

Summary of Argument

THE DISTRICT COURT has granted Timothy Emerson's Motion to Dismiss his Indictment under 18 U.S.C. 922(g)(8) as an unconstitutional exercise of congressional power. The District Court reasons that only if the Second Amendment guarantees a "personal right to bear arms" and "an individual right to keep and bear arms" independent of any militia organization can Emerson "claim a constitutional violation." (Dist. Ct. Op., p. 4) The overwhelming case history has found only a collective right in the Second Amendment. The District Court discounts the case history and relies heavily on law journal articles to find a personal right.

The personal right the District Court seeks to find in the Second Amendment involves the fundamental relationship between citizen and state. In arriving at a personal right the District Court embraces two confusions present in contemporary gun rights politics: 1) between natural rights and civil rights; 2) between a personal right and the people's right to participate in the military functions of the state. The District Court touches on the individual right-to-arms as a right to self-defense and strongly implies a right to revolution. This *amicus* will give notice to these two dimensions of the individual right-to-arms and will

introduce two other dimensions: the libertarian fantasy and the individual right's place in contemporary political cynicism.

This *amicus* will examine the historical and political theory validity of the District Court's personal right and find there can be no personal right of the sort claimed. Rather than an orphan of the Bill of Rights, as suggested (fn46) by this court in *US v. Lopez*, the true legacy of the Second Amendment is found in the citizen soldiers of twentieth century selective service acts. To “bear arms” had a military meaning (Rowland, Appendix A).

Argument

I. THE DISTRICT COURT ERRED BY CONFUSING NATURAL RIGHTS WITH CIVIL RIGHTS TO CREATE A PERSONAL RIGHT TO ARMS INDEPENDENT OF SOVEREIGN GOVERNMENT AUTHORITY

a. The Formation of Political Community

John Locke's *The Second Treatise of Government* is as much American political scripture as the Declaration of Independence, the Constitution and *The Federalist Papers*. In the State of Nature the individual is sovereign and lives by natural law. In Locke, the individual in the State of Nature is "absolute lord of his own Person and Possessions, equal to the greatest, and subject to no Body." However, the State of Nature is "full of fears and continual dangers" because there is no agreement on natural rights. The sovereign individual enters into political community to secure "lives, liberties and estates." Security requires first, "established, known, settled law;" second, "a known and indifferent judge, with authority to determine all differences according to established law;" and, third, "a power to back and support the Sentence when right, and to give it due execution." (§§123-130).

When an individual quits the State of Nature and consents to be governed, he quits “everyone his Executive Power of the law of nature [the power to make and enforce law], and resign[s] it to the publick. . .” (§89). The individual also “has given the right to the Commonwealth to imploy his force, for the Execution of the Judgments of the Commonwealth. . .” (§88). “[H]is force” becomes “the force of the community” (§3). The power created by the consent of the governed is *sovereign public authority*, although Locke never uses the phrase—or, “just powers” in the Declaration of Independence—, and it resides in the political community. Locke ends *The Second Treatise*:

§243 To conclude, The *Power that every individual gave to Society*, when he entered into it, can never revert to the Individuals again, as long as the Society lasts, but will always remain in the Community; because without this, there can be no community, no Common-wealth, . . .

The District Court finds it absurd that a court order “can collaterally and automatically extinguish a law-abiding citizen's Second Amendment rights.” (Dist. Ct. Op., p. 27) He cites the academic literature that “an individual right is inherent in the concept of ordered liberty” and “if this right were not protected, the existence of the militia, and consequently the security of the state, would be jeopardized.” (Dist. Ct. Op., p. 6) The District Court has what is absurd exactly backwards. To secure rights a state must have the “just powers” that are

surrendered to it. If a state recognizes and secures a right to be armed independent of law and public authority, the state jeopardizes itself, its "just powers," and any "concept of ordered liberty."

