

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DISTRICT OF COLUMBIA, :

4 ET AL., :

5 Petitioners :

6 v. : No. 07-290

7 DICK ANTHONY HELLER. :

8 - - - - - x

9 Washington, D.C.

10 Tuesday, March 18, 2008

11

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

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17 of the Petitioners.

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22 Respondent.

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P R O C E E D I N G S

(10:06 a.m.)

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

Mr. Dellinger.

ORAL ARGUMENT OF WALTER DELLINGER

ON BEHALF OF THE PETITIONERS

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

The Second Amendment was a direct response to concern over Article I, section 8 of the Constitution, which gave the new national Congress the surprising, perhaps even the shocking, power to organize, arm, and presumably disarm the State militias. What is at issue this morning is the scope and nature of the individual right protected by the resulting amendment and the first text to consider is the phrase, "protecting the 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. Its  
11 essential meaning --

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

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

24 CHIEF JUSTICE ROBERTS: But if that's right,  
25 doesn't that cut against you? If the militia included

1 all the people, doesn't the preamble that you rely on  
2 not really restrict the right much at all? It includes  
3 all the people.

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

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

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

4 MR. DELLINGER: Yes.

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

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

24 JUSTICE KENNEDY: Well the subject is "arms"  
25 in both clauses, as I've suggested is the common

1 subject, and they're closely related.

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

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

23 MR. DELLINGER: Yes, but once you assume  
24 that the clause is designed to protect the militia, it  
25 -- surely it's the militia that decides whether personal

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

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

8 MR. DELLINGER: No. I think --

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

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

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

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

23 JUSTICE SCALIA: Blackstone thought it was  
24 important. Blackstone thought it was important. He  
25 thought the right of self-defense was inherent, and the



1 Framers were devoted to Blackstone. Joseph Story, the  
2 first commentator on the Constitution and a member of  
3 this Court, thought it was a personal guarantee.

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

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

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

1 think the better --

2 JUSTICE GINSBURG: Mr. Dellinger --

3 MR. DELLINGER: Yes.

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

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

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

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

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

21 MR. DELLINGER: That is correct.

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

1 the militia under the militia clauses?

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

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

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

15 JUSTICE SCALIA: So what -- what was the  
16 function served by the Second Amendment as far as the  
17 militia is concerned?

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

1           Now I think the better argument for the  
2 other side, if there -- if there is to be a militia  
3 relatedness aspect of the Second Amendment, as we think  
4 clear from all of its terms, then Heller's proposed use  
5 of a handgun has no connection of any kind to the  
6 preservation or efficiency of a militia and therefore  
7 the case is over.

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

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

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

25           MR. DELLINGER: The debate over the militia

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

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

19 MR. DELLINGER: No.

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

1           MR. DELLINGER: It restricted in our view  
2 the authority of the Federal Government to interfere  
3 with the arming of the militia by the States. And the  
4 word that caused the most focus was to "arm" and that is  
5 to disarm.

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

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

24           JUSTICE SOUTER: What you are -- what you  
25 are saying is that the individual has a right to

1 challenge a Federal law which in effect would disarm the  
2 militia and make it impossible for the militia to  
3 perform those functions that militias function. Isn't  
4 that the nub of what you're saying?

5 MR. DELLINGER: Yes. That is correct.

6 JUSTICE SOUTER: Okay.

7 MR. DELLINGER: And if the Court were to  
8 embrace --

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

13 MR. DELLINGER: I think they are highly  
14 relevant to your inquiry because now 42 States have  
15 adopted constitutional provisions.

16 JUSTICE STEVENS: I'm not talking about  
17 those.

18 MR. DELLINGER: You're talking about at the  
19 time.

20 JUSTICE STEVENS: I'm talking about the  
21 contemporaneous actions of the States, before or at the  
22 time of the adoption of the Second Amendment.

23 MR. DELLINGER: I think that the -- the  
24 State amendments are generally written in different --  
25 in different terms. If you're going to protect the kind

1 of right that is -- that is being spoken of here,  
2 different from a militia right, the plain language to  
3 do it would be "Congress or the States shall pass no law  
4 abridging the right of any person to possess weapons for  
5 personal use." And that's not the right that is created  
6 here.

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

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

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

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



1 and it's -- and it's -- it's --

2 JUSTICE KENNEDY: I think that would be more  
3 restrictive.

4 MR. DELLINGER: That -- that could well --  
5 the answer then would be --

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

11 MR. DELLINGER: Parliament --

12 JUSTICE SOUTER: Here there is some  
13 guarantee against what Congress can do.

14 MR. DELLINGER: Parliament could regulate.  
15 And Blackstone appears to approve of precisely the kinds  
16 of regulations here. Now, what we have --

17 JUSTICE STEVENS: Of course, the Bill of  
18 Rights only protected the rights of Protestants.

19 MR. DELLINGER: This is correct.

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

23 MR. DELLINGER: I think that is -- that is  
24 correct.

25 JUSTICE SCALIA: As I recall, the

1 legislation against Scottish highlanders and against --  
2 against Roman Catholics did use the term -- forbade them  
3 to keep and bear arms, and they weren't just talking  
4 about their joining militias; they were talking about  
5 whether they could have arms.

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

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

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

1 --

2 CHIEF JUSTICE ROBERTS: So if you have a law  
3 that prohibits the possession of books, it's all right  
4 if you allow the possession of newspapers?

5 MR. DELLINGER: No, it's not, and the  
6 difference is quite clear. If -- if you -- there is no  
7 limit to the public discourse. If there is an  
8 individual right to guns for personal use, it's to carry  
9 out a purpose, like protecting the home. You could not,  
10 for example, say that no one may have more than 50  
11 books. But a law that said no one may possess more than  
12 50 guns would -- would in fact be I think quite  
13 reasonable.

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

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

25 JUSTICE KENNEDY: The purposes of what?

1 MR. DELLINGER: I'm sorry?

2 JUSTICE KENNEDY: You said there is no  
3 showing that rifles and handguns. I think you meant  
4 rifles and other guns.

5 MR. DELLINGER: Yes, I'm sorry. The rifles  
6 and -- yes, Justice Kennedy, the point --

7 JUSTICE KENNEDY: Is necessary for the  
8 purpose of what? What is the purpose?

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

24 JUSTICE GINSBURG: But wasn't there leeway  
25 for some weapon prohibition? Let me ask you, in

1 relation to the States that do have guarantees of the  
2 right to possess a weapon at home: Do some of those  
3 States say there are certain kinds of guns that you  
4 can't have, like machine guns?

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

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

11 JUSTICE KENNEDY: In those States -- if I  
12 could just have one -- following on Justice Ginsburg  
13 quick. Do those States, Justice Ginsburg asked,  
14 distinguish among weapons? State constitutional  
15 provisions do not do so.

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

18 JUSTICE GINSBURG: It's in interpretation.

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

1 JUSTICE SCALIA: Mr. Dellinger, let's come  
2 back to your description of the opinion below as  
3 allowing armor-piercing bullets and machine guns. I  
4 didn't read it that way. I thought the opinion below  
5 said it had to be the kind of weapon that was common for  
6 the people --

7 MR. DELLINGER: That is --

8 JUSTICE SCALIA: -- that is common for the  
9 people to have. And I don't know -- I don't know that a  
10 lot of people have machine guns or --

11 MR. DELLINGER: I think the number is --

12 JUSTICE SCALIA: -- armor-piercing bullets.  
13 I think that's quite unusual. But having a pistol is  
14 not unusual.

