it a subterfuge for a department of the Government to find ways, under the Constitution, to regulate an evil?"<sup>96</sup>

Additionally, the House Ways and Means Committee report on the bill, which the Senate Finance Committee report repeats verbatim, explained its basis as follows:

In general this bill follows the plan of the Harrison Anti-Narcotic Act and adopts the constitutional principle supporting that act in providing for the taxation of fire-arms and for procedure under which the tax is to be collected. It also employs the interstate and foreign

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<sup>88</sup> 276 U.S. 332 (1928).

<sup>89</sup> *1934 House Firearms Hearings, supra* note 51, at 162 (citing *Nigro v. United States*, 276 U.S. 332, 337-38 (1928)).

<sup>90</sup> *Nigro*, 276 U.S. at 339 (citing *Alston v. United States*, 274 U.S. 289, 294 (1927)).

<sup>91</sup> *Id.* at 341-42.

<sup>92</sup> *Id.* at 352.

<sup>93</sup> *Id.* at 353.

<sup>94</sup> *Id.* at 353-54.

<sup>95</sup> *To Regulate Commerce in Firearms: Hearings on S.B. 2258, Before a Subcommittee of the Senate Committee on Commerce*, 73d Cong., 2d Sess. 16 (1934).

<sup>96</sup> *Id.*

commerce power to regulate interstate shipment of fire-arms and to prohibit and regulate the shipment of fire-arms into the United States.<sup>97</sup>

The reports also explained that "[l]imiting the bill to the taxing of sawed-off guns and machine guns is sufficient at this time."<sup>98</sup> Accordingly, it was (pg.612) "not thought necessary to go so far as to include pistols and revolvers and sporting arms."<sup>99</sup>

During the brief floor debate on the bill, no mention was made of its constitutional basis other than to state that it was a tax measure.<sup>100</sup> Congressman Robert L. Doughton did mention, however, that "it does not in any way interfere with the rights of the States."<sup>101</sup> Finally, upon conclusion of the floor debate, it was stipulated that "machine guns, sawed-off shotguns, rifles," and not "the ordinary sporting rifle," would be subject to the NFA.<sup>102</sup> The bill was approved by those "interested in sport and sporting arms, from the standpoint of the use of those arms for ordinary purposes."<sup>103</sup>

The National Firearms Act was passed as part of the Internal Revenue Code.<sup>104</sup> On its face, it included provisions for raising revenue, and did not purport to have other law enforcement purposes or to be a criminal penal code as such.<sup>105</sup> Nonetheless, as with all tax measures, violators were subject to civil and penal liabilities.<sup>106</sup>

Upon enactment, the NFA began to be vigorously enforced.<sup>107</sup> Regarding enforcement, the concern was raised during the House committee hearings that "law-abiding citizens probably might not register."<sup>108</sup> In response to this concern, Keenan stated that "[i]f the law-abiding citizen does not register and does not get into any kind of difficulty that would cause him to come to the notice of the police, there are not going to be snooping squads going around from house to house to see who does and who does not possess arms ...."<sup>109</sup>

The official magazine of the National Rifle Association quoted Keenan's above comment and had this to say about enforcement of the newly enacted NFA:

[O]n July 14th, the first fatality resulted from a federal squad *doing exactly what Mr. Keenan told the House Ways and Means Committee they need not worry about!*

Mrs. Desse Masterson, mother of four children, was shot and killed during the course of a raid by federal agents looking for the machinegun which had been used [in a prior murder]. *Neither Mrs. Masterson, her (pg.613) husband, nor anyone else in the apartment*

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<sup>97</sup> H.R. REP. No. 1780, 73d Cong., 2d Sess. 2 (1934); S. REP. No. 1444, 73d Cong., 2d Sess. 1 (1934).

<sup>98</sup> H.R. REP. No. 1780, 73d Cong., 2d Sess. 1 (1934).

<sup>99</sup> *Id.*

<sup>100</sup> *See* 78 CONG. REC. 11400-12555 (1934).

<sup>101</sup> *Id.* at 11400.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 12555.

<sup>104</sup> National Firearms Act, ch. 757, 48 stat. 1236 (1934).

<sup>105</sup> *See id.*

<sup>106</sup> *Id.*

<sup>107</sup> AMERICAN RIFLEMAN, Aug. 1934, at 2.

<sup>108</sup> 1934 *House Firearms Hearing*, *supra* note 51, at 136.

<sup>109</sup> *Id.*

*was involved or even accused* of the original murder, of having a machine gun, or of any other federal crime. From the standpoint of the Assistant Attorney General, Mr. Keenan, who told the House Ways and Means Committee that they need not worry about honest people being bothered by federal agents, this is probably just an unfortunate accident similar to many unfortunate accidents of the same type which occurred during the efforts of federal agents to enforce the Prohibition Law.

Fortunately, there are relatively few machine guns in use around the country, so that relatively few innocent citizens may be expected to be killed by federal agents looking for *machine guns*. Had the original desires of the Attorney General been carried out, however, and *pistols and revolvers* been included in this new Federal Firearms Law, the Masterson incident perhaps gives a hint as to what might have happened and as to just how far wrong Mr. Keenan was in telling the House Ways and Means Committee that the law-abiding citizen need not worry about "snooping squads going around from house to house to see who does and who does not possess arms."<sup>110</sup>

If this incident demonstrated the civilian casualties inherent in the enforcement of Prohibition-type laws, it also anticipated the more ominous problem of growing police violence. In Europe, the growth of the police state proceeded in earnest. Adolph Hitler, who gained power just a year before the enactment of the National Firearms Act, would sign his own gun control act in 1938. By that time, firearms registration schemes and countless other devices were being used systematically to deprive people first of basic rights and, ultimately, of life itself.

In 1937, the Supreme Court upheld the National Firearms Act in *Sonzinsky v. United States*.<sup>111</sup> The defendant in *Sonzinsky* insisted "that the present levy is not a true tax, but a penalty imposed for the purpose of suppressing traffic in a certain noxious type of firearms, the local regulation of which is reserved to the states because not [sic] granted to the national government."<sup>112</sup> He argued that the Tenth Amendment power of the states to regulate firearms in their criminal codes was an exclusive power not shared by the federal government.<sup>113</sup>

The Court found the National Firearms Act on its face to be a revenue measure and nothing more.<sup>114</sup> In so finding, the Court noted that

The case is not one where the statute contains regulatory provisions related to a purported tax in such a way as has enabled this Court to say in other cases that the latter is a penalty resorted to as a means of enforcing the (pg.614) regulations. Nor is the subject of the tax described or treated as criminal by the taxing statute. Here § 2 contains no regulation other than the mere registration provisions, which are obviously supportable as in aid of a revenue purpose. On its face it is only a taxing measure ....<sup>115</sup>

Moreover, addressing the Tenth Amendment arguments, the Court stated that the NFA did not purport to exercise any general criminal power not delegated to Congress under the

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<sup>110</sup> AMERICAN RIFLEMAN, Aug. 1934, at 2 (emphasis added) (citations omitted).

<sup>111</sup> 300 U.S. 506, 510-12 (1937).

<sup>112</sup> *Id.* at 512.

<sup>113</sup> *Id.* at 512-13.

<sup>114</sup> *Id.* at 510-12.

<sup>115</sup> *Id.* at 513.

Constitution.<sup>116</sup> The Court refused to speculate as to the reasons why Congress might have taxed certain firearms:

Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of the courts.... They will not undertake, by collateral inquiry as to the measure of the regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution....

Here the annual tax of \$200 is productive of some revenue. We are not free to speculate as to the motives which moved Congress to impose it, or as to the extent to which it may operate to restrict the activities taxed. As it is not attended by an offensive regulation, and since it operates as a tax, it is within the national taxing power.<sup>117</sup>

In 1938, Congress again undertook to regulate firearms by passing the Federal Firearms Act ("FFA"), which regulated interstate commerce in firearms and prohibited possession of firearms by felons where an interstate nexus could be demonstrated.<sup>118</sup> This legislation, since it primarily regulated only interstate commerce in firearms by requiring licenses and recordkeeping by manufacturers and dealers, was far less controversial than the NFA.<sup>119</sup> Despite the lesser controversy surrounding the FFA, questions were nonetheless raised as to the constitutionality of federal regulation of firearms.<sup>120</sup>

Addressing these constitutional questions on the Senate floor, Senator William H. King, a Utah Democrat, stated to Senator Copeland, the chief sponsor, that "we have a constitutional provision that right of the people to keep and bear arms shall not be infringed ... [and that he] was wondering if this bill was not in contravention of the constitutional provision."<sup>121</sup> Denying that the FFA was in contravention of the Second Amendment, Senator Copeland argued that the provisions of the Second Amendment must be read together, and that "[t]he part relating to militia is important ... [as (pg.615) that part is], of course, in the first part of the constitutional provision."<sup>122</sup> Senator McKellar responded that, "while [the Second Amendment] refers to the militia, the provision is all-inclusive and provides that the right of the people to keep and bear arms shall remain inviolate."<sup>123</sup>

The constitutional issue was not pursued further, however, apparently because the bill was designed as a regulation of interstate commerce.<sup>124</sup> Moreover, the bill did not operate upon individual firearms owners, other than felons who received firearms in interstate commerce.<sup>125</sup> A Senate committee explained the bill as follows:

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<sup>116</sup> *Id.* at 513-15.

