

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DISTRICT OF COLUMBIA, :

4 ET AL., :

5 Petitioners :

6 v. : No. 07-290

7 DICK ANTHONY HELLER. :

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9 Washington, D.C.

10 Tuesday, March 18, 2008

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:06 a.m.

15 APPEARANCES:

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17 of the Petitioners.

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20 Of the United States, as amicus curiae, supporting
21 the Petitioners.

22 ALAN GURA, ESQ., Alexandria, Va.; on behalf of the
23 Respondent.

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P R O C E E D I N G S

(10:06 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument today in Case 07-290, District of Columbia versus Heller.

Mr. Dellinger.

ORAL ARGUMENT OF WALTER DELLINGER

ON BEHALF OF THE PETITIONERS

MR. DELLINGER: Good morning, Mr. Chief Justice, and may it please the Court:

The Second Amendment was a direct response to concern over Article I, Section 8 of the Constitution, which gave the new national Congress the surprising, perhaps even the shocking, power to organize, arm, and presumably disarm the State militias. What is at issue this morning is the scope and nature of the individual right protected by the resulting amendment and the first text to consider is the phrase protecting a right to keep and bear arms. In the debates over the Second Amendment, every person who used the phrase "bear arms" used it to refer to the use of arms in connection with militia service and when Madison introduced the amendment in the first Congress, he exactly equated the phrase "bearing arms" with, quote, "rendering military service." We know this from the

1 inclusion in his draft of a clause exempting those with
2 religious scruples. His clause says "The right of the
3 people to keep and bear arms shall not be infringed, a
4 well armed and well regulated militia being the best
5 security of a free country, but no person religiously
6 scrupulous of bearing arms shall be compelled to render
7 military service in person."

8 And even if the language of keeping and
9 bearing arms were ambiguous, the amendment's first
10 clause confirms that the right is militia-related.

11 CHIEF JUSTICE ROBERTS: If you're right,
12 Mr. Dellinger, it's certainly an odd way in the Second
13 Amendment to phrase the operative provision. If it is
14 limited to State militias, why would they say "the right
15 of the people"? In other words, why wouldn't they say
16 "state militias have the right to keep arms"?

17 MR. DELLINGER: Mr. Chief Justice, I believe
18 that the phrase "the people" and the phrase "the
19 militia" were really in -- in sync with each other. You
20 will see references in the debates of, the Federalist
21 Farmer uses the phrase "the people are the militia, the
22 militia are the people."

23 CHIEF JUSTICE ROBERTS: But if that's right,
24 doesn't that cut against you? If the militia included
25 all the people, doesn't the preamble that you rely on

1 not really restrict the right much at all? It includes
2 all the people.

3 MR. DELLINGER: Yes, I do believe it
4 includes all the people in the sense of
5 Verdugo-Urquidez, all those who are part of the polity.
6 What -- what defines the amendment is the scope and
7 nature of the right that the people have. It's, it is a
8 right to participate in the common defense and you have
9 a right invocable in court if a Federal regulation
10 interferes with your right to train for or whatever the
11 militia has established. So that --

12 JUSTICE KENNEDY: One of the concerns,
13 Mr. Dellinger, of the framers, was not to establish a
14 practice of amending the Constitution and its important
15 provisions, and it seems to me that there is an
16 interpretation of the Second Amendment differing from
17 that of the district court and in Miller and not
18 advanced particularly in the red brief, but that
19 conforms the two clauses and in effect delinks them.
20 The first clause I submit can be read consistently with
21 the purpose I've indicated of simply reaffirming the
22 existence and the importance of the militia clause.
23 Those were very important clauses. As you've indicated,
24 they're in Article I and Article II. And so in effect
25 the amendment says we reaffirm the right to have a

1 militia, we've established it, but in addition, there is
2 a right to bear arms. Can you comment on that?

3 MR. DELLINGER: Yes.

4 JUSTICE KENNEDY: And this makes, it does --
5 I think you're write right in the brief to say that the
6 preface shouldn't be extraneous. This means it's not
7 extraneous. The Constitution reaffirms the rights,
8 reaffirm several principles: The right of the people to
9 peaceably assemble, the right to be secure in their
10 homes, the Tenth Amendment reaffirms the rights, and
11 this is simply a reaffirmation of the militia clause.

12 MR. DELLINGER: Justice Kennedy, I think any
13 interpretation that delinks the two clauses as if they
14 were dealing with related but nonetheless different
15 subject matters has that to count against it, and what
16 you don't see in the debates over the Second Amendment
17 are references to, in those debates, the use of weapons
18 for personal purposes. What you see is the clause that,
19 that literally transposes to this: "Because a well
20 regulated militia is necessary to the security of a free
21 State, the right of the people to keep and bear arms
22 shall not be" --

23 JUSTICE KENNEDY: Well the subject is "arms"
24 in both clauses, as I've suggested is the common
25 subject, and they're closely related.

1 MR. DELLINGER: I think, as this Court
2 unanimously held in Miller, or at least noted in
3 Miller -- I'll leave aside the debate. The court
4 unanimously said in Miller that the Second Amendment
5 must be interpreted in light of its obvious purpose to
6 ensure the continuation and render possible the
7 effectiveness of the military forces.

8 JUSTICE SCALIA: I don't see how there's
9 any, any, any contradiction between reading the second
10 clause as a -- as a personal guarantee and reading the
11 first one as assuring the existence of a militia, not
12 necessarily a State-managed militia because the militia
13 that resisted the British was not State- managed. But
14 why isn't it perfectly plausible, indeed reasonable, to
15 assume that since the framers knew that the way militias
16 were destroyed by tyrants in the past was not by passing
17 a law against militias, but by taking away the people's
18 weapons -- that was the way militias were destroyed.
19 The two clauses go together beautifully: Since we need
20 a militia, the right of the people to keep and bear arms
21 shall not be infringed.

22 MR. DELLINGER: Yes, but once you assume
23 that the clause is designed to protect the militia, it
24 -- surely it's the militia that decides whether personal
25 possession is necessary. I mean, Miller -- what makes

1 no sense is for Miller to require the arm to be
2 militia-related if the right is not, and the key phrase
3 is "bear arms." If people --

4 JUSTICE KENNEDY: Well, do you think the
5 clause, the second clause, the operative clause, is
6 related to something other than the militia?

7 MR. DELLINGER: No. I think --

8 JUSTICE KENNEDY: All right. Well, then --

9 MR. DELLINGER: -- the second clause, the
10 phrase "keep and bear arms," when "bear arms" is
11 referred to -- is referred to in a military context,
12 that is so that even if you left aside --

13 JUSTICE KENNEDY: It had nothing to do with
14 the concern of the remote settler to defend himself and
15 his family against hostile Indian tribes and outlaws,
16 wolves and bears and grizzlies and things like that?

17 MR. DELLINGER: That is not the discourse
18 that is part of the Second Amendment. And when you read
19 the debates, the congressional debates, the only use of
20 the phrase "keep and bear arms" is a military phrase,
21 and --

22 JUSTICE SCALIA: Blackstone thought it was
23 important. Blackstone thought it was important. He
24 thought the right of self-defense was inherent, and the
25 framers were devoted to Blackstone. Joseph Story, the

1 first commentator on the Constitution and a member of
2 this Court, thought it was a personal guarantee.

3 MR. DELLINGER: When Blackstone speaks of
4 the personal guarantee, he describes it as one of the
5 use of weapons, a common law right. And if we're
6 constitutionalizing the Blackstonian common law right,
7 he speaks of a right that is subject to due restrictions
8 and applies to, quote "such weapons, such as are allowed
9 by law." So Blackstone builds in the kind of
10 reasonableness of the regulation that the District of
11 Columbia has. Now, the --

12 CHIEF JUSTICE ROBERTS: Well, that may be
13 true, but that concedes your main point that there is an
14 individual right and gets to the separate question of
15 whether the regulations at issue here are reasonable.

16 MR. DELLINGER: I don't dispute, Mr. Chief
17 Justice, that the Second Amendment is positive law that
18 a litigant can invoke in court if a State were to decide
19 after recent events that it couldn't rely upon the
20 Federal Government in natural disasters and wanted to
21 have a State-only militia and wanted to have everybody
22 trained in the use of a weapon, a Federal law that
23 interfered with that would be a law that could be
24 challenged in court by, by an individual. I mean, I
25 think the better --

1 JUSTICE GINSBURG: Mr. Dellinger --

2 MR. DELLINGER: Yes.

3 JUSTICE GINSBURG: -- short of that, just to
4 get your position clear, short of reactivating State
5 militias, on your reading does the Second Amendment have
6 any effect today as a restraint on legislation?

7 MR. DELLINGER: It would, Justice Ginsburg,
8 if the State had a militia and had attributes of the
9 militia contrary to a Federal law. And if it didn't --

10 JUSTICE GINSBURG: But it doesn't, as far as
11 I know.

12 MR. DELLINGER: As far as I know, today it
13 doesn't. And I'm not -- and the Respondents make that,
14 that argument that the amendment is without a use. But
15 you don't make up a new use for an amendment whose
16 prohibitions aren't being violated. I mean --

17 JUSTICE ALITO: Your argument is that its
18 purpose was to prevent the disarming of the organized
19 militia, isn't that correct?

20 MR. DELLINGER: That is correct.

21 JUSTICE ALITO: And if that was the purpose,
22 then how could they -- how could the Framers of the
23 Second Amendment have thought that it would achieve that
24 person, because Congress has virtually plenary power
25 over the militia under the militia clauses?

1 MR. DELLINGER: That is because, I think,
2 Justice Alito, that those who wanted to retake State
3 authority over the militia didn't get everything they
4 wanted. Madison actually did this somewhat reluctantly
5 and wanted to maintain national control.

6 JUSTICE SCALIA: They got nothing at all,
7 not everything they wanted. They got nothing at all.
8 So long as it was up to the Federal Government to
9 regulate the militia and to assure that they were armed,
10 the Federal Government could, could disband the State
11 militias.

12 MR. DELLINGER: Yes, but if -- well --

13 JUSTICE SCALIA: So what, what was the
14 function served by the Second Amendment as far as the
15 militia is concerned?

16 MR. DELLINGER: It is by no means clear that
17 the Federal Government could abolish the State militia.
18 It may be presupposed by the Article I, Section 8,
19 clauses 15 and 16, and by the Second Amendment that the
20 States may have a militia. That issue has been left
21 open as to whether you could do that, and it can be
22 called into Federal service but only in particular
23 circumstances.

24 Now I think the better argument for the
25 other side, if, if there is to be a militia relatedness

1 aspect of the Second Amendment, as we think clear from
2 all of its terms, then Heller's proposed use of a
3 handgun has no connection of any kind to the
4 preservation or efficiency of a militia and therefore
5 the case is over.

6 CHIEF JUSTICE ROBERTS: Well, but your
7 reading of the militia clause, the militia clause
8 specifically reserves concern rights to the States by
9 its terms. And as I understand your reading, you would
10 be saying the Second Amendment was designed to take away
11 or expand upon the rights that are reserved, rather than
12 simply guaranteeing what rights were understood to be
13 implicit in the Constitution itself.

14 MR. DELLINGER: I'm not sure I followed the,
15 the question exactly, but --

16 CHIEF JUSTICE ROBERTS: Well, the militia
17 clause, Article I, Section 8, says certain rights are
18 reserved to the States with respect to the militia. And
19 yet you're telling us now that this was a very important
20 right that ensured that they kept arms, but it wasn't
21 listed in the rights that were reserved in the militia
22 clause.

23 MR. DELLINGER: The debate over the militia
24 clause -- what is shocking about the militia clauses is
25 that this is a, a new national government that for the

1 first time has the power to create a standing army of
2 professionals. The militia were people who came from
3 the people themselves, put down their weapons of trade.
4 The States were devoted to the ideas of their militia of
5 volunteers, and of all the powers granted to the Federal
6 Government one of the most surprising was to say that
7 Congress shall have the power to organize, arm, and
8 discipline the militia and to -- even though the
9 officers could be appointed by the State, the discipline
10 had to be according to Congress. And this was -- this
11 caused a tremendous negative reaction to the proposed
12 Constitution.

13 JUSTICE KENNEDY: But the Second -- the
14 Second Amendment doesn't repeal that. You don't take
15 the position that Congress no longer has the power to
16 organize, arm, and discipline the militia, do you?

