

# Roll Call



## With Kavanaugh, Court Could Take Aim at Gun Control Laws

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In February, less than a week after a gunman opened fire and killed 17 students and staff in a Parkland, Florida, high school, Supreme Court Justice Clarence Thomas complained that the court was allowing too many gun control laws to go into effect across the nation.

For the past eight years, the high court has avoided major cases addressing the extent to which Congress or state lawmakers can pass laws that restrict firearms — and Thomas and other conservative justices have noted their objections. This time, it was a challenge to a California law that required an average person to wait 10 days after buying a gun to get it.

“The right to keep and bear arms is apparently this Court’s constitutional orphan,” Thomas wrote in a dissent. “And the lower courts seem to have gotten the message.”

But Thomas and the conservative wing of the Supreme Court could take aim at such laws if the Senate confirms President Donald Trump’s pick of Judge Brett Kavanaugh, whose history on the bench suggests he could press the court to jump back into the incendiary national debate over gun control laws.

The court has passed on opportunities since 2010 to hear challenges to laws that ban semi-automatic rifles, limit the number of bullets a magazine can hold, clamp down on who can get a concealed carry permit, institute waiting periods for firearm purchases, and more.

In the meantime, states and municipalities have passed those types of laws amid rising concern about mass shootings at schools and other public events that prompted nationwide protests and a flurry of proposed legislation on Capitol Hill. Trump, during the campaign, said the country needed a Supreme Court that would uphold the Second Amendment, “which is under absolute siege.”

It takes four votes for the Supreme Court to agree to hear a case. But that hasn’t happened, even though there have been five conservative justices on the bench. The why remains concealed inside the walls of the justices’ private meetings, since the court process doesn’t detail each vote or require each justice to explain their reasoning.

“We can only surmise the court doesn’t want to wade back into that aspect of the culture wars,” said Clark Neily, vice president for criminal justice at the libertarian Cato Institute, who represented gun owners in a landmark Supreme Court ruling in 2008.

Democrats such as Sen. Christopher S. Murphy of Connecticut and groups advocating gun control laws say Kavanaugh's appointment to replace retiring Justice Anthony M. Kennedy could make the difference and give the court the fourth vote to take the cases and strike down gun control laws.

"I worry Kavanaugh will be influential," Murphy said. "I think there's a developing expectation that right-wing judges invalidate any and all restrictions on the Second Amendment. I worry he will pull the court to a place where no state or municipality can exercise any oversight on gun laws."

While the chances of new federal gun restrictions are low in a political environment with Republicans currently in charge, Kavanaugh would be expected to serve decades on the Supreme Court.

Democratic lawmakers back measures such as banning assault-style weapons, implementing waiting periods on gun purchases, requiring criminal background checks on all firearm sales at gun shows, and banning bump stocks and similar devices that speed up a gun's rate of fire.

The issue will be among the controversial topics Kavanaugh is grilled about during confirmation hearings expected in late August or early September, although it could be overshadowed politically by Democratic concerns about health care and access to abortion.

"Judge Kavanaugh must tell the American public whether he will protect their most important right — the right to be safe from gun violence — or whether he will cater to the gun lobby's agenda to let virtually anyone carry any gun, anytime, anywhere," Jonathan Lowy, vice president of litigation at the Brady Campaign and Center to Prevent Gun Violence, says.

#### Counting votes

Three of the court's conservative justices — Thomas, Samuel A. Alito Jr. and Neil Gorsuch — have already expressed their views that the court should take up some of these Second Amendment cases. But they have apparently come up one vote short.

Kennedy was not soft on gun rights — he was in the majority on the 5-4 cases in 2008 and 2010 that found an individual right to possess a firearm at home for self-defense. But there might have been questions about how he would rule in other gun cases because he was also known to sometimes join the liberal wing of the court on big social issues such as access to abortion and LGBT rights.

