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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  
19 subject.

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

24 JUSTICE STEVENS: This provision has the  
25 additional limitation to suitable to their conditions,

1 and a large number of people were not permitted to have  
2 arms.

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

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

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

23           JUSTICE SOUTER: May I go back to another  
24 point, which is to the same point, and that is  
25 consistent with your emphasis on people, was your

1 emphasis a moment ago on the distinction between keeping  
2 and bearing arms. The keep part sounds in your, in your  
3 mind, at least, to speak of an individual right not  
4 necessarily limited by, by the exigency of military  
5 service.

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

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

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

1           GENERAL CLEMENT: I would say that and so  
2 would Madison and so would Jefferson, I would submit.  
3 They use --

4           JUSTICE SOUTER: Somebody going out to -- in  
5 the 18th century, someone going out to hunt a deer would  
6 have thought of themselves as bearing arms? I mean, is  
7 that the way they talk?

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

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

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

24           JUSTICE SCALIA: Wasn't -- it wasn't it the  
25 case that the banning of arms on the part of the

1 Scottish highlanders and of Catholics in England used  
2 the term forbade them to bear arms. It didn't mean they  
3 couldn't just join militias, it meant they couldn't  
4 carry arms.

5           GENERAL CLEMENT: And again, I think various  
6 phrases were used. I also think that some of the  
7 disarmament provisions specifically used the word  
8 "keep." And so, I think there is some independent  
9 meaning there, which is one point. And then I do think  
10 that even in the context of bearing arms, I will grant  
11 you that arms has a military connotation. And I think  
12 Miller would certainly support that. But I don't think  
13 it's an 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: Absolutely. And I grant  
19 you if this, if the Second Amendment said keep and bear  
20 arms for the common defense, this would be a different  
21 case.

22           JUSTICE STEVENS: The right to keep and bear  
23 -- I'm sorry. It's one right to keep and bear not two  
24 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 in a context like this, you might want to focus both  
4 on keep and bear arms.

5 JUSTICE SOUTER: You want to talk about the  
6 standard and your light is 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 pre-existing right. The Second  
17 Amendment talks about the right to bear arms not just a  
18 right to bear arms. And that pre-existing always  
19 coexisted 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 laws of parliament.

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

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

21 JUSTICE SCALIA: Like libel.

22 GENERAL CLEMENT: Like libel, and I would  
23 say like laws barring felons from possessing handguns.

24 JUSTICE KENNEDY: Or would you say  
25 protecting yourself against intruders in the home?

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

13                   JUSTICE ALITO: -- at least in part to  
14 protect the right to self-defense in the home, how could  
15 the District code provision survive under any standard  
16 of review where they totally ban the possession of the  
17 type of weapon that's most commonly used for  
18 self-defense and even as to long guns and shotguns they  
19 require at least what the code says without adding a  
20 supposed loss that might be produced in a subsequent  
21 case that even as the long guns and shotguns they have  
22 to be unloaded and disassembled or locked at all times,  
23 even presumably if someone is breaking into the home?

24                   GENERAL CLEMENT: Well, Justice Alito, let  
25 me answer the question in two parts if I can, because I

1 think the analysis of the trigger lock provision may be  
2 well different than the analysis of the other  
3 provisions. With respect to the trigger lock provision  
4 we think that there is a substantial argument that once  
5 this Court clarifies what the constitutional standard  
6 is, that there ought to be an opportunity for the  
7 District of Columbia to urge its construction, which  
8 would allow for a relatively robust self-defense  
9 exception to the trigger lock provision, and this Court  
10 could very well apply Ashwan to prevent -- principles  
11 allowing for that kind of --

12 JUSTICE SCALIA: I don't understand that.  
13 What would that be -- that you can, if you have time,  
14 when you hear somebody crawling in your -- your bedroom  
15 window, you can run to your gun, unlock it, load it and  
16 then fire? Is that going to be the etch exception?

17 GENERAL CLEMENT: If that's going to be the  
18 exception, it could clearly be inadequate, and I think  
19 that -- I mean the District of Columbia can speak to  
20 this, but it seems to me that if, for example, the  
21 police were executing a warrant at evening and had cause  
22 for doing it at evening and saw somebody with a loaded  
23 gun on their night stand with children present without a  
24 trigger lock, it seems to me that that would be a good  
25 test case to decide whether or not their construction

1 would provide for an exception to the trigger lock  
2 provision in that case.

3 JUSTICE GINSBURG: Can I --

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

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

16 GENERAL CLEMENT: In our view it makes a  
17 world of difference, Justice Ginsburg, because we  
18 certainly take the position as we have since  
19 consistently since 2001 that the Federal firearm  
20 statutes can be defended as constitutional and that  
21 would be consistent with this kind of intermediate  
22 scrutiny standard that we propose. If you apply strict  
23 scrutiny I think that the result would be quite  
24 different, unfortunately.

25 CHIEF JUSTICE ROBERTS: Well, these various

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

12 I'm not sure why we have to articulate some  
13 very intricate standard. I mean, these standards that  
14 apply in the First Amendment just kind of developed over  
15 the years as sort of baggage that the First Amendment  
16 picked up, but I don't know why when we are starting  
17 afresh, we would try to articulate a whole standard that  
18 would apply in every case?

19 GENERAL CLEMENT: Well, Mr. Chief Justice,  
20 let me say a couple of things about that, which is to  
21 say that if this Court were to decide this case and make  
22 conclusively clear that it really was focused very  
23 narrowly on this case and in some respects applying a  
24 sui generis test, we think that would be an improvement  
25 over the court of appeals opinion, which is subject to

1 more than one reading, but as Justice Ginsburg's  
2 question just said, it's certainly susceptible to a  
3 reading that it embodies district scrutiny.

