

**District of Columbia v Heller Case**  
**Heard before the US Supreme Court 3 18 08**  
**Raw Transcript**

IN THE SUPREME COURT OF THE UNITED STATES ----- x DISTRICT OF  
COLUMBIA, : ET AL., :

Petitioners :

v. : No. 07-290 DICK ANTHONY HELLER. : ----- x

Washington, D.C. Tuesday, March 18, 2008

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

APPEARANCES: WALTER DELLINGER, ESQ., Washington, D.C.; on behalf of the Petitioners.

GEN. PAUL D. CLEMENT, ESQ., Solicitor General, Department of Justice, Washington, D.C.; on behalf Of the United States, as amicus curiae, supporting the Petitioners.

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

C O N T E N T S

ORAL ARGUMENT OF PAGE WALTER DELLINGER, ESQ.

On behalf of the Petitioners 3 GEN.

PAUL D. CLEMENT, ESQ. On behalf of the United States, as amicus curiae, supporting the Petitioners 27

ALAN GURA, ESQ.

On behalf of the Respondent 48 REBUTTAL ARGUMENT OF WALTER DELLINGER, ESQ.

On behalf of the Petitioners 81

**PROCEEDINGS** (10:06 a.m.)

**CHIEF JUSTICE ROBERTS:** We will hear argument today in Case 07-290, District of Columbia versus Heller. Mr. Dellinger. ORAL ARGUMENT OF WALTER DELLINGER ON BEHALF OF THE PETITIONERS MR.

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

The Second Amendment was a direct response to concern over Article I, Section 8 of the Constitution, which gave the new national Congress the surprising, perhaps even the shocking, power to organize, arm, and presumably disarm the State militias. What is at issue this morning is the scope and nature of the individual right protected by the resulting amendment and the first text to consider is the phrase protecting a right to keep and bear arms. In the debates over the Second Amendment, every person who used the phrase "bear arms" used it to refer to the use of arms in connection with militia service and when Madison introduced the amendment in the first Congress, he exactly equated the phrase "bearing arms" with, quote, "rendering military service." We know this from the inclusion in his draft of a clause exempting those with religious scruples. His clause says "The right of the people to keep and bear arms shall not be infringed, a well armed and well regulated militia being the best security of a free country, but no person religiously scrupulous of bearing arms shall be compelled to render military service in person." And even if the language of keeping and bearing arms were ambiguous, the amendment's first clause confirms that the right is militia-related.

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

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

**CHIEF JUSTICE ROBERTS:** But if that's right, doesn't that cut against you? If the militia included all the people, doesn't the preamble that you rely on not really restrict the right much at all? It includes all the people.

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

**JUSTICE KENNEDY:** One of the concerns, Mr. Dellinger, of the framers, was not to establish a practice of amending the Constitution and its important provisions, and it seems to me that there is an interpretation of the Second Amendment differing from that of the district court and in Miller and not advanced particularly in the red brief, but that conforms the two clauses and in effect delinks them. The first clause I submit can be read consistently with the purpose I've indicated of simply reaffirming the existence and the importance of the militia clause. Those were very important clauses. As you've indicated, they're in Article I and Article II. And so in effect the amendment says we reaffirm the right to have a militia, we've established it, but in addition, there is a right to bear arms. Can you comment on that?

**MR. DELLINGER:** Yes.

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

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

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

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

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

**MR. DELLINGER:** Yes, but once you assume that the clause is designed to protect the militia, it -- surely it's the militia that decides whether personal possession is necessary. I mean, Miller -- what makes no sense is for Miller to require the arm to be militia-related if the right is not, and the key phrase is "bear arms." If people -

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

**MR. DELLINGER:** No. I think -

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

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

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

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

**JUSTICE SCALIA:** Blackstone thought it was important. Blackstone thought it was important. He thought the right of self-defense was inherent, and the framers were devoted to Blackstone. Joseph Story, the first commentator on the Constitution and a member of this Court, thought it was a personal guarantee.

