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The Checks and Balances of Armed Self-Preservation

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American governmental institutions delicately and intricately counterbalance each other in providing for each institution’s own physical defense. By arming themselves in these many separate ways, each institution has (at least partly) made itself independent of the others for its own security needs. A decision in March 2007 to invalidate a ban on private firearms in the District of Columbia means that the Supreme Court is now likely to decide whether any individual has a right to keep and bear arms at home, or anywhere outside active military service under government regulation. See Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir. 2007). The question remains unresolved, even two centuries after the states ratified the Second Amendment:

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.

U.S. Const., Amend. II. To answer that question, many have written about the political and textual history of the Second Amendment’s drafting and early construction – including the U.S. Justice Department, whose Legal Advisor concluded in 2004 that indeed there is indeed an “individual” right to keep and bear arms,1 and lower courts such as the U.S. Court of Appeals for the Ninth Circuit, which had held that there is only a “collective” right to arm an organized military force such as the National Guard.2 In resorting to those historical sources of guidance to interpret the Second Amendment, the Supreme Court would confront two fundamental choices that rival judges and commentators reading history and the actual text of the amendment have battled to address. First, the Court would choose whether government may impose policies that make any one individual’s security interest – that is, the interest in shooting an assailant if necessary in self-defense – subordinate to the collective security of the people based on the majority’s stated belief that banning private gun ownership tends to make the people safer in the aggregate or on average. Second, but no less importantly, the Court would also choose whether individuals have a right not to depend upon government police for protection against physical attack. That choice will determine whether the people have the same individual rights that the separate American governmental institutions already exercise to arm themselves for defense.

In hundreds of ways, American governmental institutions counterbalance each other’s armed security forces. Rather than relying on any agency of the Executive branch for security, the Congress has commanded its own defensive police force since 1867.3

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Current law provides for an exquisite balancing between the two legislative chambers of Congress in staffing that armed force:

The captain and lieutenants shall be selected jointly by the Sergeant at Arms of the Senate and the Sergeant at Arms of the House of Representatives; and one-half of the privates shall be selected by the Sergeant at Arms of the Senate and one-half by the Sergeant at Arms of the House of Representatives.

2 U.S.C.A. § 1901. From the beginning, likewise, the federal Judiciary has had its own marshals under arms. At least in part to check the courts’ use of force by keeping their marshals from calling in the army, there has been a Posse Comitatus Act since the end of Reconstruction. See 18 U.S.C.A. § 1385. Within the Executive branch itself, the President relies on the Department of Homeland Security for a personal guard (the Secret Service) rather than relying on the army or any other branch of military service. And of course, American taxpayers provide for arming and staffing the hundreds of overlapping and partly redundant police agencies – all under separate commands – for every state, county and city in the nation.

By arming themselves in these ways, each institution of American government has made itself at least partly independent of each other for their own security against physical attack. Each institution has security agents to defend its leaders, its personnel and its facilities, all without relying on other institutions to provide physical security. A visit to nearly any county courthouse or city council confirms this, and those agents perform a security function that is almost entirely distinct from any law enforcement –

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4 Since the first Judiciary Act of 1789, there have been marshals for each judicial district “removable from office at pleasure, whose duty it shall be to attend the district and circuit courts when sitting therein,” and whose deputies “shall be removable from office by the judge of the district court, or the circuit court sitting within the district, at the pleasure of either.” An Act to Establish the Judicial Courts of the United States, 1st Cong., 1st Sess., ch. XX, § 27, 1 Stat. 73 (Sept. 24, 1789).

5 See the 1878 legislative history cited in Gary Felicetti & John Luce, “The Posse Comitatus Act: Setting the record straight on 124 years of mischief and misunderstanding before any more damage is done,” 175 Mil. L. Rev. 86, 115 & n.137 (Mar. 2003). The authors conclude that the statute was primarily designed to re-subjugate freed black slaves by preventing the use of federal troops to counter racist intimidation in the South.

6 The functions of the Secret Service were transferred from the Treasury to the Homeland Security department in 2003. See 6 U.S.C.A. § 381. The Treasury continues to operate its own U.S. Mint Police, established in 1792, whose authority extends “to the buildings and land under the custody and control of the Mint; to the streets, sidewalks and open areas in the vicinity to such facilities; to surrounding parking facilities used by Mint employees; and to the protection in transit of bullion, coins, dies, and other property and assets of, or in the custody of, the Mint.” Pub. L. No. 104-208, Div. A, Title V, § 517, 110 Stat. 3009-347 (Sept. 30, 1996), set out in 31 U.S.C.A. § 5141 Note.
except, of course, for enforcing laws that safeguard those institutions against physical attack.

