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## IX. LOOKING AHEAD

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## **“D.C. Wants High Court to Hear Gun Case”**

*The Washington Post*

July 17, 2007

David Nakamura

The District will ask the Supreme Court to uphold its strict 30-year handgun ban, setting up what legal experts said could be a test of the Second Amendment with broad ramifications.

The high court has not ruled on the Second Amendment protection of the right to keep and bear arms since 1939. But at a morning news conference yesterday, Mayor Adrian M. Fenty (D) and Attorney General Linda Singer said they expect the court to hear a case they called crucial to public safety.

In a 2 to 1 decision in March, a panel of judges for the U.S. Court of Appeals for the D.C. Circuit ruled that the city's prohibition against residents keeping handguns in their homes is unconstitutional. In May, the full appeals court declined a petition from the city to reconsider the panel's decision.

Some gun control advocates have cautioned that a defeat in the Supreme Court could lead to tough gun laws being overturned in major cities, including New York, Chicago and Detroit. Fenty said the District had no choice but to fight because more guns in homes could lead to increases in violent crime and deadly accidents.

“The handgun ban has saved many lives and will continue to do so if it remains in effect,” Fenty said. “Wherever I go, the response from the residents is, ‘Mayor Fenty, you’ve got to fight this all the way to the Supreme Court.’”

Gun rights advocates welcomed the chance to take the fight to the high court. A central question the D.C. case poses is whether the Second Amendment protects an individual's rights to keep and bear arms.

Experts say gun rights advocates have never had a better chance for a major Second Amendment victory, because a significant number of justices on the Supreme Court have indicated a preference for the individual-rights interpretation.

“Any accurate, unbiased reading of American history is going to come down to this being an individual right,” said Wayne LaPierre, executive vice president of the National Rifle Association. “To deny people the right to own a firearm in their home for personal protection is simply out of step with the Constitution.”

The city's three-decade-old gun ban was challenged by six D.C. residents—backed by the libertarian Cato Institute—who said they wanted to keep guns in their homes for self-defense. The District's law bars all handguns unless they were registered before 1976; it was passed that year to try to curb gun violence, but it has come under attack in Congress and in the courts.

The Second Amendment states: “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.”

The last Supreme Court ruling on the issue, in *Miller v. the United States*, is considered by many to define the right to bear arms as being given to militias, not to individuals.

U.S. District Judge Emmet G. Sullivan dismissed the residents' lawsuit—*Parker v. the District of Columbia*—several years ago, ruling that the amendment was tailored to membership in a militia.

But the appeals panel ruled in March that the District has a right to regulate and require registration of firearms but not to ban them in homes. The ruling also struck down a section of the law that required owners of registered guns, including shotguns, to disassemble them or use trigger locks.

“We’re very pleased the case will go to the Supreme Court,” said Alan Gura, an attorney for the residents. “We believe it will hear the case and will affirm that the Bill of Rights does protect the individual.”

Singer said she will receive pro bono legal assistance from several high-profile constitutional law experts, including former

acting solicitor general Walter E. Dellinger III. She called the city’s handgun laws “reasonable” and said many handguns are used in illegal activities.

“This is not a law which takes away the rights to keep and bear arms,” Dellinger said. “It regulates one kind of weapon: handguns.”

Singer said she will ask for a 30-day extension to file the District’s appeal with the Supreme Court, which would push the deadline to Sept. 5. The city’s handgun laws will remain in effect throughout the appeal, Singer said.

“If the U.S. Supreme Court decides to hear this case, it could produce the most significant Second Amendment ruling in our history,” Paul Helmke, president of the Brady Center to Prevent Gun Violence, said in a statement. “If the U.S. Supreme Court follows the words of the U.S. Constitution and the Court’s own precedents, it should reverse the Appeals Court ruling and allow the District’s law to stand.”

## **“District of Columbia Set Back in Fight Over Its Gun Law”**

*The New York Times*

May 9, 2007

Adam Liptak

A federal appeals court in Washington refused yesterday to revisit a March decision striking down parts of a gun control law there. The development brought the case one step closer to possible Supreme Court consideration of the Second Amendment's meaning.

The earlier decision, by a divided three-judge panel, was the first federal appellate ruling in the nation's history to hold a gun control law unconstitutional on the ground that the Second Amendment's guarantee of a right to bear arms protects the rights of individuals, as opposed to the collective rights of state militias.

Yesterday's decision was terse, indicating little more than that 4 of the 10 active judges on the court, the United States Court of Appeals for the District of Columbia Circuit, would have granted the petition for rehearing.

“We are deeply disappointed that the court narrowly denied reconsideration,” Mayor Adrian M. Fenty said in a statement.

But Mr. Fenty and Washington's lawyers did not immediately vow to ask the Supreme Court to hear the case. “Right now we're evaluating our options,” said Linda Singer, Washington's attorney general. “We haven't ruled anything in or out.”

Because the March decision's interpretation

of the Second Amendment is in conflict with that of nine other federal appeals courts, a review by the Supreme Court is both warranted and likely should it be requested, said Michael C. Dorf, a Columbia law professor who is an authority on the Second Amendment.

Robert A. Levy, a lawyer for the plaintiffs in the case—six residents of Washington who opposed its gun law—said they would not fight a request for Supreme Court review. Mr. Levy added that he feared that Washington might be persuaded by proponents of gun control laws elsewhere to comply with the March ruling rather than risk a Supreme Court decision that could adopt an individual rights interpretation nationally.

“The obligation of District of Columbia officials,” Mr. Levy said, “is to demonstrate that D.C. laws are constitutional and not to engage in strategic behavior driven by concerns elsewhere in the country.”

Washington's gun law is among the strictest in the nation. The earlier decision struck down provisions of it that almost always banned the registration of handguns, that prohibited carrying handguns without a license even from one room of a home to another and that required lawfully owned firearms to be kept unloaded and disassembled or bound by a trigger lock.

