BRIEF OF AMICI CURIAE,
CENTER FOR JUDICIAL STUDIES AND
GUN OWNERS FOUNDATION

DISTRICT OF COLUMBIA
COURT OF APPEALS

NO. 84-1045

LEE A. SANDIDGE, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

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ISSUE PRESENTED

Are D. C. Code Sections 6-2311, 6-2361, and 22-3204, when construed *in pari materia* with other D. C. firearms laws, unconstitutional as an infringement upon the right of the people to keep and bear arms that is guaranteed by the Second Amendment?

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STATEMENT OF THE CASE

The facts of the case have been stated adequately in the briefs of Appellant and Appellee.

INTEREST OF AMICI CURIAE

The Center for Judicial Studies ("CJS") is a non-profit, educational foundation concerned with issues affecting the Constitution and the courts. The Center has associated with it over two dozen scholars -- lawyers, law professors, political scientists, and others -- in the fields of jurisprudence, constitutional history, and constitutional law. The Center's work is carried on principally through publications and conferences, but it also presents, at the invitation of the court in pending lawsuits, expert testimony on constitutional history, provides testimony before Congress on constitutional issues, and submits amicus briefs. Because this is a case of first impression on a vital constitutional issue, and because the case has not to date received the extended briefing or analysis customary for an issue

of this magnitude, CJS has prepared and filed this amicus brief with the consent of the parties.

Gun Owners Foundation ("GOF") is a non-profit organization, with over 25,000 members and supporters, which defends and protects the right of American citizens to keep and bear arms. GOF has prepared and filed this amicus brief with CJS in order to help preserve the rights of its members, and of all Americans, lawfully to acquire, possess, and use firearms in accordance with the Second Amendment's guarantee of those rights.

ARGUMENT

I. SECTIONS 6-2311, 6-2361, AND 22-3204 OF THE D.C. CODE DIRECTLY INFRINGE THE RIGHT OF THE PEOPLE, INCLUDING APPELLANT, TO KEEP AND BEAR ARMS.

The only issue on appeal in this case is whether these three statutes, which restrict or prohibit the possession and carrying of firearms, unconstitutionally infringe the right to keep and bear arms that is confirmed to American citizens by the Second Amendment to the United States Constitution. Appellant Lee Sandidge was convicted of violating D.C. Code Section 6-2311, which prohibits any person within the District of Columbia from possessing or having under his control "any firearm, unless such person ... is the holder of a valid registration certificate for such firearm." Section 6-2312 of the D.C. Code provides that: "No registration certificate shall be issued for any ... [p]istol not validly registered to the current registrant in the District prior to September 24, 1976 ...." Since Mr. Sandidge did not hold a registration certificate for a pistol on September 24, 1976, he, like most other residents of the District, is forever barred by these two statutes from owning or possessing a pistol.

Appellant Sandidge was also convicted under Section 6-2361 of the D.C. Code, which provides that: "No person shall possess ammunition in the District of Columbia unless ... [h]e is the holder of the valid registration certificate for a firearm of the same gauge or caliber as the ammunition he possesses ...." Since

Mr. Sandidge did not and could not register a pistol, he is and was prohibited by this statute from ever possessing any pistol ammunition. In addition, Mr. Sandidge was found to have violated Section 22-3204 of the D.C. Code, which provides that: "No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided ...." Of course, if Sandidge is not permitted to possess a pistol within the District, he cannot legally obtain a license to carry one.

Thus, the statutes taken together effectively prohibit any person within the District of Columbia (except for certain military and law enforcement personnel, licensed dealers, and those registered owners who were "grandfathered" ten years ago by Section 6-2312) from possessing a handgun, or from carrying a handgun, even in defense of one's life, home, or property, in defense of others, or for any other purpose, no matter how legitimate. As time passes, and as the "grandfathered" registered owners dwindle in number and finally disappear, the ban on privately held handguns will become total.

