D.C. Gun Case: Second Amendment on Trial

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Commentary By Juliet A. Leftwich

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Next week, the U.S. Supreme Court will hear oral arguments in *District of Columbia v. Heller*, 07-290, a historic case involving the meaning of the Second Amendment. The court will review a decision of the D.C. Circuit U.S. Court of Appeals that struck down the District's 32-year-old handgun possession ban, interpreting the Second Amendment as guaranteeing a private right to possess firearms that is unrelated to service in a well-regulated state militia. That decision marked the first time in U.S. history a federal appellate court had invalidated a gun law on Second Amendment grounds.

The lower court ruling was baffling, not only because it ignored the plain language of the Second Amendment — "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed" — but also because it contradicted nearly 70 years of legal precedent.

The Supreme Court addressed the meaning of the Second Amendment in *United States v. Miller*, 307 U.S. 174 (1939) where, in a unanimous decision, it rejected a Second Amendment challenge to a federal law prohibiting the interstate transportation of sawed-off shotguns. The court held that the "obvious purpose" of the Second Amendment is to "assure the continuation and render possible the effectiveness" of the state militia, and the amendment "must be interpreted and applied with that end in view."

Since *Miller*, over 200 federal and state appellate courts have rejected Second Amendment challenges to a variety of gun laws, such as those banning certain classes of firearms (including handguns), requiring the registration of guns and licensing of gun owners, and prohibiting firearm possession by convicted felons. The Supreme Court has had repeated opportunities to review these decisions and consistently has declined to do so.

Notwithstanding nearly seven decades of well-settled case law in this area, the D.C. Circuit concluded that the Second Amendment somehow enshrines a private "right to bear arms" unrelated to militia service. This, of course, is the view the National Rifle Association and other gun rights groups have long touted. The gun lobby has been so successful in perpetuating this legal fiction that most Americans, including many journalists, policymakers and presidential candidates, believe it to be true. In fact, a recent USA TODAY/Gallup Poll survey found that 73 percent of the respondents (including 93 percent of gun owners) believe the Constitution guarantees the rights of Americans to own guns.

Former U.S. Supreme Court Chief Justice Warren Burger once characterized the gun

lobby's relentless misinformation campaign regarding the Second Amendment as "one of the greatest pieces of fraud, I repeat the word fraud, on the American public by special-interest groups that I have ever seen in my lifetime."

The NRA's mythical view of the Second Amendment is completely at odds with history, as well as legal precedent. At the time the Bill of Rights was adopted, the phrase "keep and bear arms" had a strictly military connotation. Indeed, all recorded remarks from the congressional debate on the Second Amendment relate to military service; none discuss the private use of weapons.

The military nature of the amendment is reinforced further by the fact that a conscientious-objector clause was included in James Madison's original draft of the Second Amendment. Although that clause ("no person religiously scrupulous of bearing arms, shall be compelled to render military service") was later removed, it demonstrates that private gun ownership was not contemplated by the drafters.

History also makes clear that the underlying purpose of the Second Amendment was to create a balance of power between the states and the newly formed federal government. Under the Articles of Confederation, the states had been required to maintain their own "well-regulated and disciplined militia." Militia service and training were generally mandated for able-bodied men, and militia members were required to provide their own arms.

The new Constitution, however, provided for a national standing army and gave Congress authority to organize, arm and discipline state militias. The Second Amendment grew out of concerns that the federal government could exercise this authority to disarm the militias, preventing those citizen military groups from protecting their communities when called upon to do so.

Because the Second Amendment was designed to limit the ability of the federal government to interfere with state militias, many courts, including, in pre-*Miller* decisions, the U.S. Supreme Court, have held that the amendment has no application to state or local laws. For similar reasons, i.e., because the District's handgun ban is not a federal law that seeks to disarm a state militia, the Second Amendment is equally inapplicable to the District.

The D.C. Circuit turned a blind eye to the text, history and underlying purpose of the Second Amendment, concluding instead that the amendment guarantees a right to own guns for purely private purposes. Although the court held that this purported right is subject to "reasonable regulation," it found the District's handgun possession ban per se unreasonable merely because a handgun is an "arm" within the meaning of the amendment. This conclusion is both unprecedented and incorrect.

In fact, the lower court was presented with ample evidence demonstrating the reasonableness of the District's decision to ban handguns. The 1976 law was not adopted on a whim. On the contrary, it was enacted after extensive deliberation in response to

evidence showing that handguns pose a unique threat in the District's densely populated urban environment; specifically, that they are disproportionately used in violent crimes, accidental shootings, shootings of police, and suicides. Moreover, the District allowed residents to continue to possess long guns, thus permitting the possession of "arms" for self-defense. Accordingly, even under the lower court's interpretation of the Second Amendment, the District's handgun possession ban should be upheld as a constitutionally reasonable restriction.

Significantly, the D.C. law has proven particularly effective at reducing rates of suicide. In fact, the District's overall suicide rate has consistently been the lowest in the nation. Moreover, between 2000 and 2004, more than 1,400 children 16 or younger committed suicide in the U.S. Not one child in that age group committed suicide during this time period in the District.

Nineteen *amicus* briefs, written on behalf of 188 *amici*, were filed in support of the District in the *Heller* case. Those briefs represent a wide variety of important institutional voices, including law enforcement groups, public health advocates, law professors, historians, linguists, the American Bar Association, major American cities, states, former Department of Justice officials and members of Congress. These *amici* recognize, as does the general public, that the *Heller* case presents an issue of enormous national importance.

Gun violence takes the lives of more than 30,000 Americans each year. The daily headlines regarding shootings at schools, shopping centers and other supposedly safe havens, are inescapable.

The Supreme Court now has the opportunity to expose the gun lobby's fraud and reaffirm the only interpretation of the Second Amendment that is supported by the text, historical record and the court's own precedent. The court must make clear, once and for all, that the Second Amendment is not an obstacle to the common-sense gun laws that our nation needs. In the words of the District, it is "quite literally a matter of life and death."

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