17 MR. DELLINGER: No.

18 JUSTICE KENNEDY: So it was supplementing
19 it. And my question is, the question before us, is how
20 and to what extent did it supplement it. And in my view
21 it supplemented it by saying there's a general right to
22 bear arms quite without reference to the militia either
23 way.

24 MR. DELLINGER: It restricted in our view
25 the authority of the Federal Government to interfere

1 with the arming of the militia by the States. And the
2 word that caused the most focus was to "arm" and that is
3 to disarm.

4 Now, what I think is happening is that two
5 different rights are being put together. One was a
6 textual right to protect the militia. I think the
7 better argument for the -- for the other side, for
8 Mr. Heller, is that the amendment's purpose is militia
9 protective, but it was overinclusive in the way that
10 several of you have suggested, and that is that, as the
11 court below said, preserving the individual right,
12 presumably to have guns for personal use, was the best
13 way to ensure that the militia could serve when called.

14 But that right, this right of personal
15 liberty, the Blackstonian right, is an unregulated right
16 to whatever arm, wherever kept, however you want to
17 store it, and for the purposes an individual decides,
18 that is a libertarian ideal. It's not the text of the
19 Second Amendment, which is expressly about the security
20 of the State; it's about well-regulated militias, not
21 unregulated individual license, as is --

22 JUSTICE SOUTER: So what you are -- what you
23 are saying is that the individual has a right to
24 challenge a Federal law which in effect would disarm the
25 militia and make it impossible for the militia to

1 perform those functions that militias function. Isn't
2 that the nub of what you're saying?

3 MR. DELLINGER: Yes. That is correct.

4 JUSTICE SOUTER: Okay.

5 MR. DELLINGER: And if the Court --

6 JUSTICE STEVENS: May ask this question,
7 Mr. Dellinger? To what extent do you think the similar
8 provisions in State constitutions that were adopted more
9 or less at the same time are relevant to our inquiry?

10 MR. DELLINGER: I think they are highly
11 relevant to your inquiry because now 42 States have
12 adopted constitutional provisions.

13 JUSTICE STEVENS: I'm not talking about
14 those.

15 MR. DELLINGER: You're talking about at the
16 time.

17 JUSTICE STEVENS: I'm talking about the
18 contemporaneous actions of the States, before or at the
19 time of the adoption of the Second Amendment.

20 MR. DELLINGER: I think that the -- the
21 State amendments are generally written in different --
22 in different terms. If you're going to protect the kind
23 of right that is -- that is being spoken of here,
24 different from the militia right, the plain language to
25 do it would be "Congress or the States shall pass no law

1 abridging the right of any person to possess weapons for
2 personal use." And that's not the right that is created
3 here.

4 One of the troublesome aspects of viewing
5 this as a right of personal use is that that is the kind
6 of fundamental liberty interest that would create a real
7 potential for disruption. Once you unmoor it from -- or
8 untether it from its connection to the protection of the
9 State militia, you have the kind of right that could
10 easily be restrictions on State and local governments
11 and --

12 JUSTICE KENNEDY: Well, there's no question
13 that the English struggled with how to work this. You
14 couldn't conceal a gun and you also couldn't carry it,
15 but yet you had a right to have it.

16 Let me ask you this: Do you think the
17 Second Amendment is more restrictive or more expansive
18 of the right than the English Bill of Rights in 1689?

19 MR. DELLINGER: I think it doesn't address
20 the same subject matter as the English Bill of Rights.
21 I think it's related to the use of weapons as part of
22 the civic duty of participating in the common defense,
23 and it's -- and it's -- it's --

24 JUSTICE KENNEDY: I think that would be more
25 restrictive.

1 MR. DELLINGER: That -- that could well --
2 the answer then would be --

3 JUSTICE SOUTER: Well isn't it -- isn't it
4 more restrictive in the sense that the English Bill of
5 Rights was a guarantee against the crown, and it did not
6 preclude Parliament from passing a statute that would
7 regulate and perhaps limit --

8 MR. DELLINGER: Well --

9 JUSTICE SOUTER: Here there is some
10 guarantee against what Congress can do.

11 MR. DELLINGER: Parliament could regulate.
12 And Blackstone appears to approve of precisely the kinds
13 of regulations here. Now --

14 JUSTICE STEVENS: The Bill of Rights only
15 protected the rights of protestants.

16 MR. DELLINGER: This is correct.

17 JUSTICE STEVENS: And it was suitable to
18 their conditions then as allowed by law, so it was -- it
19 was a group right and much more limited.

20 MR. DELLINGER: I think that is -- that's
21 correct.

22 JUSTICE SCALIA: And as I recall the
23 legislation against Scottish highlanders and against --
24 against Roman Catholics did use the term -- forbade them
25 to keep and bear arms, and they weren't just talking

1 about their joining militias; they were talking about
2 whether they could have arms.

3 MR. DELLINGER: Well, the different kind of
4 right that you're talking about, to take this to the
5 question of -- of what the standard ought to be for
6 applying this, even if this extended beyond a
7 militia-based right, if it did, it sounds more like the
8 part of an expansive public or personal -- an expansive
9 personal liberty right, and if it -- if it is, I think
10 you ought to consider the effect on the 42 States who
11 have been getting along fine with State constitutional
12 provisions that do expressly protect an individual right
13 of -- of weapons for personal use, but in those States,
14 they have adopted a reasonableness standard that has
15 allowed them to sustain sensible regulation of dangerous
16 weapons. And if you --

17 CHIEF JUSTICE ROBERTS: What is -- what is
18 reasonable about a total ban on possession?

19 MR. DELLINGER: What is reasonable about a
20 total ban on possession is that it's a ban only on the
21 possession of one kind of weapon, of handguns, that's
22 been considered especially -- especially dangerous. The
23 --

24 CHIEF JUSTICE ROBERTS: So if you have a law
25 that prohibits the possession of books, it's all right

1 if you allow the possession of newspapers?

2 MR. DELLINGER: No, it's not, and the
3 difference is quite clear. If -- if you -- there is no
4 limit to the public discourse. If there is an
5 individual right to guns for personal use, it's to carry
6 out a purpose, like protecting the home. You could not,
7 for example, say that no one may have more than 50
8 books. But a law that said no one may possess more than
9 50 guns would -- would in fact be I think quite
10 reasonable.

11 CHIEF JUSTICE ROBERTS: The regulation --
12 the regulation at issue here is not one that goes to the
13 number of guns. It goes to the specific type. And I
14 understood your argument to be in your brief that
15 because rifles and shotguns are not banned to the staple
16 extent as handguns, it's all right to ban handguns.

17 MR. DELLINGER: That is correct because
18 there is no showing in this case that rifles and
19 handguns are not fully satisfactory to carry out the
20 purposes. And what -- and what the court below says
21 about -- about the elimination of this --

22 JUSTICE KENNEDY: The purposes of what?

23 MR. DELLINGER: I'm sorry.

24 JUSTICE KENNEDY: You said there is no
25 showing that rifles and handguns. I think you meant

1 rifles and other guns.

2 MR. DELLINGER: Yes, I'm sorry. Rifles and
3 handguns.

4 JUSTICE KENNEDY: Is necessary for the
5 purpose of what? What is the purpose?

6 MR. DELLINGER: The purpose -- if the
7 purpose -- if we are shifting and if we assume for a
8 moment arguendo that you believe this is a right
9 unconnected to the militia, then the purpose would be,
10 say, defense of the home. And where the government
11 here, where the -- where the correct standard has been
12 applied, which is where a State or the district has
13 carefully balanced the considerations of gun ownership
14 and public safety, has eliminated one weapon, the court
15 below has an absolutist standard that cannot be
16 sustained. The court below says that once it is
17 determined that handguns are, quote, "arms," unquote,
18 referred to in the Second Amendment, it is not open to
19 the District to ban them. And that doesn't promote the
20 security of a free State.

21 JUSTICE GINSBURG: But wasn't there a leeway
22 for some weapon prohibition? Let me ask you, in
23 relation to the States that do have guarantees of the
24 right to possess a weapon at home: Do some of those
25 States say there are certain kinds of guns that you

1 can't have, like machine guns?

2 MR. DELLINGER: Yes. And here what the
3 opinion below would do instead -- would -- it's hard to
4 see on the opinion below why machine guns or
5 armor-piercing bullets or other dangerous weapons
6 wouldn't be categorically protected --

7 JUSTICE BREYER: Could you go back to the --

8 MR. DELLINGER: -- in those States --

9 JUSTICE KENNEDY: If I could just have one
10 follow-on on Justice Ginsburg real quick. Do those
11 States -- Justice Ginsburg asked -- - that distinguish
12 among weapons, State constitutional provisions do not do
13 so?

14 MR. DELLINGER: No, it's not in the text of
15 the State constitutional provision; it's in their --

16 JUSTICE GINSBURG: It's in interpretation.

17 MR. DELLINGER: -- reasonable application.

18 And here, the question is how has the balance been
19 struck? The District allows law-abiding citizens to
20 have functioning firearms in the home. From the time it
21 was introduced in 1976, it has been the consistent
22 position that you're entitled to have a functioning
23 firearm. At issue is the one type of weapon --

24 JUSTICE SCALIA: Mr. Dellinger, let's come
25 back to your description of the opinion below as

1 allowing armor-piercing bullets and machine guns. I
2 didn't read it that way. I thought the opinion below
3 said it had to be the kind of weapon that was common for
4 the people --

5 MR. DELLINGER: That is --

6 JUSTICE SCALIA: -- that is common for the
7 people to have. And I don't know -- I don't know that a
8 lot of people have machine guns or armor-piercing
9 bullets. I think that's quite unusual. But having a
10 pistol is not unusual.

11 MR. DELLINGER: The number of machine guns,
12 I believe, is in excess of a hundred thousand that are
13 out there now, that are --

14 JUSTICE SCALIA: How many people in the
15 country?

16 MR. DELLINGER: Well, there are 300 million,
17 but whether that's common or not, but the --

18 JUSTICE SCALIA: I don't think it's common.

19 MR. DELLINGER: But it's the -- the court
20 protects weapons suitable for military use that are
21 lineal descendants. I don't know why an improved bullet
22 wouldn't be covered, unless you adopt the kind of
23 reasonableness standard that we suggest, where you look
24 to the fact that -- and I don't -- some people think
25 machine guns are more dangerous than handguns -- they

1 shoot a lot of people at once -- but a handgun is
2 concealable and movable. It can be taken into schools,
3 into buses, into government office buildings, and that
4 is the particular danger it poses in a densely populated
5 urban area.

6 CHIEF JUSTICE ROBERTS: Well, I'm not sure
7 that it's accurate to say the opinion below allowed
8 those. The law that the opinion, the court below, was
9 confronted with was a total ban, so that was the only
10 law they considered.

11 If the District passes a ban on machine guns
12 or whatever, then that law -- that law would be
13 considered by the court and perhaps would be upheld as
14 reasonable. But the only law they had before them was a
15 total ban.

16 JUSTICE SCALIA: Or a law on the carrying of
17 concealed weapons, which would include pistols, of
18 course.

19 MR. DELLINGER: Let me fight back on the
20 notion that it's a -- it's a total ban. It's not as if
21 every kind of weapon is useful.

22 CHIEF JUSTICE ROBERTS: Are you allowed to
23 carry the weapons that are allowed? I read the "carry
24 clause" to apply without qualification. So while you
25 say you might be able to have a shotgun in the home, you

1 can't carry it to get there.

2 MR. DELLINGER: No. You can -- you can with
3 a proper license. The District has made it clear that
4 there is no doubt that it interprets its laws to allow a
5 functioning gun. And to say that something is a total
6 ban when you own only one particular kind of weapon
7 would apply to a machine gun if it were or came into
8 common use and --

9 JUSTICE ALITO: But even if you have -- even
10 if you have a rifle or a shotgun in your home, doesn't
11 the code prevent you from loading it and unlocking it
12 except when it's being used for lawful, recreational
13 purposes within the District of Columbia? So even if
14 you have the gun, under this code provision it doesn't
15 seem as if you could use it for the defense of your
16 home.

17 MR. DELLINGER: That is not the city's
18 position, and we have no dispute with the other side on
19 the point of what the right answer should be.