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

18 JUSTICE SCALIA: How many people in the  
19 country?

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

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

23 MR. DELLINGER: But it's the -- the court  
24 protects weapons suitable for military use that are  
25 lineal descendants. I don't know why an improved bullet

1 wouldn't be covered, unless you adopt the kind of  
2 reasonableness standard that we suggest, where you look  
3 to the fact that -- and I don't -- some people think  
4 machine guns are more dangerous than handguns, they  
5 shoot a lot of people at once -- but a handgun is  
6 concealable and movable. It can be taken into schools,  
7 into buses, into government office buildings, and that  
8 is the particular danger it poses in a densely populated  
9 urban area.

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

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

20 JUSTICE SCALIA: Or a law on the carrying of  
21 concealed weapons, which would include pistols, of  
22 course.

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

1 CHIEF JUSTICE ROBERTS: Are you allowed to  
2 carry the weapons that are allowed? I read the "carry  
3 clause" to apply without qualification. So while you  
4 say you might be able to have a shotgun in the home, you  
5 can't carry it to get there.

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

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

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

24 It is a universal or near universal rule of  
25 criminal law that there is a self-defense exception. It



1 goes without saying. We have no argument whatsoever  
2 with the notion that you may load and have a weapon  
3 ready when you need to use it for self-defense.

4 I'm going to reserve the remainder of my  
5 time for rebuttal.

6 CHIEF JUSTICE ROBERTS: Why don't you  
7 remain, Mr. Dellinger. We'll make sure you have  
8 rebuttal.

9 JUSTICE KENNEDY: Because I did interrupt  
10 Justice Breyer.

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

25 MR. DELLINGER: It's a reasonable regulation

1 for two kinds of reasons.

2 First, in order -- the amendment speaks of a  
3 well-regulated militia. Perhaps it's the case that  
4 having everybody have whatever gun they want of whatever  
5 kind would advance a well-regulated militia, but  
6 perhaps not. But, in any event --

7 JUSTICE SCALIA: It means "well trained,"  
8 doesn't it?

9 MR. DELLINGER: When you -- when you have  
10 one --

11 JUSTICE SCALIA: Doesn't "well regulated"  
12 mean "well trained"? It doesn't mean -- it doesn't mean  
13 "massively regulated." It means "well trained."

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

21 There is no indication that the District  
22 militia is an entity that needs individuals to have  
23 their own handguns. You -- you -- there is a step that  
24 is -- that is missing here. The well-regulated militia  
25 is not necessarily about everyone having a gun. A

1 militia may decide to organize -- be organized that way,  
2 in which case you would have a different notion.

3           But here, I think, when you come down to  
4 apply this case, if you look at about five factors, that  
5 other weapons are allowed, important regulatory  
6 interests of these particularly dangerous weapons are --  
7 is clearly a significant regulatory, and important  
8 regulatory, interest. In two respects this is removed  
9 from the core of the amendment. Even if it is not  
10 limited to militia service, even the court below, no  
11 one doubts that that was, as the court below said, the  
12 most salient objective.

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

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

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

3 General Clement.

4 ORAL ARGUMENT OF GEN. PAUL D. CLEMENT

5 ON BEHALF OF THE UNITED STATES,

6 AS AMICUS CURIAE

7 GENERAL CLEMENT: Mr. Chief Justice, and may  
8 it please the Court:

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

13 JUSTICE STEVENS: May I ask this sort of  
14 preliminary question? Do you think it has the same  
15 meaning that it would have if it had omitted the  
16 introductory clause referring to militia?

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

23 JUSTICE STEVENS: So you think some weight  
24 should be given to the clause. And also, the other  
25 question I wanted to ask you is: Does the right "to keep

1 and bear arms" define one or two rights?

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

4 JUSTICE STEVENS: There's a right to keep  
5 arms and a right to bear arms?

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

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

19 JUSTICE SOUTER: What does the --

20 JUSTICE GINSBURG: It doesn't mean all. It  
21 doesn't mean -- "keep," on your reading, at least if  
22 it's consistent with Miller, keep and bear some arms,  
23 but not all arms.

24 GENERAL CLEMENT: Absolutely, Justice  
25 Ginsburg, and just -- I mean, to give you a clear

1 example, we would take the position that the kind of  
2 plastic guns or guns that are specifically designed to  
3 evade metal detectors that are prohibited by Federal law  
4 are not "arms" within the meaning of the Second  
5 Amendment and are not protected at all.

6 And that would be the way we would say that  
7 you should analyze that provision of Federal law, as  
8 those are not even "arms" within the provisions of the  
9 Second Amendment.

10 I think to make the same argument about  
11 machine guns would be a much more difficult argument, to  
12 say the least, given that they are the standard-issue  
13 weapon for today's armed forces and the State-organized  
14 militia.

15 JUSTICE KENNEDY: So in your view this  
16 amendment had nothing to do with the right of people  
17 living in the wilderness to protect themselves, despite  
18 maybe an attempt by the Federal Government, which is  
19 what the Second Amendment applies to, to take away their  
20 weapons?

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

1                   JUSTICE KENNEDY: I agree that Miller is  
2 consistent with what you've just said, but it seems to  
3 me Miller, which kind of ends abruptly as an opinion  
4 writing anyway, is just insufficient to subscribe -- to  
5 describe the interests that must have been foremost in  
6 the Framers' mind when they were concerned about guns  
7 being taken away from the people who needed them for  
8 their defense.

9                   GENERAL CLEMENT: Well, Justice Kennedy, we  
10 would analyze it this way, which is we would say that  
11 probably the thing that was foremost in the Framers'  
12 mind was a concern that the militia not be disarmed  
13 such that it would be maintained as a viable option to  
14 the standing army. But especially when you remember, as  
15 Justice Alito pointed out, that the Constitution in  
16 Article I, section 8, clauses 15 and 16, the militia  
17 clauses, as unamended, gave the Federal power -- the  
18 Federal authorities virtually plenary authority to deal  
19 with the organization and regulation of the militia.  
20 The most obvious way that you could protect the militia  
21 --

22                   JUSTICE STEVENS: Not plenary authority.  
23 Not plenary authority.

24                   GENERAL CLEMENT: Except for that which is  
25 reserved in --

1 JUSTICE STEVENS: Who appoints the officers?

2 GENERAL CLEMENT: Yes -- no, absolutely.

3 There is something reserved in clause 16.

4 But let me just say, if the Second Amendment  
5 had the meaning that the District of Columbia ascribes  
6 to it, one would certainly think that James Madison,  
7 when he proposed the Second Amendment would have  
8 proposed it as an amendment to Article I, section 8,  
9 clause 16.

10 He didn't. He proposed it as an amendment  
11 to Article I, section 9, which encapsulates the  
12 individual rights to be free from bills of attainder and  
13 ex post facto clauses.

14 JUSTICE STEVENS: Do you think he was guided  
15 at all by the contemporaneous provisions in State  
16 constitutions?

17 GENERAL CLEMENT: I am sure he was influenced  
18 by that, though I think, honestly --

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

21 GENERAL CLEMENT: I think -- I think  
22 Pennsylvania and Vermont are the ones that most  
23 obviously protected.

24 JUSTICE STEVENS: They are the only two.  
25 And the others quite clearly went in the other direction,



1 did they not?

2 GENERAL CLEMENT: Well, I don't know about  
3 quite clearly. The textual indication in the State  
4 amendments that probably most obviously goes in the  
5 other direction is the phrase "keep and bear arms for  
6 the common defense." And, of course, there was a  
7 proposal during the debate over the Second Amendment to  
8 add exactly those words to the Second Amendment, and  
9 that proposal was defeated, which does --

10 JUSTICE STEVENS: There was also a proposal  
11 to make it clear there was an individual right, which  
12 was also rejected.

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

15 JUSTICE STEVENS: The Pennsylvania proposal.

16 GENERAL CLEMENT: Oh, but I don't think that  
17 ever made it to the floor of the House or the Senate  
18 that I'm aware of. And I think that this happened at  
19 the actual Senate floor. There was a proposal to add  
20 the words "in the common defense," and that was  
21 rejected. I mean -- I --

22 JUSTICE KENNEDY: You think Madison was  
23 guided by the experience and the expressions of the  
24 right in English law, including the Bill of Rights of  
25 1689?

