Talkin' To America
Interview with Edwin Vieira
March 12, 2008

INTRODUCTION

This is **Talkin' to America.** I am your host Aaron Zelman. We have a special guest today. His name is Edwin Vieira. Edwin is a practicing attorney in Constitutional law, an author and he's done quite a few articles for a website called **NewsWithViews.** Edwin, welcome to **Talkin' to America.**

Edwin Vieira: My pleasure Aaron.

Aaron Zelman: Today, we want to talk about the Heller case, **Heller versus D.C.** The case that is going to the Supreme Court to theoretically determine if we Americans have a right to own firearms. As you know, **JPFO** has submitted our brief to the court, and what is fascinating about the show we are going to do today with you is a different point of view as to why this may not be a good idea.

Edwin Vieira: Well, I think that's right. It may not be a good idea at several levels, but unfortunately, that is where we are. It's gone there and they are hearing it. In fact, this month, they'll be hearing oral arguments shortly, and then I anticipate that they'll have a decision out by, oh the end of May, early June, no later than that.

Aaron Zelman: Do you think that Heller was litigated on the correct Constitutional theory?

Edwin Vieira: Well, no, I don't. The theory that Heller used was or is what is generally known as the individual right theory and it operates on the premise that you can bisect the Second Amendment. The Second Amendment reads "a well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed," and the individual right theory pays attention solely to that second clause, "the right of the people to keep and bear arms shall not be infringed" and essentially says to judges, don't pay attention to the first one, that first clause, in relationship to the militia. Now that runs into a number of problems. The first one is that if one is interpreting the Constitution from the point of original intent which I and many others believe is the only correct way to do it, you have to put yourself back into the legal intellectual framework of the people at that time and understand what they interpreted those phrases to mean and the rule of interpretation in those days, how you construed a legal document essentially said that if the document made a statement about its purpose, which the Second Amendment clearly does in that first clause, then you must interpret everything that follows in light of that purpose. So it is clear that on the basis of that rule of construction the right of the people to keep and bear arms has to be interpreted in some way in relation to a well-regulated militia, and so that is the first difficult situation that I see that the Heller people have gotten themselves into. Members of the Supreme Court could simply ask the question, well now tell us how this individual right relates to the maintenance of a well-regulated militia, and I think Heller's people might have a certain amount of difficulty there because, of course, they haven't predicated their arguments, they haven't developed the factual and legal record in the case on the basis of a militia-related right. Secondly, if you look at THE MAIN DECISION that the Supreme Court came up with in the area of the Second Amendment, it was in 1939, **United States versus Miller**. It is somewhat of a peculiar case because it involved the National Firearms Act and the question of whether a short-barrel shotgun had to be registered under that act. When the case got to the Supreme Court, the actual defendants, Mr. Miller and his co-defendant, didn't even file a brief. Actually, they were a couple of criminals who absconded. They had won the case in the District Court. The Lower Court had said that the Second Amendment had to be interpreted in their favor. It gets to the Supreme Court. They didn't even file a brief. The government filed a brief that was full of what I would call modern gun control arguments, and the interesting thing is the Supreme Court paid no attention to that whatsoever. It came up with an opinion based on some historical research it had done itself, which said that in the pre-Constitutional period, the period before the Constitution had been ratified, militias were in existence in every colony or independent state. These militias consisted of all the able-bodied men in the community from about 16 years old to 50 or 60 years old, depending on which colony you were in and that the ultimate or basic principle, operational principle of the militia was that every one of these men was required to have a

