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PERSPECTIVE

The [limited] right to keep and [absolutely no] right to bear arms

By John W. Dillon

On March 24, the 9th U.S. Circuit Court of Appeals sitting en banc affirmed the district court's dismissal of a Second Amendment lawsuit challenging Hawaii's licensing law, which requires that residents seeking a license to openly carry a firearm in public must demonstrate "the urgency or the need" to carry a firearm and that the applicant be actively "engaged in the protection of life and property" when openly carrying a firearm. *Young v. Hawai*i, 2021 DJDAR 2628. Appellant George Young applied for such a license twice in 2011 but was denied because he failed to identify "the urgency or the need" to openly carry a firearm in public. To date, no permit has been issued to openly carry a firearm to any member of the general public.

After challenging Hawaii's open carry restrictions under the Second Amendment and the due process clause of the 14th Amendment, the district court upheld Hawaii's restrictions as constitutional. On appeal before a three-judge panel, the 9th Circuit held that there is in fact a right to carry firearms in public and Hawaii's restrictions amounted to a destruction of the right, thus violating the Second Amendment. Rehearing by the entire 9th Circuit was subsequently granted, providing us with this most recent and baffling Second Amendment decision.

As never before, the 9th Circuit has become the first Court of Appeal in the country to come to the decision that the "right to keep and bear arms" does not mean what it says. According to the majority opinion written by Judge Jay Bybee, there is no right to carry or "bear" arms, either openly or concealed, in public.

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9th Circuit Judge Diarmuid F. O'Scannlain in San Francisco.

The significance of the decision bears restating — the majority opinion holds that a total ban on carrying a handgun outside the home *does not even implicate* the Second Amendment right to keep and bear arms. As Judge Diarmuid O'Scannlain's dissent stated, "[i]n so doing, our circuit has not merely demoted 'the right of the people to… bear Arms, …,' to the status of 'a second-class right' but has extinguished its status as a right altogether. …. It is no badge of honor that we now become the first and only court of appeals to do so."

In what can only be described as a severe case of judicial activism, and a skewed application of law and history, the majority opinion imports "medieval English law wholesale into our Second Amendment jurisprudence" and sets the precedent that a history of a modest regulation is sufficient to eliminate a constitutional right *entirely*.

The relevant history does in fact show some regulation in certain respects on the lawful manner of open public carry. However, such laws were specific and narrow in their application, and many specifically required violent intent/action or a complaint to be made before any kind of restriction took effect. For example, there were laws criminalizing the carry of especially dangerous or unusual weapons with the *intent or effect* of "terrorizing the people," surety laws, and laws restricting carry in particularly sensitive public places. However, the majority opinion makes the shocking logical leap that such restrictions support a conclusion that public carrying of common arms can be *entirely banned*, and that such a prohibition would not implicate "conduct [within] the historical scope of the Second Amendment."

At the heart of Judge Bybee's argument is the proposition that "[t]he states, in place of the king, assumed primary responsibility" for "securing what was formerly known as 'the king's peace'" and that "maintaining the 'king's peace' was the king's duty and, in the English view, the carrying of weapons in public areas was an affront to the king's authority." Citing these restrictions, Judge Bybee wrote "[t]he states do not violate the Second Amendment by asserting their longstanding English and American rights to prohibit certain weapons from entering those public spaces as means of providing 'domestic tranquility' and forestalling 'domestic violence.'"

In response, Judge O'Scannlain's dissent highlights that "the majority [opinion] overlooks … that our Constitution relocated the king's sovereignty not in American State or federal governments, but in "We the People of the United States." "The American citizen, in contrast with the English subject, is a constituent part of a free and sovereign people, whom state governments serve as agents. Indeed, the 'principal object' of our Constitution was not to *grant* 'new rights' from government to the people, but rather to 'secur[e]' *against* the government 'those rights' we already possess by nature. It is thus emphatically the prerogative of the American citizen to give a 'vote of no confidence' in state governments' exercise of those powers delegated from the sovereign people themselves."

The majority opinion claims the dissent cherry picks the history and case precedent. However, the opinion entirely ignores the first and third portions of the analytical framework established by the U.S. Supreme Court in *D.C. v. Heller*. *Heller* established a text and historical analysis that requires consideration of: (i) the text of the Second Amendment; (ii) the English right to keep and bear arms; (iii) the writings of important Founding-era legal scholars; (iv) 19th century judicial interpretations; and the legislative setting after the Civil War. The majority opinion ignores this textual analysis completely, which is "telling," according to Judge O'Scannlain's dissent.

The majority opinion also ignores any substantive analysis of Founding-era legal scholars such as William Blackstone and St. George Tucker, who "constitute[] the preeminent authority on English law of the founding generation." Both scholars were relied on heavily in interpreting the extent of the Second Amendment in *Heller* — and both make clear that the right to armed self-defense is the "first law of nature"— yet the majority opinion ignored these authorities. Instead, the majority opinion analyzed the Statute of Northampton of 1328. While the Statute of Northampton is certainly relevant to the historical inquiry insofar as the Second Amendment "codified a *pre-existing right*," the majority opinion mistakenly assumes that Americans adopted English law wholesale. As noted in the dissent, "[a]s St. George Tucker observed, it would have been strange to apply in the United States an English law that presumed any gathering of armed men was treasonous, because "the right to bear arms is recognized and secured in the [American] constitution itself."

In reviewing the historical legal precedents, the majority opinion also dismisses many of the same 19th century cases marshaled in *Heller* to prove that the Second Amendment secures an individual right to self-defense. These same cases "reveal just as persuasively that the amendment encompasses a right to carry a firearm openly outside the home." In contrast, the majority opinion relies on case law that only acknowledged the militia-based right to keep and bear arms; which considering the decision is *Heller*, carries no interpretive weight as *Heller* made clear that the "Second Amendment is, and always has been, an individual right centered on self-defense; it has never been a right to be exercised only in connection with a militia."

In analyzing post-Civil War state constitutions, the majority opinion clings to six state constitutions that granted their legislative bodies the broad authority to regulate the manner in which arms could be carried in the period between 1865 and 1965. However, the opinion ignores that at that same time, 16 states granted no such authority. The opinion also cites to surety laws in several states as equivalent to "good cause" restrictions on the right to carry firearms. As noted in the dissent, the opinion, entirely mischaracterizes such laws. Surety laws have never operated similar to current "good cause" restrictions, which require "good cause" *before* the right can be exercised. As noted by the original three-judge panel decision, "[while surety laws used the language 'reasonable cause,' they bear no resemblance to modern-day good cause requirements to carry a firearm."

After reading the majority opinion, it is hard to argue with U.S. Supreme Court Justice Clarence Thomas' claim that the Second Amendment has become a "second-class right" that is subject to an entirely different body of rules than the other parts of the Bill of Rights.

One thing is clear, the majority opinion has added fuel to the fire in the ongoing fight over the Second Amendment in the United States. The opinion seems destined for review by the U.S. Supreme Court. The question is will the Supreme Court grant review? If not, the Second Amendment will truly be a second- class right, unlike any in the Bill of Rights. ■

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