CONNECTICUT
LAW REVIEW

VOLUME 45 JULY 2013 NUMBER 5

Article

Defense of Self and Community: A Response to Professor Johnson

STEPHEN P. HALBROOK

Professor Nicholas Johnson traces the perception and exercise of the right of the people to keep and bear arms in the African American community from the Jim Crow era through the civil-rights movement in the twentieth century up to modern times. This topic has never been covered in such depth and is a significant contribution to African American historiography. Moreover, it contributes to Second Amendment scholarship because it demonstrates through experience why the right to armed defense of self and community is necessary in a free society.

Numerous untapped resources are awaiting discovery and analysis that buttress and further substantiate Professor Johnson's theses. Judicial decisions and legislation from the Jim Crow era illustrate the exercise of Second Amendment right by African Americans and the forces that sought to repress those rights. Defense of self and community with firearms against racist attack—a theme that Robert F. Williams prominently argued in the mid-twentieth century—proved to be consistent with traditional values, African American and otherwise. As illustrated by positions taken by the NAACP Legal Defense Fund in the Supreme Court's recent Second Amendment decisions, elements of the leadership of the African American community have taken an ambivalent approach toward the right to keep and bear arms.

ARTICLE CONTENTS

Defense of Self and Community: A Response to Professor Johnson

STEPHEN P. HALBROOK*

I. INTRODUCTION

Professor Nicholas J. Johnson has made a major, one-of-a-kind contribution to the literature of the Second Amendment.[1] He traces the perception and exercise of the right of the people to keep and bear arms in the African American community from the post-Reconstruction, Jim Crow era through modern times.[2] He demonstrates an historical development beginning with a robust exercise of this right for defense against racist violence, extending through the great debate over the limits of this right during the heyday of the civil rights movement, and progressing toward a rejection of this right by many in the African American leadership in reaction to horrific levels of criminal violence within their community.[3]

To be sure, some of the same ground has been tread by others, most prominently Professors Robert Cottrol and Ray Diamond.[4] But their work encompassed the subject from colonial times to today.[5] By limiting the time period to a little over a century, Professor Johnson is able to provide an unparalleled treatment of the subject.

---

* J.D., Georgetown University Law Center; Ph.D., Philosophy, Florida State University. Author of the books *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866–1876* (reissued as *Securing Civil Rights*); *The Founders' Second Amendment*; *Firearms Law Deskbook*; *That Every Man Be Armed*; *Target Switzerland*; and *The Swiss & the Nazis*. Argued *Printz v. United States* (1997) and other Supreme Court cases, and represented a majority of members of Congress as amici curiae in *Heller v. District of Columbia* (2008), and the National Rifle Association in *McDonald v. City of Chicago* (2010). Former assistant professor of philosophy at Tuskegee Institute, Howard University, and George Mason University. Research Fellow, The Independent Institute. For more information see my website at http://stephenhalbrook.com.

[1] Nicholas J. Johnson, *Firearms Policy and the Black Community: An Assessment of the Modern Orthodoxy*, 45 CONN. L. REV. 1491 (2013).

[2] *See id.* at 1516–67 (tracing the black community's traditional practice and modern orthodoxy regarding gun ownership).

[3] *See id.* at 1576–1603 (describing and criticizing the modern orthodox view of the black community regarding gun ownership).

[4] Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 319 (1991). Justice Clarence Thomas cited this among other works as follows: "Marshaling an impressive array of historical evidence, a growing body of scholarly commentary indicates that the 'right to keep and bear arms' is, as the Amendment's text suggests, a personal right." Printz v. United States, 521 U.S. 898, 938 n.2 (1997) (Thomas, J., concurring).

[5] *See* Cottrol & Diamond, *supra* note 4, at 319 (laying out the article's contents).