At the time of the American Revolution and the framing of the Constitution, everyone studied Locke. Thomas Jefferson adapted the concepts in the Declaration of Independence from Locke. The Declaration of Independence, however, was a charter for revolution. It asserted a natural right to revolution when political power had reverted to the people. A civil right is secured by government. The two never intersect. The Constitution was about instituting new government. The state of New Hampshire went so far as to write the fundamental concept and process into its 1784 Bill of Rights:

When men enter into a state of society, they surrender up some of their natural rights to that society, in order to insure the protection of others; and, without such an equivalent, the surrender is void.
(Thorpe)

James Wilson, one of the 55 Framers, argued for ratification before the Pennsylvania ratifying convention:

Civil liberty is natural liberty itself, divested only of that part which, placed in the government, produces more good and happiness to the community than if it had remained in the individual. (2 Elliot's Debates 429)

The Framers and ratifiers had great concerns about the sovereign political power

they were creating, but they had no illusions that they were creating a sovereign government under law but with "just powers". Alexander Hamilton wrote in

Federalist Paper No. 33 (Rossiter, p. 204):

If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted to it by its constitution, must necessarily be supreme over those societies and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a government, which is only another word for POLITICAL POWER AND SUPREMACY.

When citizens consent to be governed, they create a higher authority. When sovereign states make a treaty, they do not. John Adams located the militia within public authority (Adams, p. 474-5):

It must be made a sacred maxim, that the militia obey the executive power, which represents the whole people in the execution of laws. To suppose arms in the hands of the citizens, to be used at individual discretion, except in private self defense, or by partial orders of towns, counties, or districts of a state, is to demolish every constitution, and lay the laws prostrate, so that liberty can be enjoyed by no man—is a dissolution of the government. The fundamental law of the militia is, that it be created, directed, and commanded by the laws, and ever for the support of the laws.

The English historian Richard Tawney exquisitely contrasted public authority and secular sovereignty in the West with the political culture of China:

The first problem, which lies behind all questions of particular

reforms, is vast and fundamental. It is not who shall govern the State, but whether there shall be a State at all. It is whether public power shall exist. China has known no Roman Empire. The idea of a sovereign, of an even pressure of law, of the impersonal majesty of an authority to which, and not to his family and his friends, the individual owes allegiance, of the *Res publica*, which in Europe men remembered dimly when all had slipped and struggled back to as to a rock—that idea is not an ancient part of the nation's mental furniture...

President Lincoln in his First Inaugural gave another perspective:

A majority held in restraint by constitutional checks and limitations, and always changing easily with deliberate changes of popular opinion and sentiments, is the only true sovereign of a free people. Who ever rejects it does, of necessity, fly to anarchy or to despotism.

Also:

The central idea of secession is the essence of anarchy.

The checks and limitations on sovereignty are contained within the legal political order itself through separation of power, checks and balances, a bill of rights, regular elections, and free institutions that provide civic enlightenment and vigilance. In present gun rights consciousness, an armed populace, called the "sedentary" or "unorganized" militia, possessing a personal right-to-arms and un beholden to any public authority, is the ultimate check on state power.

(Appendix B) A contingent of extralegal armed force, active or passively threatening, created by a personal right, is not a check or limitation on sovereignty.

It is a rival sovereignty. An individual right that creates the vague threat of an

armed check or limitation on sovereignty is the essence of political cynicism, the opposite of a civic culture of public trust created by common agreement on the fundamental law of a constitution.

No matter how the state and the contours of the state are defined and constituted, the state is public authority and public authority is sovereign. The personal right the District Court and the literature it cites seek to find in the Second Amendment is the right to be armed prior to and independent of any law or state interest. Carried to its logical conclusion, the right denies the consent to be governed and repudiates the very concept of sovereign public authority created in political community.

b. To Bear Arms

The right in the Second Amendment whether taken to be individual or collective had a different purpose. To "bear arms" describes a military function. (Rowland, Appendix A) The militia was an alternative form of military organization to the regular army. John Adams' "private self-defense" (*supra*, p. 4) was not mentioned in the states' militia amendment proposals (Rowland, dissertation, p. 401). The larger context was the republican right of the people to participate in the military functions of the state rather than leave those functions

up to the King's regular army, "a separate order of the state" (Dist. Ct. Op. p. 12), which in the eighteenth century was usually composed of mercenaries, foreigners, and/or social misfits. The militiamen were citizen soldiers rooted in their communities. (Cress) The very quotes the District Court provides describe the militia explicitly as an opposing concept to the regular army. The right was not a right against any and all government. The Militia Act of 1792, enacted by the same people who ratified the Second Amendment, expressed the eighteenth century concept of the militia and what it imposed on individuals. The Militia Act required the states to "enroll"—that is, *register*—militiamen. (Appendix C). Militia duty was conscript duty. The regular army was not. The dozens of state militia acts that followed from the national act were loaded with rules imposed on gun owners. There were no protections mentioned for a personal right to be armed independent of militia that the District Court and others seek to find.

