

The Bush Administration and the Second Amendment

by *Stephen P. Halbrook*

On June 10, 2002, the U.S. Supreme Court declined to hear a case named *United States v. Emerson*, letting stand the holding of the U.S. Court of Appeals for the Fifth Circuit that the Second Amendment guarantees an individual right to keep and bear arms. In its brief filed with the Court, the Bush Administration agreed that this is a fundamental right of law-abiding citizens, but that the federal law at issue is valid. The law prohibits firearm possession by a person against whom an order has been entered restraining the person from domestic violence. The Administration's pro-Second Amendment views have provoked a firestorm among gun prohibitionists.

When she was Attorney General, Janet Reno treated that part of the Bill of Rights known as the Second Amendment with great disdain. She was the chief prosecutor for Clinton's gun control measures. When Dr. Timothy Emerson argued that the federal ban on possession of a firearm by the subject of a domestic restraining order violated the Second Amendment, the prosecut-

ing U.S. attorney in Lubbock, Texas, echoed Reno's line that the people have no right to keep and bear arms.

But U.S. District Judge Sam Cummings threw the prosecution out. His 1999 decision, at that point the most thoroughly researched judicial opinion ever published on the Second Amendment, held that the gun ban was an infringement on the right to keep arms, and that the restraining order in that case was just a boiler plate form issued in every Texas divorce case. He quoted the Founding Fathers and the latest scholarship to show that the Second Amendment protects an individual's right to have a firearm.

The Second Amendment states: "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." To the Framers, recognition of the right of all law-abiding persons to have firearms would promote a militia, which is superior to a standing army for protection of liberty. One would not have expected them to preface the right with "Duck hunting being lots of fun . . ." Promotion of the militia was a serious federal purpose, but the right was not limited to militia use.

By the 1960s, the Second Amendment had become politically incorrect, and some judges and prosecutors concocted the hypothesis that "the right of the people" to have arms really means "the power of the State" to have a militia. If the Amendment protects only the "collective" nobody and gun owners have no rights which the rulers are bound to respect, then all gun control laws are constitutional. Under this logic,

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the First and Fourth Amendment “right of the people” peaceably to assemble or to be free from unreasonable searches only protects persons selected by the government.

But this deconstruction of the right to bear arms never became universal. In September 1998, then-Senator John

Ashcroft, Chairman of the Subcommittee on the Constitution, held hearings on the Second Amendment.² He quoted James Madison in the *Federalist* No. 46 as praising “the ad-

vantage of being armed, which the Americans possess over the people of almost every other nation.” Democrat Russ Feingold declared, “I agree with every single word Sen. Ashcroft said.”

Two years later, the *Emerson* appeal was heard at the Court of Appeals for the Fifth Circuit in New Orleans. A Justice Department lawyer told the three-judge panel that a government ban on all civilian gun possession would not violate the Second Amendment, provoking a national uproar in the gun-owning community. Then-Solicitor General Seth Waxman wrote a detailed letter – that was in August 2000, when the Gore-Bush race was in full swing – explaining that, yes, the Second Amendment is kaput. The NRA posted blow-ups of the letter on campaign billboards.

Meanwhile, Al Gore was tripping over himself advocating gun “licensing” but trying to distinguish it from “registration,” then trying to make the issue go away. It is now history how key hunting States swung the election for George W., who as Texas governor signed legislation providing for “shall

issue” firearm carry permits and, in debates with Gore, promised no new gun control.

John Ashcroft survived a contentious Senate confirmation process and became Attorney General. In May 2001 NRA political chief Jim Baker read a letter from Ashcroft to the annual NRA

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convention which stated: “let me state unequivocally my view that the text and the original intent of the Second Amendment clearly protect the of right of individuals to keep and

bear firearms.” Ashcroft quoted Jefferson’s proposal that “no free man shall ever be debarred the use of arms,” and George Mason’s remark that “to disarm the people is the best and most effectual way to enslave them.” But Congress could restrict firearms “for compelling state interests,” such as disarming felons. As Samuel Adams proposed in 1788, the Constitution should “never [be] construed . . . to prevent the people of the United States *who are peaceable citizens*, from keeping their own arms.”

The gun prohibitionist lobby went ballistic. The Violence Policy Center (VPC) ignored the above words and charged that, under Ashcroft’s views, violent felons would assert their Second Amendment rights. Actually, VPC could care less what felons assert – it found intolerable the concession that peaceable citizens could keep their own arms. VPC litigation director Mathew Nosanchuk – Janet Reno’s former top firearms counsel at Justice – wrote a blistering attack unmasking Ashcroft’s heresy.

