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Legal Training Division

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The Federal Law Enforcement -Informer-

MONTHLY LEGAL RESOURCE AND COMMENTARY FOR FEDERAL LAW ENFORCEMENT OFFICERS AND AGENTS

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In This Issue

D.C. v. Heller:

The Supreme Court Decides a Second Amendment Case

by
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D.C. v. Heller:
The Supreme Court Decides a Second Amendment Case

by
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"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."

Introduction

Perhaps the drafters of these words, the Second Amendment of our Constitution's Bill of Rights, knew exactly what they meant. But ambiguity always lurks. The Amendment's ambiguity emerges from the inability to determine which of its two clauses is the prime directive: "**(clause 1)** A well regulated Militia, being necessary to the security of a free State, or **(clause 2)** the right of the people to keep and bear Arms, shall not be infringed." That ambiguity has spawned a controversy that arouses passion and touches fundamental issues of individual rights and law enforcement. After reviewing scores of briefs submitted by more than sixty interested parties and hearing arguments on March 18, the Supreme Court, itself divided 5–4, resolved the ambiguity on June 26, 2008.

The Supreme Court held that the Second Amendment validates a pre-existing individual right to keep and bear arms. Clause 2 is the prime directive. Some specific District of Columbia statutes were stricken down because they violated the Second Amendment. They also suggested, however, that state and federal governments can reasonably restrict this right. The opinion suggests that most existing federal firearms laws do not violate the Constitution. The specific effect is that D.C. residents can: (1) license a handgun to possess in their homes and (2) may possess loaded, functional firearms in their homes. Important issues remain.

The General Controversy

What does the Amendment mean? Here are the two predominant points of view.

Collective state right. The Amendment's first clause is the prime directive and the Amendment guarantees each state the collective right to maintain a militia of citizen-soldiers despite the Constitution's unified federal system of national defense. In this view, people are able to keep and bear arms because doing so furthers that collective right. It follows that legal restrictions on possessing, carrying and using firearms outside the militia would not generally violate this limited right to keep and bear arms. Those favoring gun control like this interpretation.

Individual rights. The Amendment's second clause is the prime directive and the Amendment secures each individual's right to keep and bear arms. In this view, this basic right

exists for many reasons. Fundamentally, for example, the right allows individuals to defend and feed themselves and their families. In this view, such reasons were too obvious for the drafters to note. Maintaining a militia is just one more good reason to allow the people to keep and bear arms. The Amendment's drafters chose to state the militia rationale to fit the Amendment into the Constitution's larger discussion of the relation between the existing states and the federal government. If the Amendment does grant the right to each person, it follows that legal restrictions on possessing, carrying and using firearms would more often violate this broad, fundamental and individual right to keep and bear arms. Those favoring gun rights like this interpretation.

The specific controversy in Heller

The District of Columbia had arguably the most restrictive gun control measures in the nation. A group of D.C. residents sued the District, claiming that the net effect of three of these laws violated the Second Amendment. The first law [*D.C. Code § 7-2502.02(a)(4)*] sets out licensing requirements. The second law [*D.C. Code § 22-4504*] prohibits carrying handguns without a license (apparently even when moving a gun from one place to another inside one's home). The third law [*D.C. Code § 7-2507.02*] mandates that all lawfully-owned firearms be kept both unloaded and either disassembled or secured by a trigger lock or similar device.

Most of the plaintiffs claimed that these three laws violated their individual rights under the Amendment to possess what they describe as "functional firearms" - those that could be "readily accessible to be used effectively when necessary" for self-defense in the home. The plaintiffs did not assert a right to carry such weapons outside their homes. Nor did they challenge the District's authority *per se* to require the registration of firearms.

Heller was a guard at the Federal Judicial Center on Columbus Circle who carried a handgun while on duty. His claim was stronger. After finding a bullet hole in his own front door one day after work, he wanted to keep a handgun in his D.C home for self-defense, so he applied for a license. Citing the first law listed above, the District of Columbia refused to give him a license. This gave rise to a neat anomaly: Heller was required to carry a loaded sidearm while guarding the Judicial Center in the District, but was denied the right to keep a loaded firearm of any sort to protect himself in his D.C. home. Heller's situation nicely framed the general controversy discussed above. If the Amendment guarantees the individual right to keep and bear arms, surely these D.C. laws violate that right in his case.

