

POLITICAL REVERSAL ON NATIONAL PARK GUN BAN

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According to Senator Tom Coburn (R-Ok), the "existence of different laws relating to the transportation and possession of firearms at different units of the National Park System and the National Wildlife Refuge System [has] entrapped law-abiding gun owners while at units of the National Park System and the National Wildlife Refuge System." To address this perceived problem, Coburn contended that Congress "needed to weigh in on the new regulations" issued by the Bush administration effective January 9, 2009 to "make it clear that the second amendment rights of an individual at a unit of the National Park System or the National Wildlife Refuge System should not be infringed."

These new regulations promulgated in a final rule during the waning days of the Bush administration would "allow individuals to carry concealed, loaded, and operable firearms in Federal park units and refuges to the extent that they could lawfully do so under non-conflicting state law." Previously, Interior Department regulations had generally prohibited possession of firearms in national parks and wildlife refuges "unless they were packed, cased or stored in a manner that would prevent their ready use." 36 C.F.R. § 2.4(a)(2).

As noted by Senator Coburn, in the case of *Brady Campaign to Prevent Gun Violence v. Salazar* (U.S. Dist Ct. D.C. 3/19/2009), the United States District Court for the District of Columbia had "granted a preliminary injunction with respect to the implementation and enforcement of the new regulations." As a result of this decision, prior regulations prohibiting loaded and operable firearms in national parks and refuges remained in effect.

In response to this federal district court decision, Senator Coburn claimed Congressional action was necessary "to ensure that unelected bureaucrats and judges cannot again override the Second Amendment rights of law-abiding citizens on 83,600,000 acres of National Park System land and 90,790,000 acres of land under the jurisdiction of the United States Fish and Wildlife Service." In so doing, Coburn further noted that a prompt legislative response was necessary because these new regulations were "under review by the [Obama] administration" and "may be altered."

Accordingly, to pre-empt any such action, Coburn introduced a non-germane amendment to H.R. 627, the proposed 'Credit Cardholders' Bill of Rights Act of 2009." Coburn's amendment would purportedly "protect innocent Americans from violent crime in national parks and refuges" by "Protecting the Right of Individuals to Bear Arms in Units of the National Park System and the National Wildlife Refuge System."

Specifically, this amendment would prohibit the Secretary of the Interior from enacting or enforcing "any regulation that prohibits an individual from possessing a firearm including an assembled or functional firearm in any unit of the National Park System or the National Wildlife Refuge System if:

- (1) the individual is not otherwise prohibited by law from possessing the firearm;
- and (2) the possession of the firearm is in compliance with the law of the State in

which the unit of the National Park System or the National Wildlife Refuge System is located.

The Senate passed this amendment by a vote of 67 to 29 and it became Section 512 of H.R. 627, "Protecting Americans from Violent Crime." On May 20, 2009, the House agreed to Section 512 of the Senate Bill by a vote of 279-147. On May 22, 2009, President Obama signed H.R. 627, "The Credit Cardholders' Bill of Rights Act of 2009" into law (Public Law 111-24), including Section 512.

UNLIMITED RIGHT?

As cited by Coburn, the "Second Amendment to the Constitution provides that the right of the people to keep and bear Arms, shall not be infringed." Accordingly, in Coburn's opinion, any federal regulations which prohibit the possession or transportation of a weapon in units of the National Park System or the National Refuge System necessarily prevent individuals from exercising their second amendment rights. Second Amendment rights, however, are not absolute.

In the case of *District of Columbia v. Heller*, 128 S. Ct. 2783; 171 L. Ed. 2d 637 (U.S. 6/26/2008), the U.S. Supreme Court noted that the Second Amendment right to keep and bear arms, like most rights, is not unlimited. On the contrary, historically, the Court found "the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." Moreover, in declaring unconstitutional the District of Columbia's "absolute prohibition of handguns held and used for self-defense in the home," the Court stated that nothing in our opinion should be taken to cast doubt on... laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." Further, the Court stated that "[w]e identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive."

In rejecting an absolute ban, the Court, however, noted that "[t]he Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns." Presumably, "sensitive places" could, therefore, also include public parks where in state laws and/or local ordinances could still prohibit or restrict firearms consistent with the Second Amendment.