Rights conferred by the Second Amendment were still contained within sovereign public authority. Consistent with the "right to employ his force," the Constitution makes the President the Commander-in-Chief of the militia and gives Congress the authority to call out the militia. The states, the President and the Congress have a right and need to know who the militia are and what the militia resources, as a national resource, are. That requirement denies any right to be

armed prior to and independent of law and government.

c. The Right to Revolution: The Hidden Content

The District Court describes the individual right to bear arms, embodied in the militia institution, as the crucial factor in the Revolution that prevailed over the British Army and asserts from this that “through the Constitution” “the American founders sought to codify the individual right to bear arms.” (Dist. Ct. Op., p. 11) It is strongly implied in the District Court’s Opinion and explicitly stated by others that the individual right to arms is a right to revolution or a right to threaten revolution. The King put it accurately that the Revolution was treason, but the period 1774-76 was a revolutionary situation. The Declaration of Independence was a moral justification for a revolution that had already taken place in spirit. There was a critical mass in the general population to support the treason. The Declaration invoked a natural right not a civil right. The Constitution instituted new government. It secures civil rights. The District Court embraces the great confusion between natural rights and civil rights. The Constitution would be perverted if it defined treason as the waging of war against the United States and then guaranteed a civil right to do the same.

To invent an individual civil right, the District Court exalts the militia to a status of revolutionary and military competence it did not have. The Continental Army with much help from the French Army won the War of Independence. Observations from that period on militia deficiencies are legend . (Appendix C).

Nevertheless, the right to revolution, possessed even by individuals, is read into the Second Amendment. The assertions are explicit (expanded context in Appendix D):

Sue Wimmershoff-Caplan, a member of the National Rifle Association's National Board, wrote in "The Founders and the AK-47," *Washington Post*, July 6, 1989:

The private keeping of hand-held personal firearms is within the constitutional design for a counter to government run amok, as when the military and police use such firearms against their fellow nationals. As the Tiananmen Square tragedy showed so graphically, AK-47s fall into that category of weapons, and that is why they are protected by the Second Amendment.

Twentieth-century military machines are far from invincible when outflanked by armed citizen guerrillas. . .

Modern military machines are maintained by governments. There is no distinction here among governments. Meanwhile, a proper AK-47 is a machine gun requiring a federal permit.

The NRA's Executive Vice President Wayne LaPierre wrote in *Guns, Crime and Freedom* (1994), p.7:

...those four words—"The Right of the People" [from the Declaration of Independence, a charter for revolution]—state in plain language that the people have the right, must have the right, to use whatever means necessary, including force, to abolish oppressive government.

The people do have a right to use force to abolish oppressive government. It is a natural right, a moral right, a God-given right, but it is not one of those "certain unalienable rights"—not an individual civil right—that can possibly be secured by government.

David Kopel, a prolific individual right advocate, wrote in "Trust the People: The Case against Gun Control," *Cato Institute Policy Analysis No. 109* (1988) explicitly in the context of gun ownership:

The tools of political dissent should be privately owned and unregistered.

The Second Amendment Foundation asserted in its *amicus* (Appendix E) in *US v. Francis J. Warin*, 530 F.2d 104 (1976), and sought Second Amendment protection for:

...a basic right of freemen to take up arms to defeat an oppressive

government.

Speaker of the US House of Representatives Newt Gingrich wrote in his book *To Renew America* (1994), p. 202:

The Second Amendment is a political right written into our Constitution for the purpose of protecting individual citizens from their own government.

No one has inquired into what a "political right" is in this context.

In *The Second Treatise* the right to revolution was an appeal "to Heaven" (§242) not to civil authority. It was the collective right of "the body of the people," (§242) but under rare circumstances: "For till the mischief be grown general, and the ill designs of the Rulers become visible...the People are not apt to stir." And not without ambiguity: Whether the mischief has begun "in the Peoples wantonness" or "in the Rulers Insolence...I leave it to impartial history to determine. This I am sure, whoever, either Ruler or Subject, by force goes about to invade the Rights of either Prince or People, and lays the foundation for overturning the Constitution and Frame of any Just Government, is guilty of the greatest Crime" (§ 232).

