

# D.C.'s Gun Ban Struck Down in Court, Heads to Supreme Court

**T**hirty-one years ago, the District of Columbia government prohibited residents of the District from possessing handguns. This March, the U.S. District Court of Appeals for the D.C. Circuit ruled in *Parker v. District of Columbia* that the ban violated the Second Amendment. Robert A. Levy, senior fellow in constitutional studies at the Cato Institute, and lead attorney Alan Gura represented the case's six plaintiffs who wished to keep handguns in their homes for self-defense. Levy and Gura appeared at a March 22 Cato Policy Forum to discuss their case and what it means for the future of Second Amendment rights.

**ROBERT A. LEVY:** Today's talk is not only about the Second Amendment, which is a constitutional issue, but also about gun control, which involves both the Constitution and public policy.

Strictly on policy grounds, there is a compelling argument that Americans deserve an opportunity to defend themselves by possessing suitable firearms. But even if the argument were to cut the other way—even if it could be demonstrated, which it most emphatically cannot, that more gun laws lead to less crime—gun laws are not just about policy. They are about the meaning of the Constitution and, in particular, the militia clause of the Second Amendment.

On March 9 the second most important court in the country ruled in *Parker v. District of Columbia* that the Constitution forecloses an outright ban on handguns, as we have in Washington, D.C. That means, if voters decide that such an outright ban is required for public safety, the way to go about it is to change the Constitution. We cannot simply ignore the constitutional provision and act as though the document did not exist.

*Parker* addressed a question that has divided Second Amendment scholars for

decades: does the right to keep and bear arms belong to us as individuals, or does the Constitution merely recognize the collective right of the states to arm the members of their militias?

In 1939 the Supreme Court had a golden opportunity to resolve that question. The case was *United States v. Miller* and the challenged statute required registration of machine guns, sawed-off rifles, sawed-off shotguns, and silencers. Sadly, the Court did little to illuminate, and much to mystify, the meaning of the Second Amendment. The opinion by Justice James Clark McReynolds was riddled with ambiguities. It established no definitive legal principle and offered no useful guidance or analysis to inform any modern Second Amendment deliberation.

Even worse, the Supreme Court provided in the *Miller* case just enough ammunition for appellate courts across the country to reject the individual rights view of the Second Amendment. As a result of the Court's abdication in *Miller*, the law of the land in 47 states, everywhere except Texas, Louisiana, Mississippi, and now Washington, D.C., is that individuals have no redress under the Second Amendment if a

state bans the possession and use of firearms for private—that is, nonmilitia—purposes.

Correctly interpreted, the main clause of the Second Amendment, “the right of the people to keep and bear Arms, shall not be infringed,” is what defines and secures the Second Amendment right. The subordinate clause, “A well-regulated Militia, being necessary to the security of a free State,” helps explain why we have that right.

So membership in a well-regulated militia is a sufficient, but not a necessary, condition of the exercise of our right to keep and bear arms. Imagine if the Second Amendment said, “A well-educated electorate, being necessary to self-governance in a free state, the right of the people to keep and read books, shall not be infringed.”

Surely no one would suggest that only registered voters—that is, members of the electorate—had a right to read. And yet, that is precisely the effect if the Second Amendment is interpreted to apply only to members of a militia. If the Second Amendment meant what the collective-rights advocates suggest, then the text would have read very differently. It would have said, “A well-regulated militia, being necessary to the security of a free state, the right of the states to arm their militias, shall not be infringed.”

But the Second Amendment, like the First, the Fourth, the Ninth, and the Tenth Amendments, explicitly refers to the right of the people. Consider the placement of the Second Amendment within the Bill of Rights, the part of the Constitution that deals exclusively with the rights of individuals. There can be no doubt that First Amendment rights, like speech and religion, belong to us as individuals. Fourth Amendment protections against unreasonable searches are individual rights. And in the context of the Second Amendment, we secure the right of the people by

guaranteeing the right of each person.

