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## Non-Resident Second Amendment Rights after Dearth vs. Lynch

### *Os direitos da Segunda Emenda de cidadãos norte-americanos não residentes no país após o Dearth vs. Lynch*

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#### Abstract

Two federal statutes have unwittingly resulted in depriving nonresident United States citizens of a constitutional right to bear arms. This article considers the background of the statutes, the rights and obligations of US Citizens abroad, and past jurisprudence on the Second Amendment. Through analysis of two types of scrutiny, one can consider how far to take the right to bear arms and determine how the right to bear arms should be treated for those who consciously give up permanent residency and live abroad.

**Keywords:** Second Amendment; non-resident citizens; right to bear arms; Dearth vs. Lynch; US Constitution.

#### Resumo

*Duas normas federais têm involuntariamente resultar em privar cidadãos norte-americanos não residentes no país do direito constitucional de portar armas. Este artigo considera o plano de fundo dessas normas, os direitos e obrigações dos cidadãos americanos no exterior e a jurisprudência existente sobre a Segunda Emenda. Através dessa análise, pode-se considerar o quão longe deve-se levar o direito de portar armas e, também, determinar como o direito de portar armas deve ser tratado para aqueles que conscientemente desistem de manter residência permanente nos EUA e decidem viver no exterior.*

**Palavras-chave:** Segunda Emenda; cidadãos norte-americanos não residentes no país; direito de portar armas; Dearth vs Lynch; Constituição dos Estados Unidos da América.

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### 1. INTRODUCTION

The combined power of 18 U.S.C. § 922(a)(9) and 18 U.S.C. § 922(b)(3) makes it illegal for a nonresident U.S. citizen to purchase or rent a firearm for self-defense purposes. Although the statutes were not specifically aimed at nonresident U.S. citizens, the result is a Congressional decision to eliminate nonresident U.S. citizens' Second Amendment rights in favor of giving state gun regulations more bite. A statutory ban on citizens purchasing firearms outside of their "state of residence" has placed nonresident U.S. citizens outside of the scope of Second Amendment protections. These laws are being challenged in *Dearth v. Lynch* by a plaintiff who is a U.S. citizen residing in Canada. He claims that his Second Amendment rights are being infringed by these statutes and consequently, that these statutes are unconstitutional.

This article first explores how nonresident U.S. citizen's Second Amendment rights are affected by the statutes. The statutory language and background are examined to show how the rights of nonresident U.S. citizens have been defined in the context of firearms purchases. Next, the article examines legal rights and obligations of nonresident U.S. citizens abroad. This serves to show that the Second Amendment rights should not be restricted simply because someone loses residence status in the United States. Then the paper will analyze Second Amendment jurisprudence. The analysis first considers the language of the Second Amendment, the historical jurisprudence, and the new paradigm established by *District of Columbia v. Heller* and subsequent cases. After explaining the precedent on Second Amendment issues, the article will provide an overview of the case in question, *Dearth v. Lynch*, by presenting the case's facts and procedural posture, and then outlining the 2-step approach the D.C. Circuit uses to analyze Second Amendment challenges. Finally the paper will conclude with an application of the 2-step approach to the facts of the case and an analysis of what the potential outcomes could be in the case.

## 2. THE STATUTES IN QUESTION

### 2.1. The Statutory language

The two statutes in question address both the individual attempting to purchase a firearm and the person/entity attempting to sell a firearm. 18 U.S.C. § 922(a)(9), which addresses the purchaser, reads as follows: "It shall be unlawful – for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, who does not reside in any State to receive any firearms unless such receipt is for lawful sporting purposes."<sup>1</sup> 18 U.S.C. § 922(b)(3), which addresses the seller, reads as follows: "It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver – any firearm to any person in any state who the licensee knows or has reasonable cause to believe does not reside... in the State in which the licensee's place of business is located, except that this paragraph... shall not apply to the loan or rental of a firearm to any person for temporary use for lawful sporting purposes."<sup>2</sup>

### 2.2. Background of the enactment

The two main policy considerations behind the statutes in question are preventing criminals from circumventing state firearm regulations and preventing international firearm trafficking.<sup>3</sup> As a supplement to state firearm regulations, the statutes were a result of a multi-year investigation into violent crimes. The investigation produced evidence that criminals were traveling across State borders to purchase firearms in States that had less stringent gun control laws than the criminals' resident States.<sup>4</sup> The criminals would then bring the purchased firearms back into their resident State, resulting in the criminal circumventing their resident state's firearm regulations entirely.<sup>5</sup> Congress believed that this left the states powerless to regulate the types of firearms transported

<sup>1</sup> 18 U.S.C. § 922(a)(9).

<sup>2</sup> 18 U.S.C. § 922(b)(3).

<sup>3</sup> See *Dearth v. Holder*, 893 F.Supp.2d 59, 62-63 (D.C. Cir. 2015); see also 1968 U.S.C.C.A.N. 2112, 2204: "Section 922(b)(3)... It is also designed to prevent the avoidance of State and local laws controlling firearms other than rifles and shotguns by simple expediency of crossing a State line to purchase one. There is no comparable provision in the present Federal Firearms Act."

<sup>4</sup> See *Dearth v. Holder*, 893 F.Supp.2d at p. 62-63; see also S. Rep. No. 89-1866, at p. 19 (1966): "The serious problem of individuals going across State lines to procure firearms which they could not lawfully obtain or possess in their own State and without the knowledge of their local authorities."

<sup>5</sup> See *Dearth v. Holder*, 893 F.Supp.2d at p. 62-63.

into their jurisdiction.<sup>6</sup> This problem was particularly concerning when considering easily concealable handguns.<sup>7</sup>

To combat this growing problem, Congress passed the Omnibus Crime Control Act. Congress determined that federal control over interstate and foreign commerce in firearms was needed.<sup>8</sup> Thus, Congress passed the two statutes in question to strengthen the States' abilities to regulate firearms crossing into their borders.<sup>9</sup> The combined power of 18 U.S.C. § 922(a)(9) and 18 U.S.C. § 922(b)(3) legally restricted residents to only purchasing guns within their resident state and legally restricted gun sellers to only selling guns to people who resided in the state in which their business was located. However, these laws resulted in the unintended consequence of restricting non-resident U.S. Citizens from purchasing guns in any state.

### 2.3. Definition of non-resident in the context of acquiring a firearm

A nonresident U.S. citizen is a person who has U.S. citizenship but does not have a state of residence. The combination of 27 C.F.R. § 478.11 and ATF Ruling 2010-6 defines what a person's "state of residence" is for the purpose of acquiring a firearm under the Gun Control Act of 1968.

27 C.F.R. § 478.11 defines a "state of residence" as the following: "The State in which an individual resides. An individual resides in a State if he or she is present in a State with the intention of making a home in that State."<sup>10</sup> The regulation continues to provide four examples that illustrate what a "state of residence" is. Example 1 provides that "A maintains a home in State X. A travels to State Y on a hunting, fishing, business, or other type of trip. A does not become a resident of State Y by reason of such trip."<sup>11</sup> Example 2 is not applicable to the subject of this paper.<sup>12</sup> Example 3 provides that "A, an alien, travels to the United States on a three-week vacation to State X. A does not have

<sup>6</sup> *Idem*. See also Pub.L. No. 90-351, Title IV, § 901(a)(5), 82, p. 225: "The sale or other disposition of concealable weapons... to non-residents of the State in which the licenssers' places of business are located, has tended to make ineffective the laws, regulations, and ordinances in the several States and local jurisdictions regarding such firearms."

<sup>7</sup> See *Dearth v. Holder*, 893 F.Supp.2d at p. 62-63.

