

The *Parker* Decision – Should Knife Owners Celebrate?

By David Wong.
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On Friday, March 9th, 2007, in the case of *Parker v. Washington, D.C.*, a three judge appellate panel of the United States Court of Appeals for the District of Columbia Circuit ruled in a 2-1 decision that the U.S. Constitution's Second Amendment protects an individual right to keep and bear arms, and thus Washington, D.C.'s thirty year ban on handgun possession was unconstitutional.¹ Thanks to the Internet, this potentially ground-breaking decision was speedily and widely disseminated, resulting in general high-fiving and congratulatory back-patting by the members of various pro-gun groups and online forums, and considerable consternation and hand-wringing by their anti-gun doppelgangers. The potential scope and effect of this decision on other weapons laws will likely hinge on whether the Supreme Court ultimately decides to hear the case, and whether it upholds the D.C. Circuit's ruling, and on what grounds, a process that may easily take a year or more.

So what does any of this have to do with knives and knife owners? While the decision concerned Washington, D.C.'s ban on handguns, the majority opinion did provide some discussion of the nature of the "arms" protected by the Second Amendment, which potentially include edged weapons.² For example, the court's discussion of the Militia Act of 1792 lists several types of edged weapons, including bayonets and sabers.³ Thus, the court intimated that the term "arms" can be read to encompass more than just firearms, and hence the decision may one day result in an explicit right to keep and bear *knives* and other edged weapons as an individual right protected by the Second Amendment. Indeed, one state supreme court, broadly interpreting that state's constitutional right to

¹ See, *Parker v. Washington, D.C.*, No 04-7041, D.C. 2007, slip op. at 58. The court's opinion is available at <http://pacer.cadc.uscourts.gov/docs/common/opinions/200703/04-7041a.pdf>.

² *Id.* at 51-53 (citing Militia Act of 1792 requirements).

³ *Id.*

bear arms protections, has ruled that knives such as switchblades are protected arms under that state's Constitution.⁴

So, does that mean you should slip your switchblade into your pocket, strap on your bowie knife and waltz around Washington's hip Dupont Circle neighborhood with your broadsword anytime soon? Whoa, just hold on there a moment, Custer. As you may be aware, in addition to some of the strictest gun restrictions in the nation, Washington, D.C., also is home to draconian knife laws, none of which have yet been ruled unconstitutional. For example, D.C. prohibits carry "on or about the person, whether open or concealed, of any deadly or dangerous weapon. Period. Even in your own home."⁵ Carry of any such weapon in public is a felony, punishable by up to a five year stay in the Graybar Hotel, as a "guest" of the government.⁶ So I'm guessing you probably don't want to be the test case, unless you have a lot of money to pay your lawyers, and a lot of free time on your hands.

While the appeals court decision is indeed a victory for those of us who argue that the Second Amendment protects an individual right to keep and bear arms, we should not allow giddy euphoria to obscure the fact that the decision as it stands is quite limited in scope, both as to geographic reach, i.e., Washington, D.C., and legal scope, as the decision only addressed the ability to keep a handgun at home, not to carry one in public. In fact, most other federal appellate courts that have addressed the issue have ruled that the Second Amendment does *not* protect an individual right. The majority's decision in this case also noted that even an individual Second Amendment right is still subject to constitutionally permissible "reasonable restrictions", as are, e.g., First Amendment rights.⁷ The court, for example, opined that firearms registration and

⁴ See, DAVID WONG, KNIFE LAWS OF THE FIFTY STATES: A GUIDE FOR THE LAW-ABIDING TRAVELER 137 (2006). The author cites *State v. Delgado*, 692 P.2d 610, 614 (Or., 1984), a case decided by the Oregon Supreme Court that held switchblades were a protected "arm" under that state's constitution.

⁵ See, *id.* at 30 (footnotes omitted) (citing various D.C. code statutes).

⁶ *Id.*

⁷ See, *Parker v. Washington, D.C.*, No 04-7041, D.C. 2007, slip op at 53.

proficiency testing might be held to be reasonable restrictions, and noted that “the United States Supreme Court has observed that prohibiting the carrying of concealed weapons does not offend the Second Amendment.”⁸

So what are some possible “next steps” for this case? Well, the city could petition the full appeals court for a rehearing (called an *en banc* rehearing), and in fact Washington, D.C. mayor Adrian Fenty has reportedly stated that the city will ask the full appeals court to rehear the case.⁹ The three judge panel’s decision can be overturned and reversed by the full D.C. Circuit. Assuming the city does petition for such a rehearing, and should the full court decide to grant the petition and rehear the case, then the case will be heard and a decision issued. The losing party could then petition the Supreme Court to hear the case. If the full D.C. Circuit declines to rehear the case, the city can petition the Supreme Court to hear the case.