Predictably, the Court's focus in the *Miller* case was on the militia clause. Here is the crucial passage from McReynolds's opinion in *Miller*:

In the absence of any evidence tending to show that possession or use of a [sawed-off] shotgun . . . has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.

In other words, said McReynolds, the Second Amendment did not guarantee the defendants a right to transport an unregistered, sawed-off shotgun across state lines. Why? Because the weapon had not been shown to promote the common defense and was not self-evidently a component of ordinary militia equipment.

A proper reading of the Second Amendment should not attempt to link each and every weapon to militia use, except to note that the grand scheme of the amendment was to ensure that persons trained in the use of firearms would be ready for militia service. Because the *Miller* opinion is so murky, it has to be interpreted narrowly, allowing restrictions on weapons such as machine guns and silencers with slight value to law-abiding citizens and high value to criminals.

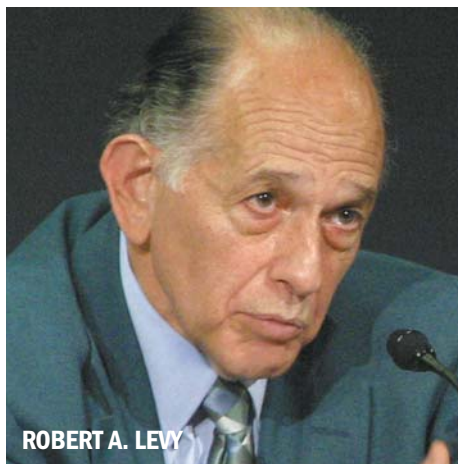
Thus, *Miller* applies to the type of weapon, not to the question whether the Second Amendment protects all individuals, only members of a militia, or just states. Sadly, that is not the manner in which *Miller* has been cited by trial and appellate courts in 10 of 12 judicial circuits, all except the D.C. Circuit and the Fifth Circuit, both of which found that *Miller* upheld neither the individual rights model of the Second Amendment nor the collective rights model.

The plaintiffs in *Parker v. District of Columbia* raised a straightforward constitutional challenge to the city's draconian gun laws. *Parker* was filed by Alan Gura, Clark Neily, Gene Healy, and myself on behalf of six law-abiding D.C. residents who want to

possess functional firearms to defend themselves where they live and sleep.

So *Parker* isn't about machine guns. It's not about assault weapons. The *Parker* litigation is simply about a pistol in the home for self-defense.

Off and on over the years, Washington, D.C., has reclaimed its title as the nation's murder capital. The D.C. government has been totally ineffective at disarming violent criminals. But at the same time, the government has done a superb job of disarming decent and peaceable residents.



ROBERT A. LEW

“The court held ‘The Second Amendment protects an individual right to keep and bear arms.’”

No handgun can be registered in the District; even pistols that were registered prior to the ban, initiated in 1976, 31 years ago, cannot be carried from room to room in the home without a license, which is never granted.

Furthermore, all firearms in the home, including rifles and shotguns, have to be unloaded and either disassembled or bound by a trigger lock. So, in effect, no one can possess a functional firearm in his or her residence. And the law applies not only to unfit persons like felons or minors or

incompetent people but across the board to ordinary, honest, responsible citizens.

The six plaintiffs in the *Parker* case live in the District, pay their taxes in the District, and obey the laws of the District, but if somebody breaks into their homes, their only remedy is to call 911 and hope that the police arrive in time. That's not good enough. The right to keep and bear arms includes, of course, the right to defend your property and your family and, most of all, your life.

As you now know, Ms. Parker and her five co-plaintiffs did prevail in the D.C. Circuit. Senior Judge Laurence Silberman, joined by Judge Thomas Griffith, over a dissent by Judge Karen Henderson, held, and I quote, “The Second Amendment protects an individual right to keep and bear arms.”

We could not have asked for a more unequivocal and explicit statement. Moreover, the court continued, the activities protected by the Second Amendment “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.” In fact, said the court, “the right to arms existed prior to the formation of the new government in 1789.”