## **“D.C.’s Ban on Handguns in Homes Is Thrown Out”**

*The Washington Post*

March 10, 2007

David Nakamura and Robert Barnes

A federal appeals court ruled yesterday that the District’s longtime ban on keeping handguns in homes is unconstitutional.

The 2 to 1 decision by an appellate panel outraged D.C. Mayor Adrian M. Fenty and other city leaders, who said that they will appeal and that gun-related crimes could rise if the ruling takes effect. The outcome elated opponents of strict gun controls because it knocked down one of the toughest laws in the country and vindicated their interpretation of the U.S. Constitution’s language on the right to bear arms.

The panel from the U.S. Court of Appeals for the D.C. Circuit became the nation’s first federal appeals court to overturn a gun-control law by declaring that the Second Amendment grants a person the right to possess firearms. One other circuit shares that viewpoint on individual rights, but others across the country say the protection that the Second Amendment offers relates to states being able to maintain a militia. Legal experts said the conflict could lead to the first Supreme Court review of the issue in nearly 70 years.

The District’s law bars all handguns unless they were registered before 1976: it was passed that year to try to curb gun violence, but it has come under attack during the past three decades in Congress and in the courts. Yesterday’s ruling guts key parts of the law but does not address provisions that effectively bar private citizens from carrying guns outside the home.

Fenty (D) said the city is committed to pursuing additional appeals, adding: “I am personally deeply disappointed and frankly outraged by this decision. It flies in the face of laws that have helped decrease gun violence in the District of Columbia.”

City attorneys said that it would take at least 30 days for the court’s decision to go into effect, during which time the District probably will file its appeal. During an appeal, which could last more than a year, the current law would remain in effect, the lawyers said.

Fenty said city officials will “do everything in our power to work to get the decision overturned, and we will vigorously enforce our handgun laws during that time.”

The ruling was the latest development in four years of litigation waged by six D.C. residents who said they wanted to keep guns in their homes for self-defense. Alan Gura, an attorney for the plaintiffs, said, “This is a tremendous victory for the civil rights of all Americans.”

Senior Judge Laurence H. Silberman wrote the majority opinion, also signed by Thomas B. Griffith. Karen LeCraft Henderson dissented. All three were appointed by Republican presidents.

“We conclude that the Second Amendment protects an individual right to keep and bear arms,” Silberman said in the 58-page majority ruling.

The residents filed their lawsuit—*Parker v. the District of Columbia*—months after then-Attorney General John D. Ashcroft declared that gun bans violate the Second Amendment. They were aided by the Cato Institute, a nonprofit group that advocates personal liberties.

The suit said the ban on handgun ownership violates the Second Amendment, which states: “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.”

U.S. District Judge Emmet G. Sullivan dismissed the suit a year later, saying the amendment was tailored to membership in a militia, which he defined as an organized military body. . . .

In the majority opinion, Silberman wrote that federal and state courts have been divided about the extent of protections covered by the Second Amendment. Some have sided with the District’s position, that a militia means just that. Others have ruled that the amendment is broader, covering the individual rights of people who own guns for hunting or self-defense.

The Supreme Court addressed the Second Amendment in 1939, but it did not hold that the right to bear arms meant specifically that a person could do so.

Yesterday’s majority opinion said that the District has a right to regulate and require the registration of firearms but not to ban them in homes. The ruling also struck down a section of the D.C. law that required owners of registered guns, including shotguns, to disassemble them or use trigger locks, saying that would render the weapons useless.

In her dissent, Henderson wrote that “the right of the people to keep and bear arms relates to those Militia whose continued vitality is required to safeguard the individual States.” She also said that because the District is not a state, the Second Amendment does not apply.

Silberman, a staunch conservative, was nominated to the appellate court by President Ronald Reagan, and Griffith was nominated by President Bush. Henderson was nominated by President George H.W. Bush.

Critics have long said that the D.C. law is ineffective, noting that the city has had hundreds of homicides in recent years, most of which were committed with handguns. Of last year’s 169 homicides, 137 were committed with firearms, D.C. police said. Enforcing the strict handgun ban is difficult with so many guns on the streets, but police recovered more than 2,600 guns last year.

This was not lost on the Court of Appeals. In a footnote, Silberman noted that “the black market for handguns in the District is so strong that handguns are readily available (probably at little premium) to criminals. It is asserted, therefore, that the D.C. gun control laws irrationally prevent only law abiding citizens from owning handguns.”

People in Virginia may legally carry guns openly or conceal them in their homes or businesses. They also may carry concealed weapons in public if they obtain a court-issued permit. In Maryland, residents can own handguns, and gun owners with “good and substantial” reasons can apply for permits to carry them.

Tom G. Palmer, a senior fellow at the Cato Institute and one of the plaintiffs who

prevailed yesterday, said he once used a handgun to ward off potential attackers when he lived in San Jose. He said the ruling would help residents protect themselves.

“Let’s be honest: Although there are many fine officers in the police department, there’s a simple test. Call Domino’s Pizza or the police, and time which one gets there first,” Palmer said.

Plaintiff Gillian St. Lawrence, 28, who lives with her husband in Georgetown, said she has a shotgun in her home and, following District law, keeps it unloaded and bound with a trigger lock. She said she’s looking forward to residents “being able to defend themselves in their homes.”

NRA Executive Vice President Wayne LaPierre said, “The only people who have anything to fear from a decision like this are the people who intend to break into someone’s home in the middle of the night.”

But former U.S. deputy attorney general Eric H. Holder Jr. said that weakening the gun law “opens the door to more people

having more access to guns and putting guns on the streets.”

