



BY ROBERT A. LEVY

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## CHAIRMAN'S MESSAGE

# Second Amendment: A Look Back, a Path Forward

Since 1939, appellate courts across the country have muddled and misinterpreted the Supreme Court's Second Amendment precedent. But in June 2008, the Court finally clarified that the Constitution secures an individual right to keep and bear arms for self-defense. *District of Columbia v. Heller* took more than five years to litigate. It overcame a 32-year de facto gun ban in Washington, DC.

Justice Scalia's 5-4 opinion acknowledged that the Second Amendment is not absolute. Weapons that are not in common use and are especially dangerous can be outlawed, some persons can be denied gun rights, and possession in some circumstances can be restricted. If sensible regulations are the objective, I, for one, applaud that goal. Indeed, *Heller* took a major step to restore sensibility in DC.

From the beginning, the battle for gun rights was structured as a three-step process. Step 1, establishing the meaning of the Second Amendment and that it does protect an individual right, was completed in *Heller*. Step 2, determining where the Second Amendment applies, was completed two years later in *McDonald v. Chicago*. The Second Amendment applies to the states, not just federal jurisdictions such as DC. Step 3, fleshing out the scope of Second Amendment rights, is the next major task. What gun control regulations will still be permitted?

Here's what we now know: The Second Amendment secures an individual right to bear arms commonly used for lawful purposes. The right is subject to reasonable restrictions. But because the Supreme Court has declared that the right to bear arms is "fundamental," we enjoy a strong presumption of individual liberty, meaning that government has the burden to justify its proposed regulations, subject to meaningful judicial scrutiny.

Since *Heller*, the Supreme Court has been asked to review 10 gun rights cases that involved, among other issues, banning interstate handgun sales, carrying a firearm outside the home for self-defense, limiting so-called assault rifles and large-capacity magazines, and conditioning handgun permits on a demonstrated need for self-defense. The Court denied review in all 10 cases—abdicated its responsibility to say what the law is. As a result, there will likely be continued resistance by some legislatures and courts to the bedrock principles laid out in *Heller*.

So where do we go from here? First, here's the good news: Since peaking in the early 1990s, gun homicide has declined by 44 percent nationwide. Overall gun crime victimization is down roughly 70 percent. During that same period, the number of guns in circulation nearly doubled. U.S. residents own more than one gun per person. Guns are way up, and gun killings are way down. Obviously, there are salutary factors at work unrelated to gun control.

Meanwhile, the focus remains on high-profile mass shootings, although multivictim spree killings are a fraction of 1 percent of all murders in the United States. Sadly, such sprees will occur even where strict gun regulations are imposed. Seventeen people were murdered at a high school in Parkland, Florida. Almost as many people are murdered in Chicago every two weeks.

As long as Republicans have sufficient votes in the Senate, we can expect little movement toward constraining semiautomatic weapons or high-capacity magazines. There may, however, be an opportunity to find common ground in one contentious area: extending background checks to internet sales and private sales at gun shows. That was a key part of the Manchin-Toomey compromise bill, which failed to get sufficient Senate support in 2013 and again in 2015. Today, if President Trump were to endorse the bill, it might have a fighting chance.

What did Manchin-Toomey offer to gun enthusiasts? The bill allowed interstate handgun sales through dealers, prohibited a registry of firearms by the attorney general, reduced the time limit for performing background checks, permitted transportation of firearms across state lines, and improved the database driving the National Instant Criminal Background Check System. The quid pro quo was to require background checks for private sales at gun shows, over the internet, and through published ads. The Manchin-Toomey compromise would have advanced the interests of gun owners while making reasonable tradeoffs wanted by the gun control side. Considered as a package, the bill offered substantial net benefits to gun owners without intruding on core Second Amendment liberties. Perhaps it's time for another look.

Robert A. Levy