NO. 04-7041

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHELLY PARKER, et al.,

Appellants

v.

DISTRICT OF COLUMBIA, et al.,

Appellees

Appeal from the United States District Court
for the District of Columbia
(No. CIV. A.03-0213 EGS)

BRIEF OF *AMICUS CURIAE* NRA CIVIL RIGHTS DEFENSE FUND IN SUPPORT OF APPELLANTS SEEKING REVERSAL

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DISCLOSURE STATEMENT

NRA Civil Rights Defense Fund is a trust established by the National Rifle Association of America. The National Rifle Association of America is a New York not-for-profit corporation. It has not issued stock or debt securities to the public. It is recognized by the Internal Revenue Service as a 26 U.S.C. § 501(c)(4) corporation. The NRA Civil Rights Defense Fund is a trust recognized by the Internal Revenue Service as a 26 U.S.C. § 501(c)(3) entity. The fund has not issued stock or debt securities to the public.

The fund is organized exclusively for the following purposes:

1. Voluntarily to assist in the preservation and defense of the human, civil, and/or constitutional rights of the individual to keep and bear arms in a free society;

2. To give financial aid gratuitously and to supply legal counsel, which counsel may or may not be directly employed by the fund, to such persons who may appear worthy thereof, who are suffering or are threatened legal injustice or infringement in their said human, civil, and constitutional rights, and who are unable to obtain such counsel or redress such injustice without assistance.

3. To conduct inquiry and research, acquire, collate, compile, and publish information, facts, statistics, and scholarly works on the origins, development and current status of said human, civil, and constitutional rights, and the extent and

adequacy of the protection of such rights;

4. To encourage, sponsor, and facilitate the cultivation and understanding of the aforesaid human, civil, and constitutional rights which are protected by the constitution, statutes, and laws of the United States of America or the various states and territories thereof, or which are established by the common law, through the giving of lectures and the publication of addresses, essays, treatises, reports, and other literary and research works in the field of said human, civil, and constitutional rights;

5. To make donations to organizations which qualify as exempt organizations under Section 501 (c)(3) of the Internal Revenue Code of the United States or the corresponding provision of any future Internal Revenue Law of the United States.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amicus.

All parties and *amicus curiae* appearing before the district court and in this court are listed in the Brief for Appellant.

Plaintiffs-Appellants:

Shelly Parker, Dick Heller, Tom G. Palmer, Gillian St. Lawrence, Tracey Ambeau, and George Lyon.

Defendants-Appellees:

District of Columbia and Anthony Williams, Mayor of the District of Columbia.

Amicus Curiae:

The NRA Civil Rights Defense Fund did not file an *amicus curiae* brief in the district court. The NRA Civil Rights Defense Fund is fully described in the Disclosure Statement, *supra* at i.

(B) Ruling Under Review.

The motion to dismiss was granted by Judge Sullivan on March 31, 2004. The case is reported as *Parker v. District of Columbia*, ___ F.Supp. 2d ___, 2004 WL 722653 (D.D.C. March 31, 2004). References to the ruling at issue appear in the Brief for Appellant.

(C) Related Cases.

Seegar v. Ashcroft, 297 F.Supp.2d 201 (D.D.C. 2004), involves the same defendants and essentially the same issue. The Brief for Appellant is due in this court on May 20, 2004.

(D) Statutes.

All applicable statutes are contained in the Brief for Appellant.

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IDENTITY OF *AMICUS CURIAE*

Amicus curiae is a legal defense fund established under § 501(c)(3) of the Internal Revenue Code. One purpose of *amicus curiae* is to "assist in the preservation and defense of the human, civil, and/or constitutional rights of the individual to keep and bear arms in a free society." Circuit Rule 29(b) is the source of authority for its filing by consent of all parties.

SUMMARY OF ARGUMENT

The district court held individuals are not protected by the Second Amendment. The amendment only applies to people performing militia duty. Consequently, Parker lacks standing. The district court erred. Its ruling means that soldiers while on duty may keep and bear arms under whatever conditions their commanders impose. The decision has no plausible connection to the words used in the amendment. It reduces a right into mere surplusage and tautology.

D.C. Code § 7-2502.01 (2001) requires the registration of all firearms with the Metropolitan Police Department. However, a pistol cannot be registered unless it was registered to the current registrant prior to September 24, 1976. D.C. Code § 7-2502.02(a)(4) (2001). Consequently, this law forbids the keeping of all pistols by a civilian, even in the home. Regardless of the scope of the right to bear arms, this law sweeps too broadly and infringes the right to keep arms component of the Second Amendment.[1]

Amicus curiae will demonstrate that the authority on which the district court relies does *not* compel this Court to adopt an interpretation of the Bill of Rights that is at odds with its text and history.

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[1] "[T]he right to keep them, with all that is implied fairly as an incident of this right, is a private individual right, guaranteed to the the citizen, not the soldier." *Andrews v. State*, 50 Tenn. 165, 182, 8 Am.Rep. 8, 16 (1871).

ARGUMENT

I. Appellants Have Standing to Raise the Second Amendment because it protects the fundamental, individual right to keep and bear arms.

The Second Amendment guarantees "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. The Second Amendment forbids the federal government from infringing the right of individual American citizens to keep and bear arms, and this prohibition contributes to fostering "a well regulated militia" by preserving the armed citizenry from which the framers believed that such a militia should be drawn. Like every other provision of the Bill of Rights, the Second Amendment has its limits. But, like every other provision of the Bill of Rights, the Second Amendment must mean *something*. The Second Amendment will mean *nothing* if the government can arbitrarily disarm American citizens who have never been shown to be dangerous or irresponsible.

A. The text and history of the Second Amendment are consistent and unambiguous.

The Second Amendment unequivocally guarantees that "the right of the people to keep and bear arms shall not be infringed." Modern scholarship has repeatedly and conclusively demonstrated that this is a right belonging to individuals, just like the "right[s] of the people" set out in the First and Fourth

Amendments. *See, e.g.*, Laurence H. Tribe, 1 *American Constitutional Law* 902 n. 221 (2000) (Second Amendment recognizes "a right (admittedly of uncertain scope) on the part of individuals to possess and use firearms in the defense of themselves and their homes."); Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 136 n. 13 (1997) (Justice Scalia interprets "the Second Amendment as a guarantee that the federal government will not interfere with the individual's right to bear arms for self-defense."); Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 Emory L. J. 1139 (1996). The Constitution's unequivocal statement is not qualified or diminished by the prefatory phrase, "A well regulated Militia, being necessary to the security of a free State . . ." Such prefatory statements of purpose were very common in state constitutions with which the framers were familiar, and they were *never* interpreted to detract from the operative clauses to which they were appended. Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.Univ. L. Rev. 793 (1998) (discussing dozens of examples); *Nunn v. State*, 1 Ga. (1 Kel.) 243, 249-51 (1846)(right is not limited to militia or militia arms; women and non-militia arms are included). The Second Amendment guarantees an individual right to arms separate and apart from militia service. This is underscored by Pulitzer Prize winning historian Leonard W. Levy:

> Believing that the [second] amendment does not authorize an individual's right to keep and bear arms is wrong. The right to bear arms is an individual right.

> The military connotation of bearing arms does not necessarily determine the meaning of a right to bear arms. If all it meant was the right to be a soldier or serve in the military, whether in the militia or the army, it would hardly be a cherished right and would never have reached constitutional status in the Bill of Rights. The "right" to be a soldier does not make much sense. Life in the military is dangerous and lonely, and a constitutionally protected claim or entitlement to serve in uniform does not have to exist in order for individuals to enlist if they so choose. Moreover, the right to bear arms does not necessarily have a military connotation, because Pennsylvania, whose constitution of 1776 first used the phrase "the right to bear arms," did not even have a state militia. In Pennsylvania, therefore, the right to bear arms was devoid of military significance. Moreover, such significance need not necessarily be inferred even with respect to states that had militias. Bearing arms could mean having arms. Indeed, Blackstone's *Commentaries* spoke expressly of the "right to have arms." An individual could bear arms without being a soldier or militiaman.