This is only part of the picture, however. Besides pistols, a wide variety of other types of arms are declared illegal. D.C. Code Sections 22-3214, 6-2302, 6-2311. Licensing and registration procedures are complex, restrictive and burdensome. See, e.g., D.C. Code Sections 6-2311, 6-2313 - 6-2320. Semi-automatic rifles, which shoot only one shot at a time, are nevertheless defined as "machine guns," and declared illegal. D.C. Code Sections 6-2302(10), 6-2312(2), 22-3201(c), 22-3214(a); Fesjian v. Jefferson, 399 A.2d 861 (D.C. App. 1979). A registered firearm may be possessed at the registrant's place of business only if he is the owner of the business, not merely a manager or employee. Scott v. United States, 392 A.2d 4 (D.C. App. 1978). And firearms that are legal and registered must be kept "unloaded and

disassembled or bound by a trigger lock," even in the registrant's home. D.C. Code Section 6-2372.

Do such laws violate the command of the Second Amendment that "the right of the people to keep and bear arms, shall not be infringed?"

An analogy is perhaps instructive. Suppose Congress and the District of Columbia Council passed a series of laws providing that all equipment used to print books, magazines, newspapers, handbills, and the like, including printing presses, mimeograph machines, and photocopiers, had to be registered with the Chief of Police within 48 hours after being brought into the District. Failure to register would be made punishable by fines and imprisonment. Furthermore, paper suitable for printing or photocopying purposes could only be possessed by those persons who had validly registered presses. Photocopiers were, by a separate law, banned outright, unless the individual had a registered photocopier prior to 1976, in which case he could keep that particular machine if he registered it every year. A registered press owner could keep his machine only in his home, or in his place of business if he was the owner and not a mere employee. However, to distribute any printed material outside his home or place of business, he would have to obtain a seperate license from the Chief of Police. Certain governmental officials could get such a license, but ordinary citizens would have to demonstrate a special need. Such licenses would be restrictively issued, and the Chief of Police would be vested with great discretion to grant or deny them. High speed presses, or those that could be "readily converted" to produce copies at a high rate, would be completely illegal.

If such laws were passed, would there even be a question that the First Amendment guarantee of freedom of the press had been "abridged?"

Such laws would be the precise counterpart in the First Amendment area of the laws now existing in the District of Columbia with respect to firearms, except that the firearms laws

are actually more restrictive than the hypothetical proposed above. Amici do not suggest that the parallel between the First Amendment and the Second Amendment is exact. It is not. What we do maintain, however, is that the right to keep and bear arms is as fundamental and essential to the preservation of liberty as any other guarantee in the Bill of Rights, that the Framers held it to be of inestimable value, and that it is no less the duty of courts to strike down laws which infringe upon it than it is to declare unconstitutional statutes that violate the First Amendment, the Fourth Amendment, or any other provision of the Bill of Rights.

The Framers of the Bill of Rights, having suffered arbitrary, oppressive misrule, and having recently fought a bitter struggle to free themselves from it, were convinced of the necessity of an armed citizenry for the prevention of tyranny. At the time of the adoption of the Constitution, both the Federalists (who favored the new Constitution) and the Anti-Federalists (who opposed it, or at least insisted upon further safeguards against federal encroachment, in the form of a Bill of Rights) argued that an armed citizenry was the best guarantee of liberty. In The Federalist, James Madison calculated the number of regular troops the new federal government might be able to raise, and estimated that it could be no more than twenty-five or thirty thousand men. The Federalist, No. 46. If the army were used by the federal government to oppress, argued Madison, it would be opposed by "a militia amounting to near half a million of citizens with arms in their hands ...." He "doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops." He favorably compared "the advantage of being armed, which the Americans possess over the people of almost every other nation" to "the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear," and where nevertheless "the governments are afraid to trust the people with arms." Id.

