No. 01-0704

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, ET AL., PETITIONER

v.

THOMAS LAMAR BEAN, RESPONDENT

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF OF SECOND AMENDMENT FOUNDATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

The Amicus Curiae Second Amendment Foundation ("SAF") is a non-profit educational foundation dedicated to promoting a better understanding about our Constitutional heritage to privately own and possess firearms. SAF was incorporated in August 1974 under the laws of the State of Washington. It is a tax-exempt organization under §§501(c)(3) of the Internal Revenue Code. The SAF's purpose is to preserve the effectiveness of the Second Amendment to the United States Constitution and provide aid and information to people throughout the United States. To that end, SAF carries on many nationally recognized educational and legal action programs designed to better inform the public about the gun control debate. SAF has a broad base of support with 600,000 members and supporters residing in every state of the union. In addition to numerous books, articles, and national seminars, SAF publishes the Journal of Firearms and Public Policy.

SAF files this amicus curiae brief to urge the constitutional principle that the Second Amendment to the Constitution of the United States protects individual citizens' rights. This brief is intended to direct this Honorable Court's attention to this principle and to point out that the issue before the Court involves rights, not privileges.

SUMMARY OF ARGUMENT

The Amicus Curiae Second Amendment Foundation urges the Court that the Second Amendment to the Constitution of the United States contains a fundamental, individual right concerning the keeping and bearing of firearms. It is not a privilege to own firearms, it is a constitutional right. Thomas Lamar Bean temporarily lost that right by his petty, foreign conviction. However, a right exists under 18 U.S.C. 925(c) by which the Secretary of the Treasury may restore the right, or an independent right exists under 28 U.S.C. 1337(a) for Mr. Bean to pursue the restoration of his rights in the District Court.

Congress defunded the ATF from conducting investigations related to a restoration of rights under 18 U.S.C. 925(c), but that did not relieve the Secretary of his statutory obligation to consider Mr. Bean's application. When the Secretary failed to comply with his statutory duty, thereby effectively denying Mr. Bean's application, resort to the District Court was appropriate.

Further, upon consideration of the numerous references by the Court to the individual nature of the right to keep and bear arms, this case is an opportunity for the Court to clearly affirm the right to keep and bear arms.

ARGUMENT

1. THE SECOND AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES PROTECTS FUNDAMENTAL INDIVIDUAL RIGHTS WHICH THE SECRETARY OF THE TREASURY IS REQUIRED TO CONSIDER FOR RESTORATION, OR THE DISTRICT COURT MAY CONSIDER RESTORATION.

A. The District Court Has Original Jurisdiction To Consider A Restoration Of Firearms Rights Under 28 U.S.C. 1337(a).

The Petitioners claim in their brief that the jurisdiction of the District Court is limited to a review under the Administrative Procedure Act by virtue of the language of 18 U.S.C. 925 (c). The brief states: "The scope of judicial review in such an action is governed by the Administrative Procedure Act (APA), 5 U.S.C. 706. See S. Rep. No. 583, 98th Cong., 2d Sess. 26-27 (1984)." Footnote 1 to that quote states:

> 1 Congress first provided an avenue for relief from firearms disabilities in 1965. Federal Firearms Act, Pub. L. No. 89-184, 79 Stat. 788. That provision was enacted after the Olin Mathieson Chemical Corporation, the parent corporation of the firearms manufacturer Winchester, was convicted of a felony. H.R. Rep. No. 708, 89th Cong., 1st Sess. 2-3 (1965). The relief provision allowed Winchester to remain in business. In 1986, Congress added the provision allowing for judicial review. Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449. A decade before Congress added the judicial review provision, the Ninth Circuit had held that an applicant for relief could

> obtain judicial review under the APA of a denial of an application. *Kitchens v. Department of Treasury*, 535 F.2d 1197, 1199-1200 (1976).

The *Kitchens* case does not support the position of the Petitioners. The *Kitchens* case supports the decision of the Fifth Circuit that independent judicial action is appropriate where, as here, the Director of ATF failed to act on the application of Bean for relief from disabilities.