Leonard W. Levy, *Origins of the Bill of Rights* 134-35 (1999). The amendment has more than one goal:

> The Second Amendment was meant to accomplish two distinct goals, each perceived as crucial to the maintenance of liberty. First, it was meant to guarantee the individual's right to have arms for self-defense and self-preservation.... The second and related objective concerned the militia, and it is the coupling of these two objectives that has caused the most confusion. The customary American militia necessitated an armed public.... The clause concerning the militia was not intended to limit ownership of arms to militia members, or return control of the militia to the states, but rather to express the preference for a militia over a standing army.

Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* 162-63 (1994).

> Any attempt to use the amendment's prefatory language to recast the

individual right as some sort of collective or governmental right leads to intolerable textual difficulties, and even outright absurdities. *See, e.g.*, William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 Duke L.J. 1236 (1994); Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 Ga. L. Rev. 1, 20-29 (1996); Glenn H. Reynolds & Don B. Kates, *The Second Amendment and States' Rights: A Thought Experiment*, 36 Wm. & Mary L. Rev. 1737 (1995); J. Norman Heath, *Exposing the Second Amendment: Federal Preemption of State Militia Legislation*, 79 U. Det. Mercy L. Rev. 39, 43 (2001)("The 'states' right' alleged to reside in the [second] amendment vanishes when exposed to the light of actual militia jurisprudence.").

The right of the individual to keep and bear arms was closely associated by the framers with the militia tradition that the American colonists brought with them from England. Many Americans of the late eighteenth century were mistrustful of standing armies, and the Federalists and Anti-Federalists agreed on at least one fundamental point: liberty was more secure on these shores than in England because the American people were armed. James Madison, for example, excoriated the European governments that were "afraid to trust the people with arms" and stressed "the advantage of being armed, which the Americans possess over the people of almost every other nation." *The Federalist No. 46*, at 321 (James Madison) (Jacob

E. Cooke ed., 1961). Patrick Henry, who opposed ratification of the Constitution partly because he feared the specter of federal control over weapons and their use, similarly proclaimed: "The great object is that every man be armed. . . . Everyone who is able may have a gun." 3 J. Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 386 (Lenox Hill 1974) (2d ed.1836).

The militia tradition with which the Framers associated the right to keep and bear arms was fundamentally different from our contemporary National Guard system.[2] As the Supreme Court has recognized, the eighteenth century militia "comprised all males physically capable of acting in concert for the common defense." *United States v. Miller*, 307 U.S. 174, 179 (1939). This was not a legal definition, and in fact the Constitution provides no definition of the militia. But the legal definition adopted in the first Militia Act was perfectly consistent with the spirit of this formulation. Militia Act, ch. 33, 1 Stat. 271 (1792) (requiring militia enrollment for most able-bodied white males at least 18 and under 45). At the time of *Miller* militia was defined:

> The militia of the United States shall consist of all able-bodied male citizens of the United States and all other able-bodied males who have or shall have declared their intention to become citizens of the United States, who shall be

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[2] The National Guard consists of state-based military organizations whose members enlist both in their state units and in the federal armed forces. *Perpich v. Department of Defense*, 496 U.S. 334, 345 (1990).

> more than eighteen years of age and, except as hereinafter provided, not more than forty-five years of age, and said militia shall be divided into three classes, the National Guard, the Naval Militia, and the Unorganized Militia.

National Defense Act, ch. 134, § 57, 39 Stat. 166, 197 (1916). To this very day, the militia is defined as including almost all men between from ages 17 through 45. 10 U.S. Code § 311.

For the framers, the militia was always put in sharp contrast with standing military organizations of any kind. *See, e.g., Articles of Confederation* art. VI, ¶ 4; 3 Elliot, *supra*, at 425 (statement of George Mason, June 14, 1788) ("Who are the Militia? They consist now of the whole people. . . ."); Malcolm, *supra*, at 148 ("Because of their long-standing prejudice against a select militia as constituting a form of standing army liable to be skewed politically and dangerous to liberty, every state had [in the post-Revolutionary period] created a general militia."). It was hoped that government would provide military training so that the militia could operate effectively when the need arose, but this training was not a *sine qua non* for the existence of the militia. The essential character of the militia lay in two fundamental qualities: that it remained inactive until a need for its services arose, and that it remained armed while in its usual inactive state. *See, e.g., Miller*, 307 U.S. at 179 ("[O]rdinarily when called for service these [militia] men were expected to appear bearing arms supplied by themselves and of the kind in common use at

the time.")

The purpose of the Second Amendment is not and cannot be to ensure that the militia receives adequate military training from the government. The government had *already* been given the power to provide for such training. U.S. Const. art. I, § 8, cl. 16. Nor does the Second Amendment purport to require that this congressional power be exercised responsibly, or indeed exercised at all. The better-trained the militia was, the more effective it would be, and so the less often would circumstances require the raising of real armies consisting of full-time, paid troops. Since standing armies were seen as a dangerous tool that would-be tyrants might use to oppress the people, a well-trained militia was widely viewed as a desirable goal, so long as the militia retained its essentially civilian character. *See, e.g., The Federalist No. 29*, at 182 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). But the Constitution gave the federal government virtually unlimited authority to raise armies, and it imposed no requirement that the militia receive effective training. *See* U.S. Const. art. I, § 8, cls. 12-16. The framers consciously considered and rejected a constitutional provision discouraging peace-time standing armies, and they no doubt recognized that it would be infeasible to write a constitutional rule requiring that the militia be well trained. *See* 2 Max Farrand, *The Records of the Federal Convention* 616-17 (1911).

What the Second Amendment does for the militia is to ensure that "the people," from which the militia must be drawn, can remain armed while the militia is in its normal, inactive state. This is why the Constitution's reference to a "well regulated militia" does not mean organizations like our National Guard. Eighteenth century readers, unfamiliar with the modern administrative state, would naturally have recognized that "well regulated" does not necessarily mean "heavily regulated." Rather, it can just as easily mean "not overly regulated" or "not inappropriately regulated." This insight is crucial to understanding the prefatory language of the Second Amendment. A "well regulated" militia is, among other things, *not inappropriately regulated.* The Second Amendment simply forbids *one* form of inappropriate regulation that the government might be especially tempted to promulgate: disarming the civilian population from which the militia must be drawn. *See* Nelson Lund, *The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders*, 4 Tex. Rev. L. & Pol. 157 (1999). Article I authorizes the federal government to adopt a wide range of militia regulations, such as requiring civilians to possess arms and requiring them to undergo military training. *See, e.g.,* Militia Act, ch. 33, 1 Stat. 271 (1792) (arms include the pistol). The Second Amendment is not a foolish redundancy on Article I, but an important prohibition against the one *intolerable* form of regulation:

civilian disarmament.

B. The right to keep and bear arms continues to serve its constitutional purpose in contemporary America.

A civilian population that is protected from the threat of disarmament contributes to "the security of a free state" in three principal ways. First, the very existence of an armed citizenry will tend to discourage would-be tyrants from attempting to use paid troops to "pacify" the population. This is not and could not be a guarantee against tyranny, but it surely raises the risks and costs of a tyrannous pacification, and thereby reduces the probability of its being attempted. *See, e.g.*, Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637, 657 & n.96 (1989). Second, an armed citizenry may be used during a national emergency. Robert Dowlut & Janet A. Knoop, *State Constitutions and The Right to Keep and Bear Arms*, 7 Okla. City U. L. Rev. 177, 197, 233-35 (1982)(unorganized militia with privately owned arms used during WWII). Third, an armed citizenry is much less dependent on the government for protection from the hazards of everyday life, both in a world (like that of the eighteenth century) where organized police forces did not exist, and in a world (like ours) in which the police can almost never put a stop to crimes in progress.[3]

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[3] Government is not constitutionally obligated to prevent crime. *See, e.g.*, *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189

Even if one discounts one and two, the constitutional right to arms still contributes to "the security of a free state." As the Founders were well aware, the right of civilians to arm themselves enables citizens to exercise their fundamental, natural right to self-defense when they are threatened with criminal attack. *See, e.g.*, Don B. Kates, *The Second Amendment and the Ideology of Self-Protection*, 9 Const. Commentary 87 (1992).

