WebMemo
Published by The Heritage Foundation
No. 1775
January 18, 2008

The Federal Government's Brief in the D.C. Gun Ban Case: A Glass That Is More Than Half Full

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Although some thoughtful lovers of liberty have lamented the half-empty aspects of the U.S. Solicitor General's recently-filed brief in the D.C. gun ban case (*District of Columbia v. Heller*), the portion that is full is legally far more significant in securing Second Amendment rights in the arena that counts most: the Supreme Court. On careful analysis, the brief's departures from sound principle are internally inconsistent and otherwise not particularly effective. Americans should recognize the importance of the government's concessions to individual liberty and ignore its predictable, bureaucratic attempt to defend existing federal laws. That is what the High Court is most likely to do.

Reason to Rejoice. It is no minor event when the national government clearly and forcefully admits to the highest court in the land that Americans enjoy a constitutional right that has been hotly debated for years, especially when that constitutional right is a limit on the government's own power. That is what the Department of Justice's chief litigator did in a brief filed last week in the Supreme Court case testing the constitutionality of the Washington, D.C., gun ban.

D.C.'s gun ban may be the strictest in the country. The city has banned the registration, and thus the possession, of handguns by private citizens and forbidden its citizens from maintaining any long gun (ordinary rifles or shotguns) in a state of readiness for self-defense in their homes. As the D.C. Circuit Court put it, under the ban, not even a law-abiding citizen may own a weapon "that could be readily accessible to be used effectively when necessary for self-defense in the home."[1]

The original plaintiffs in the case sought only to enforce the right to posses and maintain such working guns in their homes. Among them were an anti-drug activist who had received threats from drug gangs and a security guard who could lawfully use a gun at work protecting the federal judiciary but not at home. In response, D.C. government officials tried to assert their power to prosecute anyone who dared keep a gun in his or her home for self-defense.

If the Second Amendment gives individual Americans a right "to keep and bear arms" that "shall not be infringed," D.C.'s gun ban surely violates that right. Last March, the D.C. Circuit Court held that the Second Amendment does confer that *individual* right, and it then logically concluded that a near-complete ban like the District's was unconstitutional.[2]

The Federal Government's Conflict. No one knew exactly how the federal government would respond when the case was accepted by the Supreme Court. Though one influential office of the Bush Justice Department had earlier opined that the Second Amendment protects an individual right (rather than a mere militia power),[3] the govern-

This paper, in its entirety, can be found at:
www.heritage.org/Research/LegalIssues/wm1775.cfm

Produced by the Center for Legal and Judicial Studies

Published by The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002–4999
(202) 546-4400 • heritage.org

ment, no matter what political party controls it, faces very strong incentives to protect its own power. In addition, the U.S. Justice Department has a traditional obligation to try to defend existing federal laws whenever a reasonable argument can be made to support them, and there are a number of federal gun laws that the department would feel duty-bound to preserve.

Those who understood the department's dual obligations—to defend the Constitution and also to preserve federal power and federal statutes where possible—knew that some attempt at baby-splitting was likely. Serious originalists are correct that the government's brief erred in the line it tried to draw and went unreasonably far in its attempt to preserve government power, but what the government concedes is far more important. And like the original solution proposed by King Solomon, the Solicitor General's solution so threatens the viability of the individual right that it will be quickly rejected by anyone who cherishes such rights.

What the Solicitor General Concedes. The Solicitor General's brief states the government's position in no uncertain terms. The Second Amendment, it says, "protects an individual right to possess firearms unrelated to militia operations."[4] As the brief explains, this right is apparent in the amendment's plain text, its location in the Bill of Rights, and historical practices at the time of its drafting.

Americans of all stripes know that this has been the central issue underlying the Second Amendment for decades. The competing school of thought was that the Second Amendment only protected "militia rights," which in turn were wholly subject to government regulation. The U.S. government sided with the decisive weight of recent scholarly research and the more recent court cases that have seriously examined the constitutional question. That trifecta (government, scholarly, and court opinion) is going to be hard for the Supreme Court to ignore.

In the law and in everyday experience, statements by any party that are against that party's interests are treated as especially reliable and, in most instances, particularly powerful. Thus, the federal government's "admission against interest" that the Second Amendment protects an individual right is likely to have a striking impact in the Supreme Court chambers.

Splitting the Baby. Given the government's obligation to try to save as many federal gun statutes as possible, it is not surprising that the brief also urges the Supreme Court to limit the same individual right it asks the court to recognize. Because other liberties in the Bill of Rights, such as the right to speak freely, are subjected to "well-recognized exceptions"—shouting "fire" in a theater, for example—the brief reasons that the Second Amendment right to bear arms does not apply at all to certain individuals, broad classes of arms, and a wide variety of situations.[5] Under the Solicitor General's theory, the government would have broad discretion to carve out exceptions, with a very deferential judicial review.

In contrast to "statements *against* interest," positions that promote a party's interests in court are treated as mere "litigation positions" that are only as persuasive as the logic behind them. There are many reasons why the Solicitor General's baby splitting will be seen for what it is and rejected.

