

rough script of oral argument

Dellinger: 2A was direct response to concerns that new Congress. power to arm militia meant it could disarm militia. “bear arms” was at time universally used in military context. Madison used it for conscientious objection.

CJ ROBERTS: Strange way to word it – right of the people.

Dellinger: puts both clauses in synch. People=militia.

CJ ROBERTS: Doesn't that cut against you?

Dellinger: we agree it included all people in the sense of a polity & their right to engage in military service.

Kennedy: but 2A delinks the two clauses. 1st clause simply reaffirms importance of militia. IN ADDITION we have the right to keep and bear arms.

Dellinger: (fuddles around, no real answer). Don't see references to protecting private uses in the debates.

Kennedy: commonality of two clauses is that they concern arms.

Dellinger: cites Miller.

Scalia: I don't see a contradiction. Militia, plus individual rights. Militia that resisted Brits was not state managed. Framers knew how militias had been destroyed, by taking away their arms.

Dellinger: The militia (think he meant State) must decide what arms they bear.

Kennedy: Operative clause [his words] were related to something other than the militia.

Dellinger: No.

Kennedy: Remote settler defending himself.

Dellinger: That isn't in the historical discourse.

Scalia: right of self defense inherent. Joseph Story.

Dellinger: But Blackstone said right was subject to restrictions and as allowed by law.

[Kennedy or CJ ROBERTS] But doesn't that concede the individual right?

Gin: [hard to hear] something about 2A and meaning today.

Dellinger: (answer unclear)

Gin: No state today has a militia like that of the Framers.

Alito: your argument is purpose is to prevent disarm of militias. (Something about how could Framers....)

Dellinger: The proponents didn't get all they wanted.

Scalia: Feds could always disband state militias. What's the function of 2A if limited to them?

Dellinger: Better argument: what has Heller's handgun to do with the militia?

CJ ROBERTS: militia clause of const. reserves certain rights to state. Your read of 2A is that it supplements this. How? You tell us this was important, but not listed in militia clause? (context unclear)

Dellinger: new govt could raise a standing army,

Kennedy: 2A must supplement the militia clause – how does it under yr approach? My read is that it provides a right to arms independent of the militia.

Dellinger: quotes Blackstone again, doesn't answer.

Breyer (I think) You say is individual rt that a person could challenge if law disarmed citizen-militia.

Dellinger: Yes, 42 states have...

Stevens: don't give figure today, give figure of contemporaneous.

Dellinger: Why wouldn't they have said Congress shall make no law disarming anyone. Potential disruption if this Court holds individual rt.

Kennedy: British right. You think 2A is broader or narrower than 1689 Declaration?

Dellinger: don't think had same object.

Breyer: 1689 bound parliament only [either he slipped or I did—Parliament wasn't bound by it]. But Heller here wants Congress bound, too.

Scalia: didn't acts disarming the Highlanders and Catholics forbid them to "bear arms"?

Dellinger: 42 states have constitution arms provisions but find gun laws constitutional. Reasonable regulation.

CJ ROBERTS: but what's reasonable about a total ban on possession?

Dellinger: it's one kind of regulation.

CJ ROBERTS: So you could outlaw books, so long as people could read newspapers?

Dellinger: Maybe could ban having more than 50 guns.

CJ ROBERTS: but an entire type of gun?

Dellinger: rifle or shotgun more suitable.

Kennedy: for what purpose?

Dellinger: if I accept arguendo their argument for non-militia use, then for defense of home. Court below was absolutist.

Gin: Some weapons could be prohibited, like MGs.

Scalia: AP bullets. MGs not in common use, pistols are.

Dellinger: if we use lineal descent, an improved bullet is a descendant.

CJ ROBERTS: not accurate description of lower court ruling. Is ban. Reasonable regulation.

Scalia: or CCW.

Dellinger: not as if every weapon is outlawed.

CJ ROBERTS: but is carrying inside house in DC illegal?

Dellinger: not with the right license.

(Someone) Does DC Code preclude unlocking gun unless necessary?

Dellinger: not our position. Self defense is exception.

Alito: So Why is ban on handguns reasonable reg?

Dellinger: framers protected well-regd militia.

Scalia: not MASSIVELY regulated.

(illegible notes here, it was going fast)

Solicitor General, for amicus U.S:

Stevens: is it one or two rights? Keep arms and bear arms, or keep and bear arms?

SG: two.

Kennedy: Miller is consistent. To framers, people needed for self defense.

Gin: Keep AND bear.

SG: new plastic guns not 2A "arms."