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

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

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

**JUSTICE GINSBURG:** Mr. Dellinger -

**MR. DELLINGER:** Yes.

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

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

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

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

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

**MR. DELLINGER:** That is correct.

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

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

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

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

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

**MR. DELLINGER:** It is by no means clear that the Federal Government could abolish the State militia. It may be presupposed by the Article I, Section 8, clauses 15 and 16, and by the Second Amendment that the States may have a militia. That issue has been left open as to whether you could do that, and it can be called into Federal service but only in particular circumstances. Now I think the better argument for the other side, if, if there is to be a militia relatedness aspect of the Second Amendment, as we think clear from all of its terms, then Heller's proposed use of a handgun has no connection of any kind to the preservation or efficiency of a militia and therefore the case is over.

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

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

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

**MR. DELLINGER:** The debate over the militia clause -- what is shocking about the militia clauses is that this is a, a new national government that for the first time has the power to create a standing army of professionals. The militia were people who came from the people themselves, put down their weapons of trade. The States were devoted to the ideas of their militia of volunteers, and of all the powers granted to the Federal Government one of the most surprising was to say that Congress shall have the power to organize, arm, and discipline the militia and to -- even though the officers could be appointed by the State, the discipline had to be according to Congress. And this was -- this caused a tremendous negative reaction to the proposed Constitution.

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

**MR. DELLINGER:** No.

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

**MR. DELLINGER:** It restricted in our view the authority of the Federal Government to interfere with the arming of the militia by the States. And the word that caused the most focus was to "arm" and that is to disarm. Now, what I think is happening is that two different rights are being put together. One was a textual right to protect the militia. I think the better argument for the -- for the other side, for Mr. Heller, is that the amendment's purpose is militia protective, but it was overinclusive in the way that several of you have suggested, and that is that, as the court below said, preserving the individual right, presumably to have guns for personal use, was the best way to ensure that the militia could serve when called. But that right, this right of personal liberty, the Blackstonian right, is an unregulated right to whatever arm, wherever kept, however you want to store it, and for the purposes an individual decides, that is a libertarian ideal. It's not the text of the Second Amendment, which is expressly about the security of the State; it's about well-regulated militias, not unregulated individual license, as is

**JUSTICE SOUTER:** So what you are -- what you are saying is that the individual has a right to challenge a Federal law which in effect would disarm the militia and make it impossible for the militia to perform those functions that militias function. Isn't that the nub of what you're saying?

**MR. DELLINGER:** Yes. That is correct.

**JUSTICE SOUTER:** Okay.

**MR. DELLINGER:** And if the Court -

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

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

**JUSTICE STEVENS:** I'm not talking about those.

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

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

**MR. DELLINGER:** I think that the -- the State amendments are generally written in different -- in different terms. If you're going to protect the kind of right that is -- that is being spoken of here, different from the militia right, the plain language to do it would be "Congress or the States shall pass no law abridging the right of any person to possess weapons for personal use." And that's not the right that is created here. One of the troublesome aspects of viewing this as a right of personal use is that that is the kind of fundamental liberty interest that would create a real potential for disruption. Once you unmoor it from -- or untether it from its connection to the protection of the State militia, you have the kind of right that could easily be restrictions on State and local governments and -

**JUSTICE KENNEDY:** Well, there's no question that the English struggled with how to work this. You couldn't conceal a gun and you also couldn't carry it, but yet you had a right to have it. Let me ask you this: Do you think the Second Amendment is more restrictive or more expansive of the right than the English Bill of Rights in 1689?

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

**JUSTICE KENNEDY:** I think that would be more restrictive.

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

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

**MR. DELLINGER:** Well -

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

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

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

**MR. DELLINGER:** This is correct.

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

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

**JUSTICE SCALIA:** And as I recall the legislation against Scottish highlanders and against -against Roman Catholics did use the term -- forbade them to keep and bear arms, and they weren't just talking about their joining militias; they were talking about whether they could have arms.