<sup>117</sup> *Id.* at 513-14.

<sup>118</sup> Federal Firearms Act, Ch. 850, 52 Stat. 1250 (1938).

<sup>119</sup> *See id.*

<sup>120</sup> 79 CONG. REC. 11973 (1935).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *See id.*

<sup>125</sup> 52 Stat. 1250 (1938).



The bill under consideration ... is designed to regulate the manufacture of and the shipment through interstate commerce of all firearms.

... It is believed that the bill above referred to will go far in the direction we are seeking and will eliminate the gun from the crooks' hands, while interfering as little as possible with the law-abiding citizen from whom protests have been received against any attempt to take from him his means of protection from the outlaws who have rendered living conditions unbearable in the past decade.<sup>126</sup>

Meanwhile, in *United States v. Miller*,<sup>127</sup> the Supreme Court rendered an equivocal opinion concerning the status of the NFA under the Second Amendment.<sup>128</sup> *Miller* reached the Supreme Court after a district court had ruled that the NFA was unconstitutional on its face as violative of the Second Amendment.<sup>129</sup> After ruling the NFA unconstitutional, the district court then dismissed an indictment for transporting in interstate commerce a shotgun with a barrel less than eighteen inches without the required tax stamp.<sup>130</sup> The Supreme Court reversed, offering the following reasoning:

In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.<sup>131</sup> (pg.616)

Upon reversing, the Court remanded the case to the district court for further proceedings consistent with its opinion.<sup>132</sup> These proceedings would have required hearing evidence about the nature of the shotgun.<sup>133</sup> In the absence of a factual record indicating that a "sawed-off" shotgun could have military uses, the Court did not consider whether the tax and related registration requirements of the NFA violated the Second Amendment.<sup>134</sup> The Court apparently assumed that if the shotgun was a protected firearm under the Second Amendment, the tax and registration requirements may have been unconstitutional.<sup>135</sup> Otherwise the Court could have disposed of the issue without remanding the case.<sup>136</sup>

Furthermore, the Court apparently assumed that the Second Amendment protects all individuals, not just members of an organized force such as the National Guard.<sup>137</sup> The test was not whether the person in possession of the arm was a member of a formal militia unit, but whether the

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<sup>126</sup> S. REP. NO. 82, 75th Cong., 1st Sess. 1-2 (1937).

<sup>127</sup> 307 U.S. 174 (1939).

<sup>128</sup> *Id.* at 178.

<sup>129</sup> *Id.* at 177 (citing *United States v. Miller*, 26 F. Supp. 1002, 1003 (W.D. Ark. 1939)).

<sup>130</sup> *Id.* at 177-78.

<sup>131</sup> *Id.* at 178.

<sup>132</sup> *Id.* at 183.

<sup>133</sup> *See id.*

<sup>134</sup> *See id.* at 177-83.

<sup>135</sup> *See id.* at 178-79.

<sup>136</sup> *See id.* at 183.

<sup>137</sup> *See id.* at 178-81.

arm "at this time" is "ordinary military equipment" or whether its use could potentially "contribute to the common defense."<sup>138</sup> Consequently, had the Court assumed that the Second Amendment did not protect ordinary persons, it logically would not have remanded the case to determine the factual status of the firearm.<sup>139</sup>

The Court also discussed the meaning of the Second Amendment.<sup>140</sup> Referring to the militia clause of the Constitution, the Court stated that "to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made."<sup>141</sup> The Court then surveyed colonial and state militia laws to demonstrate that "the Militia comprised all males physically capable of acting in concert for the common defense" and that "these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."<sup>142</sup>

The Court in *Miller* also cited with approval to the commentaries of Justice Joseph Story and Judge Thomas M. Cooley, which articulate the philosophy behind the Second Amendment.<sup>143</sup> In his commentary, Justice Story stated:<sup>(pg.617)</sup>

The right of the citizens to keep and bear arms has justly been considered as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers, and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.<sup>144</sup>

Judge Cooley's commentaries, also cited by the Court in *Miller*, state that:

Among the other safeguards to liberty should be mentioned the right of the people to keep and bear arms.... The alternative to a standing army is "a well-regulated militia"; but this cannot exist unless the people are trained to bearing arms. The Federal and State constitutions therefore provide that the right of the people to bear arms shall not be infringed ....<sup>145</sup>

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<sup>138</sup> *Id.* at 178.

<sup>139</sup> *See id.*

<sup>140</sup> *Id.* at 178-80.

<sup>141</sup> *Id.* at 178.

<sup>142</sup> *Id.* at 179.

<sup>143</sup> *Id.* at 182 n.3.

<sup>144</sup> 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 646 (5th ed. 1891). "One of the ordinary modes, by which tyrants accomplish their purpose without resistance is, by disarming the people, and making it an offense to keep arms ... ." JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 264 (1893).

<sup>145</sup> THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 729 (8th ed. 1927). Regarding the Second Amendment, Judge Cooley further wrote:

The right declared was meant to be a strong moral check against the usurpation and arbitrary power of rulers, and as a necessary and efficient means of regaining rights when temporarily overturned by usurpation.

*The Right is General*—It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent.... But the law may make provision for the enrollment of all who are fit to perform military duty, or of a small number only, or it may wholly omit to make any provision at all; and if the right were limited to those enrolled, the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose.

Thus, although *Miller* was somewhat equivocal, it provided little comfort to supporters of registration, for its apparent holding was that registration of military-type arms might be inconsistent with the Second Amendment.<sup>146</sup> Indeed, *Miller* represents the end of an era, for Congress would soon react to the rise of European police states by reaffirming the Second Amendment and rejecting registration.<sup>147</sup> (pg.618)

III. "TO IMPAIR OR INFRINGE IN ANY MANNER ON THE RIGHT OF ANY  
INDIVIDUAL TO KEEP AND BEAR ARMS":  
THE *PROPERTY REQUISITION ACT OF 1941*

Perhaps because crime dramatically decreased after the repeal of Prohibition, gun-control proponents were, by 1940, advocating firearms registration as an aid in combatting subversion.<sup>148</sup> An article in the *New York Times*, however, demonstrated that even the legal establishment opposed registration and did not panic over subversion rhetoric:

In the face of pleas for compulsory registration of firearms as a defense measure against fifth columnists, the National Conference of Commissioners on Uniform State Laws voted today, by a large majority, to exclude from its proposed Uniform Pistol Act a clause compelling householders to register their weapons.

Professor S.B. Warner of the Harvard Law School read the proposed act, which he drafted for the firearms committee of the Interstate Commission on Crime during a two-year leave of absence from his teaching duties. The suggested law retains the traditional right of the American citizen to keep arms as a matter of protection.

W.E. Stanley of Wichita, Kan., recommended that this right be abrogated in the interests of "national defense." The present system, he said, "gives any fifth columnist the right to make an arsenal out of his home."

When Professor Warner acknowledged this was so, Mr. Stanley added:

"Then let's make every one register his weapons to aid us in combating subversive activities."

To this Mr. Warner replied:

"If such a measure is needed as a war measure, let the Federal Government pass it as such. It is not in the province of States."<sup>149</sup>

On the other hand, Robert H. Jackson, the new Attorney General and ex-Solicitor General who argued the *Miller* case,<sup>150</sup> argued in favor of registration in his report to Congress. The *New York Times* reported that, in addition to wiretapping to combat fifth columnists, "Mr. Jackson suggested adoption of an indeterminate sentence program for criminal cases in Federal courts, and

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THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 298 (3d ed. 1898).

<sup>146</sup> See *United States v. Miller*, 307 U.S. 174, 178 (1939).

<sup>147</sup> Property Requisition Act, ch. 445, 55 Stat. 742 (1941).

<sup>148</sup> See, e.g., *Asks Wire-Tapping to Help Fight Spies*, N.Y. TIMES, Jan. 4, 1941, at 7.

<sup>149</sup> *Citizen is Supported in Firearms Right*, N.Y. TIMES, Sept. 5, 1940, at 17.

<sup>150</sup> Brief for the United States at 21, *United States v. Miller*, 307 U.S. 174 (1938) (No. 696).

a law for national registration of firearms now exempt from such listing."<sup>151</sup> The actual language of the proposal was as follows:(pg.619)

I desire to recommend legislation to require registration of all firearms in the United States and a record of their transfers, accompanied by the imposition of a nominal tax on each transfer.

Such a step would be of great importance in the interests of national defense, as it would hamper the possible accumulation of firearms on the part of subversive groups.

It is also of outstanding importance in the enforcement of the criminal law....

A proposed bill drafted in this department embodying the foregoing recommendations is enclosed herewith. I recommend its enactment and hope that favorable action can be taken in respect to it at this session of the Congress.

... The provisions of the National Firearms Act, which was a registration and tax law enacted as one of the Crime Laws of the 73d Congress, apply only to certain types of weapons, including machine guns, submachine guns, sawed-off shotguns, sawed-off rifles and silencers.