None of this implies that the Second Amendment prevents government from adopting reasonable measures to prevent the misuse of firearms. However, a statute arbitrarily imposing a complete prohibition on a law-abiding adult to keep any pistol in his home simply cannot survive constitutional scrutiny. It is inconsistent with the constitutional text and with everything the Framers said about the right to keep and bear arms.

II. Supreme Court precedent does not support the constitutionality of the government's pistol ban.

The Supreme Court has issued only one opinion dealing with a Second Amendment challenge to a federal statute: *United States v. Miller*, 307 U.S. 174 (1939). Before turning to that case, we should note that reliance on a dictum in *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980), is entirely misplaced. The

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(1989); *Warren v. District of Columbia,* 444 A.2d 1 (D.C. 1981).

Second Amendment was not at issue in *Lewis*, which dealt with an equal-protection challenge to the federal statute forbidding felons to possess firearms. In the course of its equal-protection analysis, the Court dropped a footnote that included a passing reference to *Miller*. Although the citation to *Miller* was inapposite, the *Lewis* Court's actual decision upholding the federal felon-in-possession statute was perfectly consistent with Second Amendment protection of the rights of law-abiding citizens. As *Lewis* noted, 445 U.S. at 66, even the most fundamental of rights, like voting, can be taken away from convicted felons.

A. The *Miller* decision.

Jack Miller and Frank Layton were indicted for violating the National Firearms Act of 1934 by transporting an unregistered short-barreled (or sawed-off) shotgun across state lines. 307 U.S. at 175. The district court quashed the indictment, holding without explanation that the statute was inconsistent with the Second Amendment. *Id.* at 177. The government appealed to the Supreme Court, which ruled for the government without hearing any argument on behalf of the defendants. *Id.* at 175 ("no appearance for appellees").

The *Miller* opinion is short and cryptic, and its holding must be interpreted narrowly. Most of the Court's opinion is devoted to a discussion of the Framers' understanding of the militia, which the Court characterized as "civilians primarily,

soldiers on occasion." *Id.* at 179. Without raising any question as to whether the defendants were members of the militia, the Court rested its holding on the presumed nature of sawed-off shotguns:

> In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense. *Aymette v. State of Tennessee*, 2 Humph., Tenn., 154, 158.

Id. at 178. This statement of the holding is both tentative and indefinite. The Court does *not* say that short-barreled shotguns fall outside the Second Amendment, but only that the Court has not been provided with a persuasive reason to regard them as protected.[4] The Court does *not* say that military weapons alone are protected by the Second Amendment, but only that protected weapons must at least have some ability to contribute to "the common defense." The Court does *not* say that "the common defense" comprehends only foreign invaders, thus allowing for the usefulness of privately owned firearms against domestic insurrections, for ordinary law enforcement, and for self-defense against criminal attacks. Perhaps most

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[4] *Andrews v. State*, 50 Tenn. 165, 186-87, 8 Am.Rep. 8, 18-19 (1871), whether particular pistol is constitutionally protected is "a matter to be settled by evidence as to what character of weapon is included in the designation 'revolver.'"

important, the Court *never* embraces the erroneous suggestion, repeatedly suggested by the government, that the "militia" means a military organization like the National Guard.

B. *Miller* accepted the individual right interpretation of the Second Amendment.

Miller clearly, if implicitly, acknowledged that the Second Amendment protects the individual right of citizens to keep and bear arms. This is clear from the face of the Court's opinion, which never asked whether Miller and Layton were members of the National Guard, or of the militia. Nor did the Court suggest that defendants' status as members of the militia would have had the slightest bearing on the outcome of the case. As the Justices saw it, the only issue in the case was whether the defendants had a right to possess *a particular type of firearm* in violation of a federal registration requirement. Furthermore, the Court remanded the case, thereby offering the defendants an opportunity to provide evidence demonstrating exactly what the Supreme Court had been unwilling to take judicial notice of: that short-barreled shotguns "could contribute to the common defense."[5]

Nor can it be supposed that the Court somehow overlooked the possibility that Second Amendment rights belong only to members of the National Guard or

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[5] The disposition of the case on remand against Frank Layton is not reported. Jack Miller was found murdered near Chelsea, Oklahoma, April 6, 1939.

the militia. On the contrary, the government's brief (the only brief filed in *Miller*) specifically, repeatedly, and forcefully argued that the right to arms applies only to members of military organizations. See Brief of the United States, *Miller* (No. 696), at 4-5, 12, 15, 16. **The Supreme Court *refused* to accept the government's argument.** *United States v. Emerson,* 270 F.3d 203 (5th Cir. 2001), contains an extensive historical and case law analysis of the Second Amendment, and it interprets *Miller* as protecting an individual right to keep and bear arms separate and apart from militia duty. Likewise, *United States v. Hutzell*, 217 F.3d 966, 969 (8th Cir. 2000), refers to *Miller* as protecting an individual right. See also *Silveira v. Lockyer*, 328 F.3d 567, 568-588 (9th Cir.) (Pregerson, Kozinski, Kleinfeld, Gould, O'Scannlain, T.G. Nelson, JJ., dissenting), *denying rehearing* en banc *to Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2003).

The *Miller* Court could not have intended to adopt any collective right theory of the Second Amendment.[6] Under any such theory the Court would have had to come to grips with the issue of the defendants' standing to assert the Amendment in

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[6] Modern scholars who reject the individual right view of the Second Amendment adhere to two general theories of its meaning. The "collective right" theory holds that it secures a states' right, while the "sophisticated collective right" theory holds that it secures a right of individuals only, but only while they are actively participating in militia functions as members of an organized state militia. *Emerson*, 270 F.3d at 218-220 (internal citations omitted).

their defense. The fact that it did not is consistent only with the conclusion that the Court read the Amendment to guarantee an individual right.

By 1939 the Supreme Court had developed numerous, often harsh prudential standing doctrines related to the "cases and controversies"[7] requirement of Article III. *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 345-49 (1936) (Brandeis, J., concurring) and cases cited therein. One was that "unless the party setting up the unconstitutionality of the state law belongs to the class for whose sake the constitutional protection is given, or the class primarily protected, this court does not listen to his objections . . ."[8] A second was that, "The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.'"[9] A third was that "The Court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."[10]

Had the *Miller* Court believed that the Second Amendment secured other than an individual right, these principles would have counseled strongly against reaching the question of whether "possession or use of a 'shotgun having a barrel of

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[7] U.S. Const. art. III, cl. 2.

[8] E.g., *New York v. Reardon*, 204 U.S. 152, 160 (1907).

[9] *Ashwander*, 297 U.S. at 346-47, and cases cited therein.

[10] *Id.* at 347, and cases cited therein.

less than eighteen inches in length' . . . ha[d] some reasonable relationship to the preservation or efficiency of a well regulated militia."307 U.S. at 178. Had it adopted any collective right theory, the Court could not have failed to note the looming question of whether the defendants were within "the class for whose sake the constitutional protection [of the Second Amendment] is given." They obviously would not have been, if the Amendment secured only a states' right. And even under a "sophisticated" collective right view there would have been a substantial question -- unanswered in the record -- about whether the defendants were affiliated with any militia organization (however defined) and, if so, whether they were performing militia duties at the time of their alleged unlawful activities. Until it was clear that they had standing to assert the Second Amendment, there would have been no "necessity" of deciding whether the Amendment guaranteed to *anyone* a right to keep and bear short-barreled shotguns, and any substantive rule on that point would have been "broader than [wa]s required by the precise facts."

