Forum

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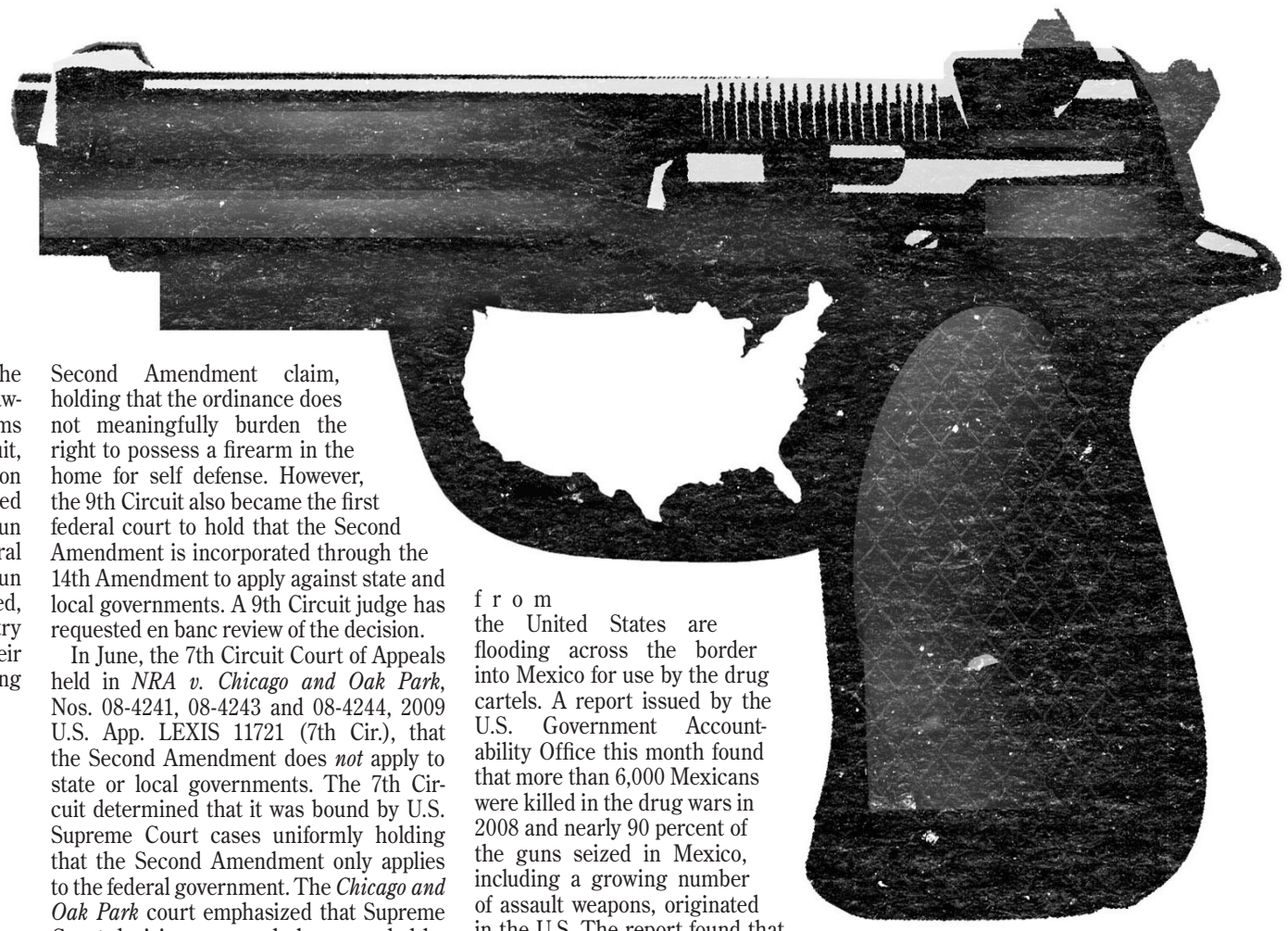
'Heller's' Wake



By Juliet A. Leftwich

The National Rifle Association was thrilled when, one year ago today, the U.S. Supreme Court held for the first time that the Second Amendment guarantees a right to possess firearms unrelated to service in a well-regulated state militia. In District of Columbia v. Heller, 128 S. Ct. 2783 (2008), the court struck down D.C.'s decades-old handgun possession ban, finding, in a 5-4 decision, that the "right of self-defense has been central to the Second Amendment" and that handguns are "overwhelmingly chosen by American society" for self-defense in the home. The court also struck down the requirement that firearms in the home be stored unloaded and disassembled or bound by a locking device, finding that the law prevented the use of firearms for self defense.

Although the *Heller* decision was no surprise, given the court's current composition, it was nonetheless very troubling, to put it mildly. The outcome-driven decision represented a complete reversal of the court's previous interpretation of the Second Amendment, set forth 70 years ago in *United States v. Miller*, 307 U.S. 174 (1939). In *Miller*, the court unequivocally held that the "obvious purpose" of the Second Amendment was to "assure the continuation and render possible the effectiveness of" the state militia and the amendment "must be interpreted with and applied with that end in view." In reliance on *Miller*, over 200 appellate courts had rejected Second Amendment challenges to our nation's gun laws.