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

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

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

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

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

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

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

**JUSTICE KENNEDY:** The purposes of what?

**MR. DELLINGER:** I'm sorry.

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

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

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

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

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

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

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

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

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

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

**JUSTICE GINSBURG:** It's in interpretation.

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

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

**MR. DELLINGER:** That is -

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

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

**JUSTICE SCALIA:** How many people in the country?

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

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

**MR. DELLINGER:** But it's the -- the court protects weapons suitable for military use that are lineal descendants. I don't know why an improved bullet wouldn't be covered, unless you adopt the kind of reasonableness standard that we suggest, where you look to the fact that -- and I don't -- some people think machine guns are more dangerous than handguns -- they shoot a lot of people at once -- but a handgun is concealable and movable. It can be taken into schools, into buses, into government office buildings, and that is the particular danger it poses in a densely populated urban area.

**CHIEF JUSTICE ROBERTS:** Well, I'm not sure that it's accurate to say the opinion below allowed those. The law that the opinion, the court below, was confronted with was a total ban, so that was the only law they considered. If the District passes a ban on machine guns or whatever, then that law -- that law would be considered by the court and perhaps would be upheld as reasonable. But the only law they had before them was a total ban.

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

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

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

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

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

**MR. DELLINGER:** That is not the city's position, and we have no dispute with the other side on the point of what the right answer should be. It is a universal or near universal rule of criminal law that there is a self-defense exception. It goes without saying. We have no argument whatsoever with the notion that you may load and have a weapon ready when you need to use it for self-defense. I'm going to reserve the remainder of my time for rebuttal.

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

**JUSTICE KENNEDY:** Because I did interrupt Justice Breyer.

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

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

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

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

**MR. DELLINGER:** When you -- when you have one --

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

**MR. DELLINGER:** Well, every -- every phrase of the amendment, like "well regulated," "security of the State," is something different than a -- a libertarian right. Here you have, I think, a fully -- on this, particularly on a facial challenge, there is no showing that rifles and shotguns are not fully available for all of the purposes of defense. There is no indication that the District militia is an entity that needs individuals to have their own handguns. You -- you -- there is a step that is -- that is missing here. The well-regulated militia is not necessarily about everyone having a gun. A militia may decide to organize -- be organized that way, in which case you would have a different notion. But here, I think, when you come down to apply this case, if you look at about five factors, that other weapons are allowed, important regulatory interests of these particularly dangerous weapons are -- is clearly a significant regulatory, and important regulatory, interest. In two respects this is removed from the core of the amendment. Even if it is not limited to militia service, even in the court below, no one doubts that that was, as the court below said, the most salient objective. So this is in the penumbra or the periphery, not the core. It was undoubtedly aimed principally, if not exclusively, at national legislation which displaced the laws in all of the States, rural as well as urban. Here you've got local legislation responsive to local needs, and this is local legislation in the seat of the government where Congress, which was created in order to protect the security of the national government, and where it would be extraordinary to assume that this is the one place that you're not going to incorporate it, the one area in the United States where no government, free of restrictions of the Second Amendment, could control dangerous weapons.

**CHIEF JUSTICE ROBERTS:** Thank you, Mr. Dellinger. General Clement.

**ORAL ARGUMENT OF GEN. PAUL D. CLEMENT**

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

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

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

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

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

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

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

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

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

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

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

**GENERAL CLEMENT:** Absolutely, Justice Ginsburg, and just -- I mean, to give you a clear example, we would take the position that the kind of plastic guns or guns that are specifically designed to evade metal detectors that are prohibited by Federal law are not "arms" within the meaning of the Second Amendment and are not protected at all. And that would be the way we would say that you should analyze that provision of Federal law, as those are not even arms within the provisions of the Second Amendment. I think to make the same argument about machine guns would be a much more difficult argument, to say the least, given that they are the standard-issue weapon for today's armed forces and the State-organized militia.

