

## Landmark Gun Ban Case Heard By Supreme Court

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On March 18, the Supreme Court heard oral arguments in *District of Columbia v. Heller*, a case the Court has stated is "limited to the following question: Whether Washington, D.C.'s bans [on handguns, on having guns in operable condition in the home and on carrying guns within the home] 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."

Most in the Supreme Court chamber seemed to agree that the Second Amendment protects an individual right. The issues that were most in contention included the meaning of the words "keep" and "bear," and whether the amendment protects the possession of arms only during militia service or also for self-defense; whether a total ban on handguns is a "reasonable" regulation of firearms; whether restrictions on the right to arms should be subject to "strict scrutiny," or legislatures or courts should be able to decide what is "reasonable;" and what kinds of regulations would be "reasonable" under the Second Amendment.

As expected, Dellinger emphasized the amendment's reference to the militia, and downplayed its operative clause, which commands that the "right of the people shall not be infringed." Because the militia are mentioned in the amendment, Dellinger insisted, individuals have a right to possess arms only while serving in a militia. To bolster that argument, he tried to write "keep" out of the amendment, presumably because "keep" means "in a private citizen's home."

### **Keep and/or bear?**

Justice David Souter asked, "[if] 'keep' should be read as, in effect, an independent guarantee, then what is served by the phrase 'and bear?'" He then answered his own question, saying "it sounds to me as though 'keep and bear' forms one phrase rather than two." Justice John Paul Stevens was more direct. "It's one right to keep and bear, not two rights, to keep and to bear." (The Brady Campaign began pushing this new theory just last year.)

Solicitor General Paul D. Clement strongly disagreed, however, and three justices asked questions supporting that point. Chief Justice John Roberts asked, if the Framers had meant to protect a militia right, "Why would they say 'the right of the people?' Why wouldn't they say 'state militias have the right to keep arms?'" Justice Anthony Kennedy added, "the amendment says we reaffirm the right to have a militia, we've established it, but in addition, there is a right to bear arms. . . . [T]here's a general right to bear arms quite without reference to the militia either way."

Early on, Justice Antonin Scalia asked, "why isn't it perfectly plausible, indeed reasonable, to assume that since the framers knew that the way militias were destroyed by tyrants in the past was not by passing a law against militias, but by taking away the people's weapons -- that was the way militias were destroyed." He added, "The two clauses go together beautifully: Since we need a militia, the right of the people to keep and bear arms shall not be infringed." Later, Justice Scalia noted, "It's not at all uncommon for a legislative provision or a constitutional provision to go further than is necessary for the principal purpose involved. The principal purpose here is the militia, but the second clause goes beyond the militia and says the right of the people to keep and bear arms."

Clement agreed. "A number of state courts that have interpreted [state constitutional right to arms provisions] have distinguished between the two rights and looked at them differently," he said. "And,

obviously, the term 'keep' is a word that I think is something of an embarrassment for an effort to try to imbue every term in the operative text with an exclusively military connotation because that is not one that really has an exclusive military connotation." Clement later added, "it's worth emphasizing that the framers knew exactly how to condition a right on militia service, because they did it with respect to the grand jury clause, and they didn't do it with respect to the Second Amendment."

## **Self-Defense**

Justice Stevens questioned whether the Second Amendment protects the right of self-defense, because most state constitutions in 1789 did not expressly mention self-defense in their provisions protecting the right to arms. And Justice Souter asked, "is there any evidence that the anti-Federalist objections to the Constitution that ultimately resulted in the Second Amendment were premised on any failure to recognize an individual right of self-defense or hunting?"

On the other hand, Justice Kennedy repeatedly suggested that the Framers intended the Second Amendment to protect the ability of settlers in the wilderness to defend themselves, and asked about self-defense in homes today.

Justice Scalia added, "[the English jurist] Blackstone thought [self-defense] was important. He thought the right of self-defense was inherent, and the framers were devoted to Blackstone. Joseph Story, the first commentator on the Constitution and a member of this Court, thought it was a personal guarantee."

Justice Samuel Alito asked, "If the amendment is intended at least, in part to protect the right to self-defense in the home, how could the District code provision survive under any standard of review where they totally ban the possession of the type of weapon that's most commonly used for self-defense?"

Dellinger back-pedaled from D.C.'s longstanding position that its laws prohibit self-defense, claiming that the city supports citizens using functional firearms for defense. That claim inspired a vigorous challenge by Heller's lawyer, Alan Gura. Solicitor General Clement sought to offer a solution to the problem, suggesting that D.C. should expressly "allow for a relatively robust self-defense exception to the trigger lock provision."

Chief Justice Roberts, however, scoffed at the idea that a citizen awakened by an intruder in the middle of the night could "turn on the lamp ... pick up [his] reading glasses," and disengage a trigger lock."

## **A ban is "reasonable?"**

Perhaps the most animated exchange of the day was between Chief Justice Roberts and Dellinger, over whether a handgun ban is "reasonable."

Dellinger argued that states with constitutional protections on the right to keep and bear arms all allow reasonable regulations, but was flatly contradicted by Chief Justice Roberts, who asked him to explain what is reasonable about a total ban on possession?

Rest assured that we will continue to follow the developments in this case closely, leading to the Court's expected decision in June.

For more information on the Heller case, including links to the official Supreme Court Transcript, C-SPAN audio recording, and all the briefs in the case, please visit [www.nraila.org/heller](http://www.nraila.org/heller).