

ORAL ARGUMENT SCHEDULED FOR NOVEMBER 19, 2004

No. 04-5016, No. 04-5081

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

SANDRA SEEGARS, *et al.*,
Appellants/Cross-Appellees,

v.

JOHN D. ASHCROFT, Attorney General of the United States,
Appellee/Cross-Appellant,

&

ANTHONY A. WILLIAMS, Mayor, District of Columbia,
Appellee.

Appeal from the United States District Court for the District of Columbia,
Civil Action No. 1:03CV00834 (RBW)

**[CORRECTED] BRIEF OF THE BRADY CENTER TO PREVENT GUN
VIOLENCE AND THE VIOLENCE POLICY CENTER AS AMICI CURIAE IN
SUPPORT OF APPELLEE ANTHONY A. WILLIAMS AND AFFIRMANCE**

Andrew L. Frey
David M. Gossett
Fatima Goss Graves
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Mathew S. Nosanchuk
COLLIER SHANNON SCOTT, PLLC
Washington Harbour
Suite 400
3050 K Street, NW
Washington, DC 20007-5108
(202) 342-8400

*Counsel for Amicus Curiae Violence
Policy Center*

Eric Mogilnicki
John A. Valentine
WILMER CUTLER PICKERING HALE AND
DORR LLP
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

Dennis A. Henigan
Brian J. Siebel
BRADY CENTER TO PREVENT GUN
VIOLENCE
1225 Eye Street, N.W., Suite 1100
Washington, D.C. 20005
(202) 289-7319

*Counsel for Amicus Curiae Brady Center
to Prevent Gun Violence*

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 are listed in the briefs for Appellants/Cross-Appellees, Appellee/Cross-Appellant Ashcroft, and Appellee Williams.

Rulings Under Review

References to the rulings at issue appear in the briefs for Appellants/Cross-Appellees, Appellee/Cross-Appellant Ashcroft, and Appellee Williams.

Related Cases

This case was not previously before this Court or any other Court. The only related case of which *amici curiae* the Brady Center to Prevent Gun Violence ("Brady Center") and the Violence Policy Center ("VPC") are aware is *Parker v. District of Columbia*, No. 04-7041 (D.C. Cir.), currently pending before this Court. Like this case, *Parker* challenges D.C. Code §§ 7-2502.02(a), 7-2507.02, and 2-4504(a) on Second Amendment grounds. On March 31, 2004, U.S. District Judge Emmet G. Sullivan dismissed *Parker* for substantially the same reasons the District Court dismissed this case. *See Parker v. District of Columbia*, 311 F. Supp. 2d 103 (D.D.C. 2004).

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GLOSSARY

Word(s)	Abbreviation
Brady Center to Prevent Gun Violence.....	"Brady Center"
<i>Amici Curiae</i> the States of Texas, Alabama, Florida, Georgia, Idaho, Kansas, Louisiana, Michigan, Mississippi, Montana, Nebraska, Ohio, South Dakota, Utah, Virginia, and Wyoming.....	"Texas"
Violence Policy Center.....	"VPC"

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.

INTEREST OF AMICI

Brady Center to Prevent Gun Violence: Founded in 1983 as the Center to Prevent Handgun Violence, the Brady Center is a national, non-profit public interest organization dedicated to reducing gun violence through education, research and legal advocacy. The Brady Center has a substantial and ongoing interest in ensuring 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 federal and state cases involving the constitutionality of gun laws, including several significant Second Amendment cases. *See United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001); *Fresno Rifle & Pistol Club v. Van de Kamp*, 965 F.2d 723 (9th Cir. 1992); *Farmer v. Higgins*, 498 U.S. 1047 (1991). In addition, Brady Center attorneys have made significant contributions to Second Amendment scholarship. *See, e.g.*, D. Henigan, E.B. Nicholson, D. Hemenway, *Guns and the Constitution: The Myth of Second Amendment Protection for Firearms in America* (Aletheia Press 1995); D. Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. U. L. REV. 107 (1991).