4 JUSTICE GINSBURG: Well, it is. It's just  
5 like the First Amendment -- Second Amendment has  
6 exceptions, but strict scrutiny applies. It says strict  
7 scrutiny applies here too.

8 GENERAL CLEMENT: I --

9 JUSTICE SCALIA: But that opinion also, it  
10 didn't use the militia prologue to say it's only the  
11 kind of weapons that would be useful in militia, and  
12 that are commonly -- commonly held today. Is there any  
13 Federal exclusion of weapons that applies to weapons  
14 that are commonly held today? I don't know what you're  
15 worried about. Machine guns, what else? Armored  
16 bullets, what else?

17 GENERAL CLEMENT: Well, Justice Scalia, I  
18 think our principal concern based on the parts of the  
19 court of appeals opinion that seemed to adopt a very  
20 categorical rule were with respect to machine guns,  
21 because I do think that it is difficult -- I don't want  
22 to foreclose the possibility of the Government, Federal  
23 Government making the argument some day -- but I think  
24 it is more than a little difficult to say that the one  
25 arm that's not protected by the Second Amendment is that

1 which is the standard issue armament for the National  
2 Guard, and that's what the machine gun is.

3 CHIEF JUSTICE ROBERTS: But this law didn't  
4 involve a restriction on machine guns. It involved an  
5 absolute ban. It involved an absolute carry  
6 prohibition. Why would you think the opinion striking  
7 down an absolute ban would also apply to a narrow one --  
8 narrower one directed solely to machine guns?

9 GENERAL CLEMENT: I think, Mr. Chief  
10 Justice, why one might worry about that is one might  
11 read the language of page 53a of the opinion of -- in  
12 the petition appendix that says once it is an arm, then  
13 it is open to the District to ban it. Now it seems to  
14 me that the District is not districtly a complete ban  
15 because it exempts pre-1976 handguns. The Federal ban  
16 on machine guns is not strictly speaking a ban, because  
17 it exempts pre -- pre-law machine guns, and there is  
18 something like 160,000 of those.

19 JUSTICE SCALIA: But that passage doesn't  
20 mean once it's an arm, in the dictionary definition of  
21 arms. Once it's an arm in the specialized accepts that  
22 the opinion referred to it, which is -- which is the  
23 type of a weapon that was used in militia, and it is --  
24 it is nowadays commonly held.

25 GENERAL CLEMENT: Well --

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

3 GENERAL CLEMENT: Well, I -- I hope that you  
4 read it that way, but I would also say that I think that  
5 whatever the definition that the lower court opinion  
6 employed, I do think it's going to be difficult over  
7 time to sustain the notion -- I mean, the Court of  
8 Appeals also talked about lineal descendants. And it  
9 does seem to me that just as this Court would apply the  
10 Fourth Amendment to something like heat imagery, I don't  
11 see why this Court wouldn't allow the Second Amendment  
12 to have the same kind of scope, and then I do think that  
13 reasonably machine guns come within the term arms.

14 Now if this Court wants to say that they  
15 don't -- I mean, I mean -- we'd obviously welcome that  
16 in our -- in our obligation to defend the  
17 constitutionality of acts of Congress. The one other  
18 thing I would say is that this is an opinion that is  
19 susceptible of different readings. It's interesting  
20 that Respondents' amici have different characterizations  
21 of it. The Goldwater Institute calls it strict  
22 scrutiny; the State of Texas calls it reasonable --  
23 reasonableness review.

24 CHIEF JUSTICE ROBERTS: Thank you, General.

25 GENERAL CLEMENT: Thank you.

1 CHIEF JUSTICE ROBERTS: Mr. Gura.

2 ORAL ARGUMENT OF ALAN GURA,

3 ON BEHALF OF THE RESPONDENTS

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

6 All 50 states allow law-abiding citizens to  
7 defend themselves and their families in their homes with  
8 ordinary functional firearms including handguns. Now  
9 I'd like to respond to one point that was raised related  
10 by the General --

11 JUSTICE SCALIA: Talk a little slower; I'm  
12 not following you.

13 MR. GURA: Okay. I'd like to respond --  
14 certainly, Justice Scalia. I'd like to respond to the  
15 point about the -- the District of Columbia's position  
16 over the years with respect to the functional firearms  
17 ban. The Petitioners have had two opportunities to urge  
18 courts to adopt this so-called self-defense exception  
19 construing the exception. The first option came in 1978  
20 in McIntosh versus Washington where, the petitioners  
21 urged the Court of Appeals of the District of Columbia  
22 to uphold the law because it was irrational in their  
23 view to prohibit self-defense in the home with firearms.  
24 They deemed it to be too dangerous, and this was a  
25 legitimate policy choice of the City Council and they

1 actually prevailed in that view.

2           The second opportunity that the Petitioners  
3 had to urge this sort of self-defense construction was  
4 actually in this case in the district court. We had a  
5 motion for summary judgment and we made certain factual  
6 allegations in this motion and on page 70a of the joint  
7 appendix we see portions of our statement of undisputed  
8 material facts. Fact number 29, which was conceded by  
9 the District of Columbia, reads: The defendants  
10 prohibit the possession of lawfully owned firearms for  
11 self-defense within the home, even in instances when  
12 self-defense would be lawful by other means under  
13 District of Columbia law. The citation for that is  
14 functional firearms ban and that point was conceded.

