



RECENT DEVELOPMENTS IN SECOND AMENDMENT LITIGATION

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A. Introduction and Overview

The Law Center to Prevent Gun Violence is tracking litigation involving Second Amendment challenges to federal, state, and local gun laws asserted in the aftermath of the United States Supreme Court's controversial, landmark decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008). In that 5-4 decision, the Court held for the first time that the Second Amendment protects the individual right of law-abiding, responsible citizens to keep a handgun in the home for self-defense. This update summarizes the most significant recent Second Amendment decisions. Our more comprehensive analysis and overview of all the Second Amendment decisions since *Heller* can be found in the *Post-Heller Litigation Summary* available at <http://smartgunlaws.org/post-heller-litigation-summary/>.

B. New Decisions

***Bonidy v. United States Postal Serv.*, 2015 U.S. App. LEXIS 10954 (10th Cir. June 26, 2015): Upholding Federal Law Prohibiting the Storage and Carry of Firearms on United States Postal Service Property**

The plaintiff in this case, a concealed carry permit holder from Colorado, brought an as-applied Second Amendment challenge to 39 C.F.R. § 232.1(l), which prohibits the storage and carry of firearms on United States Postal Service property. This regulation prohibited the plaintiff from carrying his gun into the local post office building or the adjacent parking lot and the court addressed these two locations separately in its analysis. In upholding both restrictions, the court further established the principle that the prohibition of firearms in government buildings falls outside the scope of the Second Amendment.

The court first examined the prohibition on carrying firearms in the postal building itself. As to concealed carry, the court noted that the Tenth Circuit previously held that the Second Amendment does not protect a right to carry a concealed weapon in public. Regarding the open carry of firearms, the court pointed to the Supreme Court's language from *Heller* that "nothing in our opinion should be taken to cast doubt on...laws forbidding the carrying of firearms in sensitive places such as schools and *government buildings*." This language, which the court found to be binding, rather than merely dicta, led to the conclusion that "the Second Amendment right to carry firearms does not apply to federal buildings, such as post offices." As such, the court upheld the regulation as it applied to the post office building.

As to the adjacent parking lot, the court found this to be a closer question. It concluded that, on the facts of the case, the post office building and parking lot and should be considered as a single unit, and therefore "the previously quoted language in *Heller* applies with the same force



to the parking lot as to the building itself.” The court also provided an alternative Second Amendment analysis in which it reviewed the prohibition under intermediate scrutiny.

Importantly, in choosing intermediate scrutiny, the court noted that “[t]he risk inherent in firearms and other weapons distinguishes the Second Amendment right from other fundamental rights that have been held to be evaluated under a strict scrutiny test, such as the right to marry and the right to be free from viewpoint discrimination, which can be exercised without creating a direct risk to others.” In upholding the law under intermediate scrutiny, the court concluded that the parking lot prohibition “is substantially related to the USPS’s important interest in creating a safe environment for its patrons and employees.”

Wrenn v. District of Columbia, 2015 U.S. Dist. LEXIS 71383 (D.D.C. May 18, 2015): Striking Down the District’s Concealed Carry Permitting Regime

In light of the 2014 *Palmer* decision, which struck down the District’s complete prohibition on the public carrying of firearms, the District created a concealed carry regime that requires applicants to demonstrate a “good” or “proper” reason for needing to carry a firearm. This requires a particularized showing of need beyond simply living in a high crime area. Plaintiffs argued that this “good reason”/“proper reason” requirement violated the Second Amendment and the district court agreed, declaring the District’s regime to be unconstitutional.

In beginning its analysis, the court reiterated its holding from *Palmer* that the Second Amendment right to bear arms “includes the right to carry an operable handgun outside the home for self-defense.” The court then addressed the threshold issue of whether the District’s requirement constituted a “longstanding” regulation entitled to presumptive validity. Despite evidence of a long tradition of regulation public carry in the District, the court held that “Defendants have not presented any historical evidence to support their argument that the District of Columbia’s ‘good reason’/‘proper reason’ requirement is longstanding.” Moreover, the court considered the “longstanding” analysis to be “irrelevant” because the District’s requirement has more than a minimal impact on plaintiffs’ Second Amendment rights.

The court then reviewed the challenged provisions using intermediate scrutiny as the applicable standard of review. The court found that, under this standard, although “deference should be given to the District of Columbia’s stated governmental interest in preventing crime and protecting public safety,” the District must show that its regulatory scheme “is not broader than necessary to achieve this important governmental interest.” After weighing the evidence, the court concluded that the District “failed to demonstrate that there is any relationship, let alone a tight fit, between reducing the risk to other members of the public and/or violent crime and the District of Columbia’s ‘good reason’/‘proper reason’ requirement.”

This requirement, the court held, “makes it impossible for the overwhelming majority of law-abiding citizens to obtain licenses to carry handguns in public for self-defense, thereby depriving them of their Second Amendment right to bear arms.” The court did note, however,



that its conclusion “should not be read to suggest that it would be inappropriate for the District to enact a licensing mechanism that includes appropriate time, place and manner restrictions on the carrying of handguns in public.”

***Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. Apr. 27, 2015): Upholding Local Ordinance Prohibiting Assault Weapons and Large Capacity Ammunition Magazines**

Plaintiffs in this case brought a Second Amendment challenge to an ordinance in the City of Highland Park ordinance prohibiting assault weapons and large capacity ammunition magazines (defined as those able to accept more than ten rounds). In a 2-1 decision authored by Judge Easterbrook, the Seventh Circuit panel held that the ordinance is constitutional in its entirety.

The court first analyzed a variety of threshold issues. First, with regarding the “longstanding” analysis, Judge Easterbrook wrote that “[n]othing in *Heller* suggests...that the passage of time creates an easement across the Second Amendment.” As to “common use,” the court argued that relying on how common a weapon is at the time of litigation would be “circular,” noting that “it would be absurd to say that the reason why a particular weapon can be banned is that there is a statute banning that it, so that it isn’t commonly owned.” Finally, with respect to the “dangerous and unusual” analysis, the court found it difficult to make any concrete determination based on the evidence that 9% of firearm owners have an assault weapon.

After dismissing these threshold issues, the court began its substantive analysis by laying out a novel two-part analytical framework. “[I]nstead of trying to decide what ‘level’ of scrutiny applies...we think it better to ask whether a regulation bans weapons that were common at the time of ratification or those that have ‘some reasonable relationship to the preservation or efficiency of a well-regulated militia,’ and whether law-abiding citizens retain adequate means of self-defense.” The court answered both questions in the affirmative, noting that “[s]ome of the weapons prohibited by the ordinance...bear a relation to the preservation and effectiveness of state militias” and that “[u]nlike the District of Columbia’s ban on handguns, Highland Park’s ordinance leaves residents with many self-defense options.”

The court also discussed justifications for the ordinance, finding that “[the fact that] laws similar to Highland Park’s reduce the share of gun crimes involving assault weapons is established by data...[and] [t]here is also some evidence linking the availability of assault weapons to gun-related homicides.” In short, “[a] ban on assault weapons and large-capacity magazines...may reduce the carnage if a mass shooting occurs.” Acknowledging the difficult empirical judgments involved, the court made a strong case for judicial deference in Second Amendment cases generally: “The best way to evaluate the relation among assault weapons, crime, and self-defense,” Judge Easterbrook wrote, “is through the political process and scholarly debate...[t]he central role of representative democracy is no less part of the Constitution than is the Second Amendment: when there is no definitive constitutional rule, matters are left to the legislative process.”