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Extremism in Defense of Liberty—Does *Not* Win In Court

When Senator Barry Goldwater received the Republican nomination for President in 1964, he gave a marvelous acceptance speech. That speech included two sentences that stirred many souls: "Extremism in defense of liberty is no vice. Moderation in the pursuit of justice is no virtue."[1] Stirring words, yes. For many Americans, however, this rhetoric put Goldwater beyond the pale of sensible politics. Johnson warned that Goldwater would get us into a war in Vietnam! Goldwater's "extremism" allowed Johnson to pile up what was, for that time, the largest landslide in American history; it is a night I remember well.

Was Goldwater right? On many issues, the next twenty years demonstrated that Goldwater knew what he was doing far more than Johnson. As a result, Goldwater's supporters could enjoy that warm feeling of knowing that they did the right thing. So what? Johnson won the election, and destroyed America. Johnson's "Great Society" turned many American cities into hellholes of savagery and violence. It's hard to imagine, but there was a time when no one was afraid to go into downtown Los Angeles at night for a movie; I can remember going to see *Ben-Hur* with my parents in 1962 downtown—and we walked many blocks in the dark to our car, without any concern at all.

Johnson achieved an even more impressive result in Vietnam: maximum cost with minimum benefit. Tens of thousands of young Americans were killed; hundreds of thousands wounded; many others returned with enormous mistrust for their government

and emotional scars that still haven't healed. For those who didn't serve in our military, Johnson's decisions destroyed the consensus that Communism was a bad thing, and created a counterculture that is still causing damage to America (of which Bill Clinton is one of the shining examples). Being *right* isn't enough; you need to *win*.

There is a very sad situation that is developing within the pro-gun community right now. There are people who are serious and committed gun rights activists who are making the Goldwater mistake, which I define as the belief that being right—and being extreme about being right—wins.

As you are probably aware, there is a lawsuit under way in the District of Columbia right now attempting to overturn Washington's handgun ban on new handguns. The first suit filed was by the Cato Institute, and it showed considerable gutsiness, as well as intelligence in how it was organized. Coming to the parade a bit later was NRA's suit. Many have criticized NRA for having to wait for the Cato Institute to get the ball rolling, and the critics have a point: NRA has been less than vigorous in fighting some of these battles.

As I have written before, we lost our right to keep and bear arms one slice at a time, until we have, in some states, lost most of the loaf. The District of Columbia is perhaps the most extreme example. To restore our rights will require that same slice at a time approach. We need to use some of the enemy's techniques, because they work. (We don't need to use all of our enemy's techniques; however. We don't need to lie, and we shouldn't.)

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[1] Eagleton Digital Archive of American Politics, http://www.rci.rutgers.edu/~eagleton/e-gov/e-politicalarchive-1964.htm, last accessed 10/18/2003.

This “one slice at a time” approach is slow. It’s frustrating. If you are in your 60s or 70s, there is a good chance that you won’t be alive to see a final victory—which I define as the scrapping of New York State’s Sullivan Law, because it is contrary to the Second Amendment. The history of gun control, and the strong hostility to gun rights among the elite that run this country, means that we have no other choice but gradual restoration of our rights.

If you ask the Supreme Court to make an *extreme* decision about the right to keep and bear arms as a straight up and down decision, we will lose. Let me give you an example: Does the Second Amendment protect your right to buy, sell, make, own and carry unlicensed, unregistered machine guns? I don’t care how much you may think we have history, logic, and common sense on our side: we will lose. The vast majority of federal judges are uncomfortable with the right to keep and bear arms, and in the most extreme formulations, they are not just *extremely* uncomfortable: they completely dismiss anything we have to say.

On the other hand, if you ask the Supreme Court to strike down the most absurd and abusive gun control laws, such as DC’s ban on purchasing of handguns, or New York’s restrictive (and sometimes corrupt) licensing of handgun ownership, while leaving background checks, registration, and other nuisances in place—we might have a chance.

