

# Gun Rights, Gun Wisdom

*John Q. Barrett\**

Copyright © 2008 by John Q. Barrett.  
All rights reserved.

During his country boyhood in western Pennsylvania and western New York State, Robert Jackson was very familiar with guns—his later recollection was that every house had one. His uncle, Dan Houghwot, a careful man, took young Robert hunting and taught him to handle guns safely. As a high school boy in Frewsburg, New York, Robert often went hiking on his own, usually carrying sandwiches fixed by his mother and sometimes carrying a not-too-heavy “kid’s rifle.” His pleasure was the hiking, but if he saw something to shoot at—usually woodchucks or groundhogs—he did. Jackson continued to be a real outdoorsman, a gun owner and occasionally a hunter throughout his life. One of his pistols is now a museum holding in his adult hometown of Jamestown, New York.

Jackson also was familiar with guns as a constitutional litigator in the Supreme Court of the United States and as a federal law enforcement officer. In 1939, when Jackson was Solicitor General of the United States, his name was on the top of the government’s brief and he probably was present in the Supreme Court when his colleague and close friend Gordon E. Dean argued and won a unanimous decision, *Miller v. United States*, upholding the constitutionality of a federal prosecution under the National Firearms Act (1934) for transporting an unregistered, unauthorized sawed-off shotgun across state lines.<sup>1</sup> The *Miller* Court, adopting Jackson’s and colleagues’ written arguments and (I assume) Dean’s oral arguments on behalf of the United States, noted the absence of evidence that possession of such a shotgun was reasonably related “to the preservation or efficiency of a well regulated militia” and, on that basis, the Court declined to “say that the Second Amendment guarantees the right to keep and bear such an instrument.”<sup>2</sup>

---

\* Professor of Law, St. John’s University School of Law, New York City, and Elizabeth S. Lenna Fellow, Robert H. Jackson Center, Jamestown, New York ([www.roberthjackson.org](http://www.roberthjackson.org)). I emailed an earlier version of this essay to my Jackson List on June 27, 2008.

For an archive of selected Jackson List posts, many of which have document images attached, visit <http://thejacksonlist.com>.

To subscribe to the Jackson List, which does not display recipient identities or distribute their email addresses, send “subscribe” to [barrettj@stjohns.edu](mailto:barrettj@stjohns.edu).

<sup>1</sup> 307 U.S. 174 (1939).

<sup>2</sup> *Id.* at 178.

A year later, Jackson was Attorney General of the United States. That spring, he officially transmitted to the Congress draft legislation that would have, in the interests of both international security and national law enforcement, required the registration of all firearms in the United States. Attorney General Jackson transmitted the proposed bill to the Speaker of the House, Rep. William B. Bankhead (D.-AL), beneath this May 29, 1940, transmittal letter:

My Dear Mr. Speaker:

I desire to recommend legislation to require registration of all firearms in the United States and a record of their transfers, accompanied by the imposition of a nominal tax on each transfer.

Such a step would be of great importance in the interests of national defense, as it would hamper the possible accumulation of firearms on the part of subversive groups. It is also of outstanding importance in the enforcement of the criminal law.

It is only too well known to require detailed depicting that Federal, state and local law enforcement officers have frequently been killed by desperate criminals who equip themselves with firearms and have no hesitancy to use them in an endeavor to escape apprehension.

On a number of occasions in recent years members of the personnel of the Federal Bureau of Investigation met their death in this manner while unflinchingly performing their hazardous duties.

It is to be particularly noted that the legislation, the enactment of which I recommend, would in no wise improperly limit the freedom of action of peaceful, law-abiding persons.

The contemplated legislation would not hamper or hinder any person from purchasing or possessing a firearm. It would merely require him to register the firearm and to record any transfer of the weapon.

It would interfere with personal liberty no more than is the case with the requirement that is imposed in every state in respect to registration of automobiles.

It is equally important that death dealing weapons be registered so that a record of the traffic in them may be maintained for purposes of national defense and for enforcement of the criminal law.

A proposed bill drafted in this department embodying the foregoing recommendations is enclosed herewith. I recommend its enactment and hope that favorable action can be taken in respect to it at this session of the Congress.

This proposal for mandatory federal gun registration did not pass. Indeed, an October 1941 law that granted President Roosevelt legal authority to requisition private property for defense of the United States specifically disclaimed any interpretation that it conferred such authority and said the requisition authority should not be construed “to impair or infringe in any manner the right of any individual to keep or bear arms....”

Did Jackson interpret the Second Amendment to confer such an individual right? The evidence I know of is inconclusive. His own gun use and gun ownership were instances of behavior, not constitutional exegesis ... but in many people the former does inform and evidence the latter. Jackson’s constitutional argument in the government’s *Miller* brief was nuanced, not categorical—it did not argue that the Second Amendment protects guns only in the context of militia service and does not also encompass individual rights. And the 1940 Jackson proposal seeking national gun registration legislation sought only that; he did not seek a law banning gun possession.

All of this is relevant, of course, to the Supreme Court’s decision in *District of Columbia v. Heller*,<sup>3</sup> which recognized in the Second Amendment an individual right to possess a firearm unconnected with militia service, and to use that weapon for lawful purposes such as self-defense within the home.

*Heller* itself recognizes limits on individual gun rights under the Second Amendment and displays some sensitivity to the practical concerns

---

<sup>3</sup> 554 U.S. 570 (June 26, 2008).

---

*GUN RIGHTS, GUN WISDOM*

---

that surround guns.<sup>4</sup> It can be hoped, going forward, that this jurisprudence and future explications of this individual right will remember and embody the distinction between gun savvy and gun crazy. Robert Jackson's personal behavior with guns and his legal work on gun control issues did that. His Uncle Dan raised him that way.



March 1930: Robert H. Jackson, with pistol and family,  
on vacation in Arizona.

---

<sup>4</sup> See *id.* at 626-28.