<sup>8</sup> *Idem*. See also Pub. L. No. 90-351, Title IV, § 901(a)(3), 82 Stat. p. 225: "That only through adequate federal control over interState and foreign commerce in these weapons, and over all persons engaging in the business of importing, manufacturing, or dealing in them, can this grave problem be dealt with, and effective State and local regulation of this traffic be made possible."

<sup>9</sup> See *Dearth v. Holder*, 893 F.Supp.2d at p. 62-63.

<sup>10</sup> 27 C.F.R. § 478.11.

<sup>11</sup> *Idem*.

<sup>12</sup> Example 2 provides that "A maintains a home in State X and a home in State Y. A resides in State X except for weekends or the summer months of the year and in State Y for the weekends or the summer months of the year. During the time that A actually resides in State X, A is a resident of State X, and during the time that A actually resides in State Y, A is a resident of State Y."

a state of residence in State X because A does not have the intention of making a home in State X while on vacation. This is true regardless of the length of the vacation.”<sup>13</sup> An alien<sup>14</sup> is defined “as any person not a citizen or national of the United States.”<sup>15</sup> Example 4 provides that “A, an alien, travels to the United States to work for three years in State X. A rents a home in State X, moves his personal possessions into the home, and his family resides with him in the home. A intends to reside in State X during the 3-year period of his employment. A is a resident of State X.”<sup>16</sup>

ATF ruling 2010-6 states that 27 C.F.R. § 478.11 defines a person’s “state of residence.”<sup>17</sup> The ATF ruling has two holdings. The first holding is as follows: “a United States citizen who temporarily resides in a foreign country, but who also demonstrates the intention of making a home in a particular State, is a resident of the State during the time period he or she actually resides in that State.”<sup>18</sup> The second holding specifies how a person can demonstrate intent to make a home in a state: “the intention of making a home in a State must be demonstrated to a Federal firearms licensee by presenting valid identification documents. Such documents include, but are not limited to, driver’s licenses, voter registration, tax records, or vehicle registration.”<sup>19</sup> 27 C.F.R. § 478.11 defines an “identification document” as “a document containing the name, residence address, date of birth, and photograph of the holder and which was made or issued by or under the authority of the United States Government... which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals.”<sup>20</sup>

The ATF ruling also provides what are not sufficient conditions for establishing a “state of residence.” Ownership of a home or land within a state is not sufficient to establish a “state of residence,” nor is it necessary to establish a presence and intent to make a home in a state.<sup>21</sup> Also, temporary travel, which the ATF ruling defines as short-term stays, vacations, or other transient acts in a state, are not sufficient to establish a “state of residence” because short-term stays do not demonstrate intent to make a home in the state.<sup>22</sup>

<sup>13</sup> *Idem.*

<sup>14</sup> *United States v. Meza-Rodriguez*, 798 F.3d 664, 672 (7th Cir. 2015). (holding that a noncitizen with substantial connections to the United States enjoyed Second Amendment Rights.

<sup>15</sup> *Idem.*

<sup>16</sup> *Idem.*

<sup>17</sup> *At Fruling 2010-6 at p. 1.*

<sup>18</sup> *Idem.* at p. 3.

<sup>19</sup> *Idem.*

<sup>20</sup> *Idem.* at p. 2.

<sup>21</sup> *Idem.*

<sup>22</sup> *Idem.*

## 2.4. The Second Amendment rights of non-resident U.S. citizens

The combined power of 18 U.S.C. § 922(a)(9) and 18 U.S.C. § 922(b)(3) makes it illegal for a U.S. Citizen who does not have a state of residence to purchase a firearm for any purpose while visiting the United States.<sup>23</sup> Furthermore, these two statues also prohibit nonresident U.S. citizens from renting a firearm for self-defense purposes.

ATF regulations require a purchaser of a firearm over-the-counter to fill out Form 4473 completely.<sup>24</sup> Question 13 of Form 4473 asks the purchaser to provide his/her state of residence.<sup>25</sup> In this context, an individual resides in a State “if he or she is present in a State with the intention of making a home in that State.”<sup>26</sup> Thus, a nonresident U.S. Citizen cannot provide an answer to this question. Consequently, the transaction is terminated.<sup>27</sup>

## 3. RIGHTS AND OBLIGATIONS OF NON-RESIDENT U.S. CITIZENS BEYOND THE SECOND AMENDMENT

Although nonresident U.S. citizens reside outside of the United States, they are still provided with legal rights and obligations when they travel abroad and when they return to the United States, however briefly.

One of the legal rights a nonresident U.S. citizen enjoys even though they reside abroad is the right to vote in federal elections.<sup>28</sup> In 1986, Congress passed the Uniformed and Overseas Citizens Absentee Voting Act. The act granted nonresident U.S. citizen the right to cast an absentee ballot in federal elections.<sup>29</sup> Nonresident U.S. citizens can cast a ballot in the last place they were domiciled before leaving the United States.<sup>30</sup> However, a nonresident U.S. citizen who never received domicile in any state could not cast a vote in a U.S. election.

Though Congress has not acted affirmatively on issues of other rights, one can presume they exist by default. If one can vote, then one can engage in the speech

<sup>23</sup> See 18 U.S.C. § 922(a)(9); 18 U.S.C. § 922(b)(3).

<sup>24</sup> 27 C.F.R. § 478.124(a): “A licensed importer, licensed manufacturer, or licensed dealer shall not sell... any firearm to any person, other than another licensee, unless the licensee records the transaction on a firearms transaction record, Form 4473.”

<sup>25</sup> See Form 4473: Firearms Transaction Record Part I – Over-the-Counter.

<sup>26</sup> See *idem*.

<sup>27</sup> See *Dearth v. Holder*, 893 F.Supp.2d 59, 64 (D.C. Cir. 2015).

<sup>28</sup> See 52 U.S.C. § 20303; 52 U.S.C. § 20310(5)(B).

<sup>29</sup> See 52 U.S.C. § 20303; 52 U.S.C. § 20310(5)(B).

<sup>30</sup> 52 U.S.C. § 20310(5)(B).

associated with such a vote. The freedom to practice religion or entitlement to due process is not waived for lack of residency.<sup>31</sup>

In addition to the rights of a nonresident Citizen, the federal government has the power to tax nonresident U.S. citizens anywhere in the world.<sup>32</sup> Regardless of whether a taxpayer gains income and/or resides abroad, the U.S. government can legally collect taxes on its citizens' economic gains anywhere in the world.<sup>33</sup> The Supreme Court case *Cook v. Tait* established this precedent. In *Cook*, the Court held that the government has the power to levy a tax on any U.S. citizen worldwide because U.S. citizens and their property receive a benefit from the U.S. government by just being a citizen. Thus, U.S. citizens have an obligation to pay for this benefit by filing federal income returns whether they reside in the U.S. or abroad.<sup>34</sup>

Lastly is the obligation for males to register for the selective service. The selective service is a method of recalling male citizens for service in time of war.<sup>35</sup> All male citizens, age eighteen and over, are required to register, regardless of residency, disability, religion, or dual citizenship.<sup>36</sup> Failure to register can result in loss of educational aid, federal job prospects, and can result in punitive measures and/or jail time, depending on the circumstance.<sup>37</sup> There is no listed exception for nonresident US Citizens.

## 4. AN INTRODUCTION TO THE SECOND AMENDMENT

### 4.1. The Second Amendment's language: the prefatory clause and the operating clause

The natural starting point of an analysis of what protections are afforded under the Second Amendment is the Second Amendment's language itself. It is commonly known that the Second Amendment grants U.S. Citizens the right to bear arms. Indeed

<sup>31</sup> There is clearly an exception to due process requirements for US Citizens living abroad and engaging in acts of war against the United States. TAYLOR, Adam. The U.S. keeps killing Americans in drone strikes, mostly by accident. **Washington Post**, Apr. 23, 2015. Available at: <<https://www.washingtonpost.com/news/worldviews/wp/2015/04/23/the-u-s-keeps-killing-americans-in-drone-strikes-mostly-by-accident/>>.