"I think it's much more likely that Kavanaugh would be the fourth vote," said Lawrence Friedman, a professor at New England Law in Boston who teaches constitutional law.

Kavanaugh's views appear to align more with Thomas and the Supreme Court's conservatives, based on his writing about gun control laws in a 2011 case. The Supreme Court three years earlier, in *District of Columbia v. Heller*, had struck down a D.C. ban on possession of a handgun.

Kavanaugh was on a panel of the U.S. Court of Appeals for the District of Columbia Circuit that upheld key parts of a new D.C. ban on semi-automatic rifles and limits on the size of magazines, called *Heller II*.

He dissented from the D.C. Circuit's Heller II ruling, writing that the original Heller decision allowed traditional and commonsense gun controls. But he did not think D.C.'s law followed what the Supreme Court ruled in Heller, a view that aligns with what Thomas and Alito have written about other appeals court rulings nationwide.

Kavanaugh wrote it "would strain logic and common sense" that the Second Amendment would allow semi-automatic handguns but not semi-automatic rifles, which have "not traditionally been banned and are in common use today, and are thus protected under Heller."

Based on the record in the case, Kavanaugh also would not have upheld the magazine ban. And he said the majority did not sufficiently account for the use of rifles by hunters. He found a problem with D.C.'s gun registration requirement, but also suggested that gun owner licensing could advance public safety.

Power to the chief

But there is a different question facing justices about what the Supreme Court does as an institution to avoid seeming too political or reaching beyond its role in the government by taking sides in heated policy debates such as gun control. And that would lead to some gamesmanship behind the scenes, legal experts say.

It might take four votes to take a case, but the conservative justices would need five votes to strike down gun laws. That would put Chief Justice John G. Roberts Jr. in a much more pivotal role when it comes to deciding whether to take the case.

"In theory, [Kavanaugh] could be the fourth vote" to take the case, said David Kopel, an adjunct professor of advanced constitutional law at the University of Denver, who was co-counsel for challengers in the Heller case. But it would be "foolish" to do so "when you get four and you don't have a path to five on the merits."

Roberts was in the majority in the 2008 Heller case, but as chief justice and a potential swing vote on gun control issues, he could choose which side wins and assign himself to author the opinion, Friedman said. And his job is different from the other justices, because it includes weighing whether to spend the court's institutional capital on gun cases.

Roberts "has an obligation to think about every day the legitimacy of the court in the eyes of the public and how to protect that," Friedman said.

Kopel believes the types of gun-control cases that have the best chance of getting Roberts on board and getting the other four are also going to be laws that are "serious outliers." He cited a California law, currently caught up in a court fight, that requires semi-automatic handguns to automatically stamp each shell casing with identifying marks when they fire. Gun advocates say such a thing is impossible under current technology.

Murphy, who has taken a lead role since the Sandy Hook Elementary School shooting in his home state in 2012 that killed 20 children and six adults, predicts a court that follows a conservative legal theory disallowing any restrictions on gun ownership not present when the Second Amendment was written.

"I can see there being five votes to overturn a host of commonsense, popular restrictions on felons owning guns and restrictions on types of weapons," Murphy said. "I think this court could

invalidate background checks. I don't think it's out of the realm of possibility that's what Kavanaugh believes and he would push the court in that direction."

The Supreme Court will almost certainly face more cases about gun control. But Kavanaugh's dissent from 2011 also has signs he might act differently if he's on the nation's top court — and not only because the past seven years brought numerous mass shootings.

Kavanaugh in 2011 wrote about how he was aware of the gun, drug and gang violence in D.C., where he grew up, and how public safety is an important objective of government.

His decision in the case was to apply the Heller decision "regardless of whether the result is one we agree with as a matter of first principles or policy," Kavanaugh wrote.

"So my view on how to analyze the constitutional question here under the relevant Supreme Court precedents is not to say that I think certain gun registration laws or laws regulating semi-automatic guns are necessarily a bad idea as a matter of policy."