The U.S. Supreme Court has agreed to hear the D.C. gun ban case, setting the stage for a ruling on the real meaning of the Second Amendment.

The Supreme Decision

by David B. Kopel

The United States Supreme Court will decide the most important Second Amendment case in American history this year. On Nov. 20, the Tuesday before Thanksgiving, the Supreme Court announced that it would take the case of *District of Columbia* v. *Heller*.

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History In The Making This case can be confusing if you don't understand its history. In the lower federal courts, the case was known as *Parker* v. *District of Columbia*. Parker (a woman who had been threatened by drug dealers), Heller (a security guard who wanted to have a handgun at home) and four other plaintiffs had originally brought suit to strike down the D.C. gun ban. The United States Court of Appeals for the District of Columbia Circuit ruled that five of the plaintiffs (all except Heller) lacked "standing" to sue. That is, their fear of being prosecuted if they violated the D.C. handgun ban did not give them a sufficiently concrete legal interest in order to sue.

In contrast, Heller had actually applied to register a handgun with the D.C. police and had been turned down. Because Heller was appealing from a particular administrative decision, the appellate court ruled that his case could go forward.

On the substance of the case, the appellate court panel ruled 2-1 in Heller's favor—that D.C.'s ban on handgun acquisition and ban on possession of functional firearms for defense in the home were violations of the Second Amendment.

The lawyers for the District of Columbia asked the U.S. Supreme Court to take the case. The lawyers for Heller and the other plaintiffs agreed, since their goal from the start had been to bring a Second Amendment test case to the Supreme Court.

Supreme Buy-In Even so, the Supreme Court could have refused to take the case. If it had, the lower court decision regarding the Second Amendment would have been binding precedent in the District of Columbia, but not anywhere else.

According to an Oct. 4 Associated Press article, the head of the Brady Campaign, Paul Helmke, "said the group suggested to Washington that it rework its gun laws rather than press on with an appeal." The Brady Campaign, which has vigorously fought to defend the D.C. law against every legal and legislative challenge for the last 31 years, apparently preferred to cut its losses (giving up a handgun ban and self-defense ban in one city) rather than risk a definitive Supreme Court ruling on the Second Amendment—a ruling that could be a devastating blow to their gun-ban cause.

Ironically, it wasn't too long ago when the head lawyer of the Brady Campaign was boldly insisting that the "fact" that the Second Amendment does not protect the right of ordinary Americans to own a gun is "perhaps the most well-settled point in American law." (Dennis Henigan, "The Right to Be Armed: A Constitutional Illusion," *S.F. Barrister*, Dec. 1989, p. 19.)

It takes at least four of the nine Supreme Court justices to agree to review a case. We may never know which justices voted to hear the case, or if more than four did so.

We do know that the brief for D.C. is due in early January, the brief for Heller will be due in early February and that oral arguments will probably take place in March. It is not uncommon, however, for parties to be granted extensions. The last possible date for oral argument is April 23, and the last possible date for a decision to be announced is June 23—the final day of the Supreme Court's 2007-08 term.

The case is now titled *District of Columbia* v. *Heller*, since the appealing party (the party that lost the case in the lower court) is always listed first in Supreme Court cases.

Begging The Question When parties appeal to the Supreme Court, they propose the "Question Presented." If the Supreme Court agrees to take the case, the parties must address only the Question(s) Presented. In this case, the D.C. government's petition framed the question as, "Whether the Second Amendment forbids the District of Columbia from banning private possession of handguns while allowing possession of rifles and shotguns."

On the other side, the lawyers for the D.C. citizens said that the question should be, "Whether the Second Amendment guarantees law-abiding, adult individuals a right to keep ordinary, functional firearms, including handguns, in their homes." (All the documents in this case are available at www.dcguncase.com)

In an unusual step, the Supreme Court wrote its own Question Presented:

"Whether the following provisions—D.C. Code secs. 7-2502.02(a)(4), 22-4504(a), and 7-2507.02—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."