The Attorney General's recommendation would extend the registration and nominal tax provisions of the 1934 statute to all types of firearms.<sup>152</sup>

Despite Jackson's proposal, however, firearms registration was beginning to get a bad name.<sup>153</sup> While some politicians in the 1930s seemed infatuated with emerging European statism, the ugly side of government worship was beginning to be seen.<sup>154</sup>

In 1928, Germany enacted its *Gesetz uber Schusswaffen und Munition* (Law on Firearms and Ammunition), which required firearms and ammunition acquisition permits and record keeping for all transactions.<sup>155</sup> Through this legislation, the police acquired knowledge of all firearm owners, which was used to the Nazis' advantage when they took power in 1933.<sup>156</sup> The Nazi *Waffengesetz* (Weapons Law) of 1938, signed by Adolph Hitler, built upon the previous registration systems and strictly regulated handguns.<sup>157</sup> The Nazi law provided in part:(pg.620)

- (1) Licenses to obtain or to carry firearms shall only be issued to persons whose reliability is not in doubt, and only after proving a need for them.
- (2) Issuance shall especially be denied to: ...
  3. gypsies, and to persons wandering around like gypsies;
  4. persons for whom police surveillance has been declared admissible, or upon whom the loss of civic rights has been

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<sup>151</sup> *Asks Wire-Tapping to Help Fight Spies*, N.Y. TIMES, Jan. 4, 1941, at 7.

<sup>152</sup> *A 1940 Proposal: Register Firearms*, N.Y. TIMES, Apr. 11, 1989, at A31 (citing Letter from Robert H. Jackson, Attorney General, *Department of Justice*, to William G. Bankhead, Speaker of the House, *House of Representatives* (May 29, 1940)).

<sup>153</sup> *See, e.g.*, H.R. REP. No. 1120, 77th Cong., 1st Sess. 2 (1941).

<sup>154</sup> *E.g.*, DAVID F. SCHMITZ, *THE UNITED STATES AND FASCIST ITALY: 1922-1940* 60-84 (1988).

<sup>155</sup> *I Reichsgesetzblatt* 1928, 143 (*reprinted and translated in* JAY SIMKIN & AARON ZELMAN, *GUN CONTROL: GATEWAY TO TYRANNY* 15 (1992)).

<sup>156</sup> *See id.*

<sup>157</sup> *I Reichsgesetzblatt* 1938, 265 (*reprinted and translated in* SIMKIN & ZELMAN, *supra* note 155, at 53). For another English translation of the 1938 *Reichsgesetzblatt*, see *Federal Firearms Legislation: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Judiciary Comm.*, 90th Cong., 2d Sess. 489 (1968).

- imposed, for the duration of the police surveillance or the loss of civic rights;
5. persons who have been convicted of treason or high treason, or against whom facts are under consideration which justify the assumption that they are acting in a manner inimical to the state....<sup>158</sup>

Excluded from the license requirement were members of the armed forces, the police, the SS, the SA, and leaders of the Nazi party.<sup>159</sup> Legislation also provided that unpopular persons were to be disarmed:

- (1) In individual cases a person who has acted in an inimical manner toward the state, or it is to be feared that he will endanger the public security, may be prohibited to obtain, possess, and carry firearms and ammunition, as well as weapons for cutting or stabbing.
- (2) Weapons and ammunition which may be found in the possession of a person against whom the prohibition has been declared, shall be confiscated without compensation.<sup>160</sup>

The Nazis also promulgated extensive regulations governing the manufacture, sale, and ownership of firearms.<sup>161</sup> One such regulation was the *Verordnung gegen den Waffenbesitz der Juden* (Regulations Against Jews' Possession of Weapons).<sup>162</sup> Not surprisingly, this regulation was promulgated on November 11, 1938, the day after the anti-Jewish pogrom *Kristallnacht* (Night of the Broken Glass).<sup>163</sup> Section 1 of the regulation provided that:

Jews ... are prohibited from acquiring, possessing, and carrying firearms and ammunition, as well as truncheons or stabbing weapons. Those now possessing weapons and ammunition are at once to turn them over to the local police authority.<sup>164</sup> (pg.621)

Ultimately, the gun control law was enforced against not only Jews, but also against any politically suspect person.<sup>165</sup> By having access to the names of firearms owners through the registration lists and hunting license records, the Nazis were obviously aware of any potential resistance. Worst of all, the Nazis did not just confiscate firearms; firearms owners disappeared in the night, never to be heard from again.<sup>166</sup>

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<sup>158</sup> *Id.* § 15, at 491-92.

<sup>159</sup> *Id.* §§ 18-19, at 492-93.

<sup>160</sup> *Id.* § 23, at 493.

<sup>161</sup> See SIMKIN & ZELMAN, *supra* note 155, at 83-107 (providing an eerie side-by-side comparison of the Nazi laws and the federal Gun Control Act of 1968 with its accompanying regulations).

<sup>162</sup> I *Reichsgesetzblatt* 1938, 1571.

<sup>163</sup> SIMKIN & ZELMAN, *supra* note 155, at 8, 80-81.

<sup>164</sup> I *Reichsgesetzblatt* 1938, 1571.

<sup>165</sup> Interview with Dr. David T. Schiller, in Nuremberg, Germany (March 13, 1993). Some of Dr. Schiller's ancestors managed successfully to elude the Nazis and to pass on their personal accounts of that horrible era. *Id.*

<sup>166</sup> *Id.*

The fixation in Congress against registration and confiscation was likely based on the events unfolding in Europe. Countries falling to Nazi conquest had existing licensing and registration laws, including some enacted in the 1930s, that made it much easier for the Nazis to enforce their orders to surrender firearms under penalty of death.<sup>167</sup> France, for example, forbade possession of war weapons, and required registration of commercial weapons other than hunting rifles and collection pieces.<sup>168</sup> Belgium required registration of pistols, revolvers, and war weapons, the latter of which could not be possessed for non-governmental purposes.<sup>169</sup> Possession of hunting rifles, however, carried no registration requirements.<sup>170</sup> Czechoslovakia required a permit and registration to possess and carry firearms.<sup>171</sup> Norway required a police permit and registration for possession or sale of a firearm.<sup>172</sup>

Nazi proclamations made in 1940 and 1941 in occupied countries required the surrender of private firearms.<sup>173</sup> A decree in Luxemburg provided that violations for unlawfully possessing firearms "shall be punishable by imprisonment, in serious cases by hard labor or death, in less serious cases by fine."<sup>174</sup> Likewise, in Czechoslovakia, it was declared that "the intentional illegal possession of firearms ... [was] subject to [the] martial law ...."<sup>175</sup>

On the first day the Nazis occupied Czechoslovakia, they put up posters in every town ordering the inhabitants to surrender all firearms, including (pg.622) hunting guns.<sup>176</sup> The penalty for disobedience was death.<sup>177</sup> The Nazis were able to use local and central registration records of firearms owners and hunters to execute the decree.<sup>178</sup> Lists of potential dissidents and other suspects were already prepared, and those persons disappeared immediately.<sup>179</sup>

The Nazi commander of Belgium and Netherlands proclaimed that "[t]he surrender of weapons and other implements of war has been ordered by special proclamation.... Hunting guns are [also] to be surrendered ...."<sup>180</sup> The Nazi head of Norway decreed that "[a]ll arms and munitions must be handed over" because only licensed officials and persons with police permits retained the right to possess arms.<sup>181</sup> The Nazis issued a decree concerning Poles and Jews that provided in part:

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<sup>167</sup> See, e.g., *infra* notes 168-182 and accompanying text.

<sup>168</sup> *Federal Firearms Legislation: Hearing Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Judiciary Comm.*, 90th Cong., 2d Sess. 482 (1968) (referring to a Library of Congress study dated July 5, 1968 which cited in part *decret loi du 23 October 1935*) [hereinafter *1968 Firearms Legislation Hearings*].

<sup>169</sup> *Id.* at 481.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 482.

<sup>172</sup> *Id.* at 482 (citing Lov om innførsel of June 28, 1927).

<sup>173</sup> See *id.* at 482-87.

<sup>174</sup> *Id.* at 487.

<sup>175</sup> *Id.*

<sup>176</sup> Interview with Milan Kubele, in Uhersky Brod, Czech Republic (March 16, 1994).

<sup>177</sup> *Id.*

<sup>178</sup> See *1968 Firearms Legislation Hearings*, *supra* note 168, at 487.

<sup>179</sup> *Supra* note 176.

<sup>180</sup> See *1968 Firearms Legislation Hearings*, *supra* note 168, at 487.

<sup>181</sup> *Id.*

The death penalty or, in less serious cases, imprisonment shall be imposed on any Pole or Jew ... [i]f he is in unlawful possession of firearms ... or if he has credible information that a Pole or a Jew is in unlawful possession of such objects, and fails to notify the authorities forthwith.<sup>182</sup>

In occupied France, the Nazi commander published his "Ordinance concerning the detention of arms" on posters which read:

All firearms ... will have to be turned over immediately.

Delivery must take place within 24 hours to the closest "Kommandantur" [Nazi police station ...

Anyone found in possession of firearms ... will be sentenced to death or forced labor or in lesser cases prison.<sup>183</sup>

Still, despite the fact that the Nazis often made good on the threat to execute persons in possession of firearms, the gun control decrees were not entirely successful.<sup>184</sup> In reaction to the heroic uprising of the Jews in the Warsaw ghetto in 1943, Nazi propaganda minister Joseph Goebbels complained: "it shows what is to be expected of the Jews when they are in possession of arms.... Heaven only knows how they got them."<sup>185</sup> There are numerous (pg.623) pictures of civilians with revolvers, semiautomatic pistols, and rifles at the barricades during the liberation of Paris.<sup>186</sup>

Many of the above firearms restrictions and Nazi policies were apparently widely known and published in the United States.<sup>187</sup> In an editorial against domestic firearms registration, the *American Rifleman* referred to media reports about European developments as follows:

From Berlin on January 6th the German official radio broadcast—"The German military commander for Belgium and Northern France announced yesterday that the population would be given a last opportunity to surrender firearms without penalty up to January 20th and after that date anyone found in possession of arms would be executed."

