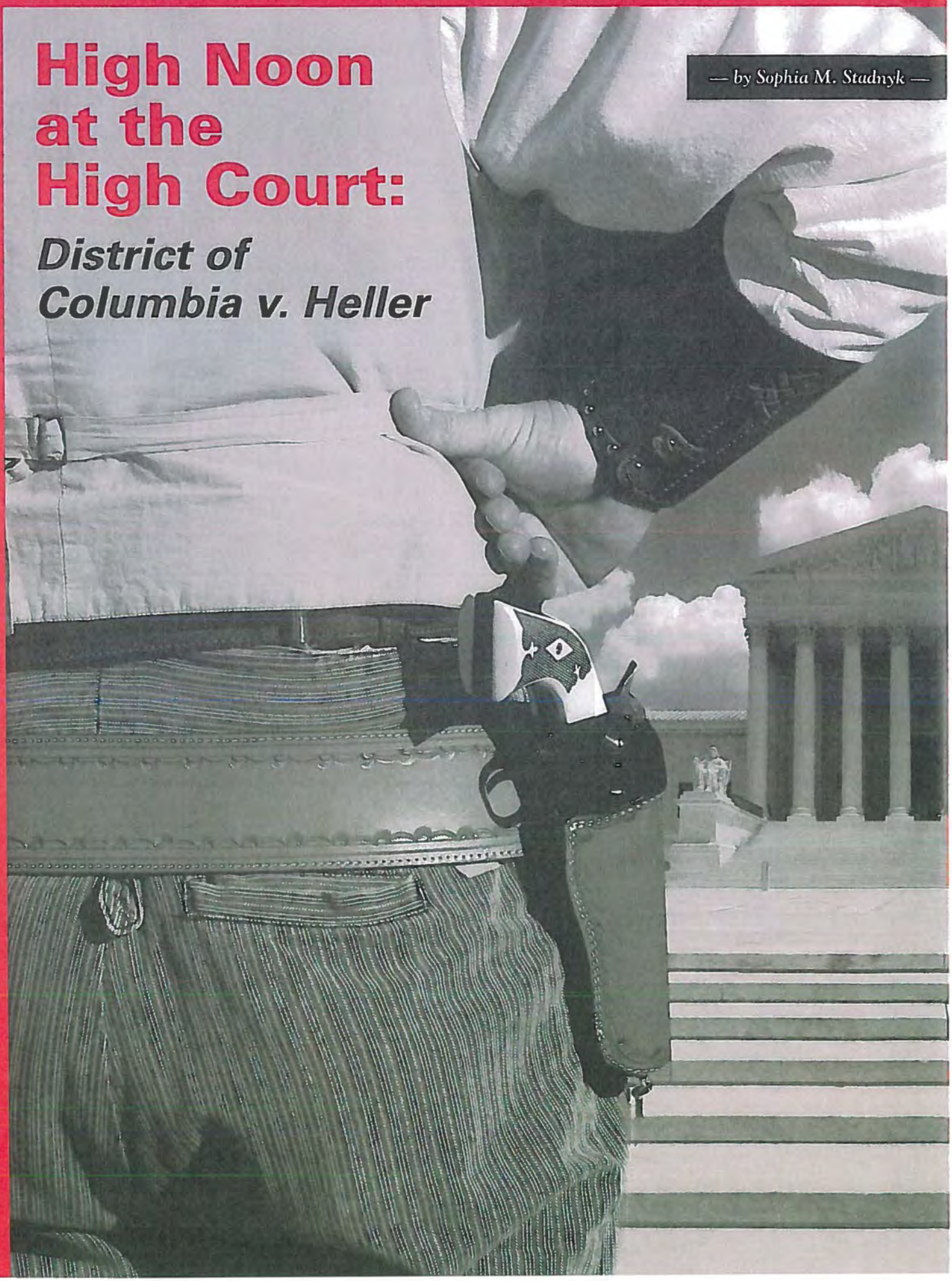
High Noon at the High Court:

District of Columbia v. Heller

— by Sophia M. Stadnyk —



The U.S. Supreme Court's much anticipated ruling in *District of Columbia v. Heller*[1] addressed one essential question—whether the Second Amendment protects an individual or a collective right—but left unanswered many others, including the standard of scrutiny applicable to firearms regulations, and whether and to what extent the Second Amendment is applicable to state and local laws.