Contrary to the contention of the Petitioners, in *Kitchens*, the court in 1976 considered the application for relief from disabilities under 18 U.S.C. 925(c) and an appeal of the decision of the Acting Director of ATF under the Administrative Procedure Act. In its analysis, the Ninth Circuit noted that the District Court had original jurisdiction to consider the application for relief from disabilities under 28 U.S.C. 1337(a) as a "civil action or proceeding arising under any Act of Congress regulating commerce." The Ninth Circuit went on to note that "[t]his action arises under the Gun Control Act of 1968 which is a statute regulating commerce." Although the court in *Kitchens* analyzed whether the ATF's action was properly reviewable under the Administrative Procedure Act, the Ninth Circuit made it clear that the District Courts have original jurisdiction to grant relief from firearms disabilities. This Court previously alluded to such avenues of relief in *Lewis v. U.S.* (1980) in footnote 2 of the dissent.

This case, like *Kitchens*, involves a matter arising under the Gun Control Act of 1968. The District Court in this case had original jurisdiction under 28 U.S.C. 1337(a) to consider Bean's application for relief from firearms disabilities. That being so, the entire argument of the Petitioners concerning the scope of review, Bean's opportunity to seek judicial review, and the District Court's authority to grant a judicial restoration of rights is irrelevant. Bean had that right to obtain a judicial restoration of rights and regardless of the analysis of the Fifth Circuit, there was no error below.

B. 18 U.S.C. 925(c) Places The Duty To Consider Restoration Of Firearms Rights On The Secretary Of The Treasury, Not the Director Of ATF.

The brief of the Petitioners uses the terms "Secretary" and "ATF" interchangeably in discussing the issue of funding by Congress for the processing of applications for relief from Federal firearms disabilities. However, the Secretary and the ATF are not interchangeable in terms of congressional intent. Congress placed the duty on the Secretary in 18 U.S.C. 925(c) to conduct the processing. There is no requirement in 18 U.S.C. 925(c) that the Secretary delegate the authority to process applications for the relief from disabilities. The Secretary allowed the processing of applications for relief from disabilities to be considered by the Director of the ATF by virtue of 27 C.F.R. 178.144(b) and (d). Although 27 C.F.R. 178.144(b) and (d) allow the Director of ATF to grant a relief from disabilities, there is no clear delegation of the decision making process only to the Director of ATF. That duty remains with the Secretary. If Congress had intended to eliminate the processing of all applications for relief from disabilities, Congress would have eliminated the Secretary's funding, not merely the funding of ATF for the processing of applications. This is not a case like *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992), where the intent of Congress to modify was "not only clear, but express."

The reason that the Congress might wish to defund the processing of applications by the ATF may be apparent in the *amicus curiae* brief filed by the Violence Policy Center (VPC).

According to that brief, the ATF has a history of restoring firearms rights to, for example, a sexual predator with a history of violence, and persons convicted of supplying explosives to terrorists. According to the VPC, "many felons whose firearms privileges were restored under Section 925(c) used those firearms to commit further crimes, including violent crimes." With a history of the types of failures claimed by the VPC, it is reasonable to consider that some members of the Congress might wish to defund the ATF's efforts. Or, just as likely, Congress may have wished ATF to use its resources in investigating crimes, not to conduct investigations concerning firearms rights restoration. In either case, or in the many other possible reasons for Congress to defund ATF's efforts in such investigations, Congress' intent is not clear.

Failing to fund the ATF to process applications does not show a clear intent to eliminate the processing of applications.[2]. Without a direct repeal of 18 U.S.C. 925(c) language concerning the duty of the Secretary, it does not follow that Congress intended that the Secretary would not be required to conduct his statutory duty.

When the application for relief from disabilities was filed by Bean with the ATF, it was the duty of the Secretary to comply with the congressional intent expressed in 18 U.S.C. 925(c) that rights be restored if the applicant meets the criteria in the statute. By the Secretary's failing to take any action on the request by Bean, Joint Appendix, p. 27, and by the ATF's refusal to process the request, Joint Appendix, p. 33, the Secretary effectively denied Bean the restoration of his constitutionally protected rights. Under 18 U.S.C. 925(c), that was a matter that could be brought to the attention of the District Court, and remedied thereby.