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

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

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

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

**JUSTICE STEVENS:** Not plenary authority. Not plenary authority.

**GENERAL CLEMENT:** Except for that which is reserved in -

**JUSTICE STEVENS:** Who appoints the officers?

**GENERAL CLEMENT:** Yes -- no, absolutely. There is something reserved in clause 16. But let me just say, if the Second Amendment had the meaning that the District of Columbia ascribes to it, one would certainly think that James Madison, when he proposed the Second Amendment would have proposed it as an amendment to Article I, Section 8, clause 16. He didn't. He proposed it as an amendment to Article I, Section 9, which encapsulates the individual rights to be free from bills of attainder and ex post facto clauses.

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

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

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

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

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

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

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

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

**JUSTICE STEVENS:** The Pennsylvania proposal.

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

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

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

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

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

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

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

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

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

But what I was about to say is I think what is highly relevant in considering the threshold question of whether there's an individual right here at all is that the parallel provisions in the English Bill of Rights that were borrowed over included the right to petition and the right to keep and bear arms. Both of those appear with specific parallel references to the people. They are both rights that are given to the people. And as this Court has made clear in *Verdugo-Urquidez*, that's a reference that appears throughout the Bill of Rights as a reference to the entire citizenry.

**JUSTICE SOUTER:** May I go back to another point, which is to the same point, and that is consistent with your emphasis on the people was your emphasis a moment ago on the distinction between keeping and bearing arms. The "keep" part sounds in your, in your mind at least, to speak of an individual right not necessarily limited by, by the exigencies of military service. My question is, if that is correct and "keep" should be read as, in effect, an independent guarantee, then what is served by the phrase "and bear"? In other words, if the people can keep them and they have them there for use in the militia as well as to hunt deer, why do we -- why do we have to have a further reference in there to a right to bear as well as to keep arms? And my point is it sounds to me as though "keep and bear" forms one phrase rather than two. But I want to know what your answer is to that.

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

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

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

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

**GENERAL CLEMENT:** Well, I will grant you this, that "bear arms" in its unmodified form is most naturally understood to have a military context. But I think the burden of the argument on the other side is to make it have an exclusively military context. And as a number of the briefs have pointed out, that's not borne out by the framing sources. In one place, although it's not bearing arms, it's bearing a gun, I think it's highly relevant that Madison and Jefferson with respect to this hunting bill that Jefferson wrote and Madison proposed, specifically used in the hunting context the phrase "bear a gun," and so I do think in that context -

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

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

**GENERAL CLEMENT:** And again, I think various phrases were, were used. I also think that some of the disarmament provisions specifically used the word "keep." And so I think there is some independent meaning there, which is one point. And then I do think that, even in the context of bearing arms, I will grant you that "arms" has a military connotation and I think Miller would certainly support that, but I don't think it's an exclusively military connotation.

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

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

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

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

**JUSTICE SOUTER:** And you want to talk about the standard, and your light's on. (Laughter.)

**GENERAL CLEMENT:** Okay. I would like to talk about the standard and my light is indeed on, so let me do that. I think there are several reasons why a standard as we suggest in our brief rather than strict scrutiny is an appropriate standard to be applied in evaluating these laws. I think first and foremost, as our colloquy earlier indicated, there is -- the right to bear arms was a preexisting right. The Second Amendment talks about "the right to bear arms," not just "a right to bear arms." And that preexisting always coexisted with reasonable regulations of firearms. And as you pointed out, Justice Souter, to be sure when you're making the translation from the English Bill of Rights you always have to deal with parliamentary supremacy. But it is very striking that, as Justice Stevens said, the right was conditioned on the conditions, which I think meant what class you were, and also subject expressly to the Parliament, the laws of Parliament.

