The reactionary politics of the Supreme Court's "gun rights" decision

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Thursday's ruling by the US Supreme Court, declaring that the Second Amendment to the US Constitution provides an individual right to gun ownership, has nothing to do with an actual defense of democratic rights. It is an exercise in specious legal reasoning and historical falsification, carried out for definite, and thoroughly reactionary, political purposes.

The majority opinion in the case *District of Columbia v. Heller* was written by Justice Antonin Scalia, joined in by the other four most conservative justices. The four more liberal justices endorsed two dissents, one written by John Paul Stevens, the other by Stephen Breyer.

The Second Amendment, part of the Bill of the Rights, reads: "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."

The imperfect punctuation and convoluted wording aside, the text clearly links the bearing of arms to the organization of militias, popular bodies of armed men, mobilized by the states, that played a role in the American Revolution. The state militias were regarded in that era as an important counterweight to a regular army under the control of the federal government.

The interpretation now espoused by the Supreme Court majority is unknown in the first 180 years of constitutional jurisprudence, including a 1939 Supreme Court decision, *United States v. Miller*, which upheld a federal ban on the possession of sawed-off shotguns against a claim that the measure violated the Second Amendment.

The campaign for an individual "right to bear arms" has been a key element in giving a populist gloss to the drastic shift to the right in official American politics over the past three decades. No matter how draconian the law-and-order measures of the Republican right, demagogy about the Second Amendment served to disguise the fundamentally anti-democratic character of their program.

There is far less to this "right" to bear arms than meets the eye. The individual possession of handguns does nothing to defend working people against systematic attacks on their jobs, living standards and democratic rights. These attacks cannot be combated through individual "self-defense," but require collective political and social struggle—action which is effectively illegal under the current political regime.

The same Supreme Court justices who are the most fervent advocates of the Second Amendment care nothing for any of the other provisions of the Bill of Rights, endorsing Bush administration actions like the suppression of *habeas corpus* rights, the authorization of torture, and the systematic promotion of religion by the federal government.

The gun-control issue has been promoted to whip up divisions in the working class, particularly between workers in rural and suburban areas, where hunting is popular, and those in the urban centers, where gun violence has cost a colossal toll in lives, particularly among minority youth.

In this context, the Supreme Court decision, by a narrow 5-4 majority, represents an effort to give a boost to the flagging political fortunes of the Bush administration and the far right, as well as to assist the beleaguered Republican presidential campaign of Senator John McCain.

The response of the Democrats was one of predictable cowardice—the party abandoned its previous support for modest gun control measures, particularly in urban areas, in the 2004 campaign, when its party platform declared for the first time its support for interpreting the Second Amendment as an individual right to gun ownership.

Senator Barack Obama, the presumptive Democratic presidential nominee for 2008, issued a statement that bowed carefully to both sides in the court case, backing an individual right to gun ownership, while at the same time expressing sympathy for the DC government, which adopted the most restrictive gun legislation in the nation more than 30 years ago.

Former Clinton pollster Geoffrey Garin summed up the unprincipled character of the Democratic response, declaring, "Whatever you believe about the merits of the decision, it's a decision that protects Democrats from the charge that they want to ban all guns, because the Supreme Court has said you can't do that." In other words, give the right wing what they want, and they can't attack you for it!

Conscious political considerations, not legal or constitutional principles, underlie the opinion written by Justice Scalia. As in all of his major decisions, Scalia starts with the desired political outcome and then works backward, constructing a legal and historical justification without regard to either precedent or logical consistency. He then piles up invective against his liberal critics on the court when they point to the barefaced apologetics in his legal arguments.

According to Scalia, the Second Amendment provides for an individual right "to possess and carry weapons in case of

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confrontation." The Amendment, he writes, "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."

As Justice John Paul Stevens points out in a dissenting opinion, some states at the time of the adoption of the Bill of Rights did have in their declaration of rights express guarantees of a right to bear arms for self-defense and hunting, but this language was not incorporated into the Second Amendment, which makes no mention of such concerns.

