



◀ **Headed to the U.S. Supreme Court?**

# D.C.'s GUN BAN: ROUND 2

**O** *A federal appeals court has refused to rehear the Parker case, likely moving the battle for the Right to Keep and Bear Arms to the U.S. Supreme Court.*

On May 8, 2007, the United States Court of Appeals for the District of Columbia turned down the petition for a rehearing of *Parker v. District of Columbia*. The decision sets the stage for the Supreme Court to issue a major ruling on the Second Amendment.

Let's start with the basic facts of the case. In 2003, six exemplary citizens of the District of Columbia brought a challenge to the District's handgun ban.

In 2004, the federal district court (trial court) ruled in favor of the District of Columbia's motion to dismiss the case. The ruling was issued by Judge Emmett Sullivan, who was appointed to the federal bench by President Bill Clinton. Sullivan ruled that the Second Amendment does not protect a right of ordinary citizens to possess firearms.

The ruling was appealed to the United States Court of Appeals, District of Columbia Circuit. The NRA Civil Rights Defense Fund filed an *amicus curiae* brief in the court of appeals supporting the plaintiffs. The federal courts of appeal hear cases arising from the federal trial courts. The federal appellate

courts are divided into 11 "circuits" that hear cases from different groups of states. For example, the Fifth Circuit Court of Appeals covers Texas, Louisiana and Mississippi. In 2001, the Fifth Circuit ruled in the *Emerson* case that the Second Amendment *does* in fact guarantee an individual right.

Besides the eleven circuits that cover the various states, there is also the D.C. Circuit. It is the "home circuit" for the federal government, so challenges to federal government actions and regulations are often brought to the federal district courts in D.C., and then appealed to the D.C. Circuit.

Appeals in the federal circuit courts are generally heard by three-judge panels, randomly selected from all the federal appellate judges in the circuit. On March 9, the D.C. Circuit reversed the *Parker* decision 2-1, ruling that the Second Amendment guarantees an *individual* right, and that the right is violated by D.C.'s ban on handgun possession, and by its ban on storing a firearm loaded for self-defense.

The majority opinion was written by Senior Judge Laurence Silberman, and joined by Judge Thomas Griffith. Dissenting was Judge Karen Henderson.

Judge Henderson's dissent argued that the Second Amendment is not an individual right and, even if it were, it would not apply to the District of Columbia, because the Second Amendment refers to "the security of a free State" and D.C. is not a state.

In a forthcoming law review article (available at [www.law.ucla.edu/volokh/freestate.pdf](http://www.law.ucla.edu/volokh/freestate.pdf)), UCLA law professor Eugene Volokh dissects Henderson's dissent. As he shows by copious citations, "A free state" was a well-established phrase meaning "a non-despotic country." The phrase was never used to distinguish the 13 state governments from the

governments of territories or other federal possessions.

After losing before the three-judge D.C. Circuit panel, the D.C. government petitioned for a rehearing *en banc*. In other words, the D.C. government asked that the appeal be re-heard by a panel consisting of all the judges on the D.C. Circuit Court of Appeals.

On May 8, the D.C. Circuit announced that it had voted 6-4 against granting the petition for rehearing *en banc*. Among the judges who voted in favor of granting the petition for rehearing were David S. Tatel and Merrick B. Garland, both Clinton appointees.

The Tatel and Garland votes were no surprise, since they had earlier signaled their strong hostility to gun owner rights in a 2000 case that had challenged the policy of Janet Reno's Department of Justice of retaining for six months the records of lawful gun buyers from the National Instant Check System.

At that time, the Tatel-Garland ruling flouted the 1968 federal law prohibiting federal gun registration, and also flouted the 1994 law that created the National Instant Check System and had ordered that instant check records of law-abiding gun purchasers be destroyed. (Attorney General John Ashcroft later ended Reno's registration scheme.)

Also voting in favor of D.C.'s petition for rehearing were Judges Raymond Randolph and Judith Rogers.

Interestingly, Judge Henderson, who had dissented in the *Parker* case, did not vote to grant the petition for rehearing. Even if she had, the vote would have been 5-5, one vote short of the majority necessary to re-hear the case *en banc*.

The D.C. government now has to make a choice. One, it could give up its unconstitutional laws, therefore allowing citizens to acquire and

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register handguns, and repeal its ban on self-defense. Two, it can appeal the case to the United States Supreme Court. Given D.C. Mayor Adrian Fenty's vehement opposition to gun owner rights, an opposition that is apparently shared by most of the D.C. Council, an appeal seems very likely.

A petition for a *writ of certiorari* (the formal mechanism for a Supreme Court appeal) must be filed within 90 days—by August 6, 2007, unless an extension is requested and granted. Then, the lawyers for the winners in the case (the good citizens of D.C. who want to own handguns for lawful home defense) will be entitled to file a response to the D.C. government's petition for a *writ of certiorari*. Since the main purpose behind the *Parker* litigation was to bring a test case to the Supreme Court, it is quite possible that the *Parker* plaintiffs may also argue that the Supreme Court should hear the case.