1           GENERAL CLEMENT: I do, Justice Kennedy, and  
2 I think in that regard it is telling that -- I mean,  
3 there are a variety of provisions in our Bill of Rights  
4 that were borrowed from the English Bill of Rights. Two  
5 very principal ones are the right to petition the  
6 government and the right to keep and bear arms. I don't  
7 think it's an accident --

8           JUSTICE GINSBURG: If we're going back to  
9 the English Bill of Rights, it was always understood to  
10 be subject to the control and limitation and restriction  
11 of Parliament. And I don't think there's any doubt  
12 about that. And that's what we're talking about here,  
13 are legislative restrictions.

14          GENERAL CLEMENT: Well, Justice Ginsburg, I  
15 think you could say the same thing for every provision  
16 of the English Bill of Rights. And obviously, when  
17 those were translated over to our system you had to make  
18 adjustment for --

19          JUSTICE SOUTER: But isn't there one  
20 difference? Not every provision of the English Bill of  
21 Rights had an express reference to permission by law,  
22 which is a reference to parliamentary authority. So  
23 that there -- there -- there was a peculiar recognition  
24 of parliamentary legislative authority on this subject.

25          GENERAL CLEMENT: That's exactly right,

1 Justice Souter. And the way I counted it, I only found  
2 three provisions in the English Bill of Rights that had  
3 a comparable reference to Parliament.

4 JUSTICE STEVENS: Yes, but that also -- this  
5 provision had the additional limitation to "suitable to  
6 their conditions," and a large number of people were not  
7 permitted to have arms.

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

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

24 And as this Court has made clear in  
25 Verdugo-Urquidez, that's a reference that

1 appears throughout the Bill of Rights as a reference to  
2 the entire citizenry.

3 JUSTICE SOUTER: May I go back to another  
4 point, which is to the same point, and that is  
5 consistent with your emphasis on the people was your  
6 emphasis a moment ago on the distinction between keeping  
7 and bearing arms. The "keep" part sounds in your -- in  
8 your mind at least, to speak of an individual right not  
9 necessarily limited by -- by the exigencies of military  
10 service.

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

21 GENERAL CLEMENT: The way I would read it,  
22 Justice Souter, is that "keep" is really talking about  
23 private possession in the home. And the way that I  
24 would look at it is in order to exercise, for example,  
25 an opportunity to hunt, that you would need to bear the

1 arms as well. And I would point you -- I think it's a  
2 useful point --

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

6 GENERAL CLEMENT: I would say that and so  
7 would Madison and so would Jefferson, I would submit.  
8 They use --

9 JUSTICE SOUTER: Somebody going out to -- in  
10 the eighteenth century, someone going to hunt a deer  
11 would have thought of himself as "bearing arms"? I  
12 mean, is that the way they talk?

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

20 In one place -- all through it's not bearing  
21 arms, it's bearing a gun -- I think it's highly relevant  
22 that Madison and Jefferson with respect to this hunting  
23 bill that Jefferson wrote and Madison proposed,  
24 specifically used in the hunting context the phrase  
25 "bear a gun," and so I do think in that context --

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

4 JUSTICE SCALIA: Wasn't -- wasn't it the  
5 case that the banning of arms on the part of the  
6 Scottish highlanders and of Catholics in England used  
7 the term, forbade them to "bear arms"? It didn't mean  
8 that could just not join militias; it meant they  
9 couldn't carry arms.

10 GENERAL CLEMENT: And again, I think various  
11 phrases were, were used. I also think that some of the  
12 disarmament provisions specifically used the word  
13 "keep." And so I think there is some independent  
14 meaning there, which is one point.

15 And then I do think that, even in the  
16 context of bearing arms, I will grant you that "arms"  
17 has a military connotation and I think Miller would  
18 certainly support that, but I don't think it's an  
19 exclusively military connotation.

20 JUSTICE STEVENS: Not only Miller, but the  
21 Massachusetts declaration. "The right to keep and bear  
22 arms for the common defense" is what is the normal  
23 reading of it.

24 GENERAL CLEMENT: Oh, absolutely. And I  
25 grant you if this -- if the Second Amendment said "keep

1 and bear arms for the common defense" this would be a  
2 different case. But --

3 JUSTICE STEVENS: There's more than one --  
4 it's one right to keep and bear, it isn't -- I'm sorry.  
5 It's one right to keep and bear, not two rights, to keep  
6 and to bear.

7 GENERAL CLEMENT: Well, I mean it's -- it's  
8 my friends from the District that are emphasizing that  
9 no word in the Constitution is surplusage. So I would  
10 say that in a context like this you might want to focus  
11 both on "keep" and on "bear arms."

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

14 (Laughter.)

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

18 I think there are several reasons why a  
19 standard as we suggest in our brief rather than strict  
20 scrutiny is an appropriate standard to be applied in  
21 evaluating these laws. I think first and foremost, as  
22 our colloquy earlier indicated, there is -- the right to  
23 bear arms was a preexisting right. The Second Amendment  
24 talks about "the right to bear arms," not just "a right  
25 to bear arms." And that preexisting right always

1 coexisted with reasonable regulations of firearms.

2           And as you pointed out, Justice Souter, to  
3 be sure when you're making the translation from the  
4 English Bill of Rights you always have to deal with  
5 parliamentary supremacy. But it is very striking that,  
6 as Justice Stevens said, the right was conditioned on  
7 the conditions, which I think meant what class you were,  
8 and also subject expressly to the Parliament, the laws  
9 of Parliament.

10           JUSTICE SCALIA: The freedom of speech that  
11 was referred to in the Constitution was also "the"  
12 freedom of speech, which referred to the preexisting  
13 freedom of speech. And there were indeed some  
14 restrictions on that such as libel that you were not  
15 allowed to do. And yet we've never held that simply  
16 because it was preexisting and that there were some  
17 regulations upon it, that we would not use strict  
18 scrutiny. We certainly apply it to freedom of speech,  
19 don't we?

20           GENERAL CLEMENT: Justice Scalia, let me  
21 make two related points. One, even in the First  
22 Amendment context, this Court has recognized -- and I  
23 point you to the Court's opinion in Robertson against  
24 Baldwin, which makes this point as to both the First and  
25 the Second Amendment. This Court has recognized that



1 there are certain preexisting exceptions that are so  
2 well established that you don't really even view them as  
3 Second Amendment or First Amendment infringement.

4 JUSTICE SCALIA: Like libel.

5 GENERAL CLEMENT: Like libel, and I would  
6 say like laws barring felons from possessing handguns.  
7 I don't think --

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

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

23 JUSTICE ALITO: If the amendment is intended,  
24 at least in part, to protect the right to self-defense  
25 in the home, how could the District code provision

1 survive under any standard of review where they totally  
2 ban the possession of the type of weapon that's most  
3 commonly used for self-defense, and even as to long guns  
4 and shotguns they require, at least what the code says  
5 without adding a supposed gloss that might be produced  
6 in a subsequent case, that even as to long guns and  
7 shotguns they have to be unloaded and disassembled or  
8 locked at all times, even presumably if someone is  
9 breaking into the home?

10 GENERAL CLEMENT: Well, Justice Alito, let  
11 me answer the question in two parts if I can, because I  
12 think the analysis of the trigger lock provision may  
13 well be different than the analysis of the other  
14 provisions.