Violence Policy Center: The VPC is a national 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 public interest endeavors, 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 ongoing 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 recent significant Second Amendment cases, including this case and *Nordyke v. King*, 319 F.3d 1185 (2003), *reh'g denied*, 364 F.3d 1025 (9th Cir. 2004).

Thus, the VPC is well situated to present to this Court arguments demonstrating that Appellants/Cross-Appellees' interpretation of the Second Amendment neither keeps faith with the actual text of the Amendment nor can be squared with the historical record, which confirms the Amendment was not intended to confer an individual right to possess and use firearms aside from service in a militia.

SUMMARY OF ARGUMENT

Appellants/Cross-Appellees ("Plaintiffs") seek to overturn long-settled precedent construing the Second Amendment as protecting only the ability of the states to maintain a "well regulated Militia." U.S. Const. amend. II. They challenge firearms restrictions of the District of Columbia on the theory the Second Amendment guarantees an individual right to keep and bear arms unrelated to militia service. *See* Compl., Counts I & II. This theory is wrong because the Second Amendment confers no individual rights to own or use firearms.

In *United States v. Miller*, 307 U.S. 174, 178 (1939), the Supreme Court held 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. Since *Miller*, the Supreme Court has twice confirmed this approach to Second Amendment analysis, and nearly every federal court of appeals to consider the issue has rejected the contention that the Second Amendment addresses or protects any right to own or use firearms unrelated to militia service.

This view is confirmed by the Second Amendment's text, which states, "[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 prefatory clause anchors the Amendment in concerns regarding the militia rather

than any individual rights. Nothing in the rest of the Amendment's text or in other provisions of the Constitution justifies disregard of the prefatory clause.

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.,* 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); David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588 (2000); Saul Cornell, *Commonplace or Anachronism: The Standard Model, The Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 CONST. COMMENTARY 221 (1999); Garry , *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, 376 n.318 (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).

To be sure, proponents of the individual-rights approach have weighed in with numerous articles suggesting a private right to own firearms was a central concern of the Framers.^{1/} Texas Br. at 21-22. These authors generally rely upon a small set of historical references. However, as discussed below, a more objective sifting of the historical record shows that discussions regarding the Second Amendment were inextricably linked with the Anti-Federalist goal of ensuring that the state militia were well-armed, well-trained, and protected from destruction by a too-powerful federal government. It is only by quoting materials out of context and "pepper[ing] their quotations with the tell-tale ellipses that invite critical readers to check what has been omitted" that individual-rights proponents create the historical illusion of a population preoccupied with the private ownership of firearms. Rakove, *supra*, at 161.

In sum, not only are Plaintiffs' Second Amendment claims controlled by *Miller*, but Plaintiffs provide no legal, textual or historical justification for this

^{1/} In recent years, individual-rights scholars have touted the high number of articles supporting their position. In fact, however, "there is virtual parity" among Second Amendment scholars when measured by the number of authors, as opposed to the number of articles. Mathew S. Nosanchuk, *The Embarrassing Interpretation of the Second Amendment*, 29 N. KY. L. REV. 705, 770 (2002); see also Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 CHI.-KENT L. REV. 349, 367-368, 384 (2000). And, as shown *infra* at n.4, there is no parity in judicial decisions interpreting the Amendment. The federal courts have rejected the individual rights approach with near-unanimity.

Court to abandon *Miller*, even if it were free to do so. Accordingly, the Court should affirm the dismissal of Plaintiffs' Second Amendment claims.

ARGUMENT

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

United States v. Miller, 307 U.S. 174 (1939), is without question the seminal case interpreting the Second Amendment. Plaintiffs contend *Miller* turned not on the substantive aspect of the 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. at 30. A less selective reading of *Miller* demonstrates that Plaintiffs' argument is merely wishful thinking. 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, a decision that is binding upon this Court.^{2/}

In *Miller*, defendants were indicted under the National Firearms Act for carrying unregistered firearms in interstate commerce. The Court rejected defendants' Second Amendment challenge to their indictment and, in the process,

^{2/} Only the Supreme Court may overrule its precedent. *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983). Thus, "[i]f a precedent of [the Supreme] Court has direct application in a case, ... the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237-238 (1997) (citation and quotation omitted).

established that the substantive right created by the Amendment relates to preserving the effectiveness of a "well regulated Militia" for the common defense, not any individual rights to bear arms.

