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Dick Heller Transformed Gun-Rights Law—and He's Not Finished

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One Friday morning in July 2008, Washington, D.C., security guard Dick Heller headed to police headquarters on an errand that he had been planning for the better part of 15 years. Three weeks earlier, the U.S. Supreme Court had made its historic Second Amendment decision in *District of Columbia v. Heller*. Now Heller set out to do what no one in D.C. had been allowed to do before he won the case: register a handgun for self-protection.

When he later emerged from the police station to address an entourage of supporters and TV cameras, he was empty handed. Despite his court victory, he had been unable to acquire a gun permit. In the weeks since the *Heller* decision, the city had hastily enacted a new and lengthy set of regulations. Heller had come to the station with his revolver—“the type Matt Dillon used to use on *Guns*,” he told reporters—but hadn’t brought the many documents that the district had decided were required to register a handgun. He could take his revolver back home, police said, but he would have to keep it trigger-locked and unloaded.

Afterward, Heller tried gamely to put a positive spin on what had just transpired, but there was no hiding his frustration. “We’re still working out the procedure of how much the government needs to regulate the citizens’ rights,” he noted ruefully.

A reporter asked, “It’s been a long time coming for you, sir. Are you encouraged?” Heller forced a smile. “It’s been a long battle,” he stated flatly.

For scholars of constitutional law, there is no questioning the momentous change *Heller* wrought. “We live in a world where, in part because of Heller, every single American has the right to own a gun in their own home for self defense,” says Adam Winkler, the UCLA constitutional law professor whose book, *Gunfight*, chronicled the *Heller* case. “His lawsuit paved the way for literally hundreds of other lawsuits. So I think his influence has really been quite huge.”

For the gun lobby and its Republican allies, preserving the victory they were handed via *Heller* has become a rallying point in every Supreme Court nomination fight that has taken place since. Now that President Barack Obama has picked federal judge Merrick Garland to replace Justice Antonin Scalia, author of the *Heller* decision, the National Rifle Association has used the centrist jurist's ambiguous views on gun rights to declare him unacceptable for confirmation—a reminder of how far it will go to protect the gains delivered by his case.

But don't try venerating *Heller* to Dick Heller himself. As his failed mission at the D.C. police station vividly illustrated, the ruling was not quite the sweeping gun-freedom victory he and many others had first thought. Instead, the win was just a single turning point in an all-out war with the precedent that had governed the regulation of guns in America for centuries.

He has spent the last seven years sparring in court with the District of Columbia over an evolving list of gun regulations authorities enacted that were designed to minimally comply with the ruling that bears his name. Over that time, he has grown increasingly disillusioned over the intransigence of courts and legislators, a frustration that has brought his anti-government views bubbling to the surface. Asked to serve as the Rosa Parks of the gun-rights movement, he's come to embody something else: a belief, now dominant in gun-rights circles, that *Heller* didn't go nearly far enough to abolish gun regulations once and for all.

Dick Heller's telling of how he made constitutional history begins with what almost sounds like the setup to a sitcom: "Two guys livin' in a basement apartment in Washington." But it quickly becomes clear that this story and its narrator had a serious mission. Its other character—the second guy in the apartment—was Heller's tenant-roommate, Dane vonBreichenruchardt. Together, as Heller later recalled, they would spend at least a decade plotting to overthrow D.C.'s gun laws before the lawsuit got filed in 2003. (Heller did not respond to requests for comment.)

Supported by Heller's pay as a security guard, vonBreichenruchardt served as Heller's constitutional muse and a "handler of sorts," according to *Reason* magazine's Brian Doherty's history of the case, *Gun Control on Trial*. Living across the street from a public housing project's open-air drug peddling and gunplay, the two in 1996 started the U.S. Bill of Rights Foundation, which vonBreichenruchardt ran as a vehicle to advance his wide-ranging libertarian views on small government, the gold standard, and guns.

Heller carried a gun at work, but—because of D.C.'s then 20-year-old gun ban—had to leave it there when he returned home each day. In 2002, vonBreichenruchardt devised a plan that would lay the groundwork for a lawsuit: Heller would go through the futile gesture of applying for a gun permit as a way to document the practical impossibility of keeping a gun for home protection in the district.

