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## **The Justice Department Discovers the Second Amendment**

Back in January, I wrote a column titled, “Gun Control on the Ropes?” The point of that article was that post-September 11<sup>th</sup>, a great many Americans had given up their comforting fantasies about the way the world really is. To my surprise, gun control seemed to have been one of the fantasies that Americans had most clearly discarded.

After that article appeared in print, I found myself wondering if I had been a little too cocky. My friends and former neighbors in California were still fighting a battle with one of the three least intelligent collections of buffoons that currently disgrace the word “legislature.” While California continues down the road to foolishness, I am happy to report that there are still plenty of positive signs of how severely the gun control nonsense has been discredited.

As those of you who have been following the legal struggles of Dr. Timothy Joe Emerson know, the federal courts are finally taking unequivocal stands in support of the Second Amendment as an individual right. Dr. Emerson’s federal trial judge ruled that the Second Amendment protects an individual right, and therefore a federal law prohibiting gun ownership by those subject to a domestic violence restraining order is unconstitutional. The U.S. Fifth Court of Appeals by a 2-1 decision, agreed that while the right is individual, the federal law remains constitutional--an example of a narrowly defined exception to the rule. This sort of an exception is equivalent to the freedom of speech not allowing you to shout “Fire!” in a crowded theater.

While gun owners were very pleased to see the Court of Appeals agree that the right to keep and bear arms--in this case, a Beretta handgun with one of those high capacity

magazines that scare the gun controllers so much--Dr. Emerson was still on the hook for having broken the federal law. Not surprisingly, he appealed to the U.S. Supreme Court, asking them to strike down the law as a violation of the Second Amendment.<sup>1</sup>

A case that is in some ways more peculiar has also been working its way up through the federal courts, that of John Lee Haney's unlawful ownership of machine guns. Unlike Emerson, whose divorce is one of those little domestic tragedies that fall into many lives, Haney's problems with the law were completely avoidable, and do not sound like the typical criminal at whom the federal machine gun law were aimed.

Mr. Haney is either showing enormous guts or enormous foolishness, setting himself up as a test case. The Solicitor General's description of the events leading up to his arrest captures it well: "On August 25, 1999, petitioner appeared at a police station and informed the officer on duty that he owned semiautomatic and fully automatic firearms. Petitioner stated that the firearms were not licensed and that the federal government lacked authority to require him to obtain a license. Law enforcement officials subsequently found two fully automatic weapons in petitioner's car and house..."<sup>2</sup>

Both of these cases--Emerson and Haney--were appealed to the U.S. Supreme Court. Remember that the Court is not *required* to hear these appeals. Contrary to the popular belief, there are few sorts of appeals that the U.S. Supreme Court *must* hear. If you believe that you have a strong argument, you ask the Supreme Court for a "writ of certiorari." If enough justices think your case is interesting or important enough, they *may* grant certiorari, and agree to hear your appeal.

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<sup>1</sup> <http://news.findlaw.com/hdocs/docs/gunlawsuits/emersonus502sgopp.pdf> contains (at least for the moment) the Solicitor General's response to Dr. Emerson's appeal.

The Solicitor General of the United States works for the Attorney General. His job is to defend federal laws before the Supreme Court. Remember that just because the Solicitor General defends a law doesn't mean that he likes that law. He may even consider the law unconstitutional, but it isn't his job to rule against it. It is the Supreme Court's job to decide that a law violates the Constitution.

So how did the Solicitor General respond to Dr. Emerson's appeal, and that of Mr. Haney? At Attorney General Ashcroft's direction (and I would assume with President Bush's approval), he responded to the appeals by agreeing that the Second Amendment protects an individual right, "broadly protects the rights of individuals, including persons who are not members of any militia or engaged in active military service or training, to possess and bear their own firearms, subject to reasonable restrictions designed to prevent possession by unfit persons or to restrict the possession of types of firearms that are particularly suited to criminal misuse."<sup>3</sup>

Instead, the argument that the Solicitor General uses is the same one used by the U.S. Court of Appeals in the *Emerson* decision--that prohibiting gun ownership by someone subject to a domestic violence restraining order is one of the "reasonable restrictions designed to prevent possession by unfit persons...." Similarly, the federal machine gun licensing law, which by itself is actually not terribly restrictive, would fit under the description of regulation of "types of firearms that are particularly suited to criminal misuse."

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<sup>2</sup> <http://news.findlaw.com/hdocs/docs/gunlawsuits/haneyus50802sgoppbrf.pdf> is the Solicitor General's response to Mr. Haney's appeal.

