Three Questions About The Second Amendment

Recently, some friends of the Second Amendment posed three questions to me, the answers to which I consider of great importance—

I. Why is the recent ban on "bump stocks" so important?

First, in "the bump-stock ban" the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("BATFE") has jury rigged a precedent for its "redefinition" of whatever statutory terms, originally defined by Congress, the unelected bureaucrats haunting the agency's offices want to expand, contract, or otherwise twist out of shape by linguistic tricks. It would be effrontery enough for *any* mere "administrative agency" to arrogate unto itself in any degree—worse yet, to usurp outright—the exclusive constitutional authority of Congress to rewrite the laws of the United States. But in the case of the BATFE in particular it is intolerable. For the BATFE has proven itself to be a rogue establishment with a strong, persistent, and often irrational bias against ordinary Americans' exercise of their rights under the Second Amendment. (The recent scandal of so-called "gun walking" under the agency's code-name "Fast and Furious" is merely the most notorious of these outrages.) So the BATFE can be expected to spew out more "redefinitions" of this ilk as time goes by—especially if (or perhaps when) the Democratic Party gains control of the White House in the 2020 elections.

Second, the "bump-stock ban" can easily be extended far beyond "bump stocks" themselves. In pertinent part, the BATFE's new regulation reads as follows:

> The term "machine gun" includes a bump-stock-type device, i.e., a device that allows a semiautomatic firearm to shoot

> more than one shot with a single pull of the trigger by harnessing the recoil energy of the semiautomatic firearm to which it is affixed so that the trigger resets and continues firing without additional physical manipulation of the trigger by the shooter. [*See* 27 C.F.R. ¶¶ 447.11, 478.11, and 479.11, *as modified perforce of* 83 Federal Register at 66553 to 66554.]

On the face of it, the BATFE has "redefined" the statutory term "machine gun" simply in order to prevent certain semiautomatic firearms—such as AR-15 type rifles—from being "bump fired". Plainly enough, however, the agency's ultimate goal is not just to ban "bump-stock-type device[s]"—and not just to outlaw "bump fire" effectuated through the employment of such "device[s]"—but instead *to ban all firearms capable of "bump fire" by any means, on the grounds that all such firearms, so usable, are effectively "machine guns"*.

After all, the ostensible reason for the present attack on "bump-stock-type device[s]" is that "bump fire" itself is deemed to be somehow equivalent to (fully) automatic fire. So, because the BATFE has set out to prohibit a general *effect*, it does not matter that the actual mechanisms of "bump fire" with a semiautomatic firearm on the one hand, and of automatic fire with an actual "machine gun" on the other hand, are distinctly different, and have hitherto always been recognized as such by Congress and the BATFE itself, as well as by every firearms expert worthy of that designation. To the BATFE, to a benighted President Trump, and to "gun-control" fanatics in Congress, State legislatures, the courts, and the big "mainstream media"—as well as to all too many credulous Americans—simplistic appearances are of greater consequence than the complex technical realities of how disparate types of firearms actually function.

To accomplish that end, following up on the ban of "bump-stock-type device[s]" the BATFE could simply declare "bump fire" to be an inherent capability of certain semiautomatic

firearms—because, self-evidently, no "bump-stock-type device" could cause any firearm to "bump fire" unless that firearm were already capable of being "bump fired". *So every semiautomatic firearm capable of "bump fire" by any means could be mischaracterized as inherently a "machine gun"*. To employ the BATFE's terminology, "bump fire" simply "harness[es] the recoil energy of the semiautomatic firearm" (an inherent characteristic), in conjunction with the firearm's existing mechanism (also an inherent characteristic), so as to allow "the trigger [to] reset[ ] and continue[ ] firing without additional physical manipulation of the trigger by the shooter". A semiautomatic firearm which can be demonstrated to be capable of "bump fire" by any means is, perforce of that capability, "designed to shoot * * * automatically more than one shot, without manual reloading, by a single function of the trigger". Inherent in the design of such a firearm is "a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single function of the trigger", where a "'single function of the trigger' means a single pull of the trigger and analogous motions", those "motions" being caused in whatever effective manner. The "single function of the trigger" is the first pull by the conscious action of the shooter, after which "harnessing the recoil energy" of the firearm "automatically", through "analogous motions", results in firing "more than one shot, without manual reloading" and without a further conscious "pull of the trigger" by the shooter (thus being practically akin to a "machine gun"). *Q.E.D.*