The Second Amendment's awkward phrasing lends itself well to legal debate: "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."[2] *Heller* revolved around the validity of a 1976 District of Columbia law that generally banned the registration of handguns; prohibited carrying a pistol without a license, even within a home; and required that all lawfully-owned firearms be kept unloaded and disassembled, or bound by a trigger-lock or similar device, unless used for recreational activities[3] (a requirement that "reduce[d] a pistol to a useless hunk of 'metal and springs'"[4]). The D.C. Council passed the handgun ban because such guns were "disproportionately linked to violent and deadly crime" and because it felt that any less restrictive measures would not be effective.[5]

In 2003, Dick Heller and five other residents filed a Section 1983 lawsuit alleging that the law violated their Second Amendment rights.[6] Heller, a D.C. special police officer, had applied to the District for, and was denied, a license to possess a handgun within his home. Like Heller, the rest of the plaintiffs did not seek to carry such weapons outside their homes; what they wanted was the ability to possess "functional firearms" (readily accessible and effective weapons) for self-defense inside the home.[7] None of the *Heller* plaintiffs "asserted membership in the District of Columbia Militia,"[8] which brought the question of whether the scope of the right protected by the Amendment was an individual ("citizen-based") or collective ("Militia-based") right squarely before the courts.

The district court dismissed their suit, finding that the Second Amendment did not bestow any rights on individuals except, perhaps, those serving in an organized militia. While the plaintiffs "extol[led] many thought-provoking and historically interesting arguments for finding an individual right, this Court would be in error to overlook sixty-five years of unchanged Supreme Court precedent and the deluge of circuit case law rejecting an individual right to bear arms not in conjunction with service in the Militia."[9]

On appeal, in a 2-1 ruling, the U.S. Court of Appeals for the D.C. Circuit held that Heller was the only plaintiff to have standing, based on the license denial (an injury independent of the District's prospective enforcement of its firearm law); the other plaintiffs had suffered no requisite injury in fact.[10] Second, it held that the district court erred in finding that the Second Amendment protected only a collective right. "[T]he phrase 'the right of the people,' when read intratextually and in light of Supreme Court precedent, leads us to conclude that the right in question is individual."[11] Moreover, it was a right "not created by government, but rather preserved by it"—"[w]e . . . take it as an expression of the drafters' view that the people possessed a natural right to keep and bear arms."[12] Lastly, the disassembled-unloaded-or-locked requirement, like the ban on carrying pistols within the home, "amount[ed] to a complete prohibition on the lawful use of handguns for self-defense. As such, [it was] unconstitutional."[13]

The District and Mayor Adrian Fenty petitioned for review.[14] The Supreme Court granted certiorari and limited the question to whether the D.C. restrictions "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."[15] A deluge of *amicus* briefs followed. Apart from the expected briefs from government entities, law enforcement agencies, and gun and sporting groups, briefs before the Court included those by the American Academy of Pediatrics, groups of academics and professors, Jews for the Preservation of Firearms Ownership, the Pink Pistols and Gays and Lesbians for Individual Liberty, and a brief on behalf of a majority of the members of the U.S. Congress, Vice President Dick Cheney, and others.[16]

The Ruling

Justice Scalia wrote the majority opinion, in which Chief Justice Roberts, and Justices Kennedy, Thomas, and Alito joined. Justice Stevens filed a dissenting opinion, in which Justices Souter, Ginsburg, and Breyer, joined. Justice Breyer also filed a dissenting opinion, in which Justices Stevens, Souter, and Ginsburg joined. After an exhaustive review of the history of and background to the Second Amendment, the majority held that the Amendment protects a pre-existing individual right, not in any way dependent upon the Constitution for its existence, to possess firearms and to use them for traditionally lawful purposes, such as self-defense within the home.

This "ancient" and "natural" right was clearly unconnected with service in a militia—while the Amendment's prefatory clause announced a purpose, it did not limit or expand the scope of the second part, the operative clause, and the operative clause's text and history demonstrated that it connoted an individual right.[17] Nowhere in the Constitution did a "right" attributed to "the people" "refer to anything other than an individual right;"[18] therefore, reading the Second Amendment as protecting only the right to keep and bear arms in an organized militia "fit[] poorly with the operative clause's description of the holder of that right as 'the people.'"[19] Interpreting the remaining wording, the Court ruled that the "most natural" reading of "keep arms" was "to have weapons," a reading consistent with historical usage.[20]

continued on page 8

Sophia M. Stadnyk is the Senior Associate Counsel with IMLA. She is the editor of the *Municipal Lawyer* and writes regularly about the U.S. Supreme Court for IMLA and for the ABA's State & Local Law News. She has an LL.B. (University of Alberta) and LL.M. (Cambridge University), and is admitted to practice law in Alberta, Canada and the State of New York.

