

**2018-2019 Responses to New Three Questions
on an Individual Right to Arms in the Second Amendment
by six of 52 cosigners of a 1999 Amicus Brief in *U.S. v. Emerson* (2001)**

In September 2018 our organization tried to reach out to the 52 cosigners of a 1999 amicus brief filed in the 5th circuit U.S. Court of Appeals in the case *U.S. v. Emerson*. The brief argued, in part, that the Second Amendment “protects only the right to 'bear Arms' for the purpose of service in the 'Militia,' and does not prohibit Congress from restricting firearm ownership unrelated to militia service.”¹ Of the 52 cosigners, we located and contacted 32, asking them the following three questions:

- Q1. When you signed the subject amicus brief, did you believe the Second Amendment gave or conferred any individual rights to arms, unconnected to the militia or military?
- Q2. After [2008 U.S. Supreme Court case *D.C. v. Heller*], did your view about the individual rights from the Second Amendment change in any way, and if so, how and why?
- Q3. If, prior to *Heller*, you didn't believe the Second Amendment conferred individual rights to arms, at that time did you think we had any rights to arms, and if so, that they could be taken away at the government's will?

Of the 32 signers contacted, 10 responded with answers to our questions; of those 10, two asked that we not publish their responses, and two did not respond to our request for approval to publish their responses. The remaining six gave us their approval to publish their responses. Their responses follow, in alphabetical order by respondent's last name. A list of all 52 signers follows on page 6, with the six respondents highlighted in yellow.

	A. <i>One of 52 signers of the September 3, 1999, amicus brief on behalf of the U.S. in the 5th circuit U.S. Court of Appeals case U.S. v. Emerson</i>	B. <i>Q1: When you signed the subject amicus brief, did you believe the Second Amendment gave or conferred any individual rights to arms, unconnected to the militia or military?</i>	C. <i>Q2: After [2008 U.S. Supreme Court case D.C. v.] Heller, did your view about the individual rights from the Second Amendment change in any way, and if so, how and why?</i>	D. <i>Q3: If, prior to Heller, you didn't believe the Second Amendment conferred individual rights to arms, at that time did you think we had any rights to arms, and if so, that they could be taken away at the government's will?</i>
1.	Chemerinsky, Erwin <i>Dean of the University of California, Berkeley, School of Law</i>	"I believe that the Second Amendment is a right to have gun for militia service. In other words, it means what it says." (10/6/2018)	"My views about the Second Amendment did not change after <i>Heller</i> . I think <i>Heller</i> was wrong." (10/6/2018)	
2.	Hoffer, Peter <i>Research History Professor, University of Georgia</i>	"...I have thrown in the towel on gun rights. After every day brings more killing with handguns, automatic weapons, and officials piously saying that their thoughts and prayers go to the victims' families, while demanding that more guns go to more people, what can a sane person say?" (9/25/2018) "I think the right to own guns may be conferred by the Ninth Amendment, but the Second Amendment is clearly about a militia. The first part of the Amendment is not a Preamble, as the [Constitution] already has a Preamble, and I don't know of any foundational document with two Preambles separated by almost the entire length of the document." (5/6/2019)		

¹ Brief for the United States as Amicus Curiae, filed by David Yassky, Brooklyn Law School, et al. *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001). Accessed 9-9-2018 from the Potowmack Institute: www.potowmack.org/yass.html