If the District appeals, the first step would be to seek a review by the full D.C. Circuit. After that decision, the Supreme Court could be asked to review the case. Constitutional scholars said the case is ripe for an airing before the Supreme Court no matter who might prevail in an appeal. However, some scholars said that a D.C. loss in the high court could create a stronger precedent against strict gun laws.

D.C. Council member Phil Mendelson (D-At Large) said the ruling could “lead to the overturning of every gun control law in the city. I don’t think we have any choice but to fight it.”

D.C. resident Kenny Barnes, who became a gun control advocate after his 37-year-old son was shot to death on U Street NW, called the ruling “crazy.”

“What kind of message are you sending?” Barnes asked. “This is not Dodge City in the 1800s.”



## **“Plaintiffs Reflect on Gun Ruling”**

*The Washington Post*

March 11, 2007

Elissa Silverman and Allison Klein

George Lyon says he wants a gun in his home because it's his constitutional right. Tom Palmer says he used a gun to ward off a beating. And Gillian St. Lawrence says her shotgun is useless because it has to be unloaded and have its trigger locked.

They are among the six city residents who successfully challenged the District's long-standing gun law, winning a major ruling Friday in a case that could reach the Supreme Court. The three men and three women share a strong desire to keep guns legally in their homes in what they say is a violent city.

“We live in a society where having a handgun at home can be the difference between life and death,” Palmer said.

D.C. officials contend that easing the gun ban will put citizens at an even higher risk of crime and say they will appeal the decision. An appeal would be likely to delay any change to the law. Officials maintain that the gun law is just as important as when it was enacted 31 years ago. Even with a ban, guns are used in more than 80 percent of the city's homicides, and police are struggling to get them out of the hands of criminals: More than 2,600 were seized last year.

Alan Gura, one of the plaintiffs' attorneys, said the residents who brought the suit are just like many District residents who want to feel safe and secure in their homes. They believe the Second Amendment gives them the right to possess a gun for that purpose.

“These are just six average, normal people

who come from all walks of life,” Gura said. “They just want to have their rights respected by the city.”

The U.S. Court of Appeals for the D.C. Circuit ruled in their favor Friday with a 2 to 1 vote that found the Second Amendment gives them the right to have handguns in their homes. It was the first major blow to the District's law, which bars all handguns unless they were registered before 1976. The court also struck down a provision requiring registered guns, including shotguns, to be disassembled or bound with trigger locks.

The case drew formidable lineups on both sides, with the National Rifle Association and the Brady Center to Prevent Gun Violence filing court papers. The ruling marked the first time that a federal appeals court has overturned a gun control law by declaring that the Second Amendment grants a person the right to possess a firearm.

Gura declined to say how he assembled the plaintiffs, who came to the case with different backgrounds and motivations.

Some of the plaintiffs grew up with guns in and around their homes and belong to the National Rifle Association. A few are involved with libertarian organizations, including the Cato Institute, which provided legal assistance in the lawsuit.

Lyon, 52, of Adams Morgan, said he kept a pistol in his home when he lived in Virginia and still owns several firearms, which he keeps outside of the city. He moved to the

District in 1984.

“Guns are a tool, and they have a use. The use is protection and security,” said Lyon, who practices communications law at a firm in Tysons Corner. “The District of Columbia’s laws prevent that.”

Palmer, 50, said that his gun rescued him 25 years ago when he was approached by a group of men in San Jose. Palmer, who is gay, said he believed the men were targeting him because of his sexual orientation. He said he and a friend started to run away, but then he took action.

“I turned around and showed them the business side of my gun and told them if they took another step, I’d shoot,” he said, adding that that ended the confrontation.

Palmer moved to the District in 1975 and lives in the U Street NW corridor, where police have struggled lately to curb assaults and other crimes. He said he considers it a fairly safe neighborhood, although his home was broken into once. He works as director of educational programs for the Cato Institute and travels to war-torn countries including Iraq.

He keeps a shotgun and several pistols stored in Colorado and Virginia. Guns have been used in his family for generations. “My mother always had two, and she kept one under her bed,” Palmer said.

St. Lawrence, 28, said that crime is on the rise in her Georgetown neighborhood and that criminals don’t worry about violating the District’s gun ban. “We have no way to defend ourselves,” she said.

A mortgage broker who was raised in a military family, St. Lawrence owns a shotgun, which she bought in Virginia. She said it sat

at the store for two years while she went through the city’s lengthy permit process. Abiding by District law, she said she keeps it unloaded and bound by a trigger lock in her home.

When she learned about the lawsuit through the Institute for Justice, a libertarian group, she said she was happy to join. “We have a Second Amendment; we should be able to rely on it,” she said.

The court ruling hinged on the Second Amendment, which states, “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.”

The District said the amendment applies solely to militias—a position endorsed in the past by all but one of the nation’s federal appeals courts. But the D.C. appeals panel said it covered individual rights of people who own guns for other purposes, such as hunting or self-defense. The Supreme Court has not taken up the issue since 1939.

Plaintiff Shelly Parker said in the lawsuit that she wanted a gun to ward off drug dealers in Northeast Washington. Tracey Ambeau also said she wanted a gun for self-defense for her home in Northwest. Neither could be reached for comment.

Dick Heller, 65, said he became involved in the firearms debate in 1997 after he read a news story about a burglary in the District in which the homeowner shot the intruder—and the homeowner was charged with a crime.

“That’s what made us really livid,” said Heller, who lives with his wife in Capitol Hill. “After that, I knew we had to be proactive.”

Heller’s decision to join the lawsuit proved

fortuitous for the pro-gun contingent. The appeals court ruled that he was the only plaintiff with legal standing because he attempted to register a handgun in the District and was turned away.

When the suit was filed in 2003, Heller worked as a special police officer providing security at a federal court building near Union Station. He said he found it insulting that he could not bring his gun home.