District of Columbia v. Heller *continued from page 7*

To "bear" something meant to "carry," and the term "bear arms" was in no way restricted to participation in a structured military organization.[21]

Turning to the D.C. law in issue, the majority held it violated the Second Amendment: "In sum, we hold that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense."[22] The "inherent right" to self-defense was central to the Second Amendment, and the total ban on handguns amounted to an unconstitutional prohibition on "the quintessential self-defense weapon," one that was "overwhelmingly chosen by American society for that lawful purpose."[23] The requirement that firearms in the home be kept inoperable at all times made "it impossible for citizens to use them for the core lawful purpose of self-defense and [was] hence unconstitutional."[24] The majority concluded by pointing out that the Constitution afforded the District of Columbia "a variety of tools for combating" the problem of handgun violence, "including some measures regulating handguns... [b]ut the enshrinement of constitutional rights necessarily takes certain policy choices off the table."[25]

All *Heller* Breaks Loose

Reactions to the ruling were mixed. Mayor Fenty was "disappointed" but stated that the District would continue "vigorously enforcing other gun-control laws" left intact by the ruling.[26] Mr. Heller said, "I'm very happy that now I'm able to defend myself...in my own home."[27] Robert Levy, the lawyer who initiated the litigation against the ban, described the ruling as "merely the opening salvo in a series of litigations that will ultimately resolve what weapons and persons can be regulated and what restrictions are permissible."[28] And gun manufacturer Smith & Wesson announced it would issue a .38 caliber revolver, Smith & Wesson Model 442 SAF Commemorative (suggested retail price, $575), in recognition of the landmark ruling.[29]

A day after the ruling, the National Rifle Association (NRA) filed lawsuits challenging local gun restrictions or bans in San Francisco,[30] Chicago, and other cities.[31] The actions raised the issue of the application of the Second Amendment against the states through the Fourteenth Amendment ("incorporation"). This issue did not come up in *Heller* because the District of Columbia is not a state; however, the Supreme Court's ruling equated the Second Amendment with the First and Fourth Amendments, which have applied to the states.[32] A second Chicago case that did not name the NRA but listed the Second Amendment Foundation, Inc. and the Illinois State Rifle Association as plaintiffs was filed on June 26, also challenging local restrictions on gun ownership.[33] Following the filing of the NRA lawsuit, Morton Grove—which in 1981 adopted the Nation's first ordinance banning the possession of handguns—voted to repeal its handgun ban.[34]

In July, the District passed a temporary law, the Firearms Control Emergency Amendment Act of 2008. The law (a) retained a firearm registration requirement, (b) required handguns within a home to be stored unloaded and either disassembled or secured with a trigger lock or similar device, unless the weapon was being used against a "reasonably perceived threat of immediate harm to a person within a registered gun owner's home," and (c) prohibited "machine guns," defining "machine gun" in such a way that the only type of handgun allowed was revolvers.[35] On July 28, Dick Heller, Amy McVey (the first D.C. resident to register a handgun after the ban was struck), and others filed suit against the District in federal court, claiming that the new law violated *Heller* by, among other things, prohibiting functional firearms for use in immediate self-defense, and by indirectly outlawing most of the commonly-sold handguns.[36]

On July 31, in a bipartisan effort, Congressman Travis Childers and 57 co-sponsors introduced H.R. 6691, the Second Amendment Enforcement Act, aimed at preempting or overturning D.C.'s emergency law. The bill referred to D.C.'s intention "to continue to unduly restrict lawful firearm possession and use," and the need for legislation to correct D.C.'s law "in order to restore the fundamental rights of its citizens under the Second Amendment...".[37] A second bill titled the Second Amendment Enforcement Act, H.R. 6842, was introduced in early September and was passed by the House of Representatives by a vote of 266-152.[38] This bill, currently before the Senate, also refers to the continued intention of District officials "to unduly restrict lawful firearm possession and use by citizens of the District" and seeks to reform D.C.'s authority over firearms by repealing the ban on semiautomatic weapons (most of the handguns sold today are semiautomatic weapons), restoring the right of self-defense in the home, and authorizing purchases of firearms by District residents.[39]

Most recently, the District of Columbia introduced a new emergency law, the Second Firearms Control Emergency Amendment Act of 2008, to replace the July measure.[40] The law eliminates the requirement that any gun in a home be kept disassembled or have a trigger lock, replacing this with a new requirement on storage of firearms when minors are on the premises. It also allows for the registration of some semiautomatic firearms.