Writing for a unanimous Court, Justice McReynolds stated 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." *Miller*, 307 U.S. at 178 (emphasis added). Historically, the Court noted, militia 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 178-9. *Miller's* plain message was the right to "keep and bear arms" in the Second Amendment refers only to *the means* by which the state militias were armed, not any rights of individuals to possess and use firearms for their own ends. Because defendants failed to demonstrate 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.

Miller viewed the Amendment as guaranteeing the right to bear arms only in connection with service in the "militia," a group "acting in concert for the *common* defense." *Id.* at 179 (emphasis added). The Court made clear that Second

Amendment analysis must focus on whether the "*possession or use*" of the weapon in question has a militia-based, rather than an individual, purpose. *Id.* at 178.^{3/}

With the exception of dictum by the Fifth Circuit in *United States v. Emerson*, 270 F.3d 203, 233 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002), this has been the accepted construction of *Miller* for more than six decades, including every federal court opinion since *Emerson*.^{4/}

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 considered, *inter alia*, whether 18 U.S.C. § 1202(a)(1), which criminalizes possession of a firearm by a convicted felon, could survive an equal

^{3/} The Court should not accept Plaintiffs' suggestion that *Miller* turned on the nature of the "arms" at issue. Pls. Br. at 29-30. This argument irrationally assumes *Miller* would have upheld defendants' Second Amendment challenge if only their weapon been employable in military service (*e.g.*, machine guns or rocket launchers). The First, Third, and Tenth Circuits have rightly rejected this attempt to distinguish *Miller*. 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).

^{4/} See, *e.g.*, *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, 388-389 (6th Cir. 2002); *Fraternal Order of Police v. United States*, 173 F.3d 898, 906 (D.C. Cir. 1999) (applying militia-based *Miller* test); *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).

protection challenge. If the statute had infringed a fundamental right, the Court would have analyzed the statute's constitutionality using strict scrutiny, under which the statute would have to be narrowly tailored to fit a compelling interest to survive review. *See, e.g., MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 21 (D.C. Cir. 2001) (applying strict scrutiny). Instead, the Court used a rational-basis review, noting the statute at issue "[did not] trench upon any constitutionally protected liberties." *Lewis*, 445 U.S. at 65 n.8 (citing *Miller* and three lower court cases rejecting Second Amendment challenges). *Lewis* thus presupposes that *Miller* did not recognize a fundamental 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 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 doubt *Miller* endorsed the militia-based view.

In short, *Miller* firmly rejected the individual-rights view espoused by Plaintiffs, and the Supreme Court has seen no need to revisit the issue since.

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

Miller explained that the meaning of the Second Amendment's right "to keep and bear arms" must be informed by the Amendment's prefatory clause concerning a "well regulated Militia." *Id.* at 178. Lower courts have since interpreted the Amendment accordingly. Even *Emerson* recognized the prefatory clause must be given "its full and proper due." *Emerson*, 270 F.3d at 236.

The traditional view of the Second Amendment's preamble is that it "does more than simply state the amendment's purpose of justification: it also 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. As the Ninth Circuit concluded:

When the second clause is read in light of the first, so as to implement the policy set forth in the preamble, we believe that 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. This "is the approach that the Supreme Court [in *Miller*] has specifically declared must be employed when seeking to determine the meaning of the Second Amendment." *Id.* Thus, the Second Amendment by its very terms must be interpreted to be about the protection of 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. at 26-27.^{5/} They implicitly assume, however, this interpretive approach applies only to the word "people." But as Pulitzer Prize-winning scholar Jack Rakove explained, Plaintiffs' textual argument illogically (and incorrectly) 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 referenced 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

^{5/} Plaintiffs rely on *United States v. Verdugo-Urquidez* for the proposition 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 even assuming the meaning of "people" is constant, "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" do have *a right to use arms as part of an organized state militia*. *United States v. Hale*, 978 F.2d 1016, 1020 (8th Cir. 1992) (rejecting individual-rights argument based on *Verdugo-Urquidez*).

interpretive principle is unquestionably applicable when we construe the word 'militia.'").