<sup>32</sup> See *Cook v. Tait*, 265 U.S. 47, 56 (1924).

<sup>33</sup> See *idem*. "The basis of the power to tax was not and cannot be made dependent upon the situs of the property in all cases, it being out of the United States... and cannot be made dependent upon the domicile of the citizen, that being in or out of the United States."

<sup>34</sup> See *idem*. "The principle was declared that the government, by its very nature, benefits the citizen and his property wherever found, and therefore has the power to make the benefit complete."

<sup>35</sup> Selective Service System, About, <https://www.sss.gov/About>.

<sup>36</sup> Selective Service System, Who Must Register, <https://www.sss.gov/Registration-Info/Who-Registration>.

<sup>37</sup> Selective Service System, Why Register, <https://www.sss.gov/Registration/Why-Register/Benefits-and-Penalties>.

the language of the Second Amendment itself surely expresses this notion explicitly: “the right of the people to keep and bear Arms, shall not be infringed.”<sup>38</sup>

However, the aforementioned quote is only part of the Second Amendment. The language that immediately precedes the aforementioned quote, which less people are familiar with, reads as follows: “A well regulated Militia, being necessary to the security of a free State.”<sup>39</sup> Thus, the Second Amendment, in its entirety, provides that “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.”<sup>40</sup>

The reason for pointing out this distinction is that the central issue of Second Amendment interpretation and analysis has revolved around the meaning and interaction of these two parts. The first part of the Second Amendment, i.e., “a well regulated Militia, being necessary to the security of a free State,”<sup>41</sup> is the prefatory or justification clause, while the second part of the Second Amendment, i.e., “the right of the people to keep and bear Arms, shall not be infringed,”<sup>42</sup> is the operative clause.<sup>43</sup> The accepted interpretation of these two clauses is that the prefatory clause states the purpose of the operative clause.<sup>44</sup> Thus, one could recast the Second Amendment’s language by phrasing it as follows: the right of the people to keep and bear Arms shall not be infringed because a well-regulated Militia is necessary to the security of a free state.<sup>45</sup>

## 4.2. Second Amendment interpretations

Three competing interpretations of the Second Amendment have found supporters both in the courts and in academia: the individual right model; the collective right model; and the narrow individual right model.<sup>46</sup>

<sup>38</sup> U.S. Constitution. Second Amendment.

<sup>39</sup> *Idem*.

<sup>40</sup> *Idem*.

<sup>41</sup> *Idem*.

<sup>42</sup> *Idem*.

<sup>43</sup> See *DC v. Heller*, 554 U.S. 570, 577 (2008): “The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause.”; see also VOLOKH, Eugene. *The Commonplace Second Amendment*. **New York University Law Review**, New York, vol. 73, n. 3, p. 793-821, jun. 1998: “The Second Amendment is widely seen as quite unusual, because it has a justification clause as well as an operative clause.”

<sup>44</sup> See *DC v. Heller*, 554 U.S. at p. 577: “Its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose.”; see also VOLOKH, Eugene. *The Commonplace Second Amendment*. **New York University Law Review**, New York, vol. 73, n. 3, p. 793-821, jun. 1998: “The Second Amendment, unusually for constitutional provisions, contains a Statement of purpose as well as a guarantee of a right to bear arms”.

<sup>45</sup> See *DC v. Heller*, 554 U.S. at p. 577: “The Amendment could be rephrased, “Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.”

<sup>46</sup> FROMAN Sandra S.; KLUKOWSKI Kenneth A. *A Round in the Chamber: District of Columbia v. Heller and the Future of the Second Amendment*. **The Journal of the Federalist Society Practice Groups**, Washington, vol. 9, n. 1, p. 16-21, feb. 2008.

The individual right model contends that the Second Amendment grants law abiding adult citizens the individual right to have firearms for any lawful purpose. The individual right is derived from natural law and English Common law, promoting the belief that the Second Amendment was created to protect individuals' fundamental right to personal protection through the use of firearms. Advocates of this model also point out that the Second Amendment acts as a final check against governmental tyranny by allowing the people to rebel against the government if necessary.

The individual right model has two alternative arguments that interpret the Second Amendment differently. One argument is that when the constitution was written, the militia was composed of every able-bodied young adult male, and modern federal law defines "militia" the same way. Thus, the individual right was granted to non-military and military personnel alike. The other argument is that the Second Amendment's prefatory clause announces a non-exclusive purpose for the individual's right to bear arms, but does not weaken the effect of the operative clause.

The collective right model claims that the purpose of the Second Amendment is to provide for an armed military force, while not disregarding the Founding Fathers' apprehension for standing armies. According to this model, the Second Amendment does not grant any individual rights to the people to bear arms. Rather, proponents of this model believe that the Second Amendment was enacted to prevent the government from passing laws that would interfere with the States' ability to raise armed militias. This model has lost persuasive value because its premise that the Second Amendment did not grant any individual rights has increasingly come under attack. Instead of fighting an uphill battle, gun control advocates turned to a third interpretive model.

The narrow individual rights model argues that the Second Amendment grants individuals the right to bear arms for the sole purpose of keeping citizens equipped with enough firearms to allow the government to call up a state militia if necessary. Thus, this model asserts that the Second Amendment grants individual rights to people who are serving in a state militia, i.e., the National Guard. This theory, like the less-popular collective right model, relies on the language of the Second Amendment's prefatory clause. Proponents believe that "militia" refers to military units and that "well regulated" refers to government-controlled units. Supporters of this model believe that the Second Amendment's operative clause grants the people the right to bear arms only to the extent that those arms can be used if the government needs to raise an armed militia.

### 4.3. The modern approach under *Heller*

Justice Scalia, an ardent textualist, examined the meaning, relationship, and implications of the two parts of the Second Amendment in the landmark case *District*

of *Columbia v. Heller*.<sup>47</sup> In *Heller*, the Court sought out to resolve the issue of whether Washington D.C.'s prohibition on the possession of usable handguns both inside and outside the home violated the Second Amendment.<sup>48</sup> To resolve this issue, the Court decided how the prefatory and operative clause interacted with each other in order to determine what the scope of the Second Amendment protection is.

Herein lies the controversy, if the prefatory clause states the purpose of the operative clause, then it appears reasonable to conclude that an individual's right to bear arms should not be narrower or broader than the purpose of maintaining a well-regulated Militia. Adopting this conclusion would lead to the inference that the people's right to bear arms is protected up to the point that it curtails the government's ability to maintain a well-regulated militia and not up to the point that it curtails the people's ability to defend themselves with the use of firearms. However, in *Heller*, the Court did not adopt this line of reasoning. Rather, the Court held that the fundamental or core interest protected by the Second Amendment is the right of the people to use arms for self-defense within their homes.<sup>49</sup> Justice Scalia wrote in the *Heller* opinion that the prefatory clause states the purpose of the operative clause and does not grammatically limit the operative clause.<sup>50</sup>

The Court ultimately ruled that the Washington D.C. prohibition on handguns was unconstitutional,<sup>51</sup> holding that the Second Amendment, at the very least, confers law-abiding citizens with the right to keep and bear non-dangerous arms for self-defense in their homes.<sup>52</sup> The Court reasoned that the fundamental or core interest protected by the Second Amendment is the right to use arms for self-defense within one's home.<sup>53</sup> There are two reasons why this holding is so important in Second Amendment jurisprudence.

First, prior to *Heller*, the only Supreme Court Case to rule on what the Second Amendment meant was the Supreme Court's 1939 ruling in *United States v. Miller*.<sup>54,55</sup>

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<sup>47</sup> 554 U.S. 570 (2008).