C. The Failure Of The Director To Act Was A Denial Which Was Also Reviewable By The District Court.

5 U.S.C. 551(13) defines "agency action" as ". . ., or a failure to act." 5 U.S.C. 706 allows the District Court:

> To the extent necessary to decision and when presented, the reviewing court shall decide . . . and determine the meaning or applicability of the terms of an agency action. The reviewing court shall -
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be -
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> * * *
>
> (D) without observance of procedure required by law;
>
> * * *

> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> * * *

The District Court, then, is allowed to consider a failure to act by the Director of the ATF and to hold such agency action unlawful and grant a petitioner relief. Under the Administrative Procedure Act, if you consider the wording of the Code sections, a failure of the Director to act is the same as a denial, which can be remedied in the first instance by the District Court.

The District Court, in considering the petition of Bean had no evidentiary record from the Secretary or the Director that would have justified a denial of Bean's application. The District Court, under the authority of 18 U.S.C. 925(c), had the power to allow Bean to present the evidence that the Secretary and the Director refused to consider the application to prevent an "arbitrary" or "capricious" denial or "a miscarriage of justice"among other reviewable errors. That evidence was sufficient to convince the District Court that it was error for the Secretary to fail to restore Bean's gun rights.

D. Congress Knew Courts Were Reviewing Denials, But Failed to Enact Reforms.

Another problem for the Petitioners is that Congress has been aware for many years that Circuit Courts have reviewed the rights of individuals after being denied by both the Secretary and the ATF.

The often repeated quote from Sen. Simon merely underscores this point. "Let me make this point perfectly clear: It was never our intent, nor is it now, for the courts to review a convicted felon's application for firearm privilege restoration." 142 Cong. Rec. S12164 (daily ed. Oct. 2, 1996)

One Senator's speech does not make the Congress' intent clear. However, it shows that for a minimum of nearly six years, Congress has failed to expressly prohibit the courts from intervening in cases like *Bean* when an application is summarily denied without proper review.

E. The Secretary And ATF Already Had The Power to Deny All Applications According To Petitioners.

The Petitioners make the claim that the Secretary already had broad powers to deny any and all applications.

> Prior to its suspension, Section 925(c) assigned broad discretion to the Secretary of the Treasury to determine whether a convicted felon's application for relief should be granted: Under Section 925(c), relief from firearms disabilities could be granted if it was established to the Secretary's satisfaction that the statutory preconditions for relief were satisfied. 18 U.S.C. 925(c).... Even when the Secretary was satisfied that the preconditions for relief were met, Section 925(c) provided only that the Secretary "may" grant relief, not that he was required to do so . . . .

What is the real difference between an improper review and no review when both are creating a miscarriage of justice? Due process in the courts must apply to both situations, as the Constitution requires.

The Petitioners claim that the Secretary was not required to act on any applications even before the defunding occurred. This raises a key point. If the Secretary had merely told the ATF to quit reviewing any applications for relief from disability based on funding priorities or on a mere whim, would that have barred judicial review?

We believe not. Such wholesale denials would be arbitrary, capricious and create miscarriages of justice. The courts would be forced to intervene in some cases like *Bean*. Simply because Congress did what the Petitioners claim the Secretary could have already accomplished does not make this any different. No review is an improper review. The result is the same—a denial of due process.

F. The District Court Is The Appropriate Forum Where The Secretary Fails To Perform His Statutory Duty.

In its Summary of Argument, the brief of the Petitioners asserts:

> Allowing district courts to grant relief from firearms disabilities to convicted felons would also create the very dangers that Congress sought to avert by imposing a bar on the use of appropriated funds by ATF. District courts are not in a position to undertake the sort of investigations that would be required to determine whether an applicant's firearms disabilities should be removed, and they have no greater ability than ATF to ensure that felons who have their firearms privileges restored will not pose an unacceptable risk to the public.

