No. 07-290

In The
Supreme Court of the United States

DISTRICT OF COLUMBIA and ADRIAN M. FENTY,
MAYOR OF THE DISTRICT OF COLUMBIA,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

---

BRIEF FOR AMICI CURIAE FORMER SENIOR OFFICIALS OF THE DEPARTMENT OF JUSTICE IN SUPPORT OF RESPONDENT

CHARLES J. COOPER
Counsel of Record
BRIAN S. KOUKOUTCHOS
HOWARD C. NIELSON, JR.
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, NW
Washington, DC 20036
(202) 220-9600

February 2008

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. The Current Administration Properly Recognized That the Second Amendment Secures an Individual Right	5
A. Prior to *United States v. Miller*, the Executive Branch Repeatedly Recognized That the Second Amendment Secures an Individual Right	5
B. The Position of the United States in *Miller* Did Not Signal an Abandonment of the Individual Rights View of the Second Amendment	10
C. The Collective Rights Analysis Offered by the Johnson Administration in Support of Its Gun Control Initiatives Was Flawed And Incomplete	15
D. Subsequent Twentieth Century Executive Interpretations Were Cursory and Often Equivocal	18
E. In Definitively Affirming That the Second Amendment Secures an Individual Right, the Current Administration Fulfilled Its Obligation to Uphold the Constitution	23

TABLE OF CONTENTS – Continued

Page

II. Interpreting the Second Amendment to Secure An Individual Right Does Not Call into Question the Constitutionality of Existing Federal Firearms Laws 26

III. The Court Need Not Address the Solicitor General's Proposal for a Multi-tiered Standard of Second Amendment Review to Affirm the Decision Below, Nor Is This Case a Suitable Vehicle for Doing So 33

CONCLUSION 35

TABLE OF AUTHORITIES

Page

CASES

Aymette v. State, 21 Tenn. 154 (1840) 9

Cases v. United States, 131 F.2d 916 (1st Cir. 1942) 12

City of Salina v. Blaksley, 83 P. 619 (Kan. 1905) ...18, 19

Emerson v. United States, 536 U.S. 907 (2002)...........2

Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866) 7

Haney v. United States, 536 U.S. 907 (2002)..............2

In re Rapier, 143 U.S. 110 (1892).................................8

Lewis v. United States, 445 U.S. 55 (1980)................29

Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir. 2007)...............................28, 29, 30, 31, 34

Printz v. United States, 521 U.S. 898 (1997) 24

Rescue Army v. Municipal Court, 331 U.S. 549 (1947)...33

Robertson v. Baldwin, 165 U.S. 275 (1897) 9, 28, 29

State v. Buzzard, 4 Ark. 18 (1842) 10

State v. Kerner, 107 S.E. 222 (N.C. 1921)..................29

United States v. Cruikshank, 92 U.S. 542 (1876)...5, 6

United States v. Cruikshank, 25 F. Cas. 707 (C.C.D. La. 1874)...6

United States v. Emerson, 270 F.3d 203 (5th Cir. 2001)...*passim*

TABLE OF AUTHORITIES – Continued

Page

United States v. Lippman, 369 F.3d 1039 (8th Cir. 2004) 27

United States v. Miller, 307 U.S. 174 (1939) ..... *passim*

United States v. Price, 328 F.3d 958 (7th Cir. 2003) 27

United States v. Tot, 131 F.2d 261 (3rd Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943) 20

United States v. Warin, 530 F.2d 103 (6th Cir. 1976) 23

United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) 16

United States Department of the Treasury v. Galioto, 477 U.S. 556 (1986) 22

STATUTES AND CONGRESSIONAL MATERIALS

U.S. CONST. amend. II .... *passim*

Enforcement Act of 1870, 16 Stat. 140, codified as amended, 18 U.S.C. §§ 241-42 6

Firearms Owners' Protection Act, Pub. L. No. 99-308, § 1(b), 100 Stat. 449, 449 (1986), codified at 18 U.S.C. § 921 21

Property Requisition Act, ch. 445, § 1, 55 Stat. 742 13

TABLE OF AUTHORITIES – Continued

Page

Federal Firearms Act, Hearings before the Subcomm. To Investigate Juvenile Delinquency of the S. Comm. On the Judiciary, 89th Cong., 1st Sess. 41 (1965)....................15, 16, 17

National Firearms Act: Hearings on H.R. 9066 Before the H. Comm. On Ways and Means, 73d Cong., 2d Sess. 19 (1934)....................................8

OTHER

Brief for the Respondent in Opposition, *Farmer v. Higgins*, No. 90-600 (1990), available at http://www.usdoj.gov/osg/briefs/1990/sg900583.txt.........22

Brief for the Appellant, *United States Department of Treasury v. Galioto*, No. 84-1904, 1986 WL 728208 (1986)..22

Reply Brief for the Appellant, *United States Department of Treasury v. Galioto*, No. 84-1904, 1986 WL 728209 (1986)................................22

Brief for the United States, *United States v. Miller*, No. 39-696, 1939 WL 48353 (1939)............11

Memorandum for the Attorney General from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, Howard C. Nielson, Jr., Deputy Assistant Attorney General, Office of Legal Counsel, and C. Kevin Marshall, Acting Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Whether the Second Amendment Secures an Individual Right* (Aug. 24, 2004).....................*passim*

TABLE OF AUTHORITIES – Continued

Page

Memorandum for All United States' Attorneys from the Attorney General, *Re: United States v. Emerson* (Nov. 9, 2001)........................1, 26, 27, 28

Letter from Seth P. Waxman, Solicitor General (Aug. 22, 2000) 18

Memorandum for D. Lowell Jensen, Assistant Attorney General, Criminal Division, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Proposed Legislation Relating to Firearms and to Mandatory Sentencing* at 2 (May 27, 1981)...........21

Letter to George Bush, Chairman, Republic National Committee, from Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal Counsel (July 19, 1973) 18

Memorandum for Richard G. Kleindienst, Deputy Attorney General, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Proposed "Federal Gun Registration and Licensing Act of 1969"* at 4 (Feb. 13, 1969) 20, 21

Unsigned Memorandum, *Re: Constitutional Basis for Administration Gun Registration And Licensing Bill* at 11-12 (June 25, 1968)..........19

TABLE OF AUTHORITIES – Continued

Page

Memorandum for Byron R. White, Deputy Attorney General, from Nicholas deB. Katzenbach, Assistant Attorney General, Office of Legal Counsel, *Re: Proposed report of the Department of Defense on H.R. 2057 "To provide for the securing of custody and disposition by the United States of missiles, rockets, earth satellites and similar devices adaptable to military uses, and for other purposes"* (Mar. 22, 1962) 14

