No. 04-7041

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHELLY PARKER, *et al.*,
Appellants,

v.

DISTRICT OF COLUMBIA and ANTHONY A. WILLIAMS,
Appellees,

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

BRIEF OF THE BRADY CENTER TO PREVENT GUN VIOLENCE, THE VIOLENCE POLICY CENTER, AND THE CITY AND COUNTY OF SAN FRANCISCO AS *AMICI CURIAE* IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and *Amici*

All parties, intervenors, and *amici curiae* appearing before the District Court and in this Court, with the exception of the City and County of San Francisco, are listed in the briefs for Appellants and Appellees District of Columbia and Williams.

Rulings Under Review

References to the rulings at issue appear in the briefs for Appellants and Appellees District of Columbia and Williams.

Related Cases

This case was not previously before this Court or any other Court. The only related case of which *amici curiae* are aware is *Seegars v. Gonzales,* 396 F.3d 1248, *r'hg denied*, 413 F.3d 1 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 1187 (2006). As in this case, the plaintiffs in *Seegars* purported to challenge the District of Columbia's firearms restrictions under the Second Amendment, among other grounds. This Court affirmed the dismissal of those claims as a preenforcement challenge to a criminal statute that the plaintiffs lacked standing to assert.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(c) and D.C. Cir. R. 26.1, *amici curiae* the Brady Center and the VPC state as follows:

The Brady Center is a non-profit organization that works to reduce firearm deaths and injuries through education, research, and legal advocacy. Through its Legal Action Project, the Brady Center participates in key court cases throughout the nation, advocating legal principles that will reduce gun violence. The Brady Center has no parent companies and no publicly held company has a 10% or greater ownership interest in the Brady Center.

The VPC is a national, not-for-profit association that conducts research and public education on firearms violence and provides information and analysis to policymakers, journalists, grassroots advocates, and the general public. It has no parent companies and no publicly held corporation owns 10% or more of its stock.

Amicus Curiae the City and County of San Francisco, as a governmental entity, is not required to file a corporate disclosure statement under Fed. R. App. P. 26.1 and 29(c), and D.C. Cir. R. 26.1.

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GLOSSARY

Word(s)	Abbreviation
Amici Curiae the States of Texas, Alabama, Arkansas, Colorado, Florida, Georgia, Michigan, Minnesota, Nebraska, North Dakota, Ohio, Utah, and Wyoming	"Texas"
Brady Center to Prevent Gun Violence	"Brady Center"
City and County of San Francisco	"San Francisco"
Congress Of Racial Equality	"CORE"
Violence Policy Center	"VPC"

INTEREST OF *AMICI*

The Brady Center is a non-profit public interest organization dedicated to reducing gun violence through education, research, and legal advocacy. The Brady Center has a substantial interest in ensuring that the Second Amendment is not misinterpreted as a barrier to strong government action to prevent gun violence. Through its Legal Action Project, the Brady Center has filed numerous *amicus* briefs in cases involving the constitutionality of gun laws. Brady Center attorneys have also made significant contributions to Second Amendment scholarship.

The VPC is a non-profit educational organization that conducts research and public education on firearms violence and provides information and analysis to policymakers, journalists, grassroots advocates, and the general public. Among other initiatives, the VPC examines the role of firearms in America, analyzes trends and patterns in firearms violence, and works to develop policies to reduce gun-related death and injury.

The VPC is an active participant in the debate over the meaning of the Second Amendment. The VPC monitors and participates in Second Amendment litigation around the country, and has filed *amicus* briefs in several Second Amendment cases.

San Francisco has a population of 776,733. In recent years, gun violence in San Francisco has been increasing, resulting in significant human and economic

costs to the city and its citizens. To combat this gun violence, San Francisco has enacted measures that limit and regulate gun possession within its borders. California has also passed gun regulation measures that assist San Francisco in combating gun violence within its borders. These measures cannot, however, address the violence fostered by lax regulation of guns in other parts of the United States. San Francisco therefore has a strong interest in supporting the constitutionality of efforts by other municipalities to regulate handguns and can offer this Court its experience in addressing issues surrounding gun regulation.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Second Amendment protects the ability of the states to maintain a "well regulated Militia," and secures to the people a right "to keep and bear arms" specifically and exclusively for that purpose. U.S. CONST. amend. II. Yet Plaintiffs ask this Court to invalidate the firearms restrictions of the District of Columbia, claiming that the Second Amendment guarantees an individual right to keep and bear arms *unrelated* to militia service. The District Court correctly recognized that long-settled precedent, fundamental principles of constitutional interpretation, and the vast weight of historical evidence confirm the militia-based understanding of the Second Amendment. In short, the Second Amendment confers no individual right to own or use firearms for purposes unrelated to militia service.

United States v. Miller, 307 U.S. 174 (1939), the Supreme Court's last opinion construing the Second Amendment, directly refutes Plaintiffs' reading of the Second Amendment. The Court held that the "possession or use" of a weapon must bear "some reasonable relationship to the preservation or efficiency of a well regulated militia" to receive Second Amendment protection. *Id.* at 178. Since *Miller*, the Supreme Court has twice confirmed this approach to Second Amendment analysis. Moreover, every federal court of appeals to consider the issue except one has followed suit, rejecting the proposition that the Second Amendment protects any right to own or use firearms unrelated to militia service.

The Second Amendment's text confirms this long-standing interpretation. It reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." The Amendment's first, or prefatory, clause anchors the Amendment in the Framers' concerns regarding the militia and the military, rather than individual self-defense. Nothing in the rest of the Amendment's text or the Constitution justifies disregard of the prefatory clause.

Further, many prominent scholars have endorsed this militia-based interpretation of the Second Amendment after careful analysis of its text and historical origins. *See*, *e.g.*, Saul Cornell, *St. George Tucker and the Second Amendment: Original Understandings and Modern Misunderstandings*, 47 WM. & MARY L. REV. 1123 (2006); Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103 (2000); Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291 (2000); Garry Wills, A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT (1999); Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309 (1998); Kenneth R. Bowling, *"A Tub to the Whale": The Founding Fathers and Adoption of the Federal Bill of Rights*, 8 J. EARLY REPUBLIC 223 (1988); Lawrence D. Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. AM. HIST. 22 (1984); Frederick B. Wiener, *The Militia Clause*

of the Constitution, 54 HARV. L. REV. 181 (1940); Lucilius A. Emery, *The Constitutional Right to Keep and Bear Arms*, 28 HARV. L. REV. 473 (1915). This includes scholars on whose works the Plaintiffs rely. *See*, *e.g.*, Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 889, 895 (describing the Amendment as "an inherently collective and political right").