These problems disappear when one reads *Miller* as a discussion of an individual right -- which, logically, must be precisely what the Court intended.

C. *Miller*'s holding applies only to weapons peculiarly adapted to criminal purposes.

The *Miller* opinion must be read cautiously and narrowly, in part because some of its language seems to carry implications that the Court could not have intended. It appears to assume that private possession of weapons that constitute "any part of the ordinary military equipment" is *per se* protected by the Second Amendment. In 1939, this would have included fully automatic rifles and mortars. Indeed, as the First Circuit pointed out shortly thereafter, it would have to include the sawed-off shotguns at issue in *Miller* itself, as well as almost any gun except militarily useless antique weapons like flintlock muskets. *Cases v. United States*, 131 F.2d 916, 922 (1942).

Reading *Miller* in light of the facts of the case, as one must, it is clear that the Court meant its holding to extend no farther than the National Firearms Act itself extended, namely to the regulation of short-barreled shotguns and rifles, machine guns, and silencers. The government argued these devices have only one characteristic in common. They appear to be particularly well-suited to criminal uses, and ill-suited to legitimate civilian purposes. This, at any rate, is certainly the

view that Congress adopted, and to which the *Miller* Court provisionally deferred.[11]

We know this, first, because the government's brief in *Miller* strongly emphasized that the National Firearms Act was directed at weapons that "clearly have no legitimate use in the hands of private individuals but, on the contrary frequently constitute the arsenal of the gangster and the desperado." Brief for the United States, *Miller* (No. 696), at 5; see also *id.* at 7-8 (extensive excerpt from legislative history discussing "gangster" use of machine guns); 8 ("weapons which are the tools of the criminal"); 18 ("weapons which are commonly used by criminals"); 20 ("arsenal of the 'public enemy' and the 'gangster'").

In addition, the "criminal's weapon" theory is the only way to make sense of the *Miller* Court's otherwise inapposite citation to the Tennessee Supreme Court's opinion in *Aymette v. State*, 21 Tenn. (2 Hum.) 154 (1840). *See Miller*, 307 U.S. at 178 (quoted above). The Tennessee court, which was construing a *state* constitutional provision that had a substantially *different* wording from the Second Amendment, could hardly have provided authority for any general interpretation of the Second Amendment. The only reason *Aymette* might have been relevant to the *Miller* case is that it dealt with certain knives that the Tennessee court said were

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[11] One must characterize this deference to Congress as provisional because *Miller* said only that it was "not within judicial notice" that short-barreled shotguns were weapons of the type that would be protected under the Second Amendment. 307 U.S. at 178.

"usually employed in private broils, and which are efficient only in the hands of the robber and the assassin." It is no accident that this language, which was quoted in the government's *Miller* Brief, at 19, occurs on exactly the page of *Aymette* cited by the Supreme Court in *Miller*. *Compare* 307 U.S. at 178 (quoted above) *with Aymette*, 2 Humphr. (Tenn.) at 156. *Aymette* held a citizen is entitled to keep arms "usually employed in civilized warfare." Glenn Harlan Reynolds, *The Right to Keep and Bear Arms Under the Tennessee Constitution: A Case Study in Civic Republican Thought*, 61 Tenn. L. Rev. 647, 661 (1994).

Under *Miller*, government may protect the public safety with measures designed to prevent criminals from acquiring weapons that are especially well-suited to criminal purposes and that have few legitimate civilian purposes. The statute at issue in *Miller* involved plausible examples of such weapons (sawed-off shotguns and rifles, machine guns, and silencers), and the statute placed limited obstacles (registration and a tax) in the path of civilian ownership and acquisition. *Miller*, 307 U.S. at 175 n.1 (quoting National Firearms Act). Whatever *Miller* may imply about more stringent regulation of such weapons, no reasonable reading of *Miller* can possibly justify the government's current effort to impose a complete pistol ban on law-abiding adults.

Courts have held that all or some pistols are constitutionally protected arms. *United States v. Emerson,* 270 F.3d 203, 260 (5th Cir. 2001) ("Second Amendment ... protects the right of individuals, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms, such as the pistol involved here"); *State ex rel. Princeton v. Buckner*, 377 S.E.2d 139 (1988); *Schubert v. DeBard*, 398 N.E.2d 1339 (Ind. Ct. App. 1980); *Taylor v. McNeal*, 523 S.W.2d 148, 150 (Mo. Ct. App. 1975); *Rinzler v. Carson*, 262 So.2d 661, 666 (Fla. 1972); *City of Las Vegas v. Moberg*, 485 P.2d 737, 738-39 (N.M. Ct. App. 1971); *State v. Nickerson*, 247 P.2d 188 (Mont. 1952); *People v. Zerillo*, 189 N.W. 927 (Mich. 1922); *State v. Kerner*, 107 S.E. 222 (N.C. 1921); *Wilson v. State*, 33 Ark. 557, 34 Am. Rep. 52 (1878); *State v. Duke*, 42 Tex. 455, 458-59 (1875); *Andrews v. State,* 50 Tenn. 165, 186-87, 8 Am.Rep. 8, 18-19 (1871); *Nunn v. State*, 1 Ga. (1 Kel.) 243 (1846). See also Robert Dowlut & Janet A. Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 Okla. City U. L. Rev. 177, 192 (1982). In view of this well-established authority, it must be held that a pistol is an arm whose keeping in the home is guaranteed by the Second Amendment.

B. This Court should not adopt an interpretation of *Miller* that renders the Second Amendment a dead letter.

A distinct line of cases has read *Miller* to put insurmountable hurdles in the path of any citizen who asserts his or her Second Amendment rights to keep arms. These cases misinterpret *Miller* to mean that Second Amendment rights can only be exercised in the context of military service. As explained above, *Miller* only becomes coherent when read as a decision about regulating weapons that are useful primarily to criminals. Furthermore, each of the circuit court opinions that adopts a broad and loose reading of *Miller* could have reached the same result through a more restrained application of the Supreme Court's guidance. Indeed, all of the cases discussed below are essentially indistinguishable from the Supreme Court's decision in *Miller* because they involve the very same weapons regulated by the statute at issue in *Miller* itself.[12]

The leading decision is *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942), which upheld a federal statute imposing a firearms disability on persons convicted

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[12] Other cases cited by the district court involved statutes imposing firearms disabilities where there has been a judicial finding of misconduct. *See Gillespie v. City of Indianapolis*, 185 F.3d 693 (7th Cir. 1999) (upholding federal statute imposing firearms disability as a consequence of criminal conviction for domestic violence). These decisions therefore offer no support for the government's radical claim that a pistol ban may be imposed without any finding of misconduct or dangerousness.

of a violent crime. After noting the nonsensical consequences entailed in *Miller*'s apparent assumption that the Second Amendment protects the civilian possession of military weapons, and military weapons alone, *Cases* essentially declared the Second Amendment unintelligible:

> Considering the many variable factors bearing upon the question it seems to us impossible to formulate any general test by which to determine the limits imposed by the Second Amendment but that each case under it, like cases under the due process clause, must be decided on its own facts and the line between what is and what is not a valid federal restriction pricked out by decided cases falling on one side or the other of the line.

Id. at 922. In a remarkably confused application of this common law approach to the Second Amendment, the court then sustained the defendant's conviction on the ground that he did not belong to a military organization, was not using the gun "in preparation for a military career," and was acting "without any thought or intention of contributing to the efficiency of the well regulated militia." *Id.* at 923. This seems to imply that violent felons would be entitled to possess firearms if they were "preparing" for a military career, or perhaps even if they were careful to *think* of themselves as "militia men" while carrying their guns about. This is every bit as nonsensical as the interpretation of *Miller* from which the *Cases* court itself understandably recoiled. It is certainly not a correct interpretation of *Miller*.