15           Certainly the idea that people can guess as  
16 to when it is that they might render the firearm  
17 operational is -- is not a one that the Court should  
18 accept, because a person who hears a noise, a person who  
19 perhaps is living in a neighborhood where there has been  
20 a spate of violent crimes, has no idea of when the  
21 District of Columbia would permit her to render the  
22 firearm operational, and in fact there is a prosecution  
23 history not under this specific provision, but certainly  
24 other under gun prohibition -- uh -- laws that we are  
25 challenging here today to prosecute people for the

1 possession or for the carrying of a prohibited firearm  
2 even when the police ruled the shooting has been lawful  
3 self-defense.

4 JUSTICE BREYER: You're saying that this is  
5 unreasonable, and that really is my question because I'd  
6 like you to assume two things with me, which you  
7 probably don't agree with, and I may not agree with them  
8 either.

9 (Laughter.)

10 JUSTICE BREYER: But I just want to you  
11 assume them for the purpose of the question. All right.  
12 Assume that the -- there is an individual right, but the  
13 purpose of that right is to maintain a citizen army,  
14 call it a militia, that that's the basic purpose. So it  
15 informs what's reasonable and what isn't reasonable.  
16 Assume -- and this is favorable to you but not as  
17 favorable as you'd like -- assume that we are going to  
18 decide whether something is proportionate or apply an  
19 intermediate standard in light of the purpose. All  
20 right?

21 Now focus on the handgun ban. As I read  
22 these 80 briefs -- and they were very good, I mean  
23 really good and informative on both sides and I'm trying  
24 to boil down the statistics where there is disagreement  
25 -- and roughly what I get and don't quarrel with this

1 too much, it's very rough, that 80,000 to 100,000 people  
2 every year in the United States are either killed or  
3 wounded in gun-related homicides or crimes or accidents  
4 or suicides, but suicide is more questionable. That's  
5 why I say 80,000 to 100,000. In the District, I guess  
6 the number is somewhere around 200 to 300 dead and maybe  
7 if it's similar 1500 to 2,000 people wounded. All  
8 right.

9 Now, in light of that, why isn't a ban on  
10 handguns, while allowing the use of rifles and muskets,  
11 a reasonable or a proportionate response on behalf of  
12 the District of Columbia?

13 MR. GURA: Because, Your Honor, for the same  
14 reason it was offered by numerous military officers at  
15 the highest levels of the U.S. military in all branches  
16 of service, writing in two briefs they agree with us  
17 that the handgun ban serves to weaken America's military  
18 preparedness because when people have handguns --  
19 handguns are military arms, they are not just civilian  
20 arms -- they are better prepared and able to use them  
21 and certainly when they join the military forces, they  
22 are issued handguns. And so if we assume that the sort  
23 of military purpose to the Second Amendment is an  
24 individual right, then the handgun ban, as noted by our  
25 military amici, would impede that.

1                   JUSTICE BREYER: Well I didn't read -- I  
2 read the two military briefs as focusing on the nature  
3 of the right which was quite -- pretty good argument  
4 there that the nature of the right is to maintain a  
5 citizen Army, and to maintain that potential today, the  
6 closest we come is to say that there is a right for  
7 people to understand weapons, to know how to use them,  
8 to practice with them. And they can do that, you see,  
9 with their rifles. They can go to gun ranges, I guess,  
10 in neighboring States. But does that make it  
11 unreasonable for a city with a very high crime rate,  
12 assuming that the objective is what the military people  
13 say, to keep us ready for the draft, if necessary, is it  
14 unreasonable for a city with that high crime rate to say  
15 no handguns here?

16                   JUSTICE SCALIA: You want to say yes.

17                   JUSTICE BREYER: Now, why?

18                   JUSTICE SCALIA: That's your answer.

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

23                   MR. GURA: The answer is yes, as Justice  
24 Scalia noted, and it's unreasonable and it actually  
25 fails any standard of review that might be offered under

1 such a the construction of individual rights because  
2 proficiency with handguns, as recognized as a matter of  
3 judicial notice by the First Circuit in *Costas* back in  
4 1942 -- that was a handgun case where the First Circuit  
5 examined the restriction on the carrying of the  
6 30-caliber revolver. And the First Circuit accepted, as  
7 a matter of judicial notice, that proficiency in use and  
8 familiarity with the handgun at issue would be one that  
9 would further a militia purpose. And so --

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

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

14 JUSTICE STEVENS: You think that is -- to  
15 understand the amendment, you must pay some attention to  
16 the militia requirement?

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

18 CHIEF JUSTICE ROBERTS: So a conscientious  
19 objector who likes to hunt deer for food, you would say  
20 has no rights under the Second Amendment. He is not  
21 going to be part of the militia, he is not going to be  
22 part of the common defense, but he wants to bear arms.  
23 You would say that he doesn't have any rights under this  
24 amendment?

25 MR. GURA: No, Your Honor. I think that the

1 militia clause informs the purpose, informs a purpose.  
2 It gives us some guide post as to how we look at the  
3 Second Amendment, but it's not the exclusive purpose of  
4 the Second Amendment. Certainly the Founders cared very  
5 much about --

6 JUSTICE GINSBURG: Is it a limitation -- is  
7 it any limitation on the legislature? Is the first  
8 clause any limitation on the legislature?

9 MR. GURA: It is a limitation to one extent,  
10 Your Honor, the extent recognized in Miller where the  
11 Miller Court asked whether or not a particular type of  
12 arm that's at issue is one that people may individually  
13 possess. It looked to the militia clause and therefore  
14 adopted a militia purpose as one of the two prongs of  
15 Miller. And so certainly if there were -- if the Court  
16 were to continue Miller -- and Miller was the only  
17 guidance that the lower court had certainly as to what  
18 arms are protected or unprotected by the Second  
19 Amendment. And yet --

20 JUSTICE STEVENS: If it limits the kind of  
21 arms to be appropriate to a militia, why does it not  
22 also limit the kind of people who may have arms?

