June 27, 2008

Summary of the "D.C. Gun Case":
***District of Columbia v. Heller,* Case No. 07-290, slip op. (U.S., June 26, 2008)**

Short Summary

In *District of Columbia v. Heller*, the Supreme Court considered the issue of whether a "District of Columbia prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution."[1] The Second Amendment provides that "[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."[2] Acknowledging the great impact that this case could have upon the Court's interpretation and application of the Bill of Rights to the States, the American Center for Law and Justice (ACLJ) filed an *amicus curiae* brief with the Supreme Court, arguing that the Bill of Rights should be interpreted in light of their meaning at the time they were enacted.

In a 5-4 decision written by Justice Scalia, the Court held that the ban on handguns violated the Second Amendment.[3] The Court based its argument on a thorough textual and historical analysis of the Amendment and carefully avoided more general public policy arguments. The Court held that the Second Amendment confers an individual right to bear arms for lawful purposes, such as self-defense in one's home, but the government may reasonably regulate the exercise of that right. The Court stated that "[t]he very enumeration of the [right to bear arms] takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon."[4] The ACLJ agrees with the Court's analysis and its conclusion that "it is not the role of this Court to pronounce the Second Amendment extinct."[5]

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[1] *District of Columbia v. Heller*, Case No. 07-290, slip op. at 1 (U.S., June 26, 2008).
[2] U.S. CONST. amend. II.
[3] *Heller*, slip. op. at 64.
[4] *Id.* at 63.
[5] *Id.* at 64 (emphasis added).

Background

Dick Heller lived in Washington, D.C. and wanted to keep a pistol in his home for self-defense. The District of Columbia, however, had barred the registration of handguns and also prohibited the possession of unregistered handguns. The District also required that lawfully possessed firearms in homes be inoperable.

The United States Court of Appeals for the District of Columbia ruled in Heller's favor by a 2-1 vote, holding that he had a personal Second Amendment right to keep his gun in his home. This decision created a conflict with the opinions of other federal courts of appeal which had held that the Second Amendment only protects the right to possess a gun while serving in the National Guard or a state militia.

Prior to *Heller*, few Supreme Court cases specifically addressed the Second Amendment. The most notable was *United States v. Miller*[6] which was decided in 1939. *Miller* involved a challenge to the Federal Firearms Act which limited the use of a particular type of shotgun.[7] The *Miller* Court held that, "[i]n the absence of any evidence tending to show that possession or use of [this type of shotgun] 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."[8] *Miller* left open many issues regarding the Second Amendment which set the stage for the *Heller* case.

Justice Scalia's Majority Opinion

Justice Scalia began his majority opinion by discussing how to properly interpret the text of the Constitution. He reaffirmed the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning."[9] The District of Columbia argued that the proper interpretation of the Second Amendment was that it only protects the right to possess and carry a firearm if it is in connection with military or militia service.[10] Heller argued, however, that the Second Amendment protects the right of the individual to possess a firearm regardless of whether that individual is connected with the militia and also protects the right to use a firearm for "traditionally lawful purposes" such as self-defense.[11]

Justice Scalia noted that, in order to properly interpret the Second Amendment, the reader must understand that it has two parts: the prefatory clause ("A well regulated Militia, being necessary to the security of a free State") and the operative clause ("the right of the people to keep and bear Arms").[12] While the prefatory clause sets out the purpose of the Amendment, the operative clause provides the command of the Amendment. In interpretation, the operative clause

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[6] *United States v. Miller*, 307 U.S. 174 (1939)
[7] *Id.* at 175.
[8] *Id.* at 178.
[9] *Heller*, slip. op. at 3 (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)).
[10] *Id.*
[11] *Id.*
[12] *Id.* at 2.

must be interpreted first and must then be compared with the prefatory clause to ensure that a correct interpretation has been reached.[13]

In considering the meaning of the Second Amendment, the Court used dictionaries that were in existence at the time that the Second Amendment was written as well as historical sources such as William Blackstone's *Commentaries*. The Court held that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation."[14] Justice Scalia undertook a historical analysis of why the Second Amendment was included in the Constitution, noting that the Amendment did not grant a new right but *merely codified a pre-existing right*. Quoting a case from 1876,[15] Justice Scalia wrote: "'[the right to bear arms] is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The Second Amendment declares that it shall not be infringed . . . .'"[16] The Court found it significant that the right to bear arms had been previously included in England's Bill of Rights after the King disarmed his Protestant enemies.[17] Justice Scalia noted that Blackstone referred to the right to bear arms as being one of the fundamental rights of Englishmen.[18]

The Court then considered the prefatory clause to determine the purpose of the Second Amendment. Justice Scalia quoted *Miller*, which stated that "the Militia comprised all males physically capable of acting in concert for the common defense,"[19] and noted that this definition of "militia" was comparable to various founding-era sources. He then concluded that the phrase "well-regulated" did not imply anything more than "proper discipline and training."[20] Finally, the phrase "Security of a Free State" refers not to individual states but to the United States as a whole.[21] The Court found three reasons why it was necessary to maintain well-trained militias for the security of the state: 1) they were useful for "repelling invasions and suppressing insurrections;" 2) they "render[ed] large standing armies unnecessary;" and 3) they helped to protect against tyranny.[22]