If "people" is to be given a consistent meaning throughout the Bill of Rights, so too must "militia"; to interpret the Amendment otherwise would be to apply inconsistent interpretive principles to two words *within the same sentence*. And if "militia" is to be read consistently throughout the Constitution, it can only be understood to refer to a military unit. Thus, the terms "militia" and "people" are not interchangeable, and the Second Amendment's reference to both the "militia" and "the people" does not support Plaintiffs' individual-rights view.

For example, the Fifth Amendment declares, "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of 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." The phrase "cases arising ... in the Militia" strongly suggests an organized unit, not simply a collection of individuals exercising individual rights. *Silveira*, 312 F.3d at 1071. The parallel use of "militia" and "the land or naval forces" further underscores that "militia" refers to a state-organized military unit.

The use of "militia" in Article I, the "Militia Clause," suggests likewise, granting Congress the powers:

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 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. And the second clause "treats the militia as an entity that Congress has the legislative responsibility for 'organizing, arming, and disciplining,'" and thus "leave[s] the extent of the militia open to congressional discretion." Rakove, *supra* at 125. Indeed, the Supreme Court has said this "provision 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."). 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.

Lastly, Article II, Section 2 states, "[t]he President shall be 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." Here again, parallel reference to "the Army and Navy and ... the Militia" demonstrates the Framers were referring to a military unit. *Silveira*, 312 F.3d at 1070; *Haney*, 264 F.3d at 1165. Thus, "[i]f the term 'the people' in the latter half of the Second Amendment must have the same meaning throughout the Constitution, so too must the phrase 'militia.'" *Silveira*, 312 F.3d at 1071. To hold otherwise "would be to apply contradictory interpretive methods to words in the same provision." *Id.*

That "militia" refers to a military unit and not the people at large is further evidenced by the term's context within the Second Amendment itself: "A *well regulated Militia* being necessary to *the security of a free State*" U.S. CONST. amend. II (emphasis added). "What the drafters ... thought 'necessary to the security of a free State was not an 'unregulated' mob of armed individuals.... To the contrary, 'well regulated' confirms that 'militia' can only reasonably be construed as referring to a military force established and controlled by a governmental entity." *Silveira*, 312 F.3d at 1072; *see also United States v. Wright*, 117 F.3d 1265, 1273 (11th Cir. 1997) (same). Furthermore, reference to the "security of a free State" strongly suggests the Framers intended "militia" "to refer only to governmental militias that are actively maintained and used for the

common defense." *Wright*, 117 F.3d at 1273. Plaintiffs' argument, in contrast, would nonsensically require interpreting the Amendment to mean a "well regulated" *people* are "necessary to the security of a free State."

Finally, Congress's statutory definitions of the "militia" illustrate that its membership is subject to change under Congress's Article I power to "organiz[e] ... the Militia." U.S. CONST. art. I, § 8, cl. 16.^{6/} This makes sense only if the militia is a military unit. Whereas membership in a military unit may, of course, be altered by statute, Congress certainly could not alter the constitutional definition of "the people." *Cf. Dickerson v. United States*, 530 U.S. 428, 437 (2000) ("Congress may not legislatively supersede our decisions interpreting and applying the Constitution."). Thus, Congress retains the power to determine who will be subject to duty in the militia and has, in fact, done so. The Second Amendment imposes limits on Congress's interference with these state militias, nothing more.

^{6/} *See, e.g.* 10 U.S.C. § 311 (militia "consists of" members of the National Guard and male citizens ages seventeen to forty-five). Contrary to Texas's suggestion that the Militia Act of 1792 defined the militia as an unorganized mass of armed citizenry (Texas Br. at 18), the Act explicitly required enrollment of all militia members in formal companies of troops. *See* Militia Act, Sess. I ch. 33, 1 Stat. 271 (passed May 8, 1792) (full text in Addendum).

