

AN A1F EXCLUSIVE!

D.C. vs HELLER

RINGSIDE

THE FIGHT
OF THE
CENTURY!

AT THE

IS THERE AN
INDIVIDUAL
RIGHT?

SUPREME

TUES.
MARCH
18

COURT

WASH.
DC

DAVE KOPEL REPORTING LIVE!

On Tuesday morning, March 18, the Supreme Court of the United States heard oral argument in *District of Columbia v. Heller*, the Second Amendment challenge to Washington, D.C.'s handgun ban and ban on the use of any firearm for self-defense in the home. I was at the counsel table for the pro-rights side—one of three lawyers there to assist Alan Gura, who would present the oral argument.

The other two lawyers, Clark Neily (of the public interest law firm Institute for Justice) and Bob Levy (of the Cato Institute) had been part of Gura's team since the case began in 2002. Unlike Gura, Neily and Levy, I was not representing Mr. Heller or the other plaintiffs in the case.

I had filed an *amicus* brief on behalf of a broad coalition of pro-Second Amendment police organizations and district attorneys. When Gura found out that there would be an extra seat at the counsel table for oral argument, he invited me to come along and help.

Representing D.C. was Walter Dellinger, who had formerly served as acting solicitor general (the lead Supreme Court lawyer) in the Clinton administration. Dellinger had previously argued 29 Supreme Court cases, while this would be Gura's first Supreme Court argument.

At exactly 10 a.m., the marshal of the court announced "Oyez, oyez, oyez," and we rose as the justices entered the courtroom.

Because D.C. had lost the case in the lower court, Dellinger argued first. He began by explaining D.C.'s theory of the Second Amendment—that it has no practical effect today, for it serves no purpose other than to protect state militias, like those of the founding era, from being disarmed by the federal government.

Chief Justice John Roberts interjected: "If you're right, Mr. Dellinger, it's certainly an odd way to phrase the operative provision. If it is limited to state militias, why would they say 'the right of the people'? In other words, why wouldn't they say 'state militias have the right to keep and bear arms'?"

Dellinger replied that, to the Founders, "the militia" included all the people. Chief Justice Roberts noted that Dellinger's point would imply that the right to arms belongs to all the people.

Justice Anthony Kennedy suggested that the first clause of the Second Amendment simply reaffirms the importance of the militia, but does not narrow the operative clause. This is a point made in a grammatical sense in an *amicus* brief by George Mason University School of Law Professor Nelson Lund, and in a historical sense in the *amicus* brief by David Hardy on behalf of Academics for the Second Amendment.

Shortly thereafter, Justice Kennedy expressed skepticism about Dellinger's ultra-narrow reading of the right to arms: "It had nothing to do with the

concern of the remote settler to defend himself and his family against hostile Indian tribes and outlaws, wolves and bears and grizzlies and things like that?"

Justice Kennedy then followed his question with the following statement: "In my view," the Second Amendment supplemented the congressional militia powers in Article I "by saying there's a general right to bear arms quite without reference to the militia either way."

Justice John Paul Stevens had long

rather than an individual right.

Justice Antonin Scalia noted that Dellinger's claim that "bear arms" was an exclusively military term was inconsistent with British laws, which had forbidden Catholics and Scottish Highlanders to "bear arms." Those laws banned gun possession in general, not merely membership in the militia.

Perhaps recognizing that his anti-individual rights argument was weak, Dellinger shifted to a backup argument: The 42 state constitutions that recognize an individual right to arms have a "reasonableness" standard for gun controls, so D.C.'s handgun ban is reasonable.

"What is reasonable about a total ban on possession?" asked Chief Justice Roberts.

That only handguns are banned, while rifles and shotguns are still allowed, Dellinger answered.

The Chief Justice shot back: "So if you have a law that prohibits the possession of books, it's all right if you allow the possession of newspapers?"

Most of the rest of Dellinger's initial presentation was consumed by a long discussion about machine guns and "armor-piercing" bullets. Dellinger argued that the decision of the U.S. Court of Appeals for the D.C. Circuit (which declared last spring that the handgun ban violated the Second Amendment) meant that machine guns and "armor-piercing" ammo bans were unconstitutional. Chief Justice Roberts and Justice Scalia disagreed, contending that the lower court's opinion was simply about a categorical handgun ban.

Justice Samuel Alito then asked Dellinger about the D.C. trigger lock law, which requires all guns in the home to be locked at all times. Dellinger conceded that the law, if read literally, would be unreasonable, but he insisted that there was an implicit exception that allowed for self-defense.

Next, Solicitor General Paul Clement, representing the U.S. Department of Justice, had 15 minutes to make his own argument. The brief that he filed in January explained at length that the Second Amendment was

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made it clear, in his written opinions, that he loathed firearms. He pointed out that in the early state constitutions, only Pennsylvania and Vermont explicitly mentioned self-defense as a reason for the right to arms, whereas others, such as Massachusetts, mentioned only "the common defence."

