

Wroclaw, January 30, 2017

**The Second Amendment to the Constitution of the United States of America in the light  
of the jurisprudence of the federal courts and the views of the doctrine.**

**The doctoral dissertation by Marcin Jan Kusaj**

**ABSTRACT**

The subject of the dissertation is the Second amendment to the Constitution of the United States of America in the light of the jurisprudence of the federal courts and the views of the doctrine. According to the adopted under the American Bill of Rights, namely the package the first ten amendments to the US Constitution, the Second amendment it is stated that "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."

In Polish literature there is a lack of monographic studies discussing in details the second amendment, both at the level of its interpretation and at the historical and doctrinal levels. When interpreting the Second Amendment it shall not be ignored that it was adopted more than two hundred years ago and that it was a product of specific historical realities, philosophical currents and doctrinal assumptions. The inclusion of these elements in ideal conditions would allow to make an overall interpretation of the Second Amendment meaning in the moment of its entry into force. However, the meaning correct at the moment of adopting of Second Amendment, could stop being such in over two hundred years of the Second Amendment history. To determine whether such changes occurred, it is necessary to investigate how, for over than two hundred years, Second Amendment was interpreted, and, if any changes in that respect occurred, what was the cause. In order to make the above mentioned analysis, it is best to use the case law of the US federal courts, as bodies suited for the application of federal law, including therefore the Second Amendment and the views of the doctrine, often reflecting prevailing at the time the conviction regarding the meaning of Second Amendment, but also interacting with the judicial process. Focusing on these two categories of sources will reduce the considerations contained in this dissertation to the issues of dogma and doctrine and analysis of historical facts, without reference to the ongoing US public discourse devoted to the discussed issue, which in many cases is emotional and distant from the actual wording of relevant legal acts.

The importance of the problems analyzed in this dissertation speaks in favour of the legitimacy of his monographic studies for a number of reasons. The first of these is uniqueness of analyzed solutions in comparison with solutions adopted in most of other democratic countries. Therefore, the cause of such differences becomes worth examining. This knowledge may contribute to a better understanding of the processes governing the evolution of democratic regimes. Moreover, the question of citizens' access to weapons is an ongoing subject of debate in Europe as well, including Poland, and is highly controversial. This doctoral dissertation is also filling a significant gap in Polish literature, not only on the field of the right to keep and bear arms, but also in regard to the right of resistance. The dissertation examined the relationship between the right to keep and bear arms and the right of resistance, hence theoretical possibility of the constitutional guarantee to citizens the right to use arms against government officials, even if the latter were elected in a manner consistent with heretofore applicable law.

The history of Second Amendment was traced in this dissertation using historical narrative method and formal-dogmatic method in the analysis of the texts of relevant legal acts. Considerations are included in the four chapters preceded by a foreword and ended with summary. The first chapter was devoted to historical and doctrinal analysis of two rights - the right of resistance and the right to keep and bear arms. Discussion of both, the right of resistance and the right to keep and bear arms, is necessary, because a substantial part of the discourse devoted to the Second Amendment, is whether and to what extent the Second Amendment protects any of these rights. To take part in that debate initial reconstruction of both rights which consists of establishing their material components and axiological justifications is required. This will enable subsequent comparison of the content of those rights to the content of norm which may be derived from the Second Amendment and, on the basis of that comparison, the assessment of views presented in jurisprudence and doctrine.

The second chapter is the transition to American soil, providing further information to enable trace and interpret the views of jurisprudence and doctrine on the Second Amendment, presented in chapters three and four. This chapter contains a brief overview of historical process that led to the creation of the United States of America, as well as the presentation of the foundations of American constitutionalism. In the second chapter there are analyzed factors affecting the development of the content of the documents adopted subsequently by the Congress, as the Constitution and the Bill of Rights. This chapter also includes an analysis of the content of those documents, to the extent relevant for the chosen topic. . The content of the Fourth amendment is presented in the second chapter to the identical scope as well.

Chapter three, was devoted to the rulings issued and views of the doctrine stated by the year 2008. It begins with a brief analysis of the theory of interpretation of the Constitution and the theory of interpretation of the Second Amendment, which had been developed by US lawyers over decades. Afterwards, the most important decision and the most significant publications, dealing with the Second Amendment promulgated and published until 2008, were presented. In 2008, the Federal Supreme Court of the United States issued a ruling on *District of Columbia v. Heller*. This judgment constituted a reversal of the previous case law of the federal judiciary and, as such, was a landmark for the interpretation of the Second Amendment, and its release was a milestone in the history of the Second Amendment interpretation. Before this ruling, the Federal Supreme Court and the vast majority of federal courts of appeal, took the view that the law established by the Second Amendment is not a right for individual citizens and they cannot complain legitimately about the violation of this right.

To analysis of the ruling of the Federal Supreme Court in the *District of Columbia v. Heller* has been devoted a large part of the fourth chapter. In this case, we see a clear shift away from the assumption that the rights protected by the Second Amendment, as stated by the authors of previous evaluations and studies, was determined by the clause, according to which " A well regulated militia being necessary to the security of a free state ". In the fourth chapter it is also analyzed in detail the decision of the Federal Supreme Court in the *McDonald v. Chicago* from the year 2010 – ruling that was another breakthrough for the interpretation of the Second Amendment. In that judgment, it was stated that the Second Amendment is effective also at the state level, which means that states may not enact any laws that would violate the right guaranteed by it. The analysis shall be given to the reception of these two decisions, both by doctrine and by the federal lower courts.

Final considerations of dissertation are devoted to a synthetic presentation of theses, which can be presented based on the results of the inquiry.

Source base for the dissertation are the book, legal acts both federal and state, federal court rulings, including justification, press releases, and transcripts from the work of the Congress, containing materials relevant when the issues.