To be sure, proponents of the individual-right approach have flooded law reviews in recent years with articles suggesting a private right to own firearms. Texas Br. 21-22 & n.9. These authors generally rely upon a small set of historical references, often quoted out of context. They also swim against the tide of a well-established body of case law. Indeed, considering the longstanding acceptance of the militia-based rights view, there has been little reason for scholars who support that view to address the topic. *See* Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHICAGO-KENT L. REV. 3, 24 (2000).

In sum, Plaintiffs' Second Amendment claims are controlled—and defeated—by *Miller* and its progeny. Plaintiffs rely chiefly on an interpretation of the Second Amendment that has been roundly rejected by almost every court of appeals. On close examination, moreover, the bulk of Plaintiffs' historical and textual arguments run smack against *Miller*'s basic holding that the Second Amendment protects a right to bear arms related to, and inextricably bound with, state militia

service. Plaintiffs provide no persuasive legal, textual, or historical justification for this Court to abandon *Miller*, even if it were free to do so. Accordingly, the Court should affirm the dismissal of Plaintiffs' Second Amendment claims.[1]

ARGUMENT

I. *UNITED STATES V. MILLER* ESTABLISHED THAT ANY SECOND AMENDMENT RIGHT MUST RELATE TO MILITIA SERVICE.

Miller is without question the seminal case interpreting the Second Amendment. Contrary to a long line of deliberate interpretation, Plaintiffs contend *Miller* turned not on the substantive issue of Miller's right to bear arms, but on the nature of the weapon at issue (*i.e.*, whether the weapon was suitable for militia service). Pls. Br. 25-26. But Plaintiffs' argument is wishful thinking, dependent upon a highly selective reading of *Miller*. As every federal appellate court save the Fifth Circuit (in dictum) recognizes, *Miller* firmly rejected the notion of a Second Amendment right unrelated to militia service. That decision is binding upon this Court.

As Justice McReynolds explained in *Miller*, it was the "obvious purpose" of the Amendment to "assure the continuation and render possible the effectiveness" of militia forces, and the Amendment "*must* be interpreted and applied with that end in view." 307 U.S. at 178 (emphasis added). Historically, the Court noted, mi-

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[1] *Amici* agree with, but do not herein address, Appellees' standing argument.

litia members were expected to supply their own arms "when called for service" to "[t]he militia which the States were expected to maintain and train," and militia members were expected to act "in concert for the common defense." *Id*. at 178-79. *Miller*'s plain message was that the right to "keep and bear arms" in the Second Amendment refers only to arms borne in lawful militia service, not any rights of individuals to possess and use firearms for their own private ends.[2] Because defendants failed to demonstrate that the "possession or use" of their firearm had "some reasonable relation to the preservation or efficiency of a well regulated militia," *id.* at 178, the Second Amendment gave them no defense.

Since *Miller*, the Supreme Court has twice affirmed the militia-based interpretation of the Second Amendment. In *Lewis v. United States*, 445 U.S. 55 (1980), the Court addressed whether 18 U.S.C. § 1202(a)(1), which criminalizes possession of a firearm by a convicted felon, could survive an equal protection challenge. The Court applied rational-basis review, rather than strict scrutiny, noting the stat-

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[2] The Court should not accept Plaintiffs' suggestion that *Miller* turned on the nature of the "arms" at issue. Pls. Br. 26. The result of that argument would be absurd; it suggests *Miller* would have upheld defendants' Second Amendment challenge if only their weapon had been employable in military service. The First, Third, and Tenth Circuits have rightly rejected this attempt to distinguish *Miller,* refusing to posit a constitutional right to possess military weapons, capable of mass killing, for private purposes. *See United States v. Parker*, 362 F.3d 1279, 1284 (10th Cir. 2004); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996); *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942).

ute at issue "[did not] trench upon any constitutionally protected liberties." 445 U.S. at 65 n.8 (citing *Miller*). By not applying strict scrutiny, *Lewis* presupposed that *Miller* did not recognize a fundamental, individual right to possess firearms. Similarly, the Court dismissed the appeal of *Burton v. Sills*, 248 A.2d 521, 527 (N.J. 1968), in which the state court cited *Miller* in concluding that the Second Amendment did not confer a right to bear arms unrelated to militia service, for "want of a substantial federal question." *Burton v. Sills*, 394 U.S. 812 (1969). This dismissal would have been inappropriate if the Court believed there was any doubt about whether *Miller* endorsed the militia-based view.

Thus, *Miller* firmly rejected the individual-rights view espoused by Plaintiffs, and the Supreme Court has seen no need to revisit the issue since. With the exception of dictum by the Fifth Circuit in *United States v. Emerson*, 270 F.3d 203, 233 (2001), this has been the accepted construction of *Miller* for more than six decades, including every published federal opinion since *Emerson*.[3] This Court "would be in error to overlook sixty-five years of unchanged Supreme Court

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[3] *See*, *e.g.*, *United States v. Parker*, 362 F.3d at 1284; *United States v. Lippman*, 369 F.3d 1039, 1044 (8th Cir. 2004); *United States v. Price*, 328 F.3d 958, 961 (7th Cir. 2003); *Silveira v. Lockyer*, 312 F.3d 1052, 1066, *reh'g en banc denied*, 328 F.3d 567 (9th Cir. 2003); *Olympic Arms v. Buckles*, 301 F.3d 384, 388-89 (6th Cir. 2002); *United States v. Wright*, 117 F.3d 1265, 1273 (11th Cir. 1997); *Rybar*, 103 F.3d at 286; *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir. 1995); *Thomas v. City Council of Portland*, 730 F.2d 41, 42 (1st Cir. 1984); *United States v. Toner*, 728 F.2d 115, 128 (2d Cir. 1984).