15 With respect to the trigger lock provision,  
16 we think that there is a substantial argument that once  
17 this Court clarifies what the constitutional standard  
18 is, that there ought to be an opportunity for the  
19 District of Columbia to urge its construction, which  
20 would allow for a relatively robust self-defense  
21 exception to the trigger lock provision. And this Court  
22 could very well, applying Ashwander to prevent --  
23 principles allow for that kind of --

24 JUSTICE SCALIA: I don't understand that.  
25 What would that be -- that you can, if you have time,

1 when you hear somebody crawling in your -- your bedroom  
2 window, you can run to your gun, unlock it, load it and  
3 then fire? Is that going to be the exception?

4 GENERAL CLEMENT: If that's going to be the  
5 exception, it would clearly be inadequate. And I think  
6 that -- I mean the District of Columbia can speak to  
7 this, but it seems to me that if, for example, the  
8 police were executing a warrant at evening and had cause  
9 for doing it at evening and saw somebody with a loaded  
10 gun on their night stand with no children present and  
11 without a trigger lock, it seems to me that that would  
12 be a good test case to decide whether or not their  
13 construction would provide for an exception to the  
14 trigger lock provision in that case.

15 JUSTICE GINSBURG: General Clement --

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

19 JUSTICE GINSBURG: There is a lot of talk  
20 about standards and stock words like strict scrutiny.  
21 Does it make a practical difference whether we take your  
22 standard or the strict scrutiny that was in the D.C.  
23 Circuit's opinion? And specifically there is a whole  
24 panoply of Federal laws restricting gun possession.  
25 Would any of them be jeopardized under your standard?

1 And the same question with the strict scrutiny; does  
2 it make any difference?

3 GENERAL CLEMENT: In our view it makes a  
4 world of difference, Justice Ginsburg, because we  
5 certainly take the position, as we have since --  
6 consistently since 2001, that the Federal firearm  
7 statutes can be defended as constitutional, and that  
8 would be consistent with this kind of intermediate  
9 scrutiny standard that we propose. If you apply strict  
10 scrutiny, I think that the result would be quite  
11 different, unfortunately.

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

24 I'm not sure why we have to articulate some  
25 very intricate standard. I mean, these standards that

1 apply in the First Amendment just kind of developed over  
2 the years as sort of baggage that the First Amendment  
3 picked up. But I don't know why when we are starting  
4 afresh, we would try to articulate a whole standard that  
5 would apply in every case?

6 GENERAL CLEMENT: Well, Mr. Chief Justice,  
7 let me say a couple of things about that, which is to  
8 say that if this Court were to decide this case and make  
9 pellucidly clear that it really was focused very  
10 narrowly on this case and it was in some respects  
11 applying a sui generis test, we think that would be an  
12 improvement over the court of appeals' opinion, which is  
13 subject to more than one reading, but as Justice  
14 Ginsburg's question just said, it's certainly  
15 susceptible to a reading that it embodies strict  
16 scrutiny. In fact --

17 JUSTICE GINSBURG: Well, it did. It said  
18 it's just like the First Amendment. First Amendment has  
19 exceptions, but strict scrutiny applies. It says strict  
20 scrutiny applies here too.

21 GENERAL CLEMENT: I --

22 JUSTICE SCALIA: But that opinion also did  
23 use the militia prologue to say it's only the kind of  
24 weapons that would be useful in militia, and that are  
25 commonly -- commonly held today. Is there any Federal

1 exclusion of weapons that applies to weapons that are  
2 commonly held today? I don't know what you're worried  
3 about. Machine guns, what else? Armored bullets, what  
4 else?

5           GENERAL CLEMENT: Well, Justice Scalia, I  
6 think our principal concern based on the parts of the  
7 court of appeals' opinion that seemed to adopt a very  
8 categorical rule were with respect to machine guns,  
9 because I do think that it is difficult -- I don't want  
10 to foreclose the possibility of the government, Federal  
11 Government making the argument some day -- but I think  
12 it is more than a little difficult to say that the one  
13 arm that's not protected by the Second Amendment is that  
14 which is the standard issue armament for the National  
15 Guard, and that's what the machine gun is.

16           CHIEF JUSTICE ROBERTS: But this law didn't  
17 involve a restriction on machine guns. It involved an  
18 absolute ban. It involved an absolute carry  
19 prohibition. Why would you think that the opinion  
20 striking down an absolute ban would also apply to a  
21 narrow one -- narrower one directed solely to machine  
22 guns?

23           GENERAL CLEMENT: I think, Mr. Chief  
24 Justice, why one might worry about that is one might  
25 read the language of page 53a of the opinion as

1 reproduced in the petition appendix that said: Once it  
2 is an arm, then it is not open to the District to ban it.

3 Now, it seems to me that the District is not  
4 strictly a complete ban because it exempts pre-1976  
5 handguns. The Federal ban on machine guns is not,  
6 strictly speaking, a ban, because it exempts pre --  
7 pre-law machine guns, and there are something like  
8 160,000 of those.

9 JUSTICE SCALIA: But that passage doesn't  
10 mean once it's an arm in the dictionary definition of  
11 arms. Once it's an arm in the specialized sense that  
12 the opinion referred to it, which is -- which is the  
13 type of a weapon that was used in militia, and it is --  
14 it is nowadays commonly held.

15 GENERAL CLEMENT: Well --

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

18 GENERAL CLEMENT: Well, I -- I hope that you  
19 read it that way. But I would also say that I think  
20 that whatever the definition that the lower court  
21 opinion employed, I do think it's going to be difficult  
22 over time to sustain the notion -- I mean, the court of  
23 appeals also talked about lineal descendants. And it  
24 does seem to me that, you know, just as this Court would  
25 apply the Fourth Amendment to something like heat

1 imagery, I don't see why this Court wouldn't allow the  
2 Second Amendment to have the same kind of scope, and  
3 then I do think that reasonably machine guns come within  
4 the term "arms."

5 Now, if this Court wants to say that they  
6 don't -- I mean -- I mean -- we'd obviously welcome that  
7 in our -- in our obligation to defend the  
8 constitutionality of acts of Congress.

9 The one other thing I would say is that this  
10 is an opinion that is susceptible of different readings.  
11 It's interesting that Respondents' amici have different  
12 characterizations of it. The Goldwater Institute calls  
13 it strict scrutiny; the State of Texas calls it  
14 reasonable -- reasonableness review.

15 CHIEF JUSTICE ROBERTS: Thank you, General.

16 GENERAL CLEMENT: Thank you.

17 CHIEF JUSTICE ROBERTS: Mr. Gura.

18 ORAL ARGUMENT OF ALAN GURA

19 ON BEHALF OF THE RESPONDENTS

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

22 All 50 states allow law-abiding citizens to  
23 defend themselves and their families in their homes with  
24 ordinary functional firearms including handguns. Now,  
25 I'd like to respond to one points that was raised lately



1 by the General --

2 JUSTICE SCALIA: Talk a little slower; I'm  
3 not following you.

4 MR. GURA: Okay. I'd like to respond --  
5 certainly, Justice Scalia. I'd like to respond to the  
6 point about the -- the District of Columbia's position  
7 over the years with respect to the functional firearms  
8 ban.

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

20 The second opportunity that the Petitioners  
21 had to urge this sort of self-defense construction was  
22 actually in this case in the district court. We had a  
23 motion for summary judgment and we made certain factual  
24 allegations in this motion, and on page 70a of the joint  
25 appendix we see portions of our statement of undisputed

1 material facts. Fact number 29, which was conceded by  
2 the District of Columbia, reads: The "defendants  
3 prohibit the possession of lawfully owned firearms for  
4 self-defense within the home, even in instances when  
5 self-defense would be lawful by other means under  
6 District of Columbia law." The citation for that is a  
7 functional firearms ban, and that point was conceded.

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

23           JUSTICE BREYER: You're saying that this is  
24 unreasonable, and that really is my question because I'd  
25 like you to assume two things with me, which you

1 probably don't agree with, and I may not agree with  
2 them, either.