The Anti-Federalists were even more adamant in urging the value of an armed citizenry. In the Virginia ratifying convention, both George Mason and Patrick Henry expressed their views in the most emphatic terms. As Mason stated:

> An instance within the memory of some of this House, will show us how our militia may be destroyed. Forty years ago, when the resolution of enslaving America was formed in Great Britain, the British Parliament was advised by an artful man, who was governor of Pennsylvania, to disarm the people -- that was the most effectual way to enslave them -- but they should not do it openly; but to weaken them and let them sink gradually, by totally disusing and neglecting the militia.

Henry agreed: "The militia, Sir, is our ultimate safety. We can have no security without it .... The great object is that every man be armed ... everyone who is able may have a gun." D. Robertson, Debates and Other Proceedings of the Convention of Virginia 270, 274 (1805), quoted in D. Hardy, Origins and Development of the Second Amendment 67 (1986).

The value and purposes that the Founding Fathers saw in an armed citizenry were succinctly expressed by the eminent nineteenth century jurist and constitutional scholar, Justice Joseph Story:

> The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of the republic; since it offers a strong moral check against usurpation and arbitrary power of the rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them. 3 J. Story, Commentaries on the Constitution 746 (1833).

Against these purposes, the District of Columbia firearms statutes, including those under which Mr. Sandidge was convicted, present a startling contrast. In passing the Firearms Control Regulations Act of 1975, of which Sections 6-2311 and 6-2361 form a key part, the District of Columbia Council specifically stated its legislative conclusion that "handguns and shotguns have no legitimate use in the purely urban environment of the District of Columbia" and that "pistols and shotguns are no longer justified in this jurisdiction." Council of the District of Columbia Report, Bill No. 1-164, April 21, 1976, at 13 (quoted in Kuhn v. Cissel, 409 A.2d 182 (D.C. App. 1979)). This Court has repeatedly stated that Section 22-3204 was intended by Congress to

"drastically tighten the ban on carrying dangerous weapons" within the District, or "drastically to limit the possession of guns" in the District. Logan v. United States, 402 A.2d 822 (D.C. App. 1979); Berkley v. United States, 370 A.2d 1331 (D.C. App. 1977). Under Section 6-2361, "possession of ammunition is presumptively unlawful." Logan v. United States, 489 A.2d 485 (D.C. App 1985). The Firearms Control Regulations Act of 1975 is a "comprehensive regulatory scheme for control of the use and sale of firearms in the District of Columbia," and its purpose "is to 'freeze' the handgun population within the District ...." McIntosh v. Washington, 395 A.2d 744 (D.C. App. 1978).

Thus, the statutes under which Mr. Sandidge was prosecuted and convicted are expressly designed to limit severely and even to prohibit citizens from exercising their right to "keep" arms (that is, to possess them), and to "bear" arms (that is, to carry them).

In its brief, however, the government treats the Second Amendment argument peremptorily, asserting the limitless principle that "statutory regulation of firearms is constitutionally permissible under the Second Amendment." Brief for Appellee at 7. The government apparently bases its argument upon two main propositions: 1) that the Second Amendment does not "guarantee to individuals the right to possess firearms"; and 2) that the "specific firearm being regulated" must bear a connection to the militia. The trial court's decision in this case was equally cryptic. In essence, the Court merely referred to United States v. Miller, 307 U.S. 174 (1939), and Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982), and indicated his view that these two decisions were dispositive of the case. (Tr. 73-74).

But, neither of the cases relied upon by the trial court resolves this case, and the two principal arguments relied upon by the government to disarm the citizens of the District are erroneous. Amici will first discuss briefly the Quilici case, to demonstrate that it is wholly inapplicable to the case at bar. We

will then turn to the government's arguments that there is no individual right to keep and bear arms, and that any such right must be evaluated in terms of the specific weapon's relationship to the militia. The Miller case will be discussed under those two headings.

II. THE SECOND AMENDMENT, AS A RESTRAINT UPON POWERS OF THE FEDERAL GOVERNMENT, DIRECTLY LIMITS THE ABILITY OF CONGRESS AND THE DISTRICT OF COLUMBIA TO PLACE RESTRICTIONS UPON FIREARMS POSSESSION, THUS DISTINGUISHING IT FROM QUILICI V. VILLAGE OF MORTON GROVE.

In Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982), suit was brought against the Village of Morton Grove to invalidate an ordinance which completely banned the possession of handguns within the village. In the posture in which the case reached the Seventh Circuit, two basic issues were presented. The first was whether the ordinance violated the Second Amendment. The second was whether the ordinance violated a provision in the Illinois Constitution relating to the right to keep and bear arms.

The Seventh Circuit held that the challenged ordinance did not violate the Illinois Constitution, a holding which need not detain us here. The particular provision in the Illinois Constitution was of modern origin, and expressly subordinated the right to keep and bear arms to the "police power" of the state. Hence, it provides little or no guidance in the instant case.

Only the Second Amendment issue could have any pertinence to the case at bar. Upon closer examination, however, it is manifest that Quilici's holding has no bearing on the application of the Second Amendment to the D.C. firearms laws. This is because the Seventh Circuit held in Quilici that the Second Amendment did not apply at all to the State of Illinois or its instrumentalities, including the Village of Morton Grove.

In the leading case of Barron v. Baltimore, 32 U.S. 243 (1833), the United States Supreme Court, speaking through Chief Justice Marshall, held that the provisions of the federal Bill of Rights operated only as restraints upon the federal government, and not upon the states. This was the established rule until the

Supreme Court decided Gitlow v. New York, 268 U.S. 652 (1925), which marked the beginning of the process of "selective incorporation" of the provisions of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment, thereby applying those provisions to the states. All except a few of the provisions of the Bill of Rights have now been "incorporated" and are held by the Supreme Court to apply to the states as well as the federal government.

The Second Amendment, however, is among the select few which have not been held to be "incorporated" against the states through the Due Process Clause. In Quilici, the Seventh Circuit relied upon Presser v. Illinois, 116 U.S. 252 (1886) to hold that the Second Amendment does not operate as a limitation upon the power of the states. Of course, at the time Presser was decided, such a holding was merely declaratory of the rule applied to all provisions of the Bill of Rights. The Seventh Circuit noted that Presser has never been overruled by the Supreme Court, and declined to consider whether it was still good law. Thus, the holding in Quilici is that the court could not entertain any challenge to the Morton Grove ordinance under the Second Amendment, that amendment being, in its analysis, completely inapplicable to a state or municipality. Any further remarks in Quilici on the meaning or interpretation of the Second Amendment are obiter dicta, and of no force in law.

The statutes at issue in this case, on the other hand, were either enacted directly by Congress (Section 22-3204) or were passed by the District of Columbia Council, which derives its legislative powers from Congress (Sections 6-2311, 6-2361). See McIntosh v. Washington, 395 A.2d 744, 747 (D.C. App. 1978) (Firearms Control Regulations Act of 1975 enacted pursuant to "Council's congressionally delegated legislative power"). Since the legislative powers of the District of Columbia Council are directly traceable to Article I, Section 8 of the Constitution which gives Congress the power to "exercise exclusive legislation" in the District, the application of the Bill of

Rights to the District does not rely upon "incorporation" for its effectiveness. See, e.g., Bolling v. Sharpe, 347 U.S. 497 (1954) (Fifth Amendment applies directly to the District of Columbia, not Fourteenth Amendment, which applies only to the states); Parsons v. District of Columbia, 170 U.S. 45 (1898) ("the United States possess complete jurisdiction, both of a political and municipal nature, over the District of Columbia"). Thus, even provisions of the Bill of Rights that have never been "incorporated" against the states were long ago held to apply to the District of Columbia. See, e.g., United States v. Moreland, 258 U.S. 433 (1922) (prosecution for "infamous" crime in District of Columbia must be upon indictment of grand jury, not mere information, because of Fifth Amendment). Unlike the situation in Quilici, the Second Amendment applies fully and directly to the District.