Several subsequent courts have proceeded in the same rudderless fashion.

Like *Cases*, each of these decisions involved statutes that could easily have been upheld on narrow and readily defensible grounds, for they involved virtually the same facts as those at issue in *Miller* itself. *See, e.g., United States v. Wright*, 117 F.3d 1265 (11th Cir. 1997) (possession of unregistered machine guns); *United States v. Rybar*, 103 F.3d 273 (3d Cir. 1996) (same); *United States v. Hale*, 978 F.2d 1016 (8th Cir. 1992) (same); *United States v. Oakes*, 564 F.2d 384 (10th Cir. 1977) (same).[13] Unfortunately and unnecessarily, these courts have adopted sweeping rationales that essentially render the Second Amendment a dead letter.

Thus, for example, *Rybar* somehow read *Miller*'s reference to "a reasonable relationship to the preservation or efficiency of a well-regulated militia," to imply that the Second Amendment does not cover those *who are in fact members of the militia of the United States*. 103 F.3d at 286. Similarly, *Wright* and *Oakes* somehow read *Miller* to mean that the Second Amendment does not cover those *who are in fact members of their state militia.* 117 F.3d at 1273; 564 F.2d at 387. *Hale* seems to have concluded that the Second Amendment is for all practical purposes merely a piece of "historical residue." 978 F.2d at 1019.

The common thread in all these opinions is the notion that Second

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[13] *See also United States v. Toner*, 728 F.2d 115 (2d Cir. 1984) (equal-protection challenge to statute requiring registration of machine guns).

Amendment rights belong only to those whom the government has included in its formal military organizations. This simply turns the Constitution upside down, converting a protected constitutional *right* into a privilege that the government is free to bestow or withhold at will. As Justice Cooley cogently noted over a century ago:

> [T]he militia, as has been elsewhere explained, consists of those persons who, under the law, are liable to the performance of military duty, and are officered and enrolled for service when called upon. But the law may make provision for the enrolment of all who are fit to perform military duty, or of a small number only, or it may wholly omit to make any provision at all; and *if the right [to keep and bear arms] were limited to those enrolled, the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check.* The meaning of the provision *undoubtedly* is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms, *and they need no permission or regulation of law for the purpose.*

Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 282 (2d ed. 1891) (emphasis added). This Court should decline to follow decisions based on a plain distortion of *Miller* and on an utterly untenable interpretation of the Constitution.

III. THE RIGHT TO KEEP AND BEAR ARMS IN OUR NATION

The question presented by Parker must be determined, not solely on the basis of conditions existing when the Second Amendment was adopted, but in the light of

the full development of the right to keep arms and its present place in American life throughout the Nation.

Americans favor the right to arms. Presently only 6 states do not guarantee a right to arms in their constitutions.[14] In addition, there are 24 reported opinions where state courts have voided a law based on the right to keep arms or to bear arms: *State v. Spiers*, 79 P.3d 30 (Wash. Ct. App. 2003)(struck down that part of statute forbidding ownership of a firearm while free on bond for a serious offense); *State v. Hamdan*, 665 N.W.2d 785 (Wis. 2003) (concealed carrying statute unconstitutional as applied); *Baca v. New Mexico Department of Public Safety*, 47 P.3d 441 (N.M. 2002) (local government prohibited from regulating in any way an incident of the right to bear arms); *State ex rel. Princeton v. Buckner*, 377 S.E.2d 139 (W.Va. 1988) (struck down gun carrying law as too restrictive); *Barnett v. State*, 695 P.2d 991 (Or. 1985) (struck down prohibition of possession of black jack); *State v. Delgado*, 692 P.2d 610 (Or. 1984) (struck down prohibition of possession of switchblade knife); *State v. Blocker*, 630 P.2d 824 (Or. 1981) (struck down prohibition of carrying a club); *State v. Kessler*, 614 P.2d 94 (Or. 1980) (struck down prohibition of possession of a club); *Junction City v. Mevis*, 601 P.2d 1145 (Kan. 1979) (struck down gun carrying ordinance as too broad); *City of*

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[14] These are California, Iowa, Maryland, Minnesota, New Jersey and New York.

Lakewood v. Pillow, 501 P.2d 744 (Colo. 1972) (struck down gun law on sale, possession, and carrying as too broad); *City of Las Vegas v. Moberg*, 485 P.2d 737 (N.M. Ct.App. 1971) (struck down gun carrying ordinance as too restrictive); *People v. Nakamura*, 62 P.2d 246 (Colo. 1936) (struck down law prohibiting possession of a firearm); *Glasscock v. City of Chattanooga*, 11 S.W.2d 678 (Tenn. 1928) (struck down gun carrying ordinance as too restrictive); *People v. Zerillo*, 189 N.W. 927 (Mich. 1922) (struck down statute prohibiting possession of a firearm); *State v. Kerner*, 107 S.E. 222 (N.C. 1921)(struck down pistol carrying license and bond requirement law as too restrictive); *In re Reilly*, 31 Ohio Dec. 364 (Ct. Com. Pl. 1919) (struck down ordinance forbidding hiring armed guard to protect property); *State v. Rosenthal*, 55 A. 610 (Vt. 1903)(struck down pistol carrying ordinance as too restrictive); *In re Brickey*, 70 P. 609 (Idaho 1902)(struck down gun carrying statute as too restrictive); *Jennings v. State*, 5 Tex. App. 298 (1878)(struck down statute requiring forfeiture of pistol after misdemeanor conviction as infringement on right to arms); *Wilson v. State*, 33 Ark. 557, 34 Am.Rep. 52 (1878) (struck down pistol carrying statute as too restrictive); *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 8 Am.Rep. 8 (1871) (struck down pistol carrying statute as too restrictive); *Smith v. Ishenhour*, 43 Tenn. (3 Cold.) 214 (1866)(struck down gun confiscation law as infringement on right to arms); *Nunn v. State*, 1 Ga.

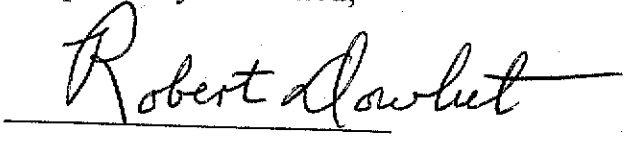
(1 Kel.) 243 (1846) (struck down pistol carrying statute as too restrictive); *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90, 13 Am.Dec. 251 (1822)(struck down concealed carrying statute as infringement on right to arms; the constitution was later amended to allow regulation of concealed carrying of arms).

To uphold the present statute would be inconsistent with the Nation's understanding that the right to arms is an individual right and that it is not restricted to militia service.

CONCLUSION

This Court should not uphold a statute that entails the kind of sweeping and unjustified infringement of Second Amendment rights involved in this case. The district court's analysis and conclusion incorrectly bestowed on the government the unnecessary and dangerous new power to disarm any law-abiding adult who is not keeping or bearing arms during military service with the permission of his commanding officer. Accordingly, the judgment below should be REVERSED.

Respectfully submitted,



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Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned counsel certifies that this brief complies with the type-volume limitations of the rule.

1. Exclusive of the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), the brief contains 6747 words.

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Robert Dowlut

Robert Dowlut

CERTIFICATE OF SERVICE

I, Robert Dowlut, hereby certify that on June 2, 2004, two paper copies of the foregoing brief were sent via United States Postal Service to counsel for the parties, as follows:

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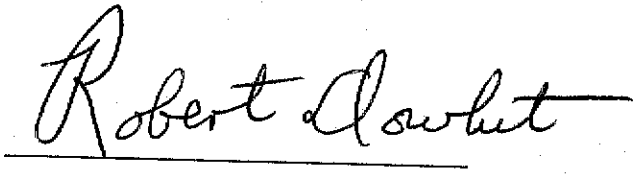

Robert Dowlut

APPENDIX A

Brief of the United States

United States v. Miller

307 U.S. 174 (1939) (No. 696)

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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 696

THE UNITED STATES OF AMERICA, APPELLANT

v.

