



## **Transcript: Second Amendment: D.C. v. Heller and McDonald v. Chicago**

**Narrator:** Well before the nation was founded, for many, guns played such a key role in survival, they were part of a new American identity.

**David Cruz:** Guns have been part of American life since the beginning. Since the settlers came and landed at Plymouth Rock.

**Robert Cottrol:** The only food you're able to consume is the food that you're able to produce, either on the farm or through hunting or fishing.

**Kermit Roosevelt:** As a colonist living in America, you would have perhaps a greater fear of wild animals than most Americans do. You might also be afraid of Native Americans attacking. A foreign army coming in and taking over American territory was a very real worry in the colonial period.

**Saul Cornell:** It's almost a constant state of warfare.

**Narrator:** The nation and the guns have changed, but many still consider them to be a central part of their identity as Americans. And many do not. Today, guns are the topic of a lot of debate.

**D.C. politician:** You cannot go out today if you have a handgun and carry it around.

**Narrator:** And that debate runs right through the Second Amendment.

**Wayne LaPierre:** We know their target; it's the Second Amendment to the Constitution.

**Narrator:** But there's one thing about the Second Amendment that gets most people to agree.

**Floyd Abrams:** It isn't written very well.

**Adam Winkler:** It's almost as if James Madison, the author of that provision, just discovered this wonderful new thing, the comma, and wanted to put it in there as many times as possible.

**Susan Herman:** Your English teacher will tell you, it's not very well drafted.

**Saul Cornell:** It's probably the most misunderstood of all the amendments, I would say.

**Narrator:** OK, here's what it actually says:

**David Cruz:** "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."

**Narrator:** And here's the thing. It took over 200 years before the Supreme Court established that the Second Amendment gives an individual a right to own a gun. America has always had guns, and we've always had laws to regulate them. So why the confusion?

**Rogers Smith:** You can make a good argument either way about whether people anticipated this simply as a right that applied to those who could serve in the militia or was a kind of individual right.

**Akhil Amar:** The Second Amendment grows out of the American Revolution. Who are the heroes of the American Revolution? Well, they're the local militias.

**Narrator:** Americans fought a long, hard, bloody war - with guns - to get rid of a king. One of the most famous stories from our revolution is the legend of Paul Revere.

**Narrator:** OK, Revere actually rode in secret that night, so he never really said this, but the story caught on that he shouted about an oncoming attack.

*The British are coming! The British are coming!*

**Narrator:** But Revere and the rebels knew that the British wanted to stop them from fighting, so they were really coming to take their weapons.

*The British are coming! The British are coming!*

*To get your guns... To get your guns.*

**Narrator:** The very start of the Revolutionary War is remembered as a shot.

**Robert Cottrol:** The embattled farmer who fired "the shot heard 'round the world" becomes a

part of American folklore, down to this day.

**Narrator:** That farmer was part of a militia. A group of citizens organized by local governments and sent to fight for the new nation.

**Robert Cottrol:** The militia is romanticized. And it's romanticized in part because the revolution starts with militia.

**Carol Berkin:** Militias have a long history in America. They are the people themselves, men, roused to arms to protect the independence, the liberty, and the safety of their colony, now their state.

**Alan Gura:** When trouble comes, the people in the community are expected to bring with them the arms that they have and use those to defend the community and restore order.

**Adam Winkler:** In the founding era, they thought of the right to bear arms not only as a right but also as a duty because they didn't have police forces and they didn't believe in a standing army.

**Framer:** A standing army is a threat to liberty.

**Kermit Roosevelt:** The standing army was considered a bad thing, something that the federal government might use to establish its tyrannical authority.

**Narrator:** The Framers didn't want their new, national government to have a full-time professional army. The king had used one of those to trample their rights.

**Narrator:** So, right here, Article I, Section 8 of the Constitution gives Congress the power to "raise and support" armies. It puts a two-year limit on money for them. And right here, Congress has the power to organize and arm militias. So instead of one powerful, full-time national army, Congress would organize temporary militias, led by the states.

**Kermit Roosevelt:** One of the reasons that the militia was considered so important and so valuable was that state militias that could actually rise to the task of national defense meant that you didn't need a standing army.

