HELLER V. D.C.

The burning question arising from the *Heller* case is whether the courts will find that the Second Amendment applies to the states. A number of current cases could eventually go to the U.S. Supreme Court and decide if *Heller* will catch fire and sweep the country.

by Dave Kopel

The State of Heller

Does the Second Amendment apply to state and local governments? Ongoing cases may soon give the Supreme Court an opportunity to issue a definitive decision on this very important question.

Most laymen, and quite a few lawyers, too, are surprised to find that the Bill of Rights does not automatically apply to state and local governments. There's a long and complicated history behind this, but here's the bottom line:

All of the provisions of the Bill of Rights are direct restrictions on the federal government. Likewise directly limited is any entity whose powers exist only because they were granted by the federal government. For example, under the Constitution, the federal government is in charge of the District of Columbia. The D.C. Council's powers exist only because Congress chose to delegate to them some of Congress's authority over the District. The *Heller* case affirmed that the Second Amendment prohibits the federal government, and federal entities such as D.C., from banning handguns for self-defense.

As Justice Scalia's opinion in *Heller* stated, the decision did not resolve

the separate question of whether the Second Amendment applies to state and local governments. The Fourteenth Amendment, enacted during Reconstruction, provides: "… nor shall any State deprive any person of life, liberty, or property, without due process of law … ."

Under modern Supreme Court doctrine, the Fourteenth Amendment's "due process" clause protects both "procedural" and "substantive" due process. Procedural due process involves the fairness of *how* the government acted. For example, before the government took away someone's driver's license, did the person have an opportunity to present his side of the story to a neutral decision-maker?

Substantive due process involves *what* the government did. Some things that a government might do would involve an unjust deprivation of constitutional liberty, even if the procedures were fair. Suppose a state passed a law that said, "Anyone who reads a book criticizing the state's governor will be imprisoned for one year." And also suppose that for prosecutions under the law, there were all the usual procedural protections: the defendant had a right to a jury trial; the defendant could cross-examine prosecution witnesses; the prosecution had to prove beyond a reasonable doubt that the defendant really had read the book; and so on. Even with very fair procedures (procedural due process), the law would be a violation of the Fourteenth Amendment because there are some ways in which a government may never deprive a person of liberty (substantive due process).

How does this affect the Bill of Rights? The Supreme Court has ruled that some, but not all, provisions of the Bill of Rights are "incorporated" in the Fourteenth Amendment's due process clause. The incorporated provisions of the Bill of Rights are thereby made enforceable against state governments. And they are also enforceable against local governments, since local governments' powers are derived from the state.

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Chicago's handgun ban presents the most straightforward challenge to *Heller*.

Most of the Supreme Court's cases on Fourteenth Amendment incorporation were decided between the 1930s and the 1960s. By the time the court was done, almost all of the provisions in the Bill of Rights had been incorporated, except: the Second Amendment right to arms; the Third Amendment right not to have soldiers quartered in one's home; and the Fifth Amendment right to a grand jury indictment before being prosecuted. Also not incorporated, of course, is the Tenth Amendment, which affirms that the people and the states retain powers not granted to the federal government.

So once the *Heller* case was decided, definitively affirming that the Second Amendment protects the rights of ordinary citizens, the next question was whether the Second Amendment applies to state and local governments.

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There are some old cases from the 19th century suggesting that it does not, but those involved another provision of the Fourteenth Amendment (the "privileges or immunities" clause), not the due process clause.

Some state trial courts in Massachusetts, Missouri and New York have already treated the Second Amendment as applicable to the states. But other courts have disagreed. Based on the Supreme Court's articulated standards for what gets incorporated into the Fourteenth Amendment, the argument for incorporating the Second Amendment is very strong, as George Mason University law professor Nelson Lund explained in a recent issue of the *Syracuse Law Review*. (The article can be downloaded here: http://ssrn.com/abstract=1239422. Click the word "Download" which appears above the article title.)

However, the question will not be definitively resolved until the U.S. Supreme Court issues a decision. From the pro-rights perspective, the sooner the Supreme Court takes a Second Amendment incorporation case, the better, since President Barack Obama's Supreme Court nominees are unlikely to look favorably on the Second Amendment.