In *Brady Campaign to Prevent Gun Violence v. Salazar*, plaintiff Brady referenced the fact that twenty-five states "prohibit the transport of concealed and loaded guns within their own parks." For example, Tennessee law prohibits carrying weapons on public parks, playgrounds, civic centers and other public recreational buildings and grounds. Tenn. Code Ann. § 39-17-1311 (2006). Similarly, in Mississippi, carrying a "stun gun, concealed pistol or revolver" in "any public park" is prohibited "unless for the purpose of participating in any authorized firearms-related activity." Miss. Code Ann. § 45-9-101(13) (2004). A broader North Dakota law prohibits the possession of a firearm at a "public gathering" which is defined to include "sporting event, school function, church, church function, political rally, musical concert, public park which prohibits hunting, or public building." N.D. Cent. Code § 62.1-02-05(1) (2003). Presumably, these state laws would remain in force within these jurisdictions because possession of a firearm in a public park would not be "in compliance with the law of the State in which the unit of the National Park System or the National Wildlife Refuge System is located."

In contrast, the Ohio state supreme court in the case of *Ohioans for Concealed Carry, Inc. v. City of Clyde*, 896 N.E.2d 967 (Ohio 9/18/2008), held that a municipal ordinance which prohibited "licensed handgun owners from carrying concealed handguns in Clyde city parks" was unconstitutional because it was in conflict with state law. With some exceptions, a state law was enacted which expressly provided that "a licensed handgun owner "may carry a concealed handgun anywhere in this state." Unlike the above cited state laws from other jurisdictions, public parks were not one of the listed exceptions in the Ohio statute.

FLAWED NEPA PROCESS

Coburn's amendment characterizes the federal court decision in *Brady Campaign to Prevent Gun Violence v. Salazar* (U.S. Dist Ct. D.C. 3/19/2009) as a judicial attempt to "override the Second Amendment rights of law-abiding citizens" who visit national parks and wildlife refuges. In fact, "despite many of the arguments raised by the parties," including the National Rifle Association, the federal district court clearly stated that "this case is not a platform for resolving disputes concerning the merits of concealed weapons or laws related to concealed weapons." According to the court, any such referendum on concealed weapons laws related to the constitutional right to bear arms is "appropriately directed to the other branches of government."

In this particular case, the sole issue before the court was whether the Department of the Interior (DOI) had "complied with Congress' statutes and regulations" under NEPA. As noted by the court, "NEPA's mandate is essentially procedural," requiring agencies to "assess the environmental consequences of federal projects by following certain procedures during the decision-making process." As a result, "NEPA merely prohibits uninformed--rather than unwise-agency action." Similarly, in determining NEPA compliance in this particular case, the role of the federal court was not to determine whether DOI had "made wise judgments in any normative sense" in lifting the gun ban in national parks and refuges.

As noted by the court, "[c]ompliance with NEPA, as well as its procedures related to environmental evaluations, are properly analyzed under the 'arbitrary and capricious standard' of the Administrative Procedure Act [APA]." Under this APA standard, agencies "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." In conducting APA review of agency action, the role of the court is to consider whether the agency decision was "based on a consideration of the relevant factors and whether there has been a clear error of judgment."

This APA standard of review is deferential to the agency, and the Court is not entitled to substitute its judgment for that of the agency. While deferential, "courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute [in this case NEPA]."

In the opinion of the court, the DOI final rule which lifted the gun ban was the product of an "astoundingly flawed process" in that DOI failed to evaluate all reasonably foreseeable environmental impacts as required by NEPA. In particular, the court noted "substantial information in the administrative record concerning environmental impacts" was either ignored or not explained by DOI. Most egregious was the fact that DOI did not explain the reversal of its "own long-standing belief under the previous regulations that allowing only inoperable and

stored firearms in national parks and wildlife refuges was necessary to safeguard against certain risks to the environment."

Further, the court noted "the almost universal view among interested parties" was "persons who possess concealed, loaded, and operable firearms in national parks and wildlife refuges will use them for any number of reasons, including self-defense against persons and animals." In the opinion of the court, this view suggested that DOI's final rule would indeed "have some impact on the environment."

