IDEAS ON LIBERTY
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Government

The Big One?

A case may be headed to the U.S. Supreme Court that could legally resolve the dispute over what the Second Amendment means. In a reasonable world no ruling would be required, since these words couldn't be more straightforward: "A well regulated militia being necessary for the security of a free state, the right of the people to keep and bear arms shall not be infringed."

But politically we don't live in a reasonable world, and some people say those words mean that the individual states may maintain National Guard units. The National Guard wasn't established until 1903 and since 1933 has been under federal jurisdiction. Go figure.*

Moreover, in an important sense, it really doesn't matter what the Second Amendment means. When someone urges the central government to exercise a power, such as putting restrictions on the possession of arms, one should consult the main Constitution, not the Bill of Rights. The matter to be decided is not whether the people have a certain right, but whether the central government has been delegated a certain power. As the framers saw it, in a free republic individuals may *do anything* except that which is expressly and by due process *forbidden*, while government may *not do anything* except that which is expressly *permitted*. Nowhere does the Constitution empower the government to restrict the possession of firearms.

Before discussing the current case, it is worth a quick detour to mention the gun controllers' favorite Supreme Court case, the 1939 *U.S. v. Miller*, which involved the interstate movement of an unregistered and untaxed sawed-off shotgun allegedly in violation of the 1934 National Firearms Act. The case would seem to comfort the gun controllers on two counts: First, the Court said the Second Amendment was written "with the obvious purpose to assure the continuation and render possible the effectiveness of" the militia that the Constitution authorizes Congress to call forth, organize, arm, and discipline.

Second, the case hinged on whether a sawed-off shotgun is a military weapon: "In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument." The case was sent back to the lower courts, but it was not pursued because Miller had died and his codefendant had disappeared.

A close reading shows that this case is no help to what has been dubbed the anti-self-defense lobby. On the first point, the Court quickly noted that the term "militia" refers not to a special force like the National Guard:

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*See my article, "Reading the Second Amendment," *The Freeman: Ideas on Liberty*, February 1998.

"[T]he history and legislation of Colonies and States, and the writings of approved commentators . . . show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense." On July 5, the U.S. Eight Circuit Court of appeals, citing *Miller*, acknowledged that "an individual's right to keep and bear arms is constitutionally protected" (*U.S. v. Hutzell*).

On the second point, the fact that the Court wondered whether a sawed-off shotgun was appropriate for military use implies that weapons unambiguously appropriate for military use (assault rifles, for example) are covered even by the gun controllers' distorted rendering of the Second Amendment.

U.S. v. Emerson

Now we come to the pending case. It has an inauspicious origin. In 1998 the wife of Dr. Timothy Joe Emerson of Texas sued him for divorce. She also applied for a temporary restraining order, a common instrument used to protect a party's financial and other interests. At the hearing on her application Mrs. Emerson said her husband had threatened her adulterous lover over the telephone, but the judge made no finding in that matter.

What Emerson did not know at the time—and what no one informed him—was that at the moment the restraining order was issued, he became a criminal under a little-known 1994 federal law that forbids someone under such an order to possess a firearm. He owns a handgun. Sometime later he displayed the gun to Mrs. Emerson, which led to his indictment for violating the federal statute (but not any state law pertaining to endangerment). Emerson challenged the constitutionality of the law on Second Amendment and other grounds, and—*mirabile dictu!*—Federal District Judge Sam R. Cummings dismissed the indictment because the law "allows a state court divorce proceeding, without particularized findings of the threat of future violence, to automatically deprive a citizen of his Second Amendment rights. . . . It is absurd that a boilerplate state court divorce order can collaterally and automatically extinguish a law-abiding citizen's Second Amendment rights. . . . That such a routine civil order has such extensive consequences totally attenuated from divorce proceedings makes the statute unconstitutional."

His opinion goes far beyond that. It is a veritable treatise on the textual structure of and history and political philosophy behind the Second Amendment, drawing on the best classical-liberal constitutional scholars. Savor his words:

> The plain language of the amendment, without attenuate inferences therefrom, shows that the function of the subordinate clause was not to qualify the right, but instead to show why it must be protected. The right exists independent of the existence of the militia. If this right were not protected, the existence of the militia, and consequently the security of the state, would be jeopardized.

(The opinion and other material can be found at the Second Amendment Foundation's Web site, www.saf.org.)

The government of course appealed. According to gun writer Neal Knox, last June's hearing before the Circuit Court of Appeals three-judge panel had some noteworthy moments. In response to a judge's question, the Justice Department's lawyer said the Second Amendment protected no individual right. When the judge asked if that meant the government could outlaw his shotgun, the lawyer said yes. The judge, a Clinton appointee, proceeded to list the guns he owns. Then pointing to the senior judge seated next to him, he said "between us [we] have enough guns to start a revolution in most South American countries."

Two of the judges apparently made no effort to hide their view that the government misunderstands the *Miller* case, on which it bases its appeal. For one thing, there is no question about Emerson's handgun being appropriate for military purposes. It's a Beretta Model 92 9mm pistol–a standard military weapon.

As of September 1, the appeals court hadn't ruled yet, but either way, the next stop will likely be the Supreme Court. □

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Does Rape Violate the Commerce Clause?

by Wendy McElroy

Last spring the U.S. Supreme Court struck down as unconstitutional a key section of the 1994 Violence Against Women Act (VAWA). That section allowed a victim of rape or other violence "motivated by gender" to sue the perpetrator for civil damages in federal court for violating her civil rights.

The act was part of the 1994 Omnibus Crime Bill. It established both a federal right to be "free from crimes of violence motivated by gender" and a federal remedy for violating that right: namely, a new tort claim that included both compensatory and punitive damages. The federal claim was not meant to replace punishment by state criminal statutes but to supplement them.

In 1995, Christy Brzonkala became the first person to sue under the act, over a rape that allegedly occurred in her dormitory room while she was a student at Virginia Polytechnic Institute. The men accused—two football players named James Crawford and Antonio Morrison—had been cleared by both a university judicial committee and a criminal grand jury. Nevertheless, Brzonkala brought a case against them in federal court. In 1999 the U.S. Court of Appeals for the Fourth Circuit (Richmond, Va.) ruled against her, saying that Congress had exceeded its constitutional authority in passing VAWA.

U.S. v. Morrison eventually came before the Supreme Court. In its decision the Court stated that the issue under consideration was "Did Congress exceed its powers when it gave victims of sex crimes the right to file civil lawsuits against their attackers?" The Court answered yes. Writing for the 5–4 majority, Chief Justice William H. Rehnquist concluded that a federal civil remedy for such crimes could be justified by none of the constitutional provisions invoked by those who defended the act.

Two constitutional arguments were used by defenders: first, that violence against women interferes with interstate trade and thus violates the Commerce Clause by which Congress may regulate interstate commerce to ensure the free flow of goods and services, and second, that the Fourteenth Amendment protects citizens against violation of due process, which occurred in Brzonkala's case because the state courts were indifferent to violence against women. Both parts of the Constitution had also been used to support the act during lengthy congressional hearings.

The Commerce Clause and VAWA

The Commerce Clause (Article I, Section 8, Clause 3) delegates to Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The clause gave a broad grant of authority over commerce to Congress without clearly delineating restrictions on that power. The purpose was to overcome the ten-

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