**Theodore Olson:** We created the defense of the rights of this country and the revolution out of the militias in the states or the colonies coming together to fight against tyranny.

**Narrator:** The federal government wouldn't accumulate too much power, but the nation would be defended. And that's why we have an amendment to make sure the militias were armed. But here's where it gets confusing. We know the Framers wanted Congress to raise an army but not to keep one hanging around. We know individuals already owned guns. The Framers were telling them to bring their guns to the fight. So when it comes to the Second Amendment, which one is more important?

**Geoffrey Stone:** A central question was "What is the meaning of that?" because you've got two clauses. One clause basically suggests that there's a right to keep and bear arms. And the other clause, the preamble, essentially says why there's a right to keep and bear arms.

**Narrator:** But if the Constitution reflected a fear of central power after the Revolutionary War, after the Civil War, things changed. People weren't as worried about a king; they were worried about bad behavior in the states. The Constitution had to be changed to protect everyone equally, especially the newly freed slaves.

**Kermit Roosevelt:** And now what's in people's minds is really an individual right of self-defense. It's about the state failing to protect you and you being able to take matters into your own hands, with the gun in your own hands.

**Narrator:** After the Civil War, guns were being used in two very different ways in different parts of the country. Groups of American settlers were taking their guns with them to expand the Western frontier. At the same time, down South during Reconstruction, armed men also forming groups. But they weren't settlers and they weren't militias. They were groups like the Ku Klux Klan. And Southern states were passing laws leaving newly freed blacks helpless to defend themselves.

**Robert Cottrol:** More and more of the Southern states began to pass stricter controls on free black men owning guns.

**Adam Winkler:** And so these laws known as the black codes severely restricted what African Americans could do. It required them to live in certain places. And among the other things it did is it banned them from possessing firearms.

**Robert Cottrol:** To ensure that they would be more compliant and less troublesome. That is, if you have this disarmed population, they're simply easier to push around. When groups like the Klan go bursting into their homes at night, they won't meet an armed response.

**Narrator:** Congress led the charge to ratify the Fourteenth Amendment after the Civil War. The goal was to apply the Bill of Rights to every state. The original Constitution only applied

to the federal government, see, "Congress Shall make no law."

**David Cruz:** The Second Amendment itself directly restricts only the federal government.

**Narrator:** The Fourteenth Amendment was written to make sure the states respected everyone's constitutional rights. The Southern states were disarming only black citizens. Through the Fourteenth Amendment, Congress intended to give freed slaves their Second Amendment right to own guns to defend themselves and their homes.

**Akhil Amar:** It's going to be an idea at the absolute center of the Reconstruction. That blacks, in particular, get to have guns in their homes to protect themselves against Klansmen because you can't count on the local police department to show up. That's a slightly different vision than the founders' main vision. The founders' vision was, when guns are outlawed, only the king's men will have guns. Now, in this new vision, it's, when guns are outlawed, only Klansmen will have guns. The threat isn't just the national standing army, but private violence.

**Narrator:** For the first time, Congress recognized an individual's right to own a gun. But the Supreme Court did not. In three early decisions, it said the Fourteenth Amendment did not protect blacks from state efforts to restrict their rights to own guns.

**Narrator:** So from the colonial days well into the 20<sup>th</sup> century, two things remained true. Most Americans could own guns, and most states, for good and bad reasons, had laws restricting them.

**Narrator:** When violent crime caused the federal government to ban certain weapons, the individual right to own a gun came up in the Supreme Court again.

#### MOVIE CLIP

**Narrator:** In the 1930s, when it came to guns in America, two big things were going on. One was crime.

**Adam Winkler:** It was an era of Prohibition, where we outlawed alcohol. It led to a huge growth in criminal syndicates – mafia, other families – that were distributing alcohol illegally. And often they used the most high-powered weapons – the newly invented machine gun, for instance – to enforce their will.

**Narrator:** Organized crime made national headlines and gangsters and their guns made Americans feel unsafe. The other big thing happening was the New Deal and a much bigger federal government with more power to regulate guns.

**Saul Cornell:** The '30s and the New Deal is the time we see the first national firearms acts that are dealing in a modern gun regulation model. There's suddenly a recognition that the problem about what to do about guns, which easily crossed state lines, is something that the federal government needs to step in to do.