Locke quotes William Barclay, a monarchist, to make his point:

This therefore is the privilege of the people in general, above what any private Person hath; That particular Men are allowed by our

Adversaries themselves, to have no other remedy but Patience; but the Body of the People may with Respect resist intolerable Tyranny; for when it is but moderate they must endure it. (§ 233)

A revolution starts out as treason and only becomes patriotism when successful. A government which indulges these sentiments as anything more than abstract principles paralyzes itself and the political culture with pernicious political cynicism.

d. The Libertarian Fantasy: Hedging Consent.

An explicit right to revolution is a more extreme purpose for a personal right to be armed outside of lawful authority than most can safely assert. A more insidious hedge on the consent to be governed is the libertarian fantasy. The individual right becomes a right to maintain a balance of power between a privately armed populace and any and all government. The operating concept is individual sovereignty. At best, it expresses a severe difficulty accommodating to public authority, and the latent right to threaten revolution puts the individual in a tenuous relationship with the state. "Individual sovereignty" and the "right to political secession," applied even to individuals, are planks in the Libertarian Party Platform (Appendix F). The concept of individual sovereignty reduces the Constitution to a treaty, as per Hamilton *supra*, p. 6, among sovereign individuals who give no more than their good faith. It is an expression of a demoralized

public mood and a defeatist retreat from political life:

Senator Ted Stevens of Alaska stated in the course of the Brady Law debates:

An armed citizenry, people who have the ability to defend themselves, are [sic] not going to become an oppressed citizenry.
—*Congressional Record*, November 19, 1993, p. S16315. (Appendix D)

No one has inquired into the Senator's meaning.

The District Court cites from Sanford Levinson's "The Embarrassing Second Amendment" seven times. Levinson wrote (p. 651):

[O]ne aspect of the structure of checks and balances within the purview of 18th century thought was the armed citizen. That is, those who would limit the meaning of the Second Amendment to the constitutional protection of state-controlled militias agree that such protection rests on the perception that militarily competent states were viewed as potential protection against a tyrannical [federal] government....But this argument assumes that there are only two basic components in the vertical structure of the American polity—national government and the states. [The words in added italic that continue are quoted in full by the District Court.] *It ignores the implication that might be drawn from the Second, Ninth and Tenth Amendments: that the citizenry itself can be viewed as an important third component of republican governance insofar as it stands ready to defend republican liberty against the depredations of the other two structures, however futile that might appear as a practical matter.*

Does this citizenry consent to be governed, give political obligation, give "just

powers" to government, and give "a right to the Commonwealth to employ" its force? Or, did sovereign individuals make a treaty? Levinson references *Sue Wimmershoff-Caplan* above with approval.

The District Court cites Stephen Halbrook, *That Every Man be Armed*, five times.

Halbrook argued *Printz* for the National Rifle Association before the Supreme Court. Halbrook writes (p. 8-9):

An appreciation of the significance of these elementary books of public right is indispensable to a correct understanding of the meaning of the Bill of Rights, in general, and of the Second Amendment, in particular. Furthermore, an understanding of the authoritarian absolutism of Plato, Bodin, Hobbes, and Filmer is as necessary as an understanding of classical libertarian republicanism in order to know what America's founders rejected as well as what they accepted. Those who drafted and supported the Bill of Rights followed the libertarian tradition of Aristotle, Cicero, and Sidney, and they rejected the authoritarian, if not totalitarian, tradition of Plato, Caesar, and Filmer. These two basic traditions in political philosophy have consistently enunciated opposing approaches to the question of people and arms, with the authoritarians rejecting the idea of an armed populace in favor of a helpless and obedient populace and the libertarian republicans accepting the armed populace and limiting the government by the consent of that armed populace.

The populace is armed first, consents to be governed second. There is no word on to whom those who are not armed are beholden.

Halbrook's competition between authoritarian absolutism and an armed

populace is a preposterous characterization of the development of western political concepts, values, and institutions; but, if the armed citizenry consents to be governed and keeps its weaponry—its executive power—outside of accountability to public authority in case things don't go right in political processes, then it never consented to be governed at all. It created political cynicism, not "just powers" of government.

