First of four letters in 2014.
No response. No response. No response. No respond.
April 23, 2014
The Honorable John Paul Stevens
Associate Justice, Retired
US Supreme Court
One First Street, NE
Washington, DC 20543

Re: "Justice Steven: The five extra words that can fix the Second Amendment," the *Washington Post*, April 13, 2014

Dear Justice Stevens:

There is a proposal for your attention at the end of this letter.

You are right that the context of the Second Amendment was militia service, a coerced civic duty, but please allow me to say that you are incorrect that we need a constitutional amendment to add words to the Second Amendment. It is the gun rights militants who need a constitutional amendment. The courts have already decided all they need to decide for firearms policy making purposes. After many pages in which Judge Silberman in *Parker* disparaged the original civic purpose of gun ownership and attempted to invent out of the "penumbra" and "emanations" of the Constitution a libertarian privacy right to gun ownership, he completely contradicted himself and concluded that we can have "registration ... for militia service if called up". That is the original civic purpose. It was a devastating defeat for the gun rights militants' core doctrine. At the same time, registration, accountability to a governing authority, is the only way guns can be effectively regulated. There is nothing in the subsequent Supreme Court rulings that overturns Judge Silberman's conclusion.

The rulings recognized that militia duty in the early Republic was conscript duty. The president is the commander in chief of the militia when called into federal service. The president needs to know who the militiamen are. There are no libertarian privacy rights in a conscript military organization. If the gun rights militants want them they need an amendment that will overrule Judge Silberman's conclusion. Otherwise, all that is missing for policy making is political leadership.

There is no political will for a constitutional amendment to reword the Second Amendment. There is no political will for a national firearms policy. But, we might take Judge Silberman's conclusion and make it the basis for political discourse and then hope for direction toward substantive change.

....
Yours truly, Potowmack

Is a retired Sup Ct justice above censure? The majority opinions in *Heller* and *McDonald* are confused and fallacious enough but the dissenting opinions are no better. Do Sup Ct justices understand constitutional doctrine? Do they know anything about political theory? Do they understand anything about the world they live in?

Justice Stevens wrote the dissenting opinion in *McDonald*. Here is his footnote 32. He discredits himself after a long career. The fundamental concepts belong in his opening paragraph not buried in a footnote. The Constitution is a frame of government. The rule of law, the state's monopoly on violence, and state's internal sovereignty all mean the same thing. Where is the public that holds him accountable?

[32] The argument that this Court should establish any such right, however, faces steep hurdles. All 50 States already recognize self-defense as a defense to criminal prosecution, see 2 P. Robinson, Criminal Law Defenses §132, p. 96 (1984 and Supp. 2009), so this is hardly an interest to which the democratic process has been insensitive. And the States have always diverged on how exactly to implement this interest, so there is wide variety across the Nation in the types and amounts of force that may be used, the necessity of retreat, the rights of aggressors, the availability of the "castle doctrine," and so forth. See Brief for Oak Park Citizens Committee for Handgun Control as *Amicus Curiae* 9–21; Brief for American Cities et al. as *Amici Curiae* 17–19; 2 W. LaFave, Substantive Criminal Law §10.4, pp. 142–160 (2d ed. 2003). Such variation is presumed to be a healthy part of our federalist system, as the States and localities select different rules in light of different priorities, customs, and conditions.

As a historical and theoretical matter, moreover, the legal status of self-defense is far more complicated than it might first appear. We have generally understood Fourteenth Amendment "liberty" as something one holds against direct state interference, whereas a personal right of self-defense runs primarily against other individuals; absent government tyranny, it is only when the state has *failed* to interfere with (violent) private conduct that self-help becomes potentially necessary. Moreover, it was a basic tenet of founding-era political philosophy that, in entering civil society and gaining "the advantages of mutual commerce" and the protections of the rule of law, one had to relinquish, to a significant degree, "that wild and savage liberty" one possessed in the state of nature. 1 W. Blackstone, Commentaries *125; see also, *e.g.*, J. Locke, Second Treatise of Civil Government §128, pp. 63–64 (J. Gough ed. 1947) (in state of nature man has power "to do whatever he thinks fit for the preservation of himself and others," but this "he gives up when he joins in a . . . particular political society"); *Green* v. *Biddle*, 8 Wheat. 1, 63 (1823) ("It is a trite maxim, that man gives up a part of his natural liberty when he enters into civil society, as the price of the blessings of that state: and it may be said, with truth, that this liberty is well exchanged for the advantages which flow from law and justice"). Some strains of founding-era thought took a very narrow view of the right to armed self-defense. See, *e.g.*, Brief of Historians on Early American Legal, Constitutional, and Pennsylvania History as *Amici Curiae* 6–13 (discussing Whig and Quaker theories). Just because there may be a natural or common-law right to some measure of self-defense, it hardly follows that States may not place substantial restrictions on its exercise or that this Court should recognize a constitutional right to the same.

Dismissing popularity and common-use as a basis for constitutional protection are central to Justice Stevens' argument. Moonshining is popular and in common use in some sectors of this society and has a tradition that goes back to the British Isles. Prostitution is popular and in common use in some sectors of society and has a tradition that is as old as civilization itself. Are moonshining and prostitution suddenly eligible for constitutional protection. Justice Stevens would make a better argument in his opinion than in a footnote.

[33] The Second Amendment right identified in *Heller* is likewise clearly distinct from a right to protect oneself. In my view, the Court badly misconstrued the Second Amendment in linking it to the value of personal self-defense above and beyond the functioning of the state militias; as enacted, the Second Amendment was concerned with tyrants and invaders, and paradigmatically with the federal military, not with criminals and intruders. But even still, the Court made clear that self-defense plays a limited role in determining the scope and substance of the Amendment's guarantee. The Court struck down the District of Columbia's handgun ban not because of the *utility* of handguns for lawful self-defense, but rather because of their *popularity* for that purpose. See 554 U. S., at ___ (slip op., at 57–58). And the Court's common-use gloss on the Second Amendment right, see *id.*, at ___ (slip op., at 55), as well as its discussion of permissible limitations on the right, *id.*, at ___ (slip op., at 54–55), had little to do with self-defense.