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Legal Sidebar

You Win Some You Lose Some...New Second Amendment Rulings

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Since the Supreme Court decided *District of Columbia v. Heller* in 2008, a majority of courts have upheld the constitutionality of firearms laws under the Second Amendment. However, in two recent federal appellate cases, the circuit courts struck down some parts of firearms laws, all of which were enacted post-*Heller*. Following other lower courts, these circuit courts applied an intermediate scrutiny standard when reviewing firearms laws that burden conduct protected by the Second Amendment. This test asks the government to show that the challenged law advances "an important or substantial" governmental interest that "would be achieved less effectively absent the regulation," and that "the means ... are not substantially broader than necessary to achieve that interest." In applying the test, the reviewing court may examine whether the government "has drawn reasonable inferences based on substantial evidence" when enacting a law that serves an important governmental interest.

In the first decision arising from the D.C. Circuit, Dick Heller, the plaintiff from the 2008 Supreme Court case, again challenged some of the District of Columbia's firearms laws. The court struck down four of the ten challenged provisions: the requirement that a registrant bring the firearm for inspection; the requirement to re-register a firearm every three years; the requirement that registrants pass a test of legal knowledge; and the prohibition on registering more than one pistol per month. The D.C. Circuit reviewed these laws under the intermediate scrutiny standard, finding that they burden the Second Amendment by making "it considerably more difficult for a person" to obtain a firearm for the purpose of self-defense in the home. The court concluded that these firearms provisions are unconstitutional because D.C. offered no substantial evidence from which the city could have reasonably concluded that fulfilling such requirements would have advanced the important governmental interest of promoting public safety.

The six remaining firearms provisions upheld were: the long gun registration requirement; the requirements that registrants appear in person, be fingerprinted, and be photographed; the registration fees requirement; and the mandatory firearms safety training course requirement. Also reviewing these provisions under intermediate scrutiny, the D.C. Circuit concluded that the government presented substantial evidence from which the city could conclude that the each of the measures "promote[] public safety" and will "mitigate various threats to public safety 'in a direct and material way.'" Notably, in 2011, the D.C. Circuit upheld D.C.'s handgun registration requirement, and its prohibition on possessing certain assault weapons and magazines with a capacity of more than 10 rounds ("large capacity magazines").

Not long after the D.C. Circuit's decision, the Second Circuit issued a decision, which reviewed firearms laws passed by the States of New York and New Jersey in 2013 after the school shooting in Newtown, Connecticut. The Second Circuit struck down a provision of law from both New York and New Jersey, while upholding each states' ban on assault weapons and large capacity magazines. Specifically, the court found unconstitutional the New York provision that prohibits possession of a magazine *loaded* with more than seven rounds. The court concluded the government did not present "sufficient evidence that a seven-round load limit would best protect public safety." Because 10-round magazines would still be lawful, the seven-round load limit will not "in any way frustrate the access of those who intend to use ten-round magazines for mass shootings or other crimes." The Second Circuit also declared unconstitutional Connecticut's prohibition on the Remington 7615, a pump action (non-semiautomatic) firearm. It stated that the prohibition burdened the presumption that the Second Amendment right applies to all bearable arms.

Connecticut, which did not present any evidence regarding this weapon, failed to rebut the presumption. The court pointed out that the state could present evidence in the future to support its prohibition.

For the other challenged provisions—the states' prospective prohibitions on the possession of semiautomatic "assault weapons" and the possession of large capacity magazines—the Second Circuit found these laws burdensome on the Second Amendment right to possess firearms that are "in common use" and "typically possessed by law-abiding citizens for lawful purposes." However, applying the intermediate scrutiny standard, the Second Circuit concluded that the states "have adequately established a relationship between the prohibition of both semiautomatic assault weapons and large-capacity magazines and the important—indeed, compelling—state interest in controlling crime." Moreover, the court concluded that neither of these laws are unconstitutionally vague.

From these cases, there appears to be more pressure on the government to present to the court substantial evidence upon which it based its legislative decisions, in order to satisfy the burden under the intermediate scrutiny standard. Moving forward, there may be more mixed decisions from the courts, with some firearms laws upheld and some held invalid. In addition, courts are not in agreement with the application of intermediate scrutiny and whether it should be the applicable test. Whereas the Second Circuit and the D.C. Circuit upheld provisions banning assault weapons and large capacity magazines under intermediate scrutiny, the Seventh Circuit recently upheld a similar city firearms ordinance, not by applying intermediate scrutiny, but rather by asking "whether a regulation bans weapons that were common at the time of ratification or those that have 'some reasonable relationship to the preservation or efficiency of a well-regulated militia,' and whether law-abiding citizens retain adequate means of self-defense." Given the different approach of the Seventh Circuit, there is speculation that the Supreme Court, which has thus far declined to hear Second Amendment cases, may grant review.

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