Memorandum for Byron R. White, Deputy Attorney General, from Nicholas deB. Katzenbach, Assistant Attorney General, Office of Legal Counsel, *Re: H.R. 2057, a bill to provide for the securing of custody and disposition by the United States of missiles, rockets, earth satellites, and similar devices adaptable to military use* (May 8, 1961) 13

Memorandum for Lawrence E. Walsh, Deputy Attorney General, from Paul A. Sweeney, Acting Assistant Attorney General, Office of Legal Counsel, *Re: H.R. 232, 86th Cong., 1st Sess., a bill "To provide for the securing of custody and disposition by the United States of missiles, rockets, earth satellites, and similar devices adaptable to military uses, and for other purposes"* at 1 (Apr. 9, 1959)....................13

TABLE OF AUTHORITIES – Continued

Page

Unsigned Memorandum, *Re: Whether Reasonable Regulation By AEC Under Proposed Amendments To Atomic Energy Act For Peacetime Use Of Fissionable Materials Would Violate The Second Amendment To The Constitution* at 7 (appended to Letter to George Norris, Jr., Esq., Joint Committee on Atomic Energy, United States Senate, from J. Lee Rankin, Assistant Attorney General, Office of Legal Counsel (Feb. 11. 1954)................................14

JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF STATUTORY CRIMES (3d ed. 1901)................32

4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1st ed. 1765).............................31

STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876 159-68 (1998)................................6

Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L. J. 637 (1989)....................25

L.A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 WM. & MARY L. REV. 1311 (1997)..25

LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (3d ed. 2000).......................................16, 24, 25

LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (1st ed. 1978)...25

INTEREST OF AMICI CURIAE

Amici Curiae are former Attorneys General and other senior officials of the Department of Justice who have had extensive government experience interpreting and enforcing the United States Constitution, the federal firearms laws, or both.[1] Amici believe that the current Administration properly bowed to its duty to uphold the Constitution when it reexamined and rejected the collective rights interpretation of the Second Amendment adopted by certain prior Administrations. *See* Memorandum for All United States' Attorneys from the Attorney General, *Re: United States v. Emerson* (Nov. 9, 2001) (announcing this interpretation); Memorandum for the Attorney General from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, Howard C. Nielson, Jr., Deputy Assistant Attorney General, Office of Legal Counsel, and C. Kevin Marshall, Acting Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Whether the Second Amendment Secures an Individual Right* (Aug. 24, 2004) ("2004 OLC Opinion") (memorializing

---

[1] A list of amici curiae is set forth in the Appendix. Pursuant to Rule 37.6, amici affirm that no person other than amici or their counsel made a monetary contribution to the preparation or submission of this brief, and that no counsel for a party authored this brief in whole or in part. The parties' letters consenting to the filing of amicus briefs have been filed with the Clerk.

the Administration's Second Amendment analysis).[2] Amici believe that the Amendment secures to individuals a personal right to keep and bear arms and that the decision below correctly interpreted and applied the Amendment in this case.

SUMMARY OF ARGUMENT

Amici wish to make three points. First, contrary to the suggestion of the amici curiae brief filed on behalf of former Attorney General Reno and other former Justice Department officials ("Reno Brief"), prior Executive Branch interpretations do not provide well-reasoned, or even consistent, support for a collective rights view of the Second Amendment. As demonstrated below, the Executive Branch had long interpreted the Amendment to secure an individual right prior to the litigation that culminated in this Court's decision in *United States v. Miller*, 307 U.S. 174 (1939). And although the Government advanced, in the alternative, a contrary, collective rights interpretation during the *Miller* litigation, the Executive Branch appears generally to have adhered to an individual rights view for many years thereafter.

[2] The Solicitor General attached the Memorandum for All United States' Attorneys to the United States' briefs in opposition in *Emerson v. United States*, 536 U.S. 907 (2002) (No. 01-8780), and *Haney v. United States*, 536 U.S. 907 (2002) (No. 01-8272). The 2004 OLC Opinion is available at http://www.usdoj.gov/olc/secondamendment2.pdf.

While the Executive Branch did offer a collective rights interpretation in support of the Johnson Administration's gun control initiatives during the 1960s, the analysis offered in support of that interpretation was flawed and incomplete. Throughout the remainder of the twentieth century, the Executive Branch's interpretations of the Second Amendment were cursory and often equivocal.

In systematically reexamining the scope of the Second Amendment, the current Administration correctly recognized that previous Executive Branch opinions and federal appellate decisions offered little meaningful historical evidence or constitutional analysis in support of the collective rights view and that the proper interpretation of the Amendment remained an open question in this Court. Building on a wealth of recent scholarship, and on the Fifth Circuit's decision in *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), the Department of Justice's Office of Legal Counsel ("OLC") carefully and exhaustively demonstrated that the Second Amendment secures an individual right and that a collective rights interpretation of the Amendment is untenable. Under these circumstances, the current Administration properly fulfilled its obligation to uphold the Constitution by embracing an individual rights view of the Second Amendment.

Second, the Reno Brief also errs in suggesting that affirming the judgment below would jeopardize existing federal firearms laws. The Second Amendment's protection was never understood to extend to

unfit persons or to unusual and especially dangerous firearms. Reading the Second Amendment to secure the right of a law-abiding individual to possess a common handgun for personal defense in his own home does not call into question any existing federal firearms regulations, including those restricting possession of machineguns. Indeed, the decision below, in emphasizing that the Amendment protects only arms of the kind commonly owned and used by private individuals for lawful purposes, contemplates that restrictions on machineguns would be constitutional.

Third, amici respectfully submit that it is neither necessary nor advisable in this case for the Court to embrace the Solicitor General's proposed multi-tiered framework for judicial review of Second Amendment cases. If the Second Amendment does secure an individual right, then this case lies within its very core. For if that right means anything, it surely protects the right of a law-abiding citizen to keep an ordinary handgun in his own home for self defense. The District of Columbia's laws prohibit this, and so are to that extent unconstitutional. This is the only question before the Court, and deciding it does not require resolution of the doctrinal issues raised by the proposal of amicus United States.

ARGUMENT

I. The Current Administration Properly Recognized That the Second Amendment Secures an Individual Right.

In interpreting the Second Amendment to secure a personal right of individuals to keep and bear arms, the current Administration properly fulfilled its duty to vindicate the Constitution. Neither judicial precedent nor, as demonstrated below, prior Executive Branch opinions, provides any persuasive support for a collective rights view of the Amendment.

A. Prior to *United States v. Miller*, the Executive Branch Repeatedly Recognized That the Second Amendment Secures an Individual Right.

The Reno Brief proceeds on the tacit assumption that Second Amendment interpretation began in 1939 with this Court's decision in *Miller*. That is incorrect. Prior to 1939, the Executive Branch repeatedly expressed its understanding that the Second Amendment secures an individual right.

