



Cato Handbook for Policymakers

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31. Restoring the Right to Bear Arms

Congress should

- compel Washington, D.C., to abide by the principles established in the Heller decision;
- repeal the federal ban on interstate purchases of handguns;
- revoke the federal age minimums on buyers and possessors of handguns;
- modernize and improve the operations of the Bureau of Alcohol, Tobacco, Firearms and Explosives;
- restore funding to process “relief from disability” applications to own firearms; and
- rescind the Department of the Interior regulation banning defensive guns in national parks.

For too long, the Second Amendment was consigned to constitutional limbo, all but erased from law textbooks and effectively banished from the nation’s courts. But no more. On June 26, 2008, after seven decades without a coherent explanation of the right celebrated during the early Republic as “the true palladium of liberty,” the Supreme Court rediscovered the Second Amendment. More than five years after six Washington, D.C., residents challenged the city’s 32-year-old ban on all functional firearms in the home, the Court held in *District of Columbia v. Heller* that the gun ban was unconstitutional.

Heller is merely the opening salvo in a series of litigations that will ultimately resolve what weapons and individuals can be regulated and what restrictions are permissible. Near term, the Court must also decide whether Second Amendment rights can be enforced against state and local governments. Despite those remaining hurdles, it’s fair to say that the Court’s blockbuster decision makes the prospects for reviving the original meaning of the Second Amendment substantially brighter.

Within the *Heller* framework, Congress now has a historic opportunity to begin restoring Americans' right to keep and bear arms. To be sure, Cato Institute scholars have opposed previous congressional meddling in the gun control arena on the ground that most federal regulations of firearms are not authorized under the interstate commerce clause. That clause was intended to ensure the free flow of trade across state lines, not to sanction a federal police power. Regrettably, the battle to limit the interstate commerce power to interstate commerce seems to have been lost in the courts, which have expanded the scope of the commerce clause to cover regulation of nearly anything and everything. But there can be no constitutional objection to repealing laws—or, at a minimum, amending their most egregious provisions—that had no constitutional pedigree ab initio. The same logic applies, of course, to laws that offend the Second Amendment.

Indeed, even if a federal gun law were constitutionally authorized, that does not mean it would be constitutionally mandated. Accordingly, included in what we propose below are recommendations to repeal or amend statutes that are misguided on public policy grounds and that may also be infringements of the Second Amendment.

Compel Washington, D.C., to Abide by the Principles Established in the *Heller* Decision

No jurisdiction in the United States works as doggedly to disarm citizens as does the District of Columbia, our nation's capital and on-again, off-again murder capital. Until the *Heller* decision, with very few exceptions, no handgun could be registered in D.C. Even those handguns grandfathered before the District's 1976 ban could not be carried from room to room in the home without a license, which was never granted. In addition, all firearms in the home, including rifles and shotguns, had to always be unloaded and either disassembled or bound by a trigger lock. In effect, no one in the District could possess a functional firearm in his or her own residence. And the law applied not just to "unfit" people like felons or the mentally incompetent, but across-the-board to ordinary, honest, responsible citizens. Happily, the Supreme Court has now ruled that all those provisions violate the personal and private right to keep and bear arms that is secured by the Second Amendment.

The D.C. city council was, therefore, on notice to alter the city's gun control regime to comply with the Court's holding. The city's first attempt at revised rules was an abject failure. At least one of the new rules was

an obvious attempt to circumvent *Heller*'s directives. Other rules violated the spirit and perhaps the letter of the opinion. At this writing, the city has responded to an avalanche of criticism and passed a second set of temporary rules, which will remain in effect until mid-December 2008, when permanent gun control regulations are due to be enacted. The city's second attempt was better than its first, but the current rules still fall short of *Heller*'s mandate. Nor is there any assurance that the permanent rules will fully comply. Consequently, Congress can and should, under Article I, section 8, of the Constitution, exercise its plenary power over all legislative matters in the nation's capital and compel the city to abide by the principles established in the *Heller* decision. Home rule, arising out of authority delegated by Congress to the D.C. government, is not a license to violate the Constitution.

For starters, Congress should enact legislation to alter how D.C. processes gun registrations. Currently, residents seeking to register a handgun must obtain and complete an application form; submit photographs, proof of residency, and proof of good vision; pass a written test; pay a fee; and be fingerprinted. If approved, the registrant must take the application to a dealer for delivery of the firearm, which is then returned to city officials for ballistics testing. The entire process can take months. Congress should mandate a more streamlined registration process for D.C., based on the congressionally created National Instant Criminal Background Check System, which is mandatory for almost all retail firearm sales in the United States. The NICS uses computerized databases to complete a background check within a few hours in most cases.