A primary focus of scholarship on the Second Amendment and the African American experience has been the period of Reconstruction. That has been the forte of this author,[6] Professor Johnson, and many others.[7] Not only is the period 1865–1876 exceptionally rich on the subject matter, it is also critically significant regarding whether the Fourteenth Amendment was understood to protect Second Amendment rights from State infringement. In *District of Columbia v. Heller*,[8] the Supreme Court viewed the Reconstruction era as demonstrative of a historical continuity since the Founding period of the Second Amendment being understood to protect individual rights.[9] And in *McDonald v. City of Chicago*,[10] the Court centered on this era in holding that the Second Amendment is incorporated into the Fourteenth Amendment.[11]

There was a virtual explosion of scholarship on the Second and Fourteenth Amendments, at the core of which was the African American experience, in anticipation of *McDonald*. Professor Johnson picks up the story after the end of Reconstruction, when what seemed to be a new beginning of civil rights degenerated into the Jim Crow era of lynchings and Klan violence—often with the connivance of the police and officials—and the attendant reaction in the black community to arm and defend themselves.[12] Johnson relies on an impressive array of original documents, memoirs, newspapers, and other historical sources.[13]

A relatively untapped source for this history may also be found in contemporaneous judicial decisions, legislative sources, and other legal literature. These sources may be obscure, but they buttress Johnson's thesis substantially. Indeed, hopefully provoked by Johnson's decisive thesis focusing on the post-Reconstruction era through current times, a new generation of scholarship will evolve. The following suggests and exemplifies how the horizon of this scholarship may be expanded with

---

[6] *See* STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866–1876, at viii–xi (1998) (reissued as SECURING CIVIL RIGHTS (2010)) (prefacing the book and its discussion about the Second Amendment's right to bear arms).

[7] *See, e.g.*, Clayton E. Cramer, Nicholas J. Johnson & George A. Mocsary, *"This Right Is Not Allowed by Governments That Are Afraid of the People": The Public Meaning of the Second Amendment When the Fourteenth Amendment Was Ratified*, 17 GEO. MASON L. REV. 823, 823–25 (2010) (introducing the contents of the article and discussing the questions that followed the Supreme Court's decision in *District of Columbia v. Heller*, and cited as authority in Ezell v. City of Chicago, 651 F.3d 684, 702 n.11 (7th Cir. 2011)).

[8] 554 U.S. 570 (2008).

[9] *Id.* at 614–18.

[10] 130 S. Ct. 3020 (2010).

[11] *Id.* at 3038–43; *see also id.* at 3058, 3071–76 (Thomas, J., concurring) (agreeing with the Court that the Fourteenth Amendment makes the Second Amendment applicable to the States and discussing statements made by members of Congress during the debates surrounding the Amendment).

[12] *See* Johnson, *supra* note 1, at 1497–1515 (discussing examples of black communities responding to violence from Reconstruction through the 1900s).

[13] *See id.* (citing a variety of original sources in support of his historical analysis).

reference to sources from the legal literature. It also expands on Johnson's discussion of the debate on self-defense between Martin Luther King Jr. and Robert F. Williams. Finally, it analyzes the amicus curiae brief of the NAACP Legal Defense Fund in the *McDonald* case, which departed from its brief in *Heller* that, as Johnson shows, opposed an individual rights reading of the Second Amendment.

II. JURISPRUDENCE AND LEGISLATION IN THE JIM CROW ERA

In the Jim Crow era, the subject was generated in relation to laws banning the carrying of concealed weapons and to proposals to suppress commerce in and possession of handguns. As an example, *State v. Cook*,[14] decided by the Missouri Court of Appeals, reversed the conviction of a defendant named George Cook for carrying a concealed weapon.[15] He was carrying a large sum of money and feared attack, for good reason:

> Defendant is a negro, and his evidence shows that in April, 1906, three negroes were taken from the jail at Springfield by a mob of whites and hung and burned on the public square of that city, and also introduced evidence tending to show that the negro population of Springfield was still in danger from mob violence, that they had been notified in the spring of 1906 to leave the county, and at about the same time he received two letters threatening to make way with him if he did not leave the county.[16]

Cook held that the defendant "had the right to carry arms concealed on his person to defend his possession thereof [i.e., the cash], if in good faith he believed there was danger of thieves and robbers trying to take it from him on his way home."[17] The court found that "there is very substantial evidence tending to show defendant was justified under the statute in carrying the revolver."[18]

A related ground of reversal in *Cook* concerned the prosecution's incitement to racist invective.[19] The prosecutor was allowed to show that the defendant ran "a club composed of negroes" where he sold illegal liquor, and to argue to the jury the following prejudicial remarks: "What causes white people to rise in a mob in a community? It's a white jury backing up a burly negro in such offenses as packing a pistol. The experience you all have had is that such dives as this defendant was

