Judicial Strategy

"Why doesn't the NRA just appeal some of these stupid gun control laws to the Supreme Court?" NRA members sometimes ask me. This is a legitimate question. If the Second Amendment is so clear, why doesn't our side just go to court, and get a clear-cut answer?

The first problem is that the U.S. Supreme Court is *not* required to hear every appeal. While the Supreme Court *must* hear certain types of cases, most appeals from the lower courts are heard at their discretion. Generally, if two different circuits of the U.S. Court of Appeals have come to differing opinions about some important point (a "circuit split"), the Supreme Court will "grant certiorari," and hear the case.[1]

For this reason, when lawyers are filing suits in the courts, they may decide not to appeal a bad decision by, say, the 9th Circuit Court of Appeals, but instead go ahead and pursue an appeal to the 5th Circuit Court of Appeals. If this causes a circuit split, there is a real chance of having the Supreme Court hear the case. Without a circuit split, the Supreme Court doesn't have to hear the case, and usually they won't.

Another reason why our side sometimes declines to appeal a decision to the Supreme Court is that a particular suit asks the right question in the wrong order. While state supreme courts have pretty consistently ruled that the Second Amendment protects an individual right, the federal courts have ruled many different ways on this question.

A few federal decisions have recognized an individual right, safe from both federal and state infringement. A few federal courts have held that the Second Amendment protects an

individual right only from federal infringement (states can pass whatever laws they want). Several federal court decisions (all of them in the last 60 years) have claimed that the Second Amendment protects only a right of the states – not of individuals.[2]

The first step towards resolving this mess is getting a clear-cut decision from the Supreme Court that the Second Amendment protects an individual right from *federal* infringement. *USA* v. *Emerson* (N.D.Texas 1999), currently on appeal before the 5th Circuit Court of Appeals, might be such a case.

The second step is to get a Supreme Court decision defining the limits of that right: the right to own? The right to purchase? The right to carry? Are certain "arms" outside that protection?

The third step is to persuade the Supreme Court that the Second Amendment is a limitation on the states as well. This would be a perfectly sensible decision, considering the recent scholarly work done on this matter.[3]

If you ask the Supreme Court to rule against a state or local gun control law before the Supreme Court has given a clear-cut statement that the Second Amendment protects an individual right, they may rule against us. Later decisions will misquote such a precedent to "prove" that there is no individual right there at all, and we won't get our day in court. On the other hand, if the Supreme Court rules against a *federal* gun control law on Second

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[1] H.W. Perry, "Certiorari, Writ of," *The Oxford Companion to the Supreme Court of the United States*, Kermit L. Hall, ed. (New York: Oxford University Press, 1992), 131-132.

[2] See Clayton E. Cramer, *For the Defense of Themselves and the State: The Original Intent and Judicial Interpretation of the Right to Keep and Bear Arms* (Westport, Conn.: Praeger Press, 1994) for an overview of this subject.

[3] Stephen P. Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876* (Westport, Conn.: Praeger Press, 1998).

Amendment grounds, we have a stronger position from which to challenge state or local gun control laws later. The right sequence is everything in this game.

Finally, remember that while judges are supposed to set aside their own private beliefs, and decide questions strictly based on law and justice, as often as not, it doesn't work out that way. From my reading of decisions dating back a couple of centuries, judges often hear a case, come up with the result that they want, then look for precedents to justify that result. For this reason, it isn't enough to have history, law, and logic on your side when you challenge a law on constitutional grounds. You really want a case where someone that the judge sympathizes with will go to prison if the court upholds a restrictive gun control law.

From my reading of the gun control decisions in American history, this is one of the reasons that so many decisions hostile to gun rights have been handed down by the courts: the criminal justice system has traditionally given a break to people who broke a gun control law, but were otherwise decent people trying to defend themselves. The people who were convicted, and who therefore appealed their cases up through the courts, were often criminals or otherwise despised sorts. (Throughout most of American history, blacks were "despised sorts," and hence the willingness of courts to uphold racist gun control laws.)

I have one thought for those of you who are impatient, and wonder why our side doesn't "force an appeal on the way to the U.S. Supreme Court" to strike down every annoying but minor gun control law passed in this country. Winning in the courts is a lot like winning a battle: direct frontal assaults often fail; the right battle plan is far more effective.

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