precedent and the deluge of circuit case law rejecting an individual right to bear arms not in conjunction with service in the Militia." *Parker*, 311 F. Supp. 2d at 109-10.[4]

II. TEXTUAL ANALYSIS CONFIRMS THAT THE SECOND AMENDMENT CONFERS NO INDIVIDUAL RIGHTS.

The unique textual structure of the Second Amendment sets it apart from all other provisions in the Bill of Rights.[5] Courts and scholars agree that the meaning of the Second Amendment's right "to keep and bear arms" must be informed by the prefatory clause concerning a "well regulated Militia." *See*, *e.g.*, *Miller*, 307 U.S. at 178. Of course, it is fundamental that "every word must have its due force, and appropriate meaning" in constitutional interpretation. *Wright v. United States*, 302 U.S. 583, 588 (1938). Even *Emerson* recognized that the prefatory clause must

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[4] Plaintiffs cite *Fraternal Order of Police ("FOP") v. United States*, 173 F.3d 898 (D.C. Cir. 1999), arguing that it is "[i]mplicit in [this] Court's reasoning … that if a rule could be shown to impair a significant portion of 'ordinary citizens' from functioning as a militia … it would violate the Second Amendment." Pls. Br. 31. *FOP*, however, did not attempt to "fix the exact form of the required relationship … because [the appellant] presented no evidence on the matter at all." *FOP*, 173 F.3d at 906.

[5] "What renders the language and structure of the amendment particularly striking is the existence of a prefatory clause, a syntactical device that is absent from all other provisions of the Constitution, including the nine other provisions of the Bill of Rights." *Silveira*, 312 F.3d at 1068.

be given "its full and proper due." 270 F.3d at 236.[6] Under plaintiffs' reading, the first nine words of the Amendment serve no function whatsoever; the meaning of the Amendment would be the same if they were omitted entirely.

The Second Amendment's prefatory clause is much more than exhortatory preamble, as Plaintiffs suggest. Rather, the accepted reading—embraced by *Miller* and courts since—is that the prefatory clause "helps shape and define the meaning of the substantive provision contained in the second clause, and thus of the amendment itself." *Silveira*, 312 F.3d at 1075.

> When the second clause is read in light of the first, so as to implement the policy set forth in the preamble, … the most plausible construction of the Second Amendment is that it seeks to ensure the existence of effective state militias in which the people may exercise their right to bear arms, and forbids the federal government to interfere with such exercise.

Id. See also Gillespie v. City of Indianapolis, 185 F.3d 693 (7th Cir. 1999) ("The link that the amendment draws between the ability 'to keep and bear Arms' and '[a] well regulated Militia' suggests that the right protected is limited, one that inures not to the individual but to the people collectively, its reach extending so far

[6] Contrary to Plaintiffs' view, this approach would not "eviscerate," Pls. Br. 39, the import of other portions of the Amendment. It merely recognizes that the prefatory clause should not be rendered superfluous or dormant. In contrast, Plaintiffs' reading relies on an unjustified preference for one clause—deemed the "operative clause"—over the rest.

as is necessary to protect their common interest in protection by a militia.").[7] At a minimum, the Second Amendment by its very terms must be construed as protecting a "well regulated Militia."

A. "Militia" Refers To An Organized Military Unit Under State Control.

Plaintiffs repeatedly insist that the "people" referenced in the Second Amendment are the same "people" mentioned elsewhere in the Bill of Rights. Pls. Br. 47.[8] Their argument, however, assumes that the term "Militia" can be reduced

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[7] Plaintiffs suggest that the Copyright and Patent Clause, U.S. CONST. art. I, § 8, cl. 8, provides an analogy for interpreting the prefatory clause of the Second Amendment. *See* Pls. Br. 40-43. But the analogy is inapt. The Copyright Clause's syntax is consistent with other clauses in Article I, Section 8, which each enumerate a power of Congress using a similar infinitive construction ("To …"). The Second Amendment follows no similar syntactical pattern in the Bill of Rights. Furthermore, the Copyright Clause's "preamble"—if it may be deemed one—is part of a clause that bestows an affirmative power on Congress. The Second Amendment, by contrast, *restricts* Congress' power. *See Silveira*, 312 F.3d at 1068 n.23.

[8] Plaintiffs argue that *United States v. Verdugo-Urquidez* establishes that "the people" referenced in the First, Second, Fourth, Ninth, and Tenth Amendments refers uniformly "to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." 494 U.S. 259, 265 (1990). But *Verdugo-Urquidez* discusses "the people" to draw a distinction between rights conferred under the Fifth and Sixth Amendments to "persons," meaning *all* persons, versus rights reserved to "the people," meaning a more selective community defined by membership. *See* Amar, *supra*, at 892 ("[W]hen the Constitution speaks of 'the people' rather than 'persons,' the collective connotation is primary."). Moreover, "bear arms" still refers to the use of arms in a military sense, and the Second Amendment must still be interpreted in light of its prefatory clause. Thus, it may well be the same "people"

to the term “people”—that “[t]he two are synonyms,” Pls. Br. 45—and that “‘militia’ referred simply to members of the public,” in their *individual* capacities, who were “capable of bearing arms in defense of the government.” Pls. Br. 24. But as Pulitzer Prize-winning scholar Jack Rakove has explained, Plaintiffs’ textual argument inappropriately requires one to presume that “people” should be “defined intratextually, by reference to its use in other amendments,” but that “Militia” should be interpreted as if it “leaps beyond the proverbial four corners of the document,” and is not, in the Second Amendment, the same organized military unit well known to the Framers and referenced repeatedly in the rest of the Constitution. Rakove, *supra*, at 124. Such unprincipled reasoning has been criticized as the “most striking defect in the textualist component of the individual rights interpretation.” *Id.* at 123; *see also Silveira*, 312 F.3d 1070 (“That same interpretive principle is unquestionably applicable when we construe the word ‘militia.’”).

The word “militia” appears in four clauses of the Constitution outside the Second Amendment. In each, it can only be understood to refer to a military unit, and *not* to an undifferentiated mass of individuals.

