



OP-EDS

Mukasey should declare where he stands on Second Amendment

By Robert A. Levy

October 02, 2007

The White House would like to see Michael Mukasey confirmed as attorney general before the Senate's October recess. Until now, the focus has been on Mukasey's reading of the tradeoff between civil liberties and national security — involving, for example, the Patriot Act, warrantless surveillance and detainee policies. Those are indeed important inquiries. But there's another critical issue that triggers strong sentiment throughout the country on which a Mukasey Justice Department might play a key role. Mr. Mukasey, where do you stand on the right to keep and bear arms?

The last time the Supreme Court addressed the Second Amendment was *United States v. Miller* (1939). Regrettably, the court's less than crystalline opinion inspired opponents of private firearms ownership to argue that the right to bear arms does not belong to us as individuals, but only protects a state's right to arm its militia. The predictable outcome of the Supreme Court's murkiness has been a split among federal appellate courts, highlighted in March of this year by a blockbuster opinion from the U.S. Court of Appeals for the D.C. Circuit in *Parker v. District of Columbia*, which held that "the Second Amendment protects an individual right ... not limited to militia service."

With that historic pronouncement, the D.C. Circuit Court became the first federal appellate court to overturn a gun regulation on Second Amendment grounds.

On Sept. 4, the District of Columbia asked the Supreme Court to review *Parker*. The city's petition to the court will not be opposed by the plaintiffs, even though they won in the appellate court. The *Parker* plaintiffs agree with the D.C. government that the citizens of this country deserve a foursquare proclamation from the nation's highest court about the real meaning of the Second Amendment. The implications could be profound. Some gun regulations make sense; others go too far. Legislators need more guidance from the court.

That brings us to the role of the Justice Department. Former Attorney General John Ashcroft, in a 2001 letter to the National Rifle Association, declared that "the text and the original intent of the Second Amendment clearly protect the right of individuals to keep and bear firearms." Ashcroft's letter was supported by 18 state attorneys general, including six Democrats. The letter was followed by two Justice Department legal briefs, filed with the Supreme Court, arguing for the first time in formal court papers against the collective rights position. Then, in 2004, the Justice Department affirmed its stance in an extended and scholarly staff memorandum opinion prepared for the attorney general. The opinion concluded that "The Second Amendment secures a right of individuals generally, not a right of States or a right restricted to persons serving in militias."

To be sure, Ashcroft also declared in an internal document that the Justice Department "will continue to defend the constitutionality of all existing federal firearms laws." But D.C. law, although enacted pursuant to congressional delegation, is not federal law. And D.C.'s across-the-board gun ban can easily be distinguished from more nuanced federal regulations.

Assuming that the Supreme Court decides to revisit *Parker*, as most observers expect, the court will likely ask the Justice Department for its views. Whether requested by the court, or submitted on the department's own volition, those views could have substantial weight. Some obvious questions arise: Will a Mukasey Justice Department stick by the Ashcroft Justice Department's individual rights perspective? Does the attorney general-in-waiting agree with the *Parker* plaintiffs that D.C.'s gun ban cannot possibly qualify as a "reasonable" regulation under an individual-rights view of the Second Amendment?

Of course, there are political considerations. Gun control is a non-starter for Democrats and red meat for Republicans. The GOP, burdened by the president's plunging popularity, can ill afford to alienate its conservative

and libertarian base — by, for example, not fully supporting the Parker case. There are few issues that galvanize conservative voters, and attract moderates, as much as the right to bear arms. For their part, the last thing that Democrats want is a gun control case percolating at the Supreme Court, with a decision likely in the heat of the '08 election.

But those political considerations do not affect the underlying merits, nor should they be a factor in determining whether a Mukasey Justice Department gets involved in Parker. More important, the Justice Department cannot demur in a case that will attract legal scholars of all persuasions — on a crucial issue that the Department has already considered and resolved. No doubt, the lineup of friend-of-the-court briefs will be formidable. It is imperative, at a minimum, that Michael Mukasey spearhead a Justice Department brief supporting an individual rights interpretation of the Second Amendment.

Levy is a senior fellow in constitutional studies at the Cato Institute and co-counsel to the plaintiffs in Parker v. District of Columbia.

[Close Window](#)