

Bloomberg

Gun-Control Backers See No High Court Hurdle for Laws

By Greg Stohr - Dec 19, 2012

Gun-control advocates, seeking new laws in the aftermath of the Connecticut school shooting, are drawing support from an unlikely source: the U.S. Supreme Court's landmark 2008 decision backing the right to bear arms.

That ruling marked the court's first declaration that the Constitution's Second Amendment protects the gun rights of individuals. At the same time, Justice Antonin Scalia's majority opinion said the government could impose restrictions, such as bans on gun possession by convicted felons and the mentally ill.

Since that ruling, in *District of Columbia v. Heller*, courts have struck down only a handful of state and local gun laws. With lawmakers and President Barack Obama now discussing improved background checks and bans on assault weapons and high-capacity magazines, gun-control advocates say they see the legal obstacles as less daunting than the political ones.

"The Second Amendment doesn't impose any significant barriers to any of the major reforms being talked about," said Adam Winkler, a professor at the University of California at Los Angeles School of Law and the author of a book on gun rights. "The Supreme Court made clear in the *Heller* case that there's plenty of room for gun control under the Second Amendment."

Gun control is getting new attention in Washington after last week's shooting massacre in Newtown, Connecticut. The gunman, Adam Lanza, killed 26 people,

including 20 children at Sandy Hook Elementary School, before turning one of his guns on himself, police say.

Obama Support

Obama supports a ban on military-style assault weapons and a requirement that purchasers at gun shows undergo background checks. The president will also look at efforts to restrict high-capacity magazines that can accept more than 10 rounds of ammunition, according to White House Press Secretary Jay Carney.

The Heller decision resolved a constitutional question that had lurked for two centuries: whether the Second Amendment protects individuals even though it refers to state-run militias. The ruling, which divided the court 5-4 along ideological lines, struck down the District of Columbia's handgun ban.

Buried within the 21,000-word majority opinion was a paragraph that gave gun-control advocates reason for hope. Gun rights are "not unlimited," Scalia wrote.

Scalia's Opinion

"Nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill," he said. Nor was the court questioning "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."

Scalia also said the Second Amendment protects weapons that are in "common use" and not those that are "dangerous and unusual."

Gun-rights advocates say the Heller ruling established important limits. The court's backing of weapons in "common use" would doom a law that limited magazines to 10 rounds, says David Kopel, a policy analyst at the Washington-based Cato Institute and adjunct professor of constitutional law at the University of Denver.

“It’s extremely common these days for regular guns bought by regular people to have ammunition magazines in the 11-to-19 range,” Kopel said. “I think the ban at 10 is plainly unconstitutional under that.”

Popular Rifle

Similarly, Congress wouldn’t be able to ban the weapon that police say Lanza used, the Bushmaster AR-15 assault rifle, said Gene Hoffman, chairman of the Calguns Foundation in San Carlos, California.

“Restrictions on probably the most popular firearm in America are going to be hard over the long term to square with the right to keep and bear common firearms,” said Hoffman, whose group provides education and legal assistance to gun owners.

Gun-control activists say they are confident both types of restrictions would pass constitutional muster.

“The Second Amendment is not an issue,” said Jonathan Lowy, director of the Legal Action Project at the Washington-based Brady Center to Prevent Gun Violence. “The Supreme Court was crystal clear that, while the Second Amendment protects the right of law-abiding citizens to have a gun in the home for self-defense, it also allows for a wide variety of sensible gun laws.”

Winkler said that, under Heller, popularity isn’t enough to ensure constitutional protection.

Self Defense

“Heller said that handguns are protected because they are in common use for self-defense, not because they’re common but because they’re common for self-defense,” he said.

Andrew Arulanandam, a spokesman for the National Rifle Association, declined to comment on the legal prospects for new legislation. The gun-rights lobby said today it will hold a “major news conference” on Dec. 21.

So far, federal courts have invalidated only what Winkler called “clear outlier” laws. On Dec. 11, three days before the Connecticut shooting, a federal appeals court in Chicago struck down an Illinois law that bars most people from carrying a loaded gun except in their home or place of business. Illinois is the only state with an outright ban on carrying a loaded weapon in public.

Writing for the majority in the 2-1 decision, Judge Richard Posner said the Second Amendment offers protection beyond the home. That reasoning put the Chicago court in conflict with a different federal appeals court, which had upheld that state’s limits on who can carry a weapon in public.

In *Heller*, Scalia said the home is “the place where the importance of the lawful defense of self, family, and property is most acute.” A follow-up Supreme Court case, a 2010 ruling, also involved in-home gun possession.

“The biggest issue the Supreme Court has to confront is whether the right recognized in *Heller* extends outside the home,” Winkler said. “That’s where we’re seeing a lot of litigation.”