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Local Government—Gun Control

Illinois Assault Weapons Ban Upheld; En Banc or Supreme Court Review Ahead?

A local law banning assault weapons and large-capacity magazines in a suburb of Chicago doesn't violate the Second Amendment, a divided U.S. Court of Appeals for the Seventh Circuit held April 27 (*Friedman v. City of Highland Park*, 2015 BL 120857, 7th Cir., No. 14-3091, 4/27/15).

The case ''is a good candidate for en banc review'' of the full Seventh Circuit and perhaps even U.S. Supreme Court review, Steven D. Schwinn of the John Marshall Law School, Chicago, told Bloomberg BNA April 30.

''There is a vocal dissent here, and I think that it's probably going to get the attention of the other judges'' on the Seventh Circuit, he said.

'Perversion of Constitutional Analysis.' Judge Frank H. Easterbrook's majority opinion is laden with traditionally conservative arguments, seemingly turned on their heads to uphold a liberal law, Schwinn said.

A spokesperson for the National Rifle Association told Bloomberg BNA May 1 that the opinion is ''a perversion of constitutional analysis.''

The court here created ''an entirely new standard of review for the Second Amendment,'' she said.

The analysis is ''unusual,'' Schwinn said. It's ''different than the kind of analysis that a lot of other circuit judges have taken,'' he said.

Even so, ''I think Easterbrook's got it right,'' Schwinn said.

''The city was pleased that the court recognized its authority to provide for the protection and safety of its residents in the manner that it saw fit,'' Steven M. Elrod of Holland & Knight, Chicago, counsel for the city of Highland Park, told Bloomberg BNA April 30.

Neither counsel for the plaintiffs nor media contacts at the Illinois State Rifle Association responded to requests for comments April 28, 29 and 30.

Five Features of Banned Weapons. The Highland Park, Ill., ordinance defines a large-capacity magazine as one that can accept more than 10 rounds, and an assault weapon as ''any semi-automatic gun that can accept a large-capacity magazine'' and that has one of five other features, the court said.

Those features are ''a pistol grip without a stock (for semi-automatic pistols, the capacity to accept a magazine outside the pistol grip); a folding, telescoping, or thumbhole stock; a grip for the non-trigger hand; a barrel shroud; or a muzzle brake or compensator,'' the court said.

Further, ''Some weapons, such as AR-15s and AK-47s, are prohibited by name,'' the court said.

Three-Part Test Applied. The primary test applied by the majority asks whether the challenged regulation:

- bans weapons that were common at the time of ratification of the Second Amendment, or
- bans weapons that have ''some reasonable relationship to the preservation of a well regulated militia,'' and
- allows law-abiding citizens to retain adequate means of self-defense.

Here, the ''features prohibited by Highland Park's ordinance were not common in 1791,'' the court said.

But some of the weapons do ''bear a relation to the preservation and effectiveness of state militias'' because they are ''commonly used for military and police functions,'' the court said.

However, ''states, which are in charge of militias, should be allowed to decide when civilians can possess military-grade firearms, so as to have them available when the military is called to duty,'' the court said.

Finally, the relatively narrow scope of the ordinance does leave residents with ''many self-defense options,'' the court said.

Group, or Individual Right? In other words, ''I think what he was saying is, is this the kind of a weapon that the militia would expect the individual citizen to bring with them when called up'' to assemble the militia, Jonathan K. Baum of Katten Muchin Rosenman LLP, Chicago, told Bloomberg BNA April 30. Baum filed an amicus curiae brief on behalf of the Law Center to Prevent Gun Violence, San Francisco, in support of the ban.

''It's a very unusual way to analyze the problem,'' but it also tells you ''what kind of weapon you can't have,'' Schwinn said.

However, this test seems to ''recast'' the Second Amendment as encompassing a group-based right as opposed to an individual right as the Supreme Court

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has recognized, according to Owen J. McGovern of Beck Redden LLP, a Houston-based trial and appellate boutique. McGovern is very familiar with this area of law but was not involved with the case here.

The Seventh Circuit's analysis ''is more akin to a balancing test'' than how ''fundamental rights'' are typically treated, and the high court explicitly rejected a balancing test approach to Second Amendment questions in *District of Columbia v. Heller*, 554 U.S. 570 (2008)(77 U.S.L.W. 1011, 7/1/08), McGovern told Bloomberg BNA May 4.

If this case does get reviewed en banc by the Seventh Circuit or at the Supreme Court, ''it will be interesting to see what's the test and what's the law going forward,'' he said.

Federalist Principles Key. The opinion invoked federalist principles to distinguish itself from recent U.S. Supreme Court decisions that overturned firearms restrictions.

The Second Amendment ''does not imperil every law regulating firearms,'' the court said, quoting *McDonald v. City of Chicago*, 561 U.S. 742 (2010)(78 U.S.L.W. 1872, 6/29/10).

''[F]ederalism and diversity still have a claim,'' within the ''limits established by the Justices'' in *McDonald* and *District of Columbia v. Heller*, 554 U.S. 570 (2008)(77 U.S.L.W. 1011, 7/1/08), the Seventh Circuit said.

Neither case purports ''to define the entire scope of the Second Amendment—to take all questions about which weapons are appropriate for self-defense out of the people's hands,'' the court said.

Court Opinion, Not a Statute. The Seventh Circuit's opinion is a ''very significant contribution to the jurisprudence in this area,'' Baum said.

''The only guidance we have on what the Second Amendment does or doesn't cover comes from *Heller* and *McDonald*,'' but the problem is, those cases aren't particularly clear in their analysis, Baum and Schwinn agreed.

Still, courts ''have tended to try and read the tea leaves'' of those opinions to figure out the Amendment's contours, Baum said.

