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The Emerson Decision: What It Means For Gun Owners

On October 16, 2001, the U.S. Fifth Circuit Court of Appeals handed down an historic decision in *USA v. Emerson*. Those of you who have been following this case—or caught the surprisingly wide, fair, and sometimes accurate coverage of the decision in the mainstream media—already know what this is about: does the Second Amendment protect an individual right to possess a gun?

Dr. Timothy Joe Emerson, the defendant, was going through a messy divorce. His wife, Sacha, claimed that Emerson had made death threats against one of Sacha's friends. Unsurprisingly, the judge issued a temporary restraining order (TRO) against Dr. Emerson on September 14, 1998. Because this TRO was related to domestic violence, Emerson was *immediately* prohibited from possession of a gun under 18 U.S.C. § 922(g)(8). Like many Texans, Emerson owned a gun—a Beretta semiautomatic pistol that he had bought the previous year. Emerson was indicted by a federal grand jury on December 8, 1998 for possession of that gun.

This is where the questions start. No one seriously disputes that convicted violent felons can be prohibited from owning a gun. But what about a person who has not yet been charged with or convicted of a crime? Emerson wasn't convicted of any crime when the judge issued that TRO, and he wasn't notified that his right to own a gun evaporated as soon as that TRO was issued.

The federal law Emerson was charged with violating was not widely known. Emerson claimed that he didn't know about it. (When Emerson bought the Beretta the previous year, he had filled out a Form 4473 that asks about domestic violence TROs, but it's certainly possible that Emerson didn't remember the details.) It is also not clear if the divorce court

judge who issued the TRO knew that it would prohibit Emerson from owning a gun, since the domestic violence TRO prohibition is a *federal* law, not a Texas law.

In 1999, federal Judge Sam Cummings heard arguments from Emerson's attorney, a federal public defender, who argued that the federal law under which Emerson was charged violated a number of protections of the Bill of Rights, including the Second Amendment. Judge Cummings found the arguments persuasive, and ruled that the law in question was unconstitutional because it denied a fundamental human right—the right to keep and bear arms—without due process.¹

The federal government, unsurprisingly, appealed Judge Cummings' decision, arguing both that the Second Amendment protected only a collective right—the right of the states to arm militias—and that the process by which the divorce court judge decided to issue the TRO adequately protected Emerson's rights. Emerson's attorney now found himself with *lots* of help from a variety of pro-gun organizations; similarly, anti-gun groups filed *amicus curiae* (friend of the court) briefs to help the federal prosecutors.

Let's be very clear on this: not everyone that came to Emerson's aid was thrilled about his alleged actions. (The Texas courts have since found him innocent on various criminal charges associated with threats, but the *federal* criminal charge of unlawful possession while subject to a TRO is not affected by that verdict.) The important questions for gun owners were: Does the Second Amendment protect an individual right? Under what circumstances can the government take away that right? Is a criminal conviction required, or can a TRO take away that right temporarily, while the courts decide what to do?

The Fifth Circuit Court of Appeals consisted of three judges. Judge Garwood wrote the decision that Judge DeMoss signed, which upheld the constitutionality of the federal

¹ *USA v. Emerson*, 46 F.Supp.2d 598 (N.D. Tex. 1999).

prohibition on gun ownership by those subject to a domestic violence TRO. However, he also ruled that the Second Amendment protects an individual right to keep and bear arms!²

The beginning of the decision quickly disposes of the question of whether Emerson's right to possess a gun can be taken away without a criminal conviction. The decision makes a statement that, while it may offend some gun rights purists, is generally accepted by even pro-gun historians and lawyers. While "the Second Amendment does protect individual rights, that does not mean that those rights may never be made subject to any limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country." While it didn't give this as an example, think about what happens when someone is arrested and taken to jail. The police take away his gun, and he doesn't get to keep it in his cell.

There were two questions that Judge Garwood now tried to answer. Is there a connection between the possibility that Emerson might misuse a gun and the domestic violence TRO? Did the divorce hearing give Emerson sufficient opportunity to defend himself from the charge of making death threats before the divorce court judge issued the TRO?

In answer to the first question, Judge Garwood decided that there was a connection between the possibility of lawless violence and the domestic violence TRO—but it was "barely" sufficient. Judge Garwood thought the matter over, looked at the existing precedents, and came to the same conclusion that most of us would come to—someone who makes death threats during a divorce might follow through with those threats. If Emerson was disarmed temporarily while the courts considered the charges, it was probably no big loss. Others might come to a different conclusion, of course, as Garwood description of "barely" sufficient makes clear.

² You can find it at <http://www.ca5.uscourts.gov/opinions/pub/99/99-10331-cr0.htm>. All the quotes from the decision in this article can be found there.