20 It is a universal or near universal rule of
21 criminal law that there is a self-defense exception. It
22 goes without saying. We have no argument whatsoever
23 with the notion that you may load and have a weapon
24 ready when you need to use it for self- defense.

25 I'm going to reserve the remainder of my

1 time for rebuttal.

2 CHIEF JUSTICE ROBERTS: Why don't you
3 remain, Mr. Dellinger. We'll make sure you have
4 rebuttal.

5 JUSTICE KENNEDY: Because I did interrupt
6 Justice Breyer.

7 JUSTICE BREYER: I just wondered if you
8 could say in a minute. One possibility is that the
9 amendment gives nothing more than a right to the State
10 to raise a militia. A second possibility is that it
11 gives an individual right to a person, but for the
12 purpose of allowing people to have guns to form a
13 militia. Assume the second. If you assume the second,
14 I wanted you to respond if you -- unless you have done
15 so fully already, to what was the Chief Justice's
16 question of why, on the second assumption, this ban on
17 handguns, not the other part, of the District of
18 Columbia, a total ban, why is that a reasonable
19 regulation viewed in terms of the purposes as I
20 described them?

21 MR. DELLINGER: It's a reasonable regulation
22 for two kinds of reasons.

23 First, in order -- the amendment speaks of a
24 well-regulated militia. Perhaps it's the case that
25 having everybody have whatever gun they want of whatever

1 kind would advance a well- regulated militia, but
2 perhaps not. But, in any event --

3 JUSTICE SCALIA: It means "well trained,"
4 doesn't it?

5 MR. DELLINGER: When you -- when you have
6 one --

7 JUSTICE SCALIA: Doesn't "well regulated"
8 mean "well trained"? It doesn't mean -- it doesn't mean
9 "massively regulated." It means "well trained."

10 MR. DELLINGER: Well, every -- every phrase
11 of the amendment, like "well regulated," "security of
12 the State," is something different than a -- a
13 libertarian right. Here you have, I think, a fully --
14 on this, particularly on a facial challenge, there is no
15 showing that rifles and shotguns are not fully available
16 for all of the purposes of defense.

17 There is no indication that the District
18 militia is an entity that needs individuals to have
19 their own handguns. You -- you -- there is a step that
20 is -- that is missing here. The well-regulated militia
21 is not necessarily about everyone having a gun. A
22 militia may decide to organize -- be organized that way,
23 in which case you would have a different notion.

24 But here, I think, when you come down to
25 apply this case, if you look at about five factors, that

1 other weapons are allowed, important regulatory
2 interests of these particularly dangerous weapons are --
3 is clearly a significant regulatory, and important
4 regulatory, interest. In two respects this is removed
5 from the core of the amendment. Even if it is not
6 limited to militia service, even in the court below, no
7 one doubts that that was, as the court below said, the
8 most salient objective.

9 So this is in the penumbra or the periphery,
10 not the core. It was undoubtedly aimed principally, if
11 not exclusively, at national legislation which displaced
12 the laws in all of the States, rural as well as urban.

13 Here you've got local legislation responsive
14 to local needs, and this is local legislation in the
15 seat of the government where Congress, which was created
16 in order to protect the security of the national
17 government, and where it would be extraordinary to
18 assume that this is the one place that you're not going
19 to incorporate it, the one area in the United States
20 where no government, free of restrictions of the Second
21 Amendment, could control dangerous weapons.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 Mr. Dellinger.

24 General Clement.

25 ORAL ARGUMENT OF GEN. PAUL D. CLEMENT

1 ON BEHALF OF THE UNITED STATES,
2 AS AMICUS CURIAE,
3 SUPPORTING THE PETITIONERS

4 GENERAL CLEMENT: Mr. Chief Justice, and may
5 it please the Court:

6 The Second Amendment to the Constitution, as
7 its text indicates, guarantees an individual right that
8 does not depend on eligibility for or service in the
9 militia.

10 JUSTICE STEVENS: May I ask you a
11 preliminary question. Do you think it has the same
12 meaning that it would have if it omitted the
13 introductory clause referring to militia?

14 GENERAL CLEMENT: I don't think so, Justice
15 Stevens, because we don't take the position that the
16 preamble plays no role in interpreting the amendment.
17 And we would point to this court's decision in Miller,
18 for example, as an example of where the preamble can
19 play a role in determining the scope --

20 JUSTICE STEVENS: So you think some weight
21 should be given to the clause. And also, the other
22 question I wanted to ask you is: Does the right to keep
23 and bear arms define one or two rights?

24 GENERAL CLEMENT: Oh, I suppose it probably
25 does define two rights that are closely related.

1 JUSTICE STEVENS: There's a right to keep
2 arms and a right to bear arms?

3 GENERAL CLEMENT: I think that's the better
4 view, and a number of State courts that have interpreted
5 analogous provisions have distinguished between the two
6 rights and looked at them differently.

7 And, obviously, the term "keep" is a word
8 that I think is something of an embarrassment for an
9 effort to try to imbue every term in the operative text
10 with an exclusively military connotation because that is
11 not one that really has an exclusive military
12 connotation. As Justice Scalia pointed out, "keep" was
13 precisely the word that authorities used in statutes
14 designed specifically to disarm individuals.

15 JUSTICE GINSBURG: It doesn't mean all. It
16 doesn't mean -- "keep," on your reading, at least if
17 it's consistent with Miller, keep and bear some arms,
18 but not all arms.

19 GENERAL CLEMENT: Absolutely, Justice
20 Ginsburg, and just -- I mean, to give you a clear
21 example, we would take the position that the kind of
22 plastic guns or guns that are specifically designed to
23 evade metal detectors that are prohibited by Federal law
24 are not "arms" within the meaning of the Second
25 Amendment and are not protected at all.

1 And that would be the way we would say that
2 you should analyze that provision of Federal law, as
3 those are not even arms within the provisions of the
4 Second Amendment.

5 I think to make the same argument about
6 machine guns would be a much more difficult argument, to
7 say the least, given that they are the standard-issue
8 weapon for today's armed forces and the State-organized
9 militia.

10 JUSTICE KENNEDY: So in your view this
11 amendment has nothing to do with the right of people
12 living in the wilderness to protect themselves, despite
13 maybe an attempt by the Federal Government, which is
14 what the Second Amendment applies to, to take away their
15 weapons?

16 GENERAL CLEMENT: Well, Justice Kennedy, I
17 wouldn't say that it has no application there. As I
18 say, I think the term "arms," especially if Miller is
19 going to continue to be the law, is influenced by the
20 preamble. But the way we would look at it --

21 JUSTICE KENNEDY: I agree that Miller is
22 consistent with what you've just said, but it seems to
23 me Miller, which kind of ends abruptly as an opinion
24 writing anyway, is just insufficient to subscribe -- to
25 describe the interests that must have been foremost in

1 the framers' minds when they were concerned about guns
2 being taken away from the people who needed them for
3 their defense.

4 GENERAL CLEMENT: Well, Justice Kennedy, we
5 would analyze it this way, which is we would say that
6 probably the thing that was foremost in the framers'
7 minds was a concern that the militia not be disarmed
8 such that it would be maintained as a viable option to
9 the standing army. But especially when you remember, as
10 Justice Alito pointed out, that the Constitution in
11 Article I, Section 8, clauses 15 and 16, the militia
12 clauses, as unamended, gave the Federal power -- the
13 Federal authorities virtually plenary authority to deal
14 with the organization and regulation of the militia.
15 The most obvious way that you could protect the militia
16 --

17 JUSTICE STEVENS: Not plenary authority.
18 Not plenary authority.

19 GENERAL CLEMENT: Except for that which is
20 reserved in --

21 JUSTICE STEVENS: Who appoints the officers?

22 GENERAL CLEMENT: Yes -- no, absolutely.
23 There is something reserved in clause 16.

24 But let me just say, if the Second Amendment
25 had the meaning that the District of Columbia ascribes

1 to it, one would certainly think that James Madison,
2 when he proposed the Second Amendment would have
3 proposed it as an amendment to Article I, Section 8,
4 clause 16.

5 He didn't. He proposed it as an amendment
6 to Article I, Section 9, which encapsulates the
7 individual rights to be free from bills of attainder and
8 ex post facto clauses.

9 JUSTICE STEVENS: Do you think he was guided
10 at all by the contemporaneous provisions in State
11 constitutions?

12 MR. DELLINGER: I am sure he was influenced
13 by that, although I think, honestly --

14 JUSTICE STEVENS: And how many of them
15 protected an individual right? Just two, right?

16 GENERAL CLEMENT: I think -- I think
17 Pennsylvania and Vermont are the ones that most
18 obviously protected.

19 JUSTICE STEVENS: And the others quite
20 clearly went in the other direction, did they not?

21 GENERAL CLEMENT: Well, I don't know about
22 quite clearly. The textual indication in the State
23 amendments that probably most obviously goes in the
24 other direction is the phrase "keep and bear arms for
25 the common defense." And, of course, there was a

1 proposal during the debate over the Second Amendment to
2 add exactly those words to the Second Amendment, and
3 that proposal was defeated, which does --

4 JUSTICE STEVENS: There was also a proposal
5 to make it clear there was an individual right, which
6 was also rejected.

7 GENERAL CLEMENT: I'm sorry, Justice
8 Stevens. Which aspect of that did you have in mind?

9 JUSTICE STEVENS: The Pennsylvania proposal.

10 GENERAL CLEMENT: Oh, but I don't think that
11 ever made it to the floor of the House or the Senate
12 that I'm aware of. And I think that this happened at
13 the actual Senate floor. There was a proposal to add
14 the words "in the common defense," and that was
15 rejected. I mean, but --

16 JUSTICE KENNEDY: You think Madison was
17 guided by the experience and the expressions of the
18 right in English law, including the Bill of Rights of
19 1689?

20 GENERAL CLEMENT: I do, Justice Kennedy, and
21 I think in that regard it is telling that -- I mean,
22 there are a variety of provisions in our Bill of Rights
23 that were borrowed from the English Bill of Rights. Two
24 very principal ones are the right to petition the
25 government and the right to keep and bear arms. I don't

1 think it's an accident --

2 JUSTICE GINSBURG: If we're going back to
3 the English Bill of Rights, it was always understood to
4 be subject to the control and limitation and restriction
5 of Parliament. And I don't think there's any doubt
6 about that. And that's what we're talking about here,
7 are legislative restrictions.

8 GENERAL CLEMENT: Well, Justice Ginsburg, I
9 think you could say the same thing for every provision
10 of the English Bill of Rights. And obviously, when
11 those were translated over to our system you had to make
12 adjustment for --

13 JUSTICE SOUTER: But isn't there one
14 difference? Not every provision of the English Bill of
15 Rights had an express reference to permission by law,
16 which is a reference to parliamentary authority. So
17 that there -- there -- there was a peculiar recognition
18 of parliamentary legislative authority on this subject.

19 GENERAL CLEMENT: That's exactly right,
20 Justice Souter. And the way I counted it, I only found
21 three provisions in the English Bill of Rights that had
22 a comparable reference to Parliament.

23 JUSTICE STEVENS: This provision has the
24 additional limitation to "suitable to their conditions,"
25 and a large number of people were not permitted to have

1 arms.

2 GENERAL CLEMENT: Again, that is also true
3 and is also relatively unique to this amendment. And if
4 I get to the point in the argument where I talk about
5 why we think that something less than strict scrutiny is
6 appropriate, I think I would point precisely to those
7 elements of the English Bill of Rights as being
8 relevant.

9 But what I was about to say is I think what
10 is highly relevant in considering the threshold question
11 of whether there's an individual right here at all is
12 that the parallel provisions in the English Bill of
13 Rights that were borrowed over included the right to
14 petition and the right to keep and bear arms. Both of
15 those appear with specific parallel references to the
16 people. They are both rights that are given to the
17 people.

18 And as this Court has made clear in
19 *Verdugo-Urquidez*, that's a reference that
20 appears throughout the Bill of Rights as a reference to
21 the entire citizenry.

22 JUSTICE SOUTER: May I go back to another
23 point, which is to the same point, and that is
24 consistent with your emphasis on the people was your
25 emphasis a moment ago on the distinction between keeping

1 and bearing arms. The "keep" part sounds in your, in
2 your mind at least, to speak of an individual right not
3 necessarily limited by, by the exigencies of military
4 service.