23 MR. GURA: It does not eliminate the kind of  
24 people, Your Honor, because the Second Amendment is the  
25 right of the people. And it would certainly be an odd

1 right that we would have against the Congress, if  
2 Congress could then redefine people out of that right.  
3 Congress could tomorrow declare that nobody is in a  
4 militia, and then nobody would have the right against  
5 the government.

6 JUSTICE GINSBURG: If you were thinking of  
7 "the people," what those words meant when the Second  
8 Amendment was adopted, it was males between the ages of  
9 what -- 17 and 45? People who were over 45 had no --  
10 they didn't serve in the militia.

11 MR. GURA: Well, certainly there were many  
12 people who were not eligible for militia duty or not  
13 subject to militia service who nevertheless were  
14 expected to, and oftentimes did in fact, have guns.

15 JUSTICE SCALIA: Which shows that maybe  
16 you're being unrealistic in thinking that the second  
17 clause is not broader than the first. It's not at all  
18 uncommon for a legislative provision or a constitutional  
19 provision to go further than is necessary for the  
20 principal purpose involved. The principal purpose here  
21 is the militia, but -- but the second clause goes beyond  
22 the militia and says the right of the people to keep and  
23 bear arms. Now, you may say the kind of arms is colored  
24 by the militia. But it speaks of the right of the  
25 people. So why not acknowledge that it's -- it's

1 broader than the first clause?

2 MR. GURA: Well, we do acknowledge that,  
3 Your Honor.

4 JUSTICE SOUTER: Then why have the first  
5 clause? I mean what's it doing -- I mean what help is  
6 it going to be?

7 MR. GURA: Well, it was a way in which to  
8 remind us -- the Framers certainly felt that a militia  
9 was very important to the preservation of liberty. The  
10 Framers had just fought a revolutionary war that relied  
11 heavily on militia forces, and so they wanted to honor  
12 that and remind us as to the purpose, one purpose, not  
13 the exclusive purpose, but a purpose of preserving the  
14 right --

15 JUSTICE KENNEDY: Could it also be simply to  
16 reaffirm that the provisions in the main text of the  
17 Constitution remain intact?

18 MR. GURA: That's correct, Your Honor. In  
19 fact, that view was taken by William Raleigh in his 1828  
20 treatise, view of the Constitution. Raleigh was, of  
21 course, a ratifier of the Second Amendment. He sat in  
22 the Pennsylvania Assembly in 1790. And look at his  
23 description of the Second Amendment. He bifurcates.  
24 First he discusses the militia clause; then he lavishes  
25 some qualified praise on it; then --

1 JUSTICE KENNEDY: But you were about to tell  
2 us before the course of questioning began about the other  
3 purposes that the amendment served. I'm -- I want to  
4 know whether or not, in your view, the operative clause  
5 of the amendment protects, was designed to protect in an  
6 earlier time, the settler in the wilderness and his  
7 right to have a gun against some conceivable Federal  
8 enactment which would prohibit him from having any guns?

9 MR. GURA: Oh, yes. Yes, Justice Kennedy.  
10 The right of the people to keep and bear arms was  
11 derived from Blackstone. It was derived from the  
12 common-law English right which the Founders wanted to  
13 expand. In fact, the chapter in which Blackstone  
14 discusses in this treatise, his fifth auxiliary right to  
15 arms is entitled --

16 JUSTICE BREYER: That brings me back to the  
17 question because Blackstone describes it as a right to  
18 keep and bear arms "under law." And since he uses the  
19 words "under law," he clearly foresees reasonable  
20 regulation of that right. And so, does the case not  
21 hinge on, even given all your views, on whether it is or  
22 is not a reasonable or slightly tougher standard thing  
23 to do to ban the handgun, while leaving you free to use  
24 other weapons? I mean, I notice that the militia  
25 statute, the first one, spoke of people coming to

1 report, in 1790 or whenever, with their rifles, with  
2 their muskets, but only the officers were to bring  
3 pistols. So that to me suggests they didn't see pistols  
4 as that crucial even then, let alone now.

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

6 JUSTICE BREYER: What's your response to the  
7 question?

8 MR. GURA: Well my response is that the  
9 government can ban arms that are not appropriate for  
10 civilian use. There is no question of that.

11 JUSTICE KENNEDY: That are not appropriate  
12 to --

13 MR. GURA: That are not appropriate to  
14 civilian use.

15 JUSTICE GINSBURG: For example?

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

22 The fact is that this Court's Miller test  
23 was the only guidance that we had below, and I think it  
24 was applied faithfully. Once a weapon is, first of all,  
25 an "arm" under the dictionary definition -- and Webster

1 has a very useful one -- then you look to see whether an  
2 arm is meant to be protected under the Second Amendment.

3 And we apply the two-pronged Miller test,  
4 and usually one would imagine if an arm fails the Miller  
5 test because it's not appropriate for common civilian  
6 applications --

7 JUSTICE GINSBURG: But why wouldn't the  
8 machine gun qualify? General Clement told us that that  
9 is standard issue in the military.

10 MR. GURA: But it's not an arm of the type  
11 that people might be expected to possess commonly in  
12 ordinary use. That's the other aspect of Miller.

13 Miller spoke about the militia as  
14 encompassing the notion that people would bring with  
15 them arms of the kind in common use supplied by  
16 themselves. And --

17 CHIEF JUSTICE ROBERTS: Is there any  
18 parallel --

19 JUSTICE GINSBURG: At this time -- I would  
20 just like to follow up on what you said. Because if you  
21 were right that it was at that time, yes; but that is  
22 not what Miller says. It says that the gun in question  
23 there was not one that at this time -- this time, the  
24 time of the Miller decision -- has a reasonable  
25 relationship to the preservation or efficiency of a

1 well-regulated militia. So it's talking about this  
2 time.

