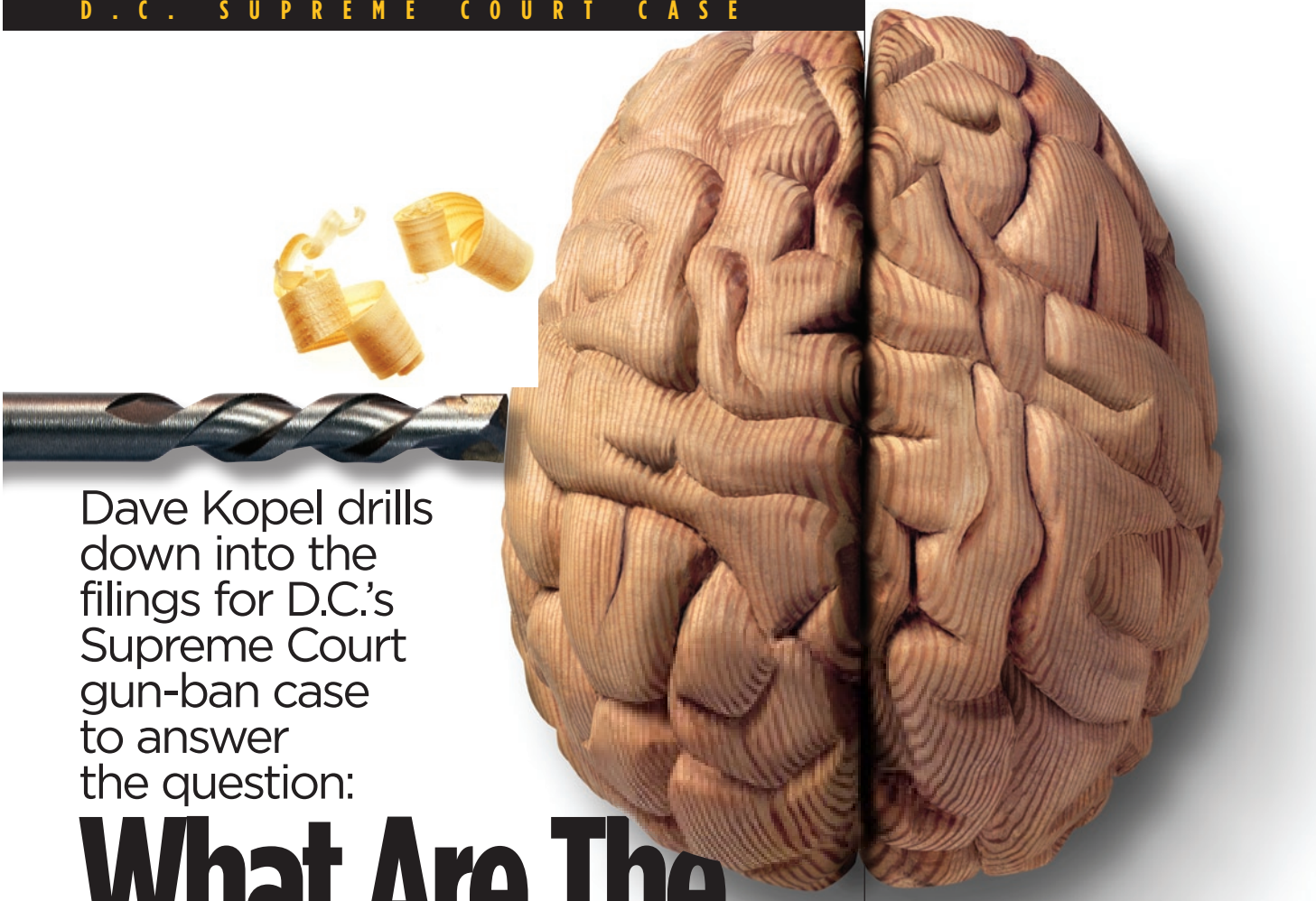

Dave Kopel drills down into the filings for D.C.'s Supreme Court gun-ban case to answer the question:

What Are The Antis Thinking?

by David B. Kopel

What are the latest arguments of the most dedicated enemies of your Second Amendment rights? To learn that answer, let's take a look at the briefs filed in *District of Columbia v. Heller*, the Supreme Court case involving the constitutionality of the Washington, D.C., ban on handguns and prohibition of home self-defense with any gun.

In January, 20 "friend of the court" (*amicus curiae*) briefs were filed in support of District of Columbia Mayor Adrian Fenty's efforts to preserve the D.C. bans. Organizations or persons who are not parties in the case, but who have an additional perspective to share with the court, file *amicus* briefs. In high-profile cases such as *Heller*, it is not uncommon for dozens of briefs to be filed.