So the Nazi invaders set a deadline similar to that announced months ago in Czecho-Slovakia, in Poland, in Norway, in Romania, in Yugo-Slavia, in Greece.

How often have we read the familiar dispatches "Gestapo agents accompanied by Nazi troopers swooped down on shops and homes and confiscated all privately-owned firearms!"

What an aid and comfort to the invaders and to their Fifth Column cohorts have been the convenient registration lists of privately owned firearms—lists readily available for the copying or stealing at the Town Hall in most European cities.

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<sup>182</sup> *Id.* at 488.

<sup>183</sup> Ordonnance concernant la detention d'armes et de radio-emetteurs dans les territoires occupes [Ordinance concerning the detention of arms and radio transmitters in the occupied territories]. On file with the *Tennessee Law Review* is a photograph of the original taken by the author at the Army Museum (Hotel National des Invalides), Paris, France, on August 22, 1994, during the fiftieth anniversary of the liberation of Paris.

<sup>184</sup> *See, e.g.*, C. TOUZE, PARIS LIBERE, PARIS RETROUVE 3 (1994).

<sup>185</sup> THE GOEBBELS DIARIES: 1942-1943 351 (Louis P. Lochner ed. & trans., 1948).

<sup>186</sup> *E.g.*, C. TOUZE, PARIS LIBERE, PARIS RETROUVE 3 (1994); "Le Journal de la Liberation de la France," a special issue of *L'Evenement du Jeudi*, August 18-24, 1994, at 21, 25, 30. [ed. from errata sheet]

<sup>187</sup> *See, e.g.*, H.R. REP. No. 1120, 77th Cong., 1st Sess. 2 (1941).

What a constant worry and danger to the Hun and his Quislings have been the privately owned firearms in the homes of those few citizens who have "neglected" to register their guns!<sup>188</sup>

Fear of tyranny was both real and reasonable in those dark days.

In 1941, less than two months before Pearl Harbor, Congress enacted legislation authorizing the President to requisition broad categories of property with military uses from the private sector on payment of fair compensation.<sup>189</sup> To avoid presidential erosion of Second Amendment rights under this legislation, however, Congress expressly included language reaffirming and protecting those rights.<sup>190</sup> Known as the Property Requisition Act, the legislation included the following provisions:

That whenever the President, during the national emergency declared by the President on May 27, 1941, but not later than June 30, 1943, determines that (1) the use of any military or naval equipment, supplies, or munitions, or component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equipment, (pg.624) supplies, or munitions is needed for the defense of the United States; (2) such need is immediate and impending and such as will not admit of delay or resort to any other source of supply; and (3) all other means of obtaining the use of such property for the defense of the United States upon fair and reasonable terms have been exhausted, he is authorized to requisition such property for the defense of the United States upon the payment of fair and just compensation for such property to be determined as hereinafter provided, and to dispose of such property in such manner as he may determine is necessary for the defense of the United States....

Nothing contained in this Act shall be construed—

- (1) *to authorize the requisitioning or require the registration of any firearms possessed by any individual for his personal protection or sport (and the possession of which is not prohibited or the registration of which is not required by existing law),*
- (2) *to impair or infringe in any manner the right of any individual to keep and bear arms, or*
- (3) *to authorize the requisitioning of any machinery or equipment which is in actual use in connection with any operating factory or business and which is necessary to the operation of such factory or business.*<sup>191</sup>

Originally, the bill which became the Property Requisition Act did not include the language protecting Second Amendment rights, but the House Committee on Military Affairs added the provisions with the following explanation:

It is not contemplated or even inferred that the President, or any executive board, agency, or officer, would trespass upon the right of the people in this respect. There appears to be

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<sup>188</sup> *The Nazi Deadline*, AMERICAN RIFLEMAN, Feb. 1942, at 7. Although this article appeared after the 1941 congressional debates analyzed *infra*, the events it described were apparently well known in 1941.

<sup>189</sup> Property Requisition Act, ch. 445, 55 Stat. 742 (1941).

<sup>190</sup> *See id.*

<sup>191</sup> Property Requisition Act, ch. 445, 55 Stat. 742 (1941) (emphasis added).



no occasion for the requisition of firearms owned and maintained by the people for sport and recreation, nor is there any desire or intention on the part of the Congress or the President to impair or infringe the right of the people under section 2 of the Constitution of the United States, which reads, in part, as follows: "the right of the people to keep and bear arms shall not be infringed." However, in view of the fact that certain totalitarian and dictatorial nations are now engaged in the willful and wholesale destruction of personal rights and liberties, your committee deem[s] it appropriate for the Congress to expressly state that the proposed legislation shall not be construed to impair or infringe the constitutional right of the people to bear arms. In so doing, it will be manifest that, although the Congress deems it expedient to grant certain extraordinary powers to the Executive in furtherance of the common defense during critical times, there is no disposition on the part of this Government to depart from the concepts and principles of personal rights and liberties expressed in our Constitution.<sup>192</sup> (pg.625)

When the matter was first debated on the House floor, Congressman Edwin Arthur Hall deplored and predicted legislation that would infringe on the Second Amendment:

Before the advent of Hitler or Stalin, who took their power from the German and the Russian people, measures were thrust upon the free legislatures of those countries to deprive the people of the possession and use of firearms, so that they could not resist the encroachments of such diabolical and vitriolic state police organizations as the Gestapo, the Ogpu, and the Cheka. Just as sure as I am standing here today, you are going to see this measure followed by legislation, sponsored by the proponents of such encroachment upon the rights of the people, which will eventually deprive the people of their constitutional liberty which provides for the possession of firearms for the protection of their homes.

I submit to you that it is a serious departure from constitutional government when we consider legislation of this type. I predict that within 6 months of this time there will be presented to this House a measure which will go a long way toward taking away forever the individual rights and liberties of citizens of this Nation by depriving the individual of the private ownership of firearms and the right to use weapons in the protection of his home, and thereby his country.<sup>193</sup>

The day after the above-quoted remarks, the Senate considered the House amendments designed to ensure protection of Second Amendment rights.<sup>194</sup> Senator Tom Connally, a Texas Democrat, described the House amendments as "safeguarding the right of individuals to possess arms."<sup>195</sup> In order to give the amendments careful consideration, Senator Albert B. Chandler, a Kentucky Democrat, moved to disagree with the House amendments.<sup>196</sup> Senator Chandler stated that "we have no reason to take the personal property of individuals which is kept solely for protection of their homes."<sup>197</sup>

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<sup>192</sup> H.R. REP. NO. 1120, 77th Cong., 1st Sess. 2 (1941).

<sup>193</sup> 87 CONG. REC., 6778 (1941).

<sup>194</sup> *See id.* at 6811.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

A conference committee was appointed, and the committee members rendered a compromise report that deleted the prohibition on registration, but retained the declaration against infringing Second Amendment rights.<sup>198</sup> Defending these changes in the House, Representative A.J. May, a Kentucky Democrat, noted that the early opposition to the bill arose because it might allow the President to seize firearms or to require firearm registration.<sup>199</sup> He recalled that, while the War Department was not known to be considering requiring registration of firearms, the Military (pg.626) Affairs Committee members nonetheless thought it best to include language expressly protecting against infringement of the right to bear arms.<sup>200</sup> Moreover, explaining the rights protected by the Second Amendment, Representative May stated that:

the right to keep means that a man can keep a gun in his house and can carry it with him if he wants to; he can take it where he wants to, ... and the right to bear arms means that he can go hunting ... and that nobody has any right, so long as he bears the arms openly and unconcealed, to interfere with him.<sup>201</sup>

Unsatisfied, Representative Dewey Short, a Missouri Republican, attacked the deletion of the anti-registration provision.<sup>202</sup> He observed that "[t]he method employed by the Communists in every country that has been overthrown has been to disarm the populace, take away their firearms with which to defend themselves, in order to overthrow the Government."<sup>203</sup> Representative Paul Kilday, a Texas Democrat, provided the following account of the background of the bill:

Now, I want to go to this constitutional question. It is really a substantial and valuable right that is involved. For a period of perhaps 15 years there has been an element in this country seeking to require the registration of all firearms. That bill has been offered in almost every Congress during that period of time. It has never been reported out of the Committee on the Judiciary, and we now have another one of those subterfuges of getting under the name of national defense something that they have not been able to get over a period of years.

I call attention to section 4 of this act, which provides that the President shall have the power to administer the provisions of the act, through any officer or agency that he may determine and to require such information as he may deem necessary in carrying out the provisions of the act. That gives the power to require the registration of every firearm in the United States because knowledge of the location and the owner would be the first information necessary for requisition.<sup>204</sup>

Kilday continued by ridiculing the revisions for merely repeating constitutional language without expressly spelling out the necessary protections<sup>205</sup> and sought to reintroduce the provision

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<sup>198</sup> *Id.* at 7097.