Second, with contemptuous disregard for the Supreme Court's decision, D.C. initially sought to continue its ban on virtually all semiautomatic handguns and rifles. The District defined "machine gun" as any gun that could fire 12 or more shots without being manually reloaded. Even guns that did not come with a 12-round magazine were illegal if they were capable of holding 12 rounds. In effect, the only handguns that could be registered were revolvers or single-shot handguns. Semiautomatic handguns constitute about three-quarters of the handguns sold in the United States annually. Banning them all violated *Heller*'s rule against "prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society" for the lawful purpose of self-defense.

Moreover, classifying semiautomatic handguns and rifles as automatic "machine guns" was patently irrational. Semiautomatic guns fire only one round each time the trigger is pulled; they have been available since

the 19th century and are used by tens of millions of Americans for hunting, target shooting, and formal competitions, including the Olympics. Perhaps D.C. finally got the message. The city's latest (temporary) rules now permit semiautomatic weapons as long as the actual magazine holds no more than ten rounds of ammunition, even if the weapon is capable of using a larger magazine.

Congress should ensure that the permanent rules ultimately adopted by the District do not constructively ban semiautomatic handguns and rifles. The guidepost should be that a firearm may not be banned unless it is prohibited by federal law or subject to the National Firearms Act, which covers weapons such as automatic machine guns and sawed-off shotguns.

Third, D.C.'s first set of revised rules still required that guns in the home be unloaded and either disassembled, trigger-locked, or kept in a gun safe. An exception was made for a firearm while it was being used against a reasonably perceived threat of immediate harm within the home. That exception was unconstitutionally vague. D.C. residents had no way to determine when the exception would become operative. According to D.C. Attorney General Peter Nickles, a homeowner could not have an unlocked and loaded gun even when investigating the sound of intruders in his or her backyard. Any rule requiring a crime victim to wait until his or her attacker has actually entered the home is unreasonable and shameful.

Once again responding to criticism, the city's second set of revised rules repealed the ban on all loaded firearms in the home, with one exception. If a minor could readily gain access to the loaded firearm without parental consent, then the weapon had to be kept in a secure location. That seems reasonable, but Congress must guarantee that D.C.'s permanent rules are no more restrictive than the rules now in effect on a temporary basis. Here's the controlling principle: D.C. may not prohibit, constructively prohibit, or significantly infringe the ability of individuals to possess and use firearms in their homes for self-protection.

Repeal the Federal Ban on Interstate Purchases of Handguns

Under federal law, a person who is not a licensed dealer—that is, a Federal Firearms Licensee—may acquire a handgun only within the person's own state. The acquirer may, however, purchase the handgun from an out-of-state FFL, providing an arrangement is made for the handgun to be shipped to an FFL in the purchaser's state of residence, where the purchaser can then obtain the handgun after complying with all necessary background checks. That rule does not apply to rifles and shotguns. A

buyer may acquire a rifle or shotgun, in person, at a licensee's premises in any state, provided the sale complies with laws applicable in both the state of sale and the state where the purchaser resides. So a person who resides in New Mexico can buy a shotgun from a licensed firearms dealer in South Dakota (who must, by federal law, get prior approval for the sale from the National Instant Criminal Background Check System). The New Mexican can then bring the gun home to New Mexico, in compliance with New Mexico law.

There is no persuasive reason why the framework applicable to rifles and shotguns should not be equally applicable to handguns. No relevant state's laws would be violated, and all background checks would be completed. In short, Congress should repeal the federal restrictions on interstate handgun sales.

The unique situation in Washington, D.C., compels timely action. Because of the District's 1976 ban, there are no stores within the city where a handgun can be obtained, and there is only one FFL willing to take delivery from out-of-city parties, on a limited basis. Thus, for all practical purposes, someone who lives in D.C. cannot acquire a handgun either inside or outside the city. Because it will be months before gun dealers are licensed to do business in the District, residents of the city who do not own a handgun are precluded from exercising the right, guaranteed by the Constitution and affirmed by the Supreme Court, to defend themselves within their homes.

Revoke the Federal Age Minimums on Buyers and Possessors of Handguns

Under current federal law, the minimum age at which prospective buyers can acquire a handgun from an FFL is 21. The minimum age at which anyone can possess a handgun, or purchase a rifle or shotgun from an FFL, is 18. Those restrictions should be repealed.