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

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

**JUSTICE SCALIA:** Like libel.

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

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

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

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

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

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

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

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

**JUSTICE GINSBURG:** Can I interrupt for a minute?

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

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

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

**CHIEF JUSTICE ROBERTS:** Well, these various phrases under the different standards that are proposed, "compelling interest," "significant interest," "narrowly tailored," none of them appear in the Constitution; and I wonder why in this case we have to articulate an all-encompassing standard. Isn't it enough to determine the scope of the existing right that the amendment refers to, look at the various regulations that were available at the time, including you can't take the gun to the marketplace and all that, and determine how these -- how this restriction and the scope of this right looks in relation to those? I'm not sure why we have to articulate some very intricate standard. I mean, these standards that apply in the First Amendment just kind of developed over the years as sort of baggage that the First Amendment picked up. But I don't know why when we are starting afresh, we would try to articulate a whole standard that would apply in every case?

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

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

**GENERAL CLEMENT:** I -

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

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

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

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

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

**GENERAL CLEMENT:** Well -

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

**GENERAL CLEMENT:** Well, I -- I hope that you read it that way. But I would also say that I think that whatever the definition that the lower court opinion employed, I do think it's going to be difficult over time to sustain the notion -- I mean, the Court of Appeals also talked about lineal descendants. And it does seem to me that, you know, just as this Court would apply the Fourth Amendment to something like heat imagery, I don't see why this Court wouldn't allow the Second Amendment to have the same kind of scope, and then I do think that reasonably machine guns come within the term "arms." Now, if this Court wants to say that they don't -- I mean -- I mean -- we'd obviously welcome that in our -- in our obligation to defend the constitutionality of acts of Congress. The one other thing I would say is that this is an opinion that is susceptible of different readings. It's interesting that Respondents' amici have different characterizations of it. The Goldwater Institute calls it strict scrutiny; the State of Texas calls it reasonable -- reasonableness review.

**CHIEF JUSTICE ROBERTS:** Thank you, General.

**GENERAL CLEMENT:** Thank you.

**CHIEF JUSTICE ROBERTS:** Mr. Gura.

**ORAL ARGUMENT OF ALAN GURA, ON BEHALF OF THE RESPONDENTS**

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

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

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

**MR. GURA:** Okay. I'd like to respond -- certainly, Justice Scalia. I'd like to respond to the point about the -- the District of Columbia's position over the years with respect to the functional firearms ban. The Petitioners have had two opportunities to urge courts to adopt this so-called self-defense exception which they construed in the amendment. The first opportunity came in 1978 in McIntosh versus Washington, where the petitioners urged the Court of Appeals of the District of Columbia to uphold the law because it was irrational in their view to prohibit self-defense in the home with firearms. They deemed it to be too dangerous, and this was a legitimate policy choice of the City Council, and they actually prevailed in that view. The second opportunity that the Petitioners had to urge this sort of self-defense construction was actually in this case in the district court. We had a motion for summary judgment and we made certain factual allegations in this motion, and on page 70a of the joint appendix we see portions of our statement of undisputed material facts. Fact number 29, which was conceded by the District of Columbia, reads: The defendants prohibit the possession of lawfully owned firearms for self-defense within the home, even in instances when self-defense would be lawful by other means under District of Columbia law. The citation for that is a functional firearms ban, and that point was conceded. Certainly the idea that people can guess as to when it is that they might render the firearm operational is -- is not a one that the Court should accept, because a person who hears a noise, a person who perhaps is living in a neighborhood where there has been a spate of violent crimes, has no idea of when the District of Columbia would permit her to render the firearm operational. And, in fact, there is a prosecution history not under this specific provision, but certainly other under gun prohibition -- laws that we are challenging here today to prosecute people for the possession or for the carrying of a prohibited firearm even when the police ruled the shooting has been lawful self-defense.