Of course the NRA and the NRA Civil Rights Defense Fund, along with other pro-rights organizations, have filed *amicus* briefs too, in support of Mr. Heller's challenge to the D.C. bans. Those briefs, some 46 in number, were filed just prior to press time and will be covered in a future issue. For a short rundown, however, see the sidebar on page 30.

All of the briefs, along with other court filings in the case, are available online at **www.nraila.org/heller**.

Several of the pro-ban briefs come from full-time professional gun-ban

organizations. The Violence Policy Center's (VPC) brief claims that handguns today are even more dangerous than when the D.C. City Council enacted the ban in 1976. These days, sales of self-loading pistols outpace those of revolvers. Technological advances have made pistols more compact, or higher in ammunition capacity, or more effective for self-defense than in 1976. These improvements are obviously the result of manufacturers trying to cater to consumer preferences, although the VPC blames everything on the wickedness of gun manufacturers.

VPC claims high-powered revolvers such as the .50-caliber S&W model 500 (very useful for carrying in areas where a bear attack is possible, I might add) are actually "vest-busters," made for killing police officers.

An appendix to the brief provides pictures of the scariest-looking handguns that the VPC can find, culled from the pages of *Shotgun News*. Examples include the Olympic Arms OA-98. The VPC does not inform the court that such handguns would still be illegal in D.C. even if the handgun law were overturned; you see, D.C. has a separate "machine gun" law that bans all semi-autos for which anyone's ever made a magazine holding 12 rounds or more.

The final section of the brief warns that handguns are inappropriate for self-defense because panicked handgun users' (the brief makes sure not to call them "crime victims") hands will be trembling so much it can "easily result in the killing of an innocent bystander." The VPC does not provide any data about how often this actually happens (in truth, hardly ever), but instead offers a citation to one of its own monographs.

Like the VPC, the Coalition to Stop Gun Violence (CSGV) explicitly favors a handgun ban. The CSGV's website lists 45 member organizations, but interestingly, many of these are not part of the CSGV brief, or any other pro-ban brief. Non-participants include the YWCA of USA, the Jesuit Conference Office of Social and International Ministries and Women's National Democratic Club.

The brief is filed by the CSGV's legal arm, the Educational Fund to Stop Gun Violence, and does include many of the CSGV member organizations, as well as many state and local gun-ban groups.

The brief argues that the Constitution provides the death penalty for treason and authorizes Congress to use the militia to "suppress insurrection." Accordingly, the brief concludes that the Second Amendment could not have been intended to allow the people to use firearms to resist or overthrow a tyrannical government.

Of course, that claim is contradicted by the writing of James Madison himself, and by many others, including Hubert H. Humphrey, who explained: "Certainly one of the chief guarantees of freedom under any government, no matter how popular and respected, is the right of citizens to keep and bear arms. This is not to say that firearms should not be very carefully used and that definite safety rules of precaution should not be taught and enforced. But the right of citizens to bear arms is just one more guarantee against arbitrary government, one more safeguard against a tyranny which now appears remote in America, but which historically has proved to be always possible." (*Know Your Lawmakers*, Guns, Feb. 1960, p. 4.)

The brief for the Brady Center—the legal arm of the Brady Campaign—is joined by the International Association of Chiefs of Police, Major Cities Chiefs and some smaller police groups, mostly formed of command officers.

The main problem for the Brady lawyers' reasoning is that, although they assemble collections of quotes and arguments that would seem persuasive if you only read their brief, most of what they write is readily contradicted once you look at the entire record. For example, they insist that the only purpose of the Second Amendment was federalism—to limit federal interference with state militias.

But one only has to look at the D.C. government's official Constitution for the proposed state of "New Columbia" (what D.C. would be called if it were granted statehood). The "New Columbia" Constitution copies the federal Bill of Rights, including a word-for-word copy of the Second Amendment. Nothing in a state constitution could limit federal power. Thus, the D.C. government's own actions contradict the *Heller* argument of the Brady Center (and of the D.C. government itself) that the Second Amendment is only about federalism.

Not to be outdone, Janet Reno returns, along with a collection of other officials from the Reno/Clinton Department of Justice, in a brief arguing that the official position of the Department of Justice since the 1930s has been that there is no individual right to arms, and that the Second Amendment is only a "collective right" of state governments.

One of the brief's biggest problems with this argument is dealing with the testimony of President Roosevelt's attorney general, Homer Cummings,

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before Congress during the passage of the National Firearms Act (NFA) of 1934. The NFA imposed a tax and registration requirement on "machine guns," short shotguns and short rifles. Cummings was asked about whether Congress could instead enact an outright ban, and Cummings replied that there might be constitutional problems.

Reno and her ex-staffers claim that Cummings was not talking about the Second Amendment; he was explaining that the congressional tax power (which is the basis for the NFA) might not extend to banning things, rather than taxing them (and registering them in order to enforce the tax).