## “The Second Amendment: Is the Court Interested?”

*SCOTUSblog*

March 09, 2007

Lyle Denniston

Nearly ten years ago, Supreme Court Justice Clarence Thomas wrote: “This Court has not had recent occasion to consider the nature of the substantive right safeguarded by the Second Amendment. . . . Perhaps, at some future date, this Court will have the opportunity to determine whether Justice [Joseph] Story was correct when he wrote that the right to bear arms ‘has justly been considered, as the palladium of the liberties of a republic.’” (Concurring opinion in *Printz v. U.S.*, June 27, 1997). Since that time, the Court has refused repeatedly to take up the issue.

Whether it can be induced to do so is a revived question, now that a divided D.C. Circuit Court has ruled unqualifiedly that the Second Amendment “protects an individual right to keep and bear arms. . . . The activities it protects are not limited to militia service, nor is an individual’s enjoyment of the right contingent upon his or her continued or intermittent enrollment in the militia.” The 2-1 ruling came Friday in *Parker, et al., v. District of Columbia, et al.* (Circuit docket 04-7041).

That ruling overturned a decision nearly three years ago by U.S. District Judge Emmet G. Sullivan in Washington, who found no individual right to have or keep guns. Sullivan wrote that, while the challengers to a District of Columbia gun control law “extol many thought-provoking and historically interesting arguments for finding an individual right, this Court would be in error to overlook sixty-five years of unchanged Supreme Court precedent and the

deluge of circuit case law rejecting an individual right to bear arms not in conjunction with service in the Militia.”

Since Justice Thomas’ suggestion of a new look at the Second Amendment’s meaning, a look he implied would be a sympathetic one for him on the individual right interpretation, the Court has repeatedly turned down appeals seeking to raise that very issue. Its most notable denials came on June 10, 2002, and Dec. 1, 2003.

In the Court’s denials of review in June 2002, the Justices refused to review a Fifth Circuit Court ruling that the Second Amendment does protect an individual right to have a gun for private use (*Emerson v. U.S.*, Supreme Court docket 01-8780) and a Tenth Circuit decision finding only a collective right for members of a state militia (*Haney v. U.S.*, docket 01-8272). A significant facet of those two cases was that the Justice Department, for the first time, took a position in favor of an individual right interpretation, reflecting a change of mind promoted by then-Attorney General John Ashcroft.

In the denial in December 2003, the Court declined to review a Ninth Circuit decision expressly disagreeing with the Fifth Circuit’s analysis in *Emerson* (*Silveira v. Lockyer*, docket 03-51).

The Court may have refused to hear both of those cases because it was debatable whether the appeals courts’ musings about the scope of the Second Amendment were

necessary to the actual decision in the individual cases. That was the point made by the opposing briefs in all of those cases, including the Justice Department itself. (The Court has also turned down later appeals seeking to raise the Second Amendment issue, most recently in January of last year in *Seegars v. Gonzales*, 05-365, a case focusing on who would have a right to sue to challenge the same D.C. gun control law that was at issue in Friday's ruling by the D.C. Circuit. In February of last year, the Justices refused to hear an appeal on whether the Second Amendment even applies to the states, through the Fourteenth Amendment [*Bach v. Pataki*, 05-786].)

It is commonly assumed that the new D.C. Circuit case ultimately will reach the Supreme Court, even if it does go first through possible *en banc* review at the Circuit level. The *Parker* case was begun four years ago as a project of the Cato Institute, a Washington-based think tank with a libertarian philosophy, and it has been viewed widely as a major test of the Second Amendment question. It attracted a wide array of *amici*, including 13 states supporting the challengers to the D.C. gun law and four states on the other side. The Justice Department had no role in the case. There is no indication anyone intends to give up on the case at this point.

But the dissenting opinion on Friday, by Circuit Judge Karen LeCraft Henderson, raises a threshold issue that may well linger around the case as it proceeds further. She dismissed the majority opinion by Senior Circuit Judge Laurence H. Silberman (joined by Circuit Judge Thomas B. Griffith) as mere *dicta*. "The meaning of the Second Amendment in the District of Columbia is purely academic," Judge Henderson wrote. "The District of Columbia is not a state within the meaning of the Second

Amendment and therefore the Second Amendment's reach does not extend to it"—a variation, peculiar to the District of Columbia, of the reasoning of six federal appeals courts in finding that the Second Amendment does not apply to the states at all (the issue that the Supreme Court declined to hear in the *Bach* case in February 2006).

The *Parker* case, at least as it emerged from the Circuit Court panel on Friday, does not appear to have a "standing" problem, as did the prior appeal that went to the Supreme Court on the District's gun control law (the *Seegars* case, denied review in January 2006—a case, incidentally, from which Chief Justice John G. Roberts, Jr., was recused because he had been on the D.C. Circuit when it denied *en banc* review of that case).

The three judges on the Circuit panel agreed that one of the six Washington residents who filed the challenge did have a right to go to court to make the challenge. That individual was Dick Anthony Heller, a D.C. special police officer who is allowed to carry a handgun on duty as a guard at the Federal Judicial Center, but wishes to have one at his home; he said he lives in a high-crime neighborhood in Washington. He applied for and was denied registration to own a handgun for personal use.

The majority opinion appears to strike down the D.C. law's flat ban on registering handguns, so far as it applies to having a gun "within the home or on possessed land," and its requirement of a license for a gun within the home or on "possessed land." That is what the six challengers sought in their lawsuit, and what the Circuit Court panel said it was ordering.

Judge Henderson, in dissent, argued that

Heller only had a right to challenge the denial of a permit for his pistol under a specific section of the local law, and disputed the majority view that Heller had successfully challenged not only the provision that led to the denial of a permit for possession, but also provisions requiring guns to be kept unloaded and disassembled

or bound by a trigger lock or barring the carrying of any pistol not registered. The majority found those clauses, too, to be unconstitutional, as restricting Heller's right under the Second Amendment to have a gun available for personal protection in his home.