Short of overt revolutionary intentions, the libertarian fantasy puts the individual into a permanent pre-revolutionary situation. The personal right the District Court and the literature it cites seek to find in the Second Amendment is the political cynicism of a civic limbo between political community and anarchy. The armed citizenry will have it both ways. It will have rights in the State of Nature, before there was law and government, and it will also have law and government to secure its rights and to make laws. However, the armed populace gives no meaningful obligation and the laws only apply to someone else. We give absolute individual freedom. Positive law becomes a code of ethics. There are no mechanisms for effective law enforcement, no prior restraint. In a prescription for authoritarian justice, the force of the community applies draconian punishment by example after the code of ethics has been violated. The cynicism is nowhere more explicit than in firearms policy. We see the collateral damage in the daily news.

Ernest van den Haag, the John M. Olin Professor of Jurisprudence and Public Policy at Fordham University, described the implications in "Libertarians & Conservatives," *National Review*, 1979 (Appendix G):

The individual would be fully sovereign in the libertarian non-society— and peace would be as precarious among individuals as it is now is among the [state] powers.

A phrase heard among personal right claimants is "an armed society is a polite society." Diplomacy is very polite, but, because sovereign states recognize no higher law, when differences become irreconcilable and communication breaks down, sovereign states go to war. Van den Haag, in the same article:

Institutions form a social order, ultimately articulated and defended in essential respects by the state, through the monopoly of legitimate coercive power exercised by its government. Any particular coercion (law) of the state may well be contested. But libertarians object not just to specific laws, but to legislation, to the authority of the state, and to its coercive power per se. Libertarians dissent from history and from the political institutions it has created in all known civilization. For, although political institutions vary no society has been able to do without them, as the libertarians propose.

(Appendix H for source of monopoly on force).

The libertarian fantasy starts with legitimate concerns about the role and amount of government in our lives and forms a continuum that spans from yahoos holed up in a farmhouse on the prairie in defiance of all authority to the

respectable towers of legal academia. The subtitle to Stephen Newman's *Liberalism at Wits' End* is *The Libertarian Revolt against the Modern State*. The scholarship the District Court cites is ideological. The libertarian fantasy is a manifestation of the libertarian revolt.

The libertarian fantasy has become a civic religion and has its true believers. Just as the District Court exalts the militia into revolutionary and military competence it did not have, the "legal scholars" find the meanings they seek. The District Court cites from the legal scholarship James Madison's "the advantage of being armed" from *Federalist Paper No. 46*, Patrick Henry's "That every man be armed" from the Virginia ratification debates and Joseph Story's "the palladium of the liberties of a republic" from his *Commentaries on the Constitution* (1833) (expanded context in Appendix I).

Madison's words in context do not support a personal right to be armed prior to law and government:

Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached and by which the militia officers are appointed... (Rossiter, p. 299)

Likewise, Henry's words do not support the claim:

The great object is, that every man be armed. But can the people afford to pay for double sets of arms &c.? Every one who is able may

have a gun. (3 Elliot's Debates 387)

The "objective" was part of a question, Who shall arm the militia (an instrument of government in this context), the states or the federal government? So also are Story's words lifted out of context. Story goes on to mention a "system of militia discipline" and declares, "How it is practicable to keep the people duly armed without some organization, it is difficult to see." Story's context was the citizen soldier. The discipline and organization are imposed from above by law. The militia was not self-constituted by individuals possessing a personal right.

Don Kates, one of the District Court's sources, has written (Kates, p. 265-6):

...the concept of anonymity or privacy in gun ownership profoundly departs from the conditions under which the Founders envisioned the amendment operating. Under the militia laws (first colonial, then state and eventually federal), every household, and/or male reaching the age of majority, was required to maintain at least one firearm in good condition. To prove compliance these firearms had to be submitted for inspection periodically....

The personal right does not hold up even in the District Court's sources.

II. THE DISTRICT COURT ERRED BY CONFUSING THE SECOND AMENDMENT'S TRUE LEGACY, THE REPUBLICAN RIGHT TO BE ARMED AS CITIZEN SOLDIERS, WITH A PERSONAL RIGHT TO ARMS OUTSIDE OF THE RULE OF LAW.

