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## Judicial Review: Good and Bad

What is judicial review? It is when the courts decide whether a law is constitutional or not. Throughout much of American history, judicial review has worked to the advantage of gun owners, because city councils, state legislatures, and Congress have so often ignored the state and federal constitutional guarantees of the right to keep and bear arms. If we couldn't win through democracy, we at least had the chance to win in the courts.

You may be wondering, "Victories in the courts? When?" The first of them was *Bliss* v. *Commonwealth* (Ky. 1822), in which the Kentucky Supreme Court struck down a ban on concealed carrying of deadly weapons. The Kentucky Constitution's right to keep and bear arms provision didn't make any distinction between open and concealed carry—and so concealed carry was constitutionally protected.[1] Another example is in 1846, when the Georgia Supreme Court struck down a ban on sales of concealable handguns. Such a law was contrary to the Second Amendment, and so it could not stand.[2] Many of these victories are quite recent, such as a 1971 case in which the New Mexico Court of Appeals struck down a city ordinance banning open carry of guns.[3]

The most astonishing recent victory comes from the U.S. Ninth Circuit Court of Appeals. Robin Wilson Stewart, Jr. was selling parts for manufacturing Maadi-Griffin .50 rifles. Because the receivers were not complete, he believed that he could sell these

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[1] *Bliss* v. *Commonwealth*, 2 Litt. 90, 13 Am. Dec. 251 (Ky. 1822).
[2] *Nunn* v. *State*, 1 Ga. 243 (Ga. 1846).
[3] *City of Las Vegas* v. *Moberg*, 82 N.M. 626 (N.M. App. 1971).

kits lawfully without an FFL. Because Stewart had a previous conviction for unlawful possession and transfer of a machine gun, BATF decided to investigate.

A BATF agent purchased one of these kits, and decided that it could be readily converted into a firearm. Based on this, he obtained a search warrant for Stewart's home. During the search, BATF found five machine guns that Stewart had manufactured. He was charged with unlawful manufacture and possession, and convicted.

Stewart's argument on appeal was that his Second Amendment rights were being violated, and furthermore, that the federal government lacked authority to regulate home manufacture of machine guns. The Ninth Circuit Court of Appeals disagreed concerning the Second Amendment—but agreed that the federal government lacked authority to prohibit home machine gun manufacturing![4]

Judge Kozinski's opinion threw out Stewart's claim about the Second Amendment because the Ninth Circuit decided last year that the Second Amendment does *not* protect an individual right. In that decision, *Silveira* v. *Lockyer* (9th Cir. 2002), Judge Kozinski wrote a very able and passionate dissent, in which he argued that the Second Amendment *does* protect an individual right to keep and bear arms. (Kozinski was born in Romania,[5] and has a bit more experience with totalitarian states than most other judges. Romania, after all, licensed *typewriters*—and such licenses were often refused.)[6]

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[4] *USA* v. *Stewart*, No. 02-10318 (9th Cir. 2003), http://caselaw.lp.findlaw.com/data2/circs/9th/0210318p.pdf, last accessed November 16, 2003.

[5] "Judges of the United States Courts," Federal Judicial Center, http://www.fjc.gov/servlet/tGetInfo?jid=1314, last accessed November 16, 2003.

[6] "Romania," *MSN Encarta*, http://uk.encarta.msn.com/text_761559516__1/Romania.html, last accessed November 16, 2003.

Unfortunately, the rules of the Ninth Circuit are that once the Ninth Circuit has spoken, all judges in that circuit are required to follow those decisions.[7] The Supreme Court may yet hear *Silveira* v. *Lockyer* this term—and if they do gun owners will either get a big win, or more likely, a loss that will cripple the right to keep and bear arms for a generation or more.

Since Kozinski couldn't decide this case based on the Second Amendment, how did he decide that the federal government didn't have authority to prohibit homemade machine guns? The federal laws about machine guns have always been based on the Constitution's grant of power to the federal government to regulate interstate commerce.[8]

Back in 1934, when Congress was debating passage of the National Firearms Act to regulate machine guns, Attorney General Homer S. Cummings and Assistant Attorney General Joseph B. Keenan testified before Congress in favor of this law. Both of them agreed that, as much as they might like it to be otherwise, the federal government could not prohibit machine gun ownership or manufacturing. The federal government could *tax* machine gun sales and transfers, but could not prohibit manufacturing.[9] Congressman Sumners suggested that because the authority of the Federal Government only extended to collecting of revenue, therefore it must be "possible at least in theory for these things to move in order to get internal revenue?" and Attorney General Cummings agreed—only

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[7] Professor Eugene Volokh, "U.S. Court of Appeals panels and precedent," http://volokh.com/2003_11_09_volokh_archive.html#106882823906020319, last accessed November 16, 2003.