For example, prior to *United States v. Cruikshank* – which held that the Second Amendment does not protect citizens against private "violation by their fellow-citizens of the rights it recognizes," 92 U.S. 542,

553 (1876)[3] – the United States repeatedly indicted and tried members of the Ku Klux Klan and other individuals under the Enforcement Act of 1870, 16 Stat. 140, codified as amended, 18 U.S.C. §§ 241-42, for conspiring to prevent former slaves from exercising their right to keep and bear arms as secured by the Second Amendment. Indeed, the prosecution in *Cruikshank* itself involved two Second Amendment counts arising out of the disarming and murder of freed slaves in Louisiana. *See* 92 U.S. at 543-43 (describing indictment); STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876 159-68 (1998) ("*Freedmen*") (documenting the *Cruikshank* trials).[4] Similar prosecutions had been previously brought against numerous members of the Ku Klux Klan in South Carolina. *See* Halbrook, *Freedmen* at 137-45. In assessing indictments for these prosecutions, Attorney General Amos T. Akerman advised the local federal prosecutor that "upon the right to bear arms, I think you are impregnable." *Id*. at 137. Whatever the merits of the Executive Branch view of state

[3] The Court recognized, however, that the Second Amendment provides that the right of "'bearing arms for a lawful purpose' . . . shall not be infringed by Congress." *Id.*

[4] Apparently acquiescing in Justice Bradley's opinion, as Circuit Justice, that the Second Amendment did not protect against purely private action, *see United States v. Cruikshank*, 25 F. Cas. 707, 714-15 (C.C.D. La. 1874), the United States appears not to have defended the sufficiency of the Second Amendment counts before the Supreme Court in this case, *see* 92 U.S. at 561 (Clifford, J., dissenting).

action reflected in these prosecutions, it is plain that the Executive Branch understood the Second Amendment to protect the right of individuals to keep and bear arms.

In litigation involving other constitutional rights, the Executive likewise made clear that it understood the Second Amendment to protect an individual right. For example, in *Ex parte Milligan*, Attorney General James Speed responded to Fourth, Fifth, and Sixth Amendment challenges to the military trial of a civilian accused of conspiring against the Government and giving aid and comfort to the South as follows:

> All these amendments are in *pari materia*, and if either is a restraint upon the President in carrying on war, in favor of the citizen, it is difficult to see why all of them are not. Yet will it be argued that the fifth article would be violated in "depriving of life, liberty, or property, without due process of law," armed rebels marching to attack the capital? Or that the fourth would be violated by searching and seizing the papers and houses of persons in open insurrection and war against the government? It cannot properly be so argued, any more than it could be that it was intended by the second article (declaring that "the right of the people to keep and bear arms shall not be infringed") to hinder the President from disarming insurrectionists, rebels, and traitors in arms while he was carrying on war against them.

71 U.S. (4 Wall.) 2, 20 (1866).

Similarly, in defending a prohibition on the mailing of lottery tickets against a First Amendment challenge, the United States argued in this Court that "[f]reedom of the press, like freedom of speech, and 'the right to keep and bear arms,' admits of and requires regulation, which is the law of liberty that prevents these rights from running into license." *In re Rapier*, 143 U.S. 110, 131 (1892). These arguments confirm that, throughout the nineteenth century, the Executive Branch understood the Second Amendment, no less than the First, Fourth, Fifth, and Sixth, to protect the rights of individuals.

The testimony of Attorney General Homer S. Cummings in support of the National Firearms Act of 1934 ("NFA") reflects the same understanding. Contrary to the Reno Brief's suggestion, *see id*. 30-31 n.9, General Cummings' testimony cannot reasonably be understood to involve solely the scope of Congress's Article I powers. Indeed, when specifically asked how the proposed legislation "escaped" the "provision in our Constitution denying the privilege to the legislature to take away the right to carry arms," General Cummings responded:

> Oh, we do not attempt to escape it. We are dealing with another power, namely the power of taxation and of regulation under the interstate commerce clause. You see, if we made a statute absolutely forbidding any human being to have a machine gun, you might say there is some constitutional question involved. But when you say "We will tax

> the machine gun" and when you say that "the absence of a license showing payment of the tax has been made indicates that a crime has been perpetrated" you are easily within the law.

National Firearms Act: Hearings on H.R. 9066 Before the H. Comm. On Ways and Means, 73d Cong., 2d Sess. 19 (1934). When the Member responded, "In other words, it does not amount to prohibition but allows of regulation," *id*., General Cummings replied, "That is the idea. We have studied that very carefully," *id*. It is plain that this discussion relates to the constitutionality of the proposed legislation under the Second Amendment, and it is significant that General Cummings responded not by denying that the Second Amendment secured an individual right, but rather by explaining that the right was subject to regulations such as those proposed in the NFA. Nor can General Cummings' view of the Second Amendment be dismissed as an offhand comment – on the contrary, he indicated that the Government had "studied that very carefully."

It is not surprising that the Executive Branch repeatedly expressed an individual rights view of the Second Amendment during the first 150 years of our history. As demonstrated at great length in the 2004 OLC Opinion, although early precedents recognized that the right to arms did not extend to weapons particularly suited for criminal misuse, *see, e.g., Aymette v. State*, 21 Tenn. 154, 158 (1840), and was subject to other well-established limitations, *see, e.g., Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897),

any suggestion that the right protected States rather than individuals or that the right was limited to members of the organized militia is simply absent from the cases and commentary prior to the twentieth century. *See* 2004 OLC Op. at 78-98, 102-05.[5]

B. The Position of the United States in *Miller* Did Not Signal an Abandonment of the Individual Rights View of the Second Amendment.

As the Reno Brief notes, *see id*. at 10, the Government's brief in *United States v. Miller* argued that the right secured by the Second Amendment "is not one which may be utilized for private purposes but only one which exists where the arms are borne in the militia . . . and intended for the protection of the

[5] As noted in the 2004 OLC Opinion, *see id*. at 97, the opinion of one Justice in *State v. Buzzard* appears to have construed the Second Amendment to protect the *federal government* against the States. *See* 4 Ark. 18, 31 (1842) ("So long as the enactments of the General Assembly do not weaken the arm of the Federal Government, impair its power, or lessen its means to protect and sustain itself, and preserve inviolate the freedom of the States, they must be respected and enforced. But the slightest interference with the constitutional regulations and restrictions in effecting these objects becomes a violation of the compact between the State and Federal Authorities, and ceases to be obligatory on the citizen."). However even on this view – which lacks any historical support and has not been endorsed, to our knowledge, by any other court or commentator – the right ultimately inures to the benefit of the individual, who is free to ignore any state laws that interfere with the Federal Government's authority.

state." Brief for the United States, *United States v. Miller*, No. 39-696, 1939 WL 48353, at *15 (1939) ("U.S. Miller Br."). The Reno Brief, however, overstates the significance of the Government's argument in *Miller*.