In May 2007, the D.C. Circuit [split 2-1] (478 F. 3d 370), ruled that D.C.'s laws, at least as applied to Heller, violated the Amendment and that Heller should be able to get a license for a handgun. The District of Columbia quickly appealed. The Supreme Court took the appeal on this limited basis:

> Whether the following provisions— D.C. Code §§ 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.

The Supreme Court Decision

Justice Scalia wrote the opinion for the five Justices (Roberts, Scalia, Thomas, Alito and Kennedy) in the majority. The four Justices in the minority (Stevens, Ginsberg, Breyer and Souter) joined in two dissents written by Justice Stevens and Justice Breyer. Justice Scalia marshaled grammar, history and precedent to find that the Second Amendment validates a pre-existing individual right to keep and bear firearms. Because D.C.'s statutes absolutely ban the exercise of that right in a citizen's home for the fundamental purpose of self-defense, the statutes violate the Constitution. "Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home." This is now the law.

Each dissenter raised a separate point. Justice Stevens argued that the collective rights interpretation is correct. Justice Breyer argued that even if the individual rights interpretation is correct, the D.C. statutes are reasonable constraints on that individual right. Although the controversy between Justice Scalia and Justice Stevens garners the attention of enthusiasts, the argument is over, at least for now. Justice Breyer's dissent addressed one side of the coming fight, and that is where we turn next.

Remaining Issues

Will this case apply to state laws? The Second Amendment restricts federal encroachment of constitutional rights; it does not apply directly to limit state governments. Instead, it must get a boost from the Fourteenth Amendment. This boost is likely, however, for several reasons.

1. Virtually all of the Bill of Rights' other provisions have already received this boost.

2. Like freedom of speech and religion, it is a right broadly extended to all citizens rather than a right more narrowly granted to those accused of a crime. It would be odd to say that the Constitution demands that Illinois hire a lawyer for an accused killer, but that the Constitution cannot address whether Illinois chooses to disarm that killer's intended victim.

3. It is the kind of individual right that must have been on the mind of the Fourteenth Amendment's drafters. The Fourteenth Amendment was crafted in the aftermath of the Civil War to prevent resurgent Southern states from stripping the rights of the newly free by violence and intimidation. The right to keep and bear arms must have been seen as a core right when the back-roads of the South teemed with armed gangs of night-riders.

When does the government's need to regulate trump a constitutional right? The Constitution's broad grant of an individual right is almost never absolute. Freedom of speech is not freedom to slander or lie in court, for example. Thus, governments can pass statutes punishing perjury. The courts have developed a series of standards to decide whether a given statute improperly violates a constitutional right.

As Justice Breyer points out, at one extreme, judges can begin with the assumption that a statute must survive "strict scrutiny" to avoid being presumed unconstitutional. At the other extreme, as long as the statute has some "rational basis," it should be presumed to be constitutional. Between these two extremes, there are a number of "intermediate standards of review." Which should apply in deciding whether the Second Amendment demands overturning a law which restricts firearms ownership, possession or carry?

The majority opinion declines to decide. They confine their holding to the D.C. statutes before them. Justice Scalia suggests, however, that many familiar existing federal firearms statutes should be found constitutional:

> [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on 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…." [Nor should it cast doubt on] prohibiting the carrying of "dangerous and unusual weapons."

No doubt it is too soon to predict much more. But here are some preliminary thoughts. Most federal firearms statutes should survive, mainly because of their longevity and common-sense underpinnings. Longstanding restrictions [like the heavy controls on possessing machine-guns] become comfortable parts of national consensus. Common-sense restrictions [like the ban on felons possessing firearms] prevail because of their unassailable logic.

