

The Many-Headed Hydra *Heller* and Post-*Heller* Litigation

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The Supreme Court ended its Term with a bang, releasing its ruling in *District of Columbia v. Heller*, No. 07-290, 2008 WL 2520816 (U.S. June 26, 2008), on the last day before the Court recessed for the summer. The 5-4 decision affirmed the ruling of the D.C. Circuit Court of Appeals and upheld an individual right to "keep and bear Arms" pursuant to the Second Amendment. Justice Scalia wrote the opinion, in which Chief Justice Roberts and Justices Kennedy, Thomas, and Alito joined. Justice Stevens and Justice Breyer filed dissenting opinions, in which Justices Souter and Ginsburg joined. The decision is an exhaustive 157-page review of the history and background of, and jurisprudence on, the Second Amendment.

The majority held the Second Amendment protects an individual right to possess a firearm, unconnected with service in a militia. While the Amendment's prefatory clause ("A well regulated Militia, being necessary to the security of a free State") announces a purpose, the clause does not limit or expand the scope of the second part, the operative clause, which reads, "the right of the people to keep and bear Arms, shall not be infringed." Turning specifically to the District of Columbia laws at issue, the majority held the District's ban on handguns, and its requirements that all lawfully-owned firearms be kept unloaded and disassembled (or bound by a trigger-lock), unless used for recreational activities, violated the Second Amendment.

Asked for his comments outside the Supreme Court, Dick Heller, one of the six D.C. residents who challenged the ban, said, "I'm very happy that now I'm able to defend myself in my household, in my own home." Robert Levy, the lawyer who initiated the litigation against the ban, was quoted as saying that the case was "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."[1]

Right he was. A day after the ruling, the National Rifle Association (NRA) filed lawsuits challenging local gun restrictions or bans in San Francisco,[2] Chicago, and several Chicago suburbs (Evanston, Morton Grove, and Oak Park).[3] The five actions raise the issue of the application of the Second Amendment against the states through the Fourteenth Amendment ("incorporation"). This issue did not come up in the *Heller* case 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. A second Chicago case that does not name the NRA but lists the Second Amendment Foundation, Inc. and the Illinois State Rifle Association as plaintiffs was filed on June 26 and also challenges local restrictions on gun ownership: *McDonald, et al., v. City of Chicago, et al.* (District docket 08-3645).[4] The individual plaintiffs in both the San Francisco complaint (which involves a gay man living in public housing) and the Chicago case are persons who claim they are otherwise entitled to possess firearms and wish to do so for purposes of self-defense in the home, but are prohibited by the local or state gun laws at issue.

One of these lawsuits echoes of déjà vu. In 1981, the Village of Morton Grove passed an ordinance, No. 81-11, that prohibited the possession of handguns within the Village's borders, subject to the listed exceptions. Three actions (later consolidated) were brought, challenging the ban on the basis that it violated the Illinois Constitution and the Second, Ninth, and Fourteenth Amendments of the U.S. Constitution. The district court granted Morton Grove's motion for summary judgment and denied the plaintiffs' motions for summary judgment. The court held that the ban was constitutional as a valid exercise of Morton Grove's police power; further, citing *Presser v. Illinois*, 116 U.S. 252 (1886), it held the Second Amendment's guarantee of the right to bear arms had not been incorporated into the Fourteenth Amendment and, therefore, was inapplicable to Morton Grove.[5] On appeal, in *Quilici v. Village of Morton Grove*,[6] the Seventh Circuit affirmed. "While we recognize that this case raises controversial issues which engender strong emotions, our task is to apply the law as it has been interpreted by the Supreme Court, regardless of whether that Court's interpretation comports with various personal views of what the law should be." The court held that because the Second Amendment "[did] not apply to the states, we need not consider the scope of its guarantee of the right to bear arms." In any event, the possession of handguns by individuals was "not part of the right to keep and bear arms." The Supreme Court declined to hear the appeal from that decision in October, 1983.

The ordinance now faces challenge again.

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Notes

1. 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.
2. *Guy Montag Doe et al. v. San Francisco Housing Authority et al.* (docket ____) filed in the U.S. District Court for the Northern District of California. A copy of the complaint in the San Francisco case is available at the NRA website at http://www.nraila.org/pdfs/sfha.pdf.
3. All were filed in the U.S. District Court for the Northern District of Illinois (Eastern Division). The cases are *NRA, et al., v. City of Chicago, et al.* (docket 08-3697); *NRA, et al., v. City of Evanston, et al.* (docket 08-3693); *NRA, et al., v. Village of Oak Park, et al.* (docket 08-3696); and *NRA, et al., v. Village of Morton Grove, et al.* (docket 08-3694).
4. A copy of the complaint is available at http://www.chicagoguncase.com/wp-content/uploads/2008/06/complaint.pdf.
5. Quilici v. Village of Morton Grove, 532 F. Supp. 1169 (N.D .Ill. 1981).
6. 695 F. 2d 261 (7th Cir. 1982). **ML**

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minate number of potential plaintiffs—operating down the supply chain from the prime bidder—could have queued up to take a run at purchasing institutions over contract award decisions. By preserving the sanctity of contract and limiting the pool of potential plaintiffs, the ruling in *Design Services* restores a measure of sanity to the tendering process.

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Notes

1. Design Services Ltd. v. Canada, 2008 SCC 22.
2. *Id.* at para. 56.
3. *Id.* at para. 57. **ML**



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