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Gun Owners' Next Victory in D.C.

By Robert A. Levy
Washington

The Supreme Court, in *District of Columbia v. Heller*, declared that Washington's 32-year ban on all functional firearms violated the Second Amendment. Justice Antonin Scalia's majority opinion, however, applied only to possession of guns in the home. The court did not address, and was not asked to address, firearms carried outside the home. That's the issue posed in a new lawsuit against the District by Tom Palmer (disclosure: my colleague at the Cato Institute) and four other plaintiffs — represented by Alan Gura, the lawyer who successfully argued *Heller* before the court.

After *Heller*, the District relaxed its ban on residents seeking "to register a pistol for use in self-defense within that person's home." But D.C. law still states that "[n]o person shall carry within the District of Columbia either openly or concealed on or about their person, a pistol, without a license." Currently, the city affords no process by which to issue such a license. A first violation of the carry ban is punishable by a fine of up to $5,000 and imprisonment for up to five years.

Does the Constitution mandate that the nation's capital allow firearms to be carried outside the home? The right to bear arms, the court said in *Heller*, is an "individual right unconnected to militia service." To "bear" means to "carry." More specifically, when used with "arms," the opinion said, "bear" means "carrying for a particular purpose — confrontation." Nothing in that formulation implies a right that can be exercised only within one's home.

Indeed Justice Ruth Bader Ginsburg, although she dissented in *Heller*, cited Black's Law Dictionary to suggest in a prior opinion that the Second Amendment entails a right to "wear, bear, or carry ..... upon the person or in the clothing or in a pocket, ... armed and ready ..... in a case of conflict with another person." That language, says Michael O'Shea in the West Virginia Law Review, "reads like a literal description of the practice of lawful concealed carry, as engaged in by millions of Americans in the forty-eight states that authorize the carrying of concealed handguns."

Of course, Second Amendment rights, like First Amendment rights, are not absolute. Scalia was careful to note that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or 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." Lawyers call such statements dicta — a statement not necessary to the holding and, therefore, not binding in other cases.

Nonetheless, dicta can be important. Gura, for that reason, took pains to fashion his new complaint to fit Scalia's framework. The Palmer lawsuit acknowledges that Washington "retains the ability to regulate the manner

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of carrying handguns, prohibit the carrying of handguns in specific, narrowly defined sensitive places, prohibit the carrying of arms that are not within the scope of Second Amendment protection, and disqualify specific, particularly dangerous individuals from carrying handguns." Restrictions on carrying are permissible, but an outright ban is not. As Gura put it, the District "may not completely ban the carrying of handguns for self-defense, deny individuals the right to carry handguns in non-sensitive places, [or] deprive individuals of the right to carry handguns in an arbitrary and capricious manner."

Proponents of a total ban have seized on another of Scalia's pronouncements in *Heller*. He pointed out that 19th-century courts considered prohibitions on carrying concealed weapons "lawful under the Second Amendment or state analogues." That statement, too, is dicta. Perhaps more significant, open-carry rather than concealed-carry was the preferred mode of arms-bearing in the 19th century. To be sure, some states prohibited concealed-carry, but only because they allowed open-carry — an alternative that the District probably would reject. An early Georgia case, for example, upheld a concealed-carry ban but struck down an open-carry ban. Ditto for other cases cited in *Heller*. Essentially, the Second Amendment demands that peaceable citizens be allowed to carry defensive weapons in some manner. The right to bear arms can be limited, but it cannot be destroyed.

Prediction: The courts will (and should) invalidate Washington's unconditional ban on carrying, as well as similar bans in Wisconsin and Illinois, the only two states to have such bans. Regulations consistent with the *Heller* opinion will be permitted. But the Supreme Court has affirmed that the Second Amendment secures an individual right, expressly enumerated in the Constitution. That means government has the burden of demonstrating that its proposed regulations are necessary.

Robert A. Levy is chairman of the Cato Institute and was co-counsel to the plaintiffs in District of Columbia v. Heller.

By Michael Larabee | September 1, 2009; 11:00 AM ET | Category: D.C. , HotTopic , guns
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Comments

Mr. Levy: Thank You! So refreshing to hear an individual championing our Constitution. Keep up the good work. Individuals like you that sacrifice your money and time and commit your intellect to this cause are great Americans.

The Founding Fathers would roll over in their grave if they could hear the nonsense being spout from the mouths of certain members of the DC council that refuses to abide by this pre-ordained right that the Constitution grants to all Americans.

Mr. Levy; I only wish you were on the DC council; it is in dire need of a person who understands US government and law!

Posted by: civilrightist | September 1, 2009 4:07 PM | Report abuse

Scalia's dicta is very troubling. The anti's will wield this to enact California style commercial regulation of firearms. If the anti's can't get an outright ban, they will work to make it *extremely* difficult to manufacture, distribute, sell, purchase, own, and use firearms. It will be interesting to see how lower courts see this dicta and whether it will be precedent for other cases.

Such things as ammunition taxes, microstamping laws, bullet serialization laws... they could all make their way on to the national scene.

I was truly disappointed with the way Scalia wrote Heller. He entirely ignored the "shall not be infringed" portion fo the amendment in his analysis. Furthermore parts of his analysis contain circular logic. (e.g. M16's can be banned because they are not in "common use"... yet they are not in common use because of bans.) The way, I see it, Heller is double edged knife. I don't know if he simply compromised his reasoning to get 5 votes or what. I would have expected better.