B. The Right To Keep And Bear Arms Is A Right To Use Arms In Military Service As Part Of A State-Organized Militia.

Plaintiffs' interpretation of the phrase "keep and bear arms" (Pls. Br. at 33-36) is equally misguided. As *Silveira* explained, it is "highly significant ... that the second clause does not purport to protect the right to 'possess' or 'own' arms, but rather to 'keep and bear' arms. This choice of words is important because the phrase 'bear arms' is a phrase that customarily relates to a military function." 312 F.3d at 1052. 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* Garry Wills, *To Keep and Bear Arms*, N.Y. REV. OF BOOKS, Vol. 42, No. 14, Sept. 21, 1995, at 64 ("the whole context of the amendment was always military"). *Miller* itself cited a Tennessee Supreme Court case confirming that to "bear arms" means to take up arms "in a military sense." *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 a private citizen bears arms, because he has a ... pistol concealed under his clothes....").

Nor does the addition of the word "keep" alter the basic character of the right. Pls. Br. at 34. Initially, 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 is the words "keep and bear" must be read together as are, for example, "necessary and proper" or "cruel and unusual." *See, e.g., Silveira*, 312 F.3d at 1074; Dorf, *supra* at 317. Another historian has concluded 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). In any event, the right "to keep ... arms" is useful only insofar as it enables one to exercise the right "to bear arms." *Silveira*, 312 F.3d at 1074. Therefore, 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.*^{7/} As is next demonstrated below, the historical record confirms this interpretation.

^{7/} Scholars have also noted the militia-related use of "keep" in the Articles of Confederation, the predecessor to the Constitution. 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 English Antecedents To The Second Amendment Do Not Support An Individual Right.

The English antecedents to the Second Amendment provide no historical support for the individual-rights view. Following the ouster of James II in 1688, the English Parliament declared the throne vacant and negotiated limits on royal power – the Declaration of Rights – to which James's successor, William of Orange, acquiesced. Bogus, *supra* at 379. The Declaration of Rights did not focus on individuals but instead outlined the relationship between Parliament and Crown. *Id.* at 378 n.330; Lois G. Schworer, *To Hold and Bear Arms: The English Perspective*, 76 CHI.-KENT L. REV. 27, 28 (2000). Parliament itself recognized that the Declaration of Rights granted no new rights to the English people. Bogus, *supra* at 378, 408 n.330 (quoting 2 MACAULAY'S HISTORY OF ENGLAND 377-378 (1906)). Thus, during the debates over the Declaration of Rights, no one complained that individuals were unable to keep arms for personal use. Schworer, *supra* at 32.

Indeed, any such idea would have seemed strange, given Parliament's 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). Within five years of approving the Declaration of Rights, during the debates over the English Game Act of 1693, Parliament considered and rejected a provision that would have allowed Protestants to keep arms in their homes. Schwoerer, *supra* at 50-51.

Thus, the Framers inherited an English legacy decidedly at odds with the individual-rights perspective. Rather, the issues in England leading to the Declaration of Rights concerned the relationship between government bodies and the risks of standing armies – exactly the issues the militia-based Second Amendment was designed to address.

B. The Framers Did Not Intend To Create Or Protect An Individual Right To Bear Arms.

1. The Second Amendment's purpose was to ensure the militia would remain an effective fighting force.

Turning to the domestic history of the Second Amendment, the term "militia" should be considered within the framework and purpose of the Bill of Rights. The Bill of Rights was designed to amend the Constitution "in order to prevent misconstruction or abuse of its powers." Resolution of the First Congress, March 4, 1789, in 1 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 338 (Jonathan Eliot ed., 1836; rpt. 1941). The Second

Amendment, like other provisions of the Bill of Rights, was intended to achieve this goal by limiting the federal government's power over the states.

