



Written by [Joe Wolverton, II, J.D.](#) on March 16, 2013

Senate Judiciary Committee Passes Feinstein's "Assault Weapons" Ban

["I'm not a sixth grader,"](#) Senator Dianne Feinstein (D-Calif.) told Senator Ted Cruz (R-Texas) in a heated exchange during a Senate Judiciary Committee "Executive Business Meeting" to discuss Feinstein's bill to ban 157 different "assault weapons" and magazines with a capacity above 10 rounds.

Feinstein reacted to a question from Cruz as to whether she would "consider it constitutional for Congress to specify that the First Amendment shall apply only to the following books and shall not apply to the books that Congress has deemed outside the protection of the Bill of Rights."



Later in the debate, Feinstein said that "there are different tests for different amendments." Thanks to decisions of the federal judiciary, the senior senator from California is correct. In a series of cases, the Supreme Court has issued rulings that are an unjustifiable demonstration of jurisprudential gerrymandering of the Bill of Rights. In these holdings, the Court has wielded the well worn shears of judicial activism, shredding Madison's "parchment barrier." The Bill of Rights is now divided into two categories: those rights which are "[fundamental to the American scheme of justice](#)" and those which are, one deduces, expendable.

In the landmark Second Amendment [case of *District of Columbia v. Heller*](#), the Supreme Court failed to announce a standard of scrutiny reserved for those rights deemed "fundamental." Writing for *The New American* after the publication of the *Heller* decision, [Edwin Vieira, Jr. accurately related](#) the confusion evoked by the decision written by Justice Antonin Scalia:

Justice Scalia further muddied these waters by "declining to establish a level of scrutiny for evaluating Second Amendment restrictions" in general, holding only that no governmental interest could justify infringing specifically on "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." What other restrictions might be justified, though, he left for later cases to consider. Thus, having explicitly treated some "gun-control" measures as "presumptively lawful," and approved of who-knows-how-many others by implication, Justice Scalia encouraged "gun controllers" to defend the panoply of modern "gun-control" legislation, and to enact new legislation of the same ilk. How far in the wrong direction this process might go is anyone's guess.

We no longer have to guess how far in the wrong direction legislation relying on the *Heller* ruling will go.

At the hearing, Feinstein asserted that the infringements on the Second Amendment imposed by her bill would pass the tests set out in *Heller*.

Senator Cruz questioned whether it was within the power of Congress to outlaw certain types of weapons. He then turned again to the book analogy, asking Feinstein if Congress should be allowed to



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proscribe certain books, as it proposes to do with guns.

Ignoring the strength of the analogy, Feinstein responded that it was the job of Congress to pass laws and it was the job of the Supreme Court to rule on the constitutionality of those laws. Hardly a correct statement of the Constitution's separation of powers, but it is her dodging of the book analogy that exposes the illegitimacy of Feinstein's quest to disarm law-abiding citizens.

Taking the point Cruz made a bit further, imagine that instead of the right "to keep and bear arms," the Second Amendment protected the right to "keep and bear books." Would Feinstein and her fellows be calling for the banning of books over a certain length or demanding that anyone who wants to buy a book be required to submit to psychological tests and obtain a license before purchase?

Given the penchant of all three branches of the federal government for usurping powers not granted to them by the states in the Constitution, it is not difficult to imagine a time when Congress would pass a law or the president would issue an executive order purporting to proscribe the purchase of certain books based on their alleged potential for inspiring readers to take up arms against the homeland. After all, isn't that the rationale the Obama administration gave for assassinating Anwar al-Awlaki without due process?

While some writers have commented that the Senate Judiciary Committee's passage of Feinstein's unconstitutional infringement of the right to keep and bear arms was "a foregone conclusion," the measure faces a more difficult challenge in the full body of the Senate, thanks to the efforts of pro-gun lobbyists.

[Fox News quotes](#) the NRA's chief lobbyist, Chris W. Cox, saying, "We are focused on the next step of the legislative process."

If the measure survives the Senate, there is little to no chance that it would then pass the Republican-controlled House of Representatives. However, as his issuing of "[23 executive actions to reduce gun violence](#)" attests, President Obama is committed to consolidating all legislative and executive power into his own hands. He "[cannot wait](#)" for Congress to disarm Americans when he believes he possesses the authority to rule by fiat.

Although Senator Feinstein claims her more than 20 years on the Senate Judiciary Committee and nine years as mayor have endowed her with superior understanding of constitutional law, she would do well to study [the words of St. George Tucker](#). Tucker, an illustrious juror of the founding era, warned Americans of the true aim of those lawmakers who would seize their arms:

This may be considered as the true palladium of liberty.... The right of self defence [sic] is the first law of nature: in most governments it has been the study of rulers to confine this right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.

Photo of handguns displayed in Sandy, Utah: AP Images

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