<sup>48</sup> See *idem.* at p. 573.

<sup>49</sup> See *United States v. Marzarella*, 614 F.3d 85, 97 (3d Cir. 2010), citing *D.C. v. Heller*, 554 U.S. 570, 629 (2008).

<sup>50</sup> *D.C. v. Heller*, 554 U.S. at p. 578: "But apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause."

<sup>51</sup> *Idem.* at p. 635.

<sup>52</sup> See *idem.* at p. 628-29: "Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home the most preferred firearm in the nation to keep and use for protection of one's home and family would fail constitutional muster."

<sup>53</sup> See *United States v. Marzarella*, 614 F.3d 85, 97 (3d Cir. 2010), citing *D.C. v. Heller*, 554 U.S. 570, 629 (2008).

<sup>54</sup> 307 U.S. 174 (1939).

<sup>55</sup> FROMAN Sandra S.; KLUKOWSKI Kenneth A. A Round in the Chamber: *District of Columbia v. Heller* and the Future of the Second Amendment. **The Journal of the Federalist Society Practice Groups**, Washington, vol. 9, n. 1, p. 16-21, feb. 2008: "The only precedent dealing with the meaning of the Second Amendment in depth is *United States v. Miller*."

Prior to the National Firearms Act of 1934, the Federal Government passed very few gun control laws.<sup>56</sup> It was not until the public unrest and political assassinations in the Vietnam War era that the federal government started to pass more gun control regulations. However, as the federal government passed more gun control laws in the 1970's, Second Amendment jurisprudence was largely underdeveloped because, as mentioned before, the Supreme Court only ruled on the meaning of the Second Amendment once in *Miller*. The increase in federal gun control laws passed by Congress increased the amount of Second Amendment challenges, but the Supreme Court did not grant certiorari on these cases until *Heller*.

Second, the Court's holding in *Heller*, i.e., the fundamental interest protected by the Second Amendment is the right of the people to use arms for self-defense within their homes, appears to go against the holding in *Miller*. In *Miller*, the court examined the constitutionality of the National Firearms Act.<sup>57</sup> The defendants were charged with violating the National Firearms Act because they were caught transporting an unregistered short-barrel shotgun between states. Defendants challenged the law on Second Amendment grounds.<sup>58</sup> The Court ruled that the National Firearms Act did not violate the Defendants' Second Amendment rights.<sup>59</sup> The Court reasoned that the purpose of the Second Amendment was to assure Congress' power to maintain a well-regulated Militia.<sup>60</sup> The Court ruled that the short barrel shotgun did not serve the purpose of preserving the government's ability to maintain a well-regulated militia.<sup>61</sup> Thus, the National Firearms Act did not infringe upon the defendants' Second Amendment rights because it fell outside the stated purpose of the Second Amendment.<sup>62</sup>

The *Miller* court seemed to be adopting either a collective right model or a narrow individual right interpretation of the Second Amendment, while the *Heller* court was unquestionably adopting an individual right model interpretation of the Second Amendment. The language and reasoning of *Miller* is more in line with the collective right model and narrow individual right model because it heavily relies on the prefatory

<sup>56</sup> See *idem.* at p. 16

<sup>57</sup> See *U.S. v. Miller*, 307 U.S. at p. 175.

<sup>58</sup> See *idem.* at p. 176: "Defendants also challenged the law on separation of powers ground, challenging the federal government infringement upon the State's police power, which the Court held was untenable".

<sup>59</sup> See *idem.* at p. 183.

<sup>60</sup> See *idem.* at p. 178: "The Constitution as originally adopted granted to the Congress power- To provide for calling forth the Militia to execute the laws of the Union... With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view."

<sup>61</sup> See *idem.*: "Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense."

<sup>62</sup> See *idem.*: "In the absence of any evidence tending to show that possession or use of a shotgun having a barrel of less than eighteen inches in length at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument."

clause to rule out the possibility that the defendants' Second Amendment rights were violated. However, the holding in *Miller* does not preclude the existence of an individual right granted by the Second Amendment like the collective right model wholly rejects and the narrow individual right model limits. Adding to the controversy is the occurrence of some circuit courts, albeit prior to *Heller*, adopting *Miller's* reasoning when confronted with Second Amendment challenges.<sup>63</sup>

## 5. THE CASE AND CONTROVERSY: DEARTH V. LYNCH

### 5.1. Procedural Posture

*Dearth v. Lynch* is the fourth chapter in the case between Plaintiffs, Steven Dearth and the Second Amendment Foundation, Inc., and Defendant, the U.S. Government. In 2009, plaintiffs filed a claim against the government in the United States District Court of Columbia that challenged the constitutionality of 18 U.S.C. § 922(a)(9), 18 U.S.C. § 922(b)(3), and related regulations as-applied to Mr. Dearth and people similarly situated to him.<sup>64</sup> Plaintiffs sought declaratory and injunctive relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202.<sup>65</sup> The government motioned to dismiss the claim for lack of standing.<sup>66</sup> The district court granted the government's motion, and the plaintiffs appealed the ruling to the D.C. Circuit Court.

On appeal,<sup>67</sup> the D.C. Circuit Court held that Mr. Dearth had standing.<sup>68</sup> However, the court did not reach the issue of whether the Second Amendment Foundation had standing because it did not raise any issues that were not already raised by Mr. Dearth.<sup>69</sup> Consequently, the circuit court reversed the district court's judgment and remanded the case to the district court for further proceedings.<sup>70</sup>

Following the Circuit Court remanding the case back to the district court, plaintiffs filed a motion for summary judgment on all 6 counts of their complaint.<sup>71</sup> Plaintiffs challenged 18 U.S.C. § 922(a)(9), 18 U.S.C. § 922(b)(3), and 27 C.F.R. §§ 478.29a, 478.96,

<sup>63</sup> See VOLOKH, Eugene. The Commonplace Second Amendment. *New York University Law Review*, New York, vol. 73, n. 3, p. 793-821, jun. 1998: "See, e.g., *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir. 1995) (concluding that right only extends to situations where a particular person's arms ownership "preserve[s] or insure[s] the effectiveness of the militia"

<sup>64</sup> See *Dearth v. Holder*, 893 F.Supp.2d 59, 59, 64-65 (D.C. Cir. 2012); *Dearth v. Holder*, 641 F.3d 499, 500 (D.C. Cir. 2011).

<sup>65</sup> *Dearth v. Holder*, 893 F.Supp.2d at p. 64.

<sup>66</sup> See *Dearth v. Holder*, 893 F.Supp.2d at p. 65; *Dearth v. Holder*, 641 F.3d at p. 500.

<sup>67</sup> *Dearth v. Holder*, 893 F.Supp.2d at p. 54; 64-65 (D.C. Cir. 2011).

<sup>68</sup> *Dearth v. Holder*, 641 F.3d at p. 503-04.

<sup>69</sup> See *Dearth v. Holder*, 893 F.Supp.2d at p. 4; *Dearth v. Holder*, 641 F.3d at p. 503.

<sup>70</sup> See *Dearth v. Holder*, 641 F.3d at p. 504.

<sup>71</sup> See *Dearth v. Holder*, 893 F.Supp.2d at p. 64.