First and foremost, the United States pressed this argument *only in the alternative*. Other portions of the brief emphasized the limited reach of the challenged statute, *see id*. at *6-*7, and argued that the " 'arms' referred to in the Second Amendment are, moreover, those which ordinarily are used for military or public defense purposes" and that "weapons peculiarly adaptable to use by criminals are not within the protection of the Amendment." *Id*. at *4. *See also, e.g., id*. at *20 ("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"; "Sawed-off shotguns, sawed-off rifles and machine guns . . . are not weapons of the character . . . recognized by the common opinion of good citizens as proper for defense."); *id*. at *8 (" '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."). This latter argument is fully consistent with the individual rights view of the Second Amendment. And it is the one the *Miller* Court adopted – *see* 307 U.S. at 178 (absent evidence that a sawed-off shotgun "is any part of the ordinary military equipment or that

its use could contribute to the common defense," Court could not "say that the Second Amendment guarantees the right to keep and bear such an instrument").[6]

Furthermore, far from abandoning the individual rights view of the Second Amendment in the wake of the *Miller* litigation, the Executive Branch continued to express this view through the Roosevelt, Eisenhower, and Kennedy Administrations.[7] Thus, in 1941,

---

[6] Indeed, *Cases v. United States*, one of the very first federal appellate decisions issued in the aftermath of *Miller*, understood the decision in precisely this manner. 131 F.2d 916, 922 (1st Cir. 1942). Thus, after quoting the operative language of the *Miller* holding, the court of appeals in *Cases* stated:

> Apparently, then, under the Second Amendment, the federal government can limit the keeping and bearing of arms by a single individual as well as by a group of individuals, but it cannot prohibit the possession or use of any weapon which has any reasonable relationship to the preservation or efficiency of a well regulated militia.

Id. The *Cases* court rejected this position, however, as incomplete, "already outdated," and unwise. *Id.*

[7] The Reno Brief asserts that "[i]n opposing Second Amendment challenges to [firearms] prosecutions, the government contended for more than 60 years that the Second Amendment did not protect an individual right to keep and bear arms for purposes unrelated to participation in a well-regulated militia." *Id*. at 3. Aside from the alternative argument in the *Miller* brief and a handful of briefs filed during the Clinton Administration, the Reno Brief offers in support of this contention briefs filed in two cases during the Reagan and first Bush Administrations. As discussed below, the briefs filed in these two cases do not advocate a collective rights view of the Second Amendment.

President Roosevelt signed into law a bill authorizing the President "to requisition such property for the defense of the United States upon the payment of fair and just compensation . . . and to dispose of such property in such manner as he may determine is necessary for the defense of the United States." Property Requisition Act, ch. 445, § 1, 55 Stat. 742, 742. Significantly, the legislation expressly provided that "[n]othing contained in this Act shall be construed – (1) to authorize the requisitioning or require the registration of any firearms possessed by any individual for his personal protection or sport . . . [or] (2) to impair or infringe in any manner the right of any individual to keep and bear arms." *Id*.

Likewise, during the Eisenhower and Kennedy Administrations, the Office of Legal Counsel repeatedly voiced Second Amendment objections to legislation that could have been construed "to prohibit private individuals from acquiring, possessing, or receiving any standard ammunition for firearms." Memorandum for Lawrence E. Walsh, Deputy Attorney General, from Paul A. Sweeney, Acting Assistant Attorney General, Office of Legal Counsel, *Re: H.R. 232, 86th Cong., 1st Sess., a bill "To provide for the securing of custody and disposition by the United States of missiles, rockets, earth satellites, and similar devices adaptable to military uses, and for other purposes"* at 1 (Apr. 9, 1959); *see also* Memorandum for Byron R. White, Deputy Attorney General, from Nicholas deB. Katzenbach, Assistant Attorney General, Office of Legal Counsel, *Re: H.R. 2057, a bill to*

provide for the securing of custody and disposition by the United States of missiles, rockets, earth satellites, and similar devices adaptable to military use (May 8, 1961); Memorandum for Byron R. White, Deputy Attorney General, from Nicholas deB. Katzenbach, Assistant Attorney General, Office of Legal Counsel, *Re: Proposed report of the Department of Defense on H.R. 2057 "To provide for the securing of custody and disposition by the United States of missiles, rockets, earth satellites and similar devices adaptable to military uses, and for other purposes"* (Mar. 22, 1962).[8]

---

[8] The Reno Brief prominently cites an unsigned OLC opinion from 1954 as illustrating the Executive Branch's view that the Second Amendment protects only a collective right. *See* Reno Brief at 18-19. It is true that this opinion's analysis, which appears to conflate the question of the scope of Congress's enumerated Article I authorities with the meaning of the Second Amendment, does contain some language consistent with a collective rights analysis. Its central point, however – that regulations that would "prohibit an individual from owning, possessing or carrying fissionable material in the form of hand-throwing bombs or grenades" would be "at least as reasonable" as the Federal Firearms Act prohibition "against the receipt of weapons from interstate transactions by persons who have been shown to be aggressors of society" – is surely consistent with any individual rights view of the Second Amendment. Unsigned Memorandum, *Re: Whether Reasonable Regulation By AEC Under Proposed Amendments To Atomic Energy Act For Peacetime Use Of Fissionable Materials Would Violate The Second Amendment To The Constitution* at 7 (appended to Letter to George Norris, Jr., Esq., Joint Committee on Atomic Energy, United States Senate, from J. Lee Rankin, Assistant Attorney General, Office of Legal Counsel (Feb. 11. 1954)).

C. The Collective Rights Analysis Offered by the Johnson Administration in Support of Its Gun Control Initiatives Was Flawed And Incomplete.

In his testimony to Congress in support of the Johnson Administration's gun control initiatives, Attorney General Nicholas deB. Katzenbach argued that "the right to bear arms protected by the second amendment relates only to the maintenance of the militia" and does not "guarantee to any individuals the right to bear arms." Federal Firearms Act, Hearings before the Subcomm. To Investigate Juvenile Delinquency of the S. Comm. On the Judiciary, 89th Cong., 1st Sess. 41 (1965) ("1965 Hearings"). In so doing, General Katzenbach departed from the individual rights view that he had previously expressed, as noted above, while head of the Office of Legal Counsel during the Kennedy Administration. General Katzenbach submitted two memoranda in support of his new interpretation, the first concluding that "respectable authority supports the view that the second amendment merely affirms the right of the States to organize and maintain militia," *id*. at 45, and the second contending, among other things, that "[i]t is certainly arguable then that it was Federal infringement of the militia that concerned these

States when the First Congress assembled, rather than any individual right to bear arms," *id*. at 47.[9]

As an initial matter, a collective rights analysis was unnecessary to support the constitutionality of the proposed legislation. *See infra*, section II. Indeed, General Katzenbach recognized that "[e]ven if it were applicable, the fact remains that this measure does not infringe on the right of the people to keep and bear arms." *Id*. at 52; *see also id*. (arguing that the proposed legislation would merely "make the purchase of weapons a little more inconvenient"). Furthermore, the analysis offered in support of the collective rights interpretation was flawed and incomplete.

