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Local Government—Gun Control

D.C. Handgun Registration Requirement, Ban on Assault Weapons, Big Magazines OK

Washington, D.C.'s requirement that gun owners register their handguns and its ban on assault weapons and large-capacity gun magazines do not violate the Second Amendment, the U.S. Court of Appeals for the District of Columbia Circuit held Oct. 4 (*Heller v. District of Columbia*, D.C. Cir., No. 10-7036, 10/4/11).

Applying *District of Columbia v. Heller*, 554 U.S. 570, 76 U.S.L.W. 4631 (2008), the court, in an opinion by Judge Douglas H. Ginsburg, explained that basic registration requirements for handguns are valid because they have a longstanding history in American law. At the same time, however, the court sent several aspects of the city's registration requirements back to the district court for a better development of the record.

The court also explained that the city's assault-weapon and magazine ban promote its important interest in crime control and protecting police officers.

U.S. Supreme Court in *Heller* did not specify the appropriate level of scrutiny to apply to Second Amendment challenges to gun control regulations. Here the court adopted a two-part test from decisions of other circuits, including *Ezell v. Chicago*, 80 U.S.L.W. 50 (7th Cir. 2011).

"We ask first whether a particular provision impinges upon a right protected by the Second Amendment; if it does, then we go on to determine whether the provision passes muster under the appropriate level of constitutional scrutiny," the court explained. "Insofar as the laws at issue here do impinge upon a Second Amendment right, they warrant intermediate rather than strict scrutiny," the court held.

A constitutional law expert told BNA that the holding has something for groups on both sides of the issue to like, but an attorney who filed an amicus brief supporting the plaintiff in the case countered that the court misapplied the Supreme Court's holding in *Heller*.

Right to Keep and Bear Arms. 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 *Heller* court said that the Second Amendment protects "an individual right to keep and bear arms," but not a right "to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." Specifically, it said that the district's "ban on handgun possession in the home," as well as its "prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense," were unconstitutional. It named the inherent right of self-defense as central to the Second Amendment right.

After the *Heller* court shot down its gun-control law, D.C. returned to the drawing board and adopted new regulations. The provisions of that law at issue in this case were the requirements that gun owners disclose personal information about themselves and their weapon, submit to a ballistic identification procedure, bring their weapon to a local police station for inspection, register no more than one pistol in a 30-day period, and renew their registration once every three years.

Also challenged were the new law's vision requirement, and its mandates that the registrant demonstrate knowledge of D.C.'s gun law, be fingerprinted, submit to a background check, and have firearms training.

The plaintiffs further argued that the law's prohibition against assault weapons and magazines that can hold more than 10 rounds of ammunition are unconstitutional. Assault weapons are defined to include certain models and brands of semi-automatic rifles, pistols, and shotguns, and firearms with certain features, like a rifle with a pistol grip "that protrudes conspicuously beneath the action of the weapon."

The district court upheld the new law in all respects.

Registration Requirements. After making clear that the district had authority to adopt its gun-control law, the court looked at the registration requirements.

The court's analysis focused on "whether a particular provision impinges upon a right protected by the Second Amendment." Then, if it does, the question is "whether the provision passes muster under the appropriate level of constitutional scrutiny."

Under *Heller*, longstanding regulations are presumptively lawful, the court said. Moreover, the "requirement of mere registration" is presumptively lawful because the registration of handguns is deeply rooted in American law and history—it has been "accepted for a century in diverse states and cities." Thus, it said that the requirement that applicants provide basic informa-

tion about themselves and their handguns does not impinge their Second Amendment right.

With respect to long guns, however, the court said that registration requirements are “novel, not historic.” It added that all the other requirements of the law are also novel as applied to both long guns and handguns.

Saying that those registration requirements do not severely limit the possession of firearms, the court decided that intermediate rather than strict scrutiny was applicable. But it said that from the record it could not tell if those requirements can survive that analysis. It therefore sent the issue back to the district court for the parties to develop a more thorough record.

Assault Weapon Ban Upheld. The court next said that it was “not aware of evidence that prohibitions on either semi-automatic rifles or large-capacity magazines are longstanding and thereby deserving of a presumption of validity.”

The court also noted a dispute over whether the bans impinged a Second Amendment right, but refused to enter that fray. Instead, it said that even assuming that the bans “impinge upon a right protected by the Second Amendment, we think intermediate scrutiny is the appropriate standard of review and the prohibitions survive that standard.”

The city’s interest in adopting the bans is protecting police officers and controlling crime, the court said. It also noted evidence that assault weapons are preferred by criminals and place law enforcement officers at risk because of their high firepower, and that high-capacity magazines “tend to pose a danger to innocent people and particularly to police officers.”

Because the evidence showed that the bans promote the city’s interests, the court said that they pass muster under intermediate scrutiny.

Judge Karen LeCraft Henderson joined the opinion.