<sup>199</sup> *Id.* at 7098.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 7100.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 7100-01.

<sup>205</sup> *Id.* at 7101.

expressly prohibiting requisition of registration of firearms.<sup>206</sup> Representative Kilday explained:<sup>(pg.627)</sup>

[s]uch a registration of firearms has been sought, unsuccessfully, for years. Now that they have been unable to get that legislation, they bring it here under the form of national defense. We are in the ridiculous position of being asked to vote for an amendment which copies the language of the Constitution into an act of Congress. Are we going to be in that ridiculous position? If so, then we are going to have to copy the language of the Constitution into every bill that we pass.... At the proper time I propose to offer a motion to recommit the conference report to the conference committee, to the end that they may pass on this and incorporate my amendment which provided that the bill shall not be construed to give the Government the power to requisition a firearm possessed by an individual, nor to require the registration of it. That must be put in here in order to make the bill constitutional. Judge Patterson[, Under Secretary of War,] testified [to the Committee on Military Affairs]. His one example was that they might need shotguns, and he felt that if they needed shotguns they should have the right to take them from anybody.<sup>207</sup>

Representative Kilday contended that express procedural or other specific barriers were necessary to ensure that Second Amendment rights were not eroded.<sup>208</sup> Registration was a step toward confiscation.<sup>209</sup> He explained:

I go further than that and say if they do not intend to require the registration of all firearms they would not object to this provision being in the bill. Judge Patterson said they had already made their plans to require registration.... Remember that registration of firearms is only the first step. It will be followed by other infringements of the right to keep and bear arms until finally the right is gone. It is no shallow pretext. The right to keep and bear arms is a substantial and valuable right to a free people, and it should be preserved.<sup>210</sup>

Representative Lyle H. Boren, an Oklahoma Democrat, set forth further reasons to support Kilday and return the bill to conference.<sup>211</sup> Boren's reasoning focused on the experiences in the Communist and Nazi totalitarian societies:

A careful reading of Trotsky's *History of the Russian Revolution* should convince anyone of the wisdom of our founding fathers in writing into the Constitution of the United States the provision that our right to bear arms as private citizens shall not be abridged. Although I never carried a gun in my life, never had one outside my home except on a hunting trip, I feel <sup>(pg.628)</sup> that the gun I own in my home is essential to maintaining the defense of my home against the aggression of lawlessness.<sup>212</sup>

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<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *See id.*

<sup>209</sup> *See id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

Adding that under the bill, as drafted, "you could disarm the State militia,"<sup>213</sup> Boren continued with the idea that tyranny must be resisted at home as well as abroad:

I propose to defend [our way of life] against the soldiers of a Hitler and against a government bureaucrat. All the invasions threatened against American democracy are not from without. I feel that the defense of democracy is on my doorstep and your doorstep as well as on the world's battlefields.... I rebel against the destruction of freedom in America under the guise of emergency.<sup>214</sup>

Representative John W. Patman, a Texas Democrat, also supported recommitment.<sup>215</sup> He unabashedly stated that the ultimate purpose of the Second Amendment is to ensure that citizens possess a means to resist governmental tyranny.<sup>216</sup> Patman reasoned that, although the Constitution made the President the head of the army, a presidential attempt at power seizure could be initially resisted by the state militias.<sup>217</sup> This idea was not fail-safe, Patman continued, because

there is a provision in the Constitution that the militia under certain conditions can be called into the national service. Then it was said, "Where will our protection be? The Executive then will have control of both the Army and the militia of the States." The answer was, "The people have a right to bear arms. The people have a right to keep arms; therefore, if we should have some Executive who attempted to set himself up as dictator or king, the people can organize themselves together and, with the arms and ammunition they have, they can properly protect themselves...."

If we permit the people here in Washington to compel the people all over the Nation to turn in their arms, their ammunition, then the Chief Executive, whoever he is, gets control of the Army and the militia, how will the people be able to protect themselves?<sup>218</sup>

Echoing Representative Kilday's sentiments, Patman addressed the uselessness of redeclaring a constitutional right without drafting explicit safeguards, such as a prohibition on registration, to prevent infringement of that right:<sup>(pg.629)</sup>

[The conferees] retained that part of the amendment which says that the right to keep and bear arms shall not be infringed. That part is meaningless. They might just as well have left it out. They cannot add to the Constitution. The Constitution guarantees to the people those rights which they have asserted in this bill.<sup>219</sup>

Next to speak was Representative Daniel A. Reed, a New York Republican, who recalled how the registration scheme established by the NFA was passed under Congress' taxation power:

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<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 7102.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

[S]ince 1933 those in control of the Government, realizing that the power to tax is the power to destroy, have appeared before the Committee on Ways and Means with the proposal to tax firearms. While they narrowed it down to machineguns on the ground that it would prevent bandits from using firearms of a certain size, yet the thought was there of getting control of the private firearms of this country. I know that our chairman of the Ways and Means Committee and others on that committee were on the alert, sensed the danger, and accordingly went no further than partial taxation and regulation, but I think every member of the committee saw the purpose and the motive of the proposed tax.<sup>220</sup>

In response, Representative John J. Sparkman, an Alabama Democrat, exhibited much greater trust in governmental motives.<sup>221</sup> In fact, in order to defeat totalitarianism, he was apparently willing to accept the totalitarian tenet that the person and all his possessions belong to the government:

Now as to the firearms. The Constitution guarantees to every citizen the right to keep and bear arms. That guaranty is not disturbed. Do not think that the Government is going to go out and take the shotguns. Under Secretary Patterson never did make any serious contention to our committee that such a thing might be expected, but he did say that if, in order to defend our homes, our institutions, or ideals, our Government, and our way of life, it is necessary to take our shotguns, we ought to have the power to do it.

I say that if in order to defend this country it is necessary to come into my home and take my shotgun, my pistol, my rifle, or anything else I have, I believe strongly enough in the defense of this country that I say you are welcome to do it.

We have more than 2,000,000 rifles we are not using now. We do not need them. Why think of the impractical things, the almost impossible things? The Government does not want to get your shotguns or your rifles.<sup>222</sup> (pg.630)

The veracity of Representative Sparkman's statement would turn out to be short-lived, however, as the War Department would soon begin taking back all the rifles it had previously issued to the state militias.<sup>223</sup> Nonetheless, before the debate ended, Representative Robert E. Thomson, a Texas Democrat, urged against recommittal with the following statement:

This is all a joke about taking a man's personal firearms like his shotgun and pistol. That is all a smoke screen to kill this bill. The Constitution protects every citizen in the right to own and bear arms. No personal rights are being violated. The War Department has no idea of doing anything ridiculous. It now has more than 2,000,000 rifles in storage.<sup>224</sup>

The motion to recommit then passed by a landslide, 255 to 51.<sup>225</sup> The subsequent conference report reflected the agreement that was reached to include both the prohibition on registration and

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<sup>220</sup> *Id.* at 7103.

<sup>221</sup> *See id.*

<sup>222</sup> *Id.*

<sup>223</sup> *E.g.*, MARVIN W. SCHLEGEL, *VIRGINIA ON GUARD: CIVILIAN DEFENSE AND THE STATE MILITIA IN THE SECOND WORLD WAR* 129 (1949).

<sup>224</sup> 87 CONG. REC. 7104 (1941).

<sup>225</sup> *Id.*

the declaration against impairment of the individual right to keep and bear arms.<sup>226</sup> Finally, with the prohibition against registration reinserted, the bill became law.<sup>227</sup>

Meanwhile, the British, whose government had disarmed the commoners nearly two decades before the war,<sup>228</sup> were begging for contributions of rifles, shotguns, pistols and revolvers from American civilians.<sup>229</sup> As Britain rearmed its citizens, the Nazis decided what measures would be necessary once they occupied the island:

[The] instructions were headed "Orders Concerning the Organization and Function Of Military Government In England" and went into considerable detail.... Anybody posting a placard the Germans didn't like would be liable to immediate execution, and a similar penalty was provided for those who failed to turn in firearms or radio sets within twenty-four hours.<sup>230</sup>

Back in America, firearms were still needed to defend the United States from expected coastal invasions and domestic sabotage. Responding to this need, sportsmen and gun clubs brought their private arms and volunteered (pg.631) for the state protective forces.<sup>231</sup> The gun control debate apparently became a dispensable luxury for less desperate times.

#### IV. *THE FIREARMS OWNERS' PROTECTION ACT OF 1986*: SHOULD THE JUDICIARY DEFER TO A BROAD INTERPRETATION OF A CONSTITUTIONAL RIGHT BY CONGRESS?

In addition to 1789, 1866, and 1941, the fourth and most recent time Congress explicitly declared its support of the right to keep and bear arms was in 1986.<sup>232</sup> The Firearms Owners' Protection Act of 1986 ("FOPA") declares:

CONGRESSIONAL FINDINGS—The Congress finds that—

- (1) the rights of citizens—
  - (A) to keep and bear arms under the second amendment to the United States Constitution;
  - (B) to security against illegal and unreasonable searches and seizures under the fourth amendment;
  - (C) against uncompensated taking of property, double jeopardy, and assurance of due process of law under the fifth amendment; and

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<sup>226</sup> H.R. REP. No. 1214, 77th Cong., 1st Sess. 2 (1941).

<sup>227</sup> Property Requisition Act, ch. 455, 55 Stat. 742 (1941).