Previous regulations pertaining to national parks and wildlife refuges generally prohibited possession of firearms unless they were unloaded and packed, cased, or stored in a manner that prevented their ready use. 48 Fed. Reg. 30,252 (June 30, 1983); 49 Fed. Reg. 18,444 (April 30, 1984). These regulations were "designed to ensure public safety and provide maximum protection of natural resources by limiting the opportunity for unauthorized use of weapons . . . while providing reasonable regulatory relief for persons living within or traveling through park areas." This view persisted for twenty-five years.

However, on December 14, 2007, forty-seven United States Senators wrote to the Secretary of the Interior asking to have these restrictions lifted. Four additional United States Senators made a similar request on February 11, 2008. In response, the DOI "chose to address this issue" on April 30, 2008, by proposing a new rule to allow persons to possess concealed, loaded, and operable firearms in national parks and wildlife refuges to the extent permitted in any state park or wildlife refuge in the state in which the federal park or wildlife refuge was located.

DOI explained that the purpose of this proposed rule was to better respect the rights of states, forty-eight of which "provide for the possession of concealed firearms by their citizens," a larger number than when the previous regulations were promulgated. DOI explained that the regulations "should be amended to defer to this development in State law." In so doing, DOI did not mention or examine whether "the previously-recognized 'public safety' and 'protection of natural resources' concerns had been alleviated over time."

DOI acknowledged "its obligations under NEPA to assess the impact of any Federal action significantly affecting the quality of the human environment, health, and safety," and noted that it was "currently working to determine the appropriate level of NEPA assessment and documentation that will be required for promulgation of this regulation." DOI, however, ultimately determined that its proposed action was subject to a "categorical exclusion" under NEPA because the Final Rule maintained existing prohibitions on illegal uses of firearms and, therefore, did not "authorize any actual impacts on the environment."

If subject to a "categorical exclusion," an agency need not prepare an environmental impact statement, or an environmental assessment if the proposed action will have no significant environmental impact. Categorical exclusions, however, are generally limited to routine agency actions which "do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect." Within this context, ""cumulative impact" on the environment includes direct and indirect effects of past, present, and reasonably foreseeable future actions on natural resources.

In addition, DOI would have to perform an environmental evaluation for any significant or highly controversial environmental impacts on public health and safety in parks, recreation or refuge lands. Applying these NEPA principles to the facts of this case, the court found DOI had failed to properly consider environmental impacts when it characterized its proposed action as a "categorical exclusion" under NEPA. While the proposed action did not actually "authorize any actual impacts on the environment," the court found DOI had failed to perform any "evaluation to ascertain the extent of any foreseeable environmental impacts." In so doing, the court found further that DOI had never explained why it was "crucial to reverse "a longstanding public safety rule to allow people to carry loaded firearms that they supposedly will never use."

In addition, the federal district court found further that DOI had ignored, without any explanation, its own long-standing belief under the previous regulations that firearm restrictions in national parks and wildlife refuges were necessary to "ensure public safety and provide maximum protection of natural resources by limiting the opportunity for unauthorized use of weapons."

Public safety and protection of natural resources are indisputably encompassed within the definition of "environmental impacts" that must be considered pursuant to NEPA. Defendants point to nothing in the Administrative Record to show why they believe their previous environmental concerns have subsided over time or why they are, in fact, no longer concerns.

In the opinion of the court, DOI had "failed to adequately distinguish its previous position that firearm restrictions were necessary to protect against environmental harms involving public safety and protection of natural resources." In so doing, the court found that DOI's "unexplained 180-degree turn away from precedent is arbitrary and capricious."

An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis for reversing its position. The core concern underlying the prohibition of arbitrary and capricious agency action is that agency 'ad hocery' is impermissible. Where an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious.

In the opinion of the court, "a consideration of the relevant facts" would have evaluated "how many loaded guns are likely to be carried into National Parks and how they will be used," Instead, DOI simply assumed "none of the guns will ever be fired" without ever explaining on what basis DOI could presume "those carrying firearms will never brandish or use them." The federal district court, therefore, enjoined implementation of DOI's proposal regulation to allow firearms in national parks and wildlife refuges.

While enactment of Coburn's amendment effectively changes the law to allow firearms in national parks and wildlife refuges, subject to state laws, DOI would still have to comply with NEPA and produce an environmental impact statement or environmental assessment in connection with any proposed regulations to implement the new law.