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## **Second Amendment Lawsuits Expose Rift At The Top Of Gun Rights Movement**

By: [Christina Wilkie](#) - February 25, 2013

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WASHINGTON -- In the insular world of gun rights groups, Alan Gottlieb is a man on the make. Over the past five years, his Bellevue, Wash.-based nonprofit, the Second Amendment Foundation (SAF), has raced to expand gun rights, building on one of the most significant court rulings in decades. Now, Gottlieb is hoping to open the legal floodgates by litigating dozens of cases nationwide.

The December shooting at Sandy Hook Elementary School in Newtown, Conn., galvanized the public in support of gun control measures, but so far, the national conversation has revolved almost entirely around legislation. Many of the most significant changes to U.S. firearms law today are happening not in Congress, however, but in the courts.

Much of the SAF's reputation in the courtroom can be attributed to a Northern Virginia-based litigator, Alan Gura, who is best known for successfully arguing *District of Columbia v. Heller* before the Supreme Court. That landmark 2008 decision held that the Second Amendment protects the right of the individual, not just the state militia, to possess a gun.

Gura and Gottlieb teamed up after the *Heller* victory and filed more than 40 lawsuits, quickly establishing the SAF as a prolific player in Second Amendment litigation. In 2010, the duo scored a major win with a case they had initiated, *McDonald v. Chicago*, which extended the *Heller* decision to cover the states. In doing so, the Supreme Court overturned the Windy City's handgun ban, on the books for 28 years.

While the political world obsesses over the legislative muscle of the National Rifle Association, the outcome of the SAF's lawsuits could have an even larger impact on the future of Second Amendment rights -- affecting everything from concealed carry laws, to background checks, to the liability that the firearms industry could face if their products cause harm.

Not everyone in the gun rights movement is thrilled about Gura and the SAF's recent flurry of lawsuits. Depending upon whom you ask, the SAF is either a brave defender of the Second Amendment or a sketchy upstart with the potential to significantly damage gun rights in the long term.

"If the Second Amendment Foundation makes a mistake at this stage, it can stymie protections for gun owners for years to come," said Adam Winkler, a professor of constitutional law at the University of California, Los Angeles, and author of *Gunfight: The Battle Over the Right to Bear Arms in America*. "That's why it's important to be strategic about your cases, and I think they are certainly being strategic -- I'm just not sure it's always the right strategy."

Because court cases can set long-lasting legal precedent, advocacy organizations are often careful about which cases they pursue, lest they risk unfavorable rulings that harm their cause. "The typical strategy for any savvy advocacy group would be to say, 'What are the most appealing cases that we have the best chance of winning, and where do we have the best chances of winning them?'" said Carl Bogus, a constitutional law expert and professor of law at Roger Williams University.

In the wake of the *Heller* decision, the NRA pursued a strategy of expanding gun rights gradually. "This makes sense, because many courts are reluctant to offer broad constitutional rulings with regard to individual rights," said Richard Broughton, a professor of law at the University of Detroit and a former Justice Department prosecutor. "The NRA takes on specific issues, and they're not going for broad Second Amendment rulings. Instead, they're asking the courts to narrowly interpret gun regulations and working to win smaller victories they can build on."

Ken Klukowski, a constitutional law professor at Liberty University and former NRA staffer, agrees. "The NRA takes the long view. They are extraordinary minds for the long ball and the big picture," he said.

#### 'STRIKE WHILE THE IRON IS HOT'

The NRA offered a textbook display of its methods last week, when it announced it was considering a lawsuit against the Illinois State Police over a backlog in the processing of gun permit applications.

Reached for comment, a spokesman said that the NRA's litigation strategy "is designed to defend the fundamental constitutional right of our over 4.5 million members and tens of millions of supporters."

By contrast, the SAF's strategy has been offensive, swinging for the fences and often making very broad constitutional arguments. "Our feeling is strike while the iron is hot and build as much case law as you can," Gottlieb said in an interview with *The Huffington Post*. "Then weave [the case law] into a spider web that's strong enough so our opponents can't get through it."

Gottlieb makes no secret of his desire to push more gun rights cases before the Supreme Court as quickly as possible or his plan to file lawsuits across the country in the hopes that two federal appeals courts will issue conflicting rulings. Such a division in the lower circuit courts greatly increases the odds that the Supreme Court will decide to hear a particular case, in order to settle the issue.

"We've gone out to plant the seed in all the various circuits," Gottlieb said. "Maybe we'll get a good Supreme Court decision, but we're also going for as many good lower court rulings, 10 or 20, as we can get."

The SAF has won big on occasion -- such as a 2011 case, *Ezell v. Chicago*, in which the U.S. Court of Appeals for the 7th Circuit struck down the city's ban on firing ranges and set an important precedent on how to interpret the Second Amendment. But Gura and the SAF have also run the risk of losing big.

A recent SAF case, *Schrader v. Holder*, is a good example. In it, Gura and the SAF sued the federal government on behalf of a Maryland man seeking to reinstate his gun rights, 40 years after he was convicted of a common-law misdemeanor which at the time rendered him ineligible to own a gun. Instead of arguing that his client was an upstanding citizen whose only crime (punching someone in a fight) took place four decades ago, Gura's case was far broader. He claimed that the Maryland law violated not only his client's Second Amendment rights, but also the rights of everyone who had ever been rendered ineligible to own a firearm because of a common-law misdemeanor.

The D.C. Circuit rejected Gura's argument, and the judge writing the opinion issued a scathing decision in which he said that if Gura had simply focused on reinstating his client's gun rights, they would likely have agreed with him.