functioning firearm and ammunition in his personal possession and the only thing that the Supreme Court couldn't decide in that case, which is why it really didn't give a definitive interpretation of the Second Amendment, it couldn't decide whether a short-barrel shotgun was a suitable militia firearm or not because the record in the case, the factual presentation in the District Court was really incomplete. I mean, there was just nothing on that particular subject and the Supreme Court didn't want to take what is called "judicial notice" of that question, they didn't want to decide for themselves without any evidence put into the case whether or not such a firearm was suitable for use in the militia. Now, I think they could've done that because obviously in World War I shotguns had been used in the trenches, the 1897 Winchester I think was reworked for use in the trenches and it was rather notorious that they had been used. The Germans had complained and said that it was a violation of either the Hague, I think it was the Hague Convention. So it was something that certainly had been in the notoriety of international relations but the Supreme Court didn't want to touch it. So as a result, there never was a complete determination under the Second Amendment but what that case, **United States versus Miller**, clearly shows was that the Supreme Court, the first time they've looked at this in modern era, in the 20th century, the last century, the first time they looked at it, they realized that they had to interpret it from the point of view of that first clause, the well-regulated militia clause. They had to go back historically and determine what were the principles on which militias were structured because that, of course, is the meaning of that terminology in the Constitution. The Constitution doesn't define it any other way, so we have to go back and look at what was the historical context in which those words were used. So just looking at that precedent of **United States versus Miller** I as a litigator would have said, well if I'm going to bring this Heller case, I better make my argument consistent with **United States versus Miller**. I might be willing to go further and say, oh besides this militia connection, there is also some element of an individual right for people who don't have a relationship to a militia, say elderly people for instance who would be over 60 years old. I might make that kind of an argument in addition but I certainly wouldn't leave out the first half of the argument because I put myself at a decided disadvantage. So, as I say, I look at this from the point of view of the composition of the Court that is there now where at least four members of that Court I would think are probably going to be hostile to any interpretation of the Second Amendment that lets people, individuals in the District of Columbia possess guns in their homes, that the litigational strategy that the Heller people are using leaves a little bit to be desired.

Aaron Zelman: Is it possible that in theory, I guess, that both approaches arrive at the same results?

Edwin Vieira: And there's your problem. It is not necessarily true that they do. It depends upon how you analyze it. The militia approach results in an absolute right because the militia structures in the pre-Constitutional era were requirements. They were actually duties to possess arms and they were duties for people to obtain those arms in the free market, buy them themselves unless they were too poor to do so and then the government would provide them with a firearm. So, that militia concept when it became a Constitutional concept, because of course in the period before the Constitution was written we were all talking about colonial statutes, but when it became a Constitutional concept, that right to possess a firearm really becomes a composite right and duty and it is impossible for the government in those circumstances to have any power to regulate that right, at least in the sense of telling someone that he can't have a firearm in his possession which is essentially what the D.C. law says, it says you can't have an operative one, it has to be broken down over the gun lock or so forth and so on, so it can't be used immediately for self-protection. Whereas the individual right theory is open to, how shall I put this, two kinds of limiting interpretations that the Supreme Court has come up with all on its own because they really don't have a basis in the Constitution. One is called the reasonable regulation interpretation which says, yes we have these rights in the Bill of Rights, we have freedom of speech, we have the right to keep and bear arms and you can go down that list but all of those rights are subject to "reasonable regulation in the public interest." Well, what does that mean? It means whatever the Supreme Court is willing to tolerate, whatever the Supreme Court is willing to say is a reasonable regulation. It's certainly not an absolute right that says I as an individual have this right, this ability to behave in a certain way which the government cannot interfere with. The other limiting interpretation that they often use is called the compelling governmental interest test, they say. The government, according to the Supreme Court, has the authority to limit, infringe, abridge, which ever one of those words you want to use, rights under the Bill of Rights, First Amendment or Second Amendment, so forth, whenever the government has a compelling interesting in doing so and once again, there is a word that has no Constitutional basis, no Constitutional definition, in fact, no definition at all that I have ever seen, compelling. Compelling is what the Supreme Court says it is. If it's an interest that they consider to be sufficiently important, they call it compelling. If not, they call it something else. So as soon as you start arguing on the individual right line and you give up this historical point, that is the absolute right, the duty of people to have a gun