---

[14] State v. Cook, 112 S.W. 710 (Mo. Ct. App. 1908).
[15] *Id.* at 711.
[16] *Id.* at 710–11.
[17] *Id.* at 711.
[18] *Id.*
[19] *Id.*

running causes the mobs."[20] The appellate court's intolerance for such remarks spoke well of its judges, in contrast to some of the judicial decisions that Johnson cites.[21]

A year after the above decision, the high court of Virginia held that a defendant who carried a revolver in latched saddlebags, construing the criminal statute narrowly, did not carry it hidden "about his person" since it was not readily accessible for immediate use.[22] The editors at the *Virginia Law Register* were unhappy with the decision, and appealed to racism in support of restrictive measures:

> It is a matter of common knowledge that in this state and in several others, the more especially in the Southern states where the negro population is so large, that this cowardly practice of "toting" guns has always been one of the most fruitful sources of crime . . . . There would be a very decided falling off of killings "in the heat of passion" if a prohibitive tax were laid on the privilege of handling and disposing of revolvers and other small arms, or else that every person purchasing such deadly weapons should be required to register . . . . Let a negro board a railroad train with a quart of mean whiskey and a pistol in his grip and the chances are that there will be a murder, or at least a row, before he alights.[23]

Registration and an annual tax of one dollar per pistol or revolver would be enacted in Virginia in 1926.[24] The expense and paperwork, similar to the poll tax for voting, would have made it difficult or impossible for the poor, including African Americans, to obtain or possess handguns. Those found in possession of unregistered handguns could be prosecuted and the handguns confiscated.[25] A person convicted of not paying the tax "shall be fined not less than twenty-five nor more than fifty dollars, or sentenced to the State convict road force for not less than thirty or not more than sixty days, or both, in the discretion of the tribunal trying the case."[26]

Since poor blacks convicted of possession of an untaxed handgun

---

[20] *Id*.

[21] *See, e.g.*, Hodges v. United States, 203 U.S. 1, 3, 20 (1906) (finding racist intimidation of black laborers outside the jurisdiction of federal courts).

[22] Sutherland v. Commonwealth, 65 S.E. 15, 15 (Va. 1909). The Record filed with the Petition at notes that the defendant had been chasing a squirrel through some brush with his pistol.

[23] Editorial, *Carrying Concealed Weapons*, 15 VA. L. REG. 391, 391–92 (1910).

[24] Act of Mar. 17, 1926, ch. 258, 1926 Va. Acts 285, *repealed by* Act of Mar. 36, 1936, ch. 296, 1936 Va. Acts 486.

[25] *Id.* at 285–86.

[26] *Id.* at 286. The State convict road force was created by Act of Mar. 6, 1906, ch. 74, 1906 Va. Acts 74.

could not pay any such fine, they would likely have been sentenced to the convict road force, about which it was written:

> Here in Virginia, practically all of our common labor is performed by negroes. Five-sixths of our criminals are negroes and about three-fourths of the convict road force are negroes. About the only difference between the free negro laborer of the ordinary variety and the convict negro laborer is that the latter got caught.[27]

Disregarding the racist innuendo, African Americans who would or could not pay a tax for exercise of a Second Amendment right were subject to being incarcerated and forced to work on roads for one to two months. The scheme seems reminiscent of slavery or involuntary servitude. The law also disarmed law-abiding African Americans who were the main victims of crime in their community.

The Virginia handgun tax was declared unconstitutional because it imposed the same tax on all pistols regardless of value: "[t]he pistol of little value and the revolver of the rich studded with diamonds are liable to the same direct tax of one dollar,"[28] and was later repealed.[29] The right to keep and bear arms was not mentioned in the decision.

The annual handgun tax of $1.00 had a ready precedent in Virginia's annual poll tax of $1.50,[30] payment of which was required to vote.[31] As the U.S. Supreme Court would hold: "The Virginia poll tax was born of a desire to disenfranchise the Negro."[32] The sponsor of the suffrage plan at the Virginia Constitutional Convention of 1902 explained:

> Discrimination! Why, that is precisely what we propose; that, exactly, is what this Convention was elected for—to discriminate to the very extremity of permissible action under the limitations of the Federal Constitution, with a view to the elimination of every negro voter who can be gotten rid of, legally, without materially impairing the numerical strength of the white electorate.[33]

---

[27] Robert W. Withers, *Road Building by Inmates of State Prisons*, *in* PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTION AT THE THIRTY-FIFTH ANNUAL SESSION HELD IN RICHMOND, VA., MAY 6TH TO 13TH, at 201, 209 (Alexander Johnson ed., 1908).