Judge Garwood now answered the second question, and decided that the way TROs are issued in Texas met the due process requirements. Emerson had been given the chance to refute the charge of death threats in court, and had neglected to do so. The question of whether Emerson received his Fifth Amendment guarantee of due process was resolved; Judge Garwood decided that the federal law was constitutional.

Most of what made Judge Garwood's decision so long, however, wasn't the due process question—it was a detailed analysis of why the Second Amendment was added to our Constitution, and what that right guaranteed. Gun owners should be very happy with the results. Judge Garwood used many of the same documents that I used for my book *For the Defense of Themselves and the State* (which was cited in Judge Cummings original decision) to establish that the Second Amendment protected an individual right to keep and bear arms.

Judge Garwood also examined *U.S. v. Miller* (1939), the last U.S. Supreme Court decision to address the constitutionality of a federal gun control law, and decided that it also protected an individual right to keep and bear arms: “We reject the collective rights and sophisticated collective rights models for interpreting the Second Amendment. We hold, consistent with *Miller*, that it protects the right of individuals, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms, such as the pistol involved here, that are suitable as personal, individual weapons and are not of the general kind or type excluded by *Miller*.”

There have been other court decisions that recognized that the Second Amendment protects an individual right to keep and bear arms, as early as 1846, by the Georgia Supreme Court.³ These have been largely state court decisions, however. This is the first such decision by a federal appeals court in a very long time—and it is directly opposite to decisions in other federal circuits that denied that there was an individual right to keep and bear arms.

³ *Nunn v. State*, 1 Ga. 243, 250, 251 (1846). 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).

So what happens now? Contrary to popular belief, not every case is guaranteed an appeal to the U.S. Supreme Court. The Supreme Court often refuses to hear appeals if it perceives the consequences of letting a decision stand are trivial. This is especially the case if the different appellate courts have come to the same conclusion.

When different circuits of the federal appeals courts come to different conclusions, however, this is known as a “circuit split.” If the question is important enough, the U.S. Supreme Court should, and often does, hear an appeal, and decides which court made the right decision. So what makes a decision “important” enough for the Supreme Court to hear it? Is someone going to go prison? That’s a pretty good reason—and Emerson stands a good chance of going to prison.

While Judge Garwood’s decision doesn’t help Emerson any, it creates a very good situation for gun owners. If Judge Garwood had struck down the federal law as unconstitutional, the federal government would have no choice but to appeal to the U.S. Supreme Court—which might feel the need to overrule Judge Garwood about not just the constitutionality of the law, but also the individual nature of the Second Amendment.

Because Judge Garwood’s decision found the law constitutional, he ordered the case back to the federal district court to be retried. The federal government can’t appeal Judge Garwood’s decision concerning the Second Amendment, because they won the part of the case that is supposed to matter to them—that the federal law was found constitutional.

If Emerson is convicted, he could go to prison. Not surprisingly, it appears that Dr. Emerson is very interested in appealing Judge Garwood’s decision to the U.S. Supreme Court. So what happens next?

If the Supreme Court *refuses* to hear Emerson’s appeal, Judge Garwood’s decision that the Second Amendment protects an individual right stands—and so will the other federal court decisions that say just the opposite. Other federal courts will point to Garwood’s decision in the future, and at some point, some case will come up that strikes down a federal gun control law, forcing the Supreme Court to resolve this question about the Second Amendment.

On the other hand, if the Supreme Court *does* hear Emerson's appeal, the federal government can continue claiming that the Second Amendment doesn't protect an individual right, and that this federal law is constitutional. Or they can take Judge Garwood's position, that the Second Amendment protects an individual right, and that this federal law is constitutional anyway. Either way, it doesn't affect the federal government's defense of the federal law about domestic violence TROs.

So, which position will the federal government take when this case is appealed? Remember that the Justice Department is now run by Attorney General Ashcroft—who believes that the Second Amendment protects an individual right. Which position do you think the federal government is going to take if the Justice Department has to go to the Supreme Court with this case? The Justice Department can either agree with us—and the Supreme Court can leave Judge Garwood's decision concerning the Second Amendment on the books—or the Justice Department can put up such a weak defense of the “collective rights” theory of the Second Amendment that the Supreme Court will rule in our favor. The Supreme Court has no need to overrule Judge Garwood's decision concerning the Second Amendment in order to uphold the domestic violence TRO law.

It is hard to read the details of the Emersons' ugly divorce and legal struggles without feeling really sorry for both of them. No matter what happens to Emerson's legal problems with the federal government, this has clearly been a very painful experience for Timothy Emerson, Sacha Emerson, and their daughter. But if this mini-tragedy of the Emersons forces the federal courts to acknowledge what most legal scholars have already established—that the Second Amendment protects an individual right—some good for gun owners will have come out of their pain.

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