Points of View

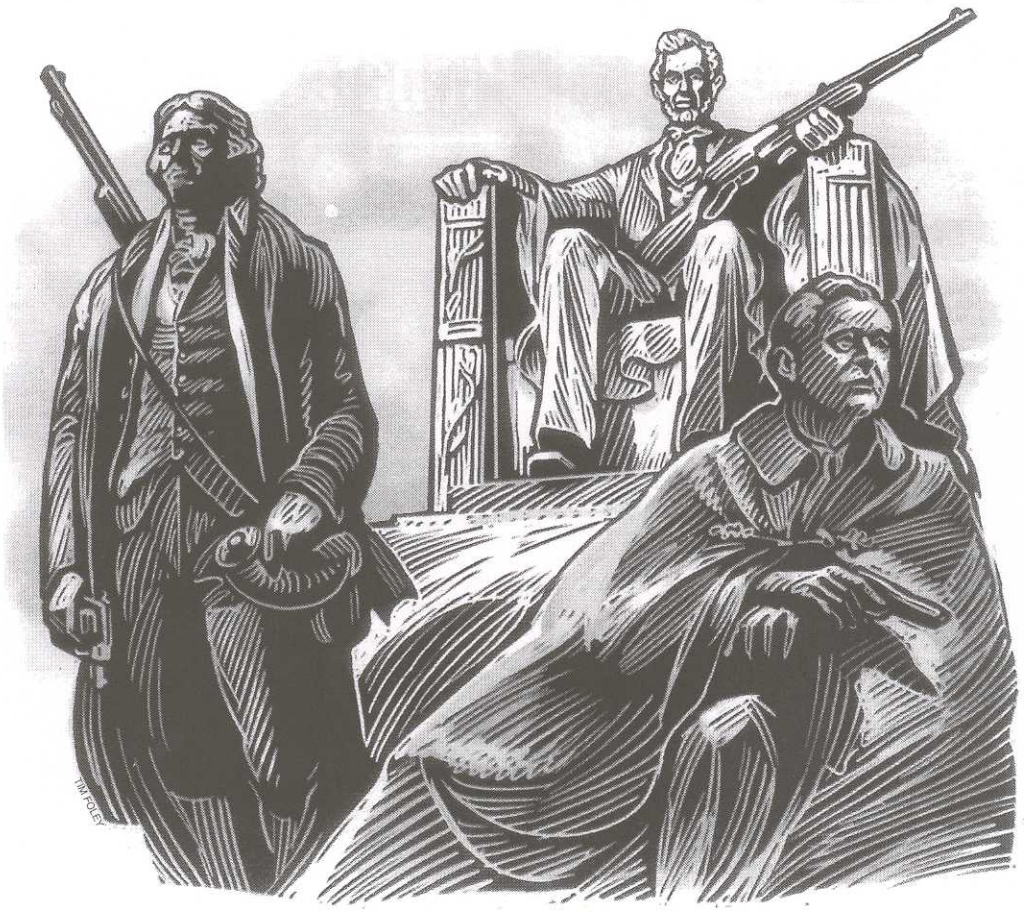
Commentary and Analysis

Congress must regulate Bush's habit of detaining **potential terrorists** without trial. ***Page 44***

In a joint **Poverty Law Center,** legal aid lawyers could swap advice and technology. ***Page 46***

Will individuals get their Second Amendment rights?
The District presents the test case.

Bearing Arms in D.C.



BY ROBERT A. LEVY

Michael Freeman is probably a bad dude—even a poster boy for gun control. He was convicted as a juvenile for assault with intent to kill, then charged as an adult with violating the ban on handgun possession in the District of Columbia. In short, Freeman isn't the type of guy who elicits much sympathy for an argument that prosecutors should drop their pending charge because D.C. gun laws violate the Second Amendment.

Most likely, Freeman never imagined that he'd become a constitutional test case. Yet his Second Amendment claim could end up before the Supreme Court. And if Freeman isn't the test case, then someone else in D.C. with a similar background might be—roughly three dozen challenges to the D.C. law have already been filed. Or better yet, to promote more-sympathetic litigants, pro-gun groups might consider organizing a peaceful demonstration in the nation's capital by responsible, armed citizens volunteering to be arrested for handgun possession. Whoever the ultimate litigant is, the goal will be to validate the Justice Department's newly announced position that the Second Amendment affords each of us an individual right to keep and bear arms.