"It's the luck of the draw in the judges," said Gottlieb, adding, "That's true in a lot of these cases. But I think the ruling is stupid, and I'm 100 percent confident we're going to win [in the end]. In fact, that's going to be one of our easier wins."

The SAF is also being more aggressive than the NRA about which cases it takes on. As of mid-February, the SAF was a party to at least 18 gun rights cases pending in trial and appellate courts, while the NRA was a party in just nine open cases. This is remarkable, considering that the SAF's total operating budget was \$4 million in 2010 (the most recent year for which figures are available), an amount that pales in comparison to the NRA's \$243 million budget that year.

Gottlieb insisted the SAF has the resources it needs to fight this many cases and said the group reinvests any legal fees it wins into more litigation. "Right now, we have about 10 attorneys working on our cases, and we're paying them all," he said.

But according to professor Winkler, "there's an element of SAF's strategy that's 'spaghetti on the wall,' in that they're filing too many lawsuits, and in a lot of these cases they're getting bad results."

The SAF's blueprint for litigation is "overly aggressive and potentially reckless," said Klukowski, the former NRA staffer who emphasized that he does not speak on behalf of the NRA. In the long run, he said, "the SAF endangers the Second Amendment by going out on a limb and going into tangents and overdriving its headlights."

"If you want to say we're pushing the envelope on these things, then yeah, we are," said Gottlieb. "But we're doing it in a way that we're confident we're going to be able to win."

Prior to the 2008 *Heller* decision, the NRA's Civil Rights Defense Fund was the only major player in U.S. gun litigation, with a multimillion-dollar budget and a team of top-flight lawyers ready to assist promising cases as they moved up through appellate courts.

Litigation was never the NRA's top priority, however, and it still isn't. Every year, the NRA pours tens of millions of dollars more into elections and influencing legislation at state and federal levels than it does into fighting court cases. Whereas the SAF has made a name for itself since

Heller by proactively attacking gun regulations in court, the NRA has focused on preventing the passage of gun control laws in the first place.

For the NRA, litigation is only one piece of an overall plan, Klukowski explained, one in which "legislative efforts, administrative efforts, grassroots communication, and participation in the electoral process all operate in tandem [with litigation], to create a synergistic effect." The architect of the plan, he said, was Wayne LaPierre, the NRA's fiery CEO. To many on both sides of the gun debate, LaPierre embodies the NRA's unique blend of savvy political skills and zealous opposition to gun regulations.

To hear Alan Gura tell it, however, the NRA's focus on lobbying elected officials has undermined its litigation efforts. "There is a failure [by the NRA] to understand that litigation is not lobbying, and it's not politics by another name," Gura said in a 2010 speech. He said that the SAF had succeeded in court where the NRA had failed and accused the latter group of using the victory in the McDonald case as "a fundraising gimmick" and of "trying to take some of the credit."

In fact, both the SAF, in the person of Alan Gura, and the NRA, in the person of Paul Clement -- the NRA's longtime appellate lawyer, a man widely recognized on both sides of the debate as one of the best in the business -- argued elements of the winning McDonald case before the Supreme Court.

"Gura's argument would be fine, except that it's contradicted by reality," said Klukowski, who called Gura's comments about the NRA's emphasis on lobbying "the preposterous bloviating of an insufferable narcissist."

"Paul Clement is not a lobbyist," Klukowski added. "It's true that the NRA's top management are career lobbyists ... [but] they are also showing tremendous wisdom, realizing that they are lobbyists [and] retaining the best Supreme Court litigators in the country to represent the NRA's legal issues."

Gura did not respond to requests for comment.

#### 'THE NEXT GREAT BATTLE'

Tensions between the NRA and Alan Gura date back to 2002, just as the case that would eventually become *D.C. v. Heller* was getting under way. In his book, Winkler describes how the NRA, hewing to its policy of avoiding risky litigation, made it clear to Gura and to Bob Levy, a senior fellow at the libertarian Cato Institute who financed the Heller case, that it did not support their plan.

From the NRA's perspective, there were not enough reliable votes among the nine justices back then supporting an individual's right to bear arms. "In that scenario, why would you take the risk of losing the Second Amendment case at the Supreme Court?" Klukowski asked. "Why wouldn't you keep working towards a day when there were five reliably conservative votes on the court?"

When Gura finally prevailed six years later in a 5-4 decision, two of those votes came from newly appointed conservative justices. Still, the relationship between Gura and the NRA never recovered.

Klukowski said he believes the Heller and McDonald rulings mark the beginning of what could be decades of intense litigation over the scope of gun rights in America. "Whether the Second Amendment blossoms into something with the force and the scope of the First Amendment -- or becomes a very narrow civil right without much practical significance -- that entirely remains to be seen," he said.

Either way, legal scholars agree that the next big gun case before the Supreme Court is likely to address the right to carry firearms in public, an issue that the high court has yet to rule on.

"They've said you can have a gun, and you can have a gun in your home," Winkler said of the court's rulings to date, "so the logical next step is to see where else you can have one."

"The next great battle in the war over the Second Amendment is going to be who gets to argue concealed carry rights," Winkler said. "Getting that case to the Supreme Court is going to be huge."

This past Friday, the circuit courts teed up the issue for the justices by creating a split: The full 7th Circuit declined to preserve an Illinois law barring concealed carry, while the 10th Circuit declared concealed-carry bans to be constitutional. The Second Amendment Foundation is involved in both disputes.