



Gun Control Groups Voice 'Grave Concerns' About Supreme Court Nominee's Record

October 9, 2020

Carrie Johnson

President Trump's nominee to the Supreme Court says she shares the outlook of her mentor, the late Justice Antonin Scalia. But on the issue of the Second Amendment, Amy Coney Barrett seems to have staked out an even more conservative position.

That's got gun control advocates warning that big changes could be on the way if Barrett gets confirmed.

In 2008, the Supreme Court ruled people have a right to keep handguns at home to defend themselves. Since that time, the high court has mostly avoided taking on new gun cases, refusing to hear 10 such lawsuits in June alone.

"The Supreme Court has been derelict in not fleshing out the scope of the Second Amendment right to keep and bear arms," said Ilya Shapiro, who publishes the *Supreme Court Review* at the libertarian Cato Institute.

But if Barrett wins Senate confirmation, the court's approach to the Second Amendment could be in for a big shift.

Kris Brown, president of Brady United Against Gun Violence, said she has "grave concerns" about that prospect.

"There's a whole host of public safety bills and laws that we've had in effect for a quarter century, including the Brady background check system, that we are concerned about with her on the court," Brown said.

Brown isn't just speculating.

In 2019, in a case before the U.S. Court of Appeals for the 7th Circuit, Judge Barrett laid out her thinking about gun rights. UCLA law professor Adam Winkler, who wrote a book about Second Amendment jurisprudence called *Gunfight: The Battle Over the Right to Bear Arms in America*, took note.

"The opinion is very revelatory," Winkler said. "It really shows that she has a very expansive view of gun rights, likely one even broader than Justice Antonin Scalia."

Scalia wrote the majority opinion in the big Second Amendment case, *District of Columbia v Heller*, back in 2008. But Scalia made clear that nothing in the decision should cast doubt on longstanding limits to protect public safety, like the ban on convicted felons possessing firearms.

Eleven years later, in 2019, his protege Judge Barrett wrote that blanket ban violated the Second Amendment.

The 7th circuit case, *Kanter v Barr*, involved a man convicted of one count of mail fraud. Rickey Kanter, who ran a company called Dr. Comfort, served his time and wanted his gun rights back. The court majority rejected the idea. But Judge Barrett produced a 37-page dissent tracing the history of the Second Amendment and the history of punishing convicted felons.

In essence, Barrett concluded that historical precedent led to the conclusion that only people convicted of dangerous felonies should lose their right to keep and bear arms. The judge left open the possibility that others convicted of misdemeanor charges — on, for instance, domestic violence — should lose their gun rights for some time.

"In sum, founding-era legislatures categorically disarmed groups whom they judged to be a threat to the public safety," Barrett wrote. "But neither the convention proposals nor historical practice supports a legislative power to categorically disarm felons because of their status as felons."

Shapiro, of the Cato Institute, weighed in on behalf of the plaintiff, who made orthopedic shoes and inserts that he falsely represented had been approved by Medicare.

"Misrepresenting shoe inserts shouldn't disqualify him from being able to carry a firearm for his own self-defense or Martha Stewart with her obstruction of justice, or someone convicted of insider trading. These are not what the enactors of the Second Amendment or the 14th Amendment had in mind when they understood what kinds of restrictions could be in place on this important right," Shapiro said.

But scores of federal judges have upheld that blanket ban for people convicted of felonies, after balancing the Second Amendment against public safety. UCLA's Winkler said he agrees that a categorical ban on felons is "over-inclusive," but he diverges when it comes to Barrett's line of reasoning.

He said her originalist approach to the Second Amendment could throw into question a lot of newer laws on the books, from prohibitions on machine guns to so-called red flag laws in at least 20 states that allow authorities or relatives to ask for court permission to remove weapons from people who represent a danger to themselves or others.

"We only started banning machine guns from civilian hands in the 1980s," Winkler said. "Does that mean that there's a constitutional right to have machine guns because there's no strong historical precedent for banning those weapons?"

The Supreme Court has ducked most big gun cases, in part because the more conservative wing of the court wasn't sure where Chief Justice John Roberts, who often cast the swing vote, stood.

But if President Trump gets his way, experts on both sides of the political aisle agree: Justice Barrett could easily provide a fourth vote to agree to hear more gun cases and a fifth vote to ease some restrictions on gun rights.

Brown said an overwhelming percentage of Americans support the existing background check system for firearms purchases, which has stopped more than 3 million people from buying guns.

"Most Americans really do know that the background check system stops felons from getting guns," she said. "Congress has known that too since 1968. If they wanted to make a change, they would. ... That really is the root of what's at risk here."