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Points of View

DANCES WITH **GUNS**

IN THE D.C. GUN CASE, THE SOLICITOR GENERAL HOPS BETWEEN POLITICS AND PRACTICALITY

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These should be high times for gun control opponents.

Their decades-long campaign to promote the Second Amendment's right 'to keep and bear Arms' as a fundamental, personal right has now, in District of Columbia v. Heller, brought the issue to the Supreme Court. On March 18, the high court will hear arguments on the constitutionality of the District's handgun ban.

As that day approaches, however, all is not bliss for the 'gun rights' community. A most unlikely traitor has been identified in their midst: the Bush Justice Department.

In what will likely be the most surprising amicus curiae filing of the Court's term, Solicitor General Paul Clement has entered the Heller case to support reversal of the 2-1 decision by the U.S. Court of Appeals for the D.C. Circuit that overturned the D.C. gun law as a violation of Second Amendment rights. The Justice Department's brief suggests a remand to the lower courts for further fact-finding. The brief sharply undercuts the department's prior efforts, initiated by then-Attorney General John Ashcroft, to appease the gun lobby on the Second Amendment.

The pro-gun 'true believers' are not pleased. The lead lawyer for plaintiff Dick Heller calls the Justice Department brief 'absurd.' A leading congressional Republican says it is 'just outrageous.' The National Rifle Association warns that 'gun owners are understandably dismayed.'

To be sure, the government's brief hardly endorses the District's handgun ban as good policy. Nor does it retreat from the department's six-year-old position that the Second Amendment right is not limited to participation in an organized state militia.

But it does strongly object to the D.C. Circuit's holding that because handguns

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are 'Arms' within the meaning of the Second Amendment, they cannot be banned, regardless of the availability of other guns for self-defense and regardless of the public safety issues at stake. Instead, according to the Justice Department, '[a] number of factors--including whether a particular kind of firearm is commonly possessed, poses specific dangers, or has unique uses, as well as the availability of functional alternatives--are relevant to the constitutional analysis.'

To the pro-gun partisans, these are fighting words. For them, it is nothing short of heresy to suggest that the constitutionality of a handgun ban could turn on 'a number of factors.'

CHEERS AT THE NRA

The Bush administration finds itself between a rock and a hard place on guns. It is, however, a dilemma of its own making. Six years ago, Ashcroft made a political decision to endorse the gun lobby's expansive view of the Second Amendment. Long after Ashcroft's departure, the Justice Department now faces the dangerous--but entirely foreseeable--consequences of that decision for the gun laws it is duty-bound to enforce.

The Second Amendment reads: 'A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.' For more than six decades, the Justice Department has successfully argued to the federal courts that the amendment guarantees the people the right to be armed only in service to a state-regulated militia.

The courts had almost universally agreed that this was the only interpretation of the amendment that accounts for all of its words. Because the militia of the founding era--in which most of the adult male population was required to obtain and 'keep' firearms at home for militia service--has long ago disappeared, the department's interpretation ensured the constitutionality of federal gun laws. With the election of President George W. Bush--and the gun lobby's boast that it would virtually have an office in the White House--the stage was set for a radical change.

In a blatantly political act, on May 17, 2001, on the eve of the National Rifle Association's convention, Ashcroft wrote a letter to the NRA, on Justice Department letterhead, explaining that it was 'unequivocally' his view that the Second Amendment 'protects the private ownership of firearms,' regardless of an individual's connection to a state militia. The letter was read aloud to the cheers of the gathered conventioneers.

A COLLISION COURSE

From the outset, it was obvious that the Ashcroft letter had put the Justice Department on a collision course with its duty to defend federal gun laws.

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In rejecting the 'militia purpose' interpretation of the Second Amendment, the department had jettisoned its most potent argument for the constitutionality of those federal laws. In a later memorandum to U.S. attorneys making his Second Amendment views official policy, Ashcroft took great pains to assure the prosecutors that the new policy 'does not mean that reasonable restrictions cannot be imposed to prevent unfit persons from possessing firearms or to restrict possession of firearms particularly suited to criminal misuse.'

