Freedom Unbound!

In striking down the D.C. gun ban, the U.S. Supreme Court rules that the Second Amendment protects an individual right of all Americans.

COVER STORY

by Dave Kopel

The Constitution is making a comeback in our nation's capital. June 26, 2008, was a great day for America—the day the United States Supreme Court declared the D.C. gun ban violated the Second Amendment. And it could not have happened without the citizen-activists of the National Rifle Association.

The 5-4 decision in *District of Columbia v. Heller* was the very last one announced at the end of the Supreme Court's 2007-08 term. Justice Antonin Scalia, recognized by his colleagues as the court's expert on firearm law and policy, wrote the majority opinion, which was joined by Chief Justice John Roberts, and by Justices Clarence Thomas, Anthony Kennedy and Samuel Alito.

The opinion held that the Second Amendment guarantees an *individual* right of all Americans, and is not limited to members of the militia or National Guard. The D.C.

"The Second Amendment protects **an individual right to possess a firearm** unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home."

ordinances that ban handguns, and that prohibit self-defense in the home with any gun, violate the Second Amendment, the Supreme Court ruled.

Justice John Paul Stevens authored a dissenting opinion, joined by Justices David Souter, Ruth Bader Ginsburg and Stephen Breyer. In it, they argued that the Second Amendment protects only a miniscule individual right, which applies, at most, to actual militia duty.

Justice Breyer wrote an additional dissent, which was also joined by the other three dissenters. They contended that even if the Second Amendment protects all law-abiding citizens, the handgun ban should be upheld because it is "reasonable."

Yet Justice Scalia's majority opinion was impressively well informed on the Second Amendment scholarship of the past three decades, and stole the spotlight. Scalia cited the research of Stephen Halbrook, Eugene Volokh, Joseph Olson, Clayton Cramer, Joyce Malcolm and many other scholars.

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After setting forth the facts of the case, Scalia's opinion began with a meticulous textual analysis of the words of the Second Amendment. This analysis was supplemented by careful attention to the many early American and English sources that demonstrated the meaning of the various words.

Justice Stevens' dissent made a frantic effort to read the Second Amendment as militia-only, but it was heavily dependent on implausible inferences and leaps of reasoning. For example, Justice Stevens noted that in the late 18th century, the phrases "keep arms" and "bear arms" were often used to refer to arms possession and use in military bodies such as the militia. But as Justice Scalia demonstrated, there are also many examples of both phrases being used to refer to owning and carrying guns for other purposes, such as self-defense and hunting.

Having analyzed the text of the Second Amendment, the majority opinion detailed the interpretation of the Second Amendment in the first half of the 19th century. Quoting the words of St. George Tucker, William Rawle and Joseph Story, Justice Scalia showed that virtually every legal scholar of the time, along with state and federal courts, recognized the Second Amendment as protecting an individual right to have guns for various purposes, including self-defense.

As Justice Scalia explained, after the Civil War, Congress passed the Freedmen's Bureau Act of 1866, the Civil Rights Act of 1871 and then the Fourteenth Amendment with the explicit purpose of stopping southern state governments from interfering with the Second Amendment rights of former slaves to own firearms to protect their homes and families. All of the scholarly commentators of the late 19th century—including the legal giants Thomas Cooley and Oliver Wendell Holmes, Jr.—recognized the Second Amendment as guaranteeing an individual right.

Quite significantly, the *Heller* majority observed that the Constitution does not grant a right to arms. Instead, the Constitution simply recognizes and protects an inherent human right: "It has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right," the opinion stated. "The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it 'shall not be infringed.'"

The 1876 *Cruikshank* case had made the same point. The *Heller* opinion quoted with approval the words of the greatest legal scholar of the 18th century, William Blackstone, who wrote that the right to arms in the English Declaration of Rights protected the "natural right of resistance and self-preservation." Similarly, the *Heller* majority quoted the 1846 Georgia Supreme Court decision in *Nunn v. State,* which "construed the Second Amendment as protecting the '*natural* right of self-defence.'"