III. THE SECOND AMENDMENT CONFIRMS THE RIGHT OF INDIVIDUALS TO KEEP AND BEAR ARMS, IN ADDITION TO PROMOTING THE EFFICACY OF STATE MILITIAS.

"It is never to be forgotten that in the construction of the language of the Constitution ... we are to place ourselves as nearly as possible in the condition of the men who framed that instrument." Ex parte Bain, 121 U.S. 1, 12 (1887). When we do so with regard to the intentions of those who framed and ratified the Second Amendment, we find no evidence of any intention on their part to deny the right to keep and bear arms to individuals, or to repose that right only in official state militias. On the contrary, the evidence is that the Framers desired to see arms distributed amongst the entire people, and that any attempt to limit the right to keep and bear arms to a "select militia" would have been vigorously opposed by them.

To support its claim that the Second Amendment does not guarantee to individuals the right to possess firearms, the government in this case cites only United States v. Miller, 307 U.S. 174, 178 (1939) and United States v. Oakes, 564 F.2d 384, 387 (10th Cir. 1977). Neither of these cases stands for the proposition cited.

Miller involved a prosecution for transporting in interstate commerce a sawed-off shotgun, in violation of the National Firearms Act, 26 U.S.C. Section 1132. The defendants interposed a demurrer, and the District Court quashed the indictment. Due to this early termination of the case, the fact that it reached the Supreme Court by direct appeal, and the fact that the defendants did not appear in the Supreme Court to argue the case, the record on appeal was apparently rather sketchy. The Supreme Court reversed, but relied upon procedural grounds. The court held that:

> In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense. Id. at 178. [emphasis added]

There is not a word in Miller indicating that individuals do not retain the right to possess firearms. The Court holds only that in the absence of some proof that a weapon (not well known as a military weapon) had some relationship to the militia, the court could not take judicial notice that it did have such a relationship. The Miller case, however, is replete with language indicating that an individual right to keep and bear arms existed in the colonies and early republic. After reviewing the authorities, the Court concluded that "the Militia comprised all males physically capable of acting in concert for the common defense." Id. at 179. When called for service, "these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time." [emphasis added] In fact, not only was there a right, there was a "general obligation of all adult male inhabitants to possess arms." [emphasis added] The "possession of arms also implied the possession of ammunition, and the authorities paid quite as much attention to the latter as to the former." Id. The court reviews statutes from the states in the 1780s, which generally provide for each adult male to equip himself with a firearm and ammunition, and to be ready to appear

when summoned for service. Instead of negating an individual right to possess firearms, the Miller decision unequivocibly indicates that a right and duty to bear arms was almost a universal practice in the early republic.

The Oakes case provides even less support for the government's position. Oakes was convicted of possessing a machine gun, and raised a Second Amendment defense. The sum total of the research by the Tenth Circuit appears to have been looking up the Miller case, and then citing it for the proposition that the Second Amendment's purpose is to "preserve the effectiveness and assure the continuation of the state militia." United States v. Oakes, 564 F.2d 384, 387 (10th Cir. 1977). From that premise, the Court concludes that it would be "unjustifiable in terms of either logic or policy" to allow the defendant to keep an unregistered firearm "merely because he is technically a member of the Kansas Militia ...." The case is less than convincing both on grounds of analytical rigor and historical understanding.

Fortunately, there has been a remarkable surge of scholarly interest recently in the historical and philosophical origins of the Second Amendment. A recent book by Stephen P. Halbrook (Ph.D., J.D.) entitled That Every Man be Armed: The Evolution of a Constitutional Right (1984), is the most complete exposition to date of the historical, philosophical, and political antecedents and development of the Second Amendment. Origins and Development of the Second Amendment (1986), by David T. Hardy, collects in convenient form many quotations from original documents and sources pertaining to the history of the Second Amendment. And any analysis of the original intention of the Second Amendment as it pertains to handguns must rely heavily upon a seminal article by Don B. Kates, Jr., Handgun Prohibition and the Original Meaning of the Second Amendment, 82 Mich. L. Rev. 204 (1983). Amici wish to acknowledge their indebtedness to these authors for much of the analysis that follows, and to commend these works to the attention of the Court.