How about new restrictions, especially those originating in state legislatures? It is impossible to predict. On the one hand, these words of the majority opinion set a major hurdle to both new restrictions and existing extreme restrictions like the D.C. statutes:

> The very enumeration of the right takes out of the hands of Government… the power to decide on a case-by case basis whether the right is *really worth* insisting upon…. [T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table [emphasis in the original].

On the other hand, the need for guns and gun control is driven by local conditions, and it is sensible to give local legislatures room to respond to them. What makes sense in rural upstate New York may not make sense in the streets of Manhattan.

The initial D.C. response and the litigation it may spawn will provide clues. On July 14, D.C. announced regulations which try to satisfy all sides. The regulations allow residents to apply for pistol permits. A written examination, proof of residency, good vision and ballistic testing are required along with payment of a fee and agreement to fingerprinting and criminal background checks. The proposed regulations do not lift restrictions on semiautomatic handguns, a move that will probably land the District back in court.

Summary

The Second Amendment guarantees an individual right to keep and bear arms. That right is adequate to strike down extreme gun control laws like the D.C. ban on having operable handguns and other operable firearms in the home for self defense. That right is not absolute, however. Governments can regulate firearms ownership, possession and carry. There is no binding guidance yet on how far that regulation can go before violating the Second Amendment. It appears likely that most existing federal firearms regulations would be deemed constitutional if challenged. Extreme gun control laws like the D.C. ban are in trouble. In fact, the National Rifle Association has already filed five lawsuits against such bans in Illinois and California. But where the line will be drawn between constitutional and unconstitutional statutes cannot be predicted. Cases will be filed, appeals will be taken and, perhaps, a future Supreme Court will provide more precise guidance.

Click **HERE** for the court's opinion.

Jeff Fluck served on active duty as an Army judge advocate. Assignments included prosecutor, chief of criminal law, and officer-in-charge [OIC] of five legal offices. Deployments included Desert Shield/Storm to Saudi Arabia with the 2d COSCOM and Vigilant Warrior to Kuwait with the 24th Infantry Division. He also trained military police at Forts McClellan and Leonard Wood. He is a graduate of Haverford College and Washington and Lee University Law School. Jeff is the Legal Division Subject Matter Expert on federal firearms violations.

CASE SUMMARIES

SUPREME COURT

Money Laundering

U.S. v. Santos, 128 S. Ct. 2020**,** June 02, 2008

The federal money-laundering statute, 18 U. S. C. §1956, prohibits the use of the "proceeds" of criminal activities for various purposes, including engaging in, and conspiring to engage in, transactions intended to promote the carrying on of unlawful activity. The word "proceeds" applies only to transactions involving criminal *profits*, not criminal receipts. In this illegal gambling operation, money paid as salary, commissions, and to winning gamblers were not "proceeds." Therefore, none of the transactions on which the money-laundering convictions were based involved lottery "profits."

Click **HERE** for the court's opinion.

* * * *

Cuellar v. U.S., 128 S. Ct. 1994**,** June 02, 2008

Evidence that money was concealed during transportation is not sufficient to sustain a conviction under 18 U. S. C. §1956, the federal money-laundering statute. The government must prove knowledge that taking the funds to Mexico was "designed," at least in part, to conceal or disguise their "nature," "location," "source," "ownership," or "control." Merely hiding funds during transportation is not sufficient to violate the statute, even if substantial efforts have been expended to conceal the money. The Government's own expert testified that the transportation's purpose was to compensate the Mexican leaders of the operation. Thus, the evidence suggested that the transportation's secretive aspects were employed to *facilitate* it, but not necessarily that secrecy was its *purpose.*

Click **HERE** for the court's opinion.

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Right to Counsel

Rothgery v. Gillespie County, 2008 U.S. LEXIS 5057, June 23, 2008

The Court reaffirms its long standing position which an overwhelming majority of American jurisdictions understand in practice: a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to

restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.

Click **HERE** for the court's opinion.

* * * *

Death Penalty

Kennedy v. La., 2008 U.S. LEXIS 5262, June 25, 2008

A death sentence for one who rapes but does not kill a child, and who did not intend to assist another in killing the child, is unconstitutional under the Eighth Amendment prohibition against cruel and unusual punishment.