Why D.C.? Lots of cities and states have restrictive gun laws. What is there about D.C. that has both gun defenders and controllers up in arms? First, a little background.

SEE **GUNS,** PAGE 43

GUNS, FROM PAGE 42

This past October in a Texas case, *United States v. Emerson,* the U.S. Court of Appeals for the 5th Circuit held that the Constitution "protects the right of individuals, including those not then actually a member of any militia . . . to privately possess and bear their own firearms . . . that are suitable as personal individual weapons." That constitutional right is not absolute, said the court. It does, however, establish a presumption against gun control. And to rebut that presumption, government regulators must first identify exceptional factors that justify a limitation on our Second Amendment right. Then the government must show that its regulation goes no further than necessary to achieve its aims.

For example, no reasonable person would argue that killers have a constitutional right to possess weapons of mass destruction. Rationally, some persons and some weapons may be restricted. Indeed, the 5th Circuit held that Emerson's Second Amendment rights could be temporarily curtailed because there was reason to believe he posed a threat to his estranged wife. And the 10th Circuit, in *United States v. Haney,* ruled that machine guns were not the type of weapon protected by the Second Amendment. Haney and Emerson both asked the U.S. Supreme Court to reverse those holdings, but on June 10 the Court declined to review either case.

The high court hasn't decided a Second Amendment case since *United States v. Miller* in 1939. There, the challenged statute required registration of machine guns, sawed-off rifles, sawed-off shotguns, and silencers. First, said the Court, "militia" is a term of art that means "the body of the people capable of bearing arms." That suggested a right belonging to all of us, as individuals. But the Court also held that the right to bear arms extended only to weapons rationally related to the militia—not the sawed-off shotgun questioned in *Miller*. That mixed ruling has puzzled legal scholars for more than six decades. If military use is the decisive test, then citizens can possess rocket launchers and missiles. Obviously, that's not what the Court had in mind. Indeed, anti-gun advocates, who regularly cite *Miller* with approval, would be apoplectic if the Court's military-use doctrine were logically extended.

Because *Miller* is so murky, it can only be interpreted narrowly, allowing restrictions on weapons, like machine guns and silencers, with slight value to law-abiding citizens, and high value to criminals. In other words, *Miller* addresses the type of weapon, not the question of whether the Second Amendment protects individuals or members of the militia. That's the conclusion the 5th Circuit reached in *Emerson*. It found that *Miller* upheld neither the individual rights model of the Second Amendment nor the collective rights model. Instead, *Miller* simply decided that the weapons at issue were not protected, whether used individually or collectively.

A SECOND AMENDMENT FIRST

Enter U.S. Attorney General John Ashcroft. First, in a letter to the National Rifle Association, he "reaffirmed a long-held opinion" that all law-abiding citizens have an individual right to keep and bear firearms, clearly protected by "the text and the original intent of the Second Amendment." Ashcroft noted that early Supreme Court decisions "routinely" recognized an individual right, as had U.S. attorneys general of both parties prior to *Miller*. Ashcroft's letter was followed by two Justice Department briefs, filed with the Supreme Court in the *Haney* and *Emerson* cases. For the first time, the federal government argued in formal court papers that the Second Amendment grants an individual right to bear arms.

Under the Clinton administration, when *Emerson* was argued before the 5th Circuit, the Justice Department's position was that the "Second Amendment protects only such acts of firearm possession as are reasonably related to the preservation or efficiency of the militia." But under Ashcroft, the new Justice Department briefs insisted that the "Second Amendment more broadly protects the rights of individuals, including persons who are not members of any militia . . . subject to reasonable restrictions designed to prevent possession by unfit persons or to restrict the possession of types of firearms that are particularly suited to criminal misuse."