In determining whether the Second Amendment was intended to embrace the right of individuals to keep and bear arms, the most instructive starting point is the language of the Amendment itself. As shown by Kates, the position of the government in this case is negated by the very language of the Bill of Rights:

> To accept such an interpretation requires the anamolous assumption that the Framers ill-advisedly used the phrase "right of the people" to describe what was being guaranteed when what they actually meant was "right of the states." In turn, that assumption leads to a host of further anamolies. The phrase "the people" appears in four other provisions of the Bill of Rights, always denoting rights pertaining to individuals. Thus, to justify an exclusively state's right view, the following set of propositions must be accepted: (1) when the first Congress drafted the Bill of Rights, it used "right of the people" in the first amendment to denote a right of individuals (assembly); (2) then, some sixteen words later, it used the same phrase in the second amendment to denote a right belonging exclusively to the states; (3) but then, forty-six words later, the fourth amendment's "right of the people" had reverted to its normal individual right meaning; (4) "right of the people" was again used in the natural sense in the ninth amendment; and (5) finally, in the tenth amendment the first Congress specifically distinguished "the states" from "the people," although it had failed to do so in the second amendment. Any one of these textual incongruities demanded by an exclusively state's right position dooms it. Cumulatively they present a truly grotesque reading of the Bill of Rights. Kates, supra, at 218.

The precatory language "a well-regulated Militia, being necessary to the security of a free State ...," was clearly not intended to preserve the militia at the expense of an individual right to keep and bear arms. Apart from the logical impossibility of such an interpretation, since the militia consisted of the whole people possessing their private arms, it would have been inconceivable to the Founders that such a fundamental right would depend for its existence upon a written declaration in a constitution. The Framers were steeped in the natural law and common law traditions, which held rights to exist independently of "paper" guarantees. The nature of the "controversy" over the Second Amendment at the time the Bill of Rights was proposed is illuminating. As recounted by Halbrook:

> Ten days after the Bill of Rights was proposed in the House, Tench Coxe published his "Remarks on the First Part of the Amendments to the Federal Constitution" .... Probably the most complete exposition of the Bill of Rights to be published during its ratification period, the "Remarks" included the following: "As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be

> occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed by the next article in their right to keep and bear their private arms." In short, what is now the Second Amendment was designed to guarantee the right of the people to have "their private arms" to prevent tyranny and to overpower an abusive standing army or select militia.
>
> Coxe sent a copy of his article to Madison along with a letter of the same date .... Far from disagreeing that the amendment protected the possession and use of "private arms," Madison explained that ratification of the amendments "will however be greatly favored by explanatory strictures of a healing tendency, and is therefore already indebted to the co-operation of your pen."
>
> Coxe's defense of the amendments was widely reprinted. A search of the literature of the time reveals that no writer disputed or contradicted Coxe's analysis that what became the Second Amendment protected the right of the people to keep and bear "their private arms." The only dispute was over whether a Bill of Rights was even necessary to protect such fundamental rights. Halbrook, supra, at 76-77. [emphasis added]

The Founders also considered the right to keep and bear arms as part of their heritage as Englishmen. Whole phrases from the American Bill of Rights were taken directly from the English Bill of Rights of 1689. The English Bill of Rights contains, with no reference to a militia, a declaration that "the subjects which are Protestants may have arms for their defence suitable to their conditions, and as allowed by law." These rights were among those declared by Parliament to be "the true, ancient, and indubitable rights and liberties of the people of this kingdom ...." Reproduced in C. Martin, Introduction to the Study of the American Constitution 349, 351, 353 (1926).