“Militia” first appears in Article I, which grants Congress the powers:

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do have a right to use arms *as part of an organized militia*. *See United States v. Hale*, 978 F.2d 1016, 1020 (8th Cir. 1992) (rejecting an individual-rights argument based on *Verdugo-Urquidez*).

> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
>
> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

U.S. CONST. art. I, § 8, cl. 15-16. The "Militia" of these provisions was no new creation, but an existing armed force in each state. Under the Articles of Confederation, states faced restrictions in maintaining a professional standing army, but were *required* to "always keep up a well-regulated and disciplined militia, sufficiently armed and accoutered, and [to] provide and constantly have ready for use, in public stores, a due number of filed pieces and tents, and a proper quantity of arms, ammunition and camp equipage." ARTICLES OF CONFEDERATION of 1787, art. VI. The Constitution, in a form of military federalism, preserved these state militias but granted the new government power to call them into federal service for certain purposes, and to keep them armed and prepared in peacetime. "The fact that the militias may be 'called forth' by the federal government only in appropriate circumstances underscores their status as state institutions." *Silveira*, 312 F.3d at 1070.

Rather than simple aggregations of individuals, these state militias were composed of formally enrolled companies, commanded by state-appointed officers and subject to military discipline. As the Supreme Court has held, the Constitution

"is explicit that the Congress shall have the responsibility for organizing, arming, and disciplining the Militia (now the National Guard), with certain responsibilities being reserved to the respective States." *Gilligan v. Morgan*, 413 U.S. 1, 6 (1973); *see also Maryland ex rel. Levin v. United States*, 381 U.S. 41, 46 (1965) ("The National Guard is the modern Militia reserved to the States by Art. I, § 8, cl. 15, 16, of the Constitution.").[9]

In short, "any reader of Article I, Section 8 would find it hard to deny that the text there considers the militia not as an unorganized mass of the citizenry but as an institution subject to close legislative regulation." Rakove, *supra*, at 126. Similarly, Article II, Section 2 designates the President as the "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States," and the Fifth Amendment establishes a right to a grand jury "except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger." In each of these provisions, the use of the term "Militia"—paired with such other military bodies as "the Army and Navy" or "the land and naval

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[9] Contrary to Texas's suggestion that the first Militia Act in 1792 established the militia as an unorganized mass of armed citizenry (Texas Br. 17-18), the Act explicitly required enrollment of all militia members in formal companies of troops. *See* Militia Act, ch. 33, 1 Stat. 271 (1792). The militia continues to be subject to Congressional definition. *See, e.g.*, 10 U.S.C. § 311 (distinguishing the organized and unorganized militia of the United States).

forces"—denotes a legally organized military force, not a collection of private citizens independently exercising their individual rights. *Silveira*, 312 F.3d at 1071.

The context of "Militia" in the Second Amendment itself provides further evidence that it refers to a military unit. The Amendment begins: "A *well regulated* Militia being necessary to *the security of a free State* …." U.S. CONST. amend. II (emphasis added). This language makes clear that the Second Amendment does not envision the militia as a "free-for-all," *Parker*, 311 F. Supp. 2d at 108, or "an 'unregulated' mob of armed individuals," *Silveira*, 312 F.3d at 1072. Rather, "only militias actively maintained and trained by the states can satisfy the 'well regulated militia' requirement of the Second Amendment." *United States v. Wright*, 117 F.3d 1265, 1273 (11th Cir. 1997). Additional support for this reading lies in the Amendment's concern for the "security of a free State," signaling that the Framers referred "only to governmental militias that are actively maintained and used for the common defense." *Id*. The absurdity of a "well regulated" *people* itself refutes Plaintiffs' assertion, Pls. Br. 45, that the terms "Militia" and "people" are "synonyms."

Finally, in *Miller*, the Supreme Court itself expressly drew the connection between the "well regulated Militia" of the Second Amendment and the "Militia" of Article I. The Court made express reference to the militia clauses of Article I, § 8 in finding that it was "[w]ith obvious purpose to assure the continuation and ren-

der possible the effectiveness of *such forces* the declaration and guarantee of the Second Amendment were made." 307 U.S. at 178. The Court further defined the Militia as "[a] body of citizens enrolled for military discipline." *Id.* This definition of the Militia is entirely inconsistent with Plaintiffs' argument that it was used in the Second Amendment as a synonym for "the people."

B. The Right To Keep And Bear Arms Is A Right Of The People Of Each State To Organize Themselves As A Military Force.

The Second Amendment's choice of words "to keep and bear arms" —rather than, for example, to *possess* or *own* arms—also pointedly connotes a militia-centered right. *See Silveira*, 312 F.3d at 1052 ("This choice of words is important because the phrase 'bear arms' is a phrase that customarily relates to a military function.").[10] *Miller* itself cited a Tennessee Supreme Court case confirming that to "bear arms" means to take up arms "in a military sense," not for private, individual defense. *See Aymette v. State*, 21 Tenn. 154, 161 (1840) ("A man in the pursuit of deer, elk, and buffaloes, might carry his rifle every day, for forty years, and, yet, it would never be said of him, that he had borne arms, much less could it be said, that

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[10] Based on a survey of documents from the founding era, Professor Dorf has shown that "[o]verwhelmingly, the term had a military connotation." Dorf, *supra*, at 314; *see also* Amar, *supra*, at 891 ("[S]tate constitutions on the books in 1789 consistently used the phrase 'bear Arms' in military contexts and no other."); Garry Wills, *To Keep and Bear Arms*, N.Y. REV. BOOKS, Sept. 21, 1995, at 64 ("The whole context of the amendment was always military.").

a private citizen bears arms, because he has a … pistol concealed under his clothes….").[11]

The right to "bear arms" therefore served as a "right of the people" to a collective role in their government's military defense. Like jury duty, military service is not always so individually desirable as to be considered a "right." But as an institution, a right of the *people*, the state militias—like trial by jury—involved ordinary citizens in a crucial government function, allowing popular participation in the defense of a free State rather than relying on an untrustworthy and potentially rapacious professional army. *See Miller*, 307 U.S. at 179 (describing the Framers' fear of standing armies); *see also* U.S. CONST. art. I, § 8, cl. 12 (limiting appropriations for standing armies). The people of each free State were guaranteed, against federal interference, a right to bear arms in well-regulated state militia—a right that could not be exercised by private individuals for merely private ends.