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

**JUSTICE BREYER:** But I just want you to assume them for the purpose of the question. All right. Assume that the -- that there is an individual right, but the purpose of that right is to maintain a citizen army; call it a militia; that that's the basic purpose. So it informs what's reasonable and what isn't reasonable. Assume -- and this is favorable to you but not as favorable as you'd like -- assume that we are going to decide whether something is proportionate or apply an intermediate standard in light of the purpose. All right. Now, focus on the handgun ban. As I read these 80 briefs -- and they were very good, I mean really good and informative on both sides -- and I'm trying to boil down the statistics where there is disagreement, and roughly what I get -- and don't quarrel with this too much; it's very rough -- that 80,000 to 100,000 people every year in the United States are either killed or wounded in gun-related homicides or crimes or accidents or suicides, but suicide is more questionable. That's why I say 80,000 to 100,000. In the District, I guess the number is somewhere around 200 to 300 dead; and maybe, if it's similar, 1,500 to 2,000 people wounded. All right. Now, in light of that, why isn't a ban on handguns, while allowing the use of rifles and muskets, a reasonable or a proportionate response on behalf of the District of Columbia?

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

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

**JUSTICE SCALIA:** You want to say yes.

**JUSTICE BREYER:** Now, why?

**JUSTICE SCALIA:** That's your answer.

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

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

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

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

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

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

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

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

**JUSTICE GINSBURG:** Is it a limitation? Is it any limitation on the legislature? Is the first clause any limitation on the legislature?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**JUSTICE KENNEDY:** That are not appropriate to -

**MR. GURA:** That are not appropriate to civilian use.

**JUSTICE GINSBURG:** For example?

**MR. GURA:** For example, I think machine guns: It's difficult to imagine a construction of Miller, or a construction of the lower court's opinion, that would sanction machine guns or the plastic, undetectable handguns that the Solicitor General spoke of. The fact is that this Court's Miller test was the only guidance that we had below, and I think it was applied faithfully. Once a weapon is, first of all, an "arm" under the dictionary definition -- and Webster has a very useful one -- then you look to see whether it's an arm that is meant to be protected under the Second Amendment, and we apply the two-pronged Miller test. And usually one would imagine if an arm fails the Miller test because it's not appropriate for common civilian applications -

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

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

**CHIEF JUSTICE ROBERTS:** Is there any parallel -

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

**MR. GURA:** That's correct. The time frame that the Court must address is always the present. The framers wished to preserve the right to keep and bear arms. They wished to preserve the ability of people to act as militia, and so there was certainly no plan for, say, a technical obsolescence. However, the fact is that Miller spoke very strongly about the fact that people were expected to bring arms supplied by themselves of the kind in common use at the time. So if in this time people do not have, or are not recognized by any court to have, a common application for, say, a machine gun or a rocket launcher or some other sort of -

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

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

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

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

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

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

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

**MR. GURA:** I agree with Your Honor, and certainly in our brief we suggest that the militia emphasis of Miller is not useful as a limiting principle to the type of arms that may be -- that may be permitted. Because, on the one hand, there's a great deal of weaponry that might be wonderful for military duty but is not appropriate for common civilian use, which would not be protected even under the Miller test's first prong. And, on the other hand, everything that civilians today might wish to have in ordinary common use -- handguns, rifles, and shotguns -- are militarily useful weapons. So we de-emphasize the military aspects of Miller as being ultimately not very useful guidance for courts. And the better guidance would be to emphasize the commonsense rule that I think judges would have really no trouble applying, and we do this all the time in constitutional law: To simply make a decision as to whether or not whichever arm comes up at issue is an arm of the kind that you could really reasonably expect civilians to have.

**JUSTICE BREYER:** Why -- now, when say "keep" and "bear," I mean you are -- I think you're on to something here. Because you say let's use our common sense and see what would be the equivalent today. Fine. If we know that at the time, in 1789, Massachusetts had a law that said you cannot keep loaded firearms in the house, right, and you have to keep all of the bullets and everything and all of the powder upstairs, why did they have that law? To stop fires because it's dangerous? They didn't have fire departments. Now we do -- or they weren't as good. We now have police departments, and the crime wave might be said similar to what were fires then. And, therefore, applying the similar kind of thing, you say: Fine, just as you could keep pistols loaded but not -- not loaded. You had to keep powder upstairs because of the risk of fire. So today, roughly, you can say no handguns in the city because of the risk of crime. Things change. But we give in both instances, then and now, leeway to the city and States to work out what's reasonable in light of their problems. Would that be a way of approaching it?