Click **HERE** for the court's opinion.

* * * *

Gun Control

D.C. v. Heller, 2008 U.S. LEXIS 5268, June 26, 2008

See the article by Senior Instructor Jeff Fluck above.

Click **HERE** for the court's opinion.

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CIRCUIT COURTS OF APPEALS

3rd CIRCUIT

U.S. v. Ozcelik, 527 F.3d 88**,** May 27, 2008**.**

The terms "shielding," "harboring," and "concealing" under 8 U.S.C. § 1324 encompass conduct "tending to substantially facilitate an alien's remaining in the United States illegally" and to prevent government authorities from detecting the alien's unlawful presence.

General advice to, in effect, keep a low profile and not do anything illegal do not tend to "substantially" facilitate the alien remaining in the country; rather, it simply states an

obvious proposition that anyone would know or could easily ascertain from almost any source. Comments about changing addresses were irrelevant because the illegal alien had already taken the action on his own accord. Holding someone criminally responsible for passing along general information to an illegal alien would effectively write the word "substantially" out of the applicable test.

The 5th Circuit agrees (cite omitted)**.**

Click **HERE** for the court's opinion.

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6th CIRCUIT

U.S. v. Purcell, 526 F.3d 953**,** May 29, 2008

The discovery of men's clothing in a bag that a female claimed to own erases for future bags the apparent authority that justified the officers' warrantless search of the first bag, thereby making a subsequent search illegal. The discovery of men's clothing eviscerated any apparent authority, but the officers could have reestablished apparent authority by asking the supposed bag owner to verify her control over the other bags to be searched.

Click **HERE** for the court's opinion.

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U.S. v. Pacheco-Lopez, 2008 U.S. App. LEXIS 13448, June 26, 2008

***Miranda* warnings are not required for "booking questions" such as the defendant's name, address, height, weight, eye color, date of birth and current address. But, during the service of a drug search warrant, asking where he was from, how he had arrived at the house, and when he had arrived are questions reasonably likely to elicit an incriminating response, thus mandating a *Miranda* warning. The location, the nature of the questioning and the failure to take notes or document the defendant's identity also support the conclusion that the booking exception is not applicable in this case. Application of the booking exception is most appropriate at the station, where administrative functions such as bookings normally take place. Extending the exception to the type of questioning here – which occurred in a private home during the investigatory stage of criminal proceedings – would undermine the protections that *Miranda* seeks to afford to criminal suspects. Where the booking exception does not apply, statements made before *Miranda* advice and waiver are "irrebuttably presumed involuntary" and must be suppressed.**

Subsequent *Miranda* warnings are not effective unless the warnings place a suspect who has just been interrogated in a position to make an *informed choice*. A *Miranda* waiver is ineffective when the same officers conduct the interrogation in the same location without any break between the two sets of questions, and the post-*Miranda* question resulted from

the knowledge gleaned during the initial questioning. There is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment.

Click **HERE** for the court's opinion.

*****

7th CIRCUIT

U.S. v. Black, 2008 U.S. App. LEXIS 13355**,** June 25, 2008

In a mail and/or wire fraud case based upon a scheme to defraud an employer of honest services, the fact that the inducement was the anticipation of money from a third party and not the employer is no defense, even when that third party never receives a benefit.

Title 18 U.S.C. § 1512(c)(1), concealing or attempting to conceal documents "with the intent to impair the [documents'] integrity or availability for use in an official proceeding" does not require proof of materiality for the excellent reason that being able to deny the materiality of a document is the usual reason for concealing the document. All that need be proved is that the document was concealed in order to make it unavailable in an official proceeding.

Click **HERE** for the court's opinion.

*****

U.S. v. Groves, 2008 U.S. App. LEXIS 13560**,** June 27, 2008

Even though appellant had repeatedly refused consent to search his home a few weeks earlier, consent from a co-occupant obtained after the appellant had left for work was lawful because the appellant was not physically present and objecting and because the police had no active role in procuring his absence.

Click **HERE** for the court's opinion.