Now What?

Two commentators correctly point out that the "real test of *Heller* will occur once the lower courts, traditionally hostile to an individual rights interpretation of the Second Amendment, face the inevitable follow-up cases challenging other restrictive gun laws."[41] The questions to be answered include what regulatory choices, short of a total ban, are—to use the words of the *Heller* majority—"still on the table"? *Heller* indicated that several options remain for local governments, but the Court was reluctant to elaborate beyond a few very general rules. First, the Second Amendment right was not an unlimited "right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[42] Nothing in the ruling was

to be taken as casting "doubt on long-standing prohibitions" like the "possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."[43] Second, discussing the nature of the right, Justice Scalia referred to an 1875 ruling, *U.S. v. Cruikshank*, noting that "States...were free to *restrict* or protect the right under their police powers."[44] Third, the "Second Amendment right, whatever its nature, extend[ed] only to certain types of weapons,"[45] being small-arm weapons typically used by "law-abiding citizens for lawful purposes," such as self-defense and defense of the home.[46]

The Court also declined to rule on the standard of judicial review that lower courts were to use in assessing challenged firearm restrictions (apart from a flat ban) in the future, explaining that, as *Heller* represented the "Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field."[47] However, the Court rejected the application of a rational-basis test, finding this was inappropriate for evaluating the extent to which a legislature may regulate a "specific, enumerated" right: "If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect."[48] Likewise, it rejected Justice Breyer's proposed "judge-empowering 'interest-balancing'" test (based on whether a statute burdened a protected interest in excess of the statute's "salutary effects upon other important governmental interests"), noting that no other enumerated constitutional right's "core protection" had been subjected to this freestanding "interest-balancing" approach.[49]

An early opportunity to begin mapping out the reach of *Heller* may be the case of *Nordyke v. King*, dealing with a local ban on firearms on government property.[50] Alameda County passed an ordinance banning the possession of firearms on County-owned property. A promoter who had used the County's fairgrounds for gun shows brought a Section 1983 action, alleging that the ordinance infringed upon his First and Second Amendment rights. The district court denied a preliminary injunction and the promoter appealed. The U.S. Court of Appeals for the Ninth Circuit rejected the First Amendment argument and held that the promoter lacked standing to raise a Second Amendment challenge because the Amendment guaranteed a collective, rather than an individual, right.[51] Back at the district court for proceedings on the merits, the promoter amended his complaint to add an as-applied First Amendment challenge and an equal protection claim. The County prevailed on both claims on summary judgment and the promoter appealed. The Ninth Circuit, in the wake of *Heller*, has granted supplemental briefing on the impact *Heller* may have on the case.

Given the relatively narrow facts in *Heller*—that the law at issue was a total ban, and passed by an entity that is not a state or local government—it seems safe to say the case begins a new chapter of litigation rather than closes one.

(Author's Note: The author thanks Paul Crawford for his gun-related advice and explanations.)