The English tradition absorbed the Liberal political tradition begun by Thomas Hobbes and Locke in the seventeenth century. (Halbrook has Hobbes and Locke on opposite poles but they are in the same lineage.) All previous political theory had been conservative: Individuals were born into political community with obligations. In Christian Europe political authority and obligation were sanctioned by scripture: St. Paul's injunction, "Obey the powers that be for they are of God." In the Liberal tradition individuals are born with rights in the State of Nature. They institute government to secure rights. In Hobbes and Locke (and the Declaration of Independence) political authority derives from the consent of the governed not from divine sanction. The simple replacement of popular sovereignty and consent for divine right and arbitrary power involved England for much of a century in civil war and revolution. The eighteenth century British Constitution which came out of those struggles was a balance among the classical forms of government, monarchy, aristocracy and democracy, manifest in the estates of the realm, the Crown, the nobility (Lords), and the people (Commons). The rulers (the Crown) and the ruled (the people) were separate estates of the realm.

The American militia consciousness that produced the Second Amendment had its roots in historical English practices and the republican ideologies that

emerged in the early modern period as the opposition ideologies to monarchy with its magistrates and regular army. They emphasized the republican virtues of the citizen soldier and the right of the citizen to participate in the military functions of the state. The militia had some theoretical, but mostly rhetorical, significance under the British Constitution. In *The Creation of the American Republic* (1969), historian Gordon Wood describes the transformation from the concepts of the British Constitution to the US Constitution, where, under representative self-government, the rulers and the ruled become one and the same. Instead of making a contract with the rulers, the people divided their sovereignty between state government and the federal government. The Anti-Federalists insisted on the Second Amendment because they projected their understanding of political concepts from the British Constitution onto the US Constitution. In Anti-Federalist consciousness, the states were the people, the ruled, analogous to the people in Parliament; and the rulers, analogous to the monarchy and its magistrates, were the Federal Government. The state constitutions of the Revolutionary period had strong legislatures and weak governors. The Anti-Federalists identified the state legislatures and state militias with the sovereignty of the people. It was that sovereignty that they wanted to protect. (Rowland, dissertation, p. 394-5) They wanted to preserve the constitutional

balance that was present in the British Constitution. However, the concepts had changed. The Second Amendment was an anachronism when ratified. The libertarian fantasy has tried to resurrect the British Constitution's balance between the people and the rulers and insert it into the anti-state (Appendix F), anti-government ideologies and political cynicism of the present.

The conscript militia institution in the United States died a natural death by the 1830s. Colonial society was settled, deferential and hierarchical. After the Revolution, American society expanded to fill a continent. It became more fluid and mobile. (Cooper, p. 14) Not only did the conscript militia no longer serve a theoretical purpose but it became impractical to enforce and maintain. Also, the regular army of the United States did not, and has not, become, as the regular army had in seventeenth century England, a feared instrument of political intrigue.

The vessel of law and public authority by the nineteenth century became the nation state. The United States, in its evolution into a modern state, for the first time combined, in a national system, the citizen soldier of the conscript militia with the professional soldier of the regular army in the Selective Service Act of 1917 which was challenged and held constitutional (*Arver v. United States*, 245 US 366 (1918); *Goldman v. United States*, 245 US 474 (1918), *Ruthenberg v. United States*, 245 US 480 (1918)) (Friedman). Here is where we find the true

legacy of the Second Amendment. The theme of Russell Weigley's authoritative *History of the United States Army* (1967) is the polarization from the beginning between citizen soldiers and professional soldiers (p. 87):

The strong-government men had desired sufficient authority to create a strong national army, and the Constitution fulfilled their wish. But in the Constitution they retained the dual military system bequeathed to the United States by its history: a citizen soldiery enrolled in the state militias, plus a professional army of the type represented by the British army or, more roughly, the Continental Army.

In the twentieth century, we have described our armed forces as being composed of citizen soldiers and been proud of their condition and performance as such.

Just as the District Court and the literature it cites maintain a great confusion between a natural right to revolution and a civil right secured by government they also maintain a great confusion between the right of the people to participate as citizen soldiers and a personal right to be armed prior to political community, without prior restraint or any state purpose.

III. THE DISTRICT COURT ERRED IN CONFUSING A RIGHT TO SELF-DEFENSE UNDER LAW AND GOVERNMENT WITH A RIGHT TO SELF-DEFENSE OUTSIDE OF THE RULE OF LAW.