3 (Laughter.)

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

6 Assume that the -- that there is an  
7 individual right, but the purpose of that right is to  
8 maintain a citizen army; call it a militia; that that's  
9 the basic purpose. So it informs what's reasonable and  
10 what isn't reasonable.

11 Assume -- and this is favorable to you but  
12 not as favorable as you'd like -- assume that we are  
13 going to decide whether something is proportionate or  
14 apply an intermediate standard in light of the purpose.  
15 All right.

16 Now, focus on the handgun ban. As I read  
17 these 80 briefs -- and they were very good, I mean  
18 really good and informative on both sides -- and I'm  
19 trying to boil down the statistics where there is  
20 disagreement, and roughly what I get -- and don't  
21 quarrel with this too much; it's very rough -- that  
22 80,000 to 100,000 people every year in the United States  
23 are either killed or wounded in gun-related homicides or  
24 crimes or accidents or suicides, but suicide is more  
25 questionable. That's why I say 80,000 to 100,000.

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

4           Now, in light of that, why isn't a ban on  
5           handguns, while allowing the use of rifles and muskets,  
6           a reasonable or a proportionate response on behalf of  
7           the District of Columbia?

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

18          And so if we assume the sort of military  
19          purpose to the Second Amendment is an individual right,  
20          then the handgun ban, as noted by our military amici,  
21          would impede that.

22          JUSTICE BREYER: Well, I didn't read -- I  
23          read the two military briefs as focusing on the nature  
24          of the right, which was quite a pretty good argument  
25          there that the nature of the right is to maintain a

1 citizen army.

2           And to maintain that potential today, the  
3 closest we come is to say that there is a right for  
4 people to understand weapons, to know how to use them,  
5 to practice with them. And they can do that, you see,  
6 with their rifles. They can go to gun ranges, I guess,  
7 in neighboring States.

8           But does that make it unreasonable for a  
9 city with a very high crime rate, assuming that the  
10 objective is what the military people say, to keep us  
11 ready for the draft, if necessary, is it unreasonable  
12 for a city with that high crime rate to say no handguns  
13 here?

14           JUSTICE SCALIA: You want to say yes.

15           JUSTICE BREYER: Now, why?

16           JUSTICE SCALIA: That's your answer.

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

21           MR. GURA: The answer is yes, as Justice  
22 Scalia noted, and it's unreasonable, and it actually  
23 fails any standard of review that might be offered under  
24 such a construction of individual rights because  
25 proficiency with handguns, as recognized as a matter of

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

8 JUSTICE STEVENS: May I ask this question:  
9 In answering yes, do you attach any significance to the  
10 reference to the militia in the Second Amendment?

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

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

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

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

23 MR. GURA: No, Your Honor. I think that the  
24 militia clause informs the purpose -- informs a purpose.  
25 It gives us some guidepost as to how we look at the

1 Second Amendment, but it's not the exclusive purpose of  
2 the Second Amendment. Certainly, the Founders cared  
3 very much about --

4 JUSTICE GINSBURG: Is it a limitation? Is  
5 it any limitation on the legislature? Is the first  
6 clause any limitation on the legislature?

7 MR. GURA: It is a limitation to one extent,  
8 Your Honor, the extent recognized in Miller where the  
9 Miller Court asked whether or not a particular type of  
10 arm that's at issue is one that people may individually  
11 possess. It looked to the militia clause and,  
12 therefore, adopted a militia purpose as one of the two  
13 prongs of Miller.

14 And so, certainly, if there were -- if the  
15 Court were to continue Miller -- and Miller was the only  
16 guidance that the lower court had, certainly, as to what  
17 arms are protected or unprotected by the Second  
18 Amendment. Then yes, the --

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

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

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

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

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

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.

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

24 Now, you may say the kind of arms is colored  
25 by the militia. But it speaks of the right of the



1 people. So why not acknowledge that it's -- it's  
2 broader than the first clause?

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

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

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

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

19 MR. GURA: That's correct, Your Honor. In  
20 fact, that view was taken by William Rawle in his 1828  
21 treatise, view of the Constitution. Rawle was, of  
22 course, a ratifier of the Second Amendment. He sat in  
23 the Pennsylvania Assembly in 1790. And if we look at  
24 his description of the Second Amendment, he bifurcates  
25 it. First, he discusses the militia clause, and he

1 lavishes some qualified praise on it. And then --

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

11 MR. GURA: Oh, yes. Yes, Justice Kennedy.  
12 The right of the people to keep and bear arms was  
13 derived from Blackstone. It was derived from the  
14 common law English right which the Founders wanted to  
15 expand.

16 In fact, the chapter in which Blackstone  
17 discusses in his treatise, his fifth auxiliary  
18 right to arms, is entitled --

19 JUSTICE BREYER: That brings me back to the  
20 question because Blackstone describes it as a right to  
21 keep and bear arms "under law." And since he uses the  
22 words "under law," he clearly foresees reasonable  
23 regulation of that right. And so does the case not  
24 hinge on, even given all your views, on whether it is or  
25 is not a reasonable or slightly tougher standard thing

1 to do to ban the handgun, while leaving you free to use  
2 other weapons?

3 I mean, I notice that the militia statute,  
4 the first one, spoke of people coming to report, in  
5 1790, or whenever, with their rifles, with their  
6 muskets, but only the officers were to bring pistols.  
7 So that, to me, suggests they didn't see pistols as that  
8 crucial even then, let alone now.

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

10 JUSTICE BREYER: What's your response is the  
11 question.

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

15 JUSTICE KENNEDY: That are not appropriate  
16 to?

17 MR. GURA: That are not appropriate to  
18 civilian use.

19 JUSTICE GINSBURG: For example?

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

1           The fact is that this Court's Miller test  
2 is the only guidance that we had below, and I think it  
3 was applied faithfully. Once a weapon is, first of all,  
4 an "arm" under the dictionary definition -- and Webster  
5 has a very useful one -- then you look to see whether  
6 it's an arm that is meant to be protected under the  
7 Second Amendment, and we apply the two-pronged Miller  
8 test. And usually one would imagine if an arm fails the  
9 Miller test because it's not appropriate for common  
10 civilian applications --

11           JUSTICE GINSBURG: But why wouldn't a  
12 machine gun qualify? General Clement told us that that's  
13 standard issue in the military.

14           MR. GURA: But it's not an arm of the type  
15 that people might be expected to possess commonly in  
16 ordinary use. That's the other aspect of Miller.  
17 Miller spoke about the militia as encompassing the  
18 notion that people would bring with them arms of the  
19 kind in common use supplied by themselves. And --

20           CHIEF JUSTICE ROBERTS: Is there any  
21 parallel --

22           JUSTICE GINSBURG: At this time -- I would  
23 just like to follow up on what you said, because if you  
24 were right that it was at that time, yes; but that's not  
25 what Miller said. It says that the gun in question

1 there was not one that at this time -- this time, the  
2 time of the Miller decision -- has a reasonable  
3 relationship to the preservation or efficiency of a  
4 well-regulated militia. So it's talking about this  
5 time.

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

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

19 CHIEF JUSTICE ROBERTS: Is there any  
20 parallel at the time that the amendment was adopted to  
21 the machine gun? In other words, I understand your  
22 point to be that, although that's useful in modern  
23 military service, it's not something civilians possess.  
24 Was there anything like that at the time of the  
25 adoption, or were the civilian arms exactly the same as

1 the ones you'd use in the military?

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

9 JUSTICE KENNEDY: It seems to me that  
10 Miller, as we're discussing it now, and the whole idea  
11 that the militia clause has a major effect in  
12 interpreting the operative clause is both overinclusive  
13 and underinclusive. I would have to agree with Justice  
14 Ginsburg that a machine gun is probably more related to  
15 the militia now than a pistol is. But that -- that  
16 seems to me to be allowing the militia clause to make no  
17 sense out of the operative clause in present-day  
18 circumstances.