The Stevens dissent placed great reliance on its claim that the Supreme Court's 1939 decision in *United States v. Miller* had conclusively found that the Second Amendment has no application outside of the militia. But it seems questionable whether Justice Stevens, or the other justices who joined his dissent, had read *Miller* carefully. The dissent described *Miller* as "upholding a conviction …" .

To the contrary, the *Miller* case came to the Supreme Court after a federal district court dismissed an indictment. The accused criminals in *Miller* had never been put on trial, let alone convicted.

As Justice Scalia explained in the majority opinion, the *Miller* opinion actually turned on whether the particular type of gun was protected by the Second Amendment, and did not declare that only members of the militia had a right to arms. Besides, the reasoning in *Miller* was cursory and opaque.

Significantly, as detailed in a law review article cited by Justice Scalia, *Miller* was apparently a collusive prosecution in

"The District's total ban on handgun possession in the home amounts to **a prohibition on an entire class of 'arms'** that Americans overwhelmingly choose for the lawful purpose of self-defense."

which the defendant's lawyer and the trial judge cooperated with the U.S. attorney's scheme to send the weakest possible Second Amendment case to the Supreme Court as a test case, thus ensuring that the National Firearms Act of 1934 would be upheld. In the case, the defendant's lawyer did not even present a brief to the Supreme Court.

In response to Justice Stevens' assertion that "hundreds of judges" have relied on the anti-individual rights interpretation of *Miller*, Scalia fired back: "Their erroneous reliance upon an uncontested and virtually unreasoned case cannot nullify the reliance of millions of Americans (as our historical analysis has shown) upon the true meaning of the right to keep and bear arms."

Perhaps the gun ban that is most clearly unconstitutional under *Heller* is another D.C. law that was not at issue in the case: D.C.'s semi-auto ban.

D.C. outlaws any self-loading rifle or handgun for which there exists a magazine holding 12 or more rounds. For example, the Colt 1911 comes with a standard 7-round magazine. It's possible, if you search long enough, to buy a 15- or 20-round magazine for the Colt. Except as a novelty, these magazines have little use on a 1911. They make the handgun much too large to carry and they extend so far below the grip that they make the gun awkward to handle.

In the District of Columbia (but nowhere else in the United States), the Colt 1911 is banned—not just if you have a 20-round magazine for the gun, but banned even if you only have the standard 7-round magazine. Why? Preposterously, the D.C. ordinance classifies the 7-round Colt as a "machine gun," and outlaws civilian possession of these so-called "machine guns."

The *Heller* decision explicitly states that there may not be bans on guns "typically possessed by law-abiding citizens for lawful purposes." This surely encompasses the 1911 and the thousands of other models banned by D.C.'s overly broad "machine gun" law. The D.C. ordinance prohibits more than half of the handguns made in the United States in a typical year, and a very large fraction of rifles, including low-powered .22 caliber rifles from venerable companies like Winchester, Ruger, Remington and Marlin.

As for the constitutionality of other gun controls: "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."

Very significantly, *Heller* did not attempt to answer the question of whether the Fourteenth Amendment makes the Second Amendment enforceable against state and local governments. By longstanding Supreme Court interpretation, each of the provisions of the Bill of Rights applies only to the federal government. A provision becomes a limit on state and local governments only if the Supreme Court chooses to "incorporate" that provision into the Fourteenth Amendment (which forbids states to deprive persons of life, liberty or property without due process of law).

The Supreme Court has not definitively ruled on whether the Second Amendment is incorporated. Some 19th century cases rejected applying the Second Amendment to the states, but these cases predate the Supreme Court's current method of Fourteenth Amendment analysis.

While not addressing the incorporation issue head-on, Justice Scalia does imply that the Second Amendment is incorporated by repeatedly equating the Second Amendment to the First and Fourth Amendments, which have long been incorporated into the Fourteenth, and by noting that "the Second Amendment right is exercised individually and belongs to all Americans."