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8th CIRCUIT

U.S. v. Kowal, 527 F.3d 741**,** May 29, 2008

Title 18 U.S.C. § 1028A(a)(1), the aggravated identity theft statute, covers the theft of a *deceased* person's identity.

Click **HERE** for the court's opinion.

9th CIRCUIT

U.S. v. Fernandez, 526 F.3d 1247**,** May 27, 2008

When the government reasonably and in good faith concludes that the target of its wiretap surveillance has adopted a new alias, it may continue to intercept such target's conversations without violating the § 2518(5) minimization requirement.

Under 18 U.S.C. § 3553(f)(2), a defendant is entitled to relief from a mandatory minimum sentence if "the defendant did not . . . possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense." The burden is on the defendant to prove that it was clearly improbable that he possessed a firearm in connection with the offense. The circumstances in which the firearms were found, coupled with the implausibility of the defendants' explanations may serve as grounds for concluding that firearms were possessed in connection with the offense of conviction. "Offense" means the offense of conviction *and all relevant conduct.* Any infraction is an offense, whether one is caught or not.

Click **HERE** for the court's opinion.

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U.S. v. Giberson, 527 F.3d 882**,** May 30, 2008

Even when the search warrant does not specifically authorize it, the search of a computer does not exceed the scope of the warrant when there is ample evidence that the documents authorized in the warrant could be found on the computer.

Computers are able to store massive quantities of intangible, digitally stored information, distinguishing them from ordinary storage containers. But neither the quantity of information, nor the form in which it is stored, is legally relevant in the Fourth Amendment context. There is no reason why officers should be permitted to search a room full of filing cabinets or even a person's library for documents listed in a warrant but should not be able to search a computer.

Click **HERE** for the court's opinion.

*****

U.S. v. Chapman, 528 F.3d 1215**,** June 23, 2008

Even though it appears to prohibit six different types of actions, only one of which is "assault," convictions under 18 U.S.C. § 111 require at least some form of assault.

Title 18 U.S.C. § 111(a) allows misdemeanor convictions only in cases where the acts constitute simple assault. To constitute simple assault, an action must be "either a willful

attempt to inflict injury upon the person of another, or a threat to inflict injury upon the person of another which, when coupled with an apparent present ability, causes a reasonable apprehension of immediate bodily harm." "Tensing up" in anticipation of arrest and disobeying orders to move and lie down, may have made the officers' job more difficult, but did not amount to a simple assault. Mere passive resistance is not sufficient for a conviction under § 111(a).

The 2nd, 3rd, 5th, 8th, and 10th circuits agree (cites omitted).

Click **HERE** for the court's opinion.

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10th CIRCUIT

U.S. v. Forbes, 528 F.3d 1273**,** June 17, 2008

Even assuming that a Customs and Border Protection agent first searched the interior of the trailer without consent or probable cause, no incriminating evidence was found during that search. The subsequent canine alert provided an independent source of suspicion to search the interior of the tractor, where the marijuana was discovered.

Click **HERE** for the court's opinion.

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DC CIRCUIT

U.S. v. Askew, 2008 U.S. App. LEXIS 13315**,** June 20, 2008

The full Court vacated and now reverses the decision by a panel in *U. S. v. Askew*, 482 F.3d 532 (D.C. Cir. 2007).

Unzipping a jacket to expose a sweatshirt underneath is a "search." A reasonable suspicion of criminal activity cannot justify a search that does not have a weapon as its "immediate object." There is no search-for-evidence counterpart to the *Terry* weapons search, permissible on only a reasonable suspicion that such evidence would be found. When there are no reasonable grounds for believing that it would establish or negate appellant's identification as the robber, unzipping a jacket to expose a sweatshirt during a show-up is precisely the sort of evidentiary search that is impermissible in the context of a *Terry* stop. (The Court expressly stated that it was not ruling that reasonable grounds for believing that it would establish or negate appellant's identification as the robber would make the search reasonable under the Fourth Amendment.) **The police may not maneuver a suspect's outer clothing – such as unzipping a suspect's outer jacket to facilitate a witness's identification at a show-up during a *Terry* stop.**

Click **HERE** for the court's opinion.