However, what Reno omits is the context of what Attorney General Cummings said. In the hearing before the House Ways & Means Committee, Representative David J. Lewis of Maryland said, "I have never quite understood how the laws of the various States [restricting concealed firearms] have been reconciled with the provision in our Constitution denying the privilege to the legislature to take away the right to carry arms." He continued, regarding the proposed machine gun bill: "I was curious to know how we escaped that provision in the Constitution."

Attorney General Cummings explained: "If we made a statute absolutely forbidding any human being to have a machine gun, you might say there is some constitutional question involved. But when you say, 'we will tax the machine gun' and when you say that 'the absence of a license showing payment of the tax has been made indicates that a crime has been perpetrated,' you are easily within the law."

Lewis followed up: "In other words, it does not amount to prohibition, but allows of regulation."

Attorney General Cummings replied: "That is the idea. We have studied that very carefully." (Hearings Before The House Committee on Ways and Means on H.R. 9066, 73rd Congress, 2d Session, 1934, pages 18-19.)

In another brief, the attorneys general of Hawaii, Massachusetts, New Jersey, Maryland and Puerto Rico joined New York State Attorney General Andrew Cuomo. Interestingly, the attorney general of Illinois, who had joined Cuomo in support of D.C. asking the Supreme Court to hear the handgun case, did not participate at this later stage, based on the case's merits.

The main point of the New York brief is to argue that the Second Amendment, whatever it means, is only a limit on the federal government, and not on the states. That issue, however, isn't directly relevant in the *Heller* case, since the Constitution specifies that the capital district (now known as the District of Columbia) is under complete federal jurisdiction. The only powers that the D.C. City Council exercises are those that are granted by Congress.

Another brief—this one by the city of Chicago—argues along the same lines as New York's. Chicago and four of its suburbs are the only jurisdictions in the U.S. with handgun bans, so Chicago's interest is plain. Perhaps Chicago and New York were hoping that the Supreme Court, even while affirming an individual right, will gratuitously announce that the right is irrelevant to state and local laws. More realistically, New York and Chicago appear to be arguing in advance about future cases that might challenge the Chicago ban, as well as the frequently abusive enforcement of New York City's handgun licensing laws.

The social science evidence is covered in a high-strung brief from the American Academy of Pediatrics and a more sober one from the American Public Health Association. These two briefs have to twist themselves into knots to claim that D.C.'s law is needed to solve the problem of gun accidents.

Continued on page 55

NRA To The Fore

Just before press time for this issue, pro-gun rights advocates had their say. With a score of briefs filed before the Supreme Court supporting the Second Amendment as an individual right and arguing that the D.C. gun ban be declared unconstitutional, the breadth of thought and the diversity of individual filings is remarkable.

Leading the way was the brief filed by NRA and the NRA Civil Rights Defense Fund.

"We want to return hope and we want to return freedom to our nation's capital. After this ban was enacted, D.C.'s murder rate tripled, and the city was labeled 'murder capital of the United States,'" said NRA Executive Vice President Wayne LaPierre. "The irony of this gun ban is that it has resulted in criminals having guns while denying law-abiding citizens their basic right to self-defense in their own homes."

Among other points, the NRA brief states:

"In adopting the Second Amendment, the Framers guaranteed an individual right to keep and bear arms for private purposes, not a collective right to keep and bear arms only in connection with state militia service.

"By its terms, the Amendment protects the right 'of the people' to keep and bear arms. The holder of the right is unambiguous: it is not the States, it is 'the people' themselves.

"Americans' personal right to possess . . . firearms for hunting or self-defense was part of the essence of the Framers' view of themselves as a free and democratic people. Had Americans in 1787 been told that the federal government could ban the frontiersman in his log cabin, or the city merchant living above his store, from keeping firearms to provide for and protect himself and his family, it is hard to imagine that the Constitution would have been ratified."

Another key amicus was filed on behalf of 55 U.S. senators and 250 members of the U.S. House of Representatives, who were joined by Vice President Dick Cheney in his capacity as president of the Senate. Such support on a Supreme Court brief has never occurred in the long history of our nation.

Also weighing in on the side of the Second Amendment are the attorneys general of 31 states.


NRA-ILA's Cox

Literally every aspect of the Second Amendment is covered by these amici, which provide the best scholarship, the best legal thinking and the best reading on the subject anywhere. History, criminology, the law, the intent of the framers, the racist nature of early gun control laws, even self-defense readings from authors cited by the Framers are covered in the briefs.