478.99, 478.124 on three different grounds: the statutes and regulations violated plaintiffs' Second Amendment right to keep and bear arms because the statute and its regulations place limitations upon the receipt and use of firearms to U.S. citizens who do not claim residency in any state; the statutes and regulations violated plaintiffs' rights to equal protection under the Fifth Amendment because they are being discriminated against on account of residency and cannot exercise their Second Amendment rights; the statutes and regulations infringe upon plaintiffs' liberty interest in international travel, which is protected by the Due Process Clause of the Fifth Amendment.<sup>72</sup> Defendant filed a motion for judgment on the pleadings and alternatively, a motion for summary judgment.<sup>73</sup> The court held that 18 U.S.C. § 922(a)(9), 18 U.S.C. § 922(b)(3), and their implementing regulations did not violate Mr. Dearth's Second Amendment rights, did not deprive him of his Fifth Amendment rights to equal protection under the law, and did not violate Dearth's rights to international travel under the Fifth Amendment.<sup>74</sup> Ultimately, the court granted summary judgment in favor of the government on all six counts.

Once again the plaintiffs appealed the district court's ruling to the circuit court.<sup>75</sup> The circuit court ruled that the record was not developed enough to uphold the summary judgment motion.<sup>76</sup> The court reasoned that the record needed to be more developed because the case represented such an important question<sup>77</sup> and the record raised too many unanswered questions about the plaintiff's situation. Thus, the circuit court vacated the district court's entering of summary judgment in favor of the government, and it remanded the case to the district court for trial.<sup>78</sup>

## 5.2. Facts

Plaintiff Stephen Dearth is an American citizen who resides in Canada. Mr. Dearth does not have a residence in the United States. Also, he is over the age of 21, does not have a criminal record, and has a valid Utah permit to publicly carry a handgun. Plaintiff Second Amendment Foundation, Inc. is a non-profit membership organization that focuses on education, research, publication, and legal actions regarding the Second Amendment's right to bear arms.

<sup>72</sup> See *idem.* at p. 65-66.

<sup>73</sup> See *idem.* at p. 64.

<sup>74</sup> See *idem.* at p. 74-75.

<sup>75</sup> *Dearth v. Lynch*, 791 F.3d 32 (D.C. Cir. 2015).

<sup>76</sup> See *idem.* at p. 34.

<sup>77</sup> See *idem.*, citing to *Kennedy v. Silas Mason Co.*, 334 U.S. 249,256-57 (1948).

<sup>78</sup> See *idem.* at p. 35.

In 2006 and 2007, while in the United States, Mr. Dearth attempted to purchase firearms. However, he was denied both times because he could not provide an answer to Question 13 of Form 4473, which asks for the buyer to provide his/her “state of residence.” Both transactions were terminated because Mr. Dearth does not reside within a state in the United States. Mr. Dearth alleged that he intends to lawfully purchase firearms in the United States for sporting and self-defense purposes. He plans on storing the firearms with his relatives in Ohio.<sup>79</sup>

### 5.3. Two-step approach to evaluate the constitutionality of a law when challenged on Second Amendment grounds

The D.C. Circuit, like other circuits,<sup>80</sup> adopted a two-step approach to analyze Second Amendment challenges.<sup>81</sup> The first inquiry is whether the challenged provision(s) impinges upon a right protected by the Second Amendment. This inquiry inevitably raises the question of what protections are afforded under the Second Amendment.

To answer this question, courts must look to the landmark case *D.C. v. Heller*, which was discussed in depth above, for guidance.<sup>82</sup> The Court held that the fundamental or core interest protected by the Second Amendment is the right to use firearms for self-defense within one’s home.<sup>83</sup> The Court also held that the Second Amendment, like the First Amendment, is not unlimited in its scope.<sup>84</sup> However, these two holdings left much of the Second Amendment’s scope undefined.<sup>85</sup>

Nonetheless, the Court provided some clarity on the limits of the Second Amendment by concluding that *Heller* did not cast doubt on longstanding gun regulations.<sup>86</sup>

<sup>79</sup> See *Dearth v. Holder*, 893 F.Supp.2d at p. 64.

<sup>80</sup> See *Ezell v. City of Chicago*, 651 F.3d at p. 684; 701-04 (7th Cir. 2011); *United States v. Chester*, 628 F.3d at p. 673; 680 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792, at p. 800-01 (10th Cir. 2010); *United States v. Marzarella*, 614 F.3d at p. 85; 89 (3d Cir. 2010).

<sup>81</sup> See *Heller v. D.C.*, 670 F.3d at p. 1244; 1252-53 (D.C. Cir. 2011).

<sup>82</sup> 554 U.S. 570 (2008).

<sup>83</sup> See *United States v. Marzarella*, 614 F.3d at p. 85; 97 (3d Cir. 2010), citing *D.C. v. Heller*, 554 U.S. at p. 570; 629 (2008).

<sup>84</sup> See *idem* at p. 595: “The Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the First Amendment’s right of free speech was not. Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for any sort of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for any purpose.”

<sup>85</sup> See *idem* at p. 626: “We do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment.”

<sup>86</sup> *Idem* at p. 626-27: “Nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”

The Court held that longstanding gun regulations are “presumptively lawful.”<sup>87</sup> Some circuits have latched onto this small piece of definitiveness from the *Heller* opinion.<sup>88</sup> The D.C. Circuit justified the presumption that a longstanding regulation is constitutional by reasoning that a long duration of acceptance demonstrates that the public has accepted the regulation and that it does not burden a constitutional right.<sup>89</sup> However, a plaintiff may rebut this presumption by demonstrating that the challenged regulation has more than a de minimis effect upon his/her right. The converse of this relatively bright-line rule is that newer regulations are not “presumptively lawful.”

Without the Supreme Court taking a definitive stance on the scope of the Second Amendment, the circuits remain split on whether and to what extent the Second Amendment affords protection outside the home.<sup>90</sup> The Seventh Circuit held that the Second Amendment’s right to bear arms for self-defense has the same importance both inside and outside the home.<sup>91</sup> Whereas the Second, Third, and Fourth Circuits held that the Second Amendment protections are more limited outside the home.<sup>92</sup>

If a court determines that the challenged regulation impinges upon a citizen’s Second Amendment rights, the court will proceed to the second step of the analysis. During the second step of the analysis, the court determines whether the challenged provision(s) passes muster under the appropriate level of constitutional scrutiny.<sup>93</sup>

The level of constitutional scrutiny depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right.<sup>94</sup> Thus, a regulation that imposes a substantial burden upon the core right of self-defense protected by the Second Amendment must have a strong justification, and in contrast, a regulation that imposes a less substantial burden should be proportionately easier to justify.

<sup>87</sup> *Idem.* at p. 26: “We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.”

<sup>88</sup> See *Nat’l Rifle Ass’n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d at p. 185; 195-96 (5th Cir. 2012); *Heller v. D.C.*, 670 F.3d at p. 1244; 1253 (D.C. Cir. 2011).

<sup>89</sup> *Heller v. D.C.*, 670 F.3d at p. 1253.

<sup>90</sup> See *Dearth v. Lynch*, 791 F.3d at p. 32; 40-41 (D.C. Cir. 2015).

<sup>91</sup> See *Moore v. Madigan*, 702 F.3d at p. 933: “The Supreme Court has decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside.”

<sup>92</sup> See *Drake v. Filko*, 724 F.3d at p. 426, 436 (3d Cir. 2013): “if the Second Amendment protects the right to carry a handgun outside the home for self-defense at all, that right is not part of the core of the Amendment.”; *Kachalsky v. County of Westchester*, 701 F.3d at p. 81; 96 (2nd Cir. 2012): “Because our tradition so clearly indicates a substantial role for State regulation of the carrying of firearms in public, we conclude that intermediate scrutiny is appropriate.”; *U.S. v. Masciandro*, 638 F.3d at p. 458; 470 (4th Cir. 2011): “We assume that any law that would burden the fundamental, core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny. But, as we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense.”

<sup>93</sup> See *Heller v. D.C.*, 670 F.3d at p. 1244; 1252.

<sup>94</sup> *Idem.* at p. 1257, quoting *United States v. Chester*, 628 F.3d at p. 673; 682 (4th Cir. 2010).