3 MR. GURA: That's correct. The time frame  
4 that the Court must address is always the present. The  
5 Framers wished to preserve the right to keep and bear  
6 arms. They wished to preserve the ability of people to  
7 act as militia, and so there was certainly no plan for,  
8 say, a technical obsolescence.

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

16 CHIEF JUSTICE ROBERTS: Is there any  
17 parallel at the time that the amendment was adopted to  
18 the machine gun? In other words, I understand your  
19 point to be that although that's useful in modern  
20 military service, it's not something civilians  
21 possessed.

22 Was there anything like that at the time of  
23 the adoption, or were the civilian arms exactly the same  
24 as the ones you'd use in the military?

25 MR. GURA: At the time that -- even at the

1 time Miller was decided, the civilian arms were pretty  
2 much the sort that were used in the military. However,  
3 it's hard to imagine how a machine gun could be a  
4 "lineal descendent," to use the D.C. circuit's wording,  
5 of anything that existed back in 1791, if you want to  
6 look to the framing era.

7 JUSTICE KENNEDY: It seems to me that  
8 Miller, as we are discussing it now, and the whole idea  
9 that the militia clause has a major effect in  
10 interpreting the operative clause, is both overinclusive  
11 and underinclusive.

12 I would have to agree with Justice Ginsburg  
13 that a machine gun is probably more related to the  
14 militia now than a pistol is. But that seems to me to  
15 be allowing the militia clause to make no sense out of  
16 the operative clause in present-day circumstances.

17 MR. GURA: Your Honor, even within the  
18 "militia" understanding, the understanding of the  
19 "militia" was always that people would bring whatever  
20 they had with them in civilian life. So a machine gun,  
21 even though it may be a wonderful --

22 JUSTICE KENNEDY: My point is: Why is that  
23 of any real relevance to the situation that faces the  
24 homeowner today?

25 MR. GURA: It's only of relevance if the

1 Court wishes to continue reading the militia clause as  
2 informing the type of weapon which is protected.

3 JUSTICE KENNEDY: Well, you are being  
4 faithful to Miller. I suggest that Miller may be  
5 deficient.

6 MR. GURA: I agree with Your Honor, and  
7 certainly in our brief we suggest that the militia  
8 emphasis of miller is not useful as a limiting principle  
9 for the type of arms that may be -- that may be  
10 permitted. Because, on the one hand, there is a great  
11 deal of weaponry that might be wonderful for military  
12 duty but is not appropriate for common civilian use,  
13 which would not be protected even under the Miller  
14 test's first prong.

15 And, on the other hand, everything that  
16 civilians today might wish to have in ordinary common  
17 use: Handguns, rifles, or shotguns, are militarily  
18 useful weapons.

19 So we de-emphasize the military aspects of  
20 Miller as being ultimately not very useful guidance for  
21 courts. And the better guidance would be to emphasize  
22 the common-sense rule that I think judges would have  
23 really no trouble applying. And we do this all the time  
24 in constitutional law: To simply make a decision as to  
25 whether or not whichever arm comes up at issue is an arm

1 of the kind that you could really reasonably expect  
2 civilians to have.

3 JUSTICE BREYER: Why -- you know, when say  
4 "keep" and "bear," I mean you are -- I think you are on  
5 to something here. Because you say let's use our common  
6 sense and see what would be the equivalent today. Fine.

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

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

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

1           MR. GURA: The legislature has a great deal  
2 of leeway in regulating firearms. There is no dispute  
3 about that. However, I wouldn't draw a complete analogy  
4 between the Boston fire ordinances that Your Honor notes  
5 and the functional-firearms ban.

6           First, even the Boston fire ordinances did  
7 not include handguns actually. At the time the word  
8 "firearm" was not understood to include pistols.  
9 Generally, the gauges inventory or weapons seized from  
10 the Americans in Boston included some 1800, or so,  
11 firearms and then 634 pistols. Nowhere in the Boston  
12 code do we see a prohibition on keeping loaded pistols  
13 in the home and certainly the idea that, that  
14 self-defense is a harm is one that is --

15           JUSTICE BREYER: Not self-defense being the  
16 harm. And I agree with you that this, the firearm  
17 analogy, floats up there but it isn't going to decide  
18 this case, the Massachusetts statute. I agree with you  
19 about that. What you've suddenly given me the idea of  
20 doing, which I'm testing, is to focus not just on what  
21 the kind of weapon is, don't just look to see whether  
22 it's a cannon or a machine gun, but look to see what the  
23 purpose of this regulation is. And does it make sense  
24 in terms of having the possibility of people trained in  
25 firearms?

1           Let's look at those military briefs. Let's  
2 say that the generals have it right, there is some kind  
3 of right to keep trained in the use of firearms subject  
4 to regulation. We have regulation worried about crime,  
5 back to my first question.

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

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

15           MR. GURA: Well, originally it was not. But  
16 what we've seen with the Fourteenth Amendment --

17           JUSTICE SCALIA: The time we're talking  
18 about, the firearms in the home ordinance, when was  
19 that?

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

21           JUSTICE STEVENS: How do you explain the  
22 fact that you include self-defense, but only two States,  
23 Pennsylvania and Vermont, did refer to self-defense as a  
24 permissible justification and all of the others referred  
25 to common defense or defense of the State, and in the

1 Articles of Confederation and the Constitution itself  
2 there is no reference to self-defense?

3 MR. GURA: Your Honor, the State courts  
4 interpreting those provisions that you reference had a  
5 different interpretation. For example, in 1895  
6 Massachusetts --

7 JUSTICE STEVENS: 1895. I'm talking about  
8 contemporaneous with the adoption of the Second  
9 Amendment.

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

12 JUSTICE STEVENS: The text of the State  
13 constitutional provisions, two of them refer to  
14 self-defense. The rest refer only to common defense; is  
15 that not correct.