**Robert Cottrol:** Now the 1934 National Firearms Act calls for the registration of automatic weapons, sawed-off shotguns and silencers.

**Narrator:** The public wanted laws to keep dangerous weapons away from the gangsters. Congress agreed.

**David Cruz:** *United States v. Miller* upheld a federal law that restricted certain types of guns like fully automatic weapons or sawed-off shotguns.

**Narrator:** The Court determined that the right to bear arms only applies to weapons that are commonly used for perfectly legal reasons, like hunting. That meant that the federal government could regulate machine guns and weapons used by gangsters.

**Adam Winkler:** *Miller* was an ambiguous opinion that never really clarified exactly what was meant by the Second Amendment. Many courts in the years after that interpreted that decision to mean there was no individual right to have a gun for personal protection.

**Narrator:** After *Miller*, two things were clear: The Court still didn't see the Second Amendment as an individual right to own a gun, and federal regulations were OK.

**Narrator:** In the 1960s, more violence brought a call for more federal gun laws.

**Saul Cornell:** So the '60s is a time of incredible turmoil in America. You have assassinations.

**Video clip:** At 1:25 the motorcade moves into the downtown area.

**Robert Cottrol:** We have the assassination of President Kennedy, Senator Bobby Kennedy when he's running for president.

**Video clip:** If there's a doctor in the house, I want to see him right here. Everybody else please stay back.

**Robert Cottrol:** Of Martin Luther King. All of this contributes to a greater sense of desire for control of firearms.

**Narrator:** Assassinations and riots in major American cities led some people to think that the best way to stop the violence was to put a limit on guns.

**Robert Cottrol:** A modern gun control movement develops that in many cases is quite frankly a Prohibition movement. Their ultimate goal is severe restrictions by the federal government on firearms ownership.

**Lyndon B. Johnson video clip:** And I think we need to support them more than we are. I think that we need a stronger gun control law.

**Narrator:** But stronger federal gun laws brought stronger resistance to gun laws.

**Saul Cornell:** This idea of banning weapons had a kind of simple model of, you know, “You take the guns away and the problem will go away.” And that was met on the other side with this kind of great bumper sticker, “Guns don’t kill people. People kill people.”

**Video clip:** President Reagan! President Reagan! (Gunshots)

**Narrator:** When President Ronald Reagan was shot by the mentally ill John Hinkley Jr. in 1981, his press secretary, James Brady, was badly wounded. Brady and his wife, Sarah, tried to get Congress to pass legislation known as the Brady bill that would require background checks before someone could buy a gun.

**Ronald Reagan video clip:** I support the Brady bill and I urge that Congress to enact it.

**Narrator:** President Reagan supported the Brady bill. The National Rifle Association objected, leading a new campaign to recognize an individual’s right to own a gun.

**Charlton Heston clip:** I say that the Second Amendment is in order of importance, the First Amendment. It is America’s first freedom, the one right that protects all the others.

**Narrator:** For two decades, the debate over the Second Amendment and an individual’s right to own a gun grew louder and stronger.

**Video clip (chanting):** No more guns! When do we want it? Now!

**Tanya Metaksa:** Do you believe that the Second Amendment is part of the Bill of Rights and an individual right? That’s what we believe.

**Video clip (chanting):** We the people! We the people!

**Justice Warren Burger (1991):** If I were writing the Bill of Rights now, there wouldn't be any such thing as the Second Amendment.

**Narrator:** It was in a climate like this that the case of *Washington, D.C. v. Heller* made it to the Supreme Court in 2008.

**Alan Gura:** Washington made it impossible for people to ever have an operable, functioning gun inside their home for self-defense.

**Narrator:** Alan Gura argued the case on behalf of Richard Heller. Even though Heller was a Washington security officer, licensed to carry a gun at work, Washington, D.C., law made it illegal for him – or anyone – to have a working gun at home, even for self-defense.

**Alan Gura:** So if somebody broke into your house and you had a rifle or a shotgun, then you could perhaps whack 'em over the head with it, you could throw it at them. But you could never actually render that firearm operable and use it to shoot an intruder. At that point, it would be considered a criminal violation.