and therefore the inability of the government to interfere with that possession then you find yourself on this slippery slope. Now it's conceivable that the Supreme Court could say this regulation in D.C. is not reasonable and they could say this regulation in D.C. does not serve a compelling governmental interest, so in that case, you would arrive at the same point, Mr. Heller could have his gun, but they might say, oh, it does serve a compelling interest and is reasonable and then Mr. Heller might not have his gun or some portions of that D.C. statute might be upheld, although, all this would be struck down. So that is why I say, yes, you can be on these two tracks and you can arrive at the same terminus provided that on the individual right track the Supreme Court keeps its wheels, you know, on that track, that they don't sort of derail on one of these citings that they have with the reasonable regulation or the compelling state interest test, and the difficulty here is that the Heller people are in fact arguing the compelling state interest test. They are coming forward and saying and telling the Supreme Court this is the test that you should use whereas if I were litigating the case, I would say, oh no, that test doesn't apply to the Second Amendment because of this historical background, the context in which that Amendment came up, that at least in terms of possession of a gun, simply having the gun in your home, there is an absolute right and the government can't interfere with that at all.

Aaron Zelman: All right, this is fascinating to say the least. Have you been in touch with the folks who are preparing the Heller case?

Edwin Vieira: Well, I never tried to insinuate myself into somebody else's business, let alone legal practice.

Aaron Zelman: Is there anything to be gained from a favorable decision by the Supreme Court?

Edwin Vieira: Well I think so, if they accept the individual rights theory. Let's take that one, that's the weaker side of the coin. If they accept that and they say, yes, there is an individual right and they agree with Heller and say, but it could be limited by a compelling interest, and then they say the D.C. statute does not meet the compelling interest standard and they will tell us why which ever provisions of the statute they think are somehow insufficient to meet whatever their theory will be in this case because, once again, it is very subjective what comes out. That result could be taken to other jurisdictions that have similar types of restrictions, and of course, cities such as New York or Boston or Chicago come to mind pretty quickly and that Supreme Court decision would be applicable as a precedent, I mean it wouldn't be binding necessarily but it would be applicable as a precedent with respect to any other statute that looked like, operated like the D.C. statute. So that would be a good result. Now, the interesting thing is that there is a half-good, half-bad result. I mean, they could easily say that the Second Amendment is limited by this compelling state interest test and in one sense that would be good because at least you would have the government having to jump over this high hurdle in other litigation but they could say in this particular case in D.C. because it was the Nation's Capital, because Mr. Heller interestingly enough is a security guard and so he has a level of training and scrutiny and so forth that the average person doesn't, they might say in this particular case the compelling state interest is met, so Heller would win part of the case in the sense that the compelling state interest would be applied and that might work in other cases to throw out statutes that didn't get to that level but on the other hand, Heller could end up losing. Or Heller could end up winning on the basis that well, he's a security guard and all he wants to do is keep a pistol in his home but on the compelling state interest theory in other cases they could rule that a person wasn't allowed to keep a rifle in his home or a person who wasn't a security guard couldn't keep a gun, or a person who hadn't gone to a certain level of firearms' training. They could say, all of those things could be made requirements or limitations in some other case. So this becomes an awfully complicated situation as soon as you get into the kind of murky world of what constitutes a compelling interest, what constitutes a reasonable regulation. If the test is does this man have a Constitutional right to "possess" a firearm that would be suitable for militia purposes in his home, period, stop right there, the answer is under the militia interpretation, yes. He wants to have, I think he wants to have a 9-mm pistol, and I guess everyone would recognize, anyone who knows about such things, would recognize that that kind of a firearm would be useful for a military or militia purpose. They are used every day by military forces and police forces all over the world. No problem there and under the militia interpretation, he would have an absolute right to possess that, simply to possess it in his home, no problem, and if they were to say that, then that would strike down a lot of these urban gun control regulations, ordinances, and so forth, which don't allow even that level of possession, let alone taking a gun on the street or in one's vehicle.

Aaron Zelman: This is **Talkin' to America**. Our guest today is Edwin Vieira, Constitutional scholar and author. It's hard to

say where this is going to end up but let's deal with something that should be on everybody's mind and that is what could be lost as the result of an unfavorable decision by the Supreme Court?