16 MR. GURA: On their literal text, yes. But  
17 judges did not interpret them that way, for example in  
18 North Carolina.

19 JUSTICE STEVENS: I understand that judicial  
20 interpretation sometimes is controlling and sometimes is  
21 not but the text itself does draw distinction just as  
22 the Second Amendment does. It doesn't mention self  
23 defense.

24 MR. GURA: While it might not mention  
25 self-defense, it was clear that the demands that the

1 States made at the ratifying conventions were for an  
2 individual right, and Madison was interested in --

3 JUSTICE STEVENS: Well, if you look at the  
4 individual rights I suppose you start back in 1689 of  
5 the declaration of rights in England in the seventh  
6 provision that they talked about said that the subjects  
7 which are protestants may have arms for their defense  
8 suitable to their conditions and as allowed by law. Now  
9 do you think the term suitable to their conditions  
10 limited the number of people who had access to arms for  
11 self defense.

12 MR. GURA: It was in England but that was  
13 criticized by the Framers St. George Tucker's addition  
14 of Blackstone.

15 JUSTICE STEVENS: So you think that the  
16 Second Amendment is a departure from the provision of  
17 the declaration of rights in England.

18 MR. GURA: It's quite clearly an expansion  
19 upon it.

20 JUSTICE STEVENS: So that's not really  
21 your -- you would not confine the right the way the  
22 English did then.

23 MR. GURA: I think the common law of England  
24 is a guide and it's always a useful guide because that's  
25 where the -- where we -- where we look to, to

1 interpret --

2 JUSTICE SCALIA: It's useful for such  
3 purposes as what keep and bear arms means and things of  
4 that sort.

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

7 JUSTICE SCALIA: They certainly didn't want  
8 to preserve the kind of militia that America had, which  
9 was a militia separate from the State, separate from the  
10 government, which enabled a revolt against the British.

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

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

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

25 JUSTICE SOUTER: But they didn't -- they

1 didn't limit it to self-defense. I mean, what provoked  
2 it, as I understand it, was concern about the militia  
3 clauses and here I mean you're certainly correct. I  
4 agree with you, Pennsylvania went beyond that. It  
5 was -- it was one of three states, as I understand, that  
6 did go beyond it. But the provocation for getting into  
7 the subject, as I understand it, was in each instance  
8 including Pennsylvania, concern over the national  
9 government's power over militias under Article 1.

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

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

1                   Now, there is no reason to suppose that  
2 Virginia would have made the same demand twice, that  
3 they would have, like all the other demands, it had  
4 separate keep and bear arms provisions and separate  
5 militia provisions that people were being duplicative  
6 for no reason. The fact is that the militia concerns  
7 were heard and they were voted down, and the Second  
8 Amendment concerns were the ones that the Federalists  
9 were easily agreeable to because the right to keep and  
10 bear arms by individuals was not controversial, it would  
11 not have altered the structure of our Constitution, and  
12 so those were agreed to quite readily.

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

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

25                   CHIEF JUSTICE ROBERTS: Well, there is

1 always a risk that the children will get up and grab the  
2 firearm and use it for some purpose other than what the  
3 Second Amendment was designed to protect.

4 MR. GURA: Oddly enough, a child can access  
5 a firearm stored consistently with the District's law,  
6 that is, a firearm that is disassemble and unloaded,  
7 nothing would prevent a child --

8 CHIEF JUSTICE ROBERTS: Well, right. But, I  
9 mean, you don't necessarily expect a young child to be  
10 able to reassemble a pistol.

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

19 But this is not a safe storage provision  
20 because we have specific exceptions that allow you to  
21 actually use the firearm in recreational shooting and  
22 also in a place of business. And we have litigation  
23 history from Washington, D.C., that tells us that we are  
24 not supposed to have inoperable firearm for purposes of  
25 self-defense because they simply do not trust people to

1 defend themselves in our home. And -- and self-defense  
2 is the heart of the Second Amendment right. That is  
3 what Blackstone is getting at when he spoke of the fifth  
4 auxiliary right to arms, because it protected the right  
5 of personal preservation.

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

11 MR. GURA: Which provisions were those,  
12 Justice Stevens?

13 JUSTICE STEVENS: Pennsylvania.

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

24 JUSTICE BREYER: Thinking of your exchange  
25 with the Chief Justice and think of the trigger lock in

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

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

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

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

1 done --

2 JUSTICE GINSBURG: What about this very law?  
3 If you take out the ban -- there is a law on the books.  
4 It's one of the ones that you challenged. It's section  
5 22-4504(a). Wouldn't that be okay -- would that be  
6 okay? It's just that you have to have a license to  
7 carry.

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

12 JUSTICE GINSBURG: It says you have to get a  
13 license if you want to possess a gun. What kind of  
14 standard? It just says you have to have a license.

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

24 However, if the license requirement is we  
25 only wanted to give licenses to people who look a

1 certain way or depends on how we feel or if the  
2 licensing office is only open Thursdays at 3:00 in the  
3 morning -- I mean, it all depends on the implementation.

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

7 MR. GURA: Well, certainly the age of  
8 majority issue is -- is an appropriate one. I don't  
9 think there is a problem with requiring a majority age  
10 18 and then 21 for --

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

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

22 JUSTICE STEVENS: Let me ask a question are  
23 you, in effect, reading the amendment to say that the  
24 right shall not be unreasonably infringed instead of  
25 shall not be infringed?