## **“A Liberal Case for the Individual Right to Own Guns Helps Sway the Federal Judiciary”**

*The New York Times*

May 7, 2007

Adam Liptak

In March, for the first time in the nation’s history, a federal appeals court struck down a gun control law on Second Amendment grounds. Only a few decades ago, the decision would have been unimaginable.

There used to be an almost complete scholarly and judicial consensus that the Second Amendment protects only a collective right of the states to maintain militias. That consensus no longer exists—thanks largely to the work over the last 20 years of several leading liberal law professors, who have come to embrace the view that the Second Amendment protects an individual right to own guns.

In those two decades, breakneck speed by the standards of constitutional law, they have helped to reshape the debate over gun rights in the United States. Their work culminated in the March decision, *Parker v. District of Columbia*, and it will doubtless play a major role should the case reach the United States Supreme Court.

Laurence H. Tribe, a law professor at Harvard, said he had come to believe that the Second Amendment protected an individual right.

“My conclusion came as something of a surprise to me, and an unwelcome surprise,” Professor Tribe said. “I have always supported as a matter of policy very comprehensive gun control.”

The first two editions of Professor Tribe’s influential treatise on constitutional law, in

1978 and 1988, endorsed the collective rights view. The latest, published in 2000, sets out his current interpretation.

Several other leading liberal constitutional scholars, notably Akhil Reed Amar at Yale and Sanford Levinson at the University of Texas, are in broad agreement favoring an individual rights interpretation. Their work has in a remarkably short time upended the conventional understanding of the Second Amendment, and it set the stage for the *Parker* decision.

The earlier consensus, the law professors said in interviews, reflected received wisdom and political preferences rather than a serious consideration of the amendment’s text, history and place in the structure of the Constitution. “The standard liberal position,” Professor Levinson said, “is that the Second Amendment is basically just read out of the Constitution.”

The Second Amendment says. “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.” (Some transcriptions of the amendment omit the last comma.)

If only as a matter of consistency, Professor Levinson continued, liberals who favor expansive interpretations of other amendments in the Bill of Rights, like those protecting free speech and the rights of criminal defendants, should also embrace a broad reading of the Second Amendment. And just as the First Amendment’s

protection of the right to free speech is not absolute, the professors say, the Second Amendment's protection of the right to keep and bear arms may be limited by the government, though only for good reason.

The individual rights view is far from universally accepted. "The overwhelming weight of scholarly opinion supports the near-unanimous view of the federal courts that the constitutional right to be armed is linked to an organized militia," said Dennis A. Henigan, director of the legal action project of the Brady Center to Prevent Gun Violence. "The exceptions attract attention precisely because they are so rare and unexpected."

Scholars who agree with gun opponents and support the collective rights view say the professors on the other side may have been motivated more by a desire to be provocative than by simple intellectual honesty.

"Contrarian positions get play," Carl T. Bogus, a law professor at Roger Williams University, wrote in a 2000 study of Second Amendment scholarship. "Liberal professors supporting gun control draw yawns."

If the full United States Court of Appeals for the District of Columbia Circuit does not step in and reverse the 2-to-1 panel decision striking down a law that forbids residents to keep handguns in their homes, the question of the meaning of the Second Amendment is almost certainly headed to the Supreme Court. The answer there is far from certain.

That too is a change. In 1992, Warren E. Burger, a former chief justice of the United States appointed by President Richard M. Nixon, expressed the prevailing view.

"The Second Amendment doesn't guarantee the right to have firearms at all," Mr. Burger said in a speech. In a 1991 interview, Mr. Burger called the individual rights view "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."

Even as he spoke, though, the ground was shifting underneath him. In 1989, in what most authorities say was the beginning of the modern era of mainstream Second Amendment scholarship, Professor Levinson published an article in *The Yale Law Journal* called "The Embarrassing Second Amendment."

"The Levinson piece was very much a turning point," said Mr. Henigan of the Brady Center. "He was a well-respected scholar, and he was associated with a liberal point of view politically."

In an interview, Professor Levinson described himself as "an A.C.L.U.-type who has not ever even thought of owning a gun."

Robert A. Levy, a senior fellow at the Cato Institute, a libertarian group that supports gun rights, and a lawyer for the plaintiffs in the Parker case, said four factors accounted for the success of the suit. The first, Mr. Levy said, was "the shift in scholarship toward an individual rights view, particularly from liberals."

He also cited empirical research questioning whether gun control laws cut down on crime; a 2001 decision from the federal appeals court in New Orleans that embraced the individual rights view even as it allowed a gun prosecution to go forward; and the Bush administration's reversal of a



longstanding Justice Department position under administrations of both political parties favoring the collective rights view.

Filing suit in the District of Columbia was a conscious decision, too, Mr. Levy said. The gun law there is one of the most restrictive in the nation, and questions about the applicability of the Second Amendment to state laws were avoided because the district is governed by federal law.

“We wanted to proceed very much like the N.A.A.C.P.,” Mr. Levy said, referring to that group’s methodical litigation strategy intended to do away with segregated schools.

Professor Bogus, a supporter of the collective rights view, said the Parker decision represented a milestone in that strategy. “This is the story of an enormously successful and dogged campaign to change the conventional view of the right to bear arms,” he said.

The text of the amendment is not a model of clarity, and arguments over its meaning tend to be concerned with whether the first part of the sentence limits the second. The history of its drafting and contemporary meaning provide support for both sides as well.

The Supreme Court has not decided a

Second Amendment case since 1939. That ruling was, as Judge Stephen Reinhardt, a liberal judge on the federal appeals court in San Francisco acknowledged in 2002, “somewhat cryptic,” again allowing both sides to argue that Supreme Court precedent aided their interpretation of the amendment.