General Katzenbach's textual analysis relied on the fact that, unlike an earlier proposal addressing conscientious objectors, the Second Amendment addresses the right of "the people" as opposed to a "person." *See id*. at 46. Given that other provisions of the Bill of Rights, including, most notably, the First and Fourth Amendments, also address individual rights of "the people," this argument is plainly untenable. *See, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (reading the phrase "the people" as used throughout the Constitution in *pari materia*); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 899 n.213 (3d ed. 2000) ("But any notion that the

---

[9] This second memorandum is the same memorandum discussed in the Reno Brief at 19-20.

phrase 'the people' is being used to connote only a collective entity like 'the electorate' or 'the citizenry' would be hard to sustain.").

Similarly, the historical analysis offered by General Katzenbach was superficial and incomplete. Among other things, his discussion of the Second Amendment's framing overlooked the majority Federalists' avowed determination to allow amendments securing individual rights but to defeat any amendments altering the balance of power between the States and the Federal Government; it failed to mention Congress's rejection of a motion to insert the phrase "for the common defense" immediately after "to keep and bear arms"; and it ignored Congress's rejection of an entirely separate constitutional amendment that would have expressly secured the States' power to organize, arm, and discipline the militia in the event of federal dereliction or neglect. *See* 2004 OLC Op. at 60-78.

Finally, General Katzenbach's treatment of precedent was mistaken. He misread not only this Court's decision in *Miller*, *see* 1965 Hearings at 41 (asserting that *Miller* rejected any individual rights view of the Second Amendment), but earlier case law as well. Thus, while recognizing that "[a] majority of court decisions, both State and Federal, assume without discussion or determination of the issue that the right to bear arms exists in the people as individuals," *id*. at 45, General Katzenbach read this body of precedent to establish only that "if such a right is personal in nature, it is at least restricted to members of a well

regulated or, synonymously, organized State militia," *id*. This proposition, however, was supported by only one of the pre-*Miller* decisions cited by General Katzenbach – the twentieth century decision *City of Salina v. Blaksley*, 83 P. 619 (Kan. 1905), which appears to have been the first decision ever to espouse a collective rights view. *See* 2004 OLC Op. at 104-05.

D. Subsequent Twentieth Century Executive Interpretations Were Cursory and Often Equivocal.

Subsequent twentieth century Executive Branch interpretations of the Second Amendment broke little new ground. Although the Executive Branch sometimes reiterated the collective rights position advanced by General Katzenbach, *see e.g.*, Letter to George Bush, Chairman, Republic National Committee, from Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal Counsel (July 19, 1973); Letter from Seth P. Waxman, Solicitor General (Aug. 22, 2000), in doing so it merely recycled General Katzenbach's testimony and provided citations to federal appellate decisions that offered little meaningful constitutional analysis. *See* 2004 OLC Op. at 5-8 (summarizing post-*Miller* federal appellate decisions).[10]

[10] For example, besides summarizing General Katzenbach's flawed textual and historical arguments, the Lawton letter cited five cases in support of its collective rights conclusion. Only one

(Continued on following page)

Furthermore, with the exception of the Clinton Administration – whose litigators advocated a collective rights interpretation (albeit without fresh analysis), *see* Reno Brief at 16, 26-27 & n.8 – the Executive Branch adopted positions that were generally equivocal and at least on occasion appear to have inclined toward an individual rights view of the Second Amendment.

Indeed, even the Johnson Administration appears to have hedged the collective rights position advanced by General Katzenbach. Thus, a later unsigned OLC memorandum analyzing a proposal to require registration and licensing of every firearm in the United States, after reciting several of the arguments offered by General Katzenbach in support of his collective rights position, concluded only that "interpretations of the Second Amendment by the Congress and the courts, as well as its language and historical context, clearly negate any *absolute* personal right of an individual to possess firearms. The Amendment does not affect regulation of individual possession *as proposed in this bill*." Unsigned Memorandum, *Re: Constitutional Basis for Administration Gun Registration And Licensing Bill* at 11-12 (June 25, 1968) (emphases added); *see also id*. at 11 (Second Amendment "does not create a personal right in

---

of those cases, however – *City of Salina* – actually supported this position. The Waxman letter, in turn, quoted from the Lawton letter and General Katzenbach's testimony and cited *Miller* and a handful of subsequent federal appellate decisions.

individuals to be free of *reasonable* legislative regulation of their possession of firearms.") (emphasis added).

When the Nixon Administration later reviewed the same proposal, then-Assistant Attorney General Rehnquist simply stated, even more neutrally, that "we do not believe that constitutional objections based on the Second Amendment's guarantee of 'the right of the people to keep and bear arms' present any serious legal obstacle to this legislation." Memorandum for Richard G. Kleindienst, Deputy Attorney General, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Proposed "Federal Gun Registration and Licensing Act of 1969"* at 4 (Feb. 13, 1969) ("Rehnquist Memorandum") (citing *Miller* and *United States v. Tot*, 131 F.2d 261 (3rd Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943)).[11]

---

[11] As discussed above, this Court's decision in *Miller* is fully consistent with an individual rights view of the Second Amendment. And the Third Circuit's decision in *Tot*, though containing dicta often cited in support of the collective rights view, ultimately rested its holding on the ground that the statute barring convicted felons from receiving firearms in interstate commerce was a reasonable restriction on firearm possession that did "not go so far as substantially to interfere with the public interest protected by the constitutional mandate[ ]." 131 F.2d at 266. That holding, of course, is fully consistent with an individual rights view of the Second Amendment. *See, e.g., Emerson*, 270 F.3d at 226 n.21; U.S. Amicus at 25-26. Accordingly, the Rehnquist Memorandum's citation of *Miller* and *Tot* does not necessarily imply that the Memorandum embraced a collective rights view of the Second Amendment.

And although the Rehnquist Memorandum endorsed the 1968 memorandum's analysis of the Commerce Clause basis for the proposed legislation as "set[ting] forth a respectable constitutional argument for the legislation and one that, more likely than not, would be accepted by the courts," Rehnquist Memorandum at 4, it does not appear to have endorsed the 1968 memorandum's Second Amendment analysis, *id*.