Although the Petitioners' brief contends that the District Courts are ill equipped to resolve such a complex factual issue, if the courts are capable of resolving whether a citizen should suffer capital punishment, it would seem that the District Courts should be able to evaluate the competing interests of the government and a citizen in a simple restoration of constitutionally guaranteed rights. Some might believe that the District Courts are better able than administrators to make such important determinations concerning personal liberty.

In fact, the VPC makes both a mistake and undermines their own case on Page 5 of their Amicus brief. First, Mr. Alan Gottlieb was never charged with "tax evasion," nor was he convicted of that crime. He was found guilty of a lesser charge under 26 U.S.C. 7206(1). Gottlieb's right to own firearms was restored on Dec. 9, 1986 by the Dept. of the Treasury, Bureau of Alcohol, Tobacco and Firearms.

More importantly, the VPC claimed that:

> VPC commenced an investigation, expecting to find a selective program granting "relief" to a few felons, most of whom had committed white collar crimes. *See id.* Instead, VPC discovered that ATF had restored the firearms privileges of thousands of felons, whose crimes included sexual assault, drug dealing, terrorism, homicide, and armed robbery. *See id.* at 42-43.

If all of these allegations are true, and these arrests actually lead to convictions, then this

only undermines the VPC's and the Government's contention that the courts couldn't do as good a job as the ATF. Furthermore, the courts are the proper venue for granting relief to prevent a "miscarriage of justice" like the *Bean* case, and to prevent the "arbitrary" or "capricious" wholesale denial of all applications, and the courts have broad authority to grant proper, equitable relief, particularly considering fundamental individual rights.

G. Gun Ownership Is A Fundamental, Individual Right, Not A Privilege.

The VPC contends in its *amicus curiae* brief that gun ownership is a "privilege," not a right. In its petition requesting certiorari, the Petitioners referred to gun rights as a privilege. The right to keep and bear arms is a fundamental personal right guaranteed by the Second Amendment to the Constitution of the United States.

In its briefs in opposition to certiorari in the cases of *Timothy Joe Emerson, Petitioner, v. United States of America*, Case No. 01-8780, and *John Lee Haney, Petitioner, v. United States of America*, Case No. 01-8272, the Petitioners herein conceded that it is the constitutional right of private citizens to own guns, possess and bear them, without regard to being a member of a militia or military service:

> "In its brief to the court of appeals, the government argued that the Second Amendment protects only such acts of firearm possession as are reasonably related to the preservation or efficiency of the militia. See Govt C.A. Br. 11-29. The current position of the United States, however, is that the Second Amendment more broadly protects the rights of individuals, including persons who are not members of any militia or engaged in active military service or training, to possess and bear their own firearms, 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. See Memorandum From the Attorney General To All United States Attorneys, Re: *United* States *v. Emerson*, Nov. 9, 2001. A copy of that memorandum is appended to this brief."

In *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), the Fifth Circuit engaged in an exhaustive analysis of this Court's decision in *United States v. Miller*, 307 U.S. 174 (1939) and the historical perspective of the Second Amendment. The court therein held that the Second Amendment guaranteed a personal right to own and possess firearms. That case was before this Honorable Court for consideration of certiorari in Case No. 01-8780. On June 10, 2002, the petition for certiorari was denied. The Amicus Curiae Second Amendment Foundation urges the Court to acknowledge and adopt the reasoning and conclusion of the Fifth Circuit in the *Emerson* case and define the personal fundamental guarantee of firearms ownership, possession and use, without regard to membership in a militia or the military.

The practical importance to this case is apparent from a determination that individuals have a fundamental personal right to firearms ownership and possession. If Bean has a fundamental personal right to firearms ownership and possession, the government cannot deny him a hearing for the restoration of said right. If the Secretary refuses to perform his statutory duty, what better place for Bean to seek a vindication of his rights than in the courts, the historical guarantor of due process of law.

H. In Consideration Of The Right Guaranteed By The Second Amendment, Deference

In The Review Should Favor Respondent.