Still, nine federal appeals courts around the nation have adopted the collective rights view, opposing the notion that the amendment protects individual gun rights. The only exceptions are the Fifth Circuit, in New Orleans, and the District of Columbia Circuit. The Second Circuit, in New York, has not addressed the question.

Linda Singer, the District of Columbia’s attorney general, said the debate over the meaning of the amendment was not only an academic one.

“It’s truly a life-or-death question for us,” she said. “It’s not theoretical. We all remember very well when D.C. had the highest murder rate in the country. and we won’t go back there.”

The decision in *Parker* has been stayed while the full appeals court decides whether to rehear the case.

Should the case reach the Supreme Court, Professor Tribe said, “there’s a really quite decent chance that it will be affirmed.”

## **“Gun Advocates Worry About D.C. Case”**

*Legal Times*

July 30, 2007

Tony Mauro

The case of *District of Columbia v. Heller* is barely at the Supreme Court’s starting gate, yet nearly everyone involved has a growing sense that this will be the Big One.

It is shaping up as the case that finally forces the Court to decide one of the most keenly debated issues in constitutional law: the full meaning of the right to keep and bear arms declared by the Second Amendment.

D.C. Mayor Adrian Fenty is appealing a March 9 ruling by the U.S. Court of Appeals for the D.C. Circuit that struck down the city’s handgun ban on Second Amendment grounds. The Court has given the city until Sept. 5 to file, and the other side—residents who want the ban overturned—say they too want high court review. If the Court accepts, the case could be argued early next year.

But even as the case heats up, factions on both sides seem to be getting cold feet. The concern is that even after nearly 70 years of high court silence, the time might not be right for it to speak to the Second Amendment question.

On the pro-gun-rights side those worries, along with long-simmering rivalries, have relegated the National Rifle Association to the sidelines in a case that could fulfill its most fervent dream: a declaration by the Court that the convoluted wording of the Second Amendment ensures an individual’s right to bear arms, rather than a collective right of state militias. If the right-leaning Roberts Court embraces that view, regulating firearm

possession and use would become harder, though not impossible.

Alan Gura, the Alexandria, Va., lawyer who masterminded the challenge to the D.C. handgun ban, says the NRA has joined him “ever so grudgingly” only in recent weeks, after years of trying to wreck the litigation and avoid a Second Amendment showdown. At earlier stages, the NRA sought to consolidate its own case, which challenged the D.C. law on a “kitchen sink” array of rationales, with Gura’s. In a 2003 filing, Gura called the NRA case “sham litigation” aimed at muddying his Second Amendment claim.

Even after the D.C. Circuit ruled in March, says Gura, the NRA lobbied for legislation to repeal the D.C. handgun ban as a way to keep the case out of the Supreme Court. “The NRA was adamant about not wanting the Supreme Court to hear the case, but we went ahead anyway,” says Gura, a name partner in the firm of Gura & Possessky. “It’s not their case, and they are somewhat territorial.”

### **Friendly Fire**

Gura insists that if the high court grants review, he will argue the case himself and won’t defer to NRA lawyers, such as Stephen Halbrook, who have Supreme Court experience. “My decisions in the case have been the correct decisions. That’s why I am arguing and he’s not.”

NRA spokesman Andrew Arulanandam denies his group sought to sabotage Gura’s

case: “Our intent to file an amicus brief if the case progresses speaks for itself.” He also noted that the NRA filed a brief supporting Gura with the circuit court.

Yet Charles Cooper of D.C.’s Cooper & Kirk acknowledges that when he reviewed the Heller case at an earlier stage for the NRA, “my concern was then, as it is now, whether our [individual rights] theory of the Second Amendment would command a majority of the Supreme Court.” Even with recent changes in the composition of the Court, says Cooper, “that is still not as clear as I would like it to be, though I am much more calm.” Nonetheless, Cooper says, if the high court declines to take up the D.C. case and lets the D.C. Circuit ruling stand, “that’s not going to disappoint me.”

Cooper’s reluctance is based on legal strategy, but others say the NRA has less lofty reasons for not wanting the Supreme Court to decide what the Second Amendment really means. “The NRA would lose its loudest fund-raising drum if this question is answered,” says Carl Bogus, a leading scholar who favors the militia rights view of the amendment.

The pro-gun-control side has also had misgivings about appealing to the Supreme Court. Other cities and states worry that if the Supreme Court upholds the circuit decision, their own efforts to regulate firearms will be in jeopardy. By not appealing, D.C. could have limited the damage to only its law.

“Obviously a lot of factors went into Mayor Fenty’s decision to appeal. He wanted to do what he could to protect the city’s laws,” says Dennis Henigan of the Brady Center to Prevent Gun Violence, a leading gun control strategist. “On the other hand, there have been some changes on the Supreme Court that could affect the outcome.”

Addressing concerns about the nationwide

impact of an adverse ruling, D.C. Attorney General Linda Singer says, “Our obligation is to the residents of the District of Columbia.” She also says, “We have a substantial chance of success on the merits” at the Supreme Court.

Singer indicated the case would not be argued by an outside Supreme Court advocate, but rather a lawyer on her staff, though she did not say which one.

A natural candidate, says Henigan, would be Alan Morrison, the former head of the Public Citizen Litigation Group, who is leaving a Stanford Law School teaching position to join Singer’s staff as a special counsel beginning Sept. 4. “He’s a huge talent,” says Henigan, who also says the city’s solicitor general, Todd Kim, is “a terrific lawyer.”

Morrison, who has argued 16 cases before the Supreme Court, confirms he has been working unofficially on several projects including the gun case recently.

### **Dodging the Bullet**

With the Roberts Court’s increasingly sharp right turn last term, it might seem that the outcome of the case is predictable: a victory for the pro-gun forces and the individual rights view.