[28] Commonwealth v. O'Neal, 13 VA. L. REG. 746, 746 (Hustings Ct. Roanoke 1928).

[29] Act of Mar. 26, 1936, ch. 296, 1936 Va. Acts 486.

[30] *See* Bowen v. Commonwealth, 101 S.E. 232, 233 (Va. 1919) (listing the taxes that had accrued against a man for residency in Virginia, including the poll tax).

[31] VA. CONST. art. II, § 21; Smith v. Bell, 75 S.E. 125, 125 (Va. 1912) (citing VA. CONST. art. II, § 21), *invalidated by* Harper v. Va. State Bd. of Elections, 383 U.S. 663, 670 (1966).

[32] Harman v. Forssenius, 380 U.S. 528, 543 (1965).

[33] *Id.* (quoting 2 REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION STATE OF VIRGINIA 3076–77 (1901–1902) (statement of the Honorable Carter Glass)).

It was not until ratification of the Twenty-fourth Amendment in 1964 that Virginia's annual poll tax of $1.50 was invalidated.[34]

Proposed federal legislation to restrict firearms was also motivated in part to deprive African Americans of Second Amendment rights. In 1924, Senator John K. Shields (a Democrat from Tennessee) introduced a bill to prohibit importation of, impose an excise tax on, discourage manufacture of, and curb transportation in interstate commerce of pistols.[35] He inserted into the Congressional Record a report to the City Club of Memphis, a civic organization, suggesting that homicide would not be repressed "as long as public opinion is opposed to the rigid enforcement of the laws against gambling, 'pistol toting,' 'boot-legging' and the various other laws which our people violate with impunity."[36] Having attributed the murder rate to victimless crimes created by the prohibitionist impulse of that era, the resolution turned to race baiting:

> Can not we, the dominant race, upon whom depends the enforcement of the law, so enforce the law that we will prevent the colored people from preying upon each other? . . .
>
> Here we have laid bare the principal cause for the high murder rate in Memphis—the carrying by colored people of a concealed deadly weapon, most often a pistol. . . .
>
> It is unspeakable that there is public sentiment among the whites that negroes should not be disturbed in their carrying of concealed weapons.[37]

Such whites apparently recognized that African Americans had a right to protection like everyone else. The above report added: "Neither do we need pistols for the protection of our homes. If we need a firearm to repel a burglar, a sawed-off shotgun with its load of buckshot is far more deadly and surer than the pistol."[38] That was an early version of how the demonization of selected firearms changed over time. The National Firearms Act of 1934 would strictly regulate short-barreled shotguns, not pistols.[39]

While seeking to disarm African Americans, Senator Shields worked to defeat federal anti-lynching legislation. The anti-lynching bill introduced by Representative Leonidas C. Dyer of Missouri passed the

---

[34] *Id.* at 530–31.

[35] 65 CONG. REC. 3945 (1924). Shields had introduced such a bill as early as 1915. Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD. 133, 135 (1975).

[36] 65 CONG. REC. 3946 (1924).

[37] *Id.*

[38] *Id.*

[39] National Firearms Act of 1934, Pub. L. No. 474, 48 Stat. 1236 (1934).

House in 1922,[40] but was successfully filibustered by Democrats in the Senate.[41] An NAACP summary of Senate debate included the following:

> Senator [Samuel M.] Shortridge, in presenting the Bill to the Senate, made a very strong and at the same time an exceedingly skillful speech. He was interrupted a number of times by questions and objections, particularly from Senator Shields (Democrat) of Tennessee who, as a member of the Judiciary Committee, had greatly opposed the reporting out of the Bill.[42]

An insightful analysis of the Jim Crow origins of similar restrictions on the right to arms in the above era was provided by Justice Rivers H. Buford of the Florida Supreme Court in his concurrence in *Watson v. Stone*.[43] A statute made it unlawful, without a license, to carry around or have in one's manual possession a pistol or repeating rifle, which the court held not to include a pistol in the pocket of an automobile.[44] Justice Buford concurred on the basis that the statute violated the Second Amendment and the arms guarantee of the Florida Declaration of Rights.[45] He added:

> I know something of the history of this legislation. The original Act of 1893 was passed when there was a great influx of negro laborers in this State drawn here for the purpose of working in turpentine and lumber camps. The same condition existed when the Act was amended in 1901 and the Act was passed for the purpose of disarming the negro laborers and to thereby reduce the unlawful homicides that were prevalent in turpentine and saw-mill camps and to give the white citizens in sparsely settled areas a better feeling of security. The statute was never intended to be applied to the white population and in practice has never been so applied.[46]

---

[40] *See* 62 CONG. REC. 10,735, 10,735–36 (1922) (presenting to the Senate House Resolution 13, which provided for punishment for the crime of lynching).

[41] NAACP, THIRTEENTH ANNUAL REPORT FOR THE YEAR 1922, at 22 (1923).

[42] *Id.* at 17.

[43] Watson v. Stone, 4 So. 2d 700, 703 (Fla. 1941) (Buford, J., concurring).

[44] *Id.* at 702–03 (majority opinion).

[45] *Id.* at 703 (Buford, J., concurring).

[46] *Id.* Justice Buford continued:

> We have no statistics available, but it is a safe guess to assume that more than 80% of the white men living in the rural sections of Florida have violated this statute. It is also a safe guess to say that not more than 5% of the men in Florida who own pistols and repeating rifles have ever applied to the Board of County Commissioners for a permit to have the same in their possession and there has never been, within my knowledge, any effort to enforce the provisions of this statute as to white people,

Justice Buford was knowledgeable about the 1901 law as he was a member of the Florida House of Representatives when it passed, and would serve in the Florida Supreme Court from 1925–1948.[47] In 1934, in Marianna, Florida, he reportedly gave a stirring speech on the steps of the Jackson County Courthouse convincing a mob of thousands not to conduct a lynching.[48]

III. THE KING-WILLIAMS DEBATE ON SELF DEFENSE

The above exemplifies how judicial decisions and legislation may be important sources that buttress Professor Johnson's thesis. The following comments switch gears to address an important debate in the NAACP about the right to self-defense over a half-century ago.

Robert F. Williams was a Marine veteran who became president of the NAACP chapter in Monroe, North Carolina, in the mid-1950s, organized armed self-defense in the black community there, and wrote about his experiences in his book *Negroes with Guns*.[49] As Professor Johnson explains, some heated rhetoric brought Williams into conflict with the national leadership of the NAACP, resulting in his removal from office.[50] The following provides more detail on some aspects of Williams and his philosophy.

The text of Williams's book was preceded by an essay by Martin Luther King, Jr., distinguishing three approaches to violence. First is pacifism, which may be impractical.[51] "The second is violence exercised in self-defense, which all societies from the most primitive to the most cultured and civilized, accept as moral and legal. The principle of self-defense, even involving weapons and bloodshed, has never been condemned . . . ."[52] The third is "violence as a tool of advancement, organized as in warfare," which could not succeed and would only result in loss of support by many for civil rights. "When the Negro uses force in self-defense he does not forfeit support—he may even win it, by the

---

> because it has been generally conceded to be in contravention of the Constitution and non-enforceable if contested.

Id.

[47] Barbara Buford, *Justice Rivers H. Buford*, HISTORIA JURIS, July 2002, at 2, *available at* http://www.flcourthistory.org/docs/jul02.pdf.

[48] *The Florida Supreme Court Portrait Gallery, Justice Rivers H. Buford*, FLA. SUP. CT., http://www.floridasupremecourt.org/about/gallery/buford.shtml (last visited Mar. 26, 2013).

[49] Robert F. Williams, *Negroes with Guns*, at xviii–xix (Wayne State Univ. Press, 1998). Citations *infra* are to the earlier edition, ROBERT F. WILLIAMS, NEGROES WITH GUNS (N.Y.: Marzani & Munsell, 1962).

[50] Johnson, *supra* note 1, at 1542–46.

[51] WILLIAMS, *supra* note 49, at 11.