During the Reagan Administration, the Department of Justice appears initially to have entertained a collective rights view of the Second Amendment. In objecting to a 1981 proposal to amend the Gun Control Act of 1968 that purported to rest "in part, on a legislative determination that the current scheme for federal firearms regulation violates a range of individual constitutional rights," including the Second Amendment, the Office of Legal Counsel could "perceive no basis for suggesting that the Act so interferes with the powers of the States to raise militias as to transgress the Second Amendment." Memorandum for D. Lowell Jensen, Assistant Attorney General, Criminal Division, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Proposed Legislation Relating to Firearms and to Mandatory Sentencing* at 2 (May 27, 1981). Neither the Department nor the President appears to have entertained such concerns about a similar bill passed by Congress five years later, however, and President Reagan signed without objection the Firearms Owners' Protection Act which expressly found that "the rights of citizens . . . to keep and bear arms under the

second amendment of the United States Constitution . . . require additional legislation to correct existing firearms statutes and enforcement policies." Pub. L. No. 99-308, § 1(b), 100 Stat. 449, 449 (1986), codified at 18 U.S.C. § 921 note.[12]

Nor did the Administration of George H.W. Bush, contrary to the Reno Brief's implication, *see id*. at 16, advance a collective rights view of the Second Amendment in urging this Court to deny review of an early decision sustaining the constitutionality of the federal machinegun ban. *See* Brief for the Respondent in Opposition, *Farmer v. Higgins*, No. 90-600 (1990), available at http://www.usdoj.gov/osg/briefs/1990/sg900583.txt. The Government's brief did note that "Petitioner does not suggest that the decision

---

[12] The Government briefs in *United States Department of the Treasury v. Galioto*, 477 U.S. 556 (1986), did not address the Second Amendment. In response to an equal protection challenge to the federal prohibition barring persons who have been adjudicated mentally incompetent or committed to a mental institution from owning a firearm, the Government did argue in passing that strict scrutiny was not appropriate because the statute did not implicate fundamental rights. *See* Brief for the Appellant, *United States Department of Treasury v. Galioto*, No. 84-1904, 1986 WL 728208, at *28 n.24 (1986); Reply Brief for the Appellant, *United States Department of Treasury v. Galioto*, No. 84-1904, 1986 WL 728209, at *4 n.5. This position is fully consistent with an individual rights view of the Second Amendment, as it was well established at the time the Amendment was drafted and ratified that the right to keep and bear arms did not extend to unfit persons, including the mentally incompetent. *See* U.S. Amicus at 26 & n.7 (explaining that the prohibition at issue in *Galioto* "has a precise analog in Framing-era practice").

below conflicts with" federal appellate decisions that "have concluded that the mere allegation that a firearm might be of value to a militia is insufficient to establish a right to possess that firearm under the Second Amendment." *Id.* at 11-12. The brief pointedly did not, however, endorse the collective-rights reasoning of these decisions. Instead, it argued on the merits only that "the court of appeals in [*United States v.*] *Warin*[, 530 F.2d 103 (6th Cir. 1976)], which like this case involved a machinegun, observed that the Second Amendment does not absolutely bar all congressional regulation of firearms. 530 F.2d at 107. Congress's decision flatly to prohibit the private possession of this particular type of weapon is surely reasonable. *See id*. at 107-108." *Id*. at 12. As discussed below, *see infra* part II, this reasoning and conclusion are fully consistent with an individual rights view of the Second Amendment.

E. In Definitively Affirming That the Second Amendment Secures an Individual Right, the Current Administration Fulfilled Its Obligation to Uphold the Constitution.

In 2001, the current Administration faced the question whether to adhere to the collective rights understanding advocated by the previous Administration. The Administration correctly recognized that the proper interpretation of the Second Amendment remained an open question in this Court and that modern federal appellate decisions embracing a

collective rights view were devoid of persuasive constitutional analysis. Furthermore, although the Executive Branch had, during the Clinton Administration and at other times in recent years voiced this interpretation, the constitutional analysis offered in support of this view was flawed and superficial. At the same time, other recent Executive interpretations were equivocal, and many earlier Executive Branch interpretations had plainly interpreted the Second Amendment to secure an individual right.

The current Administration, moreover, had the benefit of the "growing body of scholarly commentary" that had "[m]arshall[ed] an impressive array of historical evidence . . . indicat[ing] that the 'right to keep and bear arms' is, as the Amendment's text suggests, a personal right." *Printz v. United States*, 521 U.S. 898, 939 n.2 (1997) (Thomas, J., concurring) (collecting commentary); *accord* TRIBE, AMERICAN CONSTITUTIONAL LAW at 896-97 & n.211 (noting that "in recent years . . . a growing array of scholars have argued that the Second Amendment should be interpreted as creating a more expansive right to private gun ownership that may not be abridged by Congress or perhaps even by state and local governments"); 2004 OLC Op. at 9 & n.33 (concluding that "the preponderance of modern scholarship appears to support the individual-right view"). This impressive wealth of historical scholarship, all but unavailable when the Executive Branch last attempted to engage in meaningful Second Amendment analysis during the 1960s, has persuaded many prominent constitutional experts to embrace the individual rights view

of the Second Amendment, often despite prior contrary positions or predilections.[13]

The current Administration also had the benefit of OLC research that was far more searching and exhaustive than any previous Second Amendment analysis conducted by the Executive Branch. *See* 2004 OLC Op. at 1 ("This memorandum memorializes and expands upon advice that this Office provided to [Attorney General John Ashcroft] on this question in 2001."). Moreover, prior to instructing federal prosecutors to adhere to the individual rights view, this Administration also had the benefit of the Fifth Circuit's exhaustive analysis in *Emerson*, the first federal appellate decision carefully to consider

[13] *Compare*, *e.g.*, TRIBE, AMERICAN CONSTITUTIONAL LAW at 900, 902 n.221 (rejecting suggestion that the Second Amendment "may plausibly be construed to do no more than protect state defense forces against outright abolition by Congress" and concluding that the amendment secures "a right (admittedly of uncertain scope) on the part of individuals to possess and use firearms in defense of themselves and their homes"), *with* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 226 n.6 (1st ed. 1978) (arguing that "the sole concern of the second amendment's framers was to prevent such federal interference with the state militia" and concluding that the amendment is "merely ancillary to other constitutional guarantees of state sovereignty"); *see also, e.g.*, L.A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 WM. & MARY L. REV. 1311, 1401 (1997) ("Thus, like all other constitutional law scholars who have taken the time to analyze the Second Amendment, I join with them reluctantly singing the Monkees' refrain: 'I'm a believer.' "); *cf. generally* Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L. J. 637 (1989).

whether the Second Amendment secures an individual or collective right. *See* Memorandum for All United States' Attorneys from the Attorney General, *Re: United States v. Emerson* (Nov. 9, 2001).

The extensive and careful analysis offered by recent historical scholarship, the Office of Legal Counsel, and the *Emerson* opinion demonstrated that the collective rights view of the Second Amendment was untenable and that the individual rights view was correct. Under these circumstances, the Administration's duty to uphold the Constitution plainly outweighed its interest in advancing any argument, however unsound, that might further the Government's litigation interests.

