November 15, 2021

Attorney puts on a rebuttal masterclass at high court in Second Amendment case

By Daniel A. Cotter
Daniel A. Cotter is a partner at Howard & Howard Attorneys PLLC and author of the book "The Chief Justices" (Twelve Tables Press). The views expressed here are solely those of the author. He can be reached at scotuslyyours@gmail.com.

The Supreme Court heard its second states secrets case this term last week, a more than two-hour argument that is complex and difficult to understand for those not practicing in the area. It will be interesting to see how the court addresses these questions, and one wonders why the justices did not consolidate the arguments.

Masterful rebuttal

Appellate advocacy is hard, and when in front of the Supreme Court, it is an especially difficult task. Rebuttals can be even more of a challenge. But for Paul Clement, who has argued more cases before the Supreme Court than any other advocate since 2000, his experience often shows. For those aspiring appellate lawyers, I commend to you listening to his rebuttal in the *Bruen* case, dealing with the New York gun law. It is long, but is set out below in its entirety. In a few short minutes, Clement speaks to each of the justices on the court, and points out why he believes the respondent is not correct in their arguments. It is masterful because it demonstrates how a rebuttal can be effective if done right. In his few minutes, Clement spoke without interruption (emphasis added):

"First of all, I want to highlight that when the government was asked for its interest behind this permitting regime, it said that if it went to a different regime, it would multiply the number of firearms in circulation. In a country with the Second Amendment as a fundamental right, simply having more firearms cannot be a problem and can't be a government interest just to put a cap on the — the number of firearms. And that just underscores how completely non-tailored this law is. It might be well tailored to keeping the number of handguns down, but it's not well tailored to identifying people who pose a particular risk or anything else because it deprives a typical New Yorker of their right to carry for self-defense.

"The second point I want to make is just about population density. There's been a lot of discussion about that, but it's very much a double-edged sword because, when there's population density, that's an awful lot of people who all have Second Amendment rights, and so you can't just simply say we're not going to have Second Amendment rights in the areas where there's dense population. And I would say, here, experience does tell you a lot. By my count, seven of the 10 largest cities in America, measured by population, are in shall issue jurisdictions. And I've mentioned them, cities like Phoenix, Chicago, Houston. These are large cities where it hasn't been a problem. If you want to look at the empirical evidence — and *I know, Justice Breyer, you asked about this* — please also look at the English brief on the top side because it's a very rigorous statistical analysis that shows that, as a matter of actually doing statistics right, there's no difference here, and what — the only difference you really see is that people who have a handgun for self-defense end up with a better outcome. They're not shot. They're — they're not made victims. But the English brief, I think, is really worth taking a look at.

"I want to say a quick word just about permitting. There may be limiting permitting in other contexts, like parade permitting, but I'm not aware of any context whatsoever where, in order to get a permit, you have to show that you have a particularly good need to exercise your constitutional right. And I think that is the absolute central defect with New York's regime here.

"*I want to say a quick word about the history that my friend from the Solicitor General's Office emphasized. It's telling that his first example is Tennessee*. If you look at the *Heller* decision, Tennessee is a problematic state in terms of its history. The court gave — that Tennessee Supreme Court first came out with the *Aymette* decision, which the majority opinion in *Heller* criticized. It then came out with the *Simpson* decision and the *Andrews*decision, both of which protected Second Amendment rights, and the majority opinion in *Heller* praised those decisions at the same time that it criticized *Aymette*. So, to the extent there was an 1821 statute, I would put it in the same box as the *Aymette* decision.

"*Texas, which is their next example and their only other 19th century example if I heard my friend correctly*, is even more problematic to rely on because Texas had a specific constitutional amendment that was similar to the English Bill of Rights but differed from the Second Amendment, that allowed the legislature to put specific restrictions on the right. So relying on 1871 Texas is highly problematic from a historical perspective. And that just leaves them with 20th century examples, which we concede, but, by that point, the collective rights view of the Second Amendment was everywhere.

"Let me finish just by saying there's absolutely no need for a remand here. There are interesting statistics that could be developed, but none of them are relevant to the two central defects in this regime. First, that in order to exercise a constitutional right that New York is willing to concede extends outside the home, you have to show that you have an atypical need to exercise the right that distinguishes you from the general community. That describes a privilege.

"It does not describe a constitutional right. That is a sufficient basis to invalidate the law. But then there's the discretion, and the discretion here has real-world costs. If you want to look at it, look at the amicus brief in our support by the Bronx Public Defenders and other public defenders. The cost of this kind of discretion is that people are charged with violent crimes even though they have no private — no prior record just because they are trying to exercise their constitutional right to self-defense. And if you want to know how this impacts policing, one of the ways essentially making everybody in New York City a presumptive person who is unlawfully carrying is that leads to stopping and frisking everybody.

"The framers, I think, had a different vision of the Fourth Amendment and the Second Amendment, and that is that individuals get to make their decision about whether or not they want to carry a firearm outside the home for self-defense. In 43 states, people are able to do that. It has not — it doesn't mean everybody ends up carrying, and it doesn't mean that those 43 states have any more problems with violent crimes or anything else than the six or seven jurisdictions that don't honor the text, the history of the Second Amendment, and *Heller*."

Conclusion

The Biden administration last week defended a law that does not extend Supplemental Security Income to Puerto Rico. The Supreme Court will return to oral arguments on Monday, Nov. 29.