Here, ''what Easterbrook has done is to say, you can't read it like that, it isn't a roadmap,'' Baum said.

The opinion here stresses that the Supreme Court ''simply decided one case'' in *Heller*, and at least for purposes of that case, the Second Amendment right ''is the right of an individual to keep a handgun in their home for self-defense,'' which ''leaves open more questions than it answers,'' Baum said.

Courts ''should not read *Heller* like a statute rather than an explanation of the Court's disposition,'' the Seventh Circuit said here.

Heller is ''not a comprehensive guide to what the Constitution permits and what it doesn't,'' Baum said.

What Level of Scrutiny? ''We had hoped that there would be a clearer explanation of the level of scrutiny that's to be applied in Second Amendment cases,'' Elrod said.

Here, the court said ''trying to decide what 'level' of scrutiny applies, and how it works,'' are ''inquiries that do not resolve any concrete dispute.'' The three-part test it used instead is ''better,'' the court said.

But one of the ''striking things'' about the Supreme Court decisions in this area ''is that they haven't employed tiers of scrutiny either,'' Baum said.

''It didn't matter in *Heller* what level of scrutiny was applied,'' because the absolute ban on handguns would fail any tier of scrutiny, McGovern said. ''Here, it matters,'' because the questions are ''more nuanced,'' McGovern said.

It's been left up to courts ''to fill in that gap and figure out what level of scrutiny'' to apply, Baum said.

Katten Muchin Rosenman LLP has litigated similar cases in Colorado, Connecticut, Maryland, New York and California, and the ''prevailing view'' among other courts of appeals is to apply intermediate scrutiny to Second Amendment issues, Baum said.

The majority here didn't recognize a distinction between the right to keep arms and the right to bear arms, which could even be analyzed under different tiers of scrutiny, McGovern said. The right to keep arms can be subject to strict scrutiny, but the right to bear arms can be subject to intermediate scrutiny, he said.

''This is just such a confused area of law right now,'' Schwinn said.

''There's wide latitude, at least until the Supreme Court says otherwise,'' Baum said.

Conservative Arguments, Liberal Outcome. The ruling is ''very significant'' because Easterbrook ''is noted as among the most conservative judges in the country,'' Baum said.

Easterbrook's opinion for the court ''used history *against* the plaintiffs, even though opponents of gun regulation have so often used history in support of their points,'' Schwinn, co-founder of the Constitutional Law Prof Blog, wrote April 27.

The opinion ''used federalism *against* the plaintiffs, even though opponents of gun regulation so often look to 'states' rights' in this and other areas,'' he said.

It ''turned the preservation or efficiency of a well regulated militia into a point about the states' ability to decide what weapons should be available to *civilians*,'' Schwinn said.

''And finally,'' the opinion ''turned the gun-rights victories at the Supreme Court against the plaintiffs: if the plaintiffs can already possess handguns and long-guns'' for self-defense, ''why do they also need semi-automatic weapons?'' Schwinn said.

Narrower Ban Than *Heller*'s. The ordinance here is distinguishable from the District of Columbia's broad ban on handguns that was invalidated in *Heller*, the court said.

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''*Heller* held that the availability of long guns does not save a ban on handgun ownership,'' but ''did not foreclose the possibility that allowing the use of most long guns'' plus pistols and revolvers ''gives householders adequate means of defense,'' the court said.

The court rejected the plaintiffs' argument that the ordinance ''serves no purpose, because (they say) criminals will just substitute permitted firearms functionally identical to the banned guns.''

''If criminals can find substitutes for banned assault weapons, than so can law-abiding homeowners,'' the court said.

Like 1920s Tommy Gun Ban. The court rejected the plaintiffs' argument that there is no ''historical tradition'' of banning semi-automatic guns and large-capacity magazines, because they have been marketed for civilian use for over 100 years, and Highland Park didn't enact its ordinance until 2013.

''This argument proves too much,'' the court said.

Heller said a ban on private possession of machine guns was ''obviously valid,'' even though it was enacted ''more than 130 years after the states ratified the Second Amendment,'' the court said.

''Why should regulations enacted 130 years after the Second Amendment's adoption'' have ''more validity than those enacted another 90 years later?'' the court said.

'Common Ownership' Test 'Circular.' The court also rejected the plaintiffs' argument that semi-automatic guns are distinguishable from machine guns because they are ''commonly owned for lawful purposes.''

Relying on ''how common a weapon is at the time of litigation would be circular,'' the court said.

Machine guns ''aren't commonly owned for lawful purposes today because they are illegal,'' it said.

On the other hand, semi-automatic weapons and large-capacity magazines have been legal, it said.

It would be ''absurd'' to say ''that the reason why a particular weapon can be banned is that there is a statute banning it, so that it isn't commonly owned,'' the court said.

''A law's existence can't be the source of its own constitutional validity,'' it said.

Judge Ann Claire Williams joined the opinion.

Dissenting View. Judge Daniel A. Manion dissented, arguing the ordinance and the majority opinion ''are directly at odds with the central holdings of *Heller* and *McDonald*.''

''To be sure, assault rifles and large capacity magazines are dangerous. But their ability to project large amounts of force accurately is exactly why they are an attractive means of self-defense,'' Manion said.

''Ultimately, it is up to the lawful gun owner and not the government to decide these matters,'' he said.

''The right to self-defense is largely meaningless if it does not include the right to choose the most effective means of defending oneself,'' Manion said.

James B. Vogts of Swanson, Martin & Bell LLP, Chicago, argued for the plaintiffs. Christopher Brennan Wilson of Perkins Coie LLP, Chicago, argued for the city of Highland Park.

BY JEFFREY D. KOELEMAY

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