First, the Solicitor General's arguments about how much deference the courts should pay to the government's attempts to regulate or limit Second Amendment rights is out of line with established law and precedent. The executive branch is entitled to deference by the courts in its interpretations of the scope of federal statutes and regulations, partic-

1. *Parker v. District of Columbia*, 487 F.3d 370, 374 (D.C. Circuit 2007).
2. *Id.* at 395.
3. Memorandum from Office of Legal Counsel, U.S. Department of Justice, to the Attorney General on Whether the Second Amendment Secures an Individual Right, *available at* http://www.usdoj.gov/olc/secondamendment2.pdf.
4. Brief of the United States as amicus curiae in District of Columbia v. Heller 7, No. 07-290 (submitted January 2008), *available at* http://www.scotusblog.com/wp/wp-content/uploads/2008/01/us-heller-brief-1-11-08.pdf.
5. *Id.* at 20-21.

ularly when the statues and regulations are authorized by some admitted power granted to the government.[6] But the government is entitled to no particular deference (and, in some cases, particular suspicion) when it interprets the contours of individuals' fundamental rights against the government. For obvious reasons, the government should not get much deference when it claims the power to limit our individual rights.

Indeed, any lawyer and any non-activist judge knows that once an individual right analogous to the right to free speech or the right to vote is recognized, an enormous body of settled law is applied to its protection. As the Supreme Court has held again and again, the government needs to have exceedingly good reasons to infringe on an individual right, and it may only do so in the most circumscribed ways. Laws that abridge analogous fundamental rights must stand up to "strict scrutiny," among courts' most challenging levels of review, and are upheld only when the government has compelling interests and acts solely to further those interests. This is very different from the kind of review that the government proposes.

In practice, the courts approve very few regulations under this exacting review. The exceptions to analogous individual liberties, such as the right of free speech protected by the First Amendment or the right to vote protected by the Fourteenth and Fifteenth Amendments, are exceedingly rare. Convicted felons may forfeit their right to vote, and under a similar analysis, convicted felons may forfeit their right to possess firearms. A reasonable voter registration law protects the law-abiding voter, and reasonable criminal background checks may be lawful to prevent felons from obtaining guns. But large classes of law-abiding citizens cannot be denied their right to vote, to speak freely, or to exercise their religious freedom based on some flimsy government "interest." Literacy tests and grandfather clauses are seen for what they are and are struck down if they unreasonably interfere with the right to vote.

In sum, the very narrow exceptions to the freedom of speech, the vote, and the practice of one's religion prove the opposite of what the Solicitor General cites them for.

Second, the substantive arguments the Solicitor General advances are terribly flimsy. One argument is that not all hand-held guns are "arms" subject to Second Amendment protection. The brief offers no support, in the constitutional text or elsewhere, for this proposition. Tanks are indeed not arms; cannons are not arms. But all guns are "arms" within the original meaning of the Second Amendment. Any reasonable judge understands that if the government can come up with an artificial definition for "arms," it can do likewise for "speech," "vote," "religion," etc. That there may be a few hard questions about what is a protected arm (and there likely will be) does not undermine the conclusion that common handguns, rifles, and shotguns are "arms" protected by the Second Amendment.

The Solicitor General's next argument is that the amendment refers to a "well regulated militia" and that early laws on militias (which were more like today's army than any present militia group) described the weapons that soldiers should wield.[7] Because Congress could regulate the weapons used by what was essentially the national army in 1792, argues the government, Congress today should be able to prescribe what guns American citizens are able to own. This is a non-sequitur. That the government can regulate the guns used by the military (or the militia when it is in government service) has nothing to do with the individual right to own personal weapons. The government can make rules for military conduct, but it does not follow that it can dictate religious codes that soldiers and civilians alike must follow.

Moreover, this strained argument regarding a "well regulated militia" flatly contradicts the Solicitor General's earlier and more straightforward contention that the "militia" clause "does not limit the substantive right that the [Second] Amendment secures."[8] If one of these contradictory positions is to be rejected, this is the one that will be jettisoned.

6. *See, e.g., Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984).
7. Brief of the United States as amicus curiae in District of Columbia, *supra* n. 4, at 22-23.
8. *Id.* at 14-19.

This part of the Solicitor General's brief probably will not receive much attention for another important reason: The federal statutes it is trying to preserve and the hypotheticals it raises just aren't at issue in the case before the Court. D.C.'s gun ban violates any reasonable conception of a right "to keep and bear arms." The High Court has no reason to decide the exact contours of the right in order to uphold the lower court decision. The lower court simply decided that the denial of a right to possess virtually any gun in a citizen's home is unconstitutional. Going beyond that narrow holding would be dicta, and responsible judges know they are not supposed to issue advisory opinions.

Conclusion. For constitutionalists and gun-rights advocates, the Solicitor General's brief is a big victory. It got the big question, the one that matters, right: Americans do have a right to keep and bear arms. Though the details of how the Solicitor General would like to apply that right are disappointing, the Supreme Court will likely accord that part of the brief the weight it is due: none.

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