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

24 JUSTICE KENNEDY: My point is: Why is that  
25 of any real relevance to the situation that faces the

1 homeowner today?

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

5 JUSTICE KENNEDY: Well, you're being  
6 faithful to Miller. I suggest that Miller may be  
7 deficient.

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

17 And, on the other hand, everything that  
18 civilians today might wish to have in ordinary common  
19 use -- handguns, rifles, and shotguns -- are militarily  
20 useful weapons.

21 So we de-emphasize the military aspects of  
22 Miller as being ultimately not very useful guidance for  
23 courts. And the better guidance would be to emphasize  
24 the commonsense rule that I think judges would have  
25 really no trouble applying, and we do this all the time

1 in constitutional law: To simply make a decision as to  
2 whether or not whichever arm comes up at issue is an arm  
3 of the kind that you could really reasonably expect  
4 civilians to have.

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

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

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

24 Things change. But we give in both  
25 instances, then and now, leeway to the city and States



1 to work out what's reasonable in light of their  
2 problems. Would that be a way of approaching it?

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

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

17 JUSTICE BREYER: No, not self-defense being  
18 the harm. And I agree with you that this, the firearm  
19 analogy, floats up there, but it isn't going to decide  
20 this case, the Massachusetts statute. I agree with you  
21 about that.

22 What you've suddenly given me the idea of  
23 doing, which I'm testing, is to focus not just on what  
24 the kind of weapon is; don't just look to see whether  
25 it's a cannon or a machine gun, but look to see what the

1 purpose of this regulation is, and does it make sense in  
2 terms of having the possibility of people trained in  
3 firearms.

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

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

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

18 MR. GURA: Well, originally it was not. But  
19 what we've seen with the Fourteenth Amendment, and we've  
20 seen --

21 JUSTICE SCALIA: But the time we're talking  
22 about, the firearms-in-the-home ordinance, when was  
23 that?

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

25 JUSTICE STEVENS: How do you explain the

1 fact that if you include self-defense, that only two  
2 States, Pennsylvania and Vermont, did refer to  
3 self-defense as a permissible justification and all of  
4 the others referred to common defense or defense of the  
5 State, and in the Articles of Confederation and the  
6 Constitution itself there is no reference to  
7 self-defense?

8 MR. GURA: Your Honor, the State courts  
9 interpreting those provisions that you reference had a  
10 different interpretation. For example, in 1895  
11 Massachusetts --

12 JUSTICE STEVENS: 1895. I'm talking about  
13 contemporaneous with the adoption of the Second  
14 Amendment.

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

17 JUSTICE STEVENS: Just the text of the State  
18 constitutional provisions, two of them refer to  
19 self-defense. The rest refer only to common defense; is  
20 that not correct?

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

24 JUSTICE STEVENS: I understand that judicial  
25 interpretation sometimes is controlling and sometimes is

1 not. But the text itself does draw a distinction, just  
2 as the Second Amendment does. It doesn't mention  
3 self-defense.

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

8 JUSTICE STEVENS: Well, if you look at the  
9 individual rights I suppose you start back in 1689, the  
10 Declaration of Rights in England. And the seventh  
11 provision that they talked about said that: "The  
12 subjects which are Protestants may have arms for their  
13 defense suitable to their conditions and as allowed by  
14 law." Now do you think the term "suitable to their  
15 conditions" limited the number of people who had access  
16 to arms for self-defense?

17 MR. GURA: It was in England, but that was  
18 criticized by the Framers. St. George Tucker's edition  
19 of Blackstone --

20 JUSTICE STEVENS: So you think that the  
21 Second Amendment is a departure from the provision in  
22 the Declaration of Rights in England?

23 MR. GURA: It's quite clearly an expansion  
24 upon it.

25 JUSTICE STEVENS: So that's not really

1 your -- you would not confine the right the way the  
2 English did then?

3 MR. GURA: I think the common law of England  
4 is a guide, and it's always a useful guide because  
5 that's where the -- where we -- where we look to, to  
6 interpret --

7 JUSTICE SCALIA: It's useful for such  
8 purposes as what "keep and bear arms" means and things  
9 of that sort.

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

12 JUSTICE SCALIA: They certainly didn't want  
13 to preserve the kind of militia that America had, which  
14 was a militia separate from the State, separate from the  
15 government, which enabled the revolt against the  
16 British.

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

18 JUSTICE SOUTER: Is there any -- is there  
19 any record evidence that the anti-Federalist objections  
20 to the Constitution that ultimately resulted in the  
21 Second Amendment were premised on any failure to  
22 recognize an individual right of self-defense or hunting  
23 or whatnot, as distinct from being premised on concern  
24 about the power of the national government under the  
25 militia clauses in Article I?

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

6           JUSTICE SOUTER: No, but they didn't -- they  
7 didn't limit it to self-defense. I mean, what provoked  
8 it, as I understand it, was concern about the militia  
9 clauses, and I mean, you're certainly correct. I  
10 agree with you. Pennsylvania went beyond that. It  
11 was -- it was one of three States, as I understand, that  
12 did go beyond it. But the provocation for getting into  
13 the subject, as I understand it, was, in each instance  
14 including Pennsylvania, concern over the national  
15 government's power over militias under Article I.

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

25           We saw one set of proposed amendments from

1 Virginia entitled "Bill of Rights," and the Second  
2 Amendment language comes from paragraph 17 of that Bill  
3 of Rights. And then we see a list of other amendments,  
4 and then we have the 11th proposed amendment, which  
5 speaks exactly to the -- reverting control over the  
6 militia back to the -- back to the States.

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

19 CHIEF JUSTICE ROBERTS: Why isn't the  
20 trigger lock provisions that are at issue here, why  
21 aren't they similar to the various provisions that  
22 Justice Breyer mentioned like the gunpowder restriction?  
23 In other words, for reasons of domestic safety, they  
24 said you can't store the gunpowder anywhere but on the  
25 top floor. Why isn't the modern trigger lock provision

1 similar to those?

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

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

10 MR. GURA: Oddly enough, a child can access  
11 a firearm that's stored consistently with the District's  
12 law, that is, a firearm which is disassembled and  
13 unloaded, nothing would prevent a child --

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

17 MR. GURA: That's true, Your Honor.  
18 However, better safe storage approach is the one used by  
19 the majority of jurisdictions, I believe, that do have  
20 such laws, which is to require safe storage, for  
21 example, in a safe. And that is a reasonable  
22 limitation. It's a strict scrutiny limitation.  
23 Whatever standard of review we may wish to apply, I  
24 think, would encompass a safe storage provision.

25 But this is not a safe storage provision



1 because we have specific exceptions that allow you to  
2 actually use the firearm in recreational shooting and  
3 also in a place of business. And we have litigation  
4 history from Washington, D.C., that tells us that we are  
5 not supposed to have an operable firearm for purposes of  
6 self-defense because they simply do not trust people to  
7 defend themselves in our home. And -- and self-defense  
8 is the heart of the Second Amendment right. That is  
9 what Blackstone was getting at when he spoke of the  
10 fifth auxiliary right to arms, because it protected the  
11 right of personal preservation.

12 JUSTICE STEVENS: You say that the right of  
13 self-defense was the heart of the Second Amendment, in  
14 your view. Strangely that some provisions suggested  
15 that and were not accepted by the authors of the Second  
16 Amendment.