So for those of us eagerly awaiting a comprehensive and comprehensible Supreme Court statement on the Second Amendment, overturning or, at a minimum, defogging the *Miller* case, the Constitution is on our side.

That does not mean the D.C. government is foreclosed from regulating the use and ownership of firearms. Judge Silberman stated that the protections of the Second Amendment are subject to the same sort of reasonable restrictions that have been recognized as limiting, for example, First Amendment rights. So perhaps, he said, the District could justify things like concealed carry restrictions, registration, proficiency testing, and keeping guns away from felons and minors.

But an across-the-board ban on all handguns in all homes for all residents could not be construed as reasonable under any standard.

Proponents of gun control are not persuaded by those arguments, or even by empirical studies showing that gun control does not work. Nor are they persuaded by the text of the Second Amendment; the history, purpose, and structure of the Constitution; or even the intent of the Framers. In some jurisdictions, the enactment of anti-gun regulations has simply become an article of faith. Regulations persist and even spread in the face of compelling legal and policy arguments for their demise.

Happily, after 31 years, the U.S. Court of Appeals for the District of Columbia Circuit told the D.C. government that it may no longer ignore Second Amendment rights.

**ALAN GURA:** The future of the *Parker* case is as follows: The city has the opportunity to ask for review by the full D.C. Circuit Court of Appeals. There are 10 active judges. They need 6 of those 10, a majority, to vote to rehear the case. If that vote is taken, then they will need a majority of 11 judges, which I believe is still 6 because Judge Silberman, who is the senior judge, would get to participate at the rehearing stage.

Frankly, we do not know how the votes will turn out, but we are fairly confident that even if the D.C. Circuit takes the case, the decision is not going to be materially different as far as the Second Amendment is concerned. There are other aspects of the case that may be subject to en banc review related to standing, but we are not super-concerned about the decision being overturned by the full court. Of course, we are fairly confident and hopeful that the Supreme Court can read the Constitution as well. We are fairly confident that indeed it's only a matter of time until the mandate is issued and those laws become history, as they deserve to be, because they violate the Constitution.

We have had some creative statistical arguments thrown around on the policy side. I was very surprised to see that the chief of police had an opinion piece in the *Washington Post* that essentially said, "If only we were to stop the sale of handguns everywhere else, then they wouldn't come into

the District and wouldn't be used by juveniles to commit crime."

The police chief stated that D.C. arrests of juveniles for homicide had been declining since Maryland and Virginia enacted a gun-rationing ban. That's a very interesting theory. But there is a much better explanation for why arrests for murder have gone down. It's because the police don't solve those cases anymore. The D.C. police's closure rate for homicide has been plummeting.

So we certainly hope that the police department rededicates itself to solving



ALAN GURA

“You cannot have the existence of both a constitutional right and a law that negates it completely.”

crimes and not to advocating the destruction of our neighbors' constitutional rights.

We also had an interesting argument by Professor Chemerinsky of Duke University. He claimed that the right to bear arms can be regulated, and because you can regulate the right, you can basically abolish it completely.

No, that is not the case. You can regulate a right, but the onus is on the government to prove that the regulation meets whatever test you apply. When it comes to enumerated rights, which we call fundamental

rights, it has been the law for a very long time that the test is known as strict scrutiny.

For all you nonlawyers out there, it's a very, very tough test. The presumption is that the law is invalid. The government has to have what is called "a compelling state interest." The law has to be "narrowly tailored" to achieve that particular interest. There has to be "no less restrictive alternative."

Of course, in this case we didn't even get that far, because we had a complete and utter ban on firearms. You certainly cannot have the existence of both a constitutional right and a law that negates it completely.

So there is not really even a need to address what level of review this right has. If the right exists, at a minimum it means that individual law-abiding people can have a functional firearm inside their homes, including a simple, ordinary handgun. We think that that will definitely hold up.

The other thing that has started happening since the decision came down is that I have gotten phone calls from criminal defense attorneys. These guys have trials of the bad guys—bank robbers, drug dealers, those sorts of people—who should not have guns. Of course, they are going to start making Second Amendment arguments in their defense.