Edwin Vieira: The worst of all possible worlds would be for them correctly to come at the Second Amendment and say this Amendment has to be interpreted in light of a militia concept and then say, well the militia today is something like the National Guard, and if you're not a member of the National Guard or there are certain state organizations, state militias, state guards, if you are not a member of one of these organized units then you have no personal or individual right. Heller is not a member. He may be a security guard, he works for a security company but he is not a member of a National Guard unit as far as I know. So that would throw out essentially the individual right concept entirely, and that would be unfortunate because they would then be using only really the first half of the militia clause, they would not be doing what was done in the **United States versus Miller** saying, wait a minute, the militia in its Constitutional sense means all able-bodied individuals and what we are talking about with the National Guard or some of these state guard units is a selective subset of the militia if you actually look at the statutes the way the definitions go, but they could foul up on that. It wouldn't be the first time that the fouled up in a Constitutional interpretation that way. The other alternative that would lead us down a very dark road would be if they said either it's subject to reasonable regulation or it is subject to a compelling state interest and the particular statute that we have here in D.C. meets those tests because this is a pretty darn restrictive statute, and if they say this one meets those tests, and they could make the argument or make the assertion, well D.C. is not saying that Heller can't have the gun, yes he can possess the gun, but it has to be broken down or it has to be in someway made immediately unworkable with trigger locks or what have you, so it's really not useful for personal protection in any kind of scenario that comes to my mind at least. You know, the typical burglar is not going to give you the time to put the gun together before you confront him. So if they said that, well, yes on the one hand they would have agreed that a compelling interest test had to be applied, but on the other hand, my goodness, if they uphold the D.C. regulation and say this does meet that compelling standard then you can imaging the torrent of gun control legislation that will be coming out of Congress and any state jurisdiction, city, county, town or state legislature that has the ability to pass such legislation, where ever they have sufficient political pressure for gun control, the Supreme Court will have laid out on a platter for them what they can do. It will be field day for the Violence Policy Center, the Brady people.

Aaron Zelman: What do you think the odds of that happening if you had to place a bet?

Edwin Vieira: Gosh, I would rather place a bet you know at the craps table in Atlantic City. Here's your breakdown on this Court. You have four justices, Breyer, Ginsburg, Souter and Stevens, that as far as I can see are going to be in favor of the D.C. regulation. You have four on the other side, Alito, Roberts, Scalia and Thomas, I would be willing to bet a small amount that the four of them will be more favorable to what we would consider to be the correct interpretation whichever particular construction they use, they will be in favor of Heller in some way. The swing vote then becomes Justice Anthony Kennedy and Kennedy really to a large extent, in my mind at least, is a very loose cannon. It's hard to tell which way he is going to go but he tends to side with the, shall we say, liberal wing of the Court, more so than he does with the conservative wing, and this is a fellow who in more than one case has said quite clearly that he believes that foreign law can be used to interpret the Constitution, so heaven knows, he may look at some U.N. protocol on gun control and say that that should be used to interpret the Second Amendment. So you have a four-to-four split and here is this fellow in the middle, which way is he going to go, and my unfortunate gut feeling is that he is more likely to go towards the liberal side, that is towards, in some way towards upholding the statute, favoring D.C. than he is to go in the other direction, and you have to get five or the other side has to get five. We have essentially a four-to-four split and here is Kennedy in the middle and the really murky problem occurs if you don't get a clear majority for a particular opinion. You see, they could rule affirmed or denied period. They could say we're going to uphold the statute or we're going to strike this D.C. ordinance down and then they could write a whole bunch of different opinions, some concurring, some dissenting, back and forth, so that you really don't have a single interpretation of why they are doing what they do. I've seen some cases along those lines. Then what happens, that plateful of opinions goes down to the lower courts and it gets re-interpreted by the lower courts and quite often that turns into a real mish-mash especially with this issue because I think the lower courts, federal courts at least and probably most of the state courts, certainly in states like New York, California, Illinois, what have you, states where gun control is still politically favored, those lower courts are, let's say 85% or higher anti Second Amendment, they want to disarm the average American. So, you could have a win. In a way this might be the worst of all possibilities, you could have a win for Heller in the sense that they say the statute is