17 MR. GURA: Which provisions were those,  
18 Justice Stevens?

19 JUSTICE STEVENS: Pennsylvania.

20 MR. GURA: Well, Pennsylvania's provision  
21 was certainly influential. Remember, Madison was trying  
22 to mollify the anti-Federalists' concerns. The Second  
23 Amendment is clearly addressed to Pennsylvania and New  
24 Hampshire and New York and all these other States that  
25 were demanding a right to keep and bear arms, and it

1 was always understood to be an individual right because  
2 that is the way in which the right that was violated by  
3 the British in the war of revolution that occurred not  
4 too long ago. And --

5 I'm finished.

6 JUSTICE BREYER: Thinking of your exchange  
7 with the Chief Justice and think of the trigger lock in  
8 your view and what the question was, do you want -- I  
9 don't know how well trigger locks work or not -- but do  
10 you want thousands of judges all over the United States  
11 to be deciding that kind of question rather than the  
12 city councils and the legislatures that have decided it  
13 in the context of passing laws? I mean, isn't there an  
14 issue here and a problem with respect to having courts  
15 make the kinds of decisions about who is right or not in  
16 that trigger lock argument?

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

22 JUSTICE GINSBURG: If there's a fundamental  
23 right, what about licensing? One piece -- we've talked  
24 about trigger locks, we've talked about the ban on  
25 handguns, but there is also a requirement that there be

1 a license for possession of a handgun. Assuming you're  
2 right on the first question, that you couldn't flatly  
3 ban handguns, what about a requirement that you obtain a  
4 license to carry -- to have a handgun?

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

9 JUSTICE GINSBURG: What about this very law?  
10 If you take out the ban -- there is a law on the books.  
11 It's one of the ones that you challenged. It's section  
12 22-4504(a). Wouldn't that be okay -- would that be  
13 okay? It says that you have to have a license to carry.

14 MR. GURA: Yes, so long as the licensing law  
15 is not enforced in an arbitrary and capricious manner, so  
16 long as there are some hopefully objective standards and  
17 hopefully some process for --

18 JUSTICE GINSBURG: It just says -- it says  
19 you have to get a license if you want to possess a gun.  
20 What kind of standard? It just says you have to have a  
21 license.

22 MR. GURA: Well, the government could set  
23 reasonable standards for that, Your Honor. The  
24 government could require, for example, knowledge of the  
25 State's use-of-force laws. They can require some sort

1 of vision test. They could require, perhaps,  
2 demonstrated competency. And those are the types of  
3 things that we sometimes see; background checks, of  
4 course. Those are going to be reasonable licensing  
5 requirements.

6           However, if the license requirement is we  
7 only wanted to give licenses to people who look a  
8 certain way or depends on how we feel or if the  
9 licensing office is only open Thursdays at 3:00 in the  
10 morning -- I mean, it all depends on the implementation.  
11 And --

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

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

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

22           MR. GURA: Courts would have to examine  
23 those at some point. The government would have to look  
24 at the circumstances it confronted and enact, up to some  
25 point, an age limit. I think it would be very difficult

1 to have an age limit that goes beyond 21, because that's  
2 the majority age for most things in the United States.  
3 And, in fact, we have the voting rights cases from the  
4 late '60s where --

5 JUSTICE STEVENS: May I ask this question?  
6 Are you, in effect, reading the amendment to say that  
7 the right "shall not be unreasonably infringed" instead  
8 of "shall not be infringed"?

9 MR. GURA: There is that inherent aspect to  
10 every right in the Constitution.

11 JUSTICE STEVENS: So we can -- consistent  
12 with your view, we can simply read this: "It shall not  
13 be unreasonably infringed"?

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

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

21 MR. GURA: That's another way to look at it,  
22 Your Honor. Certainly. And also --

23 CHIEF JUSTICE ROBERTS: And I assume you  
24 would define "reasonable" in light of the restrictions  
25 that existed at the time the amendment was adopted.

1 MR. GURA: Those restrictions --

2 CHIEF JUSTICE ROBERTS: You know, you can't  
3 take it into the marketplace was one restriction. So  
4 that would be -- we are talking about lineal descendents  
5 of the arms but presumably there are lineal descendents  
6 of the restrictions as well.

7 MR. GURA: Framing our practices would  
8 inform the kind of restrictions that would be accepted.  
9 But even beyond that, they also inform the contours of  
10 the right. In the Fifth Circuit, for example, we have  
11 the Emerson decision now for seven years, and the way  
12 that that court has examined the Second Amendment when  
13 they get these felon and possession bans and drug addict  
14 and possession challenges, what they say is, these  
15 people simply are outside the right, as historically  
16 understood in our country. And that's a very important  
17 aspect to remember, that the Second Amendment is part of  
18 our common law tradition, and we look to framing our  
19 practices in traditional understandings of that right to  
20 see both the reasonableness of the restrictions that are  
21 available as well as its contours.

22 JUSTICE SOUTER: Can we also look to current  
23 conditions like current crime statistics?

24 MR. GURA: To some extent, Your Honor, but  
25 we have certainly seen a lot of --

1 JUSTICE SOUTER: Well, can they consider the  
2 extent of the murder rate in Washington, D.C., using  
3 handguns?

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

7 JUSTICE SCALIA: All the more reason to  
8 allow a homeowner to have a handgun.

9 MR. GURA: Absolutely, Your Honor.

10 JUSTICE BREYER: Whose judgment is that  
11 to make?

12 JUSTICE SOUTER: That was not -- the question  
13 is whether they may consider those statistics, and I take  
14 it your answer is yes?

15 MR. GURA: Well, those statistics might be  
16 considered in some way, the fact is that at some point  
17 there is a role for judicial review. And you can't  
18 simply grab a statistic -- and some of the statistics  
19 that were used here are very weak, and studies that have  
20 been rejected by the National Academy of Sciences  
21 repeatedly. I mean, we don't really have -- it's hard  
22 to say that those laws --

23 JUSTICE SOUTER: Well, it might. But my -- I  
24 think -- I don't want you to misunderstand my question.  
25 My question is that by looking to the statistics, I'm not

1 suggesting that there is only sort of one reasonable  
2 response to them. I want to know whether -- whether the  
3 policymakers may look to them; and I take it your answer  
4 is yes?

5 MR. GURA: To some degree, yes, policymakers  
6 have to be informed by what's going on in order to make  
7 policy. However, there are constitutional limitations  
8 enforced by courts that are going to limit those  
9 policies. And when you have a ban which bans 40 percent  
10 of all weapons that are the type of weapons used by  
11 civilians, 80 percent of all self-defense occurs with  
12 handguns; when you have that kind of ban, functional  
13 firearms ban, these are extreme measures and no amount  
14 of --

15 JUSTICE SOUTER: They may be. But you're --  
16 I just want to make sure you're not making the argument  
17 that because there was not a comparable homicide rate,  
18 or for that matter, a comparable need for self-defense  
19 from handgun use in 1792, that there -- 1790 -- that  
20 therefore, the statistics of today may not be considered.  
21 You're not making that argument?

22 MR. GURA: No, Your Honor, the fact is that  
23 we can always debate these things, but the object of the  
24 Bill of Rights is to remove certain judgments from the  
25 legislature, because we can make policy arguments,



1 normative arguments about many provisions of the  
2 Constitution. But to make those arguments and say,  
3 well, we've decided as a matter of policy that the right  
4 to keep and bear arms is no longer a good idea and,  
5 therefore, we are going to have restrictions that  
6 violate that stricture in the Bill of Rights, that  
7 shouldn't pass judicial review. At some point you have  
8 to go to Article V if you think that the Constitution is  
9 impractical.

10 JUSTICE KENNEDY: But just to be clear --  
11 and I don't want to misstate your position, but my  
12 understanding -- or I at least inferred -- that you would  
13 consider it reasonable to ban shipment of machine guns  
14 and sawed-off shotguns in interstate commerce?