II. Interpreting the Second Amendment to Secure An Individual Right Does Not Call into Question the Constitutionality of Existing Federal Firearms Laws.

The Reno Brief warns that an individual rights interpretation of the Second Amendment would jeopardize existing federal firearms statutes. Reno Brief at 32-34. This assertion is simply incorrect, and the Reno Brief ventures no elaboration. Indeed, the sole example offered of the supposed threat to federal firearms legislation is the Fifth Circuit's decision in *Emerson* (Reno Brief at 33 n.11), where the court, after adopting an individual rights reading of the Second Amendment, nevertheless *upheld* a statute barring firearms possession by those subject to

domestic violence restraining orders. 270 F.3d at 260, 264-65. In fact, Second Amendment challenges to federal firearms restrictions have been uniformly rejected by those courts of appeals that have held, or assumed *arguendo*, that the Second Amendment protects an individual right. *See United States v. Lippman*, 369 F.3d 1039, 1043-44 (8th Cir. 2004) (assuming in the alternative that Second Amendment protects individual right but nevertheless upholding statute barring possession of firearms by those subject to restraining orders); *id.* at 1045 (Colloton, J., concurring) (opining that decision should be limited to this alternative ground); *United States v. Price*, 328 F.3d 958, 961 (7th Cir. 2003) (assuming in the alternative that Second Amendment protects individual right but nevertheless upholding statute barring possession of firearms by convicted felons).

The amicus brief of the United States demonstrates at length that existing federal firearms regulations are consistent with the original meaning of the Second Amendment's individual right to keep and bear arms.[14] The Solicitor General voices concern,

[14] As General Ashcroft recognized in embracing an individual rights interpretation, the right secured by the Second Amendment is subject to "reasonable restrictions" designed "to prevent unfit persons from possessing firearms or to restrict possession of firearms particularly suited to criminal misuse." Memorandum for All United States' Attorneys at 1. Accordingly, General Ashcroft determined that the United States "can and will continue to defend vigorously the constitutionality, under

(Continued on following page)

however, that the particular analytical approach employed by the court below "could be read" to "cast doubt on the constitutionality" of existing federal legislation banning certain categories of firearms, "including machineguns." U.S. Amicus at 9. We respectfully disagree. Affirming the decision below, which extends Second Amendment protection to the right of a law-abiding, licensed individual to keep a registered, ordinary handgun for self-protection in his own home, does not require the adoption of any principle which endangers federal restrictions on the private possession of machineguns.

The decision below expressly holds that the "protections of the Second Amendment are subject to the same sort of reasonable restrictions that have been recognized as limiting, for instance, the First Amendment." *Parker v. District of Columbia*, 478 F.3d 370, 399 (D.C. Cir. 2007). This comports with the Court's teaching that the liberties secured by the Bill of Rights "ha[ve], from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case." *Robertson v. Baldwin,* 165 U.S. 275, 281 (1897). Without, of course, purporting to decide such cases in the abstract, the court below noted several restrictions to which the right preserved by the Second Amendment "was subject . . . at common law," and which it took "to be the sort of

---

the Second Amendment, of all existing federal firearms laws." *Id*.

reasonable regulations contemplated by the drafters of the Second Amendment." *Parker*, 478 F.3d at 399. *See also id.* at 382 n.8 (the Second Amendment "right was not newly created, but rather recognized as part of the common law tradition."). Among these are laws barring possession of firearms by unfit persons, such as felons, and laws restricting the manner of possession, such as the carrying of concealed weapons. *See id.* (discussing *Robertson*, 165 U.S. at 281-82; *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980); *State v. Kerner*, 107 S.E. 222, 225 (N.C. 1921)).

Despite agreeing that the limited holding below thus raises no doubts about the vast majority of federal firearms laws, *see* U.S. Brief at 25-27, the United States nevertheless is concerned that the court below adopted a "categorical approach," under which a determination that a particular category of firearms constitutes "arms" protected by the Second Amendment compels the conclusion that the federal government may not ban such weapons entirely. *Id.* at 21. The United States fears that "such a categorical approach would cast doubt on the constitutionality of the current federal machinegun ban, as well as on Congress's general authority to protect the public by identifying and proscribing particularly dangerous weapons." *Id.*

The D.C. Circuit, however, grounded its conclusion that "most handguns (those in common use) fit" the meaning of "arms" in the Amendment squarely on this Court's analysis in *United States v. Miller*, 307 U.S. 174 (1939). *Parker*, 478 F.3d at 397. The court of

appeals described the historical understanding of the weapons protected by the Second Amendment as "private arms" "'of the kind in common use at the time.'" *Id*. (quoting *Miller*, 307 U.S. at 179). Such were the weapons that private citizens could reasonably be expected to own and to be proficient with, leading to the *Miller* Court's conclusion that men subject to militia service in the Founding Era "'were expected to appear *bearing arms supplied by themselves and of the kind in common use at the time.*'" *Id.* at 394 (quoting *Miller*, 307 U.S. at 179) (emphasis supplied by the court below). The decision below repeatedly stressed this limitation on the type of "arms" protected by the Second Amendment. *See id.* at 383 n.9 ("commonly owned"); 386 ("'in common use'") (quoting *Miller*); 398 ("'common use'") (three iterations); 398 ("common circulation").[15]

The "common use" criterion endorsed both in *Miller* and in the decision below is likewise embraced by amicus United States, which includes "whether a particular kind of firearm is commonly possessed" among the factors to be considered in the constitutional analysis of a ban on a type or class of firearms. U.S. Amicus at 22. As the court of appeals held – and amicus United States does not dispute – ordinary handguns fit that description both in 1789 and today.

[15] The Fifth Circuit has similarly noted *Miller*'s emphasis on protected arms as those "'of the kind in common use.'" *See United States v. Emerson*, 270 F.3d 203, 225 (5th Cir. 2001) (quoting *Miller*).

478 F.3d at 397. It seems equally apparent that machineguns do not. To be sure, machineguns are a familiar part of a modern army's arsenal, but suitability for military use is not the sole test of whether a firearm falls within the Second Amendment. Cannons, for example, were common militia weapons in the colonial period – the British ignited the Revolution by marching on Concord on April 18, 1775 to seize cannon and gunpowder stored there – but men answering the call to militia service were not expected to provide their own artillery. The Founding Era militia statutes make plain that such heavy military weapons, which were neither "personally owned" nor "'of the kind in common use at the time,'" were to be provided by the state. *Parker*, 478 F.3d at 398 (discussing Militia Act of 1792).