Dissenting Judge Brett M. Kavanaugh argued that “both D.C.’s ban on semi-automatic rifles and its gun registration requirement are unconstitutional under *Heller*.” Among other things, he said that *Heller* protects a person’s right to own semi-automatic hand guns and that such protection logically extends to semi-automatic rifles. Furthermore, he said that registration of lawfully possessed guns “has not traditionally been required in the United States and even today remains highly unusual.” He also rejected use of intermediate scrutiny in Second Amendment cases. He said that “courts are to assess gun bans based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny.”

Something for Everyone. Professor Adam Winkler, UCLA School of Law, told BNA that this is an important case because “it addresses two key issues left open by the Supreme Court: can states and local governments require gun owners to register their weapons and can assault rifles be banned. The court answers both in the affirmative.”

Winkler added that the decision is also important “because it shores up intermediate scrutiny as the stan-

dard of review.” He explained that neither *Heller* nor *McDonald v. Chicago*, 78 U.S.L.W. 4844 (U.S. 2010), which applied *Heller* to the states, clarified “the appropriate standard of review to apply to gun laws.”

According to Winkler, “The D.C. Circuit now joins several others in holding that intermediate scrutiny, which requires a reasonable fit between the law and important government interests, applies to burdens on core Second Amendment rights.”

Winkler said that the opinion “offers something for both sides. For supporters of gun rights, the decision is welcome because the court suggests that longstanding gun laws are likely to be deemed constitutional.” He noted, however, that “[m]any provisions of D.C.’s law were novel,” and added that “this could be a worrisome development if it means that government can’t develop innovative ways to reduce gun violence.”

On the other hand, Winkler said, “For supporters of gun control, the decision is welcome because it upholds D.C.’s ban on assault rifles.”

The deference that the court shows to the government is another feature of the opinion that “should be good news to gun control supporters,” Winkler said. He explained that “[a]lthough the court said the record evidence was weak for both the registration requirements and the assault rifle ban,” it favored the government in both instances. “The court explained that there was insufficient evidence in the record to back up the challengers’ claim that assault rifles were useful in self-defense and thus upheld the ban. But when the government had insufficient evidence that the registration requirements furthered important objectives, the court gave the government another opportunity to prove its case by remanding for further hearings,” he said.

Wrong Analysis Applied. William J. Olson, Vienna, Va., who submitted an amicus brief in this case on behalf of Gun Owners of America Inc., and other amici, told BNA that even though his clients supported *Heller*, they decidedly did not “support . . . Mr. Heller’s request for the Court to use strict scrutiny, or any other so-called standard of review. We asked the Court to use the Supreme Court’s actual approach in *Heller I*—which was quite different.”

Olson explained that “Heller’s position in the instant case was rejected by both the majority and the dissent.” He added that “[t]he dissent was written largely consistent with the position we urged in our amicus brief for Gun Owners of America, et al.”

Olson said that “[a]pplying what the majority calls ‘intermediate scrutiny,’ the court weighed the Second Amendment right of Mr. Heller and the ‘public safety’ claims of the District government and upheld the D.C. restrictive gun control laws because two of three judges on a panel found them to be ‘reasonable.’” He added, however, that while the majority said it was following *Heller I*, “it actually repudiates *Heller I*.”

‘Shall Not Be Infringed.’ Citing to GOA’s brief, Olson said that “the Second Amendment does not permit only such gun control laws as modern jurists believe to be

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'reasonable.' GOA did not support Mr. Heller's request to use strict scrutiny, believing that the Second Amendment carries with it its own standard of review—'shall not be infringed.' ”

According to Olson, the dissent “convincingly explained that the Second Amendment is governed by its original text, history, and traditions of a self-defending and well-armed populace.” The dissent “correctly pointed out that the Supreme Court in *Heller* specifically rejected such judicially-invented balancing tests in Second Amendment cases,” he said.

Olson explained that a court's job “is to examine the text, its history, and the American tradition of a self-government leading up to the Second Amendment's enactment to determine what arms are protected and what actions respecting those arms are secured.” He said that “[i]t is decidedly not the court's job—as two judges did—to rewrite into the Second Amendment their personal and policy views of the value of individual gun ownership as weighed against their opinion about . . . public safety.” He added that “[a]s an agency of the federal government subject to the Second Amendment, the D.C. Circuit has no more authority under the Second Amendment to approve the disarming of Americans than the D.C. Government did.”

Opinion Lacks Legal Significance. Olson said that “we actually do not believe the majority opinion is legally significant. It is just more of the same, as Courts ignore the meaning of the text, and seek to retain the power to decide which laws they like and which ones they don't like, using atextual standards of review imported from First Amendment jurisprudence.”

Under the proper test, courts should “look first at the text of the Second Amendment, and if the plaintiff is one of ‘the people,’ and the firearm at issue is one of the protected ‘arms,’ then there is no state interest however important or even compelling it may seem to a particular judge or legislator that can justify an infringement of the right,” Olson said.

Stephen P. Halbrook, Fairfax, Va., who represented Heller, told BNA that the opinion is legally significant because it addresses what standard of review is applicable in Second Amendment cases—“the categorical approach versus intermediate or strict scrutiny.”

Halbrook argued for Heller. Solicitor General Todd S. Kim, D.C. Office of the Attorney General, argued for the district.

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Full text at <http://pub.bna.com/lw/107036.pdf>.