Terrorists attacked on 9/11. The heroic resistance of the passengers on United Flight 93 against the hijackers seemed to consign the doctrine of non-resistance (typical of antigun pacifists) to the dustbin of history. But incentive also existed for government entities to further bin Laden's dream by diminishing American civil liberties. The Court of Appeals in the *Emerson* case was not cowed. Its opinion issued in October 2001 was not good news for the "call 911" crowd.

The court held: "the Second Amendment protects the right of individuals to privately keep and bear their own firearms that are suitable as individual, personal weapons . . . , regardless of whether the particular individual is then actually a member of a militia."

Published as *U.S. v. Emerson*, 270 F.3d 203 (5th Cir. 2001), the 70-page opinion leaves all previous appeals court decisions in the dust. Filled with a sophisticated textual analysis and scores of quotes from the Founding Fathers, the opinion demolishes the "collective rights" decisions of other courts, which typically rely on a paragraph or two of brute assertion. The Fifth Circuit held that the law at issue "barely" passed muster under the Second Amendment, in that domestic restraining orders in Texas are required to be backed by judicial fact finding.

Dr. Emerson's attorneys filed a petition for review in the Supreme Court. A bitter internal fight broke out in the Justice Department between Ashcroft loyalists, who meant it when they swore to support the Constitution, and career

bureaucrats intent on maintaining their batting average, the Constitution be damned.

The contents of U.S. briefs in the drafting stage are not normally available for eavesdropping. However, as if forewarned that the U.S. brief in *Emerson* to be filed in the Supreme Court would endorse the individual rights-interpretation of the Second Amendment, the Violence Policy Center sent a missive signed by Andrew Frey, ex-Deputy Solicitor General, to Solicitor General

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Ted Olson, arrogantly lecturing Olson on why the brief must not commit this "politically-motivated" apostasy.

The Justice Department, Frey insisted, must never relax its iron denial of any Second Amendment right. It had argued in a 1939 brief that the Second Amendment right extended only to "the people collectively" as a militia. However, the Supreme Court's decision, *U.S. v. Miller* (1939), was silent on that argument and held instead that the Second Amendment protects a firearm if it "is any part of the ordinary military equipment or that its use could contribute to the common defense." The Court never suggested that the possessor had to be in the militia. *Miller* has been widely mis-cited as supportive of the collective rights theory, but it contains no such language.

Frey argued that Justice Department's briefs represent "the position of the United States," but a more reliable statement of that position has been expressed in acts of Congress. Just two years after the brief in *Miller* was filed, the Prop-

erty Requisition Act of 1941 prohibited any construction of the law that would “impair or infringe in any manner the right of any individual to keep and bear arms.” Congress passed that law and FDR signed it. Similarly, in the Firearms Owners’ Protection Act of 1986, signed by President Reagan, Congress recognized “the rights of citizens to keep and bear arms under the second amendment to the United States Constitution.”

As the coup d’ grâce, Frey appealed to the Machiavellian impulse: the Second Amendment’s validity must not be admitted because it would make it harder to win cases. The same could be said about any constitutional right.

In May 2002, VPC’s nightmare came true with the filing of the U.S. brief in *Emerson*. Solicitor General Olson told the Supreme Court that the Second Amendment “broadly protects the rights of individuals, including persons who are not members of any militia . . . , to possess and bear their own firearms,” excluding “possession by unfit persons” and firearm types “particularly suited to criminal misuse.” Although the latter is fuzzy, the brief makes clear

that handguns, rifles, and shotguns are protected. Attached to the brief was a memo from Ashcroft to all U.S. attorneys with the words: “The Department has a solemn obligation both to enforce federal law *and* to respect the constitutional rights guaranteed to Americans.”

Defense lawyers are now citing Bush Administration views on the Second Amendment along with the *Emerson* decision to show the unconstitutionality of the District of Columbia’s handgun ban as well as various infringements in other parts of the country. After a long hiatus, it seems that restoration of a portion of the Bill of Rights to its rightful place has finally been commenced.

Endnotes

¹ Stephen Halbrook, an attorney in Fairfax, VA, is author of *That Every Man Be Armed* and other books on the Second Amendment. He argued *Printz v. United States* (1997) in the Supreme Court, which invalidated the Brady Act’s federal mandates to the States as violative of the Tenth Amendment. See www.stephenhalbrook.com

² These hearings were not published, but under Senator Orrin Hatch’s earlier chairmanship, the Subcommittee published *The Right to Keep and Bear Arms*, Report of the Subcommittee on the Constitution, Committee on the Judiciary, U.S. Senate, 97th Cong., 2d Sess. (1982).