<sup>3</sup> <http://news.findlaw.com/hdocs/docs/gunlawsuits/haneyus50802sgoppbrf.pdf> .

By this point, some of you are shaking in disgust. Why bother to recognize an individual right if the government can still limit gun ownership like this? Recognize that there is a bit more going on here than meets the eye--some of it at the legal level, and some of it at the political level.

First of all, the courts have *always* recognized that there are circumstances where the government may disarm “unfit persons.” During the American Revolution, Tories were often disarmed by the Revolutionary governments. I don’t think most gun owners object to laws prohibiting convicted murderers, rapists, and robbers from owning guns.

Secondly, there is a sequence of events for making our laws change. If the Supreme Court were asked to make a ruling about the Second Amendment based on either the Emerson or Haney cases, I suspect that we would lose, not on the strength of the historical arguments, but based on the facts of these cases.

There is a saying in law that “hard cases make bad laws.” Emerson, while found innocent in state court on the charges involving death threats, is not the most sympathetic example to present--and certainly not the case you want the Supreme Court looking at while making the first completely clear-cut decision about the meaning of the Second Amendment. Similarly, asking the Supreme Court to strike down the relatively relaxed federal machine gun law as the first case recognizing an individual right to keep and bear arms would probably be more than most of the justices up there are willing to do. *First you need a clear-cut statement that the Second Amendment protects an individual right!*

There are cases that would be a lot better to appeal to the Supreme Court, with more sympathetic defendants, or more outrageous laws. I kid my law professor friends that the perfect defendant would be a disabled black lesbian arrested for unregistered possession

of a handgun in the District of Columbia, after she shot a neo-Nazi who had broken down her door. *That* would be the perfect sympathetic defendant.

Thirdly, there is another point to consider. If the U.S. Supreme Court hears the *Emerson* appeal, and they rule that the Second Amendment is an individual right, there will be no question that the Solicitor General made a serious attempt at defending the federal law. There will be considerable grumbling from the national news media, but the Supreme Court will have spoken, and the gun control advocates will be in a world of hurt.

You can see some of that hurt already. Five years ago, I considered myself fortunate when National Public Radio or Public Broadcasting Service interviewed someone articulate from the NRA or Gun Owners of America about the right to keep and bear arms. For the most part, our side would be brought on the program just to show that the “experts”--usually law professors who supported gun control--were so much smarter than the “gun nuts.”

My, how times have changed! On May 9, in response to the Solicitor General arguing that the Second Amendment is an individual right, National Public Radio did a program in which they interviewed Professor Akil Amar of Yale Law School (on the individual rights side, though clearly supportive of some forms of gun control) and Professor Eugene Volokh of UCLA Law School (on the individual rights side, and not embarrassed about it). There were no professors taking the “collective rights” side, only the Violence Policy Center’s “Litigation Director.”<sup>4</sup>

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<sup>4</sup> [http://search1.npr.org/opt/collections/torched/totn/data\\_totn/seg\\_143016.htm](http://search1.npr.org/opt/collections/torched/totn/data_totn/seg_143016.htm) for the details of the program.

The previous day, on PBS's "The News Hour with Jim Lehrer," it was a bit more balanced, with Professor Robert Cottrol of Georgetown University Law School and Professor of History Joyce Malcolm of Bentley College very ably defending the individual rights position, while history professors Jack Rakove of Stanford and Saul Cornell of Ohio University trying to defend the status quo.<sup>5</sup> That could not have happened five years ago--professors on our side would simply not have been invited.

Perhaps the ultimate statement of how far this change in Justice Department policy has taken us is an article in the *Washington Post*, which acknowledged that if the Supreme Court accepted the Justice Department's position about the meaning of the Second Amendment, "the federal government and, possibly, the states would have to show in court that they had a compelling reason to enact particular restrictions on gun ownership, much as they now must do when laws are alleged to affect other basic rights such as free speech. Legal analysts said that the District's sweeping ban on guns probably could not survive that level of court scrutiny...."<sup>6</sup>

When the *Washington Post* runs articles like that, you *know* the gun control movement is running scared.

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<sup>5</sup> [http://www.pbs.org/newshour/bb/law/jan-june02/arms\\_5-08.html](http://www.pbs.org/newshour/bb/law/jan-june02/arms_5-08.html) .

<sup>6</sup> Charles Lane, "Gun Ownership -- New, Old View: U.S. Adopts 'Individual Rights' Theory of 2nd Amendment," *Washington Post*, May 9, 2002, A7.