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	A. <i>One of 52 signers of the September 3, 1999, amicus brief on behalf of the U.S. in the 5th circuit U.S. Court of Appeals case U.S. v. Emerson</i>	B. <i>Q1: When you signed the subject amicus brief, did you believe the Second Amendment gave or conferred any individual rights to arms, unconnected to the militia or military?</i>	C. <i>Q2: After [2008 U.S. Supreme Court case D.C. v.] Heller, did your view about the individual rights from the Second Amendment change in any way, and if so, how and why?</i>	D. <i>Q3: If, prior to Heller, you didn't believe the Second Amendment conferred individual rights to arms, at that time did you think we had any rights to arms, and if so, that they could be taken away at the government's will?</i>
3.	Katz, Stanley <i>Director, Princeton University Center for Arts and Cultural Policy Studies</i>	"I did not believe the amendment conferred any individual right to arms. I took the 'militia' rationale of the amendment seriously." (9/27/2018)	"I thought (and think) <i>Heller</i> is very badly reasoned. I consider it a political decision that creates a right where none existed historically." (9/27/2018)	"I cannot see that there was ever a 'right' of individuals to arms. To the extent that there is post- <i>Heller</i> , it was created ab initio by the S[upreme] Court in the <i>Heller</i> case. And I fear that a Trump-appointed court will produce other decisions as bad and dangerous as <i>Heller</i> ." (9/27/2018)
4.	Perlin, Michael <i>Professor Emeritus, New York Law School</i>		"I believe the dissenters in <i>Heller</i> were absolutely right and the majority was absolutely wrong. I hope someday a more enlightened Supreme Court will vindicate this position" (6/26/2019)	
5.	Shane, Peter <i>Chair in Law, The Ohio State University Moritz College of Law</i>	"No." (5/6/2019)	"I still think <i>Heller</i> is wrongly decided, but the Second Amendment in operation now means what <i>Heller</i> says it means." (5/6/2019)	"The government is always subject to a baseline requirement of rationality before imposing regulations on anything, including gun ownership. And state constitutions may confer gun rights greater than does the federal Constitution." (5/6/2019)
6.	Zuckerman, Michael <i>Professor of History Emeritus, University of Pennsylvania</i>	"As of 2008, the history was clear and consistent. The Supreme Court had never upheld the individual rights that the plaintiffs sought and that the Court granted in <i>Heller</i> . Only by setting aside all that precedent – that is, only by egregious judicial activism – could the Court come to the conclusion that it did." (6/17/2019)	"After <i>Heller</i> , my views did change. It was hard to escape the conclusion that the Court was willing to put its politics before 'settled' law to a far greater extent than I'd previously thought, and it was clear that the advocates of individual gun rights would now be free to be even more stupid than they'd been before." (6/17/2019)	"There are jokers in this question, namely, the meaning of 'rights,' the meaning of 'taken away,' and the meaning of 'at will.' Assuming that 'rights' means merely that individuals could acquire, possess, and use guns of various sorts, of course we had 'rights' to arms, on a scale unknown anywhere else in the world. Assuming that 'taken away means regulated rather than literally taken away, and assuming that 'at will' means through ordinary legislative and/or administrative process rather than high-handedly and arbitrarily, of course they could be 'taken away' 'at will.' They still can, though the realm of such regulation has been steadily diminished, as it was bound to be, since <i>Heller</i> ." (6/17/2019)

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Below is a list of the 52 cosigners of the amicus brief filed in *U.S. v. Emerson*. The names of the 32 to whom we reached out are bolded, and the names of the six whose answers we included are highlighted:

1. **Bruce Ackerman**
2. Joyce Appleby (deceased)
3. **Jack M. Balkin**
4. Michael Bellesiles (disgraced)
5. **Adele Bernhard**
6. Ruth Bloch
7. **Carl T. Bogus**
8. **Frank Bowman**
9. John Brooke
10. **Chandos Michael Brown**
11. **Darryl Brown**
12. Edwin G. Burrows (deceased)
13. Andrew Cayton (deceased)
14. **Erwin Chemerinsky**
15. **Saul Cornell**
16. **Edward Countryman**
17. **John DiPippa**
18. **Michael Dorf**
19. Norman Dorsen (deceased)
20. **David Dow**
21. Susan R. Estrich
22. **Heidi Li Feldman**
23. **Hendrik G. Hartog**
24. Bruce Hay
25. Don Higginbotham (deceased)
26. **Peter Charles Hoffer**
27. Nancy Isenberg
28. Sheri L. Johnson
29. **Stanley N. Katz**
30. Arthur LaFrance
31. Jan Lewis Newark (deceased)
32. **Jill Lepore**
33. **Rory K. Little**
34. **Mari J. Matsuda**
35. **Andrew J. McClurg**
36. **Frank Michelman**
37. **Dawn Nunziato**
38. **Michael Perlin**
39. Carl Prince
40. Norman L. Rosenberg
41. **Malinda L. Seymore**
42. **Peter Shane**
43. **Billy G. Smith**
44. Peter J. Strauss
45. Richard Uviller (deceased)
46. Spencer Weber Waller
47. **Eldon D. Wedlock, Jr.**
48. **Leila Sadat Wexler**
49. Welsh S. White (deceased)
50. **Steve Winter**
51. **David Yassky**
52. **Michael Zuckerman**