There is another reason to believe that machineguns would not come within the individual Second Amendment right recognized below – a reason that has previously been endorsed by amicus United States. As noted above, the decision below recognizes that the right preserved by the Second Amendment was subject to exceptions or restrictions "at common law," *id.* at 399, just as the right of free speech protected by the First Amendment is subject to exceptions for such things as perjury and libel. As Blackstone – who was of course the Framers' guide to the common law – recognized, the right to bear arms was subject to an exception carved out by "[t]he offense of riding or going armed, with dangerous or unusual weapons." 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS

OF ENGLAND 148-49 (1st ed. 1765). Similarly, Bishop's treatise on statutory crimes explained that "going about armed with dangerous or unusual weapons to the terror of the people, was always indictable under the common law of England." JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF STATUTORY CRIMES § 784, at 531 (3d ed. 1901).[16]

This Court's decision in *Miller* sustaining a congressional restriction on sawed-off shotguns comports with this ancient common-law exception. In *Miller* the United States defended that prohibition on a class of weapons on the ground that "'Congress was striking not at weapons intended for legitimate use but at weapons which form the arsenal of the gangster and the desperado' . . . 'weapons which are the tools of the criminal.'" U.S. *Miller* Brief at *7, *8 (quoted in *Emerson*, 270 F.3d at 222). The same can be said of machineguns, which were likewise restricted by the very statute upheld in *Miller*, where the United States argued that "[s]awed-off shotguns, sawed-off rifles and machineguns are clearly weapons which can have no legitimate use in the hands of private individuals. [They are the] arsenal of the 'public enemy' and the 'gangster'. . . ." *Id.* at *20. Indeed, the United States went further, and specifically distinguished machineguns from the handguns at issue here: "'[W]hile there is a justification for

[16] This passage from the Bishop work was quoted by the United States in its brief in *United States v. Miller*. *See* U.S. *Miller* Brief at *11.

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 machinegun or sawed-off shotgun.'" *Id.* at *8 (quoting H. Rep. No. 1780, 73d Cong., 2d Sess. at 1-2). This position is entirely consistent with the court of appeals' caveat that Second Amendment rights are subject to common-law exceptions, and seems sufficient to answer the concerns expressed here by amicus United States.

III. The Court Need Not Address the Solicitor General's Proposal for a Multi-tiered Standard of Second Amendment Review to Affirm the Decision Below, Nor Is This Case a Suitable Vehicle for Doing So.

Few rules are more deeply rooted in this Court's tradition of restrained constitutional adjudication, or more confirmed by experience, than the venerable doctrine that "constitutional issues affecting legislation will not be determined . . . in advance of the necessity of deciding them [nor] in broader terms than are required by the precise facts to which the ruling is to be applied." *Rescue Army v. Municipal Court*, 331 U.S. 549, 569 (1947). In this case, the fundamental question presented is whether an individual right of any kind is guaranteed by the Second Amendment. Resolving that threshold issue resolves the case. For if the Second Amendment's protection does extend to individuals, the District of Columbia's sweeping, across-the-board ban on possession of *all*

handguns must surely fall. Again, the Second Amendment claim before the Court is brought by a competent, law-abiding, licensed adult seeking only to keep an ordinary, registered handgun in his own home for self-protection.[17] If the Amendment does not protect this individual, it protects no one at all.

Nevertheless, the Solicitor General invites the Court to go further and to adopt, here and now, a multi-tiered standard to govern review of all Second Amendment challenges, comprising elements of "intermediate scrutiny" (U.S. Amicus at 28), minimal scrutiny (*id.* 25-26), and several prescribed factors (*id.* 24 & n.6). The Solicitor General recognizes, however, the wisdom of "permitting Second Amendment doctrine to develop in an incremental and prudent fashion as is necessary to decide particular cases that may arise." U.S. Amicus at 29. The Solicitor General also acknowledges that his doctrinal proposal must be fashioned from scratch because "there is scant case law interpreting the scope of the Second Amendment, much less precedent fleshing out and applying various principles or sub-doctrines giving effect to that right." *Id.* at 29.

Although offered by the Solicitor General as reasons to remand for initial application of his proposed analytical model to the facts of this case, we

---

[17] Respondent is a D.C. special police officer who carries a handgun on duty as a guard at the Federal Judicial Center. *Parker*, 478 U.S. at 373-74.

submit that these points counsel in favor of declining to consider his doctrinal proposal.

As the Solicitor General further observes, "this case, which involves private possession" of a common handgun in the home, "provides no opportunity for the Court to expound on the different principles that might govern" other types of gun control statutes. *Id.* at 27. That is wise counsel. Other cases involving other individuals bringing other Second Amendment challenges to other firearms regulations are not presented here, and the Court need not develop a doctrinal framework for resolving them today. We respectfully urge the Court to do no more than rule on the narrow question presented by the circumstances of this case. That is work enough for one day.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

CHARLES J. COOPER
Counsel of Record
BRIAN S. KOUKOUTCHOS
HOWARD C. NIELSON, JR.
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, NW
Washington, DC 20036
(202) 220-9600

February 2008

APPENDIX

Amici Curiae in Support of Respondent

Edwin Meese III served as Attorney General of the United States from 1985 to 1988.

William P. Barr served as Attorney General of the United States from 1991 to 1993, as Deputy Attorney General from 1990 to 1991, and as Assistant Attorney General for the Office of Legal Counsel from 1989 to 1990.

George J. Terwilliger III served as Deputy Attorney General of the United States from 1991 to 1992, as acting Attorney General in 1993, and as United States Attorney for Vermont from 1986 to 1991.

Robert H. Bork served as Solicitor General of the United States from 1972 to 1977, except when he was serving as acting Attorney General from 1973 to 1974. He served as a Circuit Judge of the United States Court of Appeals for the District of Columbia Circuit from 1982 to 1988.

Christopher A. Wray served as Assistant Attorney General for the Criminal Division from 2003 to 2005, as Principal Associate Deputy Attorney General from 2001 to 2003, and as an Assistant United States Attorney for the Northern District of Georgia from 1997 to 2001.

Stuart Gerson served as Assistant Attorney General for the Civil Division from 1990 to 1993, as acting Attorney General in 1993, and as Assistant United

States Attorney for the District of Columbia from 1972 to 1975.

Viet D. Dinh served as Assistant Attorney General for the Office of Legal Policy from 2001 to 2003.

Timothy E. Flanigan served as Assistant Attorney General for the Office of Legal Counsel from 1990 to 1992 and as Deputy White House Counsel from 2001 to 2002.

Douglas W. Kmiec served as Assistant Attorney General for the Office of Legal Counsel from 1988 to 1989.

Jack Goldsmith served as Assistant Attorney General for the Office of Legal Counsel from 2003 to 2004, and as Special Counsel to the General Counsel of the Department of Defense from 2002 to 2003.

Richard K. Willard served as Assistant Attorney General for the Civil Division from 1983 to 1988.

Charles J. Cooper served as Assistant Attorney General for the Office of Legal Counsel from 1985 to 1988 and is also counsel of record for *amici* here.