This is actually not a new phenomenon. And it's the phenomenon that most concerned us when we took this case. Back in 2002, when this case was being thought of and it was just a twinkle in Bob's eye (actually the notion to file this case originated with Clark Neily and Steve Simpson), the situation was as follows: The criminal defense bar had litigated the Second Amendment very aggressively, and the results were terrible. Almost all of the collective rights cases were cases where, along with the kitchen sink, a drug dealer or a bank robber threw in the Second Amendment. And of course, no one is going to ever win in that kind of situation.

If for some reason the Supreme Court does not take our case, then it will likely still take whatever Second Amendment case comes next. We believe that the likelihood is that that case will not be as good as

*Continued on page 19*

ours. It will probably be a felony possession or a drug dealer, somebody who is presenting the Second Amendment in an unfavorable light, making an absurd claim that none of us here would ever make, and that is not a good platform for the Court to determine the rights of law-abiding Americans.

Most people in America are law-abiding. Virtually all gun owners are law-abiding. Maybe going shooting together is not something that frequenters of the faculty lounge do too often. But certainly in most of America, guns are a very ordinary and common aspect of life. It is sad, I think,

for that very basic fundamental right to be defined within the lens and context of a criminal proceeding. That is not what should occur. But if our case is not what the Supreme Court takes, that is probably what will occur.

With that in mind, we are somewhat concerned about Congress. There are many well-meaning members of Congress, people who support Second Amendment rights and want to go ahead and repeal the various D.C. gun bans that we have just spent all these years getting the courts to strike down.

If repeal legislation is enacted while the case is still making its way through the courts, the result is that the case will be

dismissed, the opinion will be vacated, it will have no precedential value, and the case will not get to the Supreme Court. Of course, that clears the path for the Supreme Court to take a criminal case, because we all know that Congress is not going to repeal all federal gun control laws and all gun control laws in the District of Columbia.

So we have to work with the members of Congress to make sure that, if they want to express themselves legislatively on the D.C. gun ban, they do so in a way that preserves the issue for litigation and doesn't become self-destructive of not just our case but of the Second Amendment.



# CATO UNIVERSITY

## JULY 22–27, 2007 • SAN DIEGO

**C**ato University is the Cato Institute's premier educational event of the year. This annual program brings together outstanding faculty and participants from across the country – business and professional people, retirees, small business owners, high school and college students, employees of large and small firms, families, and many others who share a commitment to liberty and learning.

This year's Cato University – the Graduate School of Liberty – will be held at the Rancho Bernardo Inn, a luxurious resort near San Diego. It's the perfect way to vacation while learning about liberty and receiving a one-of-a-kind grounding in economics, law, history, and philosophy. This year's faculty includes some of the most dynamic speakers in the country:

**PROFESSOR MARCUS COLE** of Stanford University Law School

**PROFESSOR GLEN WHITMAN** of California State University, Northridge

**PROFESSOR DAVID BEITO** of the University of Alabama

**DR. TOM G. PALMER**, senior fellow of the Cato Institute and director of Cato University

**PROFESSOR ROBERT MCDONALD** of the U.S. Military Academy at West Point

**BRIAN DOHERTY**, senior editor at *Reason* magazine and author of *Radicals for Capitalism: A Free-wheeling History of the Modern American Libertarian Movement*

**DAVID BOAZ**, executive vice president of the Cato Institute

Please join us and enjoy expert lecturers, stimulating discussions, and compelling ideas in the company of active minds – all combined with a relaxing vacation. It'll also be a tremendous opportunity to form new and enduring friendships. Full details are available [www.cato-university.org](http://www.cato-university.org).

**PRICE**  
**\$925**  
*the lowest we have been able to offer for a number of years. Take advantage!*

CATO INSTITUTE • [WWW.CATO-UNIVERSITY.ORG](http://WWW.CATO-UNIVERSITY.ORG)