Self-defense is a ubiquitous claim for the right-to-arms which the District Court repeats. Self-defense is a right defined in law and protected by law, but it is not an excuse to be armed outside of lawful authority. The self-defense security of gun owners under law and government is to create legal categories of gun ownership which gun owners as citizens, once they decide they are citizens, can effectively apply against the lawless through legal means. There is no conflict in principle between gun ownership for self-defense and prior restraint or accountability to public authority. The self-defense sought in the personal right is self-defense in the State of Nature which is the state of anarchy. There is no individual self-defense in the state of anarchy. Van den Haag again:

In fact anarchy is actually impossible. The monopoly of legitimate force held by the state can be replaced only by polyarchy—which cannot but be worse.

Our local warlord, “the strongest[,] carries it” (—Locke, §1). Militia duty located gun owners in the structure of a community, required training and imposed the duty to guard against threats. It was a different concept in both theory and practice from the personal right sought today. In eighteenth century consciousness, true liberty was under law and opposed to both tyrannical rule and licentiousness (no law). (Rakove, p. 288-95).

IV. THE DISTRICT COURT ERRED IN FRAMING THE ISSUES AS ONE OF A CONFLICT BETWEEN A “COLLECTIVE” VERSUS “INDIVIDUAL” RIGHT INTERPRETATION OF THE SECOND AMENDMENT.

The District Court reaches past the overwhelming volume of cases finding gun laws reasonable to *US v. Miller*, 307 US 174 (1939). The important phrase in *Miller* which has been often repeated in subsequent cases is "reasonable relationship to the preservation or efficiency of a well-regulated militia." This phrase implies that militia is a function of lawful authority wherever and however constituted. This is clear from militia clauses of eighteenth and nineteenth century state constitutions. (Thorpe). The District Court finds the “crucial question” of an “individual or collective right” unanswered in *Miller*. The Eighth Circuit, however, in *US v. Hale*, 978 F.2d 1016 (1982) held that:

Whether Second Amendment “right to bear arms” for militia purposes is “individual” or “collective” in nature is irrelevant where individual’s possession of arms is not related to preservation or efficiency of militia, in which case there is no Second Amendment protection.

The maintenance of a well-regulated militia is a state function. Any rights are rights in relation to that state function.

Three categories of law can be identified but which the courts have not differentiated in struggling with gun laws: 1. Military law which has no relevance here; 2. Militia law which was both military and civil depending on the circumstance but is now archaic and only relevant as history to clarify the issue; and, 3. Civil law which involves the legitimate police functions to regulated firearms outside of any military or militia context. The key word for militia law is “required” (Dist. Ct. Op., p. 9). Requirement presupposes possession. It is in this possession that the personal right is sought, but, rather than a civil right, possession was a form of tax—widely resisted—imposed by lawful authority. Militia law cannot be resurrected as a protection for private individuals. The US Bankruptcy Court in *Brown* (189 BR 653, Bkrtcy (1995)) indulged in a length discussion on the difference between personal arms and military arms. The language of other courts is clearly the language of civil regulation not militia law:

"reasonable regulation by the state under its police powers"

"the right subject to reasonable exercise of the police powers"

"the benefit to public safety"

Second Amendment Foundation v. City of Renton, 668 P. 2d 583 (1983).

"The states have always had great leeway in adopting summary procedures to protect the public health and safety."

Rabbit v. Leonard et al., 413 A.2d 489 (1979)

"Reasonable regulation for the maintenance of public order"

US v. Francis J. Warin, 530 F.2d 104 (1976).

The District Court quotes Supreme Court Justice Clarence Thomas' *obiter dictum* in *Printz* that

If, however, the Second Amendment is read to confer a *personal right* to "keep and bear arms," a colorable argument exists that the Federal Government's regulatory scheme, at least as it pertains to the purely intrastate sale and possession of firearms, runs afoul of that Amendment's protections. (Dist. Ct. Op., p. 22)

But, even this imagined personal right does not mean a right outside of any and all governmental authority only outside of the reach of Federal authority; likewise, in similarly confused words from Justice Scalia: "Of course, properly understood, it is no limitation upon arms control by the states." (Scalia, p. 137n) The personal right does not seem to be eligible for Fourteenth Amendment protection against the states.