The Supreme Court has never expressly resolved whether the Second Amendment guarantees a private right to keep and bear arms. Now for only the second time since its ratification in 1791, a federal appellate court has held that the Second Amendment does indeed guarantee an individual’s right, as one of “the people,” to keep and to bear his or her own military armaments such as pistols for private self-defense:

The premise that private arms would be used for self-defense accords with Blackstone’s observation, which had influenced thinking in the American colonies, that the people’s right to arms was auxiliary to the natural right of self-preservation. … The right of self-preservation, in turn, was understood as the right to defend oneself against attacks by lawless individuals, or, if absolutely necessary, to resist and throw off a tyrannical government.

…

The importance of the private right of self-defense is hardly surprising when one remembers that most Americans lacked a professional police force until the middle of the nineteenth century … and that many Americans lived in backcountry such as the Northwest Territory.

Parker, 478 F.3d at 383 & n.9 (citing authorities). This latest decision by the District of Columbia Circuit in March 2007, and the Fifth Circuit’s similar holding in 2001,8 contradict the holdings of all but one of the other regional circuits that addressed the question during the twentieth century.9 Those other federal circuits all held, in one form or another, that the people’s right to keep and bear arms guarantees only the right to maintain organized military units such as the National Guard. Many have predicted, as a

7 During the Depression, the Justice Department had urged the Supreme Court to hold that the “the right secured by [the Second Amendment] to the people to keep and bear arms is not one which may be utilized for private purposes but only one which exists where the arms are borne in the militia or some other military organization provided for by law and intended for the protection of the state.” See Appellant’s Br. at 15, United States v. Miller, No. 696 (U.S.), quoted in Parker v. District of Columbia, 478 F.3d 370, 392 (D.C. Cir. 2007). Without expressly accepting or rejecting that argument, the Court instead upheld a ban on individuals transporting short-barreled shotguns “[i]n the absence of any evidence tending to show that possession or use of [such a shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia.” United States v. Miller, 307 U.S. 174, 178, 59 S.Ct. 816, 817 (1939).

8 See United States v. Emerson, 270 F.3d 203, 264-65 (5th Cir. 2001).

9 See authorities cited in – and disagreed with by – Parker, 478 F.3d at 380 n.4. Only the Second Circuit has not yet decided the issue.
result of that split of opinion, that the Supreme Court will soon choose to decide the issue.\footnote{10}

Despite the early lack of policing cited by Parker, most Americans today do not lack access to professional police forces for protection against other individuals. In the District of Columbia itself, not only the Secret Service’s uniformed division and the Capitol Police, but also the city’s Metropolitan Police Department, the U.S. Park Police, the ATF, the FBI, the DEA and police departments at six private universities all enforce laws that protect public safety in one fashion or another. The lack of professional police to protect much of eighteenth century America therefore provides only limited guidance in predicting how the Supreme Court would weigh a collective legal determination that banning private ownership of armaments makes society safer overall against an individual’s interest in armed self-preservation. Rather, the Court would also likely consider whether today’s police can or do provide \textit{enough} protection against physical attack that any individual right to armed self-defense is constitutionally unnecessary. Critics of banning weapons can argue that police protection, as it exists today, is largely effective only as a deterrent against lawlessness and to prevent repeat offenses by arresting offenders who (once incarcerated) can only prey on other offenders rather than the people at large. Unlike the defense of the President (by the Secret Service) or Congress (by the Capitol Police), police forces generally do not actually provide defense – as distinct from deterrence and arrest – for most Americans who may encounter an attacker. Current events such as the April 2007 massacre at Virginia Tech show that police do not, and probably cannot, defend most of the people most of the time:

About 9:15, the gunman chained the doors of the classroom building so his potential victims could not escape and police could not enter. There, he shot as many as 46 more people.\footnote{11}

Thus, even with the benefit of police deterrence and the incapacitation of repeat offenders, the absence of individual armed self-defense usually means having no actual defense at all. This is so today for the majority of the people, who cannot afford to hire their own armed security personnel, just as it was true for the minority of freed slaves in the late nineteenth century who lacked any protection in the form of deterrence by white-controlled police forces. See \textit{Silveira v. Lockyer}, 328 F.3d 567, 576-77 (9th Cir.) (Kleinfeld, J., dissenting from denial of en banc hearing) (describing the “Black Codes” that followed Reconstruction and banned black citizens from having firearms), \textit{cert. denied}, 540 U.S. 1046 (2003).