**MR. GURA:** The legislature has a great deal of leeway in regulating firearms. There is no dispute about that. However, I wouldn't draw a complete analogy between the Boston fire ordinances that Your Honor notes and the functional firearms ban. First, even the Boston firearms ordinances did not include handguns actually. At the time the word "firearm" was not understood to include pistols. General Gage's inventory of weapons seized from the Americans in Boston included some 1800 or so firearms and then 634 pistols. Nowhere in the Boston code do we see a prohibition on keeping loaded pistols in the home. And certainly the idea that -- that self-defense is a harm is one that is -

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**JUSTICE SOUTER:** No, but they didn't -- they didn't limit it to self-defense. I mean, what provoked it, as I understand it, was concern about the militia clauses, and here I mean you're certainly correct. I agree with you. Pennsylvania went beyond that. It was -- it was one of three States, as I understand, that did go beyond it. But the provocation for getting into the subject, as I understand it, was, in each instance including Pennsylvania, concern over the national government's power over militias under Article 1.

**MR. GURA:** Justice Souter, we wouldn't see the history that way. Certainly there is agreement that the militia clauses in the Constitution were controversial. And there were separate amendments that were proposed and always rejected that would have addressed that explicitly. In fact, if we look at Virginia's proposals, it's agreed by the Petitioners that Virginia was the model for the Bill of Rights and specifically, of course, for the Second Amendment. We saw one set of proposed amendments from Virginia entitled Bill of Rights, and the Second Amendment language comes from paragraph 17 of that Bill of Rights. And then we see a list of other amendments, and then we have the 11th proposed amendment, which speaks exactly to the -- reverting control over the militia back to the -- back to the States.

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

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

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

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

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

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

**MR. GURA:** That's true, Your Honor. However, better safe storage approach is the one used by the majority of jurisdictions, I believe, that do have such laws, which is to require safe storage, for example, in a safe. And that is a reasonable limitation. It's a strict scrutiny limitation. Whatever standard of view we may wish to apply, I think, would encompass a safe storage provision. But this is not a safe storage provision because we have specific exceptions that allow you to actually use the firearm in recreational shooting and also in a place of business. And we have litigation history from Washington, D.C., that tells us that we are not supposed to have an operable firearm for purposes of self-defense because they simply do not trust people to defend themselves in our home. And -- and self-defense is the heart of the Second Amendment right. That is what Blackstone was getting at when he spoke of the fifth auxiliary right to arms, because it protected the right of personal preservation.

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

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

**JUSTICE STEVENS:** Pennsylvania.

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

I'm finished.

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

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

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

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

**JUSTICE GINSBURG:** What about this very law?

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

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

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

**MR. GURA:** Well, the government could set reasonable standards for that, Your Honor. The government could require, for example, knowledge of the State's use of force laws. They can require some sort of vision test. They could require, perhaps, demonstrated competency. And those are the types of things that we sometimes see; background checks, of course. Those are going to be reasonable licensing requirements. However, if the license requirement is we only wanted to give licenses to people who look a certain way or depends on how we feel or if the licensing office is only open Thursdays at 3:00 in the morning -- I mean, it all depends on the implementation. And -