1 MR. GURA: There is that inherent aspect to  
2 every right in the Constitution.

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

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

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

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

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

18 MR. GURA: Those restrictions.

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

24 MR. GURA: Framing our practices would  
25 inform the kind of restrictions that would be accepted,

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

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

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

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

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

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

1 MR. GURA: Absolutely, Your Honor.

2 JUSTICE BREYER: Whose judgment is that to  
3 consider?

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

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

18 MR. GURA: To some degree yes, policymakers  
19 have to be informed by what's going on in order to make  
20 policy. However, there are constitutional limitations  
21 enforced by courts that are going to limit those  
22 policies, and when you have a ban which bans 40 percent  
23 of all weapons that are the type of weapons used by  
24 civilians, 80 percent of all self-defense occurs with  
25 handguns; when you have that kind of ban, functional

1 firearms ban, these are extreme measures.

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

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

21 JUSTICE KENNEDY: Just to be clear -- and I  
22 don't want to misstate your position, but my  
23 understanding, I at least inferred that you would  
24 consider it reasonable to ban shipment of machine guns  
25 and sawed-off shotguns in interstate commerce?

1 MR. GURA: Yes, Your Honor.

2 JUSTICE STEVENS: And how about a State  
3 university wants to ban students having firearms in the  
4 dormitory?

5 MR. GURA: Certainly that creates some sort  
6 of an evidentiary record. Conceivably that --

7 JUSTICE STEVENS: That's the bare fact.  
8 That's what - a State regulation prohibits students from  
9 having arms on campus.

10 MR. GURA: We would have to fact find --

11 JUSTICE STEVENS: You'd have to think about  
12 that.

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

20 CHIEF JUSTICE ROBERTS: Thank you, Gura.  
21 Mr. Dellinger, 10 minutes.

22 REBUTTAL ARGUMENT OF WALTER DELLINGER,  
23 ON BEHALF OF THE PETITIONERS

24 MR. DELLINGER: Mr. Chief Justice, I want to  
25 address first why this law is reasonable and should be

1 sustained, and why the judgement below has to be  
2 reversed, however -- whatever position you take on the  
3 theories of the amendment. And in defending the eminent  
4 reasonableness and careful balance of this law, I need  
5 to start with the trigger law, about which Justice Alito  
6 asked.

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

12 MR. DELLINGER: Those are alternatives, Mr.  
13 Chief Justice.

14 CHIEF JUSTICE ROBERTS: If the assembly --

15 MR. DELLINGER: Just a trigger lock.

16 CHIEF JUSTICE ROBERTS: In either case it  
17 has to be unloaded, correct?

18 MR. DELLINGER: There are some versions of  
19 the trigger lock that allow you to put the trigger lock  
20 on and then load the gun. But the piece that goes in  
21 the trigger mechanism, even someone as clumsy as I could  
22 remove it in a second.

23 CHIEF JUSTICE ROBERTS: Well the law as I  
24 understand it says that the gun has to be unloaded. So  
25 under your hypothetical I assume that would violate the

1 district's law if the gun is still loaded.

2 MR. DELLINGER: It's a question of where you  
3 put the parenthesis. I read that as disassembled and  
4 unloaded or under a trigger lock and that's the, that's  
5 the way the district.

6 CHIEF JUSTICE ROBERTS: So how long does it  
7 take if your interpretation is correct how long does it  
8 take to remove the trigger lock and make the gun  
9 operable.

10 MR. DELLINGER: You place a trigger lock on  
11 and it has the version I have a few that you can buy  
12 them at 17th Street hardware has a code like a three  
13 digit code. You turn to the code and you pull it apart.  
14 That's all it takes. Even --

15 JUSTICE SCALIA: Turn on the lamp next to  
16 your bed so you can, you can turn the knob at 3-22-95 so  
17 --

18 CHIEF JUSTICE ROBERTS: Is it like that is  
19 it a numerical code.

20 MR. DELLINGER: Yes.

21 CHIEF JUSTICE ROBERTS: So then you turn on  
22 -- many you pick up your reading --

23 MR. DELLINGER: That's right. Let me tell  
24 you why at the end of the day this doesn't, this doesn't  
25 matter. For two reasons. The lesson.

1 CHIEF JUSTICE ROBERTS: It may not matter  
2 but I'd like tomorrow idea about how long it takes.

3 MR. DELLINGER: It took me three seconds.  
4 I'm not kidding. It's not that difficult to do it.  
5 That was in daylight. The other version is just a loop  
6 that goes through the chamber with a simple key. I have  
7 the key I put it together now of course if you're going,  
8 if you want to have your weapon loaded and assembled,  
9 that's a different matter but here's where I want to  
10 address the trigger lock. Here's why it doesn't matter  
11 for the handgun law. The district believes that what is  
12 important here is the ban on handguns. And it also  
13 believes that you're entitled to have have a functional  
14 usable weapon for self defense in the home and that's  
15 why this is a very proportionate law.

16 CHIEF JUSTICE ROBERTS: If proportionate in  
17 other words you're saying your interest is allowing self  
18 defense in the home.

19 MR. DELLINGER: Yes.

20 CHIEF JUSTICE ROBERTS: Is it really make  
21 sense to say the best self defense arm is a rifle as  
22 opposed to a pistol.

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

1 JUSTICE ALITO: Is there anything to show  
2 that the district council ever considered the issue of  
3 self defense that because they banned handguns and they  
4 had this provision on the trigger lock which and the  
5 issue my question with the trigger lock doesn't have to  
6 do with whether trigger locks are generally a good idea  
7 it's whether you're ever allowed to take it off for  
8 purposes of defense. There is no -- is there anything  
9 to show that the, that the council actually considered  
10 what sort of weapon is appropriate for self defense.