5 My question is, if that is correct and
6 "keep" should be read as, in effect, an independent
7 guarantee, then what is served by the phrase "and bear"?
8 In other words, if the people can keep them and they
9 have them there for use in the militia as well as to
10 hunt deer, why do we -- why do we have to have a further
11 reference in there to a right to bear as well as to keep
12 arms? And my point is it sounds to me as though "keep
13 and bear" forms one phrase rather than two. But I want
14 to know what your answer is to that.

15 GENERAL CLEMENT: The way I would read it,
16 Justice Souter, is that "keep" is really talking about
17 private possession in the home. And the way that I
18 would look at it is in order to exercise, for example,
19 an opportunity to hunt, that you would need to bear the
20 arms as well. And I would point you -- I think it's a
21 useful point --

22 JUSTICE SOUTER: But wait a minute. You're
23 not saying that if somebody goes hunting deer he is
24 bearing arms, or are you?

25 GENERAL CLEMENT: I would say that and so

1 would Madison and so would Jefferson, I would submit.
2 They use --

3 JUSTICE SOUTER: Somebody going out to -- in
4 the eighteenth century, someone going out to hunt a deer
5 would have thought of themselves as bearing arms? I
6 mean, is that the way they talk?

7 GENERAL CLEMENT: Well, I will grant you
8 this, that "bear arms" in its unmodified form is most
9 naturally understood to have a military context. But I
10 think the burden of the argument on the other side is to
11 make it have an exclusively military context. And as a
12 number of the briefs have pointed out, that's not borne
13 out by the framing sources.

14 In one place, although it's not bearing
15 arms, it's bearing a gun, I think it's highly relevant
16 that Madison and Jefferson with respect to this hunting
17 bill that Jefferson wrote and Madison proposed,
18 specifically used in the hunting context the phrase
19 "bear a gun," and so I do think in that context --

20 JUSTICE SOUTER: But it's "arms" that has
21 the kind of the military -- the martial connotation, I
22 would have thought.

23 JUSTICE SCALIA: Wasn't -- wasn't it the
24 case that the banning of arms on the part of the
25 Scottish highlanders and of Catholics in England used

1 the term, forbade them to "bear arms"? It didn't mean
2 that could just not join militias; it meant they
3 couldn't carry arms.

4 GENERAL CLEMENT: And again, I think various
5 phrases were, were used. I also think that some of the
6 disarmament provisions specifically used the word
7 "keep." And so I think there is some independent
8 meaning there, which is one point.

9 And then I do think that, even in the
10 context of bearing arms, I will grant you that "arms"
11 has a military connotation and I think Miller would
12 certainly support that, but I don't think it's an
13 exclusively military connotation.

14 JUSTICE STEVENS: Not only Miller, but the
15 Massachusetts declaration. "The right to keep and bear
16 arms for the common defense" is what is the normal
17 reading of it.

18 GENERAL CLEMENT: Oh, absolutely. And I
19 grant you if this, if the Second Amendment said "keep
20 and bear arms for the common defense" this would be a
21 different case. But --

22 JUSTICE STEVENS: --- the right to keep and
23 bear -- I'm sorry. It's one right to keep and bear, not
24 two rights, to keep and to bear.

25 GENERAL CLEMENT: Well, I mean it's -- it's

1 my friends from the District that are emphasizing that
2 no word in the Constitution is surplusage. So I would
3 say that in a context like this you might want to focus
4 both on "keep" and on "bear arms."

5 JUSTICE SOUTER: And you want to talk about
6 the standard, and your light's on.

7 (Laughter.)

8 GENERAL CLEMENT: Okay. I would like to
9 talk about the standard and my light is indeed on, so
10 let me do that.

11 I think there are several reasons why a
12 standard as we suggest in our brief rather than strict
13 scrutiny is an appropriate standard to be applied in
14 evaluating these laws. I think first and foremost, as
15 our colloquy earlier indicated, there is -- the right to
16 bear arms was a preexisting right. The Second Amendment
17 talks about "the right to bear arms," not just "a right
18 to bear arms." And that preexisting always coexisted
19 with reasonable regulations of firearms.

20 And as you pointed out, Justice Souter, to
21 be sure when you're making the translation from the
22 English Bill of Rights you always have to deal with
23 parliamentary supremacy. But it is very striking that,
24 as Justice Stevens said, the right was conditioned on
25 the conditions, which I think meant what class you were,

1 and also subject expressly to the Parliament, the laws
2 of Parliament.

3 JUSTICE SCALIA: The freedom of speech that
4 was referred to in the Constitution was also "the"
5 freedom of speech, which referred to the pre-existing
6 freedom of speech. And there were indeed some
7 restrictions on that such as libel that you were not
8 allowed to do. And yet we've never held that simply
9 because it was pre-existing and that there were some
10 regulations upon it, that we would not use strict
11 scrutiny. We certainly apply it to freedom of speech,
12 don't we?

13 GENERAL CLEMENT: Justice Scalia, let me
14 make two related points. One, even in the First
15 Amendment context, this Court has recognized -- and I
16 point you to the Court's opinion in *Robertson against*
17 *Baldwin*, which makes this point as to both the First and
18 the Second Amendment. This Court has recognized that
19 there are certain pre-existing exceptions that are so
20 well established that you don't really even view them as
21 Second Amendment or First Amendment infringement.

22 JUSTICE SCALIA: Like libel.

23 GENERAL CLEMENT: Like libel, and I would
24 say like laws barring felons from possessing handguns.
25 I don't think --

1 JUSTICE KENNEDY: Or would you say like
2 protecting yourself against intruders in the home?

3 GENERAL CLEMENT: Well, that gets to the
4 self-defense component and I don't know that I ever got
5 a chance to fully answer your question on that, Justice
6 Kennedy, which is we would say, notwithstanding the fact
7 that the preamble makes it clear that the preeminent
8 motive was related to ensuring that the militia remained
9 a viable option vis-a-vis the standing army, the
10 operative text is not so limited. And I think in that
11 regard it's worth emphasizing that the framers knew
12 exactly how to condition a right on militia service,
13 because they did it with respect to the grand jury
14 clause, and they didn't do it with respect to the Second
15 Amendment.

16 JUSTICE ALITO: If the amendment is intended
17 at least, in part to protect the right to self-defense
18 in the home, how could the District code provision
19 survive under any standard of review where they totally
20 ban the possession of the type of weapon that's most
21 commonly used for self-defense, and even as to long guns
22 and shotguns they require, at least what the code says
23 without adding a supposed gloss that might be produced
24 in a subsequent case, that even as to long guns and
25 shotguns they have to be unloaded and disassembled or

1 locked at all times, even presumably if someone is
2 breaking into the home?

3 GENERAL CLEMENT: Well, Justice Alito, let
4 me answer the question in two parts if I can, because I
5 think the analysis of the trigger lock provision may
6 well be different than the analysis of the other
7 provisions.

8 With respect to the trigger lock provision,
9 we think that there is a substantial argument that once
10 this Court clarifies what the constitutional standard
11 is, that there ought to be an opportunity for the
12 District of Columbia to urge its construction, which
13 would allow for a relatively robust self-defense
14 exception to the trigger lock provision. And this Court
15 could very well, applying Ashwan to prevent --
16 principles allow for that kind of --

17 JUSTICE SCALIA: I don't understand that.
18 What would that be -- that you can, if you have time,
19 when you hear somebody crawling in your -- your bedroom
20 window, you can run to your gun, unlock it, load it and
21 then fire? Is that going to be the exception?

22 GENERAL CLEMENT: If that's going to be the
23 exception, it could clearly be inadequate. And I think
24 that -- I mean the District of Columbia can speak to
25 this, but it seems to me that if, for example, the

1 police were executing a warrant at evening and had cause
2 for doing it at evening and saw somebody with a loaded
3 gun on their night stand, no children present without a
4 trigger lock, it seems to me that that would be a good
5 test case to decide whether or not their construction
6 would provide for an exception to the trigger lock
7 provision in that case.

8 JUSTICE GINSBURG: Can I interrupt for a
9 minute?

10 GENERAL CLEMENT: If it did, I think then
11 the statute might well be constitutional. If it didn't,
12 in my view, it probably wouldn't be.

13 JUSTICE GINSBURG: There is a lot of talk
14 about standards and stop words like strict scrutiny.
15 Does it make a practical difference whether we take your
16 standard or the strict scrutiny that was in the D.C.
17 Circuit's opinion? And specifically there is a whole
18 panoply of Federal laws restricting gun possession.
19 Would any of them be jeopardized under your standard?
20 And the same question with the District scrutiny, does
21 it make any difference?

22 GENERAL CLEMENT: In our view it makes a
23 world of difference, Justice Ginsburg, because we
24 certainly take the position, as we have since
25 consistently since 2001, that the Federal firearm

1 statutes can be defended as constitutional, and that
2 would be consistent with this kind of intermediate
3 scrutiny standard that we propose. If you apply strict
4 scrutiny, I think that the result would be quite
5 different, unfortunately.

6 CHIEF JUSTICE ROBERTS: Well, these various
7 phrases under the different standards that are proposed,
8 "compelling interest," "significant interest," "narrowly
9 tailored," none of them appear in the Constitution; and
10 I wonder why in this case we have to articulate an
11 all-encompassing standard. Isn't it enough to determine
12 the scope of the existing right that the amendment
13 refers to, look at the various regulations that were
14 available at the time, including you can't take the gun
15 to the marketplace and all that, and determine how
16 these -- how this restriction and the scope of this
17 right looks in relation to those?

18 I'm not sure why we have to articulate some
19 very intricate standard. I mean, these standards that
20 apply in the First Amendment just kind of developed over
21 the years as sort of baggage that the First Amendment
22 picked up. But I don't know why when we are starting
23 afresh, we would try to articulate a whole standard that
24 would apply in every case?

25 GENERAL CLEMENT: Well, Mr. Chief Justice,

1 let me say a couple of things about that, which is to
2 say that if this Court were to decide this case and make
3 conclusively clear that it really was focused very
4 narrowly on this case and it was in some respects
5 applying a sui generis test, we think that would be an
6 improvement over the court of appeals opinion, which is
7 subject to more than one reading, but as Justice
8 Ginsburg's question just said, it's certainly
9 susceptible to a reading that it embodies strict
10 scrutiny. In fact --

11 JUSTICE GINSBURG: Well, it did. It said
12 it's just like the First Amendment. First Amendment has
13 exceptions, but strict scrutiny applies. It says strict
14 scrutiny applies here too.

15 GENERAL CLEMENT: I --

16 JUSTICE SCALIA: But that opinion also, it
17 didn't use the militia prologue to say it's only the
18 kind of weapons that would be useful in militia, and
19 that are commonly -- commonly held today. Is there any
20 Federal exclusion of weapons that applies to weapons
21 that are commonly held today? I don't know what you're
22 worried about. Machine guns, what else? Armored
23 bullets, what else?

24 GENERAL CLEMENT: Well, Justice Scalia, I
25 think our principal concern based on the parts of the

1 court of appeals opinion that seemed to adopt a very
2 categorical rule were with respect to machine guns,
3 because I do think that it is difficult -- I don't want
4 to foreclose the possibility of the Government, Federal
5 Government making the argument some day -- but I think
6 it is more than a little difficult to say that the one
7 arm that's not protected by the Second Amendment is that
8 which is the standard issue armament for the National
9 Guard, and that's what the machine gun is.

10 CHIEF JUSTICE ROBERTS: But this law didn't
11 involve a restriction on machine guns. It involved an
12 absolute ban. It involved an absolute carry
13 prohibition. Why would you think that the opinion
14 striking down an absolute ban would also apply to a
15 narrow one -- narrower one directed solely to machine
16 guns?

17 GENERAL CLEMENT: I think, Mr. Chief
18 Justice, why one might worry about that is one might
19 read the language of page 53a of the opinion as
20 reproduced in the petition appendix that says once it is
21 an arm, then it is not open to the District to ban it.

22 Now, it seems to me that the District is not
23 strictly a complete ban because it exempts pre-1976
24 handguns. The Federal ban on machine guns is not,
25 strictly speaking, a ban, because it exempts pre --

1 pre-law machine guns, and there is something like
2 160,000 of those.