As mentioned above, this case is about much more than just allowing Mr. Bean to own firearms once again after being convicted in a foreign country of an obscure crime that would not be prosecutable for an adult eligible to own firearms in this country. This case is about whether or not Respondent originally had a "right" or only a "privilege" to own a firearm before his conviction. Addressing this issue is necessary in order to properly review whether Congress can prohibit Respondent from seeking to restore his ability to own a firearm by merely defunding a small portion of an active federal law, even though there are other avenues for relief as mentioned above under the District Court's original jurisdiction under 28 U.S.C. 1337(a) as well as 5 U.S.C. 706 and 18 U.S.C. 925.

A key portion of Mr. Bean's original District Court Petition for Relief from Disabilities Under the Federal Firearms Act read:

> Prior to this unintentional violation of a foreign law, Petitioner enjoyed all of the liberties of a United States citizen.

This Amicus holds that one of these liberties--guaranteed under the Second Amendment--is the right to keep and bear arms, and this is the right Mr. Bean seeks to restore. This is a fundamental right of individuals, and not the states, just as the other portions of the Bill of Rights enumerating "the right of the people" are interpreted as individual rights. It has been over 210 years since the ratification of the Second Amendment, yet this provision remains mostly undefined.

In an effort to understand Mr. Bean's plight, and the importance of his attempt to restore his ability to possess firearms, this Court should provide some explanation of the substantive right that he is seeking to reinstate.

I. The Second Amendment Right Is Not Meant for Dangerous Individuals.

The Second Amendment reads,

> A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

This Court should not give in to fears by extremists that by defining the Second Amendment as an individual right, this will somehow allow violent criminals and deranged individuals to legally possess modern firearms with impunity. This court has already ruled in footnote 8 in *Lewis v. United States*, 445 U.S. 55 (1980) that prohibiting convicted felons from owning guns until their rights are restored does not violate any constitutional protections.

More dramatically, in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), this court noted that the United States is able to prohibit its enemies from using our constitution as a way to avoid prosecution. A key portion of the decision reads:

> If the Fifth Amendment confers its rights on all the world except Americans engaged in defending it, the same must be true of the companion civil-rights Amendments, for none of them is limited by its express terms, territorially or as

> to persons. Such a construction would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and "werewolves" could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against "unreasonable" searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments.

While this case was about alien enemies on occupied alien territory, this case is notable because the Second Amendment is again listed as one of the "civil-rights" Amendments along with other portions of the Bill of Rights and this right has limitations when it comes to dangerous individuals, including "werewolves."

In *Ex Parte Milligan*, 71 U.S. 2 (1866), this Court noted that the Second Amendment's right to keep and bear arms would not "hinder the President from disarming insurrectionists, rebels, and traitors in arms while he was carrying on war against them."

In short, stating that the Second Amendment right to keep and bear arms is an individual right is not a precursor to anarchy and chaos.

J. The "People" And The "Militia" In The Second Amendment.

This court has already determined that the "people" in the First, Second, Fourth, Ninth and Tenth Amendments are individuals, not the States. This is particularly necessary since the Framers used both the term "people" and the "States" within the Tenth Amendment dealing with "powers" and not "rights." People have both rights and powers while the States have only powers.

This Court had an excellent discussion of "the people" in the *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). Chief Justice Rehnquist, along with Justices White, O'Connor, and Scalia ruled that Rene Martin Verdugo-Urquidez (an illegal alien) was not one of "the people" and therefore was not granted protection under the Fourth Amendment. Their ruling allowed the admission of evidence seized in a warrant-less search of his Mexican property.

Chief Justice Rehnquist, in his delivered opinion of the Court, states that regarding the use of "the people":

> "Contrary to the suggestion of *amici curiae* that the Framers used this phrase 'simply to avoid [an] awkward rhetorical redundancy,' Brief for American Civil Liberties Union, et al., as Amici Curiae 12, n 4, 'the people' seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by 'the People of the United States.' The Second Amendment protects 'the right of the people to keep and bear Arms,' and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to 'the people.' See also US Const, Amdt 1, ('Congress shall make no law . . . abridging . . . *the right of the people* peaceably to assemble'); (emphasis added) Art I, S 2, cl 1 ('The House of Representatives shall be composed of Members chosen every second Year *by the People of the several States* ') (emphasis added). While this textual

> exegesis is by no means conclusive, it suggests that 'the people' protected by the Fourth Amendment, and by the First and Second Amendments, and to whom the rights and powers are reserved in the Ninth and Tenth Amendments, refers 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."