11 MR. DELLINGER: There are decisions in the  
12 District of Columbia about the right of self defense  
13 that apply to this. But here's the most important  
14 point. It cannot effect the validity of the handgun law  
15 if you disagree with us that my statements are not  
16 sufficient to say that we believe that the law should be  
17 read given the self defense compulsion to allow whatever  
18 use makes it functional if you don't agree with that and  
19 if you think there is a controversy on this point  
20 because we believe you should have a functional firearm  
21 available in the home of law-abiding citizens who wish  
22 one. If we are wrong about that and the trigger lock is  
23 invalid then it has no effect on the handgun ban. The  
24 trigger lock applies to all weapons if it's valid and it  
25 means what they say it does none of the weapons would

1 work. We don't need a handgun it's unusable. If it's  
2 invalid or if it has the construction we believe it  
3 cannot possibly effect the handgun if you strike down  
4 the trigger lock law you're throwing us in the barn  
5 patch where we think it's where we are happy to be if  
6 all we have to do is to make clear in the trigger lock  
7 law what we have said here today that it's, it's  
8 available for self defense.

9 CHIEF JUSTICE ROBERTS: It's a related  
10 point. Do you understand the carry ban to apply if you  
11 carry the firearm from one room in the house to another.

12 MR. DELLINGER: That only applies if it's,  
13 in it's unregistered now you can't register a handgun,  
14 you can't carry a handgun but that's because it's  
15 possession is prohibited. That is to say you can't  
16 carry marijuana or hero in from one room to the other  
17 either because you can't use it at all.

18 CHIEF JUSTICE ROBERTS: Why does the D.C.  
19 law phrase it in those words you can't carry it  
20 anywhere.

21 MR. DELLINGER: Well it's the carry  
22 provision you cannot carry unregistered firearms.  
23 That's just a general requirement that firearms be  
24 registered. You're not allowed to register handguns is  
25 the mechanism by which they are prohibited. Now here

1 is, to address your question about why a ban is  
2 unreasonable the one thing we know the Second Amendment  
3 is not about is it's not about the interest of  
4 collectors. Some people collect guns the way they do  
5 stamps and if that were what the amendment were about  
6 then prohibiting someone from having a particular type  
7 of gun would prevent them from completing the set but  
8 the notion --

9 CHIEF JUSTICE ROBERTS: Why isn't that  
10 covered by the provision that you have the right to keep  
11 arms?

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

17 JUSTICE SCALIA: You mean you can't have any  
18 more arms than you would need to take with you to the  
19 militia? You can't have -- you can't have, you know, a  
20 turkey gun and a duck gun and a 30.06 and 270 and, you  
21 know, different hunting guns for different.

22 MR. DELLINGER: Well --

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

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

1 JUSTICE SCALIA: You'd have to have a 12  
2 gauge and that's it.

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

5 JUSTICE KENNEDY: I -- at least to me the  
6 question is, what would be the constitutional basis for  
7 insisting on Justice Scalia's suggestion that you need a  
8 number of guns? You have argued, it seems to me, that  
9 the District or a government could prohibit just what he  
10 said, unless you needed one to take to the militia.

11 MR. DELLINGER: I do not know why that would  
12 pass the reasonableness scrutiny that this law would  
13 because a powerful, overwhelming case could be made that  
14 you're eliminating the one type of weapon -- this law is  
15 -- is designed only for the weapon that is concealable  
16 and movable, that can be taken into schools and on to  
17 the Metro, can be easily stolen and transmitted among --

18 JUSTICE KENNEDY: I'm asking about the  
19 constitutional standard you apply to a hypothetical  
20 statute which would prohibit the guns Justice Scalia  
21 described. What is your position as to the validity of  
22 such a hypothetical law?

23 MR. DELLINGER: Would you apply this  
24 standard. You would ask whether the ban is one that's  
25 carefully balanced and considerations of gun ownership

1 and public safety. I don't see how, once we are in the  
2 land where you -- where there is a right, there is a far  
3 weaker case if there is any need for public safety to  
4 limit the number of guns one has. Here there is an  
5 overwhelming case and we are talking about local  
6 legislation.

7 I know, Justice Kennedy, that you would be  
8 concerned about a national government which sets a  
9 single standard for rural and urban areas, for east and  
10 west, north and south. Here you have legislation that  
11 is adopted by a group of citizens in the District,  
12 operating under the authority of Congress, but it is  
13 local legislation. And if it's still good law that  
14 States and local governments across the country can  
15 strike these balances as they have, it would be deeply  
16 ironic to preclude the District of Columbia as being the  
17 only place that could enact legislation free of the  
18 strictures of the Second Amendment.

19 And when you ask about the statistics, what  
20 is critical here is not to apply the kind of categorical  
21 standard the court below did or a kind of strict  
22 scrutiny that would strike this law down. This is an  
23 area unlike areas where government regulation is  
24 presumively illegitimate. This text contemplates  
25 regulation of inherently dangerous weapons. And where

1 the battle -- the great battle over methodology, to  
2 which Justice Breyer replied, in these briefs indicates  
3 that this is the kind of right -- where you have  
4 disputes among experts, it's a kind of right where even  
5 if you recognize it, deference needs to be given to the  
6 legislative resolution rather than have courts try to  
7 decide how best to resolve the statistical and  
8 methodological debates.

9 Thank you Mr. Chief Justice.

10 CHIEF JUSTICE ROBERTS: Thank you,  
11 Mr. Dellinger.

12 The case is submitted.

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

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