The problem, however, was that the department's interpretation was an invitation to judges to enforce their own views about the 'reasonableness' of particular gun restrictions, whereas the 'militia purpose' view had ensured that decisions about gun policy would rest with Congress and other legislative bodies. The Justice Department could offer endless assurances of the constitutionality of existing laws, but it could not control how courts would apply a newly expansive Second Amendment right.

As a group of former top Justice Department officials put it in an amicus brief in Heller, a Second Amendment right to be armed 'for. . . purposes unanchored to the operation of the militia' would increase 'the risk that a firearms regulation or prohibition enacted to protect public safety will be invalidated.' Significantly, one of the signatories to that brief is Roscoe Howard, a former Bush-appointed U.S. attorney for the District. In that capacity, he was in charge of prosecuting violations of D.C. gun laws.

MACHINE GUNS?

With the D.C. Circuit's ruling in Heller, the department is now reaping what Ashcroft sowed. A federal appeals court, for the first time in history, has struck down a gun law as a violation of the Second Amendment, under a theory that the department acknowledges is a direct threat to existing federal gun laws.

Although the D.C. Circuit's opinion repeated the mantra that the 'private purpose' reading of the Second Amendment permits 'reasonable' restrictions on guns, it concluded that a handgun ban was per se unreasonable. According to the Justice Department's Heller brief, this 'categorical approach would cast doubt on the constitutionality of the current federal machine gun ban, as well as on Congress's general authority to protect the public safety by identifying and proscribing particularly dangerous weapons.'

The Justice Department's Second Amendment revisionism had collided with its consequences for real gun laws used to prosecute real criminals.

FATALLY CIRCULAR

Apart from its effective demonstration of the threat to public safety from the D.C. Circuit's opinion, the Justice Department brief is still wrong on the big is-

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sue in Heller : the meaning and scope of the Second Amendment.

The brief's reasoning is fatally circular. It concedes that, to the extent the amendment's 'substantive scope was otherwise unclear,' its 'prefatory language could be used to resolve the ambiguity.' But, the brief suggests, 'an introductory declaration or statement of purpose could not supersede the plain meaning of the operative guarantee.'

This reasoning assumes the truth of the very proposition that the department is trying to prove: that the meaning of 'the right of the people to keep and bear Arms' is properly discernible apart from the amendment's statement of purpose and that, so determined, it 'plainly' supports a right to be armed for private purposes. On the contrary, it is precisely because the meaning of the guarantee cannot properly be determined apart from its expressed militia purpose that the private-purpose view fails.

Indeed, in its most extensive prior discussion of the Second Amendment, the Supreme Court, in United States v. Miller (1939), wrote that the amendment 'must be interpreted and applied' with its militia purpose 'in view.'

Whereas Miller taught that the meaning of the right to keep and bear arms cannot be determined in isolation from its context in an amendment expressing the importance of the militia, the government's brief defies that conclusion by arguing that the 'plain meaning' of the guarantee could be determined without regard for context.

FOR INSURRECTION

Finally, and most troubling, the department's brief asserts that the amendment guarantees 'an armed citizenry as a deterrent to abusive behavior by the federal government itself.'

The appearance of these words in a legal brief by the Department of Justice should be alarming to the Supreme Court and, indeed, to every American.

If an 'armed citizenry' is a constitutionally protected 'deterrent' to abuse by federal officials, this would imply that the greatest protection should be given citizens who are arming themselves against the threat of such abuse.

Does this mean that federal authorities are constitutionally barred from taking action against the stockpiling of illegal weapons by extremist groups, the organization and training of armed private militias, and other preparations for violent dissent by those who believe that the federal government is engaged in 'abusive behavior'? Can it be that the Bush Justice Department regards preparation for armed insurrection as constitutionally protected?

Having followed the gun lobby down the private-rights road, the Bush Justice De-

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partment realized it leads to a dangerous cliff, and stepped back.

At the same time, however, it stubbornly adheres to a reading of the Second Amendment that, if adopted by the Supreme Court, would limit the power of our elected officials, and law enforcement, to protect the public from criminal and political violence.

The department's brief may annoy the gun lobby. But, for completely different reasons, it should trouble the rest of the country as well.

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