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Thus, the Supreme Court will focus on three specific sections of the D.C. law. First, is the ban on citizens possessing handguns that were not registered to them as of the February 1977 effective date of the handgun ban constitutional? Second, is the ban on carrying, either openly or concealed, any handgun or other concealable weapon without a permit constitutional? Notably, the carrying ban applies even within one's own home—under the law it is illegal to carry a gun from one room of an apartment to another room. Significantly, the court is only interested in the constitutionality of the carry ban for private use in the home. The case does not involve carry outside the home.

Third, the court will explore the portion of the D.C. code prohibiting all functional firearms. All rifles and shotguns (as well as pre-1977 handguns) must be kept "unloaded and disassembled or bound by a trigger lock or similar device unless such firearm is kept at his place of business, or while being used for lawful recreational purposes within the District of Columbia." Self-defense in a place of business is allowed, but not in the home.

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What Could Happen? There are several ways in which the Supreme Court could rule against the Second Amendment. Over the years, the gun-ban lobby has propounded a variety of shifting theories to nullify the Second Amendment—that the Second Amendment right is a "collective right" (like "collective property" in a communist dictatorship, it supposedly belongs to all of the people as a group, but in practice belongs solely to the government). Or that the Second Amendment is a state's right, guaranteeing only the right of states to have National Guard units. (Apparently, they believe James Madison was such a poor wordsmith that he wrote "the right of the people to keep and bear arms" when he really meant "the right of the states to arm their militias.")

Lately, the most popular Second Amendment nullification theory has been the "narrow individual right"—meaning that the Second Amendment is an individual right of National Guardsmen not to be disarmed while on duty.

Clearly the Brady Campaign and other gun haters are afraid that the Supreme Court will recognize the Second Amendment "right of the people to keep and bear arms" as similar to the First Amendment "right of the people peaceably to assemble" and the Fourth Amendment "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." That is, a right that belongs to ordinary American citizens.

Yet while affirming an individual right in theory, the Supreme Court could nullify it in practice by adopting a standard of review that completely defers to the policy judgments of a legislature. For example, Duke law professor Erwin Chemerinsky says that guns can be regulated just as much as any other property, and since the courts have upheld bans on the possession of eagle feathers from endangered species, the Supreme Court should uphold the gun ban. Chemerinsky's theory ignores the fact that the possession and use of some especially important types of property—such as arms and printing presses—are given special protection by the Bill of Rights.

Any ruling that had the effect of nullifying the Second Amendment would likely cause an extremely strong public backlash against the court and seriously harm public belief in its legitimacy. Public faith in the constitutional rule of law could be terribly damaged.

The Up Side On the other hand, a Supreme Court decision acknowledging the unconstitutionality of the D.C. gun ban would comport with widespread public (and scholarly) understanding of the Second Amendment. The extremist D.C. law is far outside of American norms. Only six other jurisdictions (Chicago and five of its suburbs) ban handguns. And even they do not prohibit home defense with a functional long gun.

In fact, it is because the D.C. laws are very rare or unique that the Supreme Court might be willing to declare them unconstitutional. If the gun prohibition lobbies had achieved their objectives in the 1970s and 1980s (and they might well have, if not for the National Rifle Association and NRA citizen-activists), handgun and self-defense bans would already exist in dozens of American cities and even some states. It is doubtful that the Supreme Court would have the courage to declare so many laws unconstitutional, no matter how strong the evidence concerning the original meaning of the Second Amendment.

As for state and local gun laws, enforcement of any part of the Bill of Rights against state and local governments depends on whether the Supreme Court declares that the right is "incorporated" into the due process clause of the Fourteenth Amendment. That isn't an issue in the *Heller* case.

It is essential for gun rights proponents to understand that, even after a win in the *Heller* case, decisions about the vast majority of gun control issues will still be made in the political arena. Only rarely will the courts overturn a legislative action.

The most important short-term effect of a Supreme Court victory for the Second Amendment would be saving the lives of citizens of the District of Columbia, and deterring burglaries and other home invasion crimes there.