Around the same time, the Cato Institute's Robert Levy was preparing a legal attack on the D.C. law, a case he would personally finance and run with a band of fellow libertarian lawyers. They

needed plaintiffs. Instead of the usual litigants that challenged gun restrictions on Second Amendment grounds—people charged with gun crimes—Levy and his co-counsel sought media-friendly, law-abiding D.C. residents to serve as the public face of their case.

On the surface, Heller seemed the perfect plaintiff to carry the legal challenge. But the lawyers worried about his zealous anti-government views and his penchant for riffing on the supposed similarities between the D.C. government and Russia. Levy was concerned that, in Doherty's words, Heller seemed like "a clichéd vision of the sort of person obsessed with his gun rights." And so, "Dick's role as the named plaintiff was not what was intended," as Levy recalled in a recent interview.

The lawyers chose another D.C. resident, Shelly Parker, as the lead plaintiff. They saw the African-American woman as ideal because she had bravely stood up to drug dealers and had had her life threatened. Heller was essentially demoted, and told to stifle his potentially problematic political statements. "I was supposed to be invisible and vanilla," Heller told Doherty.

Four years into the litigation, Parker and four other original plaintiffs were dropped from the case because they lacked legal standing, meaning they hadn't suffered enough of an "injury," in technical terms, to file suit. Heller, meanwhile, still held the trump card that vonBreichenrucharft had engineered: the denied gun permit. That was enough to sue. *Parker v. D.C.* was renamed *Heller v. D.C.*, with Dick Heller as the sole plaintiff.

The case still faced other hurdles. Early on, lawyers for the NRA—fearing pro-gun forces lacked enough votes to convince a Supreme Court majority that the Second Amendment protects an individual's right to bear arms—tried to talk Levy out of pursuing the case. They then attempted to dissuade him from using as his lead lawyer an untested sole practitioner, Alan Gura. Doubting *Heller's* prospects, the NRA filed a competing suit, *Seegars v. Ashcroft*, helmed by a leading Second Amendment advocate, Stephen Halbrook.

The NRA's concerns were strategic, but Levy says now that something else was going on. "I think the real concern was that three lawyers from outside the NRA started stepping on some toes, and the NRA wasn't appreciative," he says.

During the Supreme Court oral arguments in *Heller*, Gura claimed the court could secure gun rights for individuals while still allowing for certain restrictions, such as a machine gun ban. Gura's concession—followed by language in Scalia's majority opinion that "nothing in our opinion should be taken to cast doubt" on longstanding regulations such as restrictions on felons "or laws imposing conditions and qualifications on the commercial sale of arms"—realigned the spectrum of gun-rights advocates. Gura had spent the previous five years racing past the NRA, fueled by a belief that they could upend centuries of law. But even that brash position paled in comparison with the radicalism of absolutists, and now Gura and his associates found themselves to the left of hard-line advocates.

The recriminations started immediately after Gura's oral argument. "Was it a failure of nerve under pressure, or did someone get to this guy?" libertarian writer Vin Suprynowicz asked.

Gura did not respond to requests for comment. But in Winkler's book, he's quoted as dismissing the "crazy" extremists who wanted him to do more to avoid the kind of compromises that now serve as justification for preserving gun regulations under *Heller*. "That would have probably made me very popular in some cabin somewhere out there in the woods," he said, but he would have lost the case.

"The *Heller* attorneys, Gura and associates, were not that eager to pursue just a pedal-to-the-metal constitutional case," says Larry Pratt of Gun Owners of America, a group that prides itself on its absolutist stance on gun rights. Heller, Pratt adds, is "someone who really gets" the Second Amendment. "In the end if we don't defend the fundamental principle, as Heller himself seems to prefer to do, we end up settling for less than what we want."

Heller at first had no intention of settling for less. Much in demand as a speaker at gun shows and other events, he vowed to make the most of his newfound ability to speak his mind, promising a campaign to expand gun rights and other freedoms.