[52] *Id.* at 13.

courage and self-respect it reflects."[53] King saw Williams as advocating that third, losing strategy.[54]

If Williams may have used heated rhetoric at times, in practice he participated in purely defensive armed defense. He initiated the arming of the black community in Monroe with the assistance of none other than the NRA. As Williams described it:

> So we started arming ourselves. I wrote to the National Rifle Association in Washington which encourages veterans to keep in shape to defend their native land, and asked for a charter, which we got. In a year we had sixty members. We had bought some guns too, in stores, and later a church in the North raised money and got us better rifles. The Klan discovered we were arming and guarding our community.[55]

The Klan tried to halt such defensive measures in the summer of 1957 by launching an armed motorcade to attack the house of Dr. Albert Perry, the NAACP vice-president in Monroe.[56] "We shot it out with the Klan and repelled their attack and the Klan didn't have any more stomach for this type of fight. They stopped raiding our community."[57] That seems perfectly in line with legitimate self-defense as articulated above by King, and it must have generated respect. To those who criticized such self-help as lawless, Williams responded:

> When people say that they are opposed to Negroes "resorting to violence" what they really mean is that they are opposed to Negroes defending themselves and challenging the exclusive monopoly of violence practiced by white racists. We have shown in Monroe that with violence working *both* ways constituted law will be more inclined to keep the peace.[58]

Nonetheless, as Professor Johnson explains, Williams was suspended from his office as an NAACP official, and the suspension was upheld by the NAACP convention.[59] Williams attributed the latter to the unwillingness of the delegates to contradict the national leadership, but felt vindicated that the resolutions adopted by the convention began with the premise that "we do not deny but reaffirm the right of an individual and

---

[53] *Id.*
[54] *Id.*
[55] *Id.* at 57.
[56] *Id.*
[57] *Id.*
[58] *Id.* at 114.
[59] Johnson, *supra* note 1, at 1544.

collective self-defense against unlawful assaults."[60]

Williams was doubtlessly seen as a public-relations liability for another reason. This was an era when McCarthyism had inflamed the Red Scare throughout the country.[61] Williams recounted how newspapers quoted police as asserting that "when they raided our community they discovered and seized our secret armory: *Russian rifles with sickle and hammer insignia.* They implied that these weapons were supplied by some sort of ominous international Communist conspiracy."[62] They failed to mention that other rifles were made in other countries and that they even had surplus M-1 rifles from the U.S. Army with that insignia.[63] As Williams asked: "Why didn't they try to involve us in a conspiracy with the U.S. Army?"[64]

At that time NRA members who qualified by firing high power rifles and were in gun clubs could purchase M-1 rifles at low prices from the Director of Civilian Marksmanship of the U.S. Army through a program designed to encourage marksmanship and promote the national defense.[65] As Williams further explained: "We had a rifle club with a charter from the National Rifle Association since 1957. . . . We did target practice."[66] By contrast with the NRA's cooperation in assisting Williams and his associates in chartering a rifle club and arming themselves, Williams stated that his pleas to the U.S. Department of Justice and the Federal Bureau of Investigation to do something about Klan violence went unanswered.[67]

As for the insinuation that his movement was communist, Williams humorously replied: "Most of our people have never even heard of Marx. When you say Marx some of the people would think that maybe you were talking about a fountain pen or a New York City cab driver. Or the movie comedians."[68] (Indeed, the allegations would have made a great Marx Brothers parody.[69]) To the contrary, Williams saw himself as solidly

---

[60] WILLIAMS, *supra* note 49, at 67 (internal quotation marks omitted). For additional text of the preamble, see Gloster B. Current, *Fiftieth Annual Convention*, CRISIS, 400, 408 (Aug.–Sept. 1959).

[61] *See* ELLEN SCHRECKER, MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA 4 (1998) ("[T]here could have been no McCarthyism without the American Communist party. The anticommunist crusade of the 1940s and 1950s was, after all, directed against the CP and it was usually right on target.").

[62] WILLIAMS, *supra* note 49, at 95, 97.

[63] *Id.* at 97.

[64] *Id.*

[65] *See* Gavett v. Alexander, 477 F. Supp. 1035, 1038–39 (D.D.C. 1979) (describing history of program).

[66] WILLIAMS, *supra* note 49, at 97–98.

[67] *Id.* at 95.

[68] *Id.* at 80.