The events preceding the Bill of Rights do not suggest the Framers were focused on an individual right to possess arms for private use. Rather, the Bill of Rights was framed at a time of tension between the Anti-Federalists, who sought to protect the interests of states through local militias, and the Federalists, who envisioned a strong nation protected by a national army. Criticisms of the effectiveness of the militia during the Revolutionary War, and fear of slave revolts in slave-owning states,^{8/} provided additional context to the Framers.

The debate over the Second Amendment's passage demonstrates that the Framers did not intend to create an individual Second Amendment right. The unamended Constitution contemplated a national and state defense system. It provided for a national army controlled by the Executive and Legislative branches and state militias subject to Congressional regulation, which included the power to arm and train the militia. U.S. CONST. art. I, § 8. The Anti-Federalists objected that these provisions created an overly powerful national government; in particular, they voiced strong concern that the federal government might eliminate the state

^{8/} Bogus, *supra* at 328-344.

militias and replace them with the standing federal army the Constitution authorized Congress to create. Hardaway, *supra* at 76-77.

For example, George Mason voiced the Anti-Federalists' fear that under the unamended Constitution the national government would disarm the militia by failing to support it financially, while simultaneously divesting the states of authority to do so. Rakove, *supra* at 138-140 (citing 10 *The Documentary History of the Ratification of the Constitution 1270-1273* (Kaminiski & Saladino eds., 1993)). States would then have no defense against a tyrant. "[M]any Framers believed a president would be easily tempted to use a standing army promiscuously in pursuit of empire and personal glory, thus bankrupting the nation and placing it at military risk." Yassky, *supra* at 603. As illustrated by many states' refusal to provide militia during the Seven Years War, state militia could serve as an important check on the national government's power. *Id.* Thus, the Second Amendment was crafted to ensure that the states would have the ability to provide independently for the needs of the militia. *Silveira*, 312 F.3d at 1076; Finkelman, *supra* at 197; Rakove, *supra* at 161-62.

On the other hand, the Federalists stressed the need for a strong constitution providing for national defense. Their experience in the Revolutionary War, where militias often proved unreliable, had convinced them a professional army was necessary to defend against any threat from Europe. Yassky, *supra*, 99 MICH. L.

REV. at 604. And, in light of the inability of state and local militias to put down Shays' Rebellion quickly, the Federalists argued that Congress needed the power to intervene and suppress such a rebellion. Rakove, *supra* at 129 (citing 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 18 (Farrand ed., rev. ed. 1996)); Hardaway, *supra* at 85-86. In sum, these debates show that Federalists and Anti-Federalists alike assumed the key issue was the control and arming of the militia. Thus, in FEDERALIST NO. 46, Madison addressed Anti-Federalist fears of a military dictatorship:

[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.*

FEDERALIST NO. 46 (James Madison) (emphasis added).^{2/}

This historical argument against Plaintiffs' individual-rights interpretation is buttressed by the evolution of the Amendment's text. Madison's initial proposal provided: "The right of the people to keep and bear arms shall not be infringed; a

^{2/} Surprisingly, Texas points to FEDERALIST NO. 46 to argue that Madison supported an individual Second Amendment right. *See* Texas Br. at 26. However, as the full passage demonstrates, FEDERALIST NO. 46 describes the *state militia* as a check on a strong national army. *See* Finkelman, *supra* at 224.

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). Madison's proposed exception for "religiously scrupulous" objectors was subsequently omitted, but its inclusion in the initial draft supports two conclusions.

First, the "religiously scrupulous" clause 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 original draft demonstrates 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.

2. The Framers intended "militia" to mean a state-organized military entity, not to be coextensive with the population as a whole.

Proponents of the individual-rights interpretation attempt to circumvent the centrality of the militia to the history and text of the Second Amendment by arguing the Framers intended the term "militia" to be virtually coextensive with the

population as a whole. Texas Br. at 17-18. The Amendment's history decisively refutes that proposition.