(Someone) If militia right, Madison would have placed with militia clause in Art I sec. 8, not Art. I sec. 9.

SG: proposal to add "for common defense" voted down by Senate.

Stevens: but could have added for defense of themselves, but didn't.

Kennedy: English law.

Ginsberg: but English law bound only king.

SG: could say same for right of petition in it.

Souter: even had "as allowed by law."

Stevens: and suitable to their conditions. Large part of population disqualified.

SG: could say same for petition right.

(I think Stevens):if right to keep is included, why add bear? (If one can keep, presumably bearing is a form of keeping, I think he meant).

Souter: hunting is bearing arms?

SG: Madison & Jefferson used it that way.

Souter: and hunting rifles are "arms?"

Scalia: used in statutes disarming Highlanders.

Souter: assume you want to get to standard of review in this lifetime?

SG: pre-existing right, and as such had limits. 1689.

Scalia: free speech also preexisting right, yet we use strict scrutiny there.

SG: Robertson v. Baldwin. Felons.

Alito: how could DC's ban survive ANY level of scrutiny? Trigger locks, too.

Ginsberg: give me practical difference between standards—would any federal laws be in jeopardy if we use one vs. another?

SG: yes.

CJ ROBERTS: standard of review appear nowhere in Constitution. We created them. Why do we have to do it here? 1st Amendment standards took years.

SG: MG ban might be at issue. Heller says we didn't really ban because we grandfathered them, but DC law also grandfathers handguns.

Scalia: MGs may not be 2A "arms"

Alan Gura, for Heller:

Gura: trigger lock, self defense exception, etc.

Breyer: if purpose is military preparedness, as General's brief says, then how does ban interfere? DC residents can shoot at ranges outside city, and own rifles and shotguns.

Gura: cites a 1st Cir. Case

Stevens: see significance to militia mention in first part?

CJ ROBERTS: and conscientious objector clause?

Gura: Miller lays out militia-relation. Arms.

Stevens: if it limits what arms they can bear, why not who can bear them?

Gin: The people – males 17-45 –other didn't serve in militia

Scalia: But wd be unrealistic to make second clause broader than the first.

Kennedy: purpose to ensure other provisions of the constitution were honored. William Rawle says so, and he voted to ratify the BoR.

Breyer: Blackstone says as allowed by law. Can hinge on reasonable regulation. 1st militia statute limited handguns to officers.

Gura: can ban guns that aren't safe for civilian use.

[Thomas and Alito share a private joke here, and Thomas laughs]

Gura: and those not in common use.

Gin: but Miller says "at this time."

CJ ROBERTS: any parallel between situation at framing and MGs today?

Kennedy: over and under inclusive, if tie right to militia clause. Militia clause not relevant to homeowners today. Miller simply is not useful.

Breyer: Boston law against keeping loaded guns in houses, to protect against danger to firefighters. Makes analogy to protecting public against handgun crime.

Stevens: State constitutions at framing, only PA & Vt were clearly individual.

Scalia: militia could exist separate from state.

Souter: did antifederalists show any concern about individual right?

Gura: the PA minority did.

Souter: something about PA real concern was over militia.

Breyer: do we want thousands of judges deciding (what gun laws are reasonable), rather than legislatures?

Gura: some license requirements, if objectly applied, might pass muser, maybe vision tests, gun law test.

Gin: So ban could be replaced by licensing?

Gura: yes, so long as not arbitrary.

[going fast here, not poss. to get everything]

Gura: or ban on DV, upheld in Emerson.

Breyer: long question about gun crime figures. Policy makers must look at them.

Stevens: if you can ban MGs, how about banning all guns in college dorms? Assuming right gets incorporated.

Dellinger, for DCs reply

Dellinger: trigger lock reasonable.

CJ ROBERTS: how many minutes does it take to remove lock and load gun?

Dellinger: a second.

CJ ROBERTS: gotta be loaded, too.

Dellinger: three digit code on the one they showed me, line them up, 3-2-2.

Scalia: first I have to turn on the lamp and find my reading glasses.
(Laughter)

CJ ROBERTS: If allowing self defense, why do you say rifle is better than a pistol?

Dellinger: They haven't proven the contrary.

Alito: something about self-defense.

Dellinger: babbles, something about don't throw me in the briar patch.

Scalia: so you're saying a person can't have more guns than he needs for militia duty?

[not in my notes, but I have some memory of Scalia saying you need one gun for ducks, one gun for deer, one gun for goose, etc.]

Kennedy: what would be the constitutional basis for saying a person can have no more than X number of guns?