unconstitutional, they come up with three or four different opinions as to why it is, or what it isn't because there will be some dissenters as well as some people in favor of that judgment. Heller wins his case and then lawyers argue about what this decision means for the next ten years in the lower courts and those lower courts will interpret it whatever they want to. That's the unfortunate thing. It will be very unlikely that if that case would be interpreted, misinterpreted in California for instance in favor of some gun control law, that the Supreme Court would immediately take another appeal or a certiorari to correct that mistake. They generally don't do that. I've seen that certainly in the area of labor law. In fact, I had one case, it had been 48 years since this statute was passed, 48 years before it finally got to them and they gave a correct interpretation of the statute and you can imagine how many lower court cases, or in that instance it was the National Labor Relations Board Administrative Agency, how many dozens of cases there had been incorrectly interpreting that statute over that 48 years.

Aaron Zelman: I am curious. If you don't mind, what do you make of the Solicitor General on behalf of the Bush Administration?

Edwin Vieira: Right.

Aaron Zelman: He gets 15 minutes to talk before the Court as I understand and he has taken a position that is a little peculiar. I'm just wondering if you are able to elaborate on that?

Edwin Vieira: Well, he's trying to salvage out of this the vast majority of federal gun control legislation plus the widest ambit for future legislation. I think in his particular brief, it really does boil down to the reasonable regulation theory. He doesn't want even the compelling state interest theory, let alone what I call the militia theory, the absolute right interpretation, and the reason for that is a great deal of the gun control legislation as you know Aaron came out of or under color of, as the lawyers say, the commerce clause, and the commerce clause tends to be interpreted by the Supreme Court on a reasonable regulation basis, so the Solicitor General doesn't want to Court to come up with some more limiting interpretation because that might open up the possibility of a tax on some of these commerce clause statutes that are already out there or it might throw some cold water on future legislation because the proponents would be putting this forward and the opponents would say, wait a minute, this legislation doesn't meet the compelling interest test, so we have to either not pass it or rewrite it or something or other. So, he is obviously taking what I would call a kind of practitioner's point of view here. He is trying to salvage as much as he can for his client being the Government of the United States and everything that the Government of the United States has on the table in terms of this vast mass of gun control legislation that is already there. Now I think from the point of view of shall I say, a technical lawyer, yeah, well that's fine. That's essentially what technical lawyers do but from the point of view of the politics of the situation, that is certainly not the impression that the Bush Administration left people with several years ago when he was running for office in terms of his position on Second Amendment rights.

Aaron Zelman: Does the Supreme Court care what the American people think concerning this issue?

Edwin Vieira: No, no, I don't think so at all. In this particular instance, the thing that really worries me of course is that they may feel, the Supreme Court may feel that they don't want to take the chance of coming up with some broad interpretation that strikes down perhaps not just the D.C. law but some other laws and then you end up with what they imagine would happen with more guns in the hands of more people, an increase in urban violence because I think they probably do believe the theory that guns in some sense cause crime. These aren't people that have studied John Lott if you know what I mean.

Aaron Zelman: Exactly.

Edwin Vieira: So, they tend to be motivated in many instances by those kind of mythical interpretations, sociological interpretations. You see a lot of really jejune stuff in these opinions and I would doubt that there are very many of them there that really understand the relationship between guns and crime. Now there may be one, maybe somebody like Thomas, might very well, I don't know too much about Alito or Roberts, Scalia might, that's four, you might get some realistic assessment. I think you will get the exact opposite out of the other four and then of course it comes down, as I said before, to Kennedy, and he may tell you that the U.N. convention in disarmament, you know, is the thing that we ought to be following.

Aaron Zelman: Well Edwin, I want to thank you very much for being our guest today. We have been talking about the Heller case. We will have this program in a transcript form also. By the way, do you have some contact information?

Edwin Vieira: Actually, if they simply go to www.NewsWithViews.com and go to the contributor column, they can get into my archive and then at the end of any one of my commentaries, many of which are on this subject, militia interpretation of the Constitution, they will find an address there at which they can contact me.

Aaron Zelman: I want to thank you Edwin. This has been **Talkin' to America**. I am your host Aaron Zelman, and I want to remind you remember if you won't defend your rights, don't complain when you lose them.

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