In a separate opinion, although concurring with the final ruling, Justice Kennedy believed that:

> ". . . explicit recognition of 'the right of the people' to Fourth Amendment protection may be interpreted to underscore the importance of the right, rather than to restrict the category of persons who may assert it."

Justice Kennedy agreed with the final decision because the search and seizure took place outside U.S. borders. Otherwise, he felt that the Amendments, including the Fourth, would provide protection for an illegal alien.

Even the dissenting opinions of Justices Brennan and Marshall give credence to the individual interpretation of the Second Amendment. In fact, these Justices rejected the narrow interpretation of "the people" given by the majority.

Justice Brennan cited that in drafting the Fourth Amendment:

> "They [the drafters] could have limited the right to 'citizens,' 'freemen,' 'residents,' or 'the American people.' . . . But the drafters of the Fourth Amendment rejected this limitation and instead provided broadly for '[t]he right of the people to be secure in their persons, houses, papers, and effects.'"

Both dissenting Justices described "the people" as "the governed." They claimed that by making a person obey our laws while even in his own country, he literally has become one of "the governed" and therefore the protection under the Amendments should apply.

Without a doubt, all of the definitions by the Justices would make "the people" certain qualified individuals, not the states or any other entity. Whether "the people" is interpreted as the "citizens," "freemen," "residents," "American people," or "the governed," in the Second Amendment, it still remains an individual's right to keep and bear arms.

The individual right to keep and bear arms by "the people" was made clear in the infamous *Dred Scott v. Sanford*, 19 How. 393 (1866), wherein the court upheld slavery in part because if the slaves were freed, they would be guaranteed all the protections listed under the Bill of Rights, including the ability to "carry arms wherever they went" under the Second Amendment.

This court has often mentioned the personal nature of the right of individuals to own firearms.[3] Most recently, Justice Stevens in two dissents has mentioned this individual right in non-militia cases.

In *Muscarello v. U.S.*, 524 U. S. 125, 132 (1998), Justice Stevens correctly wrote in discussing the meaning of the term "carries a firearm," that, "Surely a most familiar

meaning is, as the Constitution's Second Amendment ("keep and bear arms") (emphasis added) and Black's Law Dictionary, at 214, indicate: "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person."

That same year, Justice Stevens in *Spencer v. Kemna*, 523 U.S. 1 (1998), wrote that a criminal conviction "may result in tangible harms such as imprisonment, loss of the right to vote or bear arms . . . . "

Mr. Bean is now trying to reverse the "tangible harm" for a foreign conviction that is not even a crime in the United States for the average adult citizen.

On four occasions, various Justices have favorably quoted a key portion of Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497 (1961):

> "[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (dissenting opinion).

See *Albright v. Oliver*, 510 U.S. 266 (1994) (Stevens and Blackmun dissent); *Planned Parenthood of Southeastern PA v. Casey*, 505 U.S. 833 (1992) (O'Conner, Kennedy and Souter); *Moore v. East Cleveland*, 431 U.S. 494 (1977) (Powell, Brennan, Marshall and Blackmun); and *Roe v. Wade*, 410 U.S. 113 (1973) (Stewart concurring).

In none of these cases was the reference to the Second Amendment's "right to keep and bear arms" removed from the list of individual rights protected from both federal and state infringement.

Claims that the "Militia" in the Second Amendment is now the National Guard cannot stand either. This Court has ruled that the National Guard is not the Militia under the Second Amendment and that the National Guard is part of the Armed Forces. See *Perpich v. Department of Defense*, 496 U.S. 334 (1990). In that case, the militia was divided into two classes--"organized" and "reserve militia" later called the "unorganized militia."

10 U.S.C. 311(a) clearly states that all males between the ages of 17 and 45 who are either citizens of the United States or have declared their intent to become citizens are members of the unorganized militia. This definition may be sexist and age discriminatory by today's standards, since it is an old section, but it nevertheless shows the intended wide coverage of the term, "militia."

