

## Loaded for the High Court

D.C.'s defense of its gun ban is wrong, but the Supreme Court still needs to rule.

BY ROBERT A. LEVY

**T**he Second Amendment may be headed to the Supreme Court, with significance not only for D.C. residents but for every American.

On Sept. 4, the D.C. government asked the high court to reverse a federal appellate decision in *Parker v. District of Columbia* (D.C. Cir. 2007), which upheld a Second Amendment challenge to the District's ban on all functional firearms.

Two local attorneys and I represent the six D.C. residents who brought the lawsuit. Although our clients won in the appellate court, they agree with the city that the Supreme Court should revisit the Second Amendment for the first time since 1939. A four-square pronouncement from the high court is long overdue. The entire nation, not just Washington, D.C., needs to know how courts will interpret "the right of the people to keep and bear arms."

Sometime before year's end, the justices will decide whether to review the case. If the Supreme Court chooses to intervene, a final decision will probably be issued by June 30, 2008.

D.C. Mayor Adrian Fenty and Attorney General Linda Singer, in their petition to the Supreme Court and in a *Washington Post* op-ed ("Fighting for Our Handgun Ban," Sept. 4), raise four arguments in support of the city's ban. Their first argument is that the Second Amendment ensures only that members of state militias are properly armed, not that private citizens can have guns for self-defense and other personal uses. That contentious question has been debated at length on these pages. (See Dennis Henigan, "The Mythic Second," March 26, Page 60; Robert A. Levy, "Thanks to the Second Amendment," April 16, Page 68.)

The city's remaining three arguments—two legal claims and one policy claim—have received comparatively less attention. First, declares the mayor, even if the Second Amendment protects private ownership of firearms for nonmilitia purposes, a ban on all handguns is reasonable

because the District allows possession of rifles and shotguns in the home. Second, the amendment restricts the actions of the federal government, but not the states, and the District should be treated the same as a state for Second Amendment purposes. And third, "handgun bans work" and the streets of the nation's capital are safer as a result.

Let's consider each argument in turn.

### JUST RIFLES?

*It's OK to ban handguns as long as rifles and shotguns are permitted.*

The U.S. Court of Appeals for the D.C. Circuit, for good reason, called that argument "frivolous." "It could be similarly contended," wrote Senior Judge Laurence Silberman, "that all firearms may be banned so long as sabers were permitted." After all, the District does not ban home possession of knives or hatchets. Does that justify the city's handgun ban? Could publication of cookbooks be barred under the First Amendment as long as restaurant guides were allowed?

Moreover, the D.C. Code bans not just handguns, but all functional firearms. Rifles and shotguns in the home must be unloaded and either disassembled or bound by a trigger lock. That's why one of the *Parker* plaintiffs, who owns a shotgun, had to sue to render the weapon usable in an emergency.

Not to worry, says the mayor. "The District does not . . . construe this provision [regarding rifles and shotguns] to prevent the use of a lawful firearm in self-defense."

That assurance might be heartening were it not disingenuous. Once a rifle or shotgun is loaded, it is no longer a "lawful firearm." Accordingly, the District's pledge, limited to lawful weapons, is an empty one. A gun must be operative before it can be used in self-defense. Any owner who waits to load and assemble a gun until it's needed for self-defense has waited too long.

If the mayor means what he says about allowing the use of long guns for in-house defense, he should have no problem repealing the city's ban on home possession of functional rifles and shotguns, as the *Parker* plaintiffs have

demanded. (Plaintiff Dick Heller filed a motion with the D.C. Circuit on Sept. 12 on this very point.)

### NOT APPLICABLE?

***The District is like a state, and the Second Amendment doesn't apply to states.***

The District relies on an 1886 Supreme Court case, *Presser v. Illinois*, for the proposition that the Second Amendment applies only to the federal government, not to the states. Of course, the District is not a state. But, says the mayor, the city should be treated the same as a state when courts review its gun-control regulations. Therefore, so the argument goes, the city is immune from a Second Amendment challenge.

That argument fails on two counts. First, none of the amendments in the Bill of Rights originally applied to the states. Beginning in 1897, however, 11 years after *Presser*, the Supreme Court decided that the post-Civil War enactment of the 14th Amendment was intended to “incorporate” most of the Bill of Rights to hold state governments accountable for violations. To be sure, the Court never formally ruled that the Second Amendment was incorporated, but even ultra-liberal 9th Circuit Judge Stephen Reinhardt has conceded that “*Presser* rest[s] on a principle that is now thoroughly discredited.”

Second, even if states are exempt from the Second Amendment, the Constitution expressly grants to Congress, not a state, plenary legislative power over all matters whatsoever in the nation’s capital. Because the Second Amendment indisputably applies to the federal government, it therefore applies to the District, a federal enclave.

The District’s assertion that its city council, a creature of Congress, should enjoy an exemption from the Second Amendment that binds Congress itself, is bizarre. If it were true, then the Seventh Amendment right to a jury trial in civil cases—which also hasn’t been incorporated—would not apply to the District. But the courts have held otherwise, including the Supreme Court in *Pernell v. Southall Realty* (1974).

The city responds that the Second Amendment is different because, unlike the Seventh, the Second is a limitation on federal power over the states.

In effect, that’s the collectivist or states’ rights view of the Second Amendment. Thus, the District’s claim of exemption merges with, and depends on, its collectivist interpretation of the Second Amendment. If the District is wrong about the Second Amendment, then its “no-incorporation” argument collapses as well.

### A SUCCESS?

***“Handgun bans work.” They’ve “saved countless lives.”***

Before the District banned handguns in 1976, its murder rate had been declining. But soon afterward, the rate

climbed to the highest of all large U.S. cities. It also rose relative to nearby Maryland and Virginia, as well as relative to other cities with more than 500,000 people. During the 31-year life of the ban, with the exception of a few years during which the city’s murder rate ranked second or third, there have been more killings per capita in Washington, D.C., than in any other major city.

The rate climbed as high as 81 murders per 100,000 inhabitants in 1991—triple the pre-ban levels. As of 2005, the last year for which I have data, the murder rate was still 32 percent above the 1976 level.

For violent crime more generally, in 12 of the years between 1980 and 1997, including all nine years from 1989 through 1997, the D.C. violent crime rate exceeded 2,000 crimes per 100,000 people. It reached a high of 2,922 in 1993, versus 1,481 in 1976—a 97 percent increase in violent crime, 17 years after citizens were forbidden from defending themselves with firearms.

Two nonpartisan, respected federal government agencies have examined gun controls and found no statistically significant evidence to support their effectiveness.

In 2004, the National Academy of Sciences reviewed 253 journal articles, 99 books, and 43 government publications evaluating 80 gun-control measures. The researchers could not identify a single gun-control regulation that reduced violent crime, suicide, or accidents.

A year earlier, the Centers for Disease Control and Prevention reported on an independent evaluation that considered firearms and ammunition bans, restrictions on acquisition, waiting periods, registration, licensing, child-access prevention laws, and zero-tolerance laws. Conclusion: None of the laws had a meaningful effect on gun violence.

Based on those statistics and studies, there’s a compelling argument that Americans deserve an opportunity to defend themselves by possessing suitable firearms.

But even if the data were to cut the other way—even if it could be demonstrated (which it emphatically cannot) that more gun laws lead to less crime—gun laws are not just about public policy. They’re about the meaning of the Constitution.

Let us hope that the Supreme Court, at long last, will answer this vital question: Does the right to keep and bear arms belong to us as individuals, or does the Constitution merely recognize the collective right of states to arm the members of their militias?

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