15 MR. GURA: Yes, Your Honor.

16 JUSTICE STEVENS: And how about a State  
17 university wants to ban students having arms in the  
18 dormitory?

19 MR. GURA: Certainly that creates some sort  
20 of an evidentiary record. Conceivably that --

21 JUSTICE STEVENS: That's the bare fact.  
22 That's the one -- a State regulation prohibits students  
23 from having arms on campus.

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

25 JUSTICE STEVENS: You'd have to think about

1 that.

2 MR. GURA: -- some factfinding. It's  
3 something that might be doable, but again, that's so far  
4 from what we have here. We have here a ban on all guns,  
5 for all people, in all homes, at all times in the  
6 Nation's capital. That quite simply is too broad and  
7 too sweeping under any level of review.

8 Thank you, Your Honor.

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

11 REBUTTAL ARGUMENT OF WALTER DELLINGER

12 ON BEHALF OF THE PETITIONERS

13 MR. DELLINGER: Mr. Chief Justice, I want to  
14 address first why this law is reasonable and should be  
15 sustained, and why the judgment below has to be  
16 reversed, however, whatever position you take on the  
17 theories of the amendment. And in defending the eminent  
18 reasonableness and careful balance of this law, I need  
19 to start with the trigger lock, about which Justice Alito  
20 asked.

21 CHIEF JUSTICE ROBERTS: Well, before you  
22 start with it, how many minutes does it take to remove a  
23 trigger lock and load a gun? Because both the gun has  
24 to be unloaded; it has to have a trigger lock under the  
25 District law.

1           MR. DELLINGER: Those are alternatives, Mr.  
2 Chief Justice.

3           CHIEF JUSTICE ROBERTS: No, disassembly and  
4 trigger lock.

5           MR. DELLINGER: I mean, this is simply an  
6 unlock.

7           CHIEF JUSTICE ROBERTS: In either case it  
8 has to be unloaded, correct?

9           MR. DELLINGER: There are some versions of  
10 the trigger lock that allow you to put the trigger lock  
11 on and then load the gun. But the piece that goes in  
12 the trigger mechanism, even someone as clumsy as I could  
13 remove it in a second.

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

18          MR. DELLINGER: You -- it's a question of  
19 where you put the parenthesis. I read that as  
20 disassembled and unloaded or under a trigger lock, and  
21 that's the -- that's the way the District reads it.

22          CHIEF JUSTICE ROBERTS: So how long does it  
23 take? If your interpretation is correct, how long does  
24 it take to remove the trigger lock and make the gun  
25 operable?

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

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

10          MR. DELLINGER:  Well --

11          CHIEF JUSTICE ROBERTS:  Is it like that?  Is  
12 it a numerical code?

13          MR. DELLINGER:  Yes, you can have one with a  
14 numerical code.

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

17                   (Laughter.)

18          MR. DELLINGER:  Let me tell you.  That's  
19 right.  Let me tell you why at the end of the day this  
20 doesn't -- this doesn't matter, for two reasons.  The  
21 lesson --

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

24          MR. DELLINGER:  It took me three seconds.  
25 I'm not kidding.  It's -- it's not that difficult to do

1 it. That was in daylight.

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

7 But here's where I want to address the  
8 trigger lock. Here's why it doesn't matter for the  
9 handgun law. The District believes that what is  
10 important here is the ban on handguns. And it also  
11 believes that you're entitled to have a functional,  
12 usable weapon for self-defense in the home, and that's  
13 why this is a very proportionate law. If --

14 CHIEF JUSTICE ROBERTS: Well, if it's  
15 proportionate -- in other words you're saying your  
16 interest is allowing self-defense in the home. That's  
17 one of your --

18 MR. DELLINGER: Yes.

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

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

25 JUSTICE ALITO: Is there anything to show

1 that the District Council ever considered the issue of  
2 self-defense? That -- because they banned handguns and  
3 they had this provision on the trigger lock which -- and  
4 the issue -- my question with the trigger lock doesn't  
5 have to do with whether trigger locks are generally a  
6 good idea. It's whether you're ever allowed to take it  
7 off for purposes of defense. There's no -- is there  
8 anything to show that the -- that the Council actually  
9 considered what sort of weapon is appropriate for  
10 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 affect the validity of the handgun  
15 law. 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  
18 whatever use makes it functional, if you don't agree  
19 with that and if you think there's a controversy on this  
20 point, because we believe you should have a functional  
21 firearm available in the home of law-abiding citizens  
22 who wish one, if we are wrong about that and the trigger  
23 lock is invalid, that has no effect on the handgun ban.

24 That is to say, the trigger lock applies to  
25 all weapons. If it's valid and it means what they say

1 it does, none of the weapons would work. We don't need  
2 a handgun; it's unusable. If it's invalid or if it has  
3 the construction we believe, it cannot possibly affect  
4 the handgun law. If you strike down the trigger lock  
5 law, you're throwing us in the briar patch where we  
6 think it's we're happy to be; if all we have to do  
7 is to make clear in the trigger lock law what we have  
8 said here today, that it's, it's available for  
9 self-defense.

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

14 MR. DELLINGER: That only applies if it's --  
15 if it's unregistered. Now, you can't register a  
16 handgun, you can't carry a handgun, but that's because  
17 it's pro -- its possession is prohibited. That is to  
18 say you can't carry marijuana or heroin from one room to  
19 the other either, because you can't use it at all. I  
20 think that's the --

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

1           MR. DELLINGER: Well, it's -- it's -- the  
2 carry provision, you cannot carry unregistered firearms.  
3 That's just a general requirement, that firearms be  
4 registered. You're not allowed to register handguns is  
5 the mechanism by which they are prohibited.

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

14           CHIEF JUSTICE ROBERTS: Well, isn't that  
15 covered by the provision that you have the right to "keep  
16 arms"?

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

22           JUSTICE SCALIA: You mean you can't have any  
23 more arms than you would need to take with you to the  
24 militia? You can't have a -- you can't have a -- you  
25 know, a turkey gun and a duck gun and a 30.06 and a 270



1 and -- you know, different -- different hunting guns for  
2 different --

3 MR. DELLINGER: Well --

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

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

7 JUSTICE SCALIA: You can have a 12-gauge  
8 and that's it.

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

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

17 MR. DELLINGER: I do not know why that would  
18 pass the reasonableness scrutiny that this law would  
19 because a powerful, overwhelming case could be made that  
20 you're eliminating the one type of weapon -- this law is  
21 -- is designed only for the weapon that is concealable  
22 and movable, that can be taken into schools and onto the  
23 Metro, can be easily stolen and transmitted among  
24 children.

25 JUSTICE KENNEDY: I'm asking about the

1 constitutional standard you apply to a hypothetical  
2 statute which would prohibit the guns Justice Scalia  
3 described. What is your position as to the validity of  
4 such a hypothetical law?

5 MR. DELLINGER: You would apply this  
6 standard. You would ask whether the ban is one that's  
7 carefully balanced considerations of gun ownership and  
8 public safety. I don't see how, once we are in the land  
9 where you -- where there is a right, there is a far  
10 weaker case if there is any need for public safety to --  
11 to limit the number of guns one has. Here there is an  
12 overwhelming case and we are talking about local  
13 legislation.

14 I know, Justice Kennedy, that you would be  
15 concerned about a national government which sets a  
16 single standard for rural and urban areas, for East and  
17 West, North and South. Here you have legislation that  
18 is adopted by a group of citizens in the District,  
19 operating under the authority of Congress, but it is  
20 local legislation. And if it's still good law, that  
21 States and local governments across the country can  
22 strike these balances, as they have, it would be deeply  
23 ironic to preclude the District of Columbia as being the  
24 only place that could enact legislation free of the  
25 strictures of the Second Amendment.

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

16           Thank you, Mr. Chief Justice.

17           CHIEF JUSTICE ROBERTS: Thank you,  
18 Mr. Dellinger.

19           The case is submitted.

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

22

23

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