The Framers' general perception of the militia as a state entity is borne out by pre-constitutional history. The predecessor document to the Constitution, the Articles of Confederation, provided, "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 field pieces and tents, and a proper quantity of arms, ammunition and camp equipage." Articles of Confederation art. 6 (full text in Addendum). By expressly assigning responsibility for establishing and maintaining the militia to the states, the Articles of Confederation show that the founding generation regarded the militia as "a state military force to which the able-bodied male citizens of the various states might be called to service." *Silveira*, 312 F.3d at 1071. *Miller* recognized this in describing the militia as "all males physically capable of acting in concert for the common defense" (307 U.S. at 179), not the population as a whole.

C. The Framers Rejected Language Recognizing Individual Rights.

The historical record of the debates surrounding adoption of the Bill of Rights further indicates the drafters were repeatedly presented with – and rejected – language that would have created the individual rights Plaintiffs claim are found in the Second Amendment. The Pennsylvania Anti-Federalists, in a publication

entitled *Reasons of Dissent*, included fourteen proposed amendments to the Constitution. Finkelman, *supra* at 206. While some were adopted virtually verbatim, the First Congress substantially modified the seventh proposed amendment, 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." *Id.* at 209 (emphasis added). 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 bearing arms. *Id.* at 208-12.

Similar logic defeats Plaintiffs' reliance on Samuel Adams' proposal at the Massachusetts ratification convention, in which Adams suggested the "Constitution be never construed to authorize Congress ... to prevent the people of the United States, who are peaceable citizens, from keeping their own arms." Pls. Br. at 34. Plaintiffs conspicuously neglect to mention that Adams' proposal "failed to attract the support of many Massachusetts delegates, and [was] included in the Report of the *Minority* which was issued at the conclusion of that state's ratifying convention." *Silveira*, 312 F.3d at 1084 n.48 (emphasis added). Plaintiffs likewise

do not acknowledge that those who adopted the Second Amendment decided *not to employ the text of Adams' proposal* or other similar proposals, such as New Hampshire's – which would have created individual rights. *Id.* at 1083-84. The Framers plainly knew how to establish an individual right to bear arms but – as is evident from their rejection of language that would have done so in favor of the language they eventually chose (derived from Madison's initial draft) – they opted to create only a militia-based right. *Id.* at 1083 & 1084 n.48.^{10/}

D. Contemporaneous Social and Political Circumstances Suggest The Framers Did Not Intend To Foreclose Local Firearms Regulations.

The Framers, living in a time when various social and political upheavals seemed to threaten the integrity of the new republic, would have been extraordinarily reluctant to eviscerate the capacity of the government to suppress domestic insurrections. *See generally* Finkleman, *supra* at 218-222; *see also* *Federalist No. 9* (Hamilton) (in which Hamilton, in defense of the Constitution, wrote, "[a] Firm Union will be of the utmost moment to the peace and liberty of the

^{10/} Plaintiffs also quote Patrick Henry out of context when they assert he wished "that every man be armed.... Every one who is able may have a gun." Pls. Br. at 40. Henry's statement pertained solely to whether Congress should be entrusted with the important task of arming *the militia*. Henry did not assert, as Plaintiffs claim, that every person should be permitted to possess weapons irrespective of involvement in militia service. *See Debates in the Several State Conventions* at 386.

States" and "would prevent domestic faction and insurrection"). It is therefore exceedingly unlikely that they would have adopted a provision seriously undermining the ability of the government to suppress domestic insurrections. If the First Congress had created an individual right to bear arms, it would have 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 and the federal territories. Finkelman, *supra* at 211. Any such weakening of the national government's powers 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.

The Framers' general reluctance to impose constraints on the broad police power of the states likewise supports a militia-based interpretation. *See* Rakove, *supra* at 112-113 (emphasizing prevailing understanding of states' police powers, "which authorized government to legislate broadly in pursuit of the public health and welfare"). If the Framers had intended to proscribe state legislation limiting the ownership of dangerous weaponry, or even to restrict significantly the scope of such legislation, one would expect at least some discussion of this controversial contraction of state power during the otherwise wide-ranging debates over the Bill

of Rights. Instead, "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); *see also* 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").