Soon after the decision, in 2008, he created the Heller Foundation—paired with vonBreichenruchardt's U.S. Bill of Rights Foundation—to promote "a world where arms and self defense rights are considered as essential to human life as food and water." Neither nonprofit makes its financial records available, so it's difficult to discern the extent of their activities. According to an infrequently updated Heller Foundation website—which is oddly adorned with cheesecake photos of young, gun-toting women—Heller's only litigation outside of the D.C. case is in a Dallas lawsuit challenging federal machine-gun regulations. In that case, he signed on to an amicus brief filed by Pratt's GOA that called machine guns "the lineal descendants of founding-era firearms" fulfilling the ultimate purpose of the Second Amendment, "to allow the people to take up effective arms against a tyrant." A district judge's dismissal of that suit now awaits a ruling by the 5th Circuit.

Meanwhile, his post-*Heller* outspokenness has only confirmed Gura and Co's rationale for muzzling him while the suit played out. He has equated Second Amendment advocacy with opposing "socialist Obamacare." He has made a joint endorsement with vonBreichenruchardt of a minimal-government utopia of "liberty-loving people" in New Hampshire. And one element of his foundation's "vision" is to rail against the "enemies of humanity" who "believe in a centralized synarchy," a favored conspiracy-theorist term for government by a secret elite.

The gun-rights community has shifted from pragmatic to absolutist in the years since the Heller case.

But not all of his crusades have been so quixotic. He filed a lawsuit against Washington, D.C. in July 2008, shortly after his disappointing encounter with the handgun-registration bureaucrats.

The so-called *Heller II* suit challenges the regulations D.C. lawmakers put in place following the ruling in *Heller I*.

The case has been far more time-consuming than Heller expected. After parting ways with Gura and Levy, Heller enlisted as his lawyer Stephen Halbrook, the same Second Amendment expert whom the NRA hired to try to block the initial *Heller*. After a seven-year slog, punctuated by the D.C. government's multiple changes to its gun regulations, Halbrook last September managed to win a D.C. Circuit panel's ruling invalidating four of the 10 restrictions Heller challenged, a ruling that stood with last month's decision by the full appeals court not to rehear the case. Halbrook and Heller have not signaled if they will seek Supreme Court review.

The provisions *Heller II* successfully invalidated include a requirement to renew gun permits every three years, a limit of one handgun registration per month, and requirements for permit holders to pass a test on D.C. gun laws and show up at police headquarters with the gun to be registered. Left intact, however, were the District's registration requirement for long guns, a required safety class and registration fees for permit holders, and other obstacles to the sort of frictionless, gun-friendly city Heller wants D.C. to be.

Heller voiced a glass-half-empty take on the outcome in an interview published last October in the NRA magazine *America's 1st Freedom*: "We still have to be registered and fingerprinted, so the worst part is we will still be treated like criminals, but the criminals won't be standing in line to get in."

Heller added that it shouldn't have taken so much effort just to get this far. He blamed D.C. city government "communists" intent on padding their crime-fighting budgets by restricting gun rights, which he claimed only encourages more crime. "Never in my wildest dreams did I expect to be sacrificing my life" just to win the rights in D.C. that he thought he had won long ago, the now-74-year-old Heller said.

"What did he really expect?" responds *Gunfight* author Winkler. "Winning four of 10 challenges to gun regulations is an outstanding victory. I don't think of that as a mixed bag. I mean, you're challenging laws that are designed for public safety. You're challenging laws which have been upheld in court after court after court across the nation."

As the gun-rights community has shifted right in the years since *Heller*, from strategic and pragmatic to absolutist and idealistic, the greatest casualty has been reasonable expectations.

"Everybody understood—or at least any reasonable person understood—that we can't have 11-year-olds with machine guns in front of the White House when the president is delivering a speech," says Levy, the attorney who brought the initial lawsuit. "So, some weapons can be regulated, some people can be regulated, like minors and felons and mentally incompetent people, and some circumstances can be regulated." Battles over defining those circumstances, Levy says, will "be going on for a long time."