In the long term, a Supreme Court victory would have very important consequences in the development of rights-consciousness in the American people. No longer could school textbooks treat the right to arms as an outcast that is too controversial to be mentioned. The obdurate anti-rights minority (which is very powerful and dominates much of the "mainstream" media) would have to give up its propaganda that Americans have no right to arms and no right to armed defense in their homes.

As with other enumerated constitutional rights, there would still be debate about the scope of the right. Yet that debate would be shaped by the universal recognition that the right exists.

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that, even after a win in the *Heller* case, decisions about the vast majority of gun control issues will still be made in the political arena. Only rarely will the courts overturn a legislative action. It will likely be a state legislature, not courts, that will determine whether one should be protected from New Orleans-style gun confiscation in disasters, or whether a state should have a Castle Doctrine law guaranteeing that an abusive district attorney cannot prosecute those using a handgun against a carjacker or home invader.

Without the work of NRA and pro-gun rights citizen-activists in the last four decades, a potential 2008 victory in *Heller* would have been inconceivable. Regardless of the *Heller* result, citizen activism will no doubt be the key to the survival of a robust Second Amendment in the 21st century.

David B. Kopel is a constitutional scholar specializing in Second Amendment issues and a frequent contributor to America's 1st Freedom *magazine.*

My Quick Take: What's Happening, Why It's So Important

by Wayne LaPierre, *NRA Executive Vice President*

November 20, 2007, was a landmark day in Second Amendment history.

That's when the U.S. Supreme Court agreed to decide whether the Second Amendment blocks Washington, D.C., from disarming its citizens.

Today the Second Amendment doesn't just have a seat at the table of national debate. It's at the head of the table, and it's got some presidential candidates saying grace.

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I believe the Supreme Court may now right this wrong.

Believe it or not, most gun rights-related lower federal court rulings since 1939 have viewed the Second Amendment as a "collective right," not an individual right.

It all started in 1939, the last time the Supreme Court took a case where a citizen specifically claimed a Second Amendment right—the *Miller* case. In part of its ruling the high court mentioned that a short-barreled shotgun involved in the case may not be suited for use in a "militia."

Well, that did it. Lower federal courts jumped on the Supreme Court's wording to conclude that the Second Amendment was no longer about an individual right, like the First and Fourth amendments. No, it was about the "collective right" of the states to raise "well-regulated militias." They then explained away the "militias" by claiming they evolved into today's National Guard.

There's a lesson here. All it takes is one not-so-supreme reading of a ruling, and the enemies of freedom rush in to build new barriers.

Repeat a lie often enough and people believe it. Since 1939, judges and academics and media and gun-ban groups repeated the myth that, if your gun ownership isn't associated with a state-regulated "militia," then your gun ownership isn't protected by the Second Amendment.

In fact, that was the official position of the Clinton administration.

But there's no doubt what our Founding Fathers believed the Second Amendment meant. It may seem oddly phrased and punctuated to us, but it was clear to them:

"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."

Our founders believed, as do you and I, that the Second Amendment enshrines the individual right to defend person, home, family and country, a right universal and timeless, endowed to all mankind.

The opening clause is challenging only if you ignore the era in which it was written: The founders wanted to clearly spell out its role in deterring a tyrannical federal government.

There's also no doubt what most Americans think. Poll after poll, decade after decade, show a majority of Americans believe that lawful citizens have an individual right to own a firearm.

But since 1976, the good citizens of Washington, D.C., have been denied the right to keep a working firearm in their homes, much less carry one. So honest people can't lawfully defend themselves in a city that, since the gun ban took effect, has had one of the highest gun crime rates in the nation.

The Supreme Court will decide whether D.C.'s gun ban violates the Second Amendment rights of individuals who specifically aren't associated with any state-regulated militia, but who want to keep firearms at home for private use.

I'm no legal scholar, but that tells me the court may not buy this 70-year-old wrong called a "collective right."