[69] Ironically, Harpo Marx actually performed in Moscow in 1933 after the United States recognized the Soviet Union and may have smuggled messages to and from the U.S. ambassador there. *Was Harpo Marx the Silent Spy Who Stole Soviet Secrets?*, EUR. INTELLIGENCE WIRE (Dec. 28, 2002), http://www.accessmylibrary.com/coms2/summary_0286-26993299_ITM.

within the national ethos, as exhibited in his statement: "The principle of self-defense is an American tradition that began at Lexington and Concord."[70]

Williams recounts how he unsuccessfully sought the protection of the local police and the FBI, how by arming the black community they provided their own protection, and later how criminal charges were trumped up against him—his book reprinted an FBI wanted poster on him headlined "Interstate flight—kidnapping."[71] He fled the United States and found exile in Cuba and then China.[72] He returned to the United States in 1969 and the charges were thereafter dismissed.[73]

IV. THE NAACP LEGAL DEFENSE FUND'S ARGUMENT IN *MCDONALD V. CITY OF CHICAGO*

During the above years, the United States Supreme Court had never definitively addressed the Second Amendment. Finally, in *District of Columbia v. Heller*, the Court decided that the Second Amendment recognizes an individual right to keep and bear arms, rendering the District's prohibition on the possession of handguns unconstitutional.[74] The NAACP Legal Defense & Educational Fund, Inc. ("NAACP LDF") filed an amicus curiae brief in support of the District,[75] which Professor Johnson analyzes in detail. As Johnson demonstrates, the NAACP LDF argued against recognition of any right to keep and bear arms for self-defense, despite the right's exceptional importance historically for the African American community.[76]

Next, in *McDonald v. City of Chicago*, the Court considered whether the Second Amendment applies to the States through the Fourteenth Amendment, holding that it did, thereby rendering the Chicago and Oak Park handgun bans void.[77] The NAACP LDF again filed an amicus brief,

---

[70] WILLIAMS, *supra* note 49, at 72.

[71] *See id.* at 2–3, 36, 52 (discussing the events leading up to his indictment for kidnapping).

[72] *Charges Dropped Against Williams*, WILMINGTON MORNING STAR (N.C.), Jan. 17, 1976, at 2, *available at* http://news.google.com/newspapers?id=LrosAAAAIBAJ&sjid=GhMEAAAAIBAJ&pg=4497,2746287&dq=robert+williams+monroe&hl=en.

[73] *Id.*

[74] District of Columbia v. Heller, 554 U.S. 570, 573–75, 635 (2008).

[75] Brief for the NAACP Legal Defense & Educational Fund, Inc. as Amici Curiae Supporting Petitioners,**Error! Main Document Only.** 2008 WL 157192,, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290).

[76] Johnson, *supra* note 1, at 1494–95.

[77] McDonald v. City of Chicago, 130 S. Ct. 3020, 3026, 3042, 3050 (2010).

but this time styled as being in support of neither party.[78] While Professor Johnson does not analyze this brief, it is worth some discussion.

The NAACP LDF suggested that "the Court's well-established framework for the 'incorporation' of rights under the Due Process Clause of the Fourteenth Amendment should form the starting point for the Court's analysis in this case."[79] The Privileges or Immunities Clause should be probed "only if it first determines that the Second Amendment right to keep and bear arms is *not* incorporated as against the states through the Due Process Clause."[80]

Albeit qualified by the phrase "[f]or purposes of this case," the NAACP LDF recognized *Heller*'s interpretation "that there is 'an individual right to possess and carry weapons in case of confrontation' protected by the Second Amendment."[81] The NAACP LDF worried that reliance on the Privileges or Immunities Clause, which protects "citizens" instead of "persons,"[82] "could result in a rollback of constitutionally protected freedoms—both in terms of the range of individuals covered by the Fourteenth Amendment, and the scope of rights that the Amendment protects."[83] Besides the uncharted territory of that Clause, its inclusion only of citizens would not extend constitutional guarantees to corporations such as the NAACP itself. The brief continued with the dramatic statement:

> It would be ironic, to say the least, if this Court decides to reexamine the Privileges or Immunities Clause in this case—which involves firearms regulations in a city where, each year, many times more African Americans are murdered by assailants wielding guns than were killed during the Colfax massacre by white insurgents who escaped federal prosecution in *[United States v.] Cruikshank*."[84]

In *McDonald*, the Supreme Court noted that its 1876 *Cruikshank* decision "reviewed convictions stemming from the infamous Colfax Massacre in Louisiana on Easter Sunday 1873. Dozens of blacks, many

---

[78] Brief for NAACP Legal Defense & Educational Fund, Inc. as Amici Curiae Supporting Neither Party, **Error! Main Document Only.**2009 WL 4074858, McDonald v. Chicago, 130 S. Ct. 3020 (2010) (No. 08-1521).