[8] U.S. Const., Art. I, § 8.

[9] *National Firearms Act*, "Hearings Before The House Committee on Ways and Means", 73rd Cong. 2d Sess., (1934), 6, 15-16, 18-19, 22, 100-1.

if machine guns were actually or potentially moving in interstate commerce could the government tax them.[10]

So, if you manufacture a machine gun in your own home, and don't sell it or transfer it, have you engaged in interstate commerce? No. Does your manufacturing of it have any effect on interstate commerce? Well, maybe, maybe not. Back in 1942, the U.S. Supreme Court decided that a farmer who grew his own wheat, ground it into flour, and baked it into bread, for his own consumption, was engaged in interstate commerce, and thus subject to regulation of the amount of wheat he grew. Why? Because by making his own bread, this farmer—and thousands of others like him—were reducing demand for bread sold in interstate commerce.[11] Try not to laugh—this was the height of judicial enthusiasm for government regulation of the economy, and the Supreme Court has been backing away from this idea for the last few years.

Now, just because the Ninth Circuit Court of Appeals has decided that you have the right to make your own machine gun, don't go out to the garage and start up your milling machine. This decision currently applies only to those of us who live in the U.S. Ninth Circuit. The federal government is almost certainly going to appeal the *Stewart* decision to the Supreme Court, and because *Stewart* relies on a somewhat similar decision that ruled that the federal government may not prohibit homemade child pornography,[12] we might well see the U.S. Supreme Court overrule this decision. Furthermore, many states have their own machine gun laws, which are not affected by this ruling.

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[10] *National Firearms Act*, 13-14.
[11] *Wickard* v. *Filburn*, 317 U.S. 111 (1942)
[12] *U.S.* v. *McCoy*, 323 F.3d 1114 (9th Cir. 2003).

Stewart won't be getting out of the slammer anytime soon, however. While in prison on this machine gun charge, he solicited another prisoner (who, I presume, was about to get out) to go murder federal Judge Roslyn Silver who had presided over Stewart's trial. Stewart was convicted on this charge—and he's going to go away for a lot more time than the machine gun charge.[13] The courts tend to be sensitive about soliciting murder of federal judges, for some reason.

This was a victory, of sorts, for gun owners, because it recognized that there are *some* limits to federal authority over gun ownership. It is conceivable that other appellate circuits will next decide whether the 1986 ban on new machine gun manufacture is constitutional. In 1991, a federal court in Illinois struck down a conviction under this law based on the evidence that Congress knew in 1934 that they lacked the authority to ban machine gun manufacturing. The federal government chose not to appeal this case because they knew that they would probably lose again. If an appeals court had ruled on this case, the 1986 law would have been binding on that entire circuit.[14]

Judicial review can be our friend—but it can also be an enemy. In the last few years—and especially after 9/11—gun owners have been winning the battle for the hearts and minds of the people and the legislatures. Over the last two years, my column has detailed many of these victories, especially in the area of concealed weapon permit laws. Two months ago, I told you the dramatic story of our victory in Missouri—and now I have to tell that judicial review is now our enemy.

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[13] David Kravets, "Appeals court overturns machine gun conviction," *Sacramento Bee*, November 13, 2003, http://www.sacbee.com/state_wire/story/7776259p-8715132c.html, last accessed November 16, 2003.

[14] *U.S.* v. *Rock Island Armory, Inc.*, 773 F.Supp. 117, 120 (C.D. Ill. 1991).

Missouri has never had a concealed weapon permit system. Concealed carry was prohibited, with a few exceptions for police officers, probation officers, judges, process servers, and the military. More importantly, this prohibition did not apply to anyone while in their own home or business, or while "traveling in a continuous journey peaceably through this state."[15]

Shortly before the new non-discretionary concealed weapon permit system was supposed to take effect, opponents of the new law asked a judge for a temporary injunction to prevent the law taking effect. Their argument? The Missouri Constitution's right to keep and bear arms provision says: "That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; **but this shall not justify the wearing of concealed weapons**."[16] [emphasis added]

What does "shall not justify the wearing of concealed weapons" mean? Nearly all American states have right to keep and bear arms guarantees in them. When laws regulating concealed carrying of weapons first started to appear, those who challenged these laws often argued that their right to keep and bear arms was being denied. In a few cases, the state supreme courts agreed, and struck down these laws. In most states, the state supreme court decided that as long as *open* carry was allowed, *concealed* carry could be prohibited. Just to be sure, a number of states amended their state constitutions

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[15] Missouri Revised Statutes § 571-030, available at http://www.moga.state.mo.us/statutes/C500-599/5710030.HTM, last accessed November 16, 2003.