3 JUSTICE SCALIA: But that passage doesn't
4 mean once it's an arm in the dictionary definition of
5 arms. Once it's an arm in the specialized sense that
6 the opinion referred to it, which is -- which is the
7 type of a weapon that was used in militia, and it is --
8 it is nowadays commonly held.

9 GENERAL CLEMENT: Well --

10 JUSTICE SCALIA: If you read it that way, I
11 don't see why you have a problem.

12 GENERAL CLEMENT: Well, I -- I hope that you
13 read it that way. But I would also say that I think
14 that whatever the definition that the lower court
15 opinion employed, I do think it's going to be difficult
16 over time to sustain the notion -- I mean, the Court of
17 Appeals also talked about lineal descendants. And it
18 does seem to me that, you know, just as this Court would
19 apply the Fourth Amendment to something like heat
20 imagery, I don't see why this Court wouldn't allow the
21 Second Amendment to have the same kind of scope, and
22 then I do think that reasonably machine guns come within
23 the term "arms."

24 Now, if this Court wants to say that they
25 don't -- I mean -- I mean -- we'd obviously welcome that

1 in our -- in our obligation to defend the
2 constitutionality of acts of Congress.

3 The one other thing I would say is that this
4 is an opinion that is susceptible of different readings.
5 It's interesting that Respondents' amici have different
6 characterizations of it. The Goldwater Institute calls
7 it strict scrutiny; the State of Texas calls it
8 reasonable -- reasonableness review.

9 CHIEF JUSTICE ROBERTS: Thank you, General.

10 GENERAL CLEMENT: Thank you.

11 CHIEF JUSTICE ROBERTS: Mr. Gura.

12 ORAL ARGUMENT OF ALAN GURA,
13 ON BEHALF OF THE RESPONDENTS

14 MR. GURA: Thank you, Mr. Chief Justice, and
15 may it please the Court:

16 All 50 states allow law-abiding citizens to
17 defend themselves and their families in their homes with
18 ordinary functional firearms including handguns. Now,
19 I'd like to respond to one point that was raised lately
20 by the General --

21 JUSTICE SCALIA: Talk a little slower; I'm
22 not following you.

23 MR. GURA: Okay. I'd like to respond --
24 certainly, Justice Scalia. I'd like to respond to the
25 point about the -- the District of Columbia's position

1 over the years with respect to the functional firearms
2 ban.

3 The Petitioners have had two opportunities
4 to urge courts to adopt this so-called self-defense
5 exception which they construed in the amendment. The
6 first opportunity came in 1978 in McIntosh versus
7 Washington, where the petitioners urged the Court of
8 Appeals of the District of Columbia to uphold the law
9 because it was irrational in their view to prohibit
10 self-defense in the home with firearms. They deemed it
11 to be too dangerous, and this was a legitimate policy
12 choice of the City Council, and they actually prevailed
13 in that view.

14 The second opportunity that the Petitioners
15 had to urge this sort of self-defense construction was
16 actually in this case in the district court. We had a
17 motion for summary judgment and we made certain factual
18 allegations in this motion, and on page 70a of the joint
19 appendix we see portions of our statement of undisputed
20 material facts. Fact number 29, which was conceded by
21 the District of Columbia, reads: The defendants
22 prohibit the possession of lawfully owned firearms for
23 self-defense within the home, even in instances when
24 self-defense would be lawful by other means under
25 District of Columbia law. The citation for that is a

1 functional firearms ban, and that point was conceded.

2 Certainly the idea that people can guess as
3 to when it is that they might render the firearm
4 operational is -- is not a one that the Court should
5 accept, because a person who hears a noise, a person who
6 perhaps is living in a neighborhood where there has been
7 a spate of violent crimes, has no idea of when the
8 District of Columbia would permit her to render the
9 firearm operational. And, in fact, there is a
10 prosecution history not under this specific provision,
11 but certainly other under gun prohibition -- laws that
12 we are challenging here today to prosecute people for
13 the possession or for the carrying of a prohibited
14 firearm even when the police ruled the shooting has been
15 lawful self-defense.

16 JUSTICE BREYER: You're saying that this is
17 unreasonable, and that really is my question because I'd
18 like you to assume two things with me, which you
19 probably don't agree with, and I may not agree with
20 them, either.

21 (Laughter.)

22 JUSTICE BREYER: But I just want you to
23 assume them for the purpose of the question. All right.

24 Assume that the -- that there is an
25 individual right, but the purpose of that right is to

1 maintain a citizen army; call it a militia; that that's
2 the basic purpose. So it informs what's reasonable and
3 what isn't reasonable.

4 Assume -- and this is favorable to you but
5 not as favorable as you'd like -- assume that we are
6 going to decide whether something is proportionate or
7 apply an intermediate standard in light of the purpose.
8 All right.

9 Now, focus on the handgun ban. As I read
10 these 80 briefs -- and they were very good, I mean
11 really good and informative on both sides -- and I'm
12 trying to boil down the statistics where there is
13 disagreement, and roughly what I get -- and don't
14 quarrel with this too much; it's very rough -- that
15 80,000 to 100,000 people every year in the United States
16 are either killed or wounded in gun-related homicides or
17 crimes or accidents or suicides, but suicide is more
18 questionable. That's why I say 80,000 to 100,000.

19 In the District, I guess the number is
20 somewhere around 200 to 300 dead; and maybe, if it's
21 similar, 1,500 to 2,000 people wounded. All right.

22 Now, in light of that, why isn't a ban on
23 handguns, while allowing the use of rifles and muskets,
24 a reasonable or a proportionate response on behalf of
25 the District of Columbia?

1 MR. GURA: Because, Your Honor, for the same
2 reason it was offered by numerous military officers at
3 the highest levels of the U.S. military in all branches
4 of service writing in two briefs, they agree with us
5 that the handgun ban serves to weaken America's military
6 preparedness. Because when people have handguns --
7 handguns are military arms, they are not just civilian
8 arms -- they are better prepared and able to use them.
9 And, certainly, when they join the military forces, they
10 are issued handguns.

11 And so if we assume that the sort of
12 military purpose to the Second Amendment is an
13 individual right, then the handgun ban, as noted by our
14 military amici, would impede that.

15 JUSTICE BREYER: Well, I didn't read -- I
16 read the two military briefs as focusing on the nature
17 of the right, which was quite a pretty good argument
18 there that the nature of the right is to maintain a
19 citizen Army.

20 And to maintain that potential today, the
21 closest we come is to say that there is a right for
22 people to understand weapons, to know how to use them,
23 to practice with them. And they can do that, you see,
24 with their rifles. They can go to gun ranges, I guess,
25 in neighboring States.

1 But does that make it unreasonable for a
2 city with a very high crime rate, assuming that the
3 objective is what the military people say, to keep us
4 ready for the draft, if necessary, is it unreasonable
5 for a city with that high crime rate to say no handguns
6 here?

7 JUSTICE SCALIA: You want to say yes.

8 JUSTICE BREYER: Now, why?

9 JUSTICE SCALIA: That's your answer.

10 JUSTICE BREYER: Well, you want to say yes,
11 that's correct, but I want to hear what the reasoning is
12 because there is a big crime problem. I'm simply
13 getting you to focus on that.

14 MR. GURA: The answer is yes, as Justice
15 Scalia noted, and it's unreasonable, and it actually
16 fails any standard of review that might be offered under
17 such a construction of individual rights because
18 proficiency with handguns, as recognized as a matter of
19 judicial notice by the First Circuit in Cases back in
20 1942 -- that was a handgun case where the First Circuit
21 examined the restriction on the carrying of the
22 30-caliber revolver. And the First Circuit accepted, as
23 a matter of judicial notice, that proficiency in use and
24 familiarity with the handgun at issue would be one that
25 would further a militia purpose. And so --

1 JUSTICE STEVENS: Let me ask this question:
2 In answering yes, do you attach any significance to the
3 reference to the militia in the Second Amendment?

4 MR. GURA: Yes, I do, Your Honor.

5 JUSTICE STEVENS: You think that is -- to
6 understand the amendment, you must pay some attention to
7 the militia requirement?

8 MR. GURA: Yes, Your Honor, we must --

9 CHIEF JUSTICE ROBERTS: So a conscientious
10 objector who likes to hunt deer for food, you would say,
11 has no rights under the Second Amendment. He is not
12 going to be part of the militia. He is not going to be
13 part of the common defense, but he still wants to bear
14 arms. You would say that he doesn't have any rights
15 under this amendment?

16 MR. GURA: No, Your Honor. I think that the
17 militia clause informs the purpose -- informs a purpose.
18 It gives us some guidepost as to how we look at the
19 Second Amendment, but it's not the exclusive purpose of
20 the Second Amendment. Certainly, the Founders cared
21 very much about --

22 JUSTICE GINSBURG: Is it a limitation? Is
23 it any limitation on the legislature? Is the first
24 clause any limitation on the legislature?

25 MR. GURA: It is a limitation to one extent,

1 Your Honor, the extent recognized in Miller where the
2 Miller Court asked whether or not a particular type of
3 arm that's at issue is one that people may individually
4 possess. It looked to the militia clause and,
5 therefore, adopted a militia purpose as one of the two
6 prongs of Miller.

7 And so, certainly, if there were -- if the
8 Court were to continue Miller -- and Miller was the only
9 guidance that the lower court had, certainly, as to what
10 arms are protected or unprotected by the Second
11 Amendment. And yet --

12 JUSTICE STEVENS: If it limits the kinds of
13 arms to be appropriate to a militia, why does it not
14 also limit the kind of people who may have arms?

15 MR. GURA: It does not eliminate the kind of
16 people, Your Honor, because the Second Amendment is the
17 right of the people. And it would certainly be an odd
18 right that we would have against the Congress, if
19 Congress could then redefine people out of that right.
20 Congress could tomorrow declare that nobody is in a
21 militia, and then nobody would have the right against
22 the government.

23 JUSTICE GINSBURG: If you were thinking of
24 "the people," what those words meant when the Second
25 Amendment was adopted, it was males between the ages of

1 what -- 17 and 45? People who were over 45 had no --
2 they didn't serve in the militia.

3 MR. GURA: Well, certainly, there were many
4 people who were not eligible for militia duty, or not
5 subject to militia service, who nevertheless were
6 expected to, and oftentimes did, in fact, have guns.

7 JUSTICE SCALIA: Which shows that maybe
8 you're being unrealistic in thinking that the second
9 clause is not broader than the first. It's not at all
10 uncommon for a legislative provision or a constitutional
11 provision to go further than is necessary for the
12 principal purpose involved.

13 The principal purpose here is the militia,
14 but the -- but the second clause goes beyond the militia
15 and says the right of the people to keep and bear arms.

16 Now, you may say the kind of arms is colored
17 by the militia. But it speaks of the right of the
18 people. So why not acknowledge that it's -- it's
19 broader than the first clause?

20 MR. GURA: Well, we do acknowledge that,
21 Your Honor.

22 JUSTICE SOUTER: Then why have the first
23 clause? I mean what is it doing -- I mean what help is
24 it going to be?

25 MR. GURA: Well, it was a way in which to

1 remind us -- the Framers certainly felt that a militia
2 was very important to the preservation of liberty. The
3 Framers had just fought a revolutionary war that relied
4 heavily on militia forces, and so they wanted to honor
5 that and remind us as to the purpose -- one purpose, not
6 the exclusive purpose, but a purpose -- of preserving
7 the right --

8 JUSTICE KENNEDY: Could it also be simply to
9 reaffirm that the provisions in the main text of the
10 Constitution remain intact?

11 MR. GURA: That's correct, Your Honor. In
12 fact, that view was taken by William Raleigh in his 1828
13 treatise, view of the Constitution. Raleigh was, of
14 course, a ratifier of the Second Amendment. He sat in
15 the Pennsylvania Assembly in 1790. And if you look at
16 his description of the Second Amendment, he bifurcates
17 it. First, he discusses the militia clause, and he
18 lavishes some qualified praise on it. And then --

19 JUSTICE KENNEDY: But you were about to tell
20 us before the course of the questioning began about the
21 other purposes that the amendment served. I'm -- I want
22 to know whether or not, in your view, the operative
23 clause of the amendment protects, or was designed to
24 protect in an earlier time, the settler in the
25 wilderness and his right to have a gun against some

1 conceivable Federal enactment which would prohibit him
2 from having any guns?