Depending upon the challenged law and the right impinged upon, the court may apply intermediate scrutiny or strict scrutiny, but not a rational basis test.<sup>95</sup>

Intermediate scrutiny requires that a regulation promotes an “important” or “substantial” government interest that would be achieved less effectively absent the regulation.<sup>96</sup> The regulation cannot be substantially broader than necessary to achieve the government interest.<sup>97</sup> Additionally, the relationship between the regulation and the government interest needs to only be reasonable and not perfect.<sup>98</sup> This level of scrutiny is far less stringent than strict scrutiny.

The court will choose to use intermediate scrutiny over strict scrutiny when the challenged regulation impinges upon any other right protected by the Second Amendment that is not the core protection of self-defense.<sup>99</sup> As stated above, the Supreme Court ruled in *Heller* that the fundamental or core interest protected by the Second Amendment is the right to use arms for self-defense within one’s home.<sup>100</sup> Thus, when a challenged regulation impinges upon an interest protected by the Second Amendment that is not the right to use arms for self-defense within one’s home, the court will choose to examine the regulation using intermediate scrutiny as opposed to strict scrutiny.<sup>101</sup>

When applying strict scrutiny, the court determines whether the law is narrowly tailored to serve a compelling government interest.<sup>102</sup> If the court is applying strict scrutiny and a less restrictive alternative would advance the government’s interest, then the legislature must use the less restrictive alternative.<sup>103</sup>

An example of the court applying strict scrutiny to a regulation is the *Heller* case.<sup>104</sup> As mentioned prior, the challenged regulation presented to the Supreme Court prohibited individuals from keeping handguns both inside and outside their home.<sup>105</sup> The court ruled that this type of law would not pass any type of scrutiny because it impinged upon the core and fundamental protection of the Second Amendment.<sup>106</sup>

<sup>95</sup> See *idem.* at p. 1256.

<sup>96</sup> See *Ward v. Rock Against Racism*, 491 U.S. at p. 781; 782-83 (1989); *Dearth v. Lynch*, 791 F.3d at p. 32; 44 (D.C. Cir. 2015); *Heller v. D.C.*, 670 F.3d at p. 1244; 1258.

<sup>97</sup> See *idem.*

<sup>98</sup> See *United States v. Marzarella*, 614 F.3d at p. 85; 97-98 (3d Cir. 2010).

<sup>99</sup> *Heller v. D.C.*, 670 F.3d at p. 1244; 1257.

<sup>100</sup> See *United States v. Marzarella*, 614 F.3d at p. 97, citing *D.C. v. Heller*, 554 U.S. 570, 629 (2008).

<sup>101</sup> See *idem.* at p. 96.

<sup>102</sup> See *United States v. Marzarella*, 614 F.3d at p. 85, n. 14 (3d Cir. 2010), citing *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. at p. 803; 813 (2000).

<sup>103</sup> *Drake v. Filko*, 724 F.3d at p. 426; 436 (3d Cir. 2013), quoting *Playboy Entm’t Grp., Inc.*, 529 U.S. at p. 813.

<sup>104</sup> *D.C. v. Heller*, 554 U.S. at p. 570; 628-29 (2008).

<sup>105</sup> See *idem.* at p. 573.

<sup>106</sup> See *idem.* at p. 628-29.

Even though the right to bear arms is an enumerated fundamental constitutional right, courts have the discretion to not apply strict scrutiny to Second Amendment challenges.<sup>107</sup> The court applies strict scrutiny only when the challenged statute burdens the core protection of the Second Amendment, i.e., the right to use fire arms for self-defense within one's home.<sup>108</sup> The court follows the same principle for First Amendment challenges to content-based restrictions on speech in a public forum, i.e., the core protection of the First Amendment.

The rational basis test presumes the law is valid and asks only whether the statute is rationally related to a legitimate state interest.<sup>109</sup> However, courts cannot chose to apply a rational basis test to a Second Amendment challenge.<sup>110</sup> The Supreme Court ruled out this option in the *Heller* case.<sup>111</sup> The Court reasoned that if all that was required to overcome an enumerated right was a rational basis test, then the Second Amendment would have no effect and would be redundant with the separate constitutional prohibitions on irrational laws.

## 6. APPLYING PRECEDENT TO THE STATUTES

Analysis of the constitutionality of 18 U.S.C. § 922(a)(9), 18 U.S.C. § 922(b)(3), and related regulations will be organized within the framework of the two-step approach for analyzing Second Amendment challenges. First the statutes and regulations are examined for how they affect the right protected by the Second Amendment. Then the level of scrutiny is examined. Based on that level of scrutiny, the court will analyse whether the statutes and regulations can stand.

### 6.1. The potential effect of the Statutes being longstanding gun regulations and therefore presumptively lawful

To determine whether a statute impinges upon a right protected by the Second Amendment, one must start by examining whether the challenged statutes are longstanding. As mentioned in a prior section, the Seventh Circuit presumes that statutes that are longstanding are presumptively lawful.<sup>112</sup> In *Heller*, the Supreme Court gave a non-exhaustive list of longstanding restrictions that qualify as longstanding

<sup>107</sup> See *Heller v. D.C.*, 670 F.3d at p. 1256, citing to *Ward v. Rock Against Racism*, 491 U.S. at p. 781; 791 (1989); *United States v. Marzzarella*, 614 F.3d at p. 96; *U.S. v. Chester*, 628 F.3d at p. 673; 682 (4th Cir. 2010).

<sup>108</sup> See *Drake v. Filko*, 724 F.3d at p. 436; *Heller v. D.C.*, 670 F.3d at p. 1256; *United States v. Marzzarella*, 614 F.3d at p. 96.

<sup>109</sup> See *US v. Marzzarella*, 614 F.3d at p. 95 n. 13; *D.C. v. Heller*, 554 U.S. at p. 629 n. 27.

<sup>110</sup> See *US v. Marzzarella*, 614 F.3d at p. 95-96.

<sup>111</sup> See *D.C. v. Heller*, 554 U.S. at p. 629 n. 27.

<sup>112</sup> *D.C. v. Heller*, 554 U.S. at p. 570, FN. 26 (2008).

prohibitions, which the decision was not meant to cast doubt on.<sup>113</sup> One of these longstanding prohibitions was the “laws imposing conditions and qualifications on the commercial sale of arms.”<sup>114</sup>

The defendant in this case has demonstrated that there is a longstanding history of gun laws prohibiting nonresidents from purchasing guns. Defendant has pointed out that since the early 20th century, 12 states and the District of Columbia have enacted restrictions on the purchase and acquisition of firearms by nonresidents.<sup>115</sup> Although the historical restrictions on nonresident firearm purchases do not exactly replicate 922(a)(9) and 922(b)(3), multiple courts have ruled that the challenged law’s historical origins do not have to be “carbon copies” of the current statutes being challenged.<sup>116</sup>

Furthermore, the examples of longstanding gun control laws in the *Heller* opinion makes it more reasonable to conclude that 922(a)(9) and 922(b)(3) should be considered longstanding for two reasons. First, the *Heller* court uses “laws imposing conditions and qualifications on the commercial sale of arms”<sup>117</sup> as an example of a longstanding gun control law that the opinion was not meant to cast doubt on. It is pretty clear that 922(a)(9) and 922(b)(3) fall into this category. Second, the other two examples the *Heller* Court uses for longstanding gun controls, i.e., felony firearm ban and mental illness felony ban, trace their history back to the mid-1950’s.<sup>118</sup> These bans are very-well established, even though they have only been law for about the last sixty years. Thus, gun bans on nonresidents tracing back to the early 1900’s appears to be longstanding, relative to the enumerated examples used in *Heller*.