[11] Other state court cases cited by *Miller* confirm that to "bear arms" was understood in the eighteenth century strictly in a military context. *See e.g.*, *Salina v. Blaksley*, 72 Kan. 230, 83 P. 619, 620 (1905) (holding that the Kansas Constitution—which states that "the people have the right to bear arms"—"deals exclusively with the military," and "[i]ndividual rights are not considered in this section"); *Fife v. State*, 31 Ark. 455 (1876) (upholding, under state and federal constitutions, a conviction for carrying a pistol, because the pistol is "used in private quarrels and brawls, and not such as is in ordinary use, and effective as a weapon of war, and useful and necessary for 'the common defense'").

Nor does the addition of the word "keep" alter the basic character of the right. Pls. Br. 49. It seems "unlikely that the drafters intended the term 'keep' to be broader in scope than the term 'bear.'" *Silveira*, 312 F.3d at 1074. Rather, the traditional interpretation of the amendment calls for the words "keep and bear" to be read together, much like "necessary and proper" or "cruel and unusual." *See*, *e.g.*, *id.* at 1074; Dorf, *supra*, at 317. Moreover, the inclusion of the word "keep" is most likely attributable to British troops' interference with the colonies' attempts to "keep" arms, *see* Paul Finkelman, *"A Well-Regulated Militia": The Second Amendment in Historical Perspective*, 76 CHI.-KENT L. REV. 195, 204 (2000), and the word is used in this sense in the Articles of Confederation.[12] In any event, the right "to keep" arms "in no way undercuts the strong implication that the right granted by the second clause relates to the performance of a military function, and not to the indiscriminate possession of weapons for personal use." *Id.*

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[12] ARTICLES OF CONFEDERATION of 1781, art. VI (requiring that "every state shall always keep up a well regulated and disciplined militia"); *see generally* Wills, *To Keep And Bear Arms*, *supra*.

III. THE HISTORY OF THE SECOND AMENDMENT DEMONSTRATES THE FRAMERS DID NOT INTEND TO CREATE AN INDIVIDUAL RIGHT TO BEAR ARMS.

A. The Second Amendment's Purpose Was To Ensure The Militia Would Remain An Effective Fighting Force.

The Framers did not set out to secure an individual right to possess arms for private use. Rather, the Second Amendment arose largely in response to *military* concerns. The unamended Constitution contemplated a national and state defense system: authority would be divided between the national army and navy, exclusively controlled by the federal government, and the state militias, subject to Congressional regulation and Presidential command but officered and trained by the several states. U.S. CONST. art. I, § 8, cl. 15-16. The preservation of the state militias was crucially important to those ratifying the Constitution. As Madison pointed out in FEDERALIST NO. 46, these militias—not private citizens possessing arms—were viewed as the primary bulwark against abuses by a standing army:

> [I]t would not be going too far to say, that the State Governments with the people on their side would be able to repel the danger [of a standing federal army] … opposed [to which would be] a militia amounting to near half a million of citizens with arms in their hands, *officered by men chosen from among themselves*, fighting for their common liberties, and *united and conducted by governments possessing their affections and confidence.*

Id. (emphasis added).[13]

The Plaintiffs and their supporting *amici*, who quote only the first half of Madison's sentence, Pls. Br. 34, claim that an individual right to gun possession was seen as necessary to maintaining a citizen militia. Pls. Br. 22-23; NRA Br. 6. However, the historical materials reveal no concern that the federal government might confiscate guns from an armed citizenry: "there is not a single statement … [indicating] any congressman contemplated that [the Second Amendment] would establish an individual right to possess a weapon." *Silveira*, 312 F.3d at 1085 (citing Rakove, *supra*, at 210-11).

Instead, Americans worried that Congress might *fail* to provide the citizens with arms, allowing the militias to fall into disrepair, and thereby create an excuse to maintain a standing army. For example, George Mason worried that

> Congress may neglect to provide for arming and disciplining the militia, and the State Governments cannot do it, for Congress has an exclusive right to arm them, &c.… Should the national Government wish to render the militia useless, they may neglect them, and let them perish, in order to have a pretence of establishing a standing army.

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[13] Surprisingly, Texas points to FEDERALIST NO. 46 to argue that Madison supported an individual Second Amendment right. *See* Texas Br. 17. As the full passage demonstrates, however, FEDERALIST NO. 46 describes the *state militia* as a check on a strong national army, and merely notes that citizens comprise the militia. It does not suggest those individuals have a right to bear arms *unrelated* to their service in the militia.

Rakove, *supra*, at 138. This fear of federal neglect, that Congress might not arm those who refused to arm themselves, would have been poorly addressed by an individual right to gun possession—especially given that private citizens would need not only weapons but also substantial training to be militarily effective. Rather, the Second Amendment was crafted to ensure that the states would have the ability to provide independently for the needs of the militia, so that the national government could not disarm the militia by failing to support it financially, while simultaneously divesting the states of authority to do so. *Id.* at 161-62; *Silveira*, 312 F.3d at 1076; Finkelman, *supra*, at 197.

B. The Military Focus Of The Amendment Is Apparent From Its Drafting History.

The drafting of the Second Amendment renders unambiguous the central role of the militia. Madison's initial proposal provided: "The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: *but no person religiously scrupulous of bearing arms*, shall be compelled to render military service in person." THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES AND ORIGINS 169 (Neil H. Cogan ed., 1997) (emphasis added). Though subsequently omitted, Madison's proposed exception for "religiously scrupulous" objectors supports two conclusions.

First, the clause clearly employs "bearing arms" in the military sense, rather than any individual activity such as hunting or self-defense. It follows that the

same language, when used in the clause affirming the "right of the people to keep and *bear arms*," similarly pertains to military service.