On the basis of that reasoning, *the BATFE could ban the private possession of* ***every*** *semiautomatic rifle—and probably* ***every*** *semiautomatic handgun and shotgun as well—which the agency's technical staff could demonstrate to be capable of "bump fire" by any means whatsoever*.

In the minds of politicians, legislators, judges, the big "mainstream media", goofy "celebrities", and a not

inconsiderable percentage of the general public unfavorably disposed to the Second Amendment, this could be a very potent argument for banning just about all semiautomatic firearms.

II. What were the Founders trying to achieve when they adopted the Second Amendment?

The Founders certainly did not have in mind the contemporary misinterpretation of the last fourteen words of the Second Amendment which focuses on a so-called "*individual* right" to "keep and bear Arms" for the purpose of personal self-defense alone. They knew perfectly well that the right of self-defense did not need a constitutional Amendment for its recognition, protection, or exercise. For, in the words of Sir William Blackstone, the preëminent commentator on the laws of England at that time, "[s]elf defense * * * is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society." *Commentaries on the Laws of England* (American Edition, 1772), Volume 3, at 4.

Furthermore, the Founders would have interpreted the Second Amendment in just the way they wrote it: namely, treating all of its twenty-seven words as inextricable parts of a single coherent sentence. Read in that way (as every sentence in the English language must be read), the Amendment's meaning is self-evident. Its goal is "a free State". To achieve this end, "security" is indispensable. The "necessary" means to provide "security" is "[a] well regulated Militia". "[T]he right of the people to keep and bear Arms" is of central instrumentality in the operation of "[a] well regulated Militia", and through the Militia is "necessary to the security of a free State". For which reason that "right * * * shall not be infringed"—and without any exception, too, inasmuch as what the Constitution declares to be "necessary" can never be deemed to be "unnecessary". Thus, the Second Amendment guarantees not only "the right of the people to keep and bear Arms", but also, through the people's permanent possession of suitable "Arms", their right at all times to

serve in “well regulated Militia” as the defenders of “a free State”.

The Founders’ primary concern was that Congress might default on its duty in Article I, Section 8, Clause 16 of the Constitution “[t]o provide for * * * arming * * * the Militia”. But the Second Amendment also covered the possibility that the States themselves might be no less remiss. As is all too evident today, the Founders’ fears have been proven prescient as to both Congress and the States.

The contemporary “individual right” “to keep and bear Arms” concerns itself entirely with the needs and actions of *individuals* as such, not with “well regulated Militia”. Ordinary Americans’ exercise of the.”individual right” does not establish “[a] well regulated Militia”, or secure its existence, or aid in its operations. Indeed, proponents of “the individual right” turn logical and linguistic somersaults in their bootless attempts to prove that, notwithstanding the actual wording of the Second Amendment, “the individual right” has nothing whatsoever to do with the Militia.

Moreover, Americans who exercise merely “the individual right” cannot fulfill any of the responsibilities assigned to the Militia. Article I, Section 8, Clause 15 of the Constitution empowers Congress “[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions”. But—

- People exercising “the individual right” in isolation or *ad hoc* groups can neither “repel Invasions” by foreign nations capable of invading the United States, nor “suppress Insurrections” on any scale worthy of that name. For such people can draw on no collective organization, training, discipline, governance, or extensive logistical support equal to those tasks.
- Being burdened with similar deficiencies which prevent them from functioning as competent law-enforcement

> officers, people exercising merely “the individual right” are incapable in fact of “execut[ing] the Laws of the Union” (or of their own States, either). Of even more consequence, mere individuals have *no governmental authority* to execute *any* laws other than those few encompassed within the law of personal self-defense.