The Supreme Court, however, has no obligation to take the appeal. If the Supreme Court rejects the petitions for a *writ of certiorari* (as

the court rejects the vast majority of such petitions), the Circuit Court's *Parker* decision would be binding precedent in D.C., but not elsewhere.

It takes a vote of four of the Supreme Court's nine justices to grant a petition for a *writ of certiorari*. If the Supreme Court accepts the case, oral arguments would probably take place in early 2008, and the court would issue an opinion by mid-June 2008, when the 2007-08 Supreme Court term ends.

Note, however, that Second Amendment activists need to understand that, win or lose, the Supreme Court case on *Parker* will not be the final battle.

Hypothesizing that the good guys win the Supreme Court decision in *District of Columbia v. Parker* (the name of the appellant goes first on Supreme Court cases), the effect could be narrow. The D.C. gun laws are far more extreme than those of almost every other U.S. jurisdiction. For example, D.C. bans handguns, while New York City "only" imposes a months-long and frequently-abused licensing system. Likewise, D.C. is the only U.S. jurisdiction, as far as I know, that actually bans use of all firearms in self-defense. The requirement that a firearm be kept unloaded and disassembled or bound by a trigger lock or similar device was voided on Second Amendment grounds because it prevents the possession of a functional firearm to be employed in a case of threat to life or limb.

According to long-established Supreme Court precedent, the U.S. Constitution's Bill of Rights applies directly only to the federal government. For constitutional purposes, the actions of the government of the District of Columbia are equivalent to federal government actions, since D.C. is wholly under the authority of Congress; its limited home-rule

*Continued on page 60*

## D. C. Gun Ban

from page 31

powers are a grant from Congress, not a right.

So a Supreme Court win in *Parker* may not affect the broader issue of state or local gun controls. By Supreme Court interpretation, most of the Bill of Rights has been “incorporated” into the Fourteenth Amendment, and thereby made applicable to the states (and therefore, to local governments, which are treated as extensions of state governments). The Supreme Court has never ruled definitively whether the Second Amendment is incorporated into the Fourteenth Amendment.

Moreover, courts are generally cautious about overturning laws created by democratically-elected legislatures.

It was only in the 1930s that the Supreme Court began striking down laws that violated the First

Amendment. When the court got into First Amendment enforcement, it was very cautious and only overturned laws that were the grossest violations of the freedoms of speech, press and assembly.

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Likewise, the Supreme Court in the 1930s struck down a few racial segregation laws that violated the 1896 “separate but equal” doctrine, and hence plainly violated the Fourteenth Amendment’s requirement that states not deny the “equal protection of the laws.” But the Supreme Court did not invalidate segregation laws in general. It was only decades later the Supreme Court declared racial segregation to be inherently unconstitutional under the Fourteenth Amendment, and also began enforcing a more expansive reading of the First Amendment.

Thus, even if the Supreme Court affirms the pro-rights side in the *Parker* case, the most important bulwark of the right to arms and the right of self-defense will not be the courts, but will still be the legislative process, and the influence on that process of the world’s oldest and largest civil rights organization—the National Rifle Association. 

## Barnes Bullets

from page 49

incorporates a powdered-copper-and-tin mix, put it into a conventional jacket and put it into a varmint bullet called the Varmint Grenade.”

Unlike most varmint bullets that fragment, the Varmint Grenade actually explodes. The flat-base, hollow-cavity bullet remains intact at ultra-high velocities, yet explodes on impact.

Complementing its focus on innovation, Brooks has partnered with some great companies over the years, like Federal, Weatherby, Black Hills Ammunition, CorBon and others, who are increasing their sales with Barnes technology.

“This year, we have put a different spin on our Triple-Shock bullet with a very well known ammunition manufacturer that is going to be a very neat deal,” Randy said. “We can’t wait for the introduction of the product.”

Although the Brookses’ success

with Barnes Bullets sounds like a storybook tale, the company has suffered through some controversy in recent years. Barnes has been the target of misguided criticism from within the firearm industry. Claims that Barnes Bullets caved in on the lead issue by producing non-lead bullets, or that Barnes is in some way aligned with environmentalists and their anti-lead movement, couldn’t be farther from the truth.

They are stinging accusations for a company that moved away from lead bullets decades ago, based on the enhanced performance of a no-lead design and long before environmentalists drew their swords to fight the non-toxic war. But, Brooks doesn’t back down or shy away from the controversy.

“Our no-lead design came long before the environmentalist push and was predicated upon one foundation—the no-lead design offered greatly enhanced

performance,” Brooks says. “I’m quick to criticize the people who are pushing this as an environmentally safe product. I don’t ally myself or our company with them. I know they have a secondary agenda. These people want guns and hunting taken away. They’re not kidding me or anyone else.

“Our industry knows how to handle lead very well. If we take away .22 rimfire and all of a sudden it costs \$50 per carton, we lose the next generation of hunters forever. Then take away lead from skeet and trap and we’re finished. We (the industry) pull lead out of the ground and use it in its pure form. We don’t refine it and make it into something toxic. It is what it is, and we know how to handle it. I know, we know, that when people are reasonable about handling lead, it is not a problem.” 

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