



Mass shootings could prompt Supreme Court to sidestep cases seeking to expand Second Amendment rights

Richard Wolf

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Last weekend's mass shootings in Texas and Ohio may prompt the Supreme Court to delay hearing cases that could expand Second Amendment rights, experts on both sides of the nation's gun debate say.

From an obscure New York City case on gun transport rules to laws banning assault weapons and restricting guns in public, the court has several opportunities to expand firearms rights. That has made the upcoming 2019 term a potential good one for gun rights groups.

But the court under Chief Justice John Roberts has been reluctant to get involved in controversial issues, particularly when the political branches of government appear mobilized to act. With the White House and Congress debating background checks, mental health reforms and other proposals, now may be such a time.

"When the stakes are that high, the court might want to be cautious," said Jonathan Taylor, an appellate lawyer who represents the gun control group Everytown for Gun Safety.

Proponents of gun rights say the shootings that claimed 31 lives in El Paso and Dayton should not stop the justices from taking up their cause, but they admit the timing doesn't help.

The court "might not want to take any kind of Second Amendment case, because the country's in shock," said Stephen Halbrook, a senior fellow at the Independent Institute who has represented the National Rifle Association.

Since establishing a national right to possess guns at home for self defense in 2008 and extending it to the states in 2010, the Supreme Court has refused to re-enter the debate. In the meantime, most lower courts have upheld state and local restrictions on gun ownership.

The high court has let stand Chicago's semiautomatic weapons ban and a variety of prohibitions against carrying guns in public, from New Jersey to California. It has refused to second-guess age limits for carrying guns in Texas and requirements for disabling or locking up guns when not in use in San Francisco.

New York City's ban against transporting legally owned guns outside city limits appeared to go too far, at least for some justices. They agreed in January to hear a challenge mounted by gun rights groups, but since then the rules were eased in an effort by gun control groups to get the case dismissed.

Some experts on the Second Amendment said the court might decide to hear the case anyway, since a decision limited to New York would not upset the delicate balance between national gun rights and local restrictions.

"They've found this law that enabled them to weigh in, but in a context where there will be substantively almost no impact," said Clark Neily, vice president for criminal justice at the libertarian Cato Institute.

Carrying guns in public

But the weekend's shootings could provide new reasons for declaring the case moot. If so, other cases mounted by gun rights groups are waiting in the wings.

Tops among them is a challenge to New Jersey's law requiring gun owners to prove their need to carry firearms in public. A similar challenge is pending to public carry rules in Boston and Brookline, Mass.

Several states, including California and New York, have such requirements, and lower courts generally have upheld them under the Supreme Court's Second Amendment precedents. But the U.S. Court of Appeals for the District of Columbia struck down Washington, D.C.'s restrictions in 2017, creating a split among federal appeals courts.

Halbrook said the Supreme Court should hear a challenge to public carry restrictions, even in the wake of the recent shootings.

"We're talking about people who are indisputably law-abiding," he said. "There's an argument that it would be good to have law-abiding citizens with arms."

Also pending at the Supreme Court are cases challenging a federal ban on interstate handgun sales and California's ban on handguns that don't meet the state's design requirements.

"There's a huge range of cases and a tremendous amount of pressure from at least some of the conservative justices for the Supreme Court to get back in this game," said Adam Skaggs, chief counsel at the Giffords Law Center to Prevent Gun Violence.

It's far less likely that the high court will enter the debate over bans on assault weapons, such as those used in most mass shootings. Lower courts from Massachusetts to California have upheld such bans.

"Disenfranchising the American people on this life and death subject would be the gravest and most serious of steps," conservative federal appeals court Judge J. Harvie Wilkinson said in a 2017 Maryland case. "It is their community, not ours. It is their safety, not ours. It is their lives, not ours."

Another long shot stems from a lawsuit brought by families of nine victims of the 2012 Sandy Hook Elementary School shooting that killed 26 students and staff. They claim Remington Arms Co. is partly responsible for the deaths despite a federal law intended to shield manufacturers, and the Connecticut Supreme Court allowed the case to go forward. Remington has asked the high court to step in.

Chief justice is the key

Whether the Supreme Court keeps or kicks out the New York City case – and whether it agrees to hear any other case in the near future – likely depends on Roberts. He has become the court's swing vote following Associate Justice Anthony Kennedy's retirement last year.

The court's other conservatives are less circumspect. The last time the court refused to consider a restriction on carrying guns in public, Associate Justice Clarence Thomas wrote that it was "extremely improbable that the Framers understood the Second Amendment to protect little more than carrying a gun from the bedroom to the kitchen." He was joined by Associate Justice Neil Gorsuch.

When the court reversed a Massachusetts court that had upheld a ban on stun guns, Associate Justice Samuel Alito added that unless the Second Amendment applies outside the home, "then the safety of all Americans is left to the mercy of state authorities who may be more concerned about disarming the people than about keeping them safe."

Associate Justice Brett Kavanaugh's addition to the court in October bolstered the conservative majority. As a federal appeals court judge, he dissented in 2011 from a decision upholding the District of Columbia's ban on semi-automatic rifles, insisting that courts should assess such regulations based solely on "text, history and tradition."

With four liberal justices on the other side, Roberts is the man in the middle. It only takes four votes to put a case on the docket for oral argument, but his conservative colleagues would need his vote to expand gun rights. Last weekend's mayhem now presents a potential roadblock.

"The court should always consider the reality of the gun violence epidemic when it decides whether to deprive Americans of their right to enact strong public safety laws," said Jonathan Lowy, chief counsel for Brady, the gun control group named after former White House press secretary Jim Brady. "Judges should be cognizant of the real-world effects of their decisions."