**Adam Winkler:** In Washington, D.C., lawmakers decided that if we could get rid of the guns, there'd be a lot less crime. Didn't really work out as intended. Guns were so easy to get across the border, in Maryland, or Virginia in the years after the law went into effect, Washington, D.C., was wracked by crack cocaine and other criminal activity and became known as the murder capital of the United States.

**Narrator:** *D.C. v. Heller* was the first time the Supreme Court was actually asked to decide the meaning of the Second Amendment. In its argument, Washington, D.C. focused on a "well regulated militia."

**Geoffrey Stone:** The District of Columbia defended the law on the ground that the Second Amendment was limited to the right to keep and bear arms for the purposes of a militia.

**Kermit Roosevelt:** And the D.C. government has a sort of collectivist vision of security, where the idea is "The state will protect you. And in order to make you safer, we're going to limit your ability to own guns and also, ideally, limit of people who would use force against you."

**Narrator:** Alan Gura argued D.C.'s handgun ban was a violation of Richard Heller's



constitutional right.

**Alan Gura:** The Second Amendment secures the right of the people to keep and bear arms. And so we know that the right of the people means the right, not of the militia, and not of some people, but the right of the general community.

**Narrator:** And Gura argued one more point.

**Alan Gura:** In American law, the home is a special place. Whatever right you have always counts for more if you're trying to exercise it inside your own home.

**Narrator:** A 5-4 majority of the Court agreed and ruled in favor of Richard Heller. Justice Antonin Scalia wrote the majority opinion. He broke the amendment down into two parts. He called the militia clause a "prefatory" clause that suggests why the right became law, but really has no power over the right. And Justice Scalia called "The right of the people to keep and bear Arms," the "operative" clause. This, he argued, is an individual right and the very reason we have the amendment.

**Adam Winkler:** The ownership of the gun did not have to be associated with service in the militia. It just had to be useful for personal self-defense.

**Geoffrey Stone:** The majority took the position that no, the Second Amendment does not mean that the right to keep and bear arms is limited to the militia.

**Saul Cornell:** The D.C. law is struck down, and D.C. must now write a new law.

**Alan Gura:** They cannot make it impossible to have a gun available to you throughout your house in a functional way, that's useful for self-defense in the event of a criminal attack.

**Narrator:** Justice John Paul Stevens wrote a strong dissent. He said the right *was* meant to be limited by the militia phrase, and that it was a dramatic break from previous decisions of the Court.

**Narrator:** But both sides agreed there are limits on the individual right.

**Narrator:** The Court explained that by ruling for the individual right, it was not overturning all gun laws across the country.

**David Cruz:** Fairly late in the majority opinion, Justice Scalia reassures the public that "just because we're saying there is this Second Amendment right that individuals have to keep and

bear arms, that doesn't mean that all gun control laws are now unconstitutional." Laws banning convicted felons from having guns, or mentally ill people from having guns. Laws that limit carrying guns into what he calls "sensitive places" like schools or government buildings.

**Geoffrey Stone:** No right is ever absolute, and *Heller* left room for certain types of regulation.

**Narrator:** *Heller* was a landmark ruling in favor of an individual right to bear arms. But this ruling applied only to Washington, D.C., which is not a state, so Alan Gura went back to court.

**Alan Gura:** The moment that the Supreme Court decided the *Heller* case, I got on the phone and had my co-counsel in Chicago file our complaint in *McDonald v. the City of Chicago*.

**Narrator:** He won that, too. The Court declared that the Second Amendment right to bear arms is a fundamental right that the states have to protect.

**Narrator:** And so now the individual right that Congress originally wanted in each state to protect the freed slaves is protected across the nation. Individuals have a right to own a gun.

**Alan Gura:** In the wake of the *Heller* decision, obviously, we still have gun laws. But we now know that there are limits on what the government can do in this area.

**Saul Cornell:** American law is an attempt to balance liberty with order and self-government. We have a right collectively as a people to pass laws that are needed in order for us to function as a society. We also as individuals have rights that provide strong claims against government interference. And it's not hard to imagine scenarios where those two bump up against one another.

**Narrator:** This has been the history of guns in America. We've always had them. And we've always had laws to regulate them. The *Heller* decision made it clear that individuals have a right to own a gun.

**Geoffrey Stone:** And the question that is left after *Heller* is: "What is a sufficient justification to regulate weapons?"