The court has previously ruled on this matter. In *Houston v. Moore*, 5 Wheat. 1 (1820), the court in a dissent seemed to distinguish the Militia Powers under Article 1, Section 8, of the

Constitution and the right to keep and bear arms under the Second Amendment.

Presser vs. Illinois, 116 U.S. 252 (1886), makes the Second Amendment "militia" more clear. Mr. Justice Woods, in a bold statement proclaimed that:

> "It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United states, as well as that of the states; and in view of this prerogative of the general government as well as of its general powers, the States' cannot, even laying the constitutional provisions in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the General Government."

In *United States v. Schwimmer*, 279 U.S. 644 (1929), *United States v. MacIntosh*, 283 U.S. 605 (1931) and *U.S. v. Bland*, 283 U.S. 636 (1931), overruled *Girouard v. United States*, 328 U.S. 61 (1947), the court repeatedly denied naturalization to individuals, including women in *Schwimmer* and *Bland*, who would not "bear arms" in defense of the United States. It took "affirmative action" by Congress in 1942 to overrule this position, *Girouard v. United States*, *supra.*

The Supreme Court decision *U.S. vs. Miller*, 307 U.S. 174 (1939), is an interesting case dealing with the composition of the militia. To begin with, only the national government was represented at the trial. With nobody arguing to the contrary, the court followed standard court procedure and assumed that the law was constitutional until proven otherwise.

As to the militia, Mr. Justice McReynolds related the beliefs of the Founding Fathers when commenting historically about the Second Amendment. He stated that:

> ". . .The common view was that adequate defense of country and laws could be secured through the militia—civilians primarily, soldiers on occasion.
>
> "The significance attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense. 'A body of citizens enrolled for military discipline.' And further that ordinarily 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."

It is interesting to note that Miller was an individual, and not a member of the State or National Guard. The *Miller* court never questioned whether Miller was part of the militia and focused on the type of weapon he possessed. The mere fact that the there was a question over which arms received protection indicated that the right is for individuals, not the states. Otherwise, the court simply would have stated that Miller had no standing under the Second Amendment as an individual and there would have been no question as to which arms he could keep at all.[4]

By combining the historic definition for the militia, "as all persons capable of bearing

arms", and a restrictive definition for "the people," such as "the citizens", the Second Amendment clearly reads as an individual right.

It should now be extremely difficult, if not impossible, to construe the Second Amendment any other way than to ratify an individual's right to "keep and bear" arms.

K. Second Amendment Expanded Under The Fourteenth Amendment

Even if one wanted to make the subordinate militia clause of the Second Amendment dominate over the independent clause of the right of the people to keep and bear arms, such folly must end after the enactment of the Fourteenth Amendment.

One of the major concerns during reconstruction was the disarming of newly freed slaves as well as their abuse and murder. Many of the drafters and supporters of the Fourteenth Amendment specifically listed the right to keep and bear arms as a reason for enacting it while opponents cited this right as a reason against it.

Representative John Bingham, author of Section 1 of the Fourteenth Amendment, included the Second Amendment among, "These eight articles I have shown never were limitations upon the power of the States, until made so by the fourteen amendment. The words of that amendment, 'no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States,' are an express prohibition upon every State of the Union." Stephen P. Halbrook, *The Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876* (for historical context and Founders intent for the Fourteenth Amend., the Freedmen Bureau Acts, and the Civil Rights Act of 1871), Praeger Publishers, 1998, page 126.

Bingham also specifically mentioned the right to keep and bear arms in speeches to his constituents. Halbrook, *Id.* Page 131.

The court has repeatedly noted the problems in the South in this period. In *Duncan v. Louisiana*, 391 U.S. 145 (1968), the court in the concurrence noted that Senator Howard, who introduced the Fourteenth Amendment in the Senate, listed one of the reasons to enact the Amendment was the "right to keep and bear arms" among other individual rights.

