THE CRIME REPORT
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Does the Constitution Protect Stun Guns?

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October 31, 2017

Since its landmark 2008 decision in *District of Columbia v. Heller*, the Supreme Court has largely left it to lower courts to decide how far the government can go in regulating firearms. Those limits are now being debated again in a challenge to a state law that has nothing to do with guns. Massachusetts, one of four states that ban Tasers and stun guns for civilian use, has become a new battleground in the fight over the meaning of the Second Amendment.

Lyn Bates spent years training herself in firearms and self-defense techniques, and helped start a group that teaches other women to do the same. But because of the ban on stun guns, she says she's forced to choose between using lethal weapons or using nothing at all.

When she first heard about the ban, Bates recalled thinking that it was "bad law that made it harder for women in Massachusetts to be safe.

"It never occurred to me that that law might be unconstitutional."

Bates and two other plaintiffs, represented by a public interest law firm in Washington, D.C., are challenging the Massachusetts ban as unconstitutional. On the other side, Massachusetts Attorney General Maura Healey is defending the state's power to prohibit the weapons for the sake of public safety.

The case, *Martel v. Healey*, is now in U.S. District Court, awaiting a judge's decision on summary judgment.

Less than a year ago, the same Massachusetts law was challenged by Jaime Caetano, a woman who was convicted under the ban after police found a stun gun in her purse.
Caetano's case ultimately made it to the Supreme Court, which ruled that the state court's rationale in upholding her conviction was improper and vacated the conviction.
But the court did not directly address whether the ban itself was unconstitutional.
Now, Bates and her co-plaintiffs are challenging the law head-on.

Their argument is that stun guns are neither dangerous nor unusual, a key standard under the *Heller* ruling, in which the Supreme Court recognized for the first time an individual right to bear arms.

Attorney General Healey insists that the weapons are both dangerous and unusual, and without any direct precedent in the colonial era. And even if they were protected under the *Heller* precedent, the state argues that it has a legitimate interest in banning them to protect the public.

"While they are less lethal than firearms, they can nevertheless be deadly," the Attorney General argued in her brief.

(The Attorney General's office declined to offer further comment beyond its briefs in the case). Tasers and stun guns have drawn controversy in recent years, though primarily over their use by law enforcement. A 2015 investigation by the *Washington Post* identified at least 48 deaths that year during incidents in which police used Tasers, but called the link between those deaths and the Tasers "unclear."

That year, a Department of Justice report found that the percentage of local police departments authorizing the weapons increased from 7% in 2000 to 81% in 2013.

Though the terms are often used interchangeably, Tasers and ordinary stun guns are actually distinct. Stun guns require direct contact and deliver a painful shock, while Tasers can be deployed from a distance and can immobilize a target for as long as 30 seconds. Massachusetts is also arguing that alternatives to stun guns are readily available to those seeking tools for self-defense, ranging from guns to pepper spray.

For Donna Major, another of the plaintiffs in *Martel v. Healey*, that choice is not good enough. According to court briefs, Major "has a moral aversion to taking human life and cannot contemplate any circumstances under which she would use a firearm, even in self-defense."•
The case is just one piece of a bigger debate that has been simmering for nearly a decade: how far should the Second Amendment go in protecting an individual's right to bear arms? Second Amendment law remained dormant for decades until the 2008 *Heller* case and a 2010 case which applied that ruling to the states. Those decisions left open major questions surrounding the interpretation of the Second Amendment, and how far legislatures can go in regulating guns.

That is typical for the development of constitutional law, according to Clark Neily, who was a co-counsel in the *Heller* case and is now Vice President for Criminal Justice at the Cato Institute. With First Amendment law, for example, "the Supreme Court didn't try to answer every question that might come up about free speech all in one case or all in two or three cases," said Neily. "The whole judiciary has to kind of feel its way along from that initial point when the Supreme Court says on a particular right: yes, this is something that courts need to be protective of."•
Gun rights advocates have taken those open issues to the courts in an effort to develop and expand the meaning of the Second Amendment. They have challenged laws over who can be prevented from owning guns, where guns may be prohibited, what kinds of weapons can be banned, and much else.

“I think it would be fair to say that in the federal judiciary as a whole there remains a kind of a skepticism — and perhaps a dislike — of guns and gun rights,” said Neily, while noting that there are many exceptions.

Federal courts of appeals have been divided over the contours of the Second Amendment, and until last year, the Supreme Court stayed silent over those circuit splits.

But in its first Second Amendment case since 2010, the Court took on Jaime Caetano’s challenge to the Massachusetts stun gun ban. After dispensing with the case without ruling on the constitutionality of the law, the ban is now back in court.

The Center for Individual Rights (CIR), which filed a friend of the court brief in the Caetano case, saw an opportunity this year to levy the challenge more directly.

The group has previously been involved in several high-profile cases, including challenges to affirmative action policies, the Voting Rights Act, and public employee union fees.
“The court has not yet squarely held that electrical weapons are covered by the Second Amendment, but a fair reading of recent decisions provide good reasons to think that it will, and that it will also find that a complete ban on such weapons unconstitutionally violates the Second Amendment rights of individuals,” said Jennifer Flagg, a spokesperson for CIR.

In recent years, stun gun bans in several other cities and states have been repealed or reversed.
To bring the case, CIR found Bates, Major, and a third plaintiff named Christopher Martel, an electronics sales engineer who wants to carry a stun gun for self-defense.

Bates was sympathetic to their efforts. A few years earlier, she found out about a woman arrested for carrying a stun gun outside a nearby supermarket in Ashland, Massachusetts, where she lives.
“The first I heard of that incident I remember thinking how awful it was for her to be arrested for breaking a bad law just to protect herself,”• Bates said.

That woman was Jaime Caetano, whose case ultimately reached the highest court.
“How amazing is it that a situation in my little town made it to the Supreme Court and I could be part of it?”