<sup>228</sup> COLIN GREENWOOD, FIREARMS CONTROL: A STUDY OF ARMED CRIME AND FIREARMS CONTROL IN ENGLAND AND WALES 45-70 (1972).

<sup>229</sup> See AMERICAN RIFLEMAN, Nov. 1940 (advertisement to "send a gun to defend a British home").

<sup>230</sup> WILLIAM L. SCHIRER, THE RISE AND FALL OF THE THIRD REICH 782 (1959).

<sup>231</sup> See, e.g., REPORT OF THE [VIRGINIA] ADJUTANT GENERAL FOR 1945 23-24 (1946); OFFICE OF THE ASS'T SECRETARY OF DEFENSE, DEP'T OF DEFENSE, UNITED STATES HOME DEFENSE FORCES STUDY 58-59 (1981).

<sup>232</sup> Firearms Owners' Protection Act, § 1(b), 100 Stat. 449 (1986) (codified at 18 U.S.C. § 926 (1986)).

(D) against unconstitutional exercise of authority under the ninth and tenth amendments; require additional legislation to correct existing firearms statutes and enforcement policies; and

- (2) additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968, that "it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap shooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law abiding citizens for lawful purposes."<sup>233</sup>

The Gun Control Act of 1968 ("GCA"), referred to in the FOPA, had been the most comprehensive legislation on the subject to have passed, and its legislative history is beyond the scope of this study.<sup>234</sup> A brief overview (pg.632) is helpful, however, to better understand the Congressional rationale for enacting the FOPA.

Title I of the GCA, which revised the Federal Firearms Act of 1938, was based on the interstate commerce power.<sup>235</sup> Title II was based on the taxing power and amended the National Firearms Act of 1934.<sup>236</sup> The GCA carefully avoided any prohibition on possession of a firearm per se, and included no registration requirements for ordinary rifles, pistols, or shotguns.<sup>237</sup> Moreover, as noted, the GCA eschewed any intent to burden law-abiding persons, although it included no explicit reference to the Second Amendment.<sup>238</sup>

Returning to the FOPA, the Congressional finding in the statute that the Second Amendment guarantees "the rights of citizens" to keep and bear arms was supported by a report from the Senate Judiciary Committee, which stated:

The conclusion is thus inescapable that the history, concept, and wording of the second amendment to the Constitution of the United States, as well as its interpretation by every major commentator and court in the first half-century after its ratification, indicates that

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<sup>233</sup> *Id.*

<sup>234</sup> *See Federal Firearms Act: Hearings on S. 1, S. 1853, and S. 1854, Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. 1086-88 (1967) (letter of Fred B. Smith, General Counsel, Treasury Dep't.).*

<sup>235</sup> *Id.*

<sup>236</sup> *See id.*

<sup>237</sup> *Id.* at 1088-89. Regarding a proposal to prohibit possession of an NFA firearm by a person under 21 years of age, Treasury Counsel Smith stated that:

It seems doubtful that the ... provision can be justified under the taxing or commerce powers, or under any other power enumerated in the Constitution, for Federal enactment. Consequently, the Department questions the advisability of including in the bill a measure which could be construed as an usurpation of a (police) power reserved to the states by Article X of the United States Constitutional Amendments.

*Id.*

<sup>238</sup> *See supra* note 233 and accompanying text.

what is protected is an individual right of a private citizen to own and carry firearms in a peaceful manner.<sup>239</sup>

Through its substantive reforms, Congress implemented its recognition that the Second Amendment guarantees an individual right to keep the arms regulated by the Gun Control Act, including rifles, shotguns and pistols.<sup>240</sup> (pg.633) Ultimately, the FOPA recognized "the rights of citizens to keep and bear arms under the second amendment to the United States Constitution" as a reason to deregulate substantially the purchase, sale and ownership of firearms.<sup>241</sup>

In a chapter entitled "*The Fourteenth Amendment and the Right to Keep and Bear Arms: The Intent of the Framers*," the Senate Judiciary Committee report on the issue demonstrates that the Second Amendment was intended to be incorporated into the Fourteenth Amendment as a limit on state action.<sup>242</sup> As noted, the FOPA states that: "The Congress finds that (1) the rights of citizens—A) to keep and bear arms under the second amendment to the United States Constitution ... require additional legislation to correct existing firearms statutes ...."<sup>243</sup> The "statutes" referred to included state statutes which Congress could preempt under the Supremacy Clause and under the enforcement clause of the Fourteenth Amendment.<sup>244</sup>

Among the FOPA's measures designed to enforce the Second Amendment is section 926(a), which provides that:

No such rule or regulation prescribed after the date of the enactment of the Firearms Owners' Protection Act may require that records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or any political subdivision thereof, nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established.<sup>245</sup>

The inclusion of this provision reflects Congress' traditional rejection of bills to require the registration of rifles, pistols, and shotguns.<sup>246</sup> Accordingly, to prevent the Bureau of Alcohol, Tobacco and Firearms ("BATF") from establishing a system of registration of firearms transactions and purchasers, Congress has included the following provision in every BATF appropriation act passed since 1978:

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<sup>239</sup> SENATE COMM. ON THE JUDICIARY, THE RIGHT TO KEEP AND BEAR ARMS, S. REP. No. 522-3, 97th Cong., 2d Sess. 12 (1982). Additionally, two other scholarly studies were inserted into the legislative record in support of Congress' findings during Senate debate on the Firearms Owners' Protection Act of 1986. David I. Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 FORDHAM URBAN L.J. 31 (1976), reprinted in 131 CONG. REC. S8692 (1985); Stephen P. Halbrook, *To Keep and Bear Their Private Arms: The Adoption of the Second Amendment, 1787-1791*, 10 N. KY. L. REV. 13 (1982), reprinted in 131 CONG. REC. S9105 (1985).

<sup>240</sup> 100 Stat. 449 (1986).

<sup>241</sup> *Id.*

<sup>242</sup> SENATE COMM. ON THE JUDICIARY, THE RIGHT TO KEEP AND BEAR ARMS, S. REP. No. 522-3, 97th Cong., 2d Sess. 68-82 (1982).

<sup>243</sup> 100 Stat. 449 (1986).

<sup>244</sup> *See id.*

<sup>245</sup> 18 U.S.C. § 926(a) (Supp. 1987).

<sup>246</sup> *See id.*



*Provided*, That no funds appropriated herein shall be available for administrative expenses in connection with consolidating or centralizing within the Department of the Treasury the records of receipts and disposition of firearms maintained by Federal firearms licensees or for issuing or carrying out any provisions of the proposed rules of the Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, on Firearms (pg.634) Regulations, as published in the Federal Register, volume 43, number 55, of March 21, 1978 ....<sup>247</sup>

To provide additional protection, the FOPA includes language allowing persons to transport firearms through states which prohibit firearms.<sup>248</sup> This inclusion first reflects recognition by Congress that the Second Amendment protects the individual right to keep and bear arms, and also that the Second Amendment is made applicable to the States through the Fourteenth Amendment.<sup>249</sup> Senator Symms introduced this provision by explaining that "[t]he intent of this amendment ... is to protect the second amendment rights of law-abiding citizens wishing to transport firearms through States which otherwise prohibit the possession of such weapons."<sup>250</sup> In the House, Congressman Robinson stated that "our citizens have a constitutional right to bear arms ... and to travel interstate with those weapons."<sup>251</sup>

No federal court has ever issued a reported decision mentioning Congress' declaration in the Property Requisition Act of 1941 regarding the individual right to keep and bear arms. Moreover, there are no federal decisions recognizing the similar Congressional statement contained in the Freedmen's Bureau Act of 1866. In 1992, upholding the first State ban in American history on various rifles, the Ninth Circuit refused to acknowledge that over two-thirds of the same Congress that adopted the Fourteenth Amendment found that the rights to "personal security" and "personal liberty" included "the constitutional right to bear arms."<sup>252</sup> This was apparently the first time that Congress' 1866 finding regarding the Second Amendment has been presented to a court.

Dissenting from the Ninth Circuit's decision to deny rehearing in *United States v. Breier*,<sup>253</sup> Judge Noonan referred to the Congressional findings (pg.635) concerning the Second Amendment contained in the FOPA.<sup>254</sup> In that case, Judge Noonan stated that:

Donald Douglas Breier is a hobbyist who has been turned into a criminal by the too vivid zeal of government agents and prosecutors. Like many other hobbyists—stamp collectors for example—he swapped parts of his collection and sold and bought other parts. Admittedly guns are more dangerous than stamps, and Congress has seen fit to regulate gun

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<sup>247</sup> *E.g.*, 106 Stat. 1731 (1992).

<sup>248</sup> 100 Stat. 449 (1986).

<sup>249</sup> *See id.*

<sup>250</sup> 131 CONG. REC. S9114 (1985).

<sup>251</sup> 132 CONG. REC. H1695 (1986). "This section has been included to assure the right of an individual to travel in and between States with a rifle or shotgun .... This provision has been drawn very narrowly because *it is preemption of the laws of the various States ....*" H.R. REP. No. 495, 99th Cong., 2d Sess. 29 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1327, 1355 (emphasis added)).

<sup>252</sup> *Fresno Rifle & Pistol Club, Inc. v. Van de Kamp*, 965 F.2d 723, 730 (9th Cir. 1992) (refusing to consider "remarks by various legislators during passage of the Freedmen's Bureau Act of 1866, the Civil Rights Act of 1866, and the Civil Rights Act of 1871").

