

June 9, 2008

Dear Fellow Republican:

I told you I'd get you my review of the *Heller* case the day after it came out, but the opinion was 157 pages long, so it took a bit longer than I thought!

For those who love history, as I do, and are committed to the Constitution (including the 2nd Amendment), as I am, Justice Scalia's majority opinion in the *Heller* case is a must-read. You do not have to be a lawyer to appreciate most of what he has to say and how he says it. There is much history to be learned in his opinion, and of course, I appreciate the conclusion. First, I will talk about the opinion, then I will address political observations about where this leaves us.

Heller

First, a bit about Justice Scalia. I know that lots of folks are skeptical of Harvard Law School grads (like Gov. Kaine), but Justice Scalia is an HLS grad. He is also considered one of the most conservative Justices on the Supreme Court and the main proponent of a textualist or strict constructionist method for interpreting the Constitution. In his opinions, he aims to look at how the Founders understood the text of the Constitution when it was written, hence all of the history in the opinion. His is an approach that I appreciate and agree with, whatever it may mean to particular outcomes in particular cases.

Second, because the decision is 5-4, with no concurring opinions, there is no confusion as to the Court's holding. Sometimes in these really controversial cases you end up with a plurality opinion, a concurring opinion, and dissents. This can create confusion as to which opinion controls. That will not be the case here. But, because the Justices were so closely divided, it is unclear how future challenges to gun laws will be decided. More on this point in my political commentary below.

Third, the opinion is narrow. Many Supreme Court observers have noted that under the leadership of Chief Justice Roberts, the Supreme Court has taken to issuing more narrow opinions. That is certainly the case with *Heller*. They only decide the question that *Heller* presented. Therefore, the concise holding in the case (found on p. 64 of the slip opinion) is "the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense."

Fourth, the opinion does leave open some room for gun control, such as limiting concealed carry or the carrying of firearms in schools or government buildings. But, I believe that the Court's discussion of these limits is dicta. The scope of Constitutional limitations on Second Amendment rights will have to be determined by future cases. Justice Scalia says as much on p. 63 of the slip opinion, "Justice Breyer chides us for leaving so many applications of the right to keep and bear arms in doubt, and for not providing extensive historical justification for those regulations of the right that we describe as permissible. But since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field, any more than *Reynold v. United States*, 98 U.S. 145 (1879), our first in-depth Free Exercise Clause case, left that area of law in a state of utter certainty. And there will be time

enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us." So, we don't know how the Court would rule on many gun control laws, but it seems that we shall see in the coming years. I also address this in my political commentary below.

Fifth, not only does the opinion recognize an individual right in the Second Amendment, but it finds that this right pre-existed the Constitution. I think that this is significant. In fact, Justice Scalia quotes Blackstone for the proposition that the "right of resistance and self preservation" is a natural right. For those that read the opinion, you'll find this on pages 19 and 20 of the slip opinion. The fact that our nation was founded on natural law principles is often forgotten (or ignored) and the significance of this fact is (or should be) enormous.

Think of the critical sentence of the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." Each of the underlined portions demonstrates the use of a natural law rationale in the founding of our nation. The natural law is where the rights in the 1st, 2nd, and 4th Amendments to the Constitution come from (not to exclude others, but these are the ones mentioned by Scalia in *Heller*). That's why the 2nd Amendment language does not refer to establishing a right, it only says that the right to bear arms "shall not be infringed." This structure is used because the founding fathers knew that the right to keep and bear arms already existed as a matter of natural law and as a right of Englishmen as well.

In my humble opinion, there should be a greater emphasis on this source of law in rulings on Constitutional matters.

Sixth, as to the types of weapons that can be restricted under the Second Amendment, p. 53 of the slip opinion offers the best insight into the standard that the Court would use in evaluating specific weapons restrictions. Justice Scalia writes, "We therefore read *Miller* (the last 2nd Amendment case, from 1939, it was about sawed-off shotguns) to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns."

In conclusion, I believe that the opinion is a solid victory. There will clearly be future cases that will flesh out the specifics of the Second Amendment, and this leads to my political comments.

The Impact of *Heller*

First and foremost, the gunnies are now in the boat with the pro-lifers when it comes to judges. And that will not change for the foreseeable future.

This opinion was closer than it should have been – 5 to 4. And the fleshing out of the 2nd Amendment right is going to happen in the coming decades as cases come in following *Heller*. When it's this close, the importance of judges in U.S. Senate elections just became a top priority for another bloc of issue-voters, 2nd Amendment supporters (and foes).

2nd Amendment supporters – like pro-lifers – only need one thing from prospective judges, namely, a commitment to interpret the Constitution as it was written (i.e., giving it the meaning

at the time it was drafted). We don't need them to commit to "our" outcomes, unlike the other side.

The liberals have been making headway in the Courts when they could not do so among the American people via activist judges who re-interpret the Constitution and give it whatever social engineering conclusion they want (e.g., *Roe v. Wade*). This is where phrases like "evolving notions of liberty" come from, i.e., a judge declares an "evolution" in a constitutional right and then goes on to redefine the right. If that's what judges are going to do, why bother having a written constitution?

This is going to introduce whole new areas of inquiry for some candidates. For example, say you have a purportedly pro-2nd Amendment, pro-choice Democrat running for the U.S. Senate. How does he answer questions about how he will select judges? Does he say: "I will only pick judges that will uphold *Heller* and *Roe*?" I've got news for you, the logic that leads a judge to support *Roe* would lead that same judge to oppose *Heller*... assuming such judge stays consistent. If a judge is going to stay consistent on these issues, i.e., give the Constitution its meaning when drafted, they are going to oppose *Roe* and support *Heller*. So, what does our Dem Senate candidate do? Commit to picking judges that will answer his specific questions about upholding *Heller* and *Roe* the way that Senator wants? Voters who buy that angle are buying snake oil. We'll start to see how some of these folks handle this line of questioning pretty quickly...

Second, I have been asked if the *Heller* decision has much impact on Virginia. The answer is 'no,' not yet. It is the follow-on cases to *Heller* that may start to impact us in Virginia, though even then, I doubt we'll see any impact for a long, long time, and thinks would have to go badly wrong for it to change anything under Virginia law. Any impact in Virginia will likely only come from the impact on Federal laws, most of which look quite safe under *Heller*.

Third, it is simply fortifying to know that once in a while the Court can get it right. They messed up the Guantanamo Bay ruling so badly earlier this month it was downright mind boggling (I may come back to this case in a future issue). Again, I was disappointed that this ruling was only 5-4. Things are very precarious on this Court and the U.S. Senate is only growing in importance (so be sure you're helping Jim Gilmore!).