The Supreme Court Finally Gets Off the Second Amendment Bench

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ABSTRACT: After seventy years of sitting idly while the issue of gun control and its constitutionality in light of the Second Amendment escalated, the Supreme Court has finally granted certiorari to review a law banning handguns.

KEY WORDS: Second Amendment, gun control, individual rights, U.S. Supreme Court

In November of 2007 the United States Supreme Court announced that for the first time in seventy years it would consider a case involving the 2nd Amendment’s text regarding “the right of the people to keep and bear arms.”

The Amendment has long been controversial, eliciting an array of different interpretations aided by its vague and awkward prose. The case giving rise to the Court’s impending discussion is District of Columbia v. Heller, No. 07-290, which concerns the District of Columbia’s thirty-one-year-old ban on the ownership of handguns.

The plaintiff, Dick Anthony Heller, a security officer, is suing for the right to keep the handgun he uses on duty at his home while off duty for self-defense. Oral argument is scheduled for March 18, 2008. The High Court’s decision could have an impact well beyond Mr. Heller, particularly in light of yet another shooting on a college campus in the United States in which six people attending class at Northern Illinois University were shot to death with the aid of a handgun.

At issue in the Heller case will be how to construe the Second Amendment in light of its language and context. The level of scrutiny applied to any law with regard to bearing arms will depend on what the language is deemed to mean by the justices.

The Amendment’s entire text reads as follows:

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.

Many gun-right proponents argue that what should be focused on in the Amendment are the words “the right of the people to keep and bear Arms, shall not be infringed.” Gun-control advocates counter by invoking the preamble of the Amendment to point out that the right to bear arms is confined to the context of those who serve in a militia.

The federal appeals court in Heller agreed with the first interpretation, finding that the Second Amendment enumerated an individual right irrespective of service in a militia.
A majority of other federal district and appellate courts have disagreed, generally finding that all of the words in the Amendment must be given meaning, thereby attaching the right to the context of militias. The last Second Amendment case heard by the U.S. Supreme Court seventy years ago implied that the Amendment was to be read in the context of service in a militia.

While many are looking forward to finally hearing from the High Court on such a volatile matter, issues pertaining to the reach of the Court’s decision will need to be addressed.

Nearly every one of the provisions in the Bill of Rights has been applied to the states in addition to the federal government. The Second Amendment has not. However, it is unclear if it has not been applied simply because of the dearth of Supreme Court Second Amendment jurisprudence or because the Amendment actually does not apply to the states.

Moreover, the fact that the handgun ban being reviewed comes from the District of Columbia and not a state may also need to be resolved by the justices.

The Court’s seven decade silence on this issue makes speculating as to how it will resolve the case difficult, but the makeup of the current Court and how it framed the issue it gave certiorari offer clues.

The exact language of the question the Court decided to review is whether the provisions of the D.C. statute “violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes.”

The question was not written as simply and openly as whether the Amendment is a collective right regarding militias or an individual right regardless of militia service.

Instead, it was written to ask whether the rights of individuals who are not affiliated with militias are violated when they are not permitted to keep handguns for private use in their homes. By asking about whether a right was violated instead of first questioning whether the right even exists, the Court could be tipping its cap as to where its sympathies lie.

Regardless of if and how the Court construes the right to bear arms in *Heller*, it may be only the opening salvo in Second Amendment jurisprudence as opposed to any all-encompassing definitive rule. Questions about the nature of arm a citizen may legally possess, how and where legislatures may regulate that arm as well as a host of other specific issues will likely warrant further comment if a semblance of clear guidance is to be achieved. But while *Heller* will be far from conclusive, it could be a good start.