Notes

1. 128 S.Ct. 2783 (2008).
2. U.S. CONST. amend. II. An *amicus* brief filed by a group of professors of linguistics, English, and grammar in *Heller* concluded that the Amendment was restricted to a collective right. Appellate Brief for Professors of Linguistics and English Dennis E. Baron, Ph.D., Richard W. Bailey, Ph.D. and Jeffrey P. Kaplan, Ph.D. in Support of Petitioners, 2008 WL 157194 at *3.
3. The Firearms Control Regulations Act of 1975, D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02 (1976).
4. Parker v. D.C., 478 F. 3d 370, 401 (D.C. Cir. 2007) (quoting the plaintiffs).
5. Brief for Petitioners, 2008 WL 102223 (U.S.) at *4 (in 1974, handguns were used to commit 155 of 285 murders in D.C.).
6. Interestingly, the National Rifle Association was not involved in bringing the case, but filed an *amicus* brief when the matter reached the Supreme Court.
7. Parker v. D.C., 311 F. Supp. 2d 103 (D.D.C. 2004).
8. *Id.*
9. *Id.* at 109-10.
10. Parker v. D.C., 478 F. 3d 370, 374, 378 (D.C. Cir. 2007).
11. *Id.* at 382.
12. *Id.* at 382, 390.
13. *Id.* at 401.
14. The District had previously petitioned unsuccessfully for a rehearing en banc. In May 2007, the D.C. Circuit refused the petition in a 6-4 vote.
15. 552 U. S. ___ (2007).
16. Brief for Amici Curiae 55 Members of United States Senate, the President of the United States Senate, and 250 Members of United States House of Representatives in Support of Respondent, 2008 WL 383530. Senator John S. McCain, III signed onto this brief; Senator Barack Obama did not.
17. 128 S.Ct. 2783, 2789 (2008).
18. *Id.* at 2790.
19. *Id.* at 2791.
20. *Id.* at 2792.
21. *Id.* at 2793-94.
22. *Id.* at 2821-22.
23. *Id.* at 2818, 2817.
24. *Id.* at 2818.
25. *Id.* at 2822.
26. Press Release, District of Columbia's Mayor's Office, *District Government Reacts to Heller Ruling* (June 26, 2008).
27. Heller applied for a handgun permit under a revised D.C. law and was initially denied, apparently on the basis that he sought a permit for a semiautomatic pistol, but later received a permit for a revolver.
28. Mark Sherman, *Analysis: Some answers, more questions in gun case*, The Associated Press, Thursday, June 26, 2008; *see also*, Paul Duggan, *Lawyer Who Wiped Out D.C. Ban Says It's About Liberties, Not Guns*, WASHINGTON POST, March 18, 2007, page A01.
29. Press Release, Smith & Wesson, Inc., *Second Amendment Foundation and Smith & Wesson Partner on Commemorative Revolver: Engraved Model 442 Will Recognize District of Columbia vs. Heller Decision* (July 21, 2008).
30. *Guy Montag Doe v. San Francisco Housing Authority et al.* (docket ____) filed in the U.S. District Court for the Northern District of California. See the NRA website at http://www.nraila.org/pdfs/sfha.pdf.
31. *NRA v. City of Chicago, et al.* (docket 08-3697); *NRA v. City of Evanston, et al.* (docket 08-3693); *NRA v. Village of Oak Park, et al.* (docket 08-3696); and *NRA v. Village of Morton Grove, et al.* (docket 08-3694), all filed in the U.S. District Court for the Northern District of Illinois (Eastern Division).
32. The Court briefly referred to this issue in a footnote, stating the question was "not presented by this case" and referred to two of its other rulings that "reaffirmed that the Second Amendment applies only to the Federal Government." 128 S.Ct. 2783, 2813 n.23 (2008). For a detailed discussion, see Lawrence Rosenthal, *Second Amendment Plumbing After Heller: of Standards of Scrutiny, Incorporation,*

continued on page 37

warrantless search of his house. The U.S. Court of Appeals for the Seventh Circuit disagreed. Finding it was a "close case," the court nonetheless held that, because of Lawicki's long-term and continuing residence in Ryerson's home, she had actual authority to consent to the search, and the police had acted reasonably in believing that she lived there. Although a third party generally could not consent to a warrantless search of another's home, there was an exception when the government could show, by a preponderance of evidence, that the other party "possessed common authority over, or other sufficient relationship to, the premises or effects sought to be inspected." Here, the court held there was enough of a connection between Lawicki and the house. Although Ryerson was the owner of the house, Lawicki had lived with him in the house for a "significant period" (ten months) immediately prior to the search. Lawicki had not "abandoned" the premises and remained connected the home through her co-ownership (with Ryerson) of a business on the premises (all of the company records remained in the house). In addition to actual authority, the second search (when the police found the gun) was lawful on the basis of apparent authority. Ryerson's agent—the neighbor—willingly allowed the police and Lawicki to enter, and Ryerson's note identified Lawicki as his girlfriend who lived on the premises, which suggested that she still had a right of access to the house. *U.S. v. Ryerson*, No. 07-1654, 2008 WL 4248193 (7th Cir. Sept. 18, 2008). ML

Municipal Lawyer

The January/February *Municipal Lawyer* looks at these pressing employment and personnel topics for the local government lawyer: Bullying in the Workplace, ADA and Employee Termination for Misconduct Stemming from Mental Disabilities, and Employee Rights of Privacy in Electronic Communications. Don't miss it!

Looking to advertise in the *Municipal Lawyer*?