3 MR. GURA: Oh, yes. Yes, Justice Kennedy.
4 The right of the people to keep and bear arms was
5 derived from Blackstone. It was derived from the
6 common-law English right which the Founders wanted to
7 expand.

8 In fact, the chapter in which Blackstone
9 discusses this in his treatise, his fifth auxiliary
10 right to arms, is entitled --

11 JUSTICE BREYER: That brings me back to the
12 question because Blackstone describes it as a right to
13 keep and bear arms "under law." And since he uses the
14 words "under law," he clearly foresees reasonable
15 regulation of that right. And so does the case not
16 hinge on, even given all your views, on whether it is or
17 is not a reasonable or slightly tougher standard thing
18 to do to ban the handgun, while leaving you free to use
19 other weapons?

20 I mean, I notice that the militia statute,
21 the first one, spoke of people coming to report, in
22 1790, or whenever, with their rifles, with their
23 muskets, but only the officers were to bring pistols.
24 So that, to me, suggests they didn't see pistols as
25 crucial even then, let alone now.

1 MR. GURA: Well, certainly they saw --

2 JUSTICE BREYER: What's your response to the
3 question?

4 MR. GURA: Well, my response is that the
5 government can ban arms that are not appropriate for
6 civilian use. There is no question of that.

7 JUSTICE KENNEDY: That are not appropriate
8 to --

9 MR. GURA: That are not appropriate to
10 civilian use.

11 JUSTICE GINSBURG: For example?

12 MR. GURA: For example, I think machine
13 guns: It's difficult to imagine a construction of
14 Miller, or a construction of the lower court's opinion,
15 that would sanction machine guns or the plastic,
16 undetectable handguns that the Solicitor General spoke
17 of.

18 The fact is that this Court's Miller test
19 was the only guidance that we had below, and I think it
20 was applied faithfully. Once a weapon is, first of all,
21 an "arm" under the dictionary definition -- and Webster
22 has a very useful one -- then you look to see whether
23 it's an arm that is meant to be protected under the
24 Second Amendment, and we apply the two-pronged Miller
25 test. And usually one would imagine if an arm fails the

1 Miller test because it's not appropriate for common
2 civilian applications --

3 JUSTICE GINSBURG: But why wouldn't the
4 machine gun qualify? General Clement told us that's
5 standard issue in the military.

6 MR. GURA: But it's not an arm of the type
7 that people might be expected to possess commonly in
8 ordinary use. That's the other aspect of Miller.
9 Miller spoke about the militia as encompassing the
10 notion that people would bring with them arms of the
11 kind in common use supplied by themselves. And --

12 CHIEF JUSTICE ROBERTS: Is there any
13 parallel --

14 JUSTICE GINSBURG: At this time -- I would
15 just like to follow up on what you said, because if you
16 were right that it was at that time, yes; but that's not
17 what Miller says. It says that the gun in question
18 there was not one that at this time -- this time, the
19 time of the Miller decision -- has a reasonable
20 relationship to the preservation or efficiency of a
21 well-regulated militia. So it's talking about this
22 time.

23 MR. GURA: That's correct. The time frame
24 that the Court must address is always the present. The
25 framers wished to preserve the right to keep and bear

1 arms. They wished to preserve the ability of people to
2 act as militia, and so there was certainly no plan for,
3 say, a technical obsolescence.

4 However, the fact is that Miller spoke very
5 strongly about the fact that people were expected to
6 bring arms supplied by themselves of the kind in common
7 use at the time. So if in this time people do not have,
8 or are not recognized by any court to have, a common
9 application for, say, a machine gun or a rocket launcher
10 or some other sort of --

11 CHIEF JUSTICE ROBERTS: Is there any
12 parallel at the time that the amendment was adopted to
13 the machine gun? In other words, I understand your
14 point to be that, although that's useful in modern
15 military service, it's not something civilians possess.
16 Was there anything like that at the time of the
17 adoption, or were the civilian arms exactly the same as
18 the ones you'd use in the military?

19 MR. GURA: At the time that -- even at the
20 time Miller was decided, the civilian arms were pretty
21 much the sort that were used in the military. However,
22 it's hard to imagine how a machine gun could be a
23 "lineal descendent," to use the D.C. Circuit's wording,
24 of anything that existed back in 1791, if we want to
25 look to the framing era. Machine guns --

1 JUSTICE KENNEDY: It seems to me that
2 Miller, as we're discussing it now, and the whole idea
3 that the militia clause has a major effect in
4 interpreting the operative clause is both overinclusive
5 and underinclusive. I would have to agree with Justice
6 Ginsburg that a machine gun is probably more related to
7 the militia now than a pistol is. But that -- that
8 seems to me to be allowing the militia clause to make no
9 sense out of the operative clause in present-day
10 circumstances.

11 MR. GURA: Your Honor, even within the
12 militia understanding, the understanding of the militia
13 was always that people would bring whatever they had
14 with them in civilian life. So if a machine gun, even
15 though it may be a wonderful --

16 JUSTICE KENNEDY: My point is: Why is that
17 of any real relevance to the situation that faces the
18 homeowner today?

19 MR. GURA: It's only of relevance if the
20 Court wishes to continue reading the militia clause as
21 informing the type of weapon which is protected.

22 JUSTICE KENNEDY: Well, you're being
23 faithful to Miller. I suggest that Miller may be
24 deficient.

25 MR. GURA: I agree with Your Honor, and

1 certainly in our brief we suggest that the militia
2 emphasis of Miller is not useful as a limiting principle
3 to the type of arms that may be -- that may be
4 permitted. Because, on the one hand, there's a great
5 deal of weaponry that might be wonderful for military
6 duty but is not appropriate for common civilian use,
7 which would not be protected even under the Miller
8 test's first prong.

9 And, on the other hand, everything that
10 civilians today might wish to have in ordinary common
11 use -- handguns, rifles, and shotguns -- are militarily
12 useful weapons.

13 So we de-emphasize the military aspects of
14 Miller as being ultimately not very useful guidance for
15 courts. And the better guidance would be to emphasize
16 the commonsense rule that I think judges would have
17 really no trouble applying, and we do this all the time
18 in constitutional law: To simply make a decision as to
19 whether or not whichever arm comes up at issue is an arm
20 of the kind that you could really reasonably expect
21 civilians to have.

22 JUSTICE BREYER: Why -- now, when say "keep"
23 and "bear," I mean you are -- I think you're on to
24 something here. Because you say let's use our common
25 sense and see what would be the equivalent today. Fine.

1 If we know that at the time, in 1789,
2 Massachusetts had a law that said you cannot keep loaded
3 firearms in the house, right, and you have to keep all
4 of the bullets and everything and all of the powder
5 upstairs, why did they have that law? To stop fires
6 because it's dangerous? They didn't have fire
7 departments. Now we do -- or they weren't as good.

8 We now have police departments, and the
9 crime wave might be said similar to what were fires
10 then. And, therefore, applying the similar kind of
11 thing, you say: Fine, just as you could keep pistols
12 loaded but not -- not loaded. You had to keep powder
13 upstairs because of the risk of fire. So today,
14 roughly, you can say no handguns in the city because of
15 the risk of crime.

16 Things change. But we give in both
17 instances, then and now, leeway to the city and States
18 to work out what's reasonable in light of their
19 problems. Would that be a way of approaching it?

20 MR. GURA: The legislature has a great deal
21 of leeway in regulating firearms. There is no dispute
22 about that. However, I wouldn't draw a complete analogy
23 between the Boston fire ordinances that Your Honor notes
24 and the functional firearms ban.

25 First, even the Boston firearms ordinances

1 did not include handguns actually. At the time the word
2 "firearm" was not understood to include pistols.
3 General Gage's inventory of weapons seized from the
4 Americans in Boston included some 1800 or so firearms
5 and then 634 pistols. Nowhere in the Boston code do we
6 see a prohibition on keeping loaded pistols in the home.
7 And certainly the idea that -- that self-defense is a
8 harm is one that is --

9 JUSTICE BREYER: Not self-defense being the
10 harm. And I agree with you that this, the firearm
11 analogy, floats up there, but it isn't going to decide
12 this case, the Massachusetts statute. I agree with you
13 about that.

14 What you've suddenly given me the idea of
15 doing, which I'm testing, is to focus not just on what
16 the kind of weapon is -- don't just look to see whether
17 it's a cannon or a machine gun, but look to see what the
18 purpose of this regulation is, and does it make sense in
19 terms of having the possibility of people trained in
20 firearms?

21 Let's look at those military briefs. Let's
22 say that the generals have it right, there is some kind
23 of right to keep trained in the use of firearms subject
24 to regulation. We have regulation worried about crime,
25 back to my first question.

1 MR. GURA: Well, back to Your Honor's first
2 question, we don't agree that the military purpose is
3 the exclusive purpose of the Second Amendment. And we
4 also don't agree that it could be a reasonable
5 regulation or under any standard of review to prohibit
6 people from having functional firearms in their own home
7 for purposes of self-defense.

8 JUSTICE SCALIA: You don't even agree that
9 Massachusetts was subject to the Second Amendment.

10 MR. GURA: Well, originally it was not. But
11 what we've seen with the Fourteenth Amendment, and we've
12 seen --

13 JUSTICE SCALIA: But the time we're talking
14 about, the firearms in the home ordinance, when was
15 that?

16 MR. GURA: 1783 I believe was the statute.

17 JUSTICE STEVENS: How do you explain the
18 fact that you include self-defense, but only two States,
19 Pennsylvania and Vermont, did refer to self-defense as a
20 permissible justification and all of the others referred
21 to common defense or defense of the State, and in the
22 Articles of Confederation and the Constitution itself
23 there is no reference to self-defense?

24 MR. GURA: Your Honor, the State courts
25 interpreting those provisions that you reference had a

1 different interpretation. For example, in 1895
2 Massachusetts --

3 JUSTICE STEVENS: 1895. I'm talking about
4 contemporaneous with the adoption of the Second
5 Amendment.

6 MR. GURA: Well, at the time we haven't seen
7 State court decisions from exactly that era.

8 JUSTICE STEVENS: Just the text of the State
9 constitutional provisions, two of them refer to
10 self-defense. The rest refer only to common defense; is
11 that not correct?

12 MR. GURA: On their literal text, yes. But
13 judges did not interpret them that way, for example in
14 North Carolina --

15 JUSTICE STEVENS: I understand that judicial
16 interpretation sometimes is controlling and sometimes is
17 not. But the text itself does draw a distinction, just
18 as the Second Amendment does. It doesn't mention
19 self-defense.

20 MR. GURA: While it might not mention
21 self-defense, it was clear that the demands that the
22 States made at the ratifying conventions were for an
23 individual right, and Madison was interested in --

24 JUSTICE STEVENS: Well, if you look at the
25 individual rights I suppose you start back in 1689, the

1 Declaration of Rights in England. And the seventh
2 provision that they talked about said that: "The
3 subjects which are protestants may have arms for their
4 defense suitable to their conditions and as allowed by
5 law." Now do you think the term "suitable to their
6 conditions" limited the number of people who had access
7 to arms for self-defense?

8 MR. GURA: It was in England, but that was
9 criticized by the framers. St. George Tucker's edition
10 of Blackstone --

11 JUSTICE STEVENS: So you think that the
12 Second Amendment is a departure from the provision in
13 the Declaration of Rights in England?

14 MR. GURA: It's quite clearly an expansion
15 upon it.

16 JUSTICE STEVENS: So that's not really
17 your -- you would not confine the right the way the
18 English did then.

19 MR. GURA: I think the common law of England
20 is a guide, and it's always a useful guide because
21 that's where the -- where we -- where we look to, to
22 interpret --

23 JUSTICE SCALIA: It's useful for such
24 purposes as what "keep and bear arms" means and things
25 of that sort.

1 MR. GURA: It certainly is, Your Honor. And
2 it's also useful to see how --

3 JUSTICE SCALIA: They certainly didn't want
4 to preserve the kind of militia that America had, which
5 was a militia separate from the state, separate from the
6 government, which enabled the revolt against the
7 British.