In *Bell v. Maryland*, 378 U.S. 226 (1964), this court in concurring footnote 3 stated, "Negroes were not allowed to bear arms or to appear in all public places. . . ." The Fourteenth Amendment was designed to stop such abuse from continuing.

Even scholars originally limiting the individual right under the Second Amendment to the militia clause are forced to admit the new dynamics under the Fourteenth Amendment:

> At the Founding, the right of the people to keep and bear arms stood shoulder to shoulder with the right to vote; arms bearing in militias embodied a paradigmatic *political* right flanking the other main political rights of voting, office holding, and jury service. Thus "the people" and the "militia" at the heart of the Second Amendment were quintessential voters and jurymen, the same "people" in the Preamble, in Article I, section 2, and in the First, Fourth, Ninth, and Tenth Amendments. But Reconstruction Republicans recast arms bearing

> as a core *civil* right, utterly divorced from the militia and other political rights and responsibilities. Arms were needed not as part of political and politicized militia service, but to protect one's individual homestead. Everyone--even nonvoting, nonmilitia-serving women--had a right to a gun for self-protection. Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction*, Yale Univ. Press (1998), Page 258-259.

As seen in this discussion, the Second Amendment's right to keep and bear arms is one of our most fundamental individual rights. Since this is the specific right Mr. Bean is seeking to restore, the importance of this right and the obvious lack of danger Mr. Bean represents must go hand in hand in the court's decision.

CONCLUSION

Nobody is alleging that Bean represents a credible threat. Under any reasonable standard, it is clear that Bean's application was only summarily denied for lack of ATF funding and inaction by the Secretary. A quick review of his case follows.

Bean was convicted of a non-violent violation of a foreign law for possession of ammunition that would be legal for a law-abiding adult to possess in this country. It was through the accidental inaction of a third party that caused the violation by failing to remove everything from Bean's vehicle. The Mexican government even reduced the penalty for this crime from a felony to a misdemeanor after this case was made public.

Since Mr. Bean needed the restoration for the renewal of his Federal Firearms License, his business needs are similar to that of Winchester and other corporations needing relief and that are still provided funding under the law. Since ATF funds are available for the restoration of "rights" of corporations, then there should be a means for the more fundamental individual rights of Bean, or at least due process review.

At the district court, Bean presented an impressive character witness list as well. His plight has earned unanimous support for rights restoration by all four judges hearing the facts of his case.

The bottom line is that both the Secretary and the ATF failed to act on a person convicted of a foreign crime that was both perfectly legal and constitutionally protected in this county. Such dismissals are both "arbitrary and capricious" and in this particular case, created a "miscarriage of justice." These are all reasons for the court to intervene even if the original jurisdiction is ignored under 28 U.S.C. 1337(a).

For the foregoing reasons, the Amicus Curiae Second Amendment Foundation urges the Court to define the personal fundamental right of individuals under the Second Amendment to the Constitution of the United States and affirm the decision of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of this Amicus Brief of the Second Amendment Foundation has been served by regular U.S. mail, postage prepaid, on this 14th day of June, 2002 on the following counsel of record for the Petitioner and Respondent:

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1. Counsel for amicus curiae authored this brief in its entirety. No person or entity other than amicus curiae, its members, and its counsel made a monetary contribution to the preparation or submission of the brief. The written consent of all parties to the filing of this brief is attached hereto.

2. It is interesting to note that some ATF funds were used for letterhead, envelope, postage and work time to process a letter of denial for Bean's application.

3. For additional information, see David B. Kopel, *The Supreme Court's Thirty-Five Other Gun Cases: What the Supreme Court Has Said About the Second Amendment*. St. Louis University Public Law Review: Gun Control Symposium, vol 18, no. 1, 1999: 99; David B. Kopel, *The Sound of the Supremes: A Reply to Professor Yassky*. St. Louis University Public Law Review: Gun Control Symposium, vol 18, no. 1, 1999: 203; David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998: 1359. Brigham Young University Law Review: Second Amendment Symposium, 1998, No. 1.

4. See the Fifth Circuit Decision in *U. S. v. Emerson*, *supra*, for a detailed discussion of *Miller* and of the history of the Second Amendment in general.