Second, Madison's draft demonstrates that the overall thrust of the amendment was directed to the role of the militia. If the preceding two clauses were intended to affirm an individual right to bear arms, the proposed exemption for "religiously scrupulous" persons would have been unnecessary, and certainly would not have warranted a prefatory "but." Finkelman, *supra*, at 227-28. The reason for the clause's removal is illuminating: Elbridge Gerry worried that Congress, in an "attempt to destroy the militia," might "declare who are those religiously scrupulous, and prevent them from bearing arms." Saul Cornell, *"Don't Know Much About History": The Current Crisis in Second Amendment Scholarship*, 29 N. KY. L. REV. 657, 667 (2002).

Other amendments to Madison's draft reaffirmed the centrality of the state militias. The House of Representatives altered the phrase "security of a free country" to "security of a free State," Rakove, *supra*, at 120-22, thereby showing that the Amendment was specifically designed to protect the several states rather than individual persons. It also added a clause (later removed by the Senate) providing that the militia would be "composed of the body of the people," Amar, *supra*, at 104, which would have prevented Congress from defining the militia so as to exclude large classes of citizens from its ranks. The primary concern of the Amend-

ment's drafters was not any individual right to bear arms, but the size, composition, and governance of the militia.

Finally, the existence of alternative contemporaneous proposals reveals that the Framers *rejected* the very individual rights model that Plaintiffs advance. Pennsylvania Anti-Federalists proposed fourteen amendments to the Constitution. While some were adopted virtually verbatim, the First Congress substantially modified the seventh proposal, which affirmed the right of the people to bear arms "*for the defense of themselves* and their own state" and prohibited the enactment of any law to disarm "the people *or any of them* unless for crimes committed, or real danger of public injury from individuals." Finkelman, *supra*, at 209 (emphasis added).[14]

If Congress had incorporated these provisions into the Second Amendment, "the constitutional principle of private ownership of weapons would have been clear." *Id.* Instead, "Madison and his colleagues in the First Congress emphatically rejected the goals and the language of the Pennsylvania Antifederalists" relating to

[14] Most state constitutions of the time intertwined arms-bearing and militia clauses "with rules governing standing armies, troop-quartering, martial law, and civilian supremacy," not with hunting or self-defense. When interpreting such clauses, the Framers "pictured Minutemen bearing guns, not Daniel Boone gunning bears." Amar, *supra*, at 894.

bearing arms, *id.* at 208, opting instead to create only a militia-based right. *Silveira*, 312 F.3d at 1083, 1084 n.48.

C. The Framers Were Accustomed To And Accepted The Local Regulation Of Firearms.

Although the Plaintiffs present the individual-rights view as a product of the Anglo-American common-law heritage, or even of a natural right to self-defense, Pls. Br. 32, there is little historical support for such a view. *See* Don Higginbotham, *The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship*, 55 WM. & MARY Q. 39, 40 (1998) ("From the Revolution to the eve of the Civil War, there is precious little evidence that advocates of local control of the militia showed an equal or even a secondary concern for gun ownership as a personal right."). Neither in England nor in the independent states were individual citizens granted a general right to possess weapons free of government regulation. Rather, regulation of firearms was commonplace.

1. Gun possession had been subject to strict regulation in England.

The laws and customs of England, the foundation of American law, traditionally restricted gun ownership. The Game Act of 1671 limited gun possession to the highest classes, a small fraction of the population. Lois G. Schwoerer, *To Hold and Bear Arms: The English Perspective*, 76 CHI.-KENT L. REV. 27, 35 (2000). Following the 1688 ouster of James II, who had begun arming English Catholics and

disarming Protestants, *id.* at 44, the English Parliament negotiated limits on royal power—the Declaration of Rights—to which James's successor, William of Orange, acquiesced. Bogus, *supra*, at 379. Responding to James' attempt to act without Parliamentary authorization, and in order to protect the nation from the perceived Catholic menace, the Declaration provided that "the Subjects which are Protestants may have Armes for their defence Suitable to their Condition and as allowed by Law." Schwoerer, *supra*, at 43. This provision not only restricted those who could possess arms (Protestants of a suitable "Condition," *i.e.*, class), but ensured that firearms possessions would be regulated by "Law"—by Parliament, and not the Crown.

During the debates over the Declaration of Rights, no one complained that individuals lacked a general right to keep arms for personal use. *Id.* at 32. Indeed, any such idea would have seemed strange, given Parliament's extensive regulation of personal ownership of arms both before and after the Declaration of Rights. Robert Hardaway et al., *The Inconvenient Militia Clause of the Second Amendment: Why the Supreme Court Declines to Resolve the Debate Over the Right to Bear Arms*, 16 ST. JOHN'S J. LEGAL COMMENT. 41, 74-75 (2002). The Declaration was primarily intended to reshape the relationship between Parliament and Crown, *see* Bogus, *supra*, at 378 n.330; Schwoerer, *supra*, at 28, and within five years of approving the Declaration, while debating the Game Act of 1693, Parliament

overwhelmingly rejected a provision that would have allowed ordinary Protestant subjects to keep arms in their homes. *Id.* at 50-51.

2. Legal regulation of firearms continued after independence.

The regulation of gun ownership in America is not a modern invention; it was a practice accepted by the Framing generation. Firearms were commonly subject to police-power regulation in the states, and early Americans accepted the notion that groups of citizens could be disarmed without infringing state constitutions.[15] For example, Pennsylvania, through the Test Acts of 1776, disarmed those who refused to take a loyalty oath. *See* Saul Cornell, *Commonplace or Anachronism: The Standard Model, The Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 CONST. COMMENT. 221, 231-32 (1999). Similarly, early state governments monitored gun ownership and regulated weapons storage. Saul Cornell, *"Don't Know Much About History," supra*, at 672-74.[16]

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15 Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 525 (2004) ("[R]obust regulation of firearms is not only compatible with the Second Amendment, it is an essential part of the founders' vision of how guns fit within the framework of well regulated liberty.").

16 *See*, *e.g.*, 1838 Tenn. Pub. Acts ch. 137; (outlawing "Bowie knives" and "Arkansas toothpicks" to protect society from dangerous, concealed weapons); 1837 Ala. Acts 11 (same); 1837 Ga. Laws 90 (outlawing dangerous weapons, including concealed Bowie knives and pistols).