8 MR. GURA: That's correct, Your Honor.

9 JUSTICE SOUTER: Is there any -- is there
10 any record evidence that the anti-Federalist objections
11 to the Constitution that ultimately resulted in the
12 Second Amendment were premised on any failure to
13 recognize an individual right of self-defense or hunting
14 or whatnot, as distinct from being premised on concern
15 about the power of the national government and the
16 militia clauses in Article 1?

17 MR. GURA: Yes, Justice Souter. If we look
18 to, for example, the -- the demands of the Pennsylvania
19 minority, the anti-Federalists there were extremely
20 influential. They couched their demands in unmistakably
21 self-defense terms. In fact, they added a provision --

22 JUSTICE SOUTER: No, but they didn't -- they
23 didn't limit it to self-defense. I mean, what provoked
24 it, as I understand it, was concern about the militia
25 clauses, and here I mean you're certainly correct. I

1 agree with you. Pennsylvania went beyond that. It
2 was -- it was one of three States, as I understand, that
3 did go beyond it. But the provocation for getting into
4 the subject, as I understand it, was, in each instance
5 including Pennsylvania, concern over the national
6 government's power over militias under Article 1.

7 MR. GURA: Justice Souter, we wouldn't see
8 the history that way. Certainly there is agreement that
9 the militia clauses in the Constitution were
10 controversial. And there were separate amendments that
11 were proposed and always rejected that would have
12 addressed that explicitly. In fact, if we look at
13 Virginia's proposals, it's agreed by the Petitioners
14 that Virginia was the model for the Bill of Rights and
15 specifically, of course, for the Second Amendment.

16 We saw one set of proposed amendments from
17 Virginia entitled Bill of Rights, and the Second
18 Amendment language comes from paragraph 17 of that Bill
19 of Rights. And then we see a list of other amendments,
20 and then we have the 11th proposed amendment, which
21 speaks exactly to the -- reverting control over the
22 militia back to the -- back to the States.

23 Now, there is no reason to suppose that
24 Virginia would have made the same demand twice, that
25 they would have, like all the other demands, it had

1 separate "keep and bear arms" provisions and separate
2 militia provisions, that people were being duplicative
3 for no reason. The fact is that the militia concerns
4 were heard and they were voted down, and the Second
5 Amendment concerns were the ones that the Federalists
6 were easily agreeable to because the right to keep and
7 bear arms by individuals was not controversial, it would
8 not have altered the structure of our Constitution, and
9 so those were agreed to quite readily.

10 CHIEF JUSTICE ROBERTS: Why isn't the
11 trigger-lock provisions that are at issue here, why
12 aren't they similar to the various provisions that
13 Justice Breyer mentioned like the gunpowder restriction?
14 In other words, for reasons of domestic safety, they
15 said you can't store the gunpowder anywhere but on the
16 top floor. Why isn't the modern trigger-lock provision
17 similar to those?

18 MR. GURA: Well, it's not similar because
19 the modern trigger-lock provisions are aimed squarely at
20 self-defense in the home. There is no risk today that
21 the kind of powder we use --

22 CHIEF JUSTICE ROBERTS: Well, there is
23 always a risk that the children will get up and grab the
24 firearm and use it for some purpose other than what the
25 Second Amendment was designed to protect.

1 MR. GURA: Oddly enough, a child can access
2 a firearm stored consistently with the District's law,
3 that is, a firearm which is disassembled and unloaded,
4 nothing would prevent a child --

5 CHIEF JUSTICE ROBERTS: Well, right. But, I
6 mean, you don't necessarily expect a young child to be
7 able to reassemble the pistol.

8 MR. GURA: That's true, Your Honor.
9 However, better safe storage approach is the one used by
10 the majority of jurisdictions, I believe, that do have
11 such laws, which is to require safe storage, for
12 example, in a safe. And that is a reasonable
13 limitation. It's a strict scrutiny limitation.
14 Whatever standard of view we may wish to apply, I think,
15 would encompass a safe storage provision.

16 But this is not a safe storage provision
17 because we have specific exceptions that allow you to
18 actually use the firearm in recreational shooting and
19 also in a place of business. And we have litigation
20 history from Washington, D.C., that tells us that we are
21 not supposed to have an operable firearm for purposes of
22 self-defense because they simply do not trust people to
23 defend themselves in our home. And -- and self-defense
24 is the heart of the Second Amendment right. That is
25 what Blackstone was getting at when he spoke of the

1 fifth auxiliary right to arms, because it protected the
2 right of personal preservation.

3 JUSTICE STEVENS: You say that the right of
4 self-defense was the heart of the Second Amendment, in
5 your view. Strangely that some provisions suggested
6 that and were not accepted by the authors of the Second
7 Amendment.

8 MR. GURA: Which provisions were those,
9 Justice Stevens?

10 JUSTICE STEVENS: Pennsylvania.

11 MR. GURA: Well, Pennsylvania's provision
12 was certainly influential. Remember, Madison was trying
13 to mollify the anti-Federalists' concerns. The Second
14 Amendment is clearly addressed to Pennsylvania and New
15 Hampshire and New York and all these other States that
16 were demanding a right to keep and bear arms, and there
17 was always understood to be an individual right because
18 that is the way in which the right that was violated by
19 the British in the war of revolution that occurred not
20 too long ago. And --

21 I'm finished.

22 JUSTICE BREYER: Thinking of your exchange
23 with the Chief Justice and think of the trigger lock in
24 your view and what the question was, do you want -- I
25 don't know how well trigger locks work or not -- but do

1 you want thousands of judges all over the United States
2 to be deciding that kind of question rather than the
3 city councils and the legislatures that have decided it
4 in the context of passing laws? I mean, isn't there an
5 issue here and a problem with respect to having courts
6 make the kinds of decisions about who is right or not in
7 that trigger-lock argument?

8 MR. GURA: When a fundamental right is at
9 stake, there is a role for judicial review, Your Honor.
10 We are not going to see a thousand judges review such
11 laws because Washington, D.C.'s is the only example of
12 it.

13 JUSTICE GINSBURG: If it's a fundamental
14 right, what about licensing? One piece -- we've talked
15 about trigger locks, we've talked about the ban on
16 handguns, but there is also a requirement that there be
17 a license for possession of a handgun. Assuming you're
18 right on the first question, that you couldn't flatly
19 ban handguns, what about a requirement that you obtain a
20 license to carry -- to have a handgun?

21 MR. GURA: Justice Ginsburg, that would
22 depend on the licensing law itself. We don't have a
23 problem with the concept of licensing so long as it's
24 done --

25 JUSTICE GINSBURG: What about this very law?

1 If you take out the ban -- there is a law on the books.
2 It's one of the ones that you challenged. It's section
3 22-4504(a). Wouldn't that be okay -- would that be
4 okay? It says that you have to have a license to carry.

5 MR. GURA: So long as the licensing law is
6 not enforced in an arbitrary and capricious manner, so
7 long as there are some hopefully objective standards and
8 hopefully some process for --

9 JUSTICE GINSBURG: It just says -- it says
10 you have to get a license if you want to possess a gun.
11 What kind of standard? It just says you have to have a
12 license.

13 MR. GURA: Well, the government could set
14 reasonable standards for that, Your Honor. The
15 government could require, for example, knowledge of the
16 State's use of force laws. They can require some sort
17 of vision test. They could require, perhaps,
18 demonstrated competency. And those are the types of
19 things that we sometimes see; background checks, of
20 course. Those are going to be reasonable licensing
21 requirements.

22 However, if the license requirement is we
23 only wanted to give licenses to people who look a
24 certain way or depends on how we feel or if the
25 licensing office is only open Thursdays at 3:00 in the

1 morning -- I mean, it all depends on the implementation.
2 And --

3 CHIEF JUSTICE ROBERTS: What about -- what
4 about age limits -- you've got to be over 18 or you've
5 got to be over 21 to get a license?

6 MR. GURA: Well, certainly the
7 age-of-majority issue is -- is an appropriate one. I
8 don't think there is a problem with requiring a majority
9 age 18 and then 21 for --

10 CHIEF JUSTICE ROBERTS: Is the age limit
11 necessarily the same nationwide? Maybe 16 in Wyoming
12 makes more sense but 21 in the District.

13 MR. GURA: Courts would have to examine
14 those at some point. The government would have to look
15 at the circumstances it confronted and enact, up to some
16 point, an age limit. I think it would be very difficult
17 to have an age limit that goes beyond 21, because that's
18 the majority age for most things in the United States.
19 And, in fact, we have the voting rights cases from the
20 late '60s where --

21 JUSTICE STEVENS: May I ask this question?
22 Are you, in effect, reading the amendment to say that
23 the right shall not be unreasonably infringed instead of
24 shall not be infringed?

25 MR. GURA: There is that inherent aspect to

1 every right in the Constitution.

2 JUSTICE STEVENS: So we can -- consistent
3 with your view, we can simply read this: "It shall not
4 be unreasonably infringed"?

5 MR. GURA: Well, yes, Your Honor, to some
6 extent, except the word "unreasonable" is the one that
7 troubles us because we don't know what this unreasonable
8 standard looks like.

9 JUSTICE SCALIA: You wouldn't put it that
10 way. You would just say it is not being infringed if
11 reasonable limitations are placed upon it.

12 MR. GURA: That's another way to look at it,
13 Your Honor. Certainly --

14 CHIEF JUSTICE ROBERTS: -- you would define
15 "reasonable" in light of the restrictions that existed
16 at the time the amendment was adopted.

17 MR. GURA: Those restrictions --

18 CHIEF JUSTICE ROBERTS: You know, you can't
19 take it into the marketplace was one restriction. So
20 that would be -- we are talking about lineal descendents
21 of the arms but presumably there are lineal descendents
22 of the restrictions as well.

23 MR. GURA: Framing our practices would
24 inform the kind of restrictions that would be accepted.
25 But even beyond that, they also inform the contours of

1 the right. In the Fifth Circuit, for example, we have
2 the Emerson decision now for seven years, and the way
3 that that court has examined the Second Amendment when
4 they get these felon and possession bans and drug addict
5 and possession challenges, what they say is, these
6 people simply are outside the right, as historically
7 understood in our country. And that's a very important
8 aspect to remember, that the Second Amendment is part of
9 our common law tradition, and we look to framing our
10 practices in traditional understandings of that right to
11 see both the reasonableness of the restrictions that are
12 available as well as the contours.

13 JUSTICE SOUTER: Can we also look to current
14 conditions like current crime statistics?

15 MR. GURA: To some extent, Your Honor, but
16 we have certainly --

17 JUSTICE SOUTER: Well, can they consider the
18 extent of the murder rate in Washington, D.C., using
19 handguns?

20 MR. GURA: If we were to consider the extent
21 of the murder rate with handguns, the law would not
22 survive any type of review, Your Honor.

23 JUSTICE SCALIA: All the more reason to
24 allow a homeowner to have a handgun.

25 MR. GURA: Absolutely, Your Honor.

1 JUSTICE BREYER: Whose judgment is that
2 to --

3 JUSTICE SOUTER: The question is whether
4 they may consider those statistics, and I take it your
5 answer is yes?

6 MR. GURA: Well, those statistics might be
7 considered in some way, the fact is that at some point
8 there is a role for judicial review. And you can't just
9 grab at statistics -- and some of the statistics that
10 were used here are very weak, and studies that have been
11 rejected by the National Academy of Sciences repeatedly.
12 I mean, we don't really have -- it's hard to say that
13 those laws --

14 JUSTICE SOUTER: But I think -- I don't want
15 you to misunderstand my question. My question is that
16 by looking to the statistics, I'm not suggesting that
17 there is only sort of one reasonable response to them.
18 I want to know whether -- whether the policymakers may
19 look to them; and I take it your answer is yes?

20 MR. GURA: To some degree, yes, policymakers
21 have to be informed by what's going on in order to make
22 policy. However, there are constitutional limitations
23 enforced by courts that are going to limit those
24 policies. And when you have a ban which bans 40 percent
25 of all weapons that are the type of weapons used by

1 civilians, 80 percent of all self-defense occurs with
2 handguns; when you have that kind of ban, functional
3 firearms ban, these are extreme measures --

4 JUSTICE SOUTER: They may be. I just want
5 to make sure you're not making the argument that because
6 there was not a comparable homicide rate, or for that
7 matter, a comparable need for self-defense from handgun
8 use in 1792, that there -- 1790 -- that therefore, the
9 statistics of today may not be considered? You're not
10 making that argument?