Moreover, while the *Heller* court made clear that the new constitutional right was not unlimited — providing numerous examples of gun laws it deemed "presumptively lawful," e.g., prohibitions on the possession of firearms by felons and the mentally ill — it did not explain why those laws were consistent with the Second Amendment or provide a standard for legislators and lower courts to apply when determining whether other gun laws violate the amendment.

Emboldened by the *Heller* decision, the gun lobby immediately began to file lawsuits challenging a wide array of firearms laws nationwide. In fact, the first lawsuit, challenging Chicago's handgun possession ban, was filed the day *Heller* was handed down. Five other challenges to local gun laws were filed the next day and several additional challenges to state and local gun laws are pending nationally. As expected, criminal defendants across the country have also seized on *Heller* to challenge their indictments and convictions for violating federal and state firearms laws.

> While 'Heller' has clearly wreaked havoc in the courts over the last year — creating legal uncertainty where there had been none — little has changed when it comes to gun violence in America.

By far the most significant post-*Heller* issue to face the courts over the last year has been whether the Second Amendment applies to the states, a question not before the Supreme Court in *Heller* because Washington, D.C. is a federal enclave. In April, the 9th Circuit Court of Appeals weighed in on this issue in *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009), litigation brought by a gun show promoter to challenge an Alameda County ordinance prohibiting the possession of firearms on county-owned property. The court rejected the Nordykes' Second Amendment claim, holding that the ordinance does not meaningfully burden the right to possess a firearm in the home for self defense. However, the 9th Circuit also became the first federal court to hold that the Second Amendment is incorporated through the 14th Amendment to apply against state and local governments. A 9th Circuit judge has requested en banc review of the decision.

In June, the 7th Circuit Court of Appeals held in *NRA v. Chicago and Oak Park*, Nos. 08-4241, 08-4243 and 08-4244, 2009 U.S. App. LEXIS 11721 (7th Cir.), that the Second Amendment does *not* apply to state or local governments. The 7th Circuit determined that it was bound by U.S. Supreme Court cases uniformly holding that the Second Amendment only applies to the federal government. The *Chicago and Oak Park* court emphasized that Supreme Court decisions may only be overruled by the Supreme Court itself, criticizing the 9th Circuit's decision in *Nordyke* for departing from that precedent. The day after the *Chicago and Oak Park* ruling, the NRA filed a petition for certiorari to the U.S. Supreme Court.

The 2nd Circuit Court of Appeals also addressed the issue of incorporation in *Maloney v. Cuomo*, 554 F.3d 56 (2d. Cir. 2009), a case involving a challenge to a state statute prohibiting the possession of a weapon called a nunchaku (aka "nunchucks"). In upholding the statute, the 2nd Circuit stated it was "settled law" that the Second Amendment only applies to the federal government, and that *Heller* "does not invalidate this longstanding principle."

While *Heller* has clearly wreaked havoc in the courts over the last year — creating legal uncertainty where there had been none — little has changed when it comes to gun violence or gun policy in America. Gun violence has continued unabated, with several mass shootings throughout the country, including those in a nursing home in North Carolina, in an immigrant center in New York and the massacres of police officers in Oakland and Pittsburgh. In addition, guns from the United States are flooding across the border into Mexico for use by the drug cartels. A report issued by the U.S. Government Accountability Office this month found that more than 6,000 Mexicans were killed in the drug wars in 2008 and nearly 90 percent of the guns seized in Mexico, including a growing number of assault weapons, originated in the U.S. The report found that efforts to address gun trafficking are hampered by weak U.S. gun laws, including the law permitting private sellers to sell guns without conducting background checks on prospective purchasers.

How has Congress reacted to the bloodshed? Not, of course, by acting to strengthen our gun laws. Rather, it has adopted legislation to make them weaker. In May, Congress passed, and President Obama signed into law, a credit card bill with a dangerous, completely unrelated amendment allowing people to possess firearms in national parks and wildlife refuges, provided the possession is in compliance with the law of the state in which the property is located. In findings accompanying the law, Congress proclaimed that the law was necessary to "ensure that unelected bureaucrats and judges cannot again override the Second Amendment rights of law-abiding citizens," completely misinterpreting *Heller*. This irresponsible legislation has broad application, encompassing national sanctuaries such as Yosemite, Muir Woods, the Statue of Liberty, the Grand Canyon and Alcatraz.

Gun purchases spiked dramatically over the last year, reportedly because some Americans feared that Obama's election would lead to strict new laws limiting access to guns. Unfortunately, that does not appear to be the case. Obama has retreated from some of his earlier support for strong gun laws (such as a federal assault weapon ban) and Democrats are avoiding gun control legislation entirely, despite the fact that opinion polls consistently show overwhelming support for strong gun laws. So much for change.

As we mark the one-year anniversary of the *Heller* decision, what has become clear is that *Heller*, while disruptive, is not the real problem. Gun violence prevention, now more than ever, has become a purely political issue and the gun lobby continues to have a stranglehold over our policymakers, Democrats and Republicans alike. The Second Amendment makes for good talking points, but really has nothing to do with it.

Juliet A. Leftwich is the legal director of Legal Community Against Violence, a national law center founded in the wake of the 101 California St. assault weapon massacre in San Francisco.