The majority noted that, in modern times, there are at least three reasons to recognize the Second Amendment right to bear arms: 1) preserving the militia; 2) self-defense; and 3) hunting.[23] There was one primary reason why this fundamental right was included in the Second Amendment, however: "the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right—unlike some other English rights—was codified in a written Constitution."[24] Since a main purpose of the Amendment was to protect citizens against the possibility of being oppressed by the federal government and military, the

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[13] *Id.* at 3.
[14] *Id.* at 19.
[15] *United States v. Cruikshank*, 92 U.S. 542 (1876).
[16] *Heller*, slip. op. at 19 (quoting *Cruikshank*, 92 U.S. at 553).
[17] *Id.*
[18] *Id.* at 20.
[19] *Id.* at 22 (citing *Miller*, 307 U.S. at 179).
[20] *Id.* at 23.
[21] *Id.* at 24.
[22] *Id.* at 24-25.
[23] *Id.* at 26.
[24] *Id.*

majority stated that the dissenters' argument that the Second Amendment pertained to military-related uses did not make sense.[25] The majority also noted that its holding was consistent with previous decisions that had looked at the right to bear arms.[26]

The Court further noted that, as with most rights, the Second Amendment right to bear arms is not unlimited.[27] For example, restrictions on firearm possession by felons and the mentally disabled are permissible as well as bans on possession within schools and government buildings. The District of Columbia ban on handguns, however, was unconstitutional because handguns are "overwhelmingly chosen by American society for [the lawful purpose of self-defense]."[28] Moreover, the District's requirement that firearms in the home must be kept inoperable at all times was also unconstitutional. The Court reasoned that this requirement made the weapons unavailable for self-defense which it found was a primary reason for the right to bear arms.[29]

In closing, the Court stated that the Second Amendment limited the ability of the elected branches and the courts to restrict the availability of guns for self-defense:

> We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many amici who believe that prohibition of handgun ownership is a solution. The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns. **But the enshrinement of constitutional rights necessarily takes certain policy choices off the table.** These include the absolute prohibition of handguns held and used for self-defense in the home. Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. **That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.**[30]

Dissenting Opinions

Justice Stevens wrote a dissenting opinion—joined by Justices Souter, Ginsburg, and Breyer—that argued that the two phrases in the Second Amendment should be given equal weight. Justice Stevens stated that the right to bear arms must be viewed in light of the goal of the Amendment to ensure that States were not disarmed by the Federal Government. Justice Stevens framed the argument in terms of States' rights, arguing that the Amendment simply acts to ensure the ability of the States to maintain militias, consisting of armed individuals, as a

[25] *Id.* at 27.
[26] *Id.* at 47-48 (citing *Cruikshank*, 92 U.S. at 542; *Presser v. Illinois*, 116 U.S. 252 (1886); *Miller*, 307 U.S. at 174).
[27] *Id.* at 54.
[28] *Id.* at 56.
[29] *Id.* at 58.
[30] *Id.* at 64 (emphasis added).

counterbalance to a standing federal army.[31] The Stevens dissent argued that the right to keep and bear arms did not extend beyond military or militia uses.[32]

In Justice Stevens' view, the Second Amendment included the militia reference because the Amendment was limited to protecting the States' ability to form effective militias.[33] The prefatory clause defined the scope and purpose of the operative portion of the Amendment.[34] As such, the text did not support the majority's view that the Second Amendment guaranteed "the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[35] In sum, the personal right to bear arms "was not enshrined in the Second Amendment by the Framers; it is the product of today's law-changing decision."[36]

Justice Breyer also wrote a dissenting opinion which was joined by Justices Stevens, Souter, and Ginsburg. Justice Breyer focused on the appropriate standard of review (*e.g.*, strict scrutiny or reasonableness) of regulations on the individual use, possession, and ownership of firearms. He concluded that a rational basis or reasonableness test, with deference to the States, was the proper standard to protect the limited, federal individual right from infringement.[37]

Justice Breyer then summarized the voluminous empirical data submitted by various *amici* to evaluate whether the District of Columbia's restrictions rationally furthered a government interest in saving lives.[38] He concluded that "[d]ifferent localities may seek to solve similar problems in different ways, and a city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems."[39] Even assuming that the majority had correctly identified the right at issue, the District of Columbia's regulations did not unduly burden self-defense and recreational uses of firearms.[40]

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[31] *Id.* at 2, 5-6, 37-38 (Stevens, J., dissenting).
[32] *Id.* at 42-44.
[33] *Id.* at 18-28, 31-38.
[34] *Id.* at 6-10.
[35] *Id.* at 17.
[36] *Id.* at 45.
[37] *Id.* at 1-2, 10 (Breyer, J., dissenting).
[38] *Id.* at 13-14.
[39] *Id.* at 26 (citation and quotation omitted).
[40] *Id.* at 31-40.