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

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

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

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

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

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

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

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

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

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

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

**MR. GURA:** Those restrictions -

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

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

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

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

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

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

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

**MR. GURA:** Absolutely, Your Honor.

**JUSTICE BREYER:** Whose judgment is that to -

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

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

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

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

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

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

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

**MR. GURA:** Yes, Your Honor.

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

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

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

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

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

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

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

**REBUTTAL ARGUMENT OF WALTER DELLINGER, ON BEHALF OF THE PETITIONERS**

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

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

**MR. DELLINGER:** Those are alternatives, Mr. Chief Justice.

**CHIEF JUSTICE ROBERTS:** No, disassembled -

**MR. DELLINGER:** Just a trigger lock.

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

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

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

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

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

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

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

**MR. DELLINGER:** Well -

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

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

**CHIEF JUSTICE ROBERTS:** So then you turn on the lamp, you pick up your reading glasses (Laughter.)

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

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

**MR. DELLINGER:** It took me 3 seconds. I'm not kidding. It's -- it's not that difficult to do it. That was in daylight. The other version is just a loop that goes through the chamber with a simple key. You have the key and put it together. Now, of course if you're going -if you want to have your weapon loaded and assembled, that's a different matter. But here's where I want to address the trigger lock. Here's why it doesn't matter for the handgun law. The District believes that what is important here is the ban on handguns. And it also believes that you're entitled to have a functional, usable weapon for self-defense in the home, and that's why this is a very proportionate law.

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

**MR. DELLINGER:** Yes.

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

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

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

**MR. DELLINGER:** There are decisions in the District of Columbia about the right of self-defense that apply to this. But here's the most important point. It cannot affect the validity of the handgun law. If you disagree with us that my statements are not sufficient to say that we believe that the law should be read, given the self-defense compulsion, to allow whatever use makes it functional, if you don't agree with that and if you think there's a controversy on this point, because we believe you should have a functional firearm available in the home of law-abiding citizens who wish one, if we are wrong about that and the trigger lock is invalid, that has no effect on the handgun ban. That is to say, the trigger lock applies to all weapons. If it's valid and it means what they say it does, none of the weapons would work. We don't need a handgun; it's unusable. If it's invalid or if it has the construction we believe, it cannot possibly affect the handgun law. If you strike down the trigger lock law, you're throwing us in the briar patch where we think it's where we're happy to be if all we have to do is to make clear in the trigger lock law what we have said here today, that it's, it's available for self-defense.

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

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

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

**MR. DELLINGER:** Well, it's -- it's -- the carry provision, you cannot carry unregistered firearms. That's just a general requirement, that firearms be registered. You're not allowed to register handguns is the mechanism by which they are prohibited. Now, here is -- to address your question about why a ban is unreasonable, the one thing we know the Second Amendment is not about is it's not about the interest of collectors. Some people collect guns the way they do stamps, and if that were what the amendment were about then prohibiting someone from having a particular type of gun would prevent them from completing the set. But the notion -

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

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

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

**MR. DELLINGER:** Well -

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

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

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

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

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

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

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

**MR. DELLINGER:** You would apply this standard. You would ask whether the ban is one that's carefully balanced considerations of gun ownership and public safety. I don't see how, once we are in the land where you -- where there is a right, there is a far weaker case if there is any need for public safety to -to limit the number of guns one has. Here there is an overwhelming case and we are talking about local legislation. I know, Justice Kennedy, that you would be concerned about a national government which sets a single standard for rural and urban areas, for East and West, North and South. Here you have legislation that is adopted by a group of citizens in the District, operating under the authority of Congress, but it is local legislation. And if it's still good law, that States and local governments across the country can strike these balances, as they have, it would be deeply ironic to preclude the District of Columbia as being the only place that could enact legislation free of the strictures of the Second Amendment. And when you ask about the statistics, what is critical here is not to apply the kind of categorical standard the court below did or a kind of strict scrutiny that would strike this law down. This is an area, unlike areas where government regulation is presumptively illegitimate, this text contemplates regulation of inherently dangerous weapons. And where the battle -- the great battle over methodology, to which Justice Breyer replied, in these briefs -indicates that this is the kind of right -- where you have disputes among experts, it's a kind of right where even if you recognize it, deference needs to be given to the legislative resolution rather than have courts try to decide how best to resolve the statistical and methodological debates. Thank you, Mr. Chief Justice.

**CHIEF JUSTICE ROBERTS:** Thank you, Mr. Dellinger. The case is submitted. (Whereupon, at 11:43 a.m., the case in the above-entitled matter was submitted.)

91

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Official - Subject to Final Review Page 92

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