However, even if 922(a)(9) and 922(b)(3) are deemed to be longstanding, which I think it is safe to assume they are, and thus, presumptively constitutional, the presumption is rebuttable. To rebut this presumption, a plaintiff has to merely show that the challenged law has more than a de minimis effect upon his/her Second Amendment right.<sup>119</sup> Thus, the inquiry does not end here, and I will examine the effect 922(a)(9) and 922(b)(3) have on nonresident U.S. citizens in the next section.

<sup>113</sup> See *idem.* at p. 626-27.

<sup>114</sup> *Idem.*

<sup>115</sup> See *Dearth v. Lynch*, 791 F.3d at p. 32; 42-43 (D.C. Cir. 2015).

<sup>116</sup> See *Heller v. D.C.*, 670 F.3d at p. 1244; 1252-53 (D.C. Cir. 2011).

<sup>117</sup> *D.C. v. Heller*, 554 U.S. at p. 570; 626-27 (2008).

<sup>118</sup> See *Nat’l Rifle Ass’n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d at p. 185; 196-97 (5th Cir. 2012).

<sup>119</sup> See *Heller v. D.C.*, 670 F.3d at p. 1253.

## 6.2. The Statutes effect on non-resident U.S. citizens' Second Amendment rights

This inquiry raises the somewhat difficult question of what rights are guaranteed by the Second Amendment. As detailed in a prior section, the *Heller* case analyzed this issue. *Heller* ultimately held that the fundamental right of the Second Amendment is the right for the people to bear arms for self-defense within their homes.<sup>120</sup> However, the Court did not specify how far the right to bear arms for self-defense purposes extended outside the home. The *Heller* court clearly ruled that the Second Amendment is not unlimited in its scope.<sup>121</sup> Meaning, the fundamental right of self-defense with a firearm does not extend to every place or every situation. However, there is a huge spectrum between the fundamental right of the Second Amendment being limited to an individuals' home and the fundamental right not being extended to everywhere.

This gray area where the right to legally bear arms applies is important to the outcome to the case at hand. In order for the Court to rule that these statutes do not violate nonresident U.S. citizen's Second Amendment Rights to legally bear arms, the court has to infer at least one of three things. Either the court is inferring that the right to legally bear arms does not extend outside the home, the prohibition of the sales for firearms is not the same as eliminating the right to bear arms, or that nonresident U.S. citizens simply lose their second amendment rights when they choose to live abroad.

Starting with the first inference that the fundamental right to legally bear arms for self-defense does not extend outside the home, if we assume for the sake of argument that nonresident U.S. citizens are not in their "home" when they are in the United States, which is debatable, and that the court does not infer either of the other two inferences specified above, then the Court must infer that the fundamental right to legally bear arms is limited only to the individual's house. The reason is that the only difference between a resident U.S. citizen being anywhere in the U.S. and a non-resident U.S. citizen being in the U.S. is the fact that a resident U.S. citizen has a "home" in the country in which he/she can exercise his/her right to legally bear arms. If a nonresident U.S. citizen cannot legally purchase a gun for self-defense while he/she is in the United States, then he/she cannot exercise their right to self-defense with a firearm anywhere. Thus, the Court would have to be inferring that the fundamental right to legally bear arms does not extend outside an individual's home.

The second inference the court may draw is the prohibition of the sales for firearms to nonresident U.S. citizens is not the same as eliminating the right for nonresident U.S. citizens to bear arms. In *Heller*, the court struck down Washington's ban on the

<sup>120</sup> See *D.C. v. Heller*, 554 U.S. at p. 570; 628-29 (2008).

<sup>121</sup> See *idem.* at p. 559.

possession of usable handguns both inside and outside the house.<sup>122</sup> That is different than making it illegal to purchase handguns, like 922(a)(9) and 922(b)(3) do for nonresident U.S. citizens.<sup>123</sup> Thus, the court may draw this distinction to justify 922(a)(9) and 922(b)(3) as being constitutional, while still maintaining that nonresident U.S. citizens have Second Amendment rights and the fundamental right of the Second Amendment to legally bear arms may extend outside the home.

The third and least persuasive inference is that nonresident U.S. citizens simply lose their second amendment rights when they choose to live abroad. For the court to uphold 922(a)(9) and 922(b)(3) as constitutional, while maintaining that the fundamental right of the Second Amendment to legally bear arms may extend outside the house and the prohibition of the sales for firearms to nonresident U.S. citizens is not the same as eliminating the right for nonresident U.S. citizens to bear arms, then the Court must be drawing a distinction between nonresident U.S. citizens and resident U.S. citizens. The distinction being that resident U.S. citizens have Second Amendment protections, while nonresident U.S. citizens do not have those same protections.

All of these inferences appear untenable, and the Court should rule that the combined power of the statutes in question at least have more than a de minimis effect upon non-resident U.S. citizen's Second Amendment rights. To prohibit a class of citizens from purchasing firearms for self-defense purposes clearly is an infringement upon their Second Amendment right. The *Heller* Court adopted an individual right model interpretation of the Second Amendment by holding that the Second Amendment protected the fundamental right of individuals' to bear arms for self-defense.<sup>124</sup> Granted, the Court qualified its holding by ruling the fundamental right was within an individual's home. However, this was the fundamental right of the Second Amendment, which will have more of an effect on what level of scrutiny is applied.<sup>125</sup> In light of the Supreme Court moving towards an individual rights model interpretation of the Second Amendment in *Heller*, it would be pretty radical for the D.C. Circuit to rule that the statutes in question do not have more than a de minimis effect upon nonresident U.S. citizen's Second Amendment rights. Thus, the court should find that the first part of the two part test is satisfied.

<sup>122</sup> See *idem.* at p. 635.

<sup>123</sup> See 18 U.S.C. § 922(a)(9); 18 U.S.C. § 922(b)(3).

<sup>124</sup> See *D.C. v. Heller*, 554 U.S. at p. 570; 628-29 (2008): "Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home the most preferred firearm in the nation to keep and use for protection of one's home and family would fail constitutional muster."

<sup>125</sup> See *Heller v. D.C.*, 670 F.3d at p. 1244; 1257 (D.C. Cir. 2011), quoting *United States v. Chester*, 628 F.3d at p. 673; 682 (4th Cir. 2010).

### 6.3. Applying the Proper Scrutiny

The second part of the two step approach, i.e., what type of scrutiny will apply, is where the case will be won or lost. These statutes have been challenged many times in the past on different grounds, and when the court has applied intermediate scrutiny, the court has upheld the statutes as constitutional.<sup>126</sup> Thus, it appears the plaintiff's greatest and potentially only chance of success is to convince the court to apply strict scrutiny in this case.

Whether the Court will choose to apply strict scrutiny or intermediate scrutiny will come down to the classification of what type of Second Amendment right the statutes are infringing upon. If the court finds that the statutes violate the plaintiff's fundamental right protected by the Second Amendment, then the court will almost certainly apply strict scrutiny.<sup>127</sup> Contrarily, if the court finds that the statutes violate the plaintiff's non-fundamental Second Amendment rights protected by the Second Amendment, then the court will most likely apply intermediate scrutiny.

The distinction between fundamental and non-fundamental Second Amendment rights will hinge on the definition of "home." In *Heller*, the court only held that the fundamental right protected by the Second Amendment is the right for citizens to use firearms for self-defense within their homes.<sup>128</sup> The court did not rule out the possibility that the fundamental right may extend outside the home in certain circumstances, but it did rule out the possibility that the fundamental right extended everywhere under any circumstances.<sup>129</sup> Thus, unless this case or another Second Amendment case is eventually granted cert for the Supreme Court to decide whether and how far the fundamental right of the Second Amendment extends, the D.C. Circuit will either have to rule on whether this statute violates the fundamental right expressed in *Heller*, i.e. self-defense with a firearm in the home, or make a landmark ruling that the fundamental right does in fact extend outside the home to some degree.

