MEMO FROM DON B. KATES: NORDYKE'S SECOND AMENDMENT THEORY

Written by Don B. Kates
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NORDYKE'S SECOND AMENDMENT THEORY

The opinion contributes to an essentially harmless historical error: that the Second Amendment is about resisting government. Heller was less guilty of this which is an error endemic to both pro and anti-gun Second Amendment discussions.

The Second Amendment is about self defense which early modern philosophy saw as the central human right, a right which can not be abolished because human self-preservation is the very reason for human society.

This truth is obscured to us by two errors which have crept into modern thinking. The first error is the modern anti-gun view which reduces the right of self defense to a triviality: i.e. it means no more than that a 105 pound woman may vainly struggle bare handed against a 210 pound attacker as he rapes and then strangles her. No, as the Founding Fathers conceived of it, integral to the right to self-defense was the right to possess the weaponry necessary to self-defense.

The second modern error is that we tend to conceive self-defense as referring only to resisting apolitical criminals. No, the Founding Fathers (understandably) saw self-defense as including defense against any attacker, political ore apolitical, including genocidal government.

INCORPORATION DISCUSSION

The foregoing criticism should not be seen as minimizing the magnitude of the Nordyke opinion. Until the Supreme Court supercedes it, the opinion will deservedly stand as a beacon light in the area. And it deserves signal credit for its accomplishment. The briefs did supply the court with the basic information. But the court went far beyond them in piling up relevant and persuasive information and in attempting to rationalize an area in which the Supreme Court's jurisprudence has been ahistorcal, chaotic and unprincipled.

PRACTICAL APPLICATIONS OF NORDYKE

The opinion correctly recognizes the primacy of the self-defense purpose in its conclusion upholding the ordinance because "It does not directly impede the efficacy of self-defense or limit self-defense in the home." (Elsewhere the court summarizes its conclusion: "the Ordinance does not meaningfully impede the ability of individuals to defend themselves in their homes with usable firearms....")

Restrictions on Firearms in the Home

By implication this would seem to invalidate, or at least render questionable, such state and local legislation as trigger lock requirements applicable to the home; safe storage requirements and firearm

discharge prohibitions that do not exempt self defense; and bans on frangible and other ammunition designed specifically for self defense.

Government Property/"Sensitive Places"

The court upheld the ordinance banning gun possession on county property on two intellectually vulnerable theories: any area where there are a lot of people is a "sensitive place" which Heller says is an exception to Second Amendment rights; and government has virtual carte blanche as to restricting guns on its own property.

Logically, these theories do not hold water. Nordyke erroneously accepts the county's bald claim that the fair grounds is a sensitive place even though the ordinance itself does not so classify the fair grounds; and despite state law which expressly provides that guns may be present at a gun show. More broadly, the idea that any area where there are a lot of people is a "sensitive place" is highly dubious. A more persuasive view is that sensitive places are only things like jails, prisons and psychiatric facilities.

Logically, any suggestion that areas where there are a lot of people are ipso facto "sensitive places" runs right up against the Second Amendment's phraseology "keep and bear." What is the point of a right to bear arms for self defense if any place with people is a sensitive place where you have no right to bear?

The most reasonable explanations for this error are: (a) the Nordyke court was seeking to armor its premier conclusion on incorporation by minimizing the likelihood of en banc review; and/or (b) the court was seeking to confine and minimize the scope of the Second Amendment right.

But, whatever the reason for the error, it is made. After further review, Nordyke is now the 9th Circuit rule and, as Holmes said, the life of the law is history (read precedent) not logic. The bottom line here is that under Nordyke virtually all gun laws are valid unless they affect home possession or use of guns for self defense.

THE DREADFUL SPECTER OF AN AW CASE

"Assault weapon" is an epithet brilliantly seized upon by the anti-gun movement to demonize a heterogenous collection of down-powered low value firearms.

This demonization campaign has been terrifically successful. Many Americans, including the vast majority of judges, are (wrongly) convinced that banning AWs is minimal, sensible gun control -- and that anyone who wants to own an AW is probably a crazed pervert who wants to murder children for there is no valid reason for anyone wanting an AW. The result is that a Second Amendment case against AW bans would be totally unsympathetic!

Gun cases are difficult even with highly sympathetic plaintiffs. Even with highly sympathetic plaintiffs -- law abiding adults who want a handgun to defend their homes -- we managed to win Heller by only one vote. And the arguments that persuaded the four dissenters are ludicrous. Their dissents represent political correctness not honest legal reasoning.

The overwhelming likelihood is that any AW case brought in California will be lost. And to justify banning AWs the judges will adopt distorted rationales which will then be available to justify an endless parade of other gun bans.

But this is where Nordyke comes in. It gives 9th Circuit judges a perfect basis for upholding AW bans which basis is difficult to see being relevant to bans of other kinds of guns.

Obviously AWs are not commonly owned weapons that are necessary to defend the home.

There is probably no way to prevent an AW case being brought. The world is full of nuts and of incompetent lawyers like those who brought Silveira. And public defenders are going to be using the Second Amendment to defend their clients. But the Nordyke rationale, no matter how erroneous it is in the application Nordyke made of it, will serve to dispose of the dreadful specter of AW cases with minimal cost to other Second Amendment litigation.

In conclusion: AWs are viewed by most people with the loathing and horror with which Jehovah's Witnesses were viewed by the communities which legislated against them 90 years ago. It took 30 years, and countless S Ct cases, to eradicate that legislation. It will take at least that long before we win an AW case under the Second Amendment.

COUNSEL INVOLVED

This case was originated, and has been primarily financed for the last nine years by Don Kilmer in the wake of his clients' bankruptcy.

When the Second Amendment issue appeared in th court of appeals in 2002 Kilmer requested, and the NRA agreed, to pay all costs on the case and to finance Don Kates to assist him as co-counsel.

Amicus briefs supporting Kilmer were filed by: C.D. Michel, Trutanich-Michel, on behalf of the National Rifle Association and the California Rifle & Pistol Association. w. Steve Halbrook, on the brief; Tracy Duell-Cazes, Law Offices of Tracy Duell-Cazes, San Jose, California, on behalf of amici curiae Professors of Law; Vanessa A. Zecher, Law Offices of Vanessa A. Zecher, San Jose, California, filed a brief on behalf of amici curiae Professors of Law, History, Political Science, or Philosophy. Alan Gura, Gura & Possessky, PLLC, Alexandria, Virginia, filed a brief on behalf of the Second Amendment Foundation.

The Duell-Cazes brief originated in a controversy between counsel and their consultants which deserves comment. It was written by Prof. Michael Curtis, the leading authority on incorporation of the 14th Amendment, and also represented three other academics, Professors Bill Van Alstune, Richard Aynes and Michael Lawrence. As a matter of historical accuracy they argued that incorporation of the 14th Amendment should be under the Privileges and Immunities Clause rather than Due Process. (The opinion more or less acknowledged this but also recognized that prior erroneous authority precluded it from so holding.)

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