Assuming that bans on the sale of a handgun to a 20-year-old, or possession of a handgun by a 17-year-old, could survive Second Amendment scrutiny, state, not federal, law should address that topic. Although the federal statute includes some exceptions—for example, a parent may take a child target shooting—it nonetheless usurps traditional state powers, is overbroad, and encroaches on parental rights. Even if a child is under direct and continuous parental supervision, the parent commits a federal crime unless he or she writes a note giving the child permission to target-shoot and the child always carries the note. Congress should abolish federal

age limits—leaving the states to set their own policies, with due regard to a paucity of empirical evidence that federal age limits have reduced gun accidents or criminal violence.

Modernize and Improve the Operations of the ATF

Abusive practices by the Bureau of Alcohol, Tobacco, Firearms and Explosives led Congress to enact the Firearms Owners' Protection Act in 1986. Yet much more needs to be done. For example, when the ATF imposes a penalty on a gun store, the store should be able to appeal the case to a neutral administrative law judge. Currently, an employee of the ATF itself hears appeals of ATF penalties.

Appropriations riders have prevented ATF from using gun dealer records to compile a computerized national registration database of gun owners. The prohibition should be part of a permanent statute. Federal law already prohibits the creation of a national gun registry, but ATF has claimed that a computerized database of every sale ever conducted by every retired FFL is not a national gun registry.

Other appropriations riders protect citizen privacy by preventing ATF from disclosing gun-tracing data (e.g., the name and address of a person whose gun is stolen) to the general public. The data can still be disclosed in connection with a bona fide law enforcement investigation. Those disclosure rules should be permanently codified.

The ATF's firearms-testing facility has long been a subject of concern. People who conduct tests on firearms are not required to have expertise in forensics or other procedures appropriate to a crime laboratory. To support prosecutions for machine gun possession, ATF testers have been known to use one ammunition type after another, until they find one that occasionally makes the firearm malfunction by producing two shots from a single trigger pull. The jury then sees an official report from ATF declaring that the gun is a machine gun. Congress should require that all ATF firearms testing be filmed, and the films be preserved.

Restore Funding to Process "Relief from Disability" Applications to Own Firearms

The federal prohibitions on firearms possession are extremely broad, and ex post facto. The Gun Control Act of 1968 banned gun possession by anyone convicted of a felony or dishonorably discharged from the military. Thus, a person who pleaded guilty to a tax offense in 1959,

or who was dishonorably discharged in 1965 because of homosexual orientation, is barred for life from possessing a gun. The 1994 ban on gun possession by someone guilty of a domestic violence misdemeanor is also *ex post facto*—applying to people who might have pleaded guilty decades earlier, although they had done nothing wrong, because they could not afford a lawyer and it was simpler to resolve the case for a \$50 fine.

To provide a safety valve for the expansive bans, the Gun Control Act allows “relief from disability.” People who can prove they have a long record of law-abiding behavior and good conduct can petition ATF for restoration of their Second Amendment rights. Granting a petition is entirely discretionary on the part of ATF.

Since 1992, appropriations riders have forbidden ATF from processing petitions for restoration of rights. Those riders should end, and ATF should be directed to set up a process in which such petitions are funded by a fee charged the petitioner.

Federal law also bans gun possession by people subject to temporary restraining orders. The law should be clarified so that it applies only to cases where a judge has made a particularized finding that a person has threatened, or constitutes a threat to, another person. Routine orders directing one or both parties in a divorce to stay away from and not harm each other should not be the basis for deprivation of a constitutional right. The change can be effectuated by changing the word “or” to “and” in 18 U.S. Code § 922(d)(8)(B)(i) and in (g)(8)(C)(i).

Rescind the Department of the Interior Regulation Banning Defensive Guns in National Parks

A Department of the Interior regulation bans the possession of loaded guns by all citizens visiting or traveling through national parks. It is unfair to forbid hikers or campers, who may be many miles from law enforcement assistance, from having a means to protect themselves from deadly attack by wild animals or criminals. Although Interior is considering changing the regulation, Congress should ensure that a future administration does not reimpose the old regulation. A federal statute should clearly state that national park visitors may carry firearms outdoors to the extent allowed by the law of the host state.

Conclusion

The Second Amendment secures “the right of the people” by guaranteeing the right of each person. Over the years, our elected representatives

have adopted a dangerously court-centric view of the Constitution: a view that decisions about constitutionality are properly left to the judiciary. But members of Congress also swear an oath to uphold the Constitution. Congress can make good on that oath by legislating to restore our right to keep and bear arms.

Suggested Readings

District of Columbia v. Heller, 554 U.S. _____, 128 S. Ct. 2783 (2008).

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—*Prepared by David B. Kopel and Robert A. Levy*