Gun rights activist Angel Shamaya recently expressed his indignation about Stephen Halbrook's oral arguments attempting to overturn the District of Columbia's handgun ban. In those oral arguments, Halbrook agreed with the judge that the

government may restrict the right to bear arms in some ways without necessarily violating the Second Amendment.[2]

That the government may regulate a right shouldn't be any great surprise. Just about all of our rights are subject to *some* reasonable restrictions—and unless you are a member of the ACLU, the following examples demonstrate this:

- Freedom of speech is a right—but that doesn't mean that you can walk through your neighborhood at 2:00 AM delivering political speeches through a bullhorn, nor may you walk into a courtroom and start singing.
- Freedom of the press is a right—but you can still be sued for libeling a private person, and that right doesn't include the right to print child pornography.
- You have a right to keep and bear arms—but that doesn't mean that you are allowed to stockpile weaponized anthrax or 1000 pound TNT bombs in your house.

What Stephen Halbrook told the court was, "Your honor, we are here wanting to register handguns. We are not here wanting unrestricted access. We're not here asking to carry them, other than in the home." Mr. Shamaya, with whom I have talked frequently and pleasantly, and who is a passionate defender of the right to keep and bear arms, considers this a betrayal of the Second Amendment. I have found that not only Mr. Shamaya, but others who regard themselves as principled defenders of the right to keep and bear arms, seem to not understand what is going with Halbrook's statement.

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[2] "NRA Attorney: 'YOUR HONOR, WE ARE HERE WANTING TO REGISTER HANDGUNS'," http://www.keepandbeararms.com/information/XcIBViewItem.asp?ID=3618, last accessed 10/18/2003.

Here are the points that I have been making where this question comes up:

1. The District of Columbia had mandatory handgun registration before they adopted their handgun freeze law in 1976. Halbrook is giving up nothing when he says that we want to register handguns in DC. Right now, law-abiding adults in DC may not register any handguns—there is no legal way to bring a new handgun into the District, so you can't register them. If the courts strike down this ban on new handguns, it will not affect the pre-existing registration law.

2. Halbrook is asking the courts to strike down a gun control law that I'm sure that most federal judges support. He's asking them to do it based on Second Amendment grounds, which is a quite dramatic step. Reassuring the judges that he is not asking them to strike down *every* gun control law that DC has, makes it easier for the courts to strike down what is clearly the most outrageous part of the law: the ban on bringing handguns into DC.

3. Handgun registration is a waste of resources, money, and time. The evidence is pretty clear that gun registration solves very, very few violent crimes. Nonetheless, registration, by itself, is constitutional. I don't see that it necessarily conflicts with the Second Amendment. Registration does not infringe on the right to keep and bear arms. Prohibiting handgun ownership infringes on the right; a ban on carrying a gun infringes; even non-discretionary concealed weapon permit laws infringe a little because they require you to pay for a license.

Registration, by itself, is just a minor nuisance; it does not prevent you from owning a gun.

4. Yes, most mandatory registration laws make it illegal to possess an unregistered gun, but it would be easy to write a registration law that didn't criminalize possession of an unregistered gun. If the police came across an unregistered gun during an investigation, they *could* just take down the serial number, and your name, and register it. That wouldn't infringe on your right to keep and bear arms, although it might infringe on your privacy.

5. What Halbrook is doing is indeed "slippery slope": but he's trying to push our rights *up* the slope, not down it. DC's gun control laws are already just about all the way down the hill. We aren't giving anything up when we say that we accept gun registration in DC—but we may get recognition of a right to keep and bear arms, and restoration of the right of DC residents to purchase and own handguns again. That would be a major win.

6. A victory in the federal courts with respect to the DC handgun law, on Second Amendment grounds, would set us up for the next question: does the Fourteenth Amendment impose similar protections against *state* laws? This is the question that the *Silveira* case is now trying to raise before the U.S. Supreme Court. In my opinion, *Silveira* should not even have been filed until we had a clear-cut modern Supreme Court decision that recognized that the Second Amendment protected an

individual right. This is the sort of decision that might come out of this challenge to the DC handgun law.

Let's not make the Goldwater mistake. It's not enough to be right. We have to win as well.

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