Municipal Lawyer

For information, please contact:

AHI Meeting Services
P.O. Box 519
118 W. Church Street
Selbyville, DE 19975

Phone: 1-800-788-7077
e-mail: convene@aol.com

DISTRICT OF COLUMBIA V. HELLER *continued from page 9*

Well-regulated Militias, and Criminal Street Gangs, Chapman University School of Law, Legal Studies Research Paper Series, Paper No. 08-302 (copy available at: http://ssrn.com/abstract=1245402).
33. McDonald, et al. v. City of Chicago, et al. (District docket 08-3645).
34. Robert Channick, *Morton Grove repeals 27-year-old gun ban*, CHICAGO TRIBUNE, July 28, 2008. The ordinance had previously been upheld as a valid exercise of municipal police power, with the court finding that the Second Amendment had not been incorporated into the Fourteenth Amendment and, therefore, was inapplicable to Morton Grove. Quilici v. Village of Morton Grove, 532 F. Supp. 1169 (N.D. Ill.1981), *aff'd*, Quilici v. Village of Morton Grove, 695 F. 2d 261 (7th Cir. 1982). The Supreme Court declined to hear the appeal.
35. Press Release, District of Columbia, *Mayor Fenty, Council Unveil Firearms Legislation and Regulations* (July 14, 2008).
36. Heller v. District of Columbia, District Court Docket 08-1289. See David C. Lipscomb, *Heller, others challenge semi-automatic ban*, WASHINGTON TIMES, July 29, 2008.
37. H.R. 6691, 110th Cong. § 2(5), (6), and (7) (2008).
38. H.R. 6842, 110th Cong. (2008).
39. *Id.* at § 2, 4, 7 and 10.
40. Press Release, District of Columbia, *Mayor Fenty, Council Announce New Emergency Legislation to Amend the District's Gun Law* (Sept. 15, 2008).
41. Glenn H. Reynolds & Brannon P. Denning, Heller's *Future in the Lower Courts*, 102 NW. U. L. REV. COLLOQUY 406 (July 17, 2008).
42. 128 S.Ct. 2783, 2799, 2816 (2008).
43. *Id.* at 2816-17.
44. *Id.* at 2813 (emphasis added).
45. *Id.* at 2814.
46. *Id.* at 2814-17.
47. *Id.* at 2821.
48. *Id.* at 2817 n.27.
49. *Id.* at 2821.
50. Pending 9th Cir. (07-15763); earlier appeal at 319 F. 3d 1185 (9th Cir. 2003); order denying petition for *en banc* review, 364 F. 3d 1025 (9th Cir. 2004).
51. 319 F. 3d at 1192-93. ML

WIRELESS FACILITY SITING *continued from page 17*

(S.D.N.Y. 2000); Sprint Spectrum v. Mills, 283 F. 3d 404 (2d Cir. 2002).
57. USCOC of Greater Iowa, Inc. v. Zoning Bd. of Adjustment of the City of Des Moines, 465 F. 3d 817, 823 (8th Cir. 2006); USCOC of N.H. RSA #2, Inc. v. City of Franklin, 413 F. Supp. 2d 21, 31 (D.N.H. 2006).
58. Masterpage Commc'ns v. Town of Olive, 418 F. Supp. 2d 66, 77 (N.D.N.Y. 2005).
59. *Id.* at 81. *But see*, USCOC of Greater Missouri, LLC v. City of Ferguson, Mo., No. 4:07-CV-1489(JCH), 2007 WL 4218978, *7 (E.D. Mo. Nov. 29, 2007).
60. Rancho Palos Verdes v. Abrams, 544 U.S. 113 (2005).
61. *Id.* at 127.
62. Kay v. Ranchos Palos Verdes, 504 F. 3d 803, 815 (9th Cir. 2007).
63. Tennessee ex rel. Wireless Income Prop., LLC v. City of Chattanooga, 403 F. 3d 392, 399 (6th Cir. 2005) (citing cases).
64. Sprint PCS Assets, LLC v. City of La Canada Flintridge, 448 F. 3d 1067, 1071 (9th Cir. 2006).
65. Petition at 17-25.
66. *Id.* at 27.
67. *Id.* at 32.
68. *Id.* at 36.
69. H.R. Report No. 104-458, at 208.
70. Amherst v. Omnipoint Commc'ns Enters., Inc., 173 F. 3d 9, 17 (1st Cir. 1999). ML