Despite reversing the Clinton administration's theory of the Second Amendment, the Ashcroft Justice Department declared that both *Emerson* and *Haney* were correctly decided. In *Emerson,* the restriction on persons subject to a domestic violence restraining order was a reasonable exception to Second Amendment protection. And in *Haney,* the ban on machine guns applied to a type of weapon uniquely susceptible to criminal misuse.

That brings us back to D.C. and Michael Freeman. Supporting Freeman's assertion of an individual right to bear arms are the U.S. Department of Justice and the 5th Circuit. There's also support from an impressive array of legal scholars, including Harvard's liberal icon, Laurence Tribe, and Yale's highly respected Akhil Amar, who agree on two fundamental issues: First, the Second Amendment confers an individual rather than a collective right. Second, that right is not absolute; it is subject to reasonable regulation. To the extent there's disagreement, it hinges on what constitutes reasonable regulation; that is, where to draw the line. That's why the D.C. handgun ban is so interesting—and so vulnerable.

D.C. IS DIFFERENT

For starters, the D.C. statute prohibits anyone but law enforcement officials from owning a handgun. Thus, the law applies not just to "unfit" persons like felons, minors, or the mentally incompetent, but across the board to ordinary, honest, responsible citizens. Moreover, a handgun is quintessentially a personal weapon, used by those citizens to defend themselves against criminal predators. It is not like the machine gun forbidden in *Haney* or the sawed-off shotgun barred in *Emerson*. If "reasonable" regulations are those that apply only to bad persons or to massively destructive firearms, then D.C.'s blanket prohibitions are patently unreasonable.

Just as important, Congress has plenary legislative authority over the nation's capital. That means the D.C. government, a creature of Congress, is constrained by the Second Amendment as much as the federal government itself. Yes, the 14th Amendment, ratified in 1868, requires the states to honor many—but not all—provisions of the Bill of Rights. Like the other nine amendments, the Second Amendment originally applied only to the federal government. Unlike many of the other amendments, the applicability of the Second Amendment to the states has not been resolved. Yet because D.C. is not a state and is controlled by Congress, that complex and widely debated question need not be addressed when D.C. law is challenged on Second Amendment grounds.

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Finally, felonies under D.C. law are prosecuted by the U.S. attorney for the District of Columbia, an employee of the Justice Department—the same Justice Department that is now on record favoring an individual right to bear arms. To be sure, Ashcroft has declared in an internal memorandum that the Justice Department "will continue to defend the constitutionality of all existing federal firearms laws." But D.C. laws are not federal laws. They are local laws, enacted pursuant to congressionally delegated authority under the District of Columbia Home Rule Act. Presumably, therefore, the U.S. attorney might have been expected to support a motion to drop the handgun possession charge pending against Michael Freeman. But he did not.

Instead, the U.S. attorney argued in response to Freeman's motion that the D.C. handgun ban must be upheld in light of binding precedent from the D.C. Court of Appeals in a 1987 case, *Sandidge v. United States,* which held that "the Second Amendment guarantees a collective rather than an individual right." So it seems that John Ashcroft is allowing the U.S. attorney to prosecute infractions of a law that the Department of Justice deems to be unconstitutional. At a minimum, an intellectually honest brief might have conceded that the Justice Department was hamstrung in lower court, but then urged Freeman to appeal his case, all the way to the Supreme Court if necessary, where *Sandidge* could be overturned.

A NEW PRECEDENT?

If and when Freeman's case, or a comparable one, does reach the high court, where there's no binding precedent, the Justice Department will not be able to finesse the constitutional issue. Meanwhile, it is bizarre for Ashcroft to go out of his way to assert a new Second Amendment theory in cases—*Emerson* and *Haney*—where the theory almost certainly wouldn't matter, then decline to reaffirm the theory in cases arising under D.C. law, where it could dictate the outcome.

For those of us eagerly awaiting a Supreme Court pronouncement—the first in 63 years—perhaps we should be grateful for the Justice Department's puzzling stance. After all, if the federal government had supported Freeman's motion, and the charges were dropped, no one would appeal his case to a higher authority. We would be denied legal precedent to apply in later cases. And we would forgo a singularly favorable set of circumstances, because of D.C.'s unique position, to challenge a gun ban that is manifestly unconstitutional.

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