But things aren’t that clear-cut, says Bogus, the Second Amendment scholar and a professor at Roger Williams University’s law school. “It does not fall out clearly on the liberal-conservative divide,” he says, noting that some conservative legal scholars such as Robert Bork oppose the individual rights view, while some liberals like Laurence Tribe back it.

The justices themselves have said remarkably little about the Second Amendment through the years, though at least two of them

Antonin Scalia and Clarence Thomas—have said enough to convince most analysts that they would support the pro-gun, individual rights view.

In a 1997 decision, *Printz v. United States*, Thomas said, almost wistfully, “Perhaps, at some future date, this Court will have the opportunity to determine whether Justice [Joseph] Story was correct when he wrote that the right to bear arms ‘has justly been considered, as the palladium of the liberties of a republic.’”

For his part, Scalia, in a book 10 years ago, described “my interpretation of the Second Amendment as a guarantee that the federal government will not interfere with the individual’s right to bear arms for self-defense.”

During their confirmation hearings, new Justices Samuel Alito Jr. and John Roberts Jr. were asked about their Second Amendment views.

Senators grilled Alito about his 1996 dissent in *United States v. Rybar*, during his tenure as a judge on the U.S. Court of Appeals for the 3rd Circuit. In that decision, Alito said Congress had overstepped its powers under the commerce clause when it passed a ban on machine gun ownership.

But Alito said during his 2006 hearing that his was a “very modest position,” adding that Congress could cure the problem by including in the law some statement or finding that asserted a connection between the ban and interstate commerce.

Roberts, when asked directly about his view of the Second Amendment, demurred on the

grounds that the issue could come before him. But he did say in his September 2005 hearing that 1939’s *United States v. Miller* had “side-stepped the issue” and left the meaning of the Second Amendment “a very open issue.”

*Miller* marked the last time the Court dealt directly with the meaning of the Second Amendment. It upheld a restriction on sawed-off shotguns, asserting that the laws appeared to have little to do with “a well-regulated militia.”

To Henigan of the Brady Center, Roberts’ stated view of *Miller* was telling. “When he said that, it was a signal, to my ears” that Roberts would take the individual rights view. Most gun rights advocates also say *Miller* sidestepped the Second Amendment question, says Henigan, while “nine circuit courts have found that *Miller* did in fact decide the meaning of the Second Amendment” as a militia right.

Little is known about the other justices’ Second Amendment views. As is often the case, Justice Anthony Kennedy might cast the deciding vote.

No matter what the outcome of the case, even the pro-gun-rights Gura believes it will be far from the last word the Supreme Court has on the subject of the Second Amendment.

“There’s this incredible temptation, which I don’t understand, to think that one Second Amendment case will resolve everything,” says Gura. “It doesn’t work that way.” Even if the Court declares it protects an individual right, the scope of the right will have to be fleshed out, he says. “It will take an eternity to resolve.”

## “Bearing Arms in D.C.”

*Legal Times*  
July 22, 2002  
Robert A. Levy

Michael Freeman is probably a bad dude—even a poster boy for gun control. He was convicted as a juvenile for assault with intent to kill, then charged as an adult with violating the ban on handgun possession in the District of Columbia. In short, Freeman isn’t the type of guy who elicits much sympathy for an argument that prosecutors should drop their pending charge because D.C. gun laws violate the Second Amendment.

Most likely, Freeman never imagined that he’d become a constitutional test case. Yet his Second Amendment claim could end up before the Supreme Court. And if Freeman isn’t the test case, then someone else in D.C. with a similar background might be—roughly three dozen challenges to the D.C. law have already been filed. Or better yet, to promote more-sympathetic litigants, pro-gun groups might consider organizing a peaceful demonstration in the nation’s capital by responsible, armed citizens volunteering to be arrested for handgun possession.

Whoever the ultimate litigant is, the goal will be to validate the Justice Department’s newly announced position that the Second Amendment affords each of us an individual right to keep and bear arms.

Why D.C.? Lots of cities and states have restrictive gun laws. What is there about D.C. that has both gun defenders and controllers up in arms? First, a little background.

This past October in a Texas case, *United States v. Emerson*, the U.S. Court of

Appeals for the 5th Circuit held that the Constitution “protects the right of individuals, including those not then actually a member of any militia . . . to privately possess and bear their own firearms . . . that are suitable as personal individual weapons.” That constitutional right is not absolute, said the court. It does, however, establish a presumption against gun control. And to rebut that presumption, government regulators must first identify exceptional factors that justify a limitation on our Second Amendment right. Then the government must show that its regulation goes no further than necessary to achieve its aims.

For example, no reasonable person would argue that killers have a constitutional right to possess weapons of mass destruction. Rationally, some persons and some weapons may be restricted. Indeed, the 5th Circuit held that Emerson’s Second Amendment rights could be temporarily curtailed because there was reason to believe he posed a threat to his estranged wife. And the 10th Circuit, in *United States v. Haney*, ruled that machine guns were not the type of weapon protected by the Second Amendment. Haney and Emerson both asked the U.S. Supreme Court to reverse those holdings, but on June 10 the Court declined to review either case.

The high court hasn’t decided a Second Amendment case since *United States v. Miller* in 1939. There, the challenged statute required registration of machine guns, sawed-off rifles, sawed-off shotguns, and silencers. First, said the Court, “militia” is a

term of art that means “the body of the people capable of bearing arms.” That suggested a right belonging to all of us, as individuals. But the Court also held that the right to bear arms extended only to weapons rationally related to the militia—not the sawed-off shotgun questioned in *Miller*. That mixed ruling has puzzled legal scholars for more than six decades. If military use is the decisive test, then citizens can possess rocket launchers and missiles. Obviously, that’s not what the Court had in mind. Indeed, anti-gun advocates, who regularly cite *Miller* with approval, would be apoplectic if the Court’s military-use doctrine were logically extended.