<sup>253</sup> 827 F.2d 1366 (9th Cir. 1987). Judge Noonan's statements were contained in his dissent from the denial of a rehearing. *Id.* The previous majority opinion made no reference to the Second Amendment. *See* 813 F.2d 212 (9th Cir. 1987).

<sup>254</sup> 827 F.2d at 1366-67 (Noonan, J., dissenting).

dealers. But unlike stamps, guns are the subject of constitutional protection: "the right of the people to keep and bear arms shall not be infringed." Congress has regulated guns, sensitive to the Second Amendment and to the difference between hobbyists and those making a living out of the gun business.<sup>255</sup>

Judge Noonan argued that the congressional declaration provided a means of interpretation, and that the Congressional declaration rendered the statutory restrictions inapplicable to this case.<sup>256</sup> The central issue in *Breier* was whether Congress intended to apply retroactively its new narrow definition of being "engaged in the business" of dealing in firearms.<sup>257</sup> If one was found to be engaged in the firearms business, then a federal firearms license was required, the absence of which was a felony.<sup>258</sup> Judge Noonan explained:

The Act begins with two congressional findings. First, Congress finds that Second Amendment and other constitutional rights of citizens "require additional legislation to correct existing firearms statutes *and enforcement policies*". Second, Congress finds that:  
... additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968, that "it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms...."<sup>259</sup>

The Congressional findings indicate that the right of "the people" to bear arms belongs to individuals, and that unnecessary burdens infringe that right.<sup>260</sup> The obvious purpose of referring to these Congressional declarations is to show that, by giving an honest and expansive interpretation of a constitutional right, Congress thereby intends that other provisions of law be read in such a manner as not to interfere with that right. Judge Noonan, (pg.636) recognizing the importance of the Congressional interpretations, asserted that:

After making these findings Congress went on to amend 18 U.S.C. § 921 by *inter alia* defining the term "engaged in business." The definition sets out that to be a dealer one must have "the principal objective of livelihood and profit" from the trade.

Called upon to construe 18 U.S.C. § 921 in the light of the Firearms Owner's Protection Act, a court should not hesitate to respond to the congressional concern of correcting existing enforcement policy, and a court should not fail to acknowledge the explicit declaration that Congress in this legislature is reaffirming the intent of the Gun Control Act of 1968. The 1986 amendment makes crystal-clear how the old statute should

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<sup>255</sup> *Id.* at 1366 (Noonan, J., dissenting) (citations omitted).

<sup>256</sup> *See id.* at 1366-67 (Noonan, J., dissenting).

<sup>257</sup> *United States v. Breier*, 813 F.2d 212, 214 (9th Cir. 1987).

<sup>258</sup> *See id.* (citing 18 U.S.C. § 921 (1986)).

<sup>259</sup> 827 F.2d at 1366-67 (Noonan, J., dissenting) (emphasis in original).

<sup>260</sup> *See supra* note 232 and accompanying text.

be read: the law was not meant to reach the hobbyist who is not making his living out of trading in guns.<sup>261</sup>

Thus, by deferring to the Congressional declaration that every citizen has a right to keep and bear arms, Judge Noonan would have interpreted the statute in favor of the individual engaged in a few incidental firearms transactions, and against wide-ranging governmental restrictions.<sup>262</sup>

Courts may appeal to the Constitution in order to determine whether a statute is consistent therewith. Perhaps more often, courts appeal to the rule that a statute should be construed so as to be consistent with the Constitution. Judge Noonan's analysis is of the latter sort, but with the added twist that the judiciary should defer to Congress' positive construction of a constitutional right in order to interpret Congress' intent in a given statute.<sup>263</sup>

Should the judiciary defer to congressional declarations of constitutional rights in order to determine whether a statute is constitutional? The query is more easily answered in the affirmative in regard to state law. In determining whether a state statute prohibiting possession of firearms is consistent with the Fourteenth Amendment, a court should certainly consider the Congressional declaration that no person should be denied "the constitutional right to bear arms."<sup>264</sup> Even in the harder case of a federal prohibition on firearms, a court should consider Congress' statements in 1866, 1941, and 1986 and construe the Second Amendment broadly to recognize the right of individuals to keep and bear arms.<sup>265</sup>

In contrast with Judge Noonan's analysis, some judges have assiduously refrained from any acknowledgment of the Congressional declarations that the Second Amendment protects the rights of citizens to have firearms.<sup>266</sup> (pg.637) A Sixth Circuit case quoted only floor speeches on the FOPA which did not mention the Second Amendment, and then the court asserted that "there is no individual right to possess a firearm."<sup>267</sup> Similarly, an Eighth Circuit opinion failed to mention Congress' 1986 declaration, while arguing that the Second Amendment does not protect possession of a type of firearm unless the possessor demonstrated his nexus with a militia.<sup>268</sup> The Eighth Circuit

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<sup>261</sup> 827 F.2d at 1367 (Noonan, J., dissenting).

<sup>262</sup> *See id.* (Noonan, J., dissenting).

<sup>263</sup> *See id.* (Noonan, J., dissenting).

<sup>264</sup> Freedmens' Bureau Act, 14 Stat. 176-77 (1866).

<sup>265</sup> *See, e.g.*, 827 F.2d at 1366-67 (Noonan, J., dissenting).

<sup>266</sup> *See, e.g.*, *United States v. Cassidy*, 899 F.2d 543, 549 n.12 (6th Cir. 1990).

<sup>267</sup> *Id.* Commenting on this statement, the Eastern District of Michigan in *United States v. Hammonds*, 786 F. Supp. 650, 657 n.5 (E.D. Mich. 1992), noted:

[T]hroughout the seven years that Congress dealt with the amendments to the Gun Control Act that are presently at issue, in enacting the 1986 amendments the Legislature approached this matter with clearly stated belief that there is a constitutionally protected individual "right" to possess firearms.

In fact, Congress expressly so stated in the Federal Firearms Owners' Protection Act of 1986 .... Although this expression is not, of course, dispositive of the issue of whether there is a Constitutional right, the fact that key legislators and the Act itself expressed the belief that such a "right" exists is reflective upon the context of the debate and consideration of this legislation, and, of course, Congressional intent.

*Id.*

<sup>268</sup> *United States v. Hale*, 978 F.2d 1016, 1018-20 (8th Cir. 1992). This case concerned the paradox that arose in the Firearms Owners' Protection Act because it prohibited possession of machineguns. 18 U.S.C. § 922(o) (1988). Concurring in *Hale*, Circuit Judge Beam more cautiously wrote:

I also agree that Hale's possession of the particular weapons at issue in this case is not protected by the Second Amendment. I disagree, however, that *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942); *United States v.*

opinion even brushes aside<sup>269</sup> the following clear statement by the Supreme Court, in *United States v. Verdugo-Urquidez*,<sup>270</sup> that "the people" protected by the Second Amendment are individuals, not states:

"[T]he people" seems to have been a term of art employed in select parts of the Constitution.... The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people." See also U.S. Const., Amdt. 1 ("Congress shall make no law ... abridging ... *the right of the people* peaceably to assemble") (emphasis added); Art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second year *by the People of the several States*") (emphasis added). While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, (pg.638) and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.<sup>271</sup>

Departing for a moment from the Second Amendment, a last-minute floor amendment to the FOPA has given rise to renewed jurisprudence concerning the enumerated powers of Congress.<sup>272</sup> This equivocal provision of the FOPA was interpreted to ban possession of machineguns made after 1986, resulting in the refusal by the Department of the Treasury to register them under the NFA.<sup>273</sup> Under one line of cases, NFA registration requirements were ruled unconstitutional as applied to prohibited firearms for which the BATF will not accept tax payments.<sup>274</sup> These cases rely in part on the statements made in 1934 by proponents of the NFA, who explained that Congress has no enumerated power to prohibit possession of firearms, and that Congress could require registration of machineguns only to collect revenue.<sup>275</sup> A second line of cases, however, sustained the registration

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*Warin*, 530 F.2d 103 (6th Cir. 1976); *United States v. Oakes*, 564 F.2d 384 (10th Cir. 1977) and *United States v. Nelson*, 859 F.2d 1318 (8th Cir. 1988) properly interpret the Constitution or the Supreme Court's holding in *United States v. Miller*, 307 U.S. 174 (1939) insofar as they say that Congress has the power to prohibit an individual from possessing any type of firearm, even when kept for lawful purposes.

*Hale*, 978 F.2d at 1021 (citations omitted).

<sup>269</sup> *Hale*, 978 F.2d at 1020.

<sup>270</sup> 494 U.S. 259 (1990).

<sup>271</sup> *Id.* at 265.

<sup>272</sup> 18 U.S.C. § 922(o) (1988).

<sup>273</sup> *Farmer v. Higgins*, 907 F.2d 1041, 1044-45 (11th Cir. 1990) (construing 18 U.S.C. § 922(o)).