By far, the most influential legal authority during the founding period was William Blackstone, whose Commentaries on the Laws of England was first published in 1765. In his chapter on "The Absolute Rights of Individuals," Blackstone included among his short list of rights the provision of the English Bill of Rights permitting subjects to have arms for their defense, holding this to be "the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." To vindicate all of their rights, Blackstone said, Englishmen are entitled "in the first place, to the regular administration and free course of justice in the courts of law; next, to the right

of petitioning the king and parliament for redress of grievances; and, lastly, to the right of having and using arms for self-preservation and defence." W. Blackstone, Commentaries on the Laws of England *143-44.

In short, the language employed by the Framers in the Second Amendment, the common-law tradition upon which they relied, and their contemporary statements all indicated that an individual right to keep and bear arms, extending to the whole people, was intended. Since the people were the militia, there is nothing to indicate that their concern for "a well-regulated Militia" was exclusive of an individual right. After an exhaustive search of the contemporary documents, Halbrook has summed up the matter cogently:

> In recent years it has been suggested that the Second Amendment protects the "collective" right of states to maintain militias, while it does not protect the right of "the people" to keep and bear arms. If anyone entertained this notion in the period during which the Constitution and Bill of Rights were debated and ratified, it remains one of the most closely guarded secrets of the eighteenth century, for no known writing surviving from the period between 1787 and 1791 states such a thesis. The phrase "the people" meant the same thing in the Second Amendment as it did in the First, Fourth, Ninth and Tenth Amendments -- that is, each and every free person. A select militia defined as the only privileged class entitled to keep and bear arms was considered an anathema to a free society, in the same way that Americans denounced select spokesmen approved by the government as the only class entitled to freedom of the press. Nor were those who adopted the Bill of Rights willing to clutter it with details -- such as nonpolitical justifications for the right to bear arms (for example, for self-protection and for hunting) -- or with a list of what everyone knew to be common arms, such as muskets, scatter-guns, pistols, and swords. In the light of present-day developments, perhaps the most striking insight of those who originally opposed the attempt to summarize all the rights of a freeman in a bill of rights was that, no matter how it was worded, artful misconstruction would be employed to limit and to destroy the very rights that needed to be protected. Halbrook, supra, at 83-84.

IV. HANDGUNS ARE A TYPE OF FIREARM PROTECTED BY THE SECOND AMENDMENT.

The government argues that "[t]he issue here is whether the specific firearm being regulated bears a connection to the militia ... not, as Appellant appears to argue, whether the class of firearms regulated bears a relation to militias generally." Brief for Appellee at 7. The only authority relied upon is United States v. Oakes, 564 F.2d 384, 387 (10th Cir. 1977).

But, the Oakes case, without citation of authority, only states that the court would not interpret the Second Amendment "to guarantee Appellant's right to keep an unregistered firearm which has not been shown to have any connection to the militia, merely because he is technically a member of the Kansas Militia ...." While this could be construed to refer only to the particular firearm at issue in Oakes, there is nothing that requires such a limiting construction. The language is equally susceptible to the construction that the amendment would not create a right to possess any unregistered firearm. It would preposterous to contend that, in order to decide which weapons are protected by the Second Amendment, a particularized court determination would have to be made for each weapon in the country, based upon that weapon's own unique characteristics. And, of course, Miller (which is the only case cited in the entire Second Amendment discussion in Oakes) establishes no such rule. Miller refers to a class or category of weapons, namely, "shotgun[s] having a barrel of less than eighteen inches in length," which is a category created by the National Firearms Act, 26 U.S.C. Section 1132.

As we have argued above, the Framers expressed no intention to limit weapons possession strictly to military purposes. The Miller case, in describing the weapons that were supplied by militia men when called for service, refers to them only as "the kind in common use at the time." There is no basis for the limitation proposed by the government.