James Madison, the Amendment's principal drafter, considered proposals along those lines that were not tied to the maintenance of a militia. Madison instead followed proposals by Virginia and other states, embedding the right to arms in the context of maintenance of a militia, an approach that was eventually adopted by all the states in ratifying the Bill of Rights. Thus the "keep and bear arms" language in the Amendment was meant to enable militia members to fulfill their duties.

Scalia's response to this rebuttal was to shout and scream. Stevens "flatly misreads the historical record," engages in "faulty" analysis, and uses reasoning "worthy of a mad hatter."

In his own dissenting opinion, Justice Breyer establishes that at the time the Second Amendment was drafted, while use of firearms was common in what was primarily an agrarian and frontier society, cities such as Boston and New York banned loading or firing guns.

Scalia and the majority fare no better in attempting to ground a broader individual right to bear arms in English and colonial history. During the Restoration, the monarchy used select militias loyal to them to suppress political dissidents, in part by disarming them. Catholic James II ordered general disarmaments of Protestant regions.

When the Protestant monarchy was restored in 1688 in the "Glorious Revolution," the Declaration of Rights, codified as the English Bill of Rights, included a statute reversing who was to be armed and disarmed, providing that "the subjects which are Protestants may have arms for their defense suitable to their conditions and as allowed by law."

Stevens demonstrates in his dissent that the concerns animating the drafters of the Constitution were different than those a century earlier in England. The debate on the Constitution reflected a widespread fear that a national standing army posed a threat to individual liberty and the sovereignty of the separate states. (In this the Founders were quite prescient—there is no greater threat to the democratic rights of the American people than the existing US military machine, a gargantuan apparatus that oppresses much of the world)

Many also thought that the civilian, sometime soldiers of the state militias were adequate for that task. But the Framers ultimately recognized that militia members might be incapable of providing for the common defense.

As a result the original Constitution gave Congress the power to raise a national, standing army and also to organize, arm and call up the states' militias. But the states retained rights to appoint militia officers and train the militia.

Fear remained, however, that Congress might disarm the state militias, and thereby eliminate militias as a bulwark against national tyranny. The proposals that led to adoption of the Second Amendment were designed to foreclose this threat.

For Scalia and the majority to arrive at their result also required them to blatantly misread prior Supreme Court precedent. In 1939 in *United States v. Miller* the court unanimously concluded that the Second Amendment did not apply to possession of a firearm that did not have some "reasonable relation to the preservation or efficiency of a well regulated militia."

Scalia wanted for political reasons—including direct pressure from the Bush administration—to avoid directly reversing *Miller*. A court decision that effectively legalized the private possession of heavy weaponry would cut across the administration's anti-terror campaign. So Scalia argues that the *Miller* decision does not mean what it clearly does.

He claims the *Miller* court did not consider the history of the Second Amendment but that is simply false. The *Miller* court specifically stated that given the history of the Amendment, its obvious purpose was to preserve the effectiveness of militias, and that the "signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of the Colonies and States, and the writings of approved commentators."

The majority opinion insists, that like other rights, the right to keep a gun for self-defense is subject to limitation; that nothing in the opinion should be taken to cast doubt on longstanding prohibitions on carrying concealed weapons, possession of firearms by felons and the mentally ill, carrying weapons in "sensitive places" like schools and government buildings, and qualifications on the commercial sale of arms.

The court does not otherwise provide any other indication as to what laws might be undermined by the newly recognized right. Given a right to have guns for self-defense, can arms now be carried in public places for that purpose? The court's failure to do so suggests it could not provide a reasonable standard for drawing such lines.

Scalia and the right-wing of the judiciary often claim to represent "judicial restraint" and purport to oppose "judicial activism"—by which they mean, any court action that interferes with private property or government action infringing democratic rights. The 5-4 decision in the gun rights case demonstrates that Scalia & Co. are the real "judicial activists," while the not-so-liberal minority faction conducts a largely impotent rearguard action against an increasingly arrogant and dictatorial right-wing bloc.

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