These briefs, including NRA's benchmark friend of the court filing, can be found at **www.nraila.org/heller**

The fatal gun accident rate has actually declined by 86 percent since 1948, while the per capita firearms supply has risen by 158 percent. Fatal gun accidents involving children have declined even more steeply, so that the odds of a child under 10 being killed by an accident in a swimming pool are about a hundred times greater than the risk of a child being killed in a gun-related accident.

Eighteen members of the U.S. House of Representatives filed a brief arguing that, "Interpretation of the Second Amendment to resolve this case should be informed by Congress' legislative activities and role as a constitutional interpreter." The brief lists various gun control laws enacted by Congress.

... the odds of a child under 10 being killed by an accident in a swimming pool are about a hundred times greater than the risk of a child being killed in a gun-related accident.

Although the brief doesn't say so, four different congressional enactments, including the 2006 Protection of Lawful Commerce in Arms Act (which passed both houses of Congress by huge majorities), have declared that the Second Amendment is an important individual right. If the Supreme Court defers to congressional interpretation, the individual Second Amendment right is a sure winner before the court.

The lead representative on the anti-rights congressional brief was Philadelphia's Chaka Fattah. He was joined by Robert A. Brady, D-Pa.; Judiciary Committee Chair John Conyers, D-Mich.; Danny K. Davis, D-Ill.; Keith Ellison, D-Minn.; Sam Farr, D-Calif.; Al Green, D-Texas; Raúl M. Grijalva, D-Ariz.; Michael Honda, D-Calif.; Zoe Lofgren, D-Calif.; Carolyn McCarthy, D-N.Y.; Gwen Moore, D-Wis.; James P. Moran, D-Va., Eleanor Holmes Norton, D-D.C.; former Black Panther Bobby L. Rush, D-Ill.; Maxine Waters, D-Calif.; Lynn C. Woolsey, D-Calif.; and Albert R. Wynn, D-Md.

Interestingly, not all congresspersons who support handgun bans signed the brief. For example, Sen. Barack Obama, now campaigning for president, was conspicuously absent. Yet after the Supreme Court announced it would hear the case, Senator Obama's campaign stated that Obama "believes that we can recognize and respect the rights of law-abiding gun owners and the right of local communities to enact commonsense laws to combat violence and save lives. Obama believes the D.C. handgun law is constitutional." (*Chicago Tribune*, Nov. 20, 2007).

Another gun-ban organization, the Legal Community Against Violence (LCAV), filed a brief on behalf of Baltimore, Cleveland, Los Angeles, Milwaukee, New York City, Oakland, Philadelphia, Sacramento, San Francisco, Seattle and Trenton. The brief is joined by the U.S. Conference of Mayors, an association of big-city mayors.

The most absurd part of the LCAV brief is that it credits the tremendous drop in New York City crime under Mayor Giuliani, who was elected in November 1993, to the ban on so-called "assault weapons" adopted during the crime-ridden reign of Mayor David Dinkins in 1991. Of course, that's impossible, since so-called "assault weapons" constituted far less than 1 percent of the guns used in New York City's crime. For example, in 1988, of 12,138 guns seized by New York City police, only 80 were "assault-type" firearms. ("Handguns, not Assault Rifles, are NYC Weapon of Choice," *White Plains Reporter-Dispatch*, March 27, 1989.)

The LCAV also credits a 1998 New York City law requiring handguns be sold with a locking device and a 2000 law requiring the same for long guns. Yet New York City's law-abiding gun owners were never part of the crime problem to begin with. And making them spend a few extra dollars to buy a trigger lock would not have made a difference.

Many of the *amicus* briefs reach into American history to find precedent for Washington, D.C.'s extreme law. The best they can find is an 1837 Georgia law, which they describe as a ban on concealable "weapons." More precisely, it banned the sale or carrying of all handguns except horsemen's pistols.

What these briefs omit was that in the 1846 case of *Nunn v. State*, the Georgia Supreme Court declared the 1837 law to be an unconstitutional violation of the Second Amendment. The court wrote:

"The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear arms of every description, not merely as are used by the militia, shall not be infringed, curtailed or broken in upon, in the smallest degree; and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State. Our opinion is, that any law, State or Federal, is repugnant to the Constitution, and void, which contravenes this right, originally belonging to our forefathers, trampled under foot by Charles I and his two wicked sons and successors, reestablished by the revolution of 1688, conveyed to this land of liberty by the colonists and finally incorporated conspicuously in our own Magna Charta! And Lexington, Concord, Camden, River Raisin, Sandusky and the laurel-crowned field of New Orleans, plead eloquently for this interpretation! And the acquisition of Texas may be considered the full fruits of this great constitutional right."

All of these *amicus* briefs in favor of the D.C. gun ban were written with the help of major corporate law firms.

But if the justices and clerks carefully read all briefs on both sides of the case, they will find that history, precedent and social science all point to the unconstitutionality of the D.C. bans.