Right now, there are two major cases that the Supreme Court could hear either in its 2009-2010 term or its 2010-2011 term. The most straightforward cases involve challenges to the Chicago handgun ban. The day after *Heller* was decided, the National Rifle Association filed suit against the Chicago ban. The lead lawyer in that case is Stephen Halbrook, winner of three Supreme Court cases on firearm issues.

The Second Amendment Foundation brought a parallel suit, with *Heller* victor Alan Gura as the lead attorney. Those cases have been partially consolidated for the purposes of appeal, and are currently before the federal Seventh Circuit Court of Appeals.

Five Chicago suburbs also had handgun bans. Four of the suburbs—Morton Grove, Evanston, Wilmette and Winnetka—sensibly acted to get rid of their bans. The only recalcitrant gun-banning suburb is Oak Park. The NRA/Halbrook suit on behalf of the civil rights of the citizens of Oak Park has been consolidated with the Chicago cases.

In the Seventh Circuit, I wrote an *amicus* (friend of the court) brief on behalf of the International Law Enforcement Educators & Trainers Association, as well as think tanks and academics. The brief details the empirical evidence showing the Chicago handgun ban has harmed public safety—particularly by leading to an immediate, sharp and permanent rise in Chicago's burglary and assault rates. The brief is available at davekopel.org/Briefs/ILEETA-Chicago-amicus.pdf.

As a Supreme Court vehicle, the Chicago/Oak Park cases have the obvious advantage of lead attorneys who have already won gun rights cases in the U.S. Supreme Court. In addition, the type of law at issue—a handgun ban—has already been ruled to be a violation of the Second Amendment. Consequently, the only question for the Supreme Court to answer would be if the Second Amendment is incorporated into the Fourteenth.

Unfortunately, Chicago and Oak Park have continued to delay the case, getting extensions on their briefs until this past April. Oral arguments before a three-judge panel may not take place until this summer, and it could take several months, or perhaps longer, for a decision to be issued. If Chicago and Oak Park lose, they could ask for a rehearing *en banc* before all 16 of the Seventh Circuit judges. An *en banc* rehearing (a hearing with every appeals judge from the circuit) could easily delay the case a year further.

Another case that could offer the Supreme Court the opportunity to decide Second Amendment incorporation is *Nordyke v. King*, which involves a challenge to the Alameda County, Calif., ban on gun shows on county property. That case was argued before a three-judge panel of the Ninth Circuit Court of Appeals in January. You can listen to the oral argument by going to www.ca9.uscourts.gov, and then searching for "Nordyke."

As the oral argument shows, the panel of three judges was very interested in whether Ninth Circuit precedent stops them from ruling in favor of incorporation. As a general rule, a three-judge panel in a circuit court of appeals cannot overrule a prior decision from a three-judge panel in the same circuit. Only the entire circuit, hearing the case *en banc,* can overrule circuit precedent.

However, there is an exception for situations in which the Supreme Court has made a change in the law. The issue before the Ninth Circuit is whether the *Heller* case made enough of a change in Fourteenth Amendment law that the Ninth Circuit's previous decision against incorporation is no longer binding.

Once the three-judge panel rules in *Nordyke*, it's possible that the Ninth Circuit might agree to an *en banc* rehearing. Such a rehearing would, of course, slow down the case's possible movement toward the Supreme Court.

Should the Supreme Court eventually decide to hear *Nordyke*, it would be possible for the court to rule that the Second Amendment must be obeyed by state and local governments, *and* that a ban on gun shows on county property does not violate the Second Amendment. This would not be a perfect result, but it would still be very positive, on the whole, for Second Amendment rights.

The lead lawyer in *Nordyke* is Donald Kilmer, a California lawyer with extensive experience in gun law cases. He is assisted by Don Kates, a Washington state lawyer with a very long and eminent record of Second Amendment scholarship and litigation.

Whether these cases will eventually make their way before the Supreme Court is yet to be seen. But it would be foolish to take for granted a Supreme Court victory on Second Amendment incorporation. The *Heller* victory was only achieved by a single vote, and we can expect that the anti-rights side would, as in *Heller*, bring in enormous resources from top law firms to present the best possible arguments against judicial enforcement of the Second Amendment.

America's 1st Freedom will keep you updated on these cases as they progress through the court system.