The absence of any recorded controversy on this point strongly suggests that those who created the Bill of Rights did not believe the Second Amendment constrained the freedom of the states to exercise their police powers by regulating the ownership and use of arms within their borders.^{11/} Plaintiffs imply gun regulation is a modern innovation, but early Americans accepted the notion that groups of citizens could be disarmed without infringing state constitutions. For example, Pennsylvania, through the Test Acts of 1776, disarmed those who refused to take a loyalty oath. Cornell, *supra* at 231-232. Similarly, early state governments monitored gun ownership and regulated weapons storage. Saul

^{11/} Rakove, *supra* at 127 ("the Framers had no plausible, much less compelling, reason even to ask whether there should be any change in the traditional legislative competence of the states").

Cornell, "*Don't Know Much About History*" *The Current Crisis in Second Amendment Scholarship*, 29 N. KY. L. REV. 657, 672-674 (2002).^{12/}

Indeed, in more than two centuries of American jurisprudence, only two federal courts have ever invalidated gun control laws on the basis of the Second Amendment. Yassky, *supra* at 592. One was reversed by the Supreme Court in *Miller*; the other is *Emerson*, which Plaintiffs ask this Court to follow. *Emerson*, 270 F.3d 203; *United States v. Miller*, 26 F. Supp. 1002 (W.D. Ark. 1939), *rev'd* 307 U.S. 174 (1939). The federal courts' protracted and virtually unanimous acknowledgement of the right of the states 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.^{13/} That history stands forthrightly opposed to the proposition that the Second Amendment creates a personal right to bear arms unrelated to militia service.

^{12/} 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).

^{13/} See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) ("Deeply embedded traditional ways of conducting 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.").

CONCLUSION

For all of the foregoing reasons, this Court should affirm the decision of the District Court to dismiss Plaintiffs' Second Amendment claims.

Dated: July 28, 2004

Respectfully submitted,

WILMER CUTLER PICKERING HALE AND DORR LLP

Eric Mogilnicki
John A. Valentine
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Dennis A. Henigan
Brian J. Siebel
BRADY CENTER TO PREVENT GUN VIOLENCE
1225 Eye Street, N.W., Suite 1100
Washington, D.C. 20005
(202) 289-7319

*Counsel for Amicus Curiae Brady Center to
Prevent Gun Violence*

[CONTINUED ON NEXT PAGE]

MAYER, BROWN, ROWE & MAW LLP

Andrew L. Frey
David M. Gossett
Fatima Goss Graves
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Mathew S. Nosanchuk
COLLIER SHANNON SCOTT, PLLC
Washington Harbour
Suite 400
3050 K Street, NW
Washington, DC 20007-5108
(202) 342-8400

Counsel for Amicus Curiae Violence Policy Center

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 6976 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.

Eric Mogilinicki, Esq.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the foregoing were served this 28th day of July 2004, by overnight commercial courier, on the following:

Stephen P. Halbrook, Esq.
Suite 404
10560 Main Street
Fairfax, VA 22030

Counsel for Appellants/Cross-Appellees

Lutz Alexander Praeger, Esq.
OFFICE OF THE ATTORNEY GENERAL
FOR THE DISTRICT OF COLUMBIA
One Judiciary Square
441 Fourth Street, N.W.
Washington, D.C. 20001-2714

Counsel for Appellee Anthony Williams

Daniel Meron, Esq.
U.S. DEPARTMENT OF JUSTICE
CIVIL DIVISION, APPELLATE
601 D Street, N.W., Room 9121
Washington, DC 20530

*Counsel for Appellee/Cross-Appellant
John D. Ashcroft*

Matthew F. Stowe, Esq.
Deputy Solicitor General
OFFICE OF THE TEXAS ATTORNEY
GENERAL
P.O. Box 12548
Austin, TX 78711-2548

*Counsel for the State of Texas et al.,
amici curiae*

Eric Mogilinicki, Esq.

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 esponton; 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 soldier, 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 as 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 manœuvres 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 discipline; 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.