Because *Miller* is so murky, it can only be interpreted narrowly, allowing restrictions on weapons, like machine guns and silencers, with slight value to law-abiding citizens, and high value to criminals. In other words, *Miller* addresses the type of weapon, not the question of whether the Second Amendment protects individuals or members of the militia. That’s the conclusion the 5th Circuit reached in *Emerson*. It found that *Miller* upheld neither the individual rights model of the Second Amendment nor the collective rights model. Instead, *Miller* simply decided that the weapons at issue were not protected, whether used individually or collectively.

### **A Second Amendment First**

Enter U.S. Attorney General John Ashcroft. First, in a letter to the National Rifle Association, he “reaffirmed a long-held opinion” that all law-abiding citizens have an individual right to keep and bear firearms, clearly protected by “the text and the original intent of the Second Amendment.” Ashcroft noted that early Supreme Court decisions “routinely” recognized an individual right, as had U.S.

attorneys general of both parties prior to *Miller*. Ashcroft’s letter was followed by two Justice Department briefs, filed with the Supreme Court in the *Haney* and *Emerson* cases. For the first time, the federal government argued in formal court papers that the Second Amendment grants an individual right to bear arms.

Under the Clinton administration, when *Emerson* was argued before the 5th Circuit, the Justice Department’s position was that the “Second Amendment protects only such acts of firearm possession as are reasonably related to the preservation or efficiency of the militia.” But under Ashcroft, the new Justice Department briefs insisted that the “Second Amendment more broadly protects the rights of individuals, including persons who are not members of any militia . . . subject to reasonable restrictions designed to prevent possession by unfit persons or to restrict the possession of types of firearms that are particularly suited to criminal misuse.”

Despite reversing the Clinton administration’s theory of the Second Amendment, the Ashcroft Justice Department declared that both *Emerson* and *Haney* were correctly decided. In *Emerson*, the restriction on persons subject to a domestic violence restraining order was a reasonable exception to Second Amendment protection. And in *Haney*, the ban on machine guns applied to a type of weapon uniquely susceptible to criminal misuse.

That brings us back to D.C. and Michael Freeman. Supporting Freeman’s assertion of an individual right to bear arms are the U.S. Department of Justice and the 5th Circuit. There’s also support from an impressive array of legal scholars, including Harvard’s liberal icon, Laurence Tribe, and Yale’s highly respected Akhil Amar, who agree on

two fundamental issues: First, the Second Amendment confers an individual rather than a collective right. Second, that right is not absolute; it is subject to reasonable regulation. To the extent there's disagreement, it hinges on what constitutes reasonable regulation; that is, where to draw the line. That's why the D.C. handgun ban is so interesting—and so vulnerable.

### **D.C. Is Different**

For starters, the D.C. statute prohibits anyone but law enforcement officials from owning a handgun. Thus, the law applies not just to “unfit” persons like felons, minors, or the mentally incompetent, but across the board to ordinary, honest, responsible citizens. Moreover, a handgun is quintessentially a personal weapon, used by those citizens to defend themselves against criminal predators. It is not like the machine gun forbidden in *Haney* or the sawed-off shotgun barred in *Emerson*. If “reasonable” regulations are those that apply only to bad persons or to massively destructive firearms, then D.C.'s blanket prohibitions are patently unreasonable.

Just as important, Congress has plenary legislative authority over the nation's capital. That means the D.C. government, a creature of Congress, is constrained by the Second Amendment as much as the federal government itself. Yes, the 14th Amendment, ratified in 1868, requires the states to honor many—but not all—provisions of the Bill of Rights. Like the other nine amendments, the Second Amendment originally applied only to the federal government. Unlike many of the other amendments, the applicability of the Second Amendment to the states has not been resolved. Yet because D.C. is not a state and is controlled by Congress, that complex and widely debated question need not be addressed when D.C. law is

challenged on Second Amendment grounds.

Finally, felonies under D.C. law are prosecuted by the U.S. attorney for the District of Columbia, an employee of the Justice Department—the same Justice Department that is now on record favoring an individual right to bear arms. To be sure, Ashcroft has declared in an internal memorandum that the Justice Department “will continue to defend the constitutionality of all existing federal firearms laws.” But D.C. laws are not federal laws. They are local laws, enacted pursuant to congressionally delegated authority under the District of Columbia Home Rule Act. Presumably, therefore, the U.S. attorney might have been expected to support a motion to drop the handgun possession charge pending against Michael Freeman. But he did not.

Instead, the U.S. attorney argued in response to Freeman's motion that the D.C. handgun ban must be upheld in light of binding precedent from the D.C. Court of Appeals in a 1987 case, *Sandidge v. United States*, which held that “the Second Amendment guarantees a collective rather than an individual right.” So it seems that John Ashcroft is allowing the U.S. attorney to prosecute infractions of a law that the Department of Justice deems to be unconstitutional. At a minimum, an intellectually honest brief might have conceded that the Justice Department was hamstrung in lower court, but then urged Freeman to appeal his case all the way to the Supreme Court if necessary, where *Sandidge* could be overturned.

### **A New Precedent?**

If and when Freeman's case, or a comparable one, does reach the high court, where there's no binding precedent, the Justice Department will not be able to

finesse the constitutional issue. Meanwhile, it is bizarre for Ashcroft to go out of his way to assert a new Second Amendment theory in cases—*Emerson* and *Haney*—where the theory almost certainly wouldn't matter, then decline to reaffirm the theory in cases arising under D.C. law, where it could dictate the outcome.

For those of us eagerly awaiting a Supreme Court pronouncement—the first in 63

years—perhaps we should be grateful for the Justice Department's puzzling stance. After all, if the federal government had supported Freeman's motion, and the charges were dropped, no one would appeal his case to a higher authority. We would be denied legal precedent to apply in later cases. And we would forgo a singularly favorable set of circumstances, because of D.C.'s unique position, to challenge a gun ban that is manifestly unconstitutional.