[79] *Id.*, **Error! Main Document Only.**2009 WL 4074858, at *2.

[80] *Id.*

[81] *Id.* at *4 n.3 (quoting District of Columbia v. Heller, 128 S. Ct. 2783, 2797 (2008)).

[82] *Id.* at *16 (quoting U.S. CONST. amend. XIV, § 1).

[83] *Id.* at *5.

[84] *Id.* at *5–6 (footnote omitted); *see also* United States v. Cruikshank, 92 U.S. 542, 557–59 (1875) (overturning the convictions of the white defendants because, among other reasons, the counts that defendants were charged with, including hindering the plaintiffs' ability to enjoy their guaranteed rights, privileges, and immunities, were "too vague and general").

unarmed, were slaughtered by a rival band of armed white men."[85] *Cruikshank* overturned the convictions because they were based in part on the First and Second Amendments, which do not apply to private action.[86]

McDonald also stated that "petitioners and many others who live in high-crime areas dispute the proposition that the Second Amendment right does not protect minorities and those lacking political clout."[87] It cited the NAACP LDF's brief for the fact "that in 2008, almost three out of every four homicide victims in Chicago were African Americans."[88] The Court then concluded:

> If, as petitioners believe, their safety and the safety of other law-abiding members of the community would be enhanced by the possession of handguns in the home for self-defense, then the Second Amendment right protects the rights of minorities and other residents of high-crime areas whose needs are not being met by elected public officials.[89]

In short, elected officials in Chicago banned handguns, leaving the law-abiding persons at the mercy of armed criminals, who could care less about an ordinance prohibiting possession of handguns. The Court's ruling is consistent with Professor Johnson's thesis regarding the historical experience that ruling elites have sought to disarm African Americans, who have again and again sought to exercise Second Amendment rights to protect themselves from violence, whether the source was mobs from without, or criminals from within, their communities.[90]

IV. CONCLUSION

"Infringe on the Second Amendment? No way, say 30 percent of African Americans (myself included)," wrote Courtland Milloy in the *Washington Post* on Martin Luther King Day, 2013, giving a snapshot of

---

[85] McDonald v. City of Chicago, 130 S. Ct. 3020, 3030 (2010) (citing Brief for NAACP Legal Defense & Education Fund, Inc. as Amici Curiae Supporting Neither Party, *supra* note 78, at 3 & n.2). See STEPHEN P. HALBROOK, SECURING CIVIL RIGHTS: FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS 139–49 (First Independent Instit. ed. 2010) (1998), for a description of the events and litigation leading to *Cruikshank*.

[86] *See Cruikshank*, 92 U.S. at 551–53 (discussing how the First and Second Amendments "operate upon the National government alone").

[87] *McDonald*, 130 S. Ct. at 3049.

[88] *Id.* at 3049 n.32 (citing Brief for NAACP Legal Defense & Education Fund, Inc. as Amici Curiae Supporting Neither Party, *supra* note 78, at 5 n.4).

[89] *McDonald*, 130 S. Ct. at 3049.

[90] *See* Johnson, *supra* note 1, at 1500 (discussing the violence faced by Blacks after slavery and their subsequent aim for the "right of Blacks to arm themselves for personal protection").

some of the same history traced by Professor Johnson.[91] It appears that Johnson has brought to life the historical details of a tradition that lives on.

While popular support for Bill of Rights guarantees may ebb and flow, the Second Amendment recognizes a right that seems most appreciated when it is desperately needed. Professor Johnson has demonstrated the value of the right to keep and bear arms to the African American community to defend against and resist racist violence. The mirror image of this experience reflects a shameful history of efforts, both legislative and outside of the law, to maintain white supremacy by disarming African Americans. Hopefully his efforts will prompt other scholars to dig deep and further bring to light the full story.

[91] Courtland Milloy, *On MLK Holiday, Walking for Civil Rights and the Second Amendment*, WASH. POST (Jan. 15, 2013), http://www.washingtonpost.com/local/on-mlk-holiday-walking-for-civil-rights-and-the-second-amendment/2013/01/15/c00f816c-5f54-11e2-b05a-605528f6b712_story.html.