<sup>274</sup> *United States v. Dalton*, 960 F.2d 121 (10th Cir. 1992); *United States v. Rock Island Armory, Inc.*, 773 F. Supp. 117 (C.D.Ill. 1991), *appeal dismissed*, No. 91-2595, 1991 WL 224268 (7th Cir. Aug 13, 1991). These cases have been approvingly cited by other federal courts. *United States v. Kurt*, 988 F.2d 73, 75-76 (9th Cir. 1993) (citing *Dalton* only); *United States v. Parker*, 960 F.2d 498, 500 (5th Cir. 1992); *United States v. Ferguson*, 788 F.Supp. 580, 581 (D.D.C. 1992); *United States v. Aiken*, 787 F.Supp. 106, 107-8 (D. Md. 1992), *aff'd* 974 F.2d 446, 448-50 (4th Cir. 1992).

The Justice Department originally agreed with the courts, stating: "The United States agrees that the foregoing decisions [*Dalton* and *Rock Island*] are persuasive and should control the disposition of this appeal, and ... [that defendant's] conviction under 26 U.S.C. § 5861(d) should be vacated ...." Joint Motion for Remand, *United States v. Kirk*, No. 918418, *granted* (5th Cir. 1992).

<sup>275</sup> See *supra* notes 68-90 and accompanying text.

requirements under the commerce power, despite the fact that Congress passed the registration requirements strictly under the tax power.<sup>276</sup>

A related issue is whether Congress has the power to prohibit the possession of a firearm at a local school. The Ninth Circuit upheld the Gun Free School Zones Act of 1990 as an exercise of the interstate commerce (pg.639) power.<sup>277</sup> The Fifth Circuit, however, ruled the Act unconstitutional as exceeding Congress' enumerated powers.<sup>278</sup> In *United States v. Lopez*, the Fifth Circuit noted that

[i]t is also conceivable that some applications of [the Gun Free School Zones Act] might raise Second Amendment concerns. *Lopez* does not raise the Second Amendment and thus we do not now consider it. Nevertheless, this orphan of the Bill of Rights may be something of a brooding omnipresence here.<sup>279</sup>

The Fifth Circuit also noted that, in the FOPA, Congress explicitly recognized "the rights of citizens ... to keep and bear arms under the second amendment ...."<sup>280</sup> The Supreme Court has recently affirmed the Fifth Circuit's holding that the Act is unconstitutional.<sup>281</sup>

Ultimately, Congress may expand but not contract constitutional rights recognized by the Supreme Court.<sup>282</sup> When Congress construes a Bill of Rights guarantee broadly, it reflects the interests of the people at large who influence Congress through the rights of petition and suffrage, and, in the final analysis, keeping and bearing arms.<sup>283</sup> St. George Tucker, who wrote the first major commentaries on the Bill of Rights, recognized the role of the people in enforcing the Bill of Rights:

A bill of rights may be considered, not only as intended to give law, and assign limits to a government about to be established, but as giving information to the people. By reducing speculative truths to fundamental laws, every man of the meanest capacity and understanding may learn his own rights, and know when they are violated ....<sup>284</sup> (pg.640)

Thus, when a Congressional declaration reflects the people's understanding of a constitutional right, a court should be loath to enforce its own narrow interpretation. In the United States, half of all

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<sup>276</sup> *United States v. Ardoin*, 19 F.3d 177 (5th Cir. 1994) (2-1 opinion), *cert. denied*, 115 S. Ct. 327 (1994); *United States v. Ross*, 9 F.3d 1182, 1192-94 (7th Cir. 1993), *cert. granted and judgement vacated*, 114 S. Ct. 2129 (1994); *United States v. Jones*, 976 F.2d 176, 182-84 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2351 (1993).

<sup>277</sup> *United States v. Edwards*, 13 F.3d 291 (9th Cir. 1993), *cert. granted and judgment vacated*, 115 S. Ct. 1819 (1995).

<sup>278</sup> *United States v. Lopez*, 2 F.3d 1342 (5th Cir. 1993), *aff'd*, 115 S. Ct. 1624 (1995). Following the Fifth Circuit's *Lopez* opinion, a district court declared the federal machinegun ban as exceeding Congress' enumerated powers. *United States v. Bownds*, 860 F. Supp. 336 (S.D. Miss. 1994).

<sup>279</sup> *Id.* at 1364 n.46. The court wrote: "For an argument that the Second Amendment should be taken seriously, see Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989)." *Id.*

<sup>280</sup> 2 F.3d at 1355.

<sup>281</sup> 115 S. Ct. 1624 (1995).

<sup>282</sup> See generally J. Edmond Nathanson, *Congressional Power to Contradict the Supreme Court's Constitutional Decisions: Accommodation of Risks in Conflict*, 27 WM. & MARY L. REV. 331 (1986); Matt Pawa, Comment, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us?* 141 U. PA. L. REV. 1029 (1993).

<sup>283</sup> See Amar, *supra* note 1, at 1162-73 (discussing the populist and structural core of the Second Amendment).

<sup>284</sup> 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES 308 (1803).

households contain a firearm, and many firearms owners believe that they are among "the people" protected by the Second Amendment.<sup>285</sup>

Tucker adhered to the then-incipient view that the courts are duty bound to declare that statutes contrary to the Constitution are void.<sup>286</sup> Elaborating on this view, Tucker stated as follows:

If, for example, a law be passed by congress, prohibiting the free exercise of religion, according to the dictates, or persuasions of a man's own conscience; or abridging the freedom of speech, or of the press; or the right of the people to assemble peaceably, or to keep and bear arms; it would, in any of these cases, be the province of the judiciary to pronounce whether any such act were constitutional, or not; and if not, to acquit the accused from any penalty which might be annexed to the breach of such unconstitutional act.... The judiciary, therefore, is that department of the government to whom the protection of the rights of the individual is by the constitution especially confided, interposing it's [sic] shield between him and the sword of usurped authority, the darts of oppression, and the shafts of faction and violence.<sup>287</sup>

In 1803, the above doctrine was adopted by the United States Supreme Court in *Marbury v. Madison*.<sup>288</sup> Since then, however, the federal judiciary has often been shy about protecting certain constitutional rights. The right of the people to keep and bear arms prevents a state monopoly of force and resists absolute concentration of power in the hands of the few. Federal judges are appointed, not elected, and some courts have not been careful to protect this right. It is noteworthy that some of the strongest precedents (pg.641) protecting the right to keep and bear arms under state bills of rights were decided by elected judges.<sup>289</sup>

In conclusion, Congress has reaffirmed and reinforced the Second Amendment on three occasions.<sup>290</sup> In the Freedmen's Bureau Act of 1866, Congress guaranteed to the freed slaves "full and equal benefit of all laws and proceedings concerning personal liberty [and] personal security ..., including the constitutional right to bear arms."<sup>291</sup> Again, in the war-time Property Requisition Act of 1941, Congress prohibited any construction which would "require the registration of any firearm possessed by any individual for his personal protection or sport," or which would "infringe in any manner the right of any individual to keep and bear arms."<sup>292</sup> Finally, in the Firearms Owners'

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<sup>285</sup> The Hearst Corporation reported that "[h]alf (50%) of the American population *wrongly* believe the Constitution gives every citizen the right to own a handgun." THE AMERICAN PUBLIC'S KNOWLEDGE OF THE U.S. CONSTITUTION: A HEARST REPORT 27 (1987) (emphasis added). If this statement reflects the political agenda of the power elite, which is often adverse to firearms ownership in the community, it also illustrates the point made by St. George Tucker: the Bill of Rights (including the Second Amendment) is written in a manner so as to be understood by commoners, who *rightly* believe that it means what it says. The percentage of people who Hearst claims "wrongly" believe that the Second Amendment protects the right of every citizen may well be higher than 50%. The existence of these persons nicely illustrates C. Wright Mills' point that America has not reached totalitarianism because "media markets are not entirely ascendant over primary publics." C. WRIGHT MILLS, THE POWER ELITE 304 (1956).

<sup>286</sup> See TUCKER, *supra* note 281, at 357.

<sup>287</sup> *Id.*

<sup>288</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>289</sup> *E.g.*, *City of Princeton v. Buckner*, 377 S.E.2d 139 (W. Va. 1988); *State v. Kessler*, 614 P.2d 94 (Or. 1980).

<sup>290</sup> See *supra* notes 2, 12, 15 and accompanying text.

<sup>291</sup> 14 Stat. 176-77 (1866).

<sup>292</sup> 55 Stat. 742 (1941).

Protection Act of 1986, Congress found that "the rights of citizens ... to keep and bear arms under the second amendment to the United States Constitution" were being inadequately protected, and that additional legislation was necessary to correct the Gun Control Act and the enforcement policies of the BATF.<sup>293</sup>

These Congressional declarations are directed at the basic political units. A declaration of a constitutional right reflects a consensus and a form of self-discipline in the Congress itself. It is an assurance to the people at large that their rights are recognized and enforced. It functions to admonish and encourage the people to stand up for their rights through every constitutional means. Such a declaration is also a directive to the executive branch (1) to enforce the right against state, local, and private action, or (2) not to infringe on the right through the promulgation of rules and regulations. Moreover, such a declaration is an emphatic statement from the popularly elected branch to the appointed judiciary, that the right to keep and bear arms is a fundamental, individual right, and that statutes regulating this right should be narrowly construed against the government and in favor of the people. Today, however, as the republic enters its third century, it remains to be seen whether Congress will continue to protect this provision of the Bill of Rights, or whether the courts will defer to the popular branch's broad interpretation of the right to keep and bear arms.

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<sup>293</sup> 100 Stat. 449 (1986).