JACK MILLER AND FRANK LAYTON

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The memorandum opinion of the District Court, filed January 3, 1939 (R. 3), sustaining a demurrer to the indictment, is not reported.

JURISDICTION

The judgment of the District Court was entered on January 3, 1939 (R. 4). The appeal was prayed for and allowed on January 30, 1939 (R. 4, 5). The jurisdiction to review the judgment complained of, by direct appeal, is conferred by the Criminal Appeals Act of March 2, 1907, c. 2564, 34

Stat. 1246 (U. S. C., Title 18, Sec. 682); and Section 238 of the Judicial Code as amended (U. S. C., Title 28, Sec. 345). Probable jurisdiction was noted by this Court on March 13, 1939.

QUESTION PRESENTED

Whether the District Court erred in sustaining the demurrer of the appellees to the indictment on the ground that Section 11 of the National Firearms Act is invalid as contravening the Second Amendment to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment to the Constitution provides:

> A well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

Section 11 of the National Firearms Act (Act of June 26, 1934, c. 757, 48 Stat. 1236, 1239; U. S. C., Title 26, Sec. 1132j), provides:

> It shall be unlawful for any person who is required to register as provided in Section 5 hereof and who shall not have so registered, or any other person who has not in his possession a stamp-affixed order as provided in Section 4 hereof, to ship, carry, or deliver any firearm in interstate commerce.

The National Firearms Act, as amended April 10, 1936, has been copied in its entirety in the Appendix, *infra*, pp. 22–30.

STATEMENT

The appellees were indicted on September 1, 1938, in the United States District Court for the Western District of Arkansas for violating Section 11 of the National Firearms Act (R. 1). The indictment, which was in one count, charged that on April 18, 1938, the appellees unlawfully transported in interstate commerce from the town of Claremore, Oklahoma, to the town of Siloam Springs, Arkansas, a certain firearm, to wit, a double barrel 12-gauge Stevens shotgun having a barrel less than 18 inches in length, the appellees not having registered the firearm as required by Section 5 of the National Firearms Act and not having in their possession a stamp-affixed order as required by Section 4 of the National Firearms Act and the regulations issued under authority of such Act.

The appellees filed a demurrer to the indictment which alleged, *inter alia*, that the National Firearms Act and the provisions thereof with respect to the registration of firearms and the possession of stamp-affixed orders are in violation of the Second Amendment to the Constitution (R. 2–3). In a memorandum opinion filed January 3, 1939 (R. 3), the District Judge held Section 11 of the National Firearms Act, the section under which the indict-

ment was laid, invalid, as being in contravention of the Second Amendment. The demurrer was accordingly sustained (R. 4). The other grounds assigned in the demurrer were not passed upon by the court.

On January 30, 1939, the United States filed a petition for appeal, assignment of errors, and statement of jurisdiction with the District Court (R. 4–5), and on the same day the District Court signed the order allowing an appeal (R. 5). On March 13, 1939, this Court noted probable jurisdiction.

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

(1) In holding that Section 11 of the National Firearms Act is invalid as violating the Second Amendment to the Constitution.

(2) In sustaining the demurrer to the indictment.

SUMMARY OF ARGUMENT

The Second Amendment does not grant to the people the right to keep and bear arms, but merely recognizes the prior existence of that right and prohibits its infringement by Congress. It cannot be doubted that the carrying of weapons without lawful occasion or excuse was always a crime under the common law of England and of this country. In both countries the right to keep and bear arms has been generally restricted to the keeping and bearing of arms by the people collectively for their common defense and security. Indeed, the very

language of the Second Amendment discloses that this right has reference only to the keeping and bearing of arms by the people as members of the state militia or other similar military organization provided for by law. The "arms" referred to in the Second Amendment are, moreover, those which ordinarily are used for military or public defense purposes, and the cases unanimously hold that weapons peculiarly adaptable to use by criminals are not within the protection of the Amendment. The firearms referred to in the National Firearms Act, i. e., sawed-off shotguns, sawed-off rifles, and machine guns, clearly have no legitimate use in the hands of private individuals but, on the contrary, frequently constitute the arsenal of the gangster and the desperado. Section 11, upon which the indictment was based, places restrictions upon the transportation in interstate commerce of weapons of this character only, and clearly, therefore, constitutes no infringement of "the right of the people to keep and bear arms," as that term is used in the Second Amendment.

ARGUMENT

SECTION 11 OF THE NATIONAL FIREARMS ACT DOES NOT VIOLATE THE SECOND AMENDMENT

In sustaining the demurrer to the indictment the District Court in its memorandum opinion stated merely that (R. 3):

> The indictment is based upon the Act of June 26, 1934, c. 757, Section 11, 48 Statute 1239. The court is of the opinion that this

> section is invalid, in that it violates the Second Amendment to the Constitution of the United States providing, "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed."

Whatever may have been the reasons which actuated the court in reaching this conclusion, we submit that "the right of the people to keep and bear arms," as that term is used in the Second Amendment, is not abridged by the Section.

Preliminarily, it may be pointed out that the National Firearms Act does not apply to all firearms but only to a limited class of firearms. The term "firearm" is defined in Section 1 of the Act (*infra*, p. 22) to refer only to "a shotgun or rifle having a barrel of less than 18 inches in length, or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person, or a machine gun, and includes a muffler or silencer for any firearm whether or not such firearm is included within the foregoing definition."[1] But even as to this class of firearms there is not a word in the National Firearms Act which expressly prohibits the obtaining, ownership, possession or transportation thereof by anyone if compliance is had with

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[1] As amended by the Act of April 10, 1936, c. 169, 49 Stat. 1192 (*infra*, p. 22), the term *firearm* does not include a rifle which is within the foregoing provisions solely by reason of the length of its barrel if the calibre of such rifle is .22 or smaller and if its barrel is 16 inches or more in length.

the provisions relating to registration, the payment of taxes, and the possession of stamp-affixed orders (*infra*, pp. 24 *et seq.*). It may be argued that Congress, in inserting these provisions in the National Firearms Act, intended, through the exercise of its taxing power and its power to regulate interstate and foreign commerce, to discourage, except for military and law-enforcement purposes, the traffic in and utilization of the weapons to which the Act refers. But it is also indisputable that Congress was striking not at weapons intended for legitimate use but at weapons which form the arsenal of the gangster and the desperado. In the Report of the Committee on Ways and Means of the House of Representatives (H. Rep. No. 1780, 73d Cong., 2d Sess.) it was stated (pp. 1–2):

> This bill is the result of the suggestions to Congress for many years that there is a legitimate field and method of regulation of dangerous weapons by the Congress. It has been frequently pointed out that there are limitations on the States, that the Federal Government has powers in the field, and that the evil needs a remedy. The growing frequency of crimes of violence in which people are killed or injured by the use of dangerous weapons needs no comment. The gangster as a law violator must be deprived of his most dangerous weapon, the machine gun. Your committee is of the opinion that limiting the bill to the taxing

APPENDIX A

of sawed-off guns and machine guns is sufficient at this time. It is not thought necessary to go so far as to include pistols and revolvers and sporting arms. But while there is justification for permitting the citizen to keep a pistol or revolver for his own protection without any restriction, there is no reason why anyone except a law officer should have a machine gun or sawed-off shotgun.

* * * * *

In general this bill follows the plan of the Harrison Anti-Narcotic Act and adopts the constitutional principle supporting that act in providing for the taxation of fire-arms and for procedure under which the tax is to be collected. It also employs the interstate and foreign commerce power to regulate interstate shipment of fire-arms and to prohibit and regulate the shipment of fire-arms into the United States.