\footnote{11 “At least 33 dead in rampage on Virginia campus,” http://www.msnbc.msn.com/id/18134671/ (April 16, 2007).}
Still, a majority in the District of Columbia apparently feels that banning or restricting individual armament today actually provides the people with greater aggregate security than privately armed self-preservation provides— even though some individuals will find themselves defenseless against attackers who kill them—by preventing or at least discouraging attackers from obtaining firearms and by reducing the risk of accidental gunshots. The District government makes such an argument in the Parker case. Because of that rationale for banning individual ownership of weapons, and because of improvements in armed police protection since the Founding, today the Supreme Court would face an essential question that the historical debaters of the Second Amendment have never resolved: whether government may aggregate or collectivize the personal security of individuals by requiring the people to depend entirely on police to provide whatever level of armed protection the police are capable of providing. This is the core of the debate over gun control, and it is the core of the issue that the Supreme Court would resolve if it chooses to decide Parker.

Quite apart from that core concern, the historical debaters who advocate recognizing an individual right to keep and to bear arms also contend that armed individuals, when acting “as a body,” served to check the risk of tyrannical oppression by government. Their opponents, in advocating for only a collective right to arm organized state forces like the National Guard, contend that such collective forces would have sufficed in checking any oppression by the national government. Here the advocates for recognizing only a collective right to armaments might add, as a purely practical matter, the simple truth that no single individual could possibly hope to check the government’s combined firepower except by acting collectively “as a body.” That is certainly true today, when the government military forces of the United States are the most powerful in the world, and the drafters of the Second Amendment also would have understood that practical reality. They had only recently launched a revolution against a world superpower by famously declaring that “we must ... all hang together, or most assuredly we shall all hang separately.”

For that practical reason, the idea of individuals bearing arms collectively to check government tyranny may add little to answering whether the Second Amendment secures either an individual right or only a collective right to keep arms and to bear them. Nevertheless, the concept of checks and balances may help to illustrate whether individuals have a fundamental liberty interest in self-preservation by force of arms that is analogous to other fundamental liberties protected elsewhere in the Constitution.

12 See Parker, 478 F.3d at 399 n.17 (noting that the District’s ban “is justified solely as a measure to protect public safety.”).
13 See Op. Off. of Legal Counsel, supra, at 93-94 (suggesting that an 1840 Tennessee decision appears to have had in mind “the people, in an extreme case of governmental tyranny, independently bearing arms as a body to check the government.”).
14 See the conflicting commentaries cited in Silveira, 312 F.3d at 1065-66.
The text of the Constitution is replete with provisions that are intended to secure the blessings of liberty – or conversely, to protect against the dangers of tyranny – notwithstanding their possible costs. Significantly, those protections not only recognized the evils associated with a monarch, or an executive with absolute power, but also the risk of tyranny by an unrestrained majority. The limited delegations of power to the Federal Government, the tripartite division of authority among three branches of the Federal Government, the division of the Legislature into two Houses, the staggered terms of office, with Senators serving six years, the President four years, and Representatives only two, the provision for a Presidential veto of Acts of Congress, the guarantee of life tenure for federal judges – all of the checks and balances are consistent with the interest in protecting individual liberty from the possible misuse of power by a transient unrestrained majority.

Walters v. National Ass’n of Radiation Survivors, 473 U.S. 305, 369 n.18 (1985) (Stevens, J., dissenting). If the Supreme Court chooses to decide the Parker case, it will choose whether government may or may not prevent individuals from doing something that the President, Congress, the federal Judiciary and hundreds of state and local governments have all done to preserve their existence. Deciding the Second Amendment question means deciding whether the people have the liberty to preserve their own lives in that manner, or whether – instead – the majority has the lawful power to make most of the people depend entirely on government to protect them by force of arms.

About the Author

Robert E. Kohn is a practicing lawyer and a member of the State Bar of California and of the District of Columbia Bar. He is also a co-chair for federal rules of procedure and trial practice in the Federal Litigation Section of the Federal Bar Association, and he serves as the editor of the SideBAR newsletter of that section. His other publications include “New Antitrust Remedies for Lying to Government Rule Makers,” 52 Federal Lawyer 25 (Feb. 2005), and “Applying the Insider Trading Doctrine to Debt Securities,” 6 InSights 18 (Nov. 1992) (co-authored with Richard M. Phillips). He clerked for the Hon. Joel F. Dubina of the U.S. Court of Appeals for the Eleventh Circuit after graduating with honors from Duke University School of Law.