To be sure, the National Rifle Association and its co-thinkers claim that “the individual right” protects ordinary Americans against tyranny. This is wishful thinking. Even if armed, mere individuals or *ad hoc* groups cannot be expected to fend off by themselves the well organized and equipped forces of an ensconced tyrannical régime, any more than they can be expected to “repel Invasions” or “suppress Insurrections” on their own.

Although “the individual-right” misinterpretation of the Second Amendment does not support the Militia—and therefore does next to nothing for “the security of a free State”—the Militia interpretation of the Amendment guarantees “the individual right” as part of “the security of a free State”. An individual’s exercise of the right of personal self-defense always executes *some* law—whether against murder, manslaughter, mayhem, rape, battery, assault, armed robbery, and so on—under circumstances in which no other means of law enforcement is available. In that situation, the individual performs a function constitutionally assigned to the Militia: namely, executing the laws applicable in such circumstances. Thus, when the Second Amendment is properly interpreted so as to guarantee the existence of “well regulated Militia”, “the individual right” to personal self-defense receives the maximum amount of protection, too.

Similarly as to “Arms”. By its own terms, the “individual-right” theory embraces only “Arms” suitable for personal self-defense. This limitation enables proponents of “gun control” to deny that so-called “weapons of war”, “assault firearms”, and firearms capable of “bump fire” are entitled to any

protection at all from the Second Amendment. One need peruse only the infamous decision in the recent case *Kolbe* v. *Hogan*, 849 F.3d 114 (4th Cir. 2017), to see how convincing this denial can be for contemporary judges intent upon to reducing the Second Amendment to a vestigial organ in the constitutional *corpus juris*.

Were the suitability of "Arms" for service in the Militia the legal standard, however, *all* conceivable "Arms" would be protected, including "weapons of war", "assault firearms", and firearms capable of being "bump fired" (not to mention true "machine guns"). Within that extensive array would surely be found "Arms" useful in any imaginable situation involving personal self-defense.

III. Why is the fixation on "it's our right" insufficient to achieve the true purpose of the Second Amendment?

"[T]he right of the people to keep and bear Arms" may be "our right" in principle. But what good is that naked assertion when some "gun-control" statute is enacted or some judicial decision is handed down which purports to deny "our right" in practice?

Any competent lawyer will advise his client that "a right without a remedy is nonexistent". So what is the *sure, certain, and final* remedy for modern-day "gun control"?

Beyond doubt, it is *not* "the individual right". Reliance on "the individual right" *exposes* ordinary Americans to "gun control" *to the maximum degree possible*, because the legal contest is between mere private citizens, on the one side, and public officials, on the other. Under what passes for constitutional law today, "the individual right" can *always* be overridden by a so-called "compelling governmental interest"—which is whatever judges hostile to the Second Amendment say it is. Thus, "our right" is held hostage to their prejudices.

If, however, people exercising "the right * * * to keep and bear Arms" were active members of "well regulated Militia"—as all able-bodied Americans from sixteen years of age upwards should be—then contemporary "gun control" would necessarily pit one part of the government—a legislature or a court—against another part of the government—the Militia. This, of course, would create a logically as well as a legally untenable situation. For no conceivable "governmental interest" could exist for one part of the government to prevent another part of the government from performing its constitutional tasks. For example, Congress obviously cannot fulfill its constitutional duty "[t]o provide for * * * arming * * * the Militia" by "[*dis*]arming * * * the Militia". Neither can the States nullify that duty of Congress by themselves disarming their Militia. Thus, were the Militia in full constitutional operation, "gun control" of the contemporary sort would be *impossible* in both principle and practice. If that is not a compelling reason to pay close attention to *all* twenty-seven words of the Second Amendment (as well as the Militia Clauses of the original Constitution), one cannot imagine what could be.

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