It is apparent therefore that Section 11, the section upon which the indictment was based, places restrictions upon the transportation in interstate commerce of only those weapons which are the tools of the criminal. "The right of the people to keep and bear arms" recognized by the Second Amendment does not, we submit, guarantee to the criminal the right to maintain and utilize arms which are particularly adaptable to his purposes.

The Second Amendment does not *confer* upon the people the right to keep and bear arms; it is one

of the provisions of the Constitution which, recognizing the prior existence of a certain right, declares that it shall not be infringed by Congress. Thus the right to keep and bear arms is not a right granted by the Constitution and therefore is not dependent upon that instrument for its source. *United States* v. *Cruikshank,* 92 U. S. 542, 543; *Presser* v. *Illinois,* 116 U. S. 252, 265; *Robertson* v. *Baldwin,* 165 U. S. 275, 281.

Accordingly, in determining the nature and extent of the right referred to in the Second Amendment, we must look to the common law on the subject as it existed at the time of the adoption of the Amendment. *State* v. *Workman,* 35 W. Va. 367, 372; *State* v. *Kerner,* 181 N. C. 574, 577; cf. *Patton* v. *United States,* 281 U. S. 276, 288. While it has been said that the question whether there was a common law right to possess or carry firearms is a disputed one (*People* v. *Horton,* 264 N. Y. S. 84, 87, affirmed, 239 App. Div. 610), it cannot be doubted that at least the carrying of weapons without lawful occasion or excuse was always a crime under the common law of England [2] and was a part of our common law derived from that nation.[3]

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[2] Hawkins Pleas of the Crown (6th Ed.), Vol. I, p. 266; Wharton on Criminal Law (11th Ed.), Vol. 3, sec. 1869; Russell on Crimes (6th Ed.), Vol. 1, pp. 588–589; Hochheimer's Criminal Law (2d Ed.), sec. 281; Blackstone Comm., Vol. 4, p. 149.

[3] Bishop's Statutory Crimes (3d Ed.), sec. 784; McClain on Criminal Law, Vol. 2, sec. 1029. See also *State* v. *Huntly,* 25 N. C. 418; *State* v. *Roten,* 86 N. C. 701.

The earliest enactment upon the subject of bearing arms (Statute of Northampton, 2 Edw. III, c. 3, enacted in 1328) seems to have gone so far as to make it a misdemeanor for anyone, except the king's ministers or servants, to go or ride anywhere armed by day or night.[4] While it would seem doubtful that this statute was construed as broadly as its language warranted, it was recognized that the statute meant at least to punish people who went armed to terrify the king's subjects and that in this respect it constituted an affirmation of the common law. In *Sir John Knight's case* (1686), 3 Mod. 117, 87 Eng. Rep. 75, the Report states (p. 118):

> The Chief Justice said, that the meaning of the statute of 2 *Edw.* 3, c. 3, was to punish people who go armed to terrify the king's subjects. It is likewise a great offence at the *common law*, as if the king were not able or willing to protect his subjects; and therefore this act is but an affirmance of that law; and it having appointed a penalty, this Court can inflict no other punishment than what is therein directed.

And in Bishop on Statutory Crimes (3d Ed.), sec. 784, it was said (p. 531):

> Whatever we may deem of this statute, the leading offense punishable by it, namely, riding or going about armed with dangerous or unusual weapons to the terror of the people, was always indictable under the common law of England, and it has become a part of the common law of our states.[5]

In further derogation of any supposed right to possess weapons conferred by the English common law, a statute was enacted in 1670 (22 Charles II, c. 25, sec. 3) which provided that no person not having lands of a yearly value of 100 pounds, other than the son and heir of an esquire or person of higher degree, should be allowed to have or use guns, bows, etc.

Thus it would seem that the early English law did not guarantee an unrestricted right to bear arms. Such recognition as existed of a right in

[4] This statute (1 Statutes at Large of England, p. 422), so far as pertinent, provides:

"Item it is enacted, That no Man great nor small, of what Condition soever he be, except the King's Servants in his Presence, and his Ministers in executing of the King's Precepts, or of their Office, and such as be in their Company assisting them, and also upon a Cry made for Arms to keep the Peace, and the same in such Places where such Acts happen, be so hardy to come before the King's Justices, or other of the King's Ministers doing their Office with Force and Arms, (2) nor bring no Force in affray of the Peace, (3) nor to go nor ride armed by Night nor by Day, in Fairs, Markets, nor in the Presence of the Justices or other Ministers, nor in no Part elsewhere, upon Pain to forfeit their Armour to the King, and their Bodies to Prison at the King's Pleasure. * * *"

[5] See also *Rex* v. *Meade*, 19 T. L. R. 540 (1903), where the court said that the firing of a revolver in a public place, with the result that the people were terrorized, was an offense not only under the Statute of Northampton, but also under the common law.

the people to keep and bear arms appears to have resulted from oppression by rulers who disarmed their political opponents and who organized large standing armies which were obnoxious and burdensome to the people. (Cooley's Constitutional Limitations (8th ed.) Vol. 1, p. 729; 28 Harvard Law Review 473.) This right, however, it is clear, gave sanction only to the arming of the people as a body to defend their rights against tyrannical and unprincipled rulers. It did not permit the keeping of arms for purposes of private defense. Thus, in *Aymette* v. *State,* 2 Humphr. (Tenn.) 154, the court, in reviewing the history and origin of the right in England to bear arms, particularly as assured by the Bill of Rights of 1688, 1 Wm. & Mary, c. 2, said (pp. 156–157):

> By the act 22 and 23, Car. 2d, ch. 25, sec. 3, it is provided that no person who has not lands of the yearly value of £100, other than the son and heir apparent of an esquire, or other person of higher degree, &c., shall be allowed to keep a gun, &c. By this act, persons of a certain condition in life were allowed to keep arms, while a large proportion of the people were entirely disarmed. But King James the 2d, by his own arbitrary power, and contrary to law, disarmed the Protestant population and quartered his Catholic soldiers among the people. This, together with other abuses, produced the revolution by which he was compelled to abdicate the throne of England. William and Mary succeeded him, and in the first year of their reign, Parliament passed an act recapitulating the abuses which existed during the former reign, and declared the existence of certain rights which they insisted upon as their undoubted privileges. Among these abuses they say, in sec. 5, that he had kept a "standing army within the kingdom in time of peace without consent of Parliament, and quartered soldiers contrary to law." Sec. 6. "By causing several good subjects, being Protestants, to be disarmed, at the same time when Papists were both armed and employed contrary to law."

In the declaration of rights that follows, sec. 7 declares, that "the subjects which are Protestants may have arms for their defence, suitable to their condition and as allowed by law." This declaration, although it asserts the right of the Protestants to have arms, does not extend the privilege beyond the terms provided in the act of Charles 2d, before referred to. "They may have arms," says the Parliament, "suitable to their condition, and as allowed by law." The *law,* we have seen, only allowed persons of a certain *rank* to have arms, and consequently this declaration of right had reference to such only. It was in reference to these facts, and to this state of the English law, that the second section of the amendment to the Constitution of the United States was incorporated into that instrument. It declares that "a

well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed."

* * * * *

The evil that was produced by disarming the people in the time of James the second was that the King, by means of a standing army, quartered among the people, was able to overawe them, and compel them to submit to the most arbitrary, cruel, and illegal measures. Whereas, if the people had retained their arms, they would have been able, by a just and proper resistance to those oppressive measures, either to have caused the King to respect their rights, or surrender (as he was eventually compelled to do) the government into other hands. No private defence was contemplated or would have availed anything. If the subjects had been armed, they could have resisted the payment of excessive fines, or the infliction of illegal and cruel punishments. When, therefore, Parliament says, that "subjects which are Protestants may have arms for their defence, suitable to their condition as allowed by law," it does not mean for *private defence,* but being armed, they may as a body, rise up to defend their just rights, and compel their rulers to respect the laws. This declaration of right is made in reference to the fact before complained of, that the people had been disarmed, and soldiers had been quartered

among them contrary to law. The complaint was against the *government.* The grievances to which they were thus forced to submit were for the most part of a public character, and could have been redressed only by the people rising up for their *common defence* to vindicate their rights.