The Framers' broad understanding of the police power likewise supports a militia-based interpretation. *See* Rakove, *supra*, at 112-13 (emphasizing the prevailing understanding of states' police powers, "which authorized government to legislate broadly in pursuit of the public health and welfare"). Living in a time when various social and political upheavals seemed to threaten the survival of the new republic, the Framers would have been extraordinarily reluctant to eviscerate the capacity of the government to suppress domestic insurrections. *See* Finkelman, *supra*, at 218-22; FEDERALIST NO. 9 (Hamilton) (writing in defense of the Constitution that "[a] Firm Union will be of the utmost moment to the peace and liberty of the States" and "would prevent domestic faction and insurrection").

Yet Plaintiffs' theory of an individual right to bear arms assumes that the First Congress deprived itself of the power to regulate the flow of weaponry even in those places where it had plenary jurisdiction, such as the District of Columbia. Finkelman, *supra*, at 211. Any such weakening of the government's ability to keep order would have been contrary to the overall thrust of the new Constitution. "The goal was to prevent anarchy, violence, and rebellions. This prevention was accomplished by controlling the militias and the army and by retaining the right to limit weapons to those who formed 'A well regulated Militia.'" *Id.* at 222. If the Framers had intended to proscribe or restrict legislation limiting the ownership of dangerous weaponry one would expect at least some discussion of this controversial

contraction of police power during the otherwise wide-ranging debates over the Bill of Rights.[17]

Indeed, in more than two centuries of American jurisprudence, no decision of a federal court invalidating a gun-control law on the basis of the Second Amendment has been upheld. Even *Emerson* found that the gun-control law in question passed constitutional scrutiny because Second Amendment rights were not insulated from "limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable." 270 F.3d at 261. The federal courts' protracted and virtually unanimous acknowledgement of the right of states, municipalities, and the federal government to enact regulations limiting the private ownership and use of firearms is not just a jurisprudential curiosity; it is itself an important aspect of the Second Amendment's history.[18] That history stands forth-

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[17] Plaintiffs and their *amici* also invoke the interpretations of later commentators such as St. George Tucker, offhand *dicta* of later courts, and debates surrounding the enactment of the *Fourteenth* Amendment in order to support their interpretation of the Second Amendment. Pls. Br. 37-38; NRA Br. 29; CORE Br. 5. These opinions of later commentators, though often misunderstood, see Cornell, *St. George Tucker*, *supra*, at 1124-25 (describing the "individual rights misreading of Tucker," and noting that Tucker's lectures "explicitly described the Second Amendment as a right of the states"), are in any case insufficient in light of the overwhelming evidence for the military interpretation at the Founding. *See Rapanos v. United States*, 126 S. Ct. 2208 (2006) (noting that "subsequent history is less illuminating than the contemporaneous evidence").

[18] *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) ("Deeply embedded traditional ways of conducting

rightly opposed to the proposition that the Second Amendment creates a personal right to bear arms unrelated to militia service.

CONCLUSION

This Court should affirm the decision of the District Court.

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government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.").

Dated: August 7, 2006 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies pursuant to Fed. R. App. P. 29(d) & 32(a)(7)(B) & (C) and D.C. Cir. R. 32(a)(4) that: (i) the foregoing brief contains 6,996 words, exclusive of exempted portions; and (ii) the brief was prepared in proportionately spaced typeface using Microsoft Word for Windows in Times New Roman 14-point font.

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ADDENDUM

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Militia Act of 1792,
Second Congress, Session I. Chapter XXVIII

Passed May 8, 1792,
providing federal standards for the organization of the Militia.

An ACT more effectually to provide for the National Defence, by establishing an Uniform Militia throughout the United States.

I. Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That each and every free able-bodied white male citizen of the respective States, resident therein, who is or shall be of age of eighteen years, and under the age of forty-five years (except as is herein after excepted) shall severally and respectively be enrolled in the militia, by the Captain or Commanding Officer of the company, within whose bounds such citizen shall reside, and that within twelve months after the passing of this Act. And it shall at all time hereafter be the duty of every such Captain or Commanding Officer of a company, to enroll every such citizen as aforesaid, and also those who shall, from time to time, arrive at the age of 18 years, or being at the age of 18 years, and under the age of 45 years (except as before excepted) shall come to reside within his bounds; and shall without delay notify such citizen of the said enrollment, by the proper non-commissioned Officer of the company, by whom such notice may be proved. That every citizen, so enrolled and notified, shall, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch, with a box therein, to contain not less than twenty four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of power and ball; or with a good rifle, knapsack, shot-pouch, and power-horn, twenty balls suited to the bore of his rifle, and a quarter of a power of power; and shall appear so armed, accoutred and provided, when called out to exercise or into service, except, that when called out on company days to exercise only, he may appear without a knapsack. That the commissioned Officers shall severally be armed with a sword or hanger, and espontoon; and that from and after five years from the passing of this Act, all muskets from arming the militia as is herein required, shall be of bores sufficient for balls of the eighteenth part of a pound; and every citizen so enrolled, and providing himself with the arms, ammunition and accoutrements, required as aforesaid, shall hold the same exempted from all suits, distresses, executions or sales, for debt or for the payment of taxes.

II. And be it further enacted, That the Vice-President of the United States, the Officers, judicial and executives, of the government of the United States; the members of both houses of Congress, and their respective officers; all custom house officers, with the clerks; all post officers, and stage-drivers who are employed in the care and conveyance of the mail of the post office of the United States; all Ferrymen employed at any ferry on the post road; all inspectors of exports; all pilots, all mariners actually employed in the sea service of any citizen or merchant within the United States; and all persons who now are or may be hereafter exempted by the laws of the respective states, shall be and are hereby exempted from militia duty, notwithstanding their being above the age of eighteen and under the age of forty-five years.