[16] Missouri Const., Art. I, § 23, available at http://www.moga.state.mo.us/const/A01023.HTM, last accessed November 16, 2003.

to specify that the right to bear arms did not include the right to bear arms *concealed*.[17] The state legislature could ban concealed carry, or license it, or make it completely legal, but no one could insist that they had a *right* to carry concealed.

In the 128 years since Missouri altered their state constitution to clarify that concealed carry is not a right, the Missouri Supreme Court has heard a number of cases where the right to keep and bear arms was under dispute. In cases such as *State* v. *Wilforth* (Mo. 1881) and *State* v. *Shelby* (Mo. 1886), the Missouri Supreme Court ruled that the state was within its authority to ban concealed carry—but said nothing that indicated that they were *required* to ban it.[18]

Exactly on point, however, is *State* v. *Keet* (Mo. 1916). Like the previous decisions, the Missouri Supreme Court ruled that there was no right to carry concealed, and the state was therefore within its authority to ban concealed carry. However: "The provision exempting those who carried a weapon in self-defense from the penalty of the law originated in Revised Statutes 1879, § 1275. That provision was expressly repealed by the act of April 28, 1909 (Laws of 1909, p. 452), and has never been re-enacted." Clearly, the Missouri legislature had the authority to allow concealed carry under some conditions, and the *Keet* decision didn't dispute that they had that authority.[19]

Remember when I mentioned a few paragraphs back that Missouri law allows police officer, judges, process servers, and even people passing peaceably through the state to carry concealed? Clearly, the Missouri legislature has the authority to allow

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[17] Generally, 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).

[18] *State* v. *Wilforth*, 74 Mo. 528, 41 Am. Rep. 330 (1881); *State* v. *Shelby*, 90 Mo. 302, 2 S.W. 468 (1886).

concealed carrying of guns under *some* conditions—and the antigunners have never dispute this before. If the Missouri legislature lacks the authority to *license* concealed carry because of that provision in the state constitution, then it lacks the authority to allow concealed carry under all those other circumstances as well.

The evidence is very clear on this—and we have the advantage that not only is NRA paying lawyers to defend this law, but the Missouri Attorney General is doing so as well. Even though Attorney General Jay Nixon opposed the new law, his office has vigorously defended it in court (as the Attorney General is required to do with any state law). Unfortunately, having the facts on our side wasn't enough: Circuit Judge Stephen Ohmer decided that the Missouri Legislature doesn't have the legal authority to allow concealed carry, and made the temporary injunction permanent.[20]

Now, the Missouri Supreme Court will have to decide this. We have some advantages, besides pesky little details like previous rulings of the Missouri Supreme Court. Even the St. Louis *Post-Dispatch*, which vigorously editorialized against the new law, concedes that it is clearly constitutional for the Missouri legislature to pass such a law.[21]

So what happens if the Missouri Supreme Court goes along with Judge Ohmer? It will expose the naked corruption and dishonesty of the justices involved—and demonstrate that the only solution is to remove those justices at the next election. If we

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[19] *State* v. *Keet*, 269 Mo. 206, 190 S.W. 573 (1916).

[20] Tim Bryant, "Judge continues order against concealed guns," St. Louis *Post-Dispatch*, November 7, 2003, available at http://www.stltoday.com/stltoday/news/stories.nsf/News/Missouri+State+News/165132642353BAFA86256DD7006B3E05?OpenDocument&Headline=Judge+continues+ord, last accessed November 16, 2003.

[21] "The road to hell," St. Louis *Post-Dispatch*, November 12, 2003, available at http://www.stltoday.com/stltoday/news/stories.nsf/News/Editorial+%2F+Commentary/E175A5F3F13E4D1486256DDC003CE351?OpenDocument&Headline=CONCE, last accessed November 16, 2003.

win, however, it will cost the antigunners a pile of money. You see, to get the injunction against the law, they were required to post a $250,000 bond to pay for the losses suffered by private parties in the event that the law is ultimately found constitutional.[22] Even for the multimillionaires that fund most antigun activity, that's gotta hurt!

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[22] "'Permanent' Court Injunction Halts Conceal and Carry Permits," Memphis *Democrat*, November 13, 2003, available at http://www.memphisdemocrat.com/2003/news/031113_guns.shtml, last accessed November 16, 2003.