Any fine distinctions among types of weapons are not critical to the analysis of the D.C. statutes, because those statutes prohibit the possession of all pistols, and pistols are clearly "part of the ordinary military equipment" that can "contribute to the common defense," and are certainly firearms of "the kind in common use" at this time. Miller, 307 U.S. at 178-79. As is well known, the Army for more than seventy years issued .45 Automatic Colt pistols to servicemen. Recently, the Army has adopted 9 mm. Beretta as the standard sidearm. "Pentagon Picks

Beretta as Sidearm," American Rifleman, Mar. 1985, at 58. Yet 9 mm. automatic pistols, of the same general type used by the Army, cannot be registered in the District. Fesjian v. Jefferson, 399 A.2d 861 (D.C. App. 1979) (Browning 9 mm. automatic pistol could not be registered). Furthermore, the District has defined "machine guns" as "any firearm which shoots, is designed to shoot, or can be readily converted or restored to shoot ... semi-automatically, more than twelve shots without manual reloading." D.C. Code Section 6-2302(10). But, virtually any semi-automatic rifle -- which includes the standard military rifles used by most nations -- can be so "converted" merely by inserting a magazine with a capacity greater than twelve rounds. Thus, a Colt AR-15 could not be registeredsince under D.C. law it was considered a "machine gun." Fesjian, 399 A.2d at 863. The AR-15, of course, is the semi-automatic "civilian" version of the M-16, the standard rifle for U.S. military forces. See "Q & A," American Rifleman, May 1986, at 56-57. In effect, the government argues that weapons cannot be possessed under the Second Amendment unless they have some direct relationship to militia purposes, while at the same time arguing in favor of statutes which prohibit the possession of all such weapons.

Even if a determination of suitability for militia use had to be made with respect to the particular weapon for which a Second Amendment right is asserted, Appellant Sandidge's pistol would qualify in this case. Not only are pistols in general standard military issue throughout the world, but small .25 ACP pistols, such as the one Mr. Sandidge was carrying (Tr. 70), have been issued to regular military forces both in the United States and Europe. See, e.g., W. Smith, Small Arms of the World 181 (1973) (small .25 caliber automatics "have seen extensive military use by staff officers in various European armies through both wars"); N. Flayderman, Flayderman's Guide to Antique American Firearms 107 (1983) (several thousand .25 ACP Colts issued by United States); W. Smith, Book of Pistols and Revolvers 147 (1968) (compact automatic in .25 ACP caliber "was widely

carried as an auxiliary arm by German ranking officers in World War II"). Even accepting the government's premises, its arguments must fail.

V. CONCLUSION

The Supreme Court of Oregon, in a recent decision giving effect to that state's constitutional protection of the right to keep and bear arms, stated:

> We are not unmindful that there is current controversy over the wisdom of a right to bear arms, and that the original motivations for such a provision might not seem compelling if debated as a new issue. Our task, however, in construing a constitutional provision is to respect the principles given the status of constitutional guarantees and limitations by the drafters; it is not to abandon these principles when this fits the needs of the moment. State v. Kessler, 289 Or. 359, 614 P.2d 94 (1980).

Similarly, Amici are aware that it is now, and has been for some years, the stated express policy of the District of Columbia to restrict and prohibit firearms ownership rather than to protect it. But when the policy of a legislative body contravenes the express and mandatory guarantees of the Constitution, it is the statutory policy, not the Constitution, that must yield.

Amici therefore request that this Honorable Court declare D.C. Code Sections 6-2311, 6-2361, and 22-3204 (as construed in pari materia with Section 6-2311) to be unconstitutional, and that the convictions of Appellant Sandidge be reversed.

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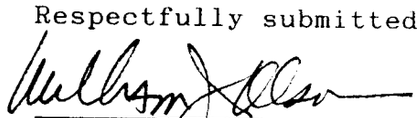
Respectfully submitted,



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CERTIFICATE OF SERVICE

I, the undersigned counsel of record for Appellant Lee A. Sandidge, do hereby certify that on this fourteenth day of October, 1986, I served a true copy of the foregoing Brief of Amici Curiae upon counsel for Appellant and Appellee in this cause, by depositing same with the United States Postal Service, properly addressed and postage prepaid.