Consequently, the plaintiff's in this case should be making two main arguments for why strict scrutiny applies. The primary argument should be that the nonresident U.S. citizens are in their "home" while they are in the U.S. for a period of time. The secondary argument plaintiffs should make is that the fundamental right to bear arms for self-defense extends to some degree outside of an individual's home.

<sup>126</sup> See, e.g., *United States v. Decastro*, 682 F.3d 160, 161 (2d Cir.2012): "transportation of firearm from another State into one's State of residence under section 922(a)(3)".

<sup>127</sup> See *Heller v. D.C.*, 670 F.3d at p. 1244; 1257 (D.C. Cir. 2011), quoting *United States v. Chester*, 628 F.3d at p. 673, 682 (4th Cir. 2010).

<sup>128</sup> See *D.C. v. Heller*, 554 U.S. at p. 570; 628-29 (2008)

<sup>129</sup> See *idem.* at p. 595: "The Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the First Amendment's right of free speech was not. Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for any sort of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for any purpose."

Starting with the primary argument, if the plaintiff can establish that nonresident U.S. citizens are in their “home” while in the U.S., then the statutes will clearly violate the fundamental right protected by the Second Amendment. However, the government will advance the counter argument that nonresidents are, by definition, not in their home while visiting the U.S.<sup>130</sup> The best strategy for the plaintiff to combat this counterargument is by advancing a policy argument for why nonresident U.S. citizens are at “home” while in the U.S.

The policy argument for why nonresident U.S. citizens are at home while in the U.S. should focus on how Justice Scalia justified that the Second Amendment protects the fundamental right that people are entitled to bear arms for self-defense in their homes. Scalia wrote “the prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute... banning from the home the most preferred firearm in the nation to keep and use for the protection of one’s home and family would fail constitutional muster.”<sup>131</sup> Now, as much as the government may make semantic arguments that a nonresident U.S. citizen is, by definition, not in his/her home while he/she is in the United States, it is undeniable that wherever the nonresident is staying in the United States that the same concerns apply to them. That is, the place they are staying will contain their self, potentially their family members, and definitely their property for the time they are in the United States. Thus, if the plaintiff can persuade the court that the place where nonresidents are staying in the U.S. is for all intents and purposes their “home,” then the statutes will be in clear violation of the fundamental right protected by the Second Amendment and subject to strict scrutiny.

Turning to the secondary argument, if the plaintiff can establish that the fundamental right to bear arms for self-defense extends to some degree outside of an individual’s home, then the court can reasonably hold that the statutes violate the fundamental right protected by the Second Amendment. The plaintiff can draw an analogy between an individual’s home and other private areas that demand the same type of protection, e.g., a car, place of business, and hotel rooms. However, the government will have a strong counter argument. The government can argue that *Heller’s* holding was restricted to the “home” of individuals, and that the circuit court is not in the position to extend the Supreme Court’s holding without direction from the Supreme Court itself.<sup>132</sup>

Ultimately, the choice to apply intermediate or strict scrutiny is very important to this case, if not dispositive. The facts, issues, and law present the attorneys on both side with room to advocate for their respective positions. Based on prior cases challenging

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<sup>130</sup> See at *Fruling* 2010-6 at p. 1.

<sup>131</sup> See *D.C. v. Heller*, 554 U.S. at p. 570; 626-27 (2008).

<sup>132</sup> See *Dearth v. Lynch*, 791 F.3d at p. 32; 41-42 (D.C. Cir. 2015).

the law and the dissenting opinion in *Dearth v. Lynch*, it seems to be a safer prediction that the circuit court will ultimately side with the government and choose intermediate scrutiny. However, as mentioned above, this case presents strong arguments for the plaintiff's position as well, which may convince the circuit court otherwise, or potentially the Supreme Court if cert is granted.

### 6.3.1. *Constitutionality under Intermediate Scrutiny*

As stated in the prior section, if the court were to apply intermediate scrutiny, then the court will most likely uphold the statutes as constitutional. The statutes undoubtedly serve the compelling government interest of crime prevention.<sup>133</sup> Also, in the absence of the statutes it appears that the government's interest would be less effectively achieved. However, the third prong of the intermediate scrutiny test, i.e., whether the means chosen are substantially broader than necessary to achieve that interest, is vulnerable to attack by the plaintiff.

Plaintiff can make a legitimate argument that the flat ban on nonresident U.S. citizens purchasing guns is broader than necessary. Plaintiffs can argue that a better means for advancing this could be something similar to how nonresidents are allowed to vote in federal elections, which was discussed above.<sup>134</sup> For instance, nonresident U.S. citizens could be allowed to purchase weapons in the state that they resided in immediately prior to leaving the U.S. to reside abroad. This will solve the concern of circumventing state gun regulations because the nonresident will still be subjected to the state gun regulations of the state in which they resided in lastly. However, the government will likely counter this argument by pointing out that the nonresident U.S. citizens are legally allowed to bring guns into the U.S. while they visit the U.S., even though they are prohibited from purchasing guns in the U.S.<sup>135</sup>

### 6.3.2. *Constitutionality under Strict Scrutiny*

If the court were to apply strict scrutiny, then the court will most likely strike down the statutes as unconstitutional. Strict scrutiny is in virtually all cases a death sentence for challenged laws because the burden is so high on the government. The government must demonstrate that the law is narrowly tailored to serve a compelling

<sup>133</sup> See *Ward v. Rock Against Racism*, 491 U.S. at p. 781; 782-83 (1989); *Dearth v. Lynch*, 791 F.3d at p. 32; 44 (D.C. Cir. 2015); *Heller v. D.C.*, 670 F.3d at p.1244, 1258.

<sup>134</sup> See 52 U.S.C. § 20310(5)(B).

<sup>135</sup> See *Dearth v. Lynch*, 791 F.3d at p. 32; 47-49 (D.C. Cir. 2015).

government interest.<sup>136</sup> Thus, if a less restrictive alternative would advance the government's interest, then the legislature must use the less restrictive alternative.<sup>137</sup>

If the case reaches the point where the court is scrutinizing the statutes strictly, the plaintiffs should have no problem coming up with a less restrictive alternative to the flat out ban on nonresident U.S. citizens purchasing weapons for self-defense. For instance, the plaintiffs could suggest a different form for nonresident U.S. citizens to fill out, or an exception to the statutes for nonresident U.S. citizens.

## 7. CONCLUSION

Undoubtedly, constitutionally guaranteed freedoms are without limit, but that limit is confined by a higher level of scrutiny, if not the highest scrutiny. The regulations in question, though dealing with the valid concern of firearms travelling from state to state, the incidental result is to take away the right of otherwise law-abiding citizens, not because they may travel to another state, but because they do not have the residency qualifications of the statute. Stemming organized crime, mass shootings, domestic terrorism, and international terrorism is undoubtedly a compelling state interest, but this law would fall for being overbroad if subjected to strict scrutiny. As *Dearth* rises through the federal system, it deserves a grant of cert by the United States Supreme Court. If one right can be infringed, solely for the choice to live outside the country, then what other rights can be taken away for the same reason? Can speech critical of US foreign policy be criminalized, simply for it being made on the streets of Paris? Does due process stop at customs? These are the perils of the overly broad wording of the statutes. Jurisprudence is needed for an answer.

## 8. REFERENCES

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<sup>136</sup> See *United States v. Marzzarella*, 614 F.3d at p. 85, n. 14 (3d Cir. 2010), citing *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000).

<sup>137</sup> *Drake v. Filko*, 724 F.3d at p. 426; 436 (3d Cir. 2013), quoting *Playboy Entm't Grp., Inc.*, 529 U.S. at p. 813.