Justice Stevens led Dellinger into a discussion of 18th century English judge and scholar William Blackstone and of the 1689 English Declaration of Rights, which Stevens (apparently following the lead of a brief written by Roger Williams Law School Professor Carl Bogus and Ohio State University historian Saul Cornell) claimed to be a "group right,"

an individual right. But it also argued that the Supreme Court should set an “intermediate scrutiny” standard of review for the Second Amendment, and remand the case back to the lower court to determine whether D.C.’s law meets this standard.

Questions from Justice Ruth Bader Ginsberg suggested that she strongly endorses the government’s authority to ban particular types of guns. It was not clear if the bans she had in mind were only for machine guns or if she thought that a handgun ban would be constitutional.

Justice Kennedy said that the test from the 1939 case *United States v. Miller* (focused on whether a gun has militia utility) was “insufficient” to address the Framers’ concerns “about guns being taken away from the people who needed them for their defense.”

Justice Alito wondered how D.C.’s laws could survive any standard of review, since they ban the guns most commonly used for self-defense, and ban defensive use of all guns.

Chief Justice Roberts said that, despite the solicitor general’s request to set an intermediate standard for judicial review of gun control laws, there was no need for the Supreme Court to articulate an intricate doctrine. (This view was set forth in the *amicus* brief authored on behalf of former U.S. Attorneys General Edwin Meese III and William Barr by former Department of Justice Office of Legal Counsel head Chuck Cooper.) This would allow the court to simply declare the handgun ban to be obviously unconstitutional.

Now it was Gura’s turn. In a series of five moot courts (practice sessions for oral arguments) in the previous two weeks, Gura had been hammered mercilessly by expert lawyers playing the role of the Supreme Court justices.

Before the actual Supreme Court, Gura’s presentation showed how well he had learned from the moots. He began by showing the key facts that would decide part of the case in our favor: contrary to the claims of Dellinger and Clement, there was no

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implicit self-defense exception to the trigger lock law because banning self-defense was the intent of the law.

Gura pointed out that D.C. had so admitted, and the District of Columbia Court of Appeals had agreed, in the 1977 case *McIntosh v. Washington*, where the NRA had challenged D.C.'s then-new handgun and self-defense bans. Further, Gura explained, D.C. lawyers had formally acknowledged as an undisputed fact, when the trial court was hearing the *Heller* case, that the trigger lock law banned self-defense.

Justice Stephen Breyer asked a lengthy question about whether, in light of the Second Amendment's primary purpose of encouraging a citizen army, and in light of the statistics about handgun crime, the handgun ban is a "proportionate" law.

Gura pointed to briefs from retired generals and other officers (including NRA Secretary Edward J. Land) that pointed out that the D.C. laws prevent District residents from acquiring civilian familiarity with firearms, and that research has shown that soldiers who are experienced with guns in civilian life make much better combat marksmen.

Justice Breyer replied that D.C. residents can still use rifles at target ranges in Maryland or Virginia.

Gura then pointed to the many federal court cases that recognized the militia utility of handguns.

Justices Ginsberg and Souter pro-pounded a series of challenging questions, while Justice Scalia stepped in to support Gura. Justice Kennedy returned to his "settler in the wilderness" imagery.

Dellinger had reserved 10 minutes for rebuttal, and he used all the time in arguing for the reasonableness of the D.C. laws. Chief Justice Roberts expressed skepticism about a crime victim's ability to remove a trigger lock and load a gun in the dark, in the few seconds after a criminal had broken into his or her home.

D.C.'s law against carrying guns actually forbids a person who owns a legal handgun (a pre-1976 grandfathered one) from carrying the handgun from one room to another in his or her own

home. Dellinger could only characterize the carry law as reasonable by misstating what it actually says.

Although oral argument had been scheduled to take 75 minutes in total, overtime questions to all three of the lawyers had added an additional 22 minutes—an unusual display of the Supreme Court's keen interest in the subject.

As I headed to the airport in the afternoon, my talkative cab driver asked what I had been doing in Washington. He was an immigrant from Eritrea, an east African nation that used to be part of Ethiopia. Before Eritrea won its independence, it was under the rule of the genocidal tyrant Mengistu, whom the cab driver described as an African Hitler. Yet the cabbie's tribe, the Afars, had always been left alone by the government, he said, because everyone in the tribe had a rifle, and carried it wherever he went.

The cab driver was disgusted with the D.C. law banning handguns and self-defense in the home. He told me about his friend, an Ethiopian immigrant, who was a landlord. One day, the police raided a tenant's apartment, suspecting the tenant was involved with drugs. The police also raided the landlord's home, and found no drugs, but did find a gun that the landlord kept for self-defense.

For a year and a half, the landlord was dragged through the D.C. courts until, finally, the prayers of his cab driver friend were answered: a kind-hearted judge put the landlord on probation, instead of sending him to jail.

"The American Constitution is the greatest in the world," the cabbie affirmed. "Every country should use it. The one thing that every American can give to his children and grandchildren is the American Constitution."

Two centuries separate James Madison from the Eritrean cab driver. Yet the two men are united in their passionate love of America's constitutional liberty.

After the recent oral arguments in the D.C. case, I am hopeful that the Supreme Court will fulfill the hopes of our revered Founders and of our newest patriotic citizens by affirming our individual Right to Keep and Bear Arms. 