III. And be it further enacted, That within one year after the passing of the Act, the militia of the respective states shall be arranged into divisions, brigades, regiments, battalions, and companies, as the legislature of each state shall direct; and each division, brigade, and regiment, shall be numbered at the formation thereof; and a record made of such numbers of the Adjutant-General's office in the state; and when in the field, or in serviced in the state, such division, brigade, and regiment shall, respectively, take rank according to their numbers, reckoning the first and lowest number highest in rank. That if the same be convenient, each brigade shall consist of four regiments; each regiment or two battalions; each battalion of five companies; each company of sixty-four privates. That the said militia shall be officered by the respective states, as follows: To each division on Major-General, with two Aids-de-camp, with the rank of major; to each brigade, one brigadier-major, with the rank of a major; to each company, one captain, one lieutenant, one ensign, four serjeants, four corporals, one drummer, and one fifer and bugler. That there shall be a regimental staff, to consist of one adjutant, and one quartermaster, to rank as lieutenants; one paymaster; one surgeon, and one surgeon's mate; one serjeant-major; one drum- major, and one fife-major.

IV. And be it further enacted, That out of the militia enrolled as is herein directed, there shall be formed for each battalion, as least one company of grenadiers, light infantry or riflemen; and that each division there shall be, at least, one company of artillery, and one troop of horse: There shall be to each company of artillery, one captain, two lieutenants, four serjeants, four corporals, six gunners, six bombardiers, one drummer, and one fifer. The officers to be armed with a sword or hanger, a fusee, bayonet and belt, with a cartridge box to contain twelve cartridges; and each private of matoss shall

furnish themselves with good horses of at least fourteen hands and an half high, and to be armed with a sword and pair of pistols, the holsters of which to be covered with bearskin caps. Each dragoon to furnish himself with a serviceable horse, at least fourteen hands and an half high, a good saddle, bridle, mail-pillion and valise, holster, and a best plate and crupper, a pair of boots and spurs; a pair of pistols, a sabre, and a cartouchbox to contain twelve cartridges for pistols. That each company of artillery and troop of house shall be formed of volunteers from the brigade, at the discretion of the Commander in Chief of the State, not exceeding one company of each to a regiment, nor more in number than one eleventh part of the infantry, and shall be uniformly clothed in raiments, to be furnished at their expense, the colour and fashion to be determined by the Brigadier commanding the brigade to which they belong.

V. And be it further enacted, That each battalion and regiment shall be provided with the state and regimental colours by the Field-Officers, and each company with a drum and fife or bugle-horn, by the commissioned officers of the company, in such manner as the legislature of the respective States shall direct.

VI. And be it further enacted, That there shall be an adjutant general appointed in each state, whose duty it shall be to distribute all orders for the Commander in Chief of the State to the several corps; to attend all publick reviews, when the Commander in Chief of the State shall review the militia, or any part thereof; to obey all orders from him relative to carrying into execution, and perfecting, the system of military discipline established by this Act; to furnish blank forms of different returns that may be required; and to explain the principles of which they should be made; to receive from the several officers of the different corps throughout the state, returns of the militia under their command, reporting the actual situation of their arms, accoutrements, and ammunition, their delinquencies, and every other thing which relates to the general advancement of good order and discipline: All which, the several officers of the division, brigades, regiments, and battalions are hereby required to make in the usual manner, so that the said adjutant general may be duly furnished therewith: From all which returns be shall make proper abstracts, and by the same annually before the Commander in Chief of the State.

VII. And be it further enacted, That the rules of discipline, approved and established by Congress, in their resolution of the twenty-ninth of March,

1779, shall be the rules of discipline so be observed by the militia throughout the United States, except such deviations from the said rules, as may be rendered necessary by the requisitions of the Act, or by some other unavoidable circumstances. It shall be the duty of the Commanding Officer as every muster, whether by battalion, regiment, or single company, to cause the militia to be exercised and trained, agreeably to the said rules of said discipline.

VIII. And be it further enacted, That all commissioned officers shall take rank according to the date of their commissions; and when two of the same grade bear an equal date, then their rank to be determined by lots, to be drawn by them before the Commanding officers of the brigade, regiment, battalion, company or detachment.

IX. And be it further enacted That if any person whether officer or solder, belonging to the militia of any state, and called out into the service of the United States, be wounded or disabled, while in actual service, he shall be taken care of an provided for at the publick expense.

X. And be it further enacted, That it shall be the duty of the brigade inspector, to attend the regimental and battalion meeting of the militia composing their several brigades, during the time of their being under arms, to inspect their arms, ammunition and accoutrements; superintend their exercise and maneuvres and introduce the system of military discipline before described, throughout the brigade, agreeable to law, and such orders as they shall from time to time receive from the commander in Chief of the State; to make returns to the adjutant general of the state at least once in every year, of the militia of the brigade to which he belongs, reporting therein the actual situation of the arms, accoutrement, and ammunition, of the several corps, and every other thing which, in his judgment, may relate to their government and general advancement of good order and military disciple; an adjutant general shall make a return of all militia of the state, to the Commander in Chief of the said state, and a duplicate of the same to the president of the United States.

And whereas sundry corps of artillery, cavalry and infantry now exist in several of the said states, which by the laws, customs, or usages thereof, have not been incorporated with, or subject to the general regulation of the militia.

XI. Be it enacted, That such corps retain their accustomed privileges subject, nevertheless, to all other duties required by this Act, in like manner with the other militias.

The Articles of Confederation, Article VI
Agreed to by Congress November 15, 1777;
ratified and in force, March 1, 1781.

Article VI. No State, without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any King, Prince or State; nor shall any person holding any office of profit or trust under the United States, or any of them, accept any present, emolument, office or title of any kind whatever from any King, Prince or foreign State; nor shall the United States in Congress assembled, or any of them, grant any title of nobility.

No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No State shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the United States in Congress assembled, with any King, Prince or State, in pursuance of any treaties already proposed by Congress, to the courts of France and Spain.

No vessel of war shall be kept up in time of peace by any State, except such number only, as shall be deemed necessary by the United States in Congress assembled, for the defense of such State, or its trade; nor shall any body of forces be kept up by any State in time of peace, except such number only, as in the judgement of the United States in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defense of such State; but every State shall always keep up a well-regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of filed pieces and tents, and a proper quantity of arms, ammunition and camp equipage.

No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or

shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay till the United States in Congress assembled can be consulted; nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled, and then only against the Kingdom or State and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States in Congress assembled, unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States in Congress assembled shall determine otherwise.