

# New Jersey Law Journal

VOL. 211 - NO 8

FEBRUARY 25, 2013

ESTABLISHED 1878

## COMMENTARY

### Peculiar View of Second Amendment Can Be Linked to Scalia

By Frank Askin

The Internet — not to mention more established media — is awash with claims that the Second Amendment was intended to protect the people from a tyrannical national government.

“The Second Amendment was to protect the ability of the people to violently overthrow the government,” proclaims Richard Schrade, an attorney from Georgia and a member of the Libertarian National Committee.

On Jan. 19, gun enthusiasts rallied around the country on “Gun Appreciation Day” under the auspices of Political Media Inc., a Republican-affiliated public relations group. Opposition to “government tyranny” was the rallying cry at most of the events.

“I’m here because the Second Amendment is critical in keeping our country free and safe. And not just from criminals, but from our own government,” explained a rally participant in Montgomery, Ala. “We need to know the Second Amendment gives me the power to protect myself against tyranny.”

Others went so far as to claim the Holocaust would never have happened if the Nazis had not first disarmed the

---

*Askin is distinguished professor of law and director of the Constitutional Litigation Clinic at Rutgers Law School-Newark.*

German populous.

New Mexico graphic designer Kurt Nimmo recently wrote on his blog Infowars.com: “According to the Founders, guns — including AK-47s — belong in the hands of citizens as eloquently spelled out in the Second Amendment. Thomas Jefferson and the Founders did not craft the Second Amendment to protect the rights of hunters and target shooters. It was included to ensure the right of citizens to violently oppose a tyrannical federal government.”

The blog of Jews for the Protection of Firearms Ownership echoes all of these claims: “Before a government can become a full-blown tyranny, the government must first disarm its citizens. The Founders of this nation, from their own experience, knew that when government goes bad, liberty evaporates and people die — unless the people are armed.”

No one bothers to explain just how a band (or even a horde) of armed citizens — even if armed with AK-47s — is going to compete with the U.S. Army with its drones, tanks and whatever!

Where do these gun nuts get their peculiar view of the Second Amendment? From none other than the self-anointed constitutional scholar Justice Antonin Scalia.

In his majority opinion in the 2008 gun-control case, *District of Columbia v. Heller*, Scalia announced that a major purpose of the Second Amendment was to

provide opportunity for the people to store arms in order to be able to overthrow an oppressive government.

For example, Scalia explained, the amendment was adopted because “of fear that the federal government would disarm the people in order to impose rule through a standing army or select militia.”

He added that it “was understood across the political spectrum that the right [to bear arms] helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down.”

In other words, in Scalia’s view, the founders specifically provided in the nation’s charter a mechanism for popular uprising.

Curiously, during the McCarthy Era after World War II, American Communist leaders, among others, were prosecuted and jailed under the infamous Smith Act for “teaching and advocating” the overthrow of the government by force and violence — even though the government never introduced evidence that they had stored guns or other weapons. They were charged only with advocacy.

Now it seems, Scalia has and his followers have discovered that the founders themselves not only advocated the propriety of overthrowing the government, but intended to protect the gathering of the wherewithal to do so.

Once upon a time, conservative scholars loved to quote Justice Robert Jackson’s famous maxim that “the Constitution is not a suicide pact.” That adage has often been cited to support laws that restricted civil liberties in the name of fighting terrorism and social disorder. But that proposition has apparently now been stricken from the conservative platform. ■