Noted legal commentator and law professor Eugene Volokh mentions on his law blog that he thinks we’re probably looking at a Spring or Fall 2008 timeframe for such a process to play out, which due to the timing has the potential for election-year effects as the gun-control issue may become politically prominent.¹⁰ Will the full appeals court even decide to rehear the case? Will the Supreme Court? Who knows: various legal commentators have opined both ways. The fact is, no one really knows, and at this point all such opinions are educated guesses at best, and pure speculation or wishful thinking at worst.

Even if the Supreme Court ultimately decides to hear the case, and even if it affirms that the Second Amendment protects an individual right to keep and bear arms, the Court’s decision will almost certainly be written as narrowly as possible. For instance, the Court is unlikely to address the issue of whether the

⁸ See, *id.* at 54 (citing *Robertson v. Baldwin*, 165 U.S. 275 (1897), a U.S. Supreme Court case from 1897).

⁹ See, Court strikes down D.C. handgun law, CNN, Mar. 9, 2007, available at

http://www.cnn.com/2007/LAW/03/09/gun.ban.ruling/index.html?eref=rss_topstories.

¹⁰ See, The Volokh Conspiracy law blog at http://volokh.com/archives/archive_2007_03_04-2007_03_10.shtml#1173454696.

Second Amendment applies directly to the states via the selective incorporation doctrine of the Court's Fourteenth Amendment jurisprudence. The Court is similarly unlikely to address the scope of what arms are protected by the right. So knife owners shouldn't dust off their ka-bars and Arkansas toothpicks for that vacation trip to the Big Apple just yet. Indeed, even if the Supreme Court suddenly decided to tackle Second Amendment issues in earnest, *and* the Court embraced a strong individual rights interpretation, *and* ruled that the Second Amendment embodies a fundamental right, it could be many years, decades perhaps, before major federal gun and knife control statutes are successfully challenged on Second Amendment grounds. Ditto for state statutes, and that's assuming that the high Court rules that the Second Amendment applies to the states via the Fourteenth Amendment.

Maybe in ten to twenty years your kids or grandkids might benefit from the *Parker* decision, *if* a lot of these contingencies go the right way. Remember, Florida's "shall issue" concealed carry weapon law took effect in 1987, and sparked a revolution in states' views of concealed firearm carry: twenty years later, a majority of the states have "shall issue" concealed carry laws. (Unfortunately, only a few of these states' concealed carry laws cover concealed knife carry; most only address concealed firearm carry). So a twenty year timeframe is not out of the question for a similar Second Amendment individual rights revolution.

Of course, another, perhaps less talked about possibility is that Congress will change Washington, D.C.'s laws to conform to the *Parker* decision's mandates before the case ever reaches the Supreme Court. Should Congress do so, this would likely moot the issue, thus giving the high court (or the full D.C. Circuit, depending on the timing) a good reason to avoid either hearing the case entirely, or disposing of the appeal without reaching the merits. Indeed, proposed legislation to repeal D.C.'s gun ban has been floating around Capitol Hill for

years.¹¹ Ironically, the *Parker* decision may provide the impetus for a Democrat-controlled Congress to pass such legislation and repeal the D.C. gun ban, in order to avoid a Supreme Court decision that could potentially jeopardize lots of other gun (and knife) control laws down the road.

In conclusion, the *Parker* decision may prove to be the straw that broke the gun-control camel's back. Or the decision may simply be an important and well-reasoned footnote in the fight to regain our heavily eroded Second Amendment right to keep and bear arms. Whatever the short-term outcome, both knife and gun owners need to remain vigilant, as the fight will continue to be a long one, and one that is far from over.

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¹¹ See, e.g., House GOP Proposes to Repeal D.C. Gun Bans, Washington Post, Sep. 14, 2004, available at <http://www.washingtonpost.com/wp-dyn/articles/A18935-2004Sep13.html>.