V. POLITICAL CYNICISM

The present polarization and impasse over firearms policy can be found in two extensively documented papers: Andrew Herz' "Gun Crazy" (1995) and Barnett and Kates' "Under Fire" (1996). Herz' conventional arguments provoked acrimonious condemnation from individual right advocates Barnett and Kates, but Barnett and Kates arrive at this conclusion (p. 1259):

It may reasonably be argued that the Second Amendment does not preclude such gun regulations as registration, licensing, background checks, prohibition of arms to the deranged, children, and people with felony or violence convictions.[540] What seems no longer open to dispute is that the Amendment guarantees every law-abiding, responsible adult a constitutional right to choose to possess arms.

What Barnett and Kates concede may "reasonably be argued" are essential ingredients of firearms policy. There appears to be much common ground among Barnett and Kates, many of the legal scholars they and the District Court cite, the gun control organizations and even the gun manufacturers. The President of Colt Manufacturing proposed a national permitting system in 1997 (Appendix J). Out of this common ground could be distilled a reasonable and effective gun control policy to address the current crisis in gun violence which the great majority of the people could support and which would be consistent with sovereign public authority, historical practice, the contours of citizenship under law and government and the legitimate, as opposed to the anarchic or insurrectionist, interests of gun owners.

The impasse is the political cynicism found in Barnett and Kates. While dismissing the insurrectionist accusations against Second Amendment rights as "malicious straw man" (p. 1232), they take alarm at what they identify as the confiscationist designs of the gun controllers. The personal right fabricated in the

volume of literature is a right secured against confiscation/prohibition. It is a right that only has meaning in present gun control politics. They don't trust political processes, want one foot planted in the State of Nature, and want it secured there by the courts. The Second Amendment, however, is not relevant to the claim.

If the choice is between confiscation (tyranny) and a personal right (anarchy) the case for the personal right does not hold up. Maintaining public order is a state prerogative and confiscation in times of civil unrest or criminal activity is a legitimate state action. However, a right to maintain a balance of power between an armed populace and any and all government or a right to insurrection, to threaten or fantasize insurrection has no purpose that a state can protect. Even the District Court provides a quote from the eighteenth century that the right-to-arms does not extend to those who have been or are in "actual rebellion" (p. 16).

The antidote to political cynicism is public enlightenment. The great concern of the gun lobby and libertarians is coercive government. The way we minimize coercive government is to use free institution to get out all the relevant information, conduct rational, informed public debate, arrive at and build public support around a consensus, and let policy follow.

Firearms policy more than any other will be arrived at in the public

conscious through this process. The completely necessary debate has not taken place. There is no serious public enlightenment now and no political leadership on the substantive political issues involved. *Warin*, the most important Second Amendment case since *Miller* and before *Emerson*, has never been mentioned in the *Washington Post*. *Emerson*, which involves the fundamental relationship between citizen and state, was mentioned only once (AP report, 4/4/99, p. A 10, but not in all editions). (more *Washington Post* in Appendix I) We hear much about trigger locks and there is much effort and expense to collect public health statistics. There is no context that includes the consent of the governed and the "just powers" of government.

If there are ambiguities in the record and in the concepts, it is necessary to clarify the ambiguities now and decide what we want to live in today. During the nineteenth century, the states wrote and rewrote their constitutions every few decades. (Thorpe) The bills of rights of those constitutions are very instructive. Most start with an article that the people have a right to "alter or abolish" their government. The language is from the Declaration of Independence, a charter for revolution. These rights documents then go on to define the right of militia as *authorized* by law, the right to *peaceable* assemble, and define treason as the *waging of war* against the state. It was not explained how the people were

supposed to exercise the right to revolution when their most important instruments were denied them.

VI. CONCLUSION: SECURING NEW RIGHTS

There will not be any results in firearms policy until there is public knowledge, understanding and conviction. It is not the business of the courts to conduct public debate or a national civics lesson on the contours of citizenship. Until the confusion is cleared up in the public consciousness and the purposes of gun ownership and regulation are defined in policy, the courts do not need to be inventing new civil liberties to compensate for the failure in other places to debate issues on their proper terms, reconcile differences, and enact and make work reasonable policies which are consistent with history, a viable legal political order, and what most players seem to be willing to accept. ACCORDINGLY, THE JUDGMENT OF THE DISTRICT COURT SHOULD BE REVERSED.

Respectfully submitted,

Attorney for the Potomack Institute