The NRA is already bringing legal cases against other local gun bans, such as San Francisco's gun ban for residents of public housing, and the handgun bans in Chicago and several of its surrounding suburbs. These NRA cases might give the Supreme Court, in the foreseeable future, the opportunity to issue a decisive ruling on incorporation.

For now, *Heller* limits only the federal government—and entities such as the D.C. City Council, whose powers are granted by the federal government.

D.C. and its allies had argued that a handgun ban was acceptable because people could still have long guns for self-defense in the home. But the *Heller* majority observed: "There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police. Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid."

Having declared that the Second Amendment guarantees an *individual* right whose core is the ownership of firearms for lawful self-defense in the home, the Scalia opinion quickly disposed of D.C.'s ban on functional firearms in the home.

"Assuming he is not disqualified from exercising Second Amendment rights, **the District must permit Heller to register his handgun** and must issue him a license to carry it in the home."

The D.C. law required that rifles and shotguns (and grandfathered handguns owned before the 1976 ban) be locked or disassembled at all times in the home. Because there was no exception for self-defense, the locking law was ruled unconstitutional.

The dissenting opinion written by Justice Breyer said that courts should perform an *ad hoc* balancing test on the merits of gun bans or gun controls. Detailing the social science evidence, which had been presented by the parties and their *amici*, Justice Breyer wrote that there were concerns of social science on both sides of the issue. Accordingly, he argued, courts should not interfere with the D.C. City Council's decision.

Justice Scalia accurately noted, however, that the Breyer approach would negate the very decision to enact the Second Amendment.

"We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach," Scalia wrote. "The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad."

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Heller could not have been won if handgun prohibition were not abnormal in the United States. When the 1976 D.C. handgun ban was enacted, some city council members openly acknowledged that the ban would accomplish little, but that they hoped it would be the start of a trend toward a national handgun ban.

Yet the handgun ban virus spread only to Chicago and four Chicago suburbs. Through exhaustive efforts, the NRA convinced voters to crush statewide handgun ban initiatives in Massachusetts (1976) and California (1982). The NRA also successfully pushed for pre-emption laws in nearly every state in the country to prevent local governments from banning handguns.

These efforts of years past doubtless had a tremendous impact on the *Heller* decision. Though pro-rights lawyers made powerful arguments about the original meaning of the Second Amendment, the Supreme Court's ultimate ruling would have been harder to win if handgun bans had already been on the books in a dozen states and scores of cities.

The great legal skills of all the many attorneys who worked on the case were essential to the pro-gun rights victory in *Heller*. But it's important to note that the best pro-Second Amendment lawyers in America had the chance to win because the NRA has labored for decades to make sure that handgun prohibition is freakishly rare in American life.

Heller's 5-4 margin shows that Supreme Court appointments and Senate confirmations really do matter. Had a President Walter Mondale, Michael Dukakis, Al Gore or John Kerry been appointing justices, the result in *Heller* would likely have been much different, and the Second Amendment would have been nullified. And had just a few 2002 and 2004 U.S. Senate races turned out differently—had Second Amendment citizen-activists worked just a little less hard—the nomination of Samuel Alito would have been filibustered to death.

On the heels of this major victory, it's important to note that citizen activism is no less important this year. A President Barack Obama would undoubtedly appoint justices who would ensure that *Heller* was the last case in which the Second Amendment was enforced. Obama justices and an Obama U.S. Department of Justice would fight energetically against recognizing the Second Amendment as a limit on state or local gun bans.

Heller is not the end of the struggle against domestic and global prohibitionists who would destroy the natural right of resistance and self-preservation. Yet *Heller* is an enormously important victory that creates the opportunity for more victories in the future.

In the long run, whether *Heller*'s potential will be fulfilled depends mainly on whether America's oldest civil rights organization—the National Rifle Association—continues to receive the support of citizen-activists who believe strongly in the Right to Keep and Bear Arms.

For more information on this historic case, go to www.nraila.org/heller.