In this country, as in England, it has been almost universally recognized that the right to keep and bear arms, guaranteed in both the Federal and State Constitutions, had its origin in the attachment of the people to the utilization as a protective force of a well-regulated militia as contrasted with a standing army which might possibly be used to oppress them. (*People* v. *Brown,* 253 Mich. 537, 539; Cooley's Constitutional Limitations (8th ed.), vol. 1, p. 729; Story on the Constitution (2d ed.), vol. 2, secs. 1897–1898; 28 Harvard Law Review 473; see also the Third Amendment to the Constitution.) Indeed, the very declaration in the Second Amendment that "a well-regulated militia, being necessary to the security of a free State," indicates that the right secured by that Amendment to the people to keep and bear arms is not one which may be utilized for private purposes but only one which exists where the arms are borne in the militia or some other military organization provided for by law and intended for the protection of the state. In *Salina* v. *Blaksley,* 72 Kan. 230, the court, in referring to the provision of the State Constitution declaring that the people had the right to bear

arms for their defense and security, said (pp. 232–233):

> That the provision in question applies only to the right to bear arms as a member of the state militia, or some other military organization provided for by law, is also apparent from the second amendment to the federal constitution, which says: "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." Here also the right of the people to keep and bear arms for their security is preserved, and the manner of bearing them for such purpose is clearly indicated to be as a member of a well-regulated militia, or some other military organization provided for by law.

And in *State* v. *Buzzard*, 4 Ark. 18, the court, in referring to the Second Amendment, said (pp. 24–25):

> If these general powers of the government are restricted in regard to the right to keep and bear arms, the limitation, to whatever extent it may exist, will be better understood, and more clearly seen, when the object for which the right is supposed to have been retained, is stated. That object could not have been to protect or redress by individual force, such rights as are merely private and individual, as has been already, it is believed, sufficiently shown; consequently, the object must have been to provide an additional security for the public liberty and the free

institutions of the State, as no other important object is perceived, which the reservation of such right could have been designed to effect. Besides which, the language used appears to indicate, distinctly, that this, and this alone, was the object for which the article under consideration was adopted. And it is equally apparent, that a well regulated militia was considered by the people as the best security a free state could have, or at least, the best within their power to provide. But it was also well understood, that the militia, without arms, however well disposed, might be unable to resist, successfully, the efforts of those who should conspire to overthrow the established institutions of the country, or subjugate their common liberties; and therefore, to guard most effectually against such consequences, and enable the militia to discharge this most important trust, so reposed in them, and for this purpose only, it is conceived the right to keep and bear arms was retained, and the power which, without such reservation, would have been vested in the government, to prohibit, by law, their keeping and bearing arms for any purpose whatever, was so far limited or withdrawn: which conclusion derives additional support from the well known fact, that the practice of maintaining a large standing army in times of peace, had been denounced and repudiated by the people of the United States, as an institution dangerous to civil liberty and a free State, which produced, at once, the necessity of providing some ade-

quate means for the security and defence of the State, more congenial to civil liberty and republican government. And it is confidently believed that the people designed and expected to accomplish this object, by the adoption of the article under consideration, which would forever invest them with a legal right to keep and bear arms for that purpose; but it surely was not designed to operate as an immunity to those, who should so keep or bear their arms as to injure or endanger the private rights of others, or in any manner prejudice the common interests of society.

While some courts have said that the right to bear arms includes the right of the individual to have them for the protection of his person and property as well as the right of the people to bear them collectively (*People* v. *Brown,* 253 Mich. 537; *State* v. *Duke,* 42 Tex. 455), the cases are unanimous in holding that the term "arms" as used in constitutional provisions refers only to those weapons which are ordinarily used for military or public defense purposes and does not relate to those weapons which are commonly used by criminals. Thus in *Aymette* v. *State, supra,* it was said (p. 158):

> As the object for which the right to keep and bear arms is secured, is of general and public nature, to be exercised by the people in a body, for their *common defence,* so the *arms,* the right to keep which is secured, are such as are usually employed in civilized warfare, and that constitute the ordinary military equipment. If the citizens have these arms in their hands, they are prepared in the best possible manner to repel any encroachments upon their rights by those in authority. They need not, for such a purpose, the use of those weapons which are usually employed in private broils, and which are efficient only in the hands of the robber and the assassin. These weapons would be useless in war. They could not be employed advantageously in the common defence of the citizens. The right to keep and bear them, is not, therefore, secured by the constitution.

In *State* v. *Workman,* 35 W. Va. 367, 373, *supra,* it was likewise said:

> * * * in regard to the kind of arms referred to in the amendment, it must be held to refer to the weapons of warfare to be used by the militia, such as swords, guns, rifles, and muskets—arms to be used in defending the State and civil liberty—and not to pistols, bowie-knives, brass knuckles, billies, and such other weapons as are usually employed in brawls, street-fights, duels, and affrays, and are only habitually carried by bullies, blackguards, and desperadoes, to the terror of the community and the injury of the State. Bish. Crim. St. § 792.

See also *State* v. *Blaksley,* 72 Kan. 230; *People* v. *Persce,* 204 N. Y. 397; *People* v. *Warden,* 139 N. Y. S. 277; *People* v. *Ferguson,* 129 Cal. App. 300; *Ex parte Thomas,* 1 Okla. Cr. R. 210; *Andrews* v. *State,* 3 Heisk. (Tenn.) 165; *Fife* v. *State,* 31 Ark.

455; *State* v. *Duke,* 42 Tex. 455; *People* v. *Brown,* 253 Mich. 537; *State* v. *Hogan,* 63 Ohio St. 202; *Pierce* v. *State,* 42 Okla. Cr. R. 272; *Mathews* v. *State,* 33 Okla. Cr. R. 347; *English* v. *State,* 35 Tex. 473; *State* v. *Kerner,* 181 N. C. 574; *Glenn* v. *State,* 10 Ga. App. 128; *Hill* v. *State,* 53 Ga. 472.[6]

In recognition of this principle, this Court, in *Robertson* v. *Baldwin,* 165 U. S. 275, 281–282, stated that the right of the people to keep and bear arms is not infringed by laws prohibiting the carrying of concealed weapons.

That the foregoing cases conclusively establish that the Second Amendment has relation only to the right of the people to keep and bear arms for lawful purposes and does not conceivably relate to weapons of the type referred to in the National Firearms Act cannot be doubted. Sawed-off shotguns, sawed-off rifles and machine guns are clearly weapons which can have no legitimate use in the hands of private individuals. On the contrary they frequently constitute the arsenal of the "public enemy" and the "gangster" and are not weapons of the character which, as was said in *People* v. *Brown,* 253 Mich. 537, 542, are recognized by the common opinion of good citizens as proper for defence.

In the only other case in which the provisions of the National Firearms Act have been assailed as

[6] It has even been said in *Walter* v. *State,* 3 Ohio N. P. N. S. 13, that it is doubtful whether a shotgun is within the meaning of the term "arms" as used in the Constitution of Ohio.

being in violation of the Second Amendment (*United States* v. *Adams,* 11 F. Supp. 216 (S. D. Fla.)), the contention was summarily rejected as follows (pp. 218–219):

> The second amendment to the Constitution, providing, "the right of the people to keep and bear arms, shall not be infringed," has no application to this act. The Constitution does not grant the privilege to racketeers and desperadoes to carry weapons of the character dealt with in the act. It refers to the militia, a protective force of government; to the collective body and not individual rights. * * *

CONCLUSION

For the reasons stated, we respectfully submit that Section 11 of the National Firearms Act does not infringe "the right of the people to keep and bear arms" secured by the Second Amendment, and therefore that the judgment of the District Court should be reversed and the cause remanded for further proceedings.

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