The Moral Liberal

Justice Delayed is Justice Denied

By: Ilya Shapiro – December 18, 2013

Four years is too long to wait for a ruling on a constitutional claim. Not for the ultimate vindication of a right that's been summarily denied, mind you, but a mere ruling in a case asserting this right that has long ago been briefed and argued.

That's the situation faced by my colleague Tom Palmer and his fellow plaintiffs in a lawsuit challenging the District of Columbia's complete ban on carrying guns for self-defense outside the home. Palmer v. District of Columbia was one of many suits filed in the wake of the Supreme Court's 2008 ruling in District of Columbia v. Heller, which found that the Second Amendment protects an individual right to keep and bear arms. (Recall that two years ago the Seventh Circuit struck down a similar ban in Chicago, the only other place in the country where there is no legal way to exercise the right to carry – forget places like New York, New Jersey, and Maryland, where it's possible in theory even if local law enforcement can, and always do, deny requests in practice.)

This case has now been pending for more than four years without a resolution of cross-motions for summary judgment – both parties agreed that the case can be decided by the judge on the law, without fact-finding or a trial. The docket (see pages 37-42 of this document) is one of the weirdest I've ever seen for a federal case: Palmer was filed in August 2009 and a hearing was held in January 2010, at which point Judge Henry Kennedy took the case under advisement. In July 2011, Chief Justice John Roberts (!) reassigned the case from Judge Kennedy to Judge Frederick J. Scullin, Jr. of the Northern District of New York. (In other words, Judge Kennedy sat on the case for 18 months and then retired.) There was a status conference soon after, then a motion hearing scheduled for August 2012 (more than a year later), which was rescheduled for October 2012, after which Judge Scullin took the case under advisement, and then… nothing. Plaintiffs' counsel Alan Gura (my friend and sometime co-author) filed a motion to expedite in August 2013, and then a petition for a writ of mandamus – a request that a higher court command a government official to do something – with the U.S. Court of Appeals for the D.C. Circuit in October 2013.

This past Monday, the D.C. Circuit denied the petition in a one-paragraph order, saying, "Petitioners have not shown that the district court's delay in ruling on the pending cross-motions for summary judgment is so egregious or unreasonable as to warrant the extraordinary remedy of mandamus at this time. [citations omitted] We are confident that the district court will act on the motions as promptly as its docket permits."

Not "unreasonable"?! This case has now been pending for than two years before the current judge – after spending two years before a different judge – who's had the full briefing papers from the beginning and held a hearing 14 months ago. In the time since this lawsuit was filed, several other similar cases have produced circuit court (appellate) rulings in Second Amendment-related cases, and

the Supreme Court has considered cert petitions in many of those. And yet, here a district court has not ruled at all as to whether there's any right to bear arms at all.

I'm sorry to say that I'm much less confident than is the D.C. Circuit that Judge Scullin will act promptly. He's had plenty of time (as did Judge Kennedy before him) but apparently has no desire to rule on what would obviously be another high-profile case involving that inconvenient, "embarrassing" Second Amendment.

But the implications of this delay go well beyond the Second Amendment. What does the inability to reach a ruling in Palmer v. District of Columbia mean for the right to access the courts? If the government prosecutes someone for violating a challenged law, they don't wait four years in incarcerating you. What are civil rights lawyers supposed to tell their client? That federal courts don't think that certain claims are important enough to even bother ruling on?

This is a significant constitutional issue involving an outright ban of an enumerated right. If Judge Scullin wants to write some cute opinion that says that D.C.'s ban is just a time-place-manner regulation – e.g., you don't have absolute freedom of speech, everywhere, all the time – the place being Washington and the time being always, let him do that. Alan Gura will then get on with his appeal.

In the meantime, this is a black eye on the judiciary. Judges dismiss meritless lawsuits all the time, so the only conclusion we can draw here is that the district court knows that there's no way to square D.C.'s law with the Constitution but doesn't want to say so.