11 MR. GURA: No, Your Honor, the fact is that
12 we can always debate these things, but the object of the
13 Bill of Rights is to remove certain judgments from the
14 legislature, because we can make policy arguments,
15 normative arguments about many provisions of the
16 Constitution. But to make those arguments and say,
17 well, we've decided as a matter of policy that the right
18 to keep and bear arms is no longer a good idea and,
19 therefore, we are going to have restrictions that
20 violate that stricture in the Bill of Rights, that
21 shouldn't pass judicial review. At some point you have
22 to go to Article 5 if you think that the Constitution is
23 impractical.

24 JUSTICE KENNEDY: But Just to be clear --
25 and I don't want to misstate your position, but my

1 understanding, I at least inferred that you would
2 consider it reasonable to ban shipment of machine guns
3 and sawed-off shotguns in interstate commerce?

4 MR. GURA: Yes, Your Honor.

5 JUSTICE STEVENS: And how about a State
6 university wants to ban students having arms in the
7 dormitory?

8 MR. GURA: Certainly that creates some sort
9 of an evidentiary record. Conceivably that --

10 JUSTICE STEVENS: That's the bare fact.
11 That's what -- a State regulation prohibits students
12 from having arms on campus.

13 MR. GURA: We would have to do --

14 JUSTICE STEVENS: You'd have to think about
15 that.

16 MR. GURA: -- some fact finding. It's
17 something that might be doable, but again, that's so far
18 from what we have here. We have here a ban on all guns,
19 for all people, in all homes, at all times in the
20 Nation's capital. That questionably is too broad and
21 too sweeping under any level of review.

22 Thank you, Your Honor.

23 CHIEF JUSTICE ROBERTS: Thank you, Gura.

24 Mr. Dellinger, 10 minutes.

25 REBUTTAL ARGUMENT OF WALTER DELLINGER,

1 ON BEHALF OF THE PETITIONERS

2 MR. DELLINGER: Mr. Chief Justice, I want to
3 address first why this law is reasonable and should be
4 sustained, and why the judgement below has to be
5 reversed, however, whatever position you take on the
6 theories of the amendment. And in defending the eminent
7 reasonableness and careful balance of this law, I need
8 to start with the trigger law, about which Justice Alito
9 asked.

10 CHIEF JUSTICE ROBERTS: Well, before you
11 start with it, how many minutes does it take to remove a
12 trigger lock and load a gun? Because both the gun has
13 to be unloaded; it has to have a trigger lock under the
14 District laws.

15 MR. DELLINGER: Those are alternatives, Mr.
16 Chief Justice.

17 CHIEF JUSTICE ROBERTS: No, disassembled --

18 MR. DELLINGER: Just a trigger lock.

19 CHIEF JUSTICE ROBERTS: In either case it
20 has to be unloaded, correct?

21 MR. DELLINGER: There are some versions of
22 the trigger lock that allow you to put the trigger lock
23 on and then load the gun. But the piece that goes in
24 the trigger mechanism, even someone as clumsy as I could
25 remove it and effect it --

1 CHIEF JUSTICE ROBERTS: Well, the law, as I
2 understand it, says that the gun has to be unloaded. So
3 under your hypothetical, I assume that would violate the
4 District's law if the gun is still loaded.

5 MR. DELLINGER: You know, it's a question of
6 where you put the parenthesis. I read that as
7 disassembled and unloaded or under a trigger lock, and
8 that's the, that's the way the District --

9 CHIEF JUSTICE ROBERTS: So how long does it
10 take? If your interpretation is correct, how long does
11 it take to remove the trigger lock and make the gun
12 operable.

13 MR. DELLINGER: You -- you place a trigger
14 lock on and it has -- the version I have, a few -- you
15 can buy them at 17th Street Hardware -- has a code, like
16 a three-digit code. You turn to the code and you pull
17 it apart. That's all it takes. Even -- it took me 3
18 seconds.

19 JUSTICE SCALIA: You turn on, you turn on
20 the lamp next to your bed so you can -- you can turn the
21 knob at 3-22-95, and so somebody --

22 MR. DELLINGER: Well --

23 CHIEF JUSTICE ROBERTS: Is it like that? Is
24 it a numerical code?

25 MR. DELLINGER: Yes, you can have one with a

1 numerical code.

2 CHIEF JUSTICE ROBERTS: So then you turn on
3 the lamp, you pick up your reading glasses --

4 (Laughter.)

5 MR. DELLINGER: Let me tell you. That's
6 right. Let me tell you why at the end of the day this
7 doesn't -- this doesn't matter, for two reasons. The
8 lesson --

9 CHIEF JUSTICE ROBERTS: It may not matter,
10 but I'd like some idea about how long it takes.

11 MR. DELLINGER: It took me 3 seconds. I'm
12 not kidding. It's -- it's not that difficult to do it.
13 That was in daylight.

14 The other version is just a loop that goes
15 through the chamber with a simple key. You have the key
16 and put it together. Now, of course if you're going --
17 if you want to have your weapon loaded and assembled,
18 that's a different matter.

19 But here's where I want to address the
20 trigger lock. Here's why it doesn't matter for the
21 handgun law. The District believes that what is
22 important here is the ban on handguns. And it also
23 believes that you're entitled to have a functional,
24 usable weapon for self-defense in the home, and that's
25 why this is a very proportionate law.

1 CHIEF JUSTICE ROBERTS: Well, if
2 proportionate, in other words you're saying your
3 interest is allowing self-defense in the home --

4 MR. DELLINGER: Yes.

5 CHIEF JUSTICE ROBERTS: Does it really make
6 sense to say the best self-defense arm is a rifle, as
7 opposed to a pistol?

8 MR. DELLINGER: It is -- there has been no
9 showing here that a rifle or a shotgun is inadequate for
10 the purposes of self-defense in this facial challenge.

11 JUSTICE ALITO: Is there anything to show
12 that the District Council ever considered the issue of
13 self-defense? That -- because they banned handguns and
14 they had this provision on the trigger lock which -- and
15 the issue -- my question with the trigger lock doesn't
16 have to do with whether trigger locks are generally a
17 good idea. It's whether you're ever allowed to take it
18 off for purposes of defense. There's no -- is there
19 anything to show that the -- that the council actually
20 considered what sort of weapon is appropriate for
21 self-defense?

22 MR. DELLINGER: There are decisions in the
23 District of Columbia about the right of self-defense
24 that apply to this. But here's the most important
25 point. It cannot affect the validity of the handgun

1 law. If you disagree with us that my statements are not
2 sufficient to say that we believe that the law should be
3 read, given the self-defense compulsion, to allow
4 whatever use makes it functional, if you don't agree
5 with that and if you think there's a controversy on this
6 point, because we believe you should have a functional
7 firearm available in the home of law-abiding citizens
8 who wish one, if we are wrong about that and the trigger
9 lock is invalid, that has no effect on the handgun ban.

10 That is to say, the trigger lock applies to
11 all weapons. If it's valid and it means what they say
12 it does, none of the weapons would work. We don't need
13 a handgun; it's unusable. If it's invalid or if it has
14 the construction we believe, it cannot possibly affect
15 the handgun law. If you strike down the trigger lock
16 law, you're throwing us in the briar patch where we
17 think it's where we're happy to be if all we have to do
18 is to make clear in the trigger lock law what we have
19 said here today, that it's, it's available for
20 self-defense.

21 CHIEF JUSTICE ROBERTS: It's a related
22 point. Do you understand the ban -- the carry ban to
23 apply if you carry the firearm from one room in the
24 house to another?

25 MR. DELLINGER: That only applies if it's --

1 if it's unregistered. Now, you can't register a
2 handgun, you can't carry a handgun, but that's because
3 its both -- its possession is prohibited. That is to
4 say you can't carry marijuana or heroin from one room to
5 the other either, because you can't use it at all, I
6 think.

7 CHIEF JUSTICE ROBERTS: Why is the -- why is
8 the D.C. law phrased in those terms? In other words, if
9 you can't have a handgun at all, why do you have a
10 separate provision saying that you can't carry it
11 anywhere?

12 MR. DELLINGER: Well, it's -- it's -- the
13 carry provision, you cannot carry unregistered firearms.
14 That's just a general requirement, that firearms be
15 registered. You're not allowed to register handguns is
16 the mechanism by which they are prohibited.

17 Now, here is -- to address your question
18 about why a ban is unreasonable, the one thing we know
19 the Second Amendment is not about is it's not about the
20 interest of collectors. Some people collect guns the
21 way they do stamps, and if that were what the amendment
22 were about then prohibiting someone from having a
23 particular type of gun would prevent them from
24 completing the set. But the notion --

25 CHIEF JUSTICE ROBERTS: Why isn't that

1 covered by the provision that you have the right to keep
2 arms?

3 MR. DELLINGER: Well, the word "keep" would
4 encompass -- "keep" can encompass every use of an arm,
5 and that's why it provides no limit at all, unless you
6 read it in combination with "keep and bear" and that in
7 combination with "well-regulated militia."

8 JUSTICE SCALIA: You mean you can't have any
9 more arms than you would need to take with you to the
10 militia? You can't have a -- you can't have a -- you
11 know, a turkey gun and a duck gun and a 30.06 and a 270
12 and -- you know, different -- different hunting guns for
13 different --

14 MR. DELLINGER: Well --

15 JUSTICE SCALIA: You can't do that? I mean
16 a State could say you don't --

17 MR. DELLINGER: Of course you could do that.

18 JUSTICE SCALIA: You can have to have a 12
19 gauge and that's it.

20 MR. DELLINGER: And like the District that
21 allows that, as every State does. There are --

22 JUSTICE KENNEDY: I -- at least to me the
23 question is, what would be the constitutional basis for
24 insisting on Justice Scalia's suggestion that you need a
25 number of guns? You have argued, it seems to me, that

1 the District or a government could prohibit just what he
2 said, unless you needed one to take to the militia.

3 MR. DELLINGER: I do not know why that would
4 pass the reasonableness scrutiny, but this law would
5 because a powerful, overwhelming case could be made that
6 you're eliminating the one type of weapon -- this law is
7 -- is designed only for the weapon that is concealable
8 and movable, that can be taken into schools and onto the
9 Metro, can be easily stolen and transmitted among --

10 JUSTICE KENNEDY: I'm asking about the
11 constitutional standard you apply to a hypothetical
12 statute which would prohibit the guns Justice Scalia
13 described. What is your position as to the validity of
14 such a hypothetical law?

15 MR. DELLINGER: You would apply this
16 standard. You would ask whether the ban is one that's
17 carefully balanced considerations of gun ownership and
18 public safety. I don't see how, once we are in the land
19 where you -- where there is a right, there is a far
20 weaker case if there is any need for public safety to --
21 to limit the number of guns one has. Here there is an
22 overwhelming case and we are talking about local
23 legislation.

24 I know, Justice Kennedy, that you would be
25 concerned about a national government which sets a

1 single standard for rural and urban areas, for East and
2 West, North and South. Here you have legislation that
3 is adopted by a group of citizens in the District,
4 operating under the authority of Congress, but it is
5 local legislation. And if it's still good law, that
6 States and local governments across the country can
7 strike these balances, as they have, it would be deeply
8 ironic to preclude the District of Columbia as being the
9 only place that could enact legislation free of the
10 strictures of the Second Amendment.

11 And when you ask about the statistics, what
12 is critical here is not to apply the kind of categorical
13 standard the court below did or a kind of strict
14 scrutiny that would strike this law down. This is an
15 area, unlike areas where government regulation is
16 presumptively illegitimate, this text contemplates
17 regulation of inherently dangerous weapons. And where
18 the battle -- the great battle over methodology, to
19 which Justice Breyer replied, in these briefs --
20 indicates that this is the kind of right -- where you
21 have disputes among experts, it's a kind of right where
22 even if you recognize it, deference needs to be given to
23 the legislative resolution rather than have courts try
24 to decide how best to resolve the statistical and
25 methodological debates.

1 Thank you, Mr. Chief Justice.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 Mr. Dellinger.

4 The case is submitted.

5 (Whereupon, at 11:43 a.m., the case in the
6 above-entitled matter was submitted.)

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