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The Dangers of "Reasonable Regulation"

For a very long time—and not just with respect to the right to keep and bear arms—our courts have taken the position that no right is absolute. Every right is subject to reasonable regulation, if the government has an overpowering good reason, and there is no other way to accomplish the legitimate end.

If this seems bizarre to you, remember the bizarre circumstances of September 11, 2001. Every airplane in the U.S. was ordered to land, immediately. Fighter planes shadowed commercial airliners—with orders to shoot down planes that were believed to be hijacked, and were not following orders. Large numbers of "suspicious" people were arrested, most of whom were deported, and some of who are still awaiting trial. Extraordinary circumstances sometimes require extraordinary responses; the greatest danger is when extraordinary circumstances become ordinary.

Two recent cases highlight the difficulties of figuring out what constitutes "reasonable regulation" of the right to keep and bear arms. The first decision is *U.S.* v. *Parker,* just decided by the U.S. 10th Circuit Court of Appeals. The defendant was prosecuted under *federal* law for violating a Utah gun control law (requiring a concealed carry permit to have a loaded gun in your car). Something called "Assimilative Crimes Act (ACA), 18 U.S.C. § 13" makes it a federal crime to violate a *state* gun control law on a *federal* military reservation.

Defendant Dale Parker drove into Dugway Proving Grounds with a loaded revolver under the seat of his truck, a few months after September 11th. MPs performed a random search of his truck (not surprising, post-9/11), and found the

revolver. Parker made the plausible claim that he had forgotten that the gun was there. Of course, it was a violation of Utah law, and under ACA, Parker was convicted in federal court.

On appeal, Parker argued that the federal law violates the Second Amendment. The Court of Appeals decided that the Second Amendment does not protect an individual right, based on previous Tenth Circuit precedents that have wrongly misread *U.S.* v. *Miller* (1939) as the authoritative statement. I'm not happy about this, but Tenth Circuit judges are supposed to follow their Circuit's existing precedents until the Supreme Court overturns them.

The majority's opinion is full of amazing and amusing claims. For example, they claim that a .38 revolver is not a military weapon, and therefore would not be protected by the Second Amendment, even if it were an individual right. Whoops! It was not that many years ago that the United States Air Force commonly issued .38 revolvers to flight crews, and at one time, even USAF security details used them.

Judge Kelly wrote a concurring opinion in which he emphasized that the Second Amendment *does* protect an individual right—but still agreed that Parker's conviction was not a problem by observing that "the obvious purpose of this prosecution–restricting concealed weapons on a military base to identified military personnel–is a reasonable restriction and thus does not contravene the Second Amendment…."[1]

I'm pleased that Judge Kelly felt that it was important to take a stand in favor of the Second Amendment. I also think most of my readers can agree that there are

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[1] *U.S.* v. *Parker* (10th Cir. 2004), available at http://pacer.ca10.uscourts.gov/pdf/03-4119.pdf, last accessed March 30, 2004.

legitimate reasons why military bases have some restrictions on carrying guns. What are you going to say if five hundred al-Qaeda members decide to exercise their Second Amendment rights at Andrews Air Force Base just after President Bush has landed in Air Force One? Yes, a "reasonable restriction"—but what constitutes a "reasonable restriction" is a little unclear, and there is no clear-cut dividing line between "reasonable" and "unreasonable." The second recent arms case demonstrates the danger of this approach.

The Michigan Court of Appeals recently upheld the authority of a public housing agency to bar tenants from having guns in their apartments. The defendant, Diane Andrew, was apparently emotionally disturbed, and perhaps suicidal. A neighbor informed a social worker that Ms. Andrew had a gun in her home. This led to a search warrant, and eventually, to Ms. Andrew's eviction.

Ms. Andrew argued that her right to keep and bear arms under the Second Amendment, and the Michigan Constitution's guarantee, has been violated. The Court of Appeals refused to admit that the Second Amendment protected an individual right, but agreed that the Michigan Constitution's guarantee is an individual right. The Court still upheld the authority of the public housing agency to evict Ms. Andrew, because previous decisions had "determined that 'the constitutionally guaranteed right to bear arms is subject to a reasonable exercise of the police power.'… The state has a legitimate interest in limiting access to weapons."

There is a legitimate state interest in limiting emotionally disturbed or mentally ill people from having access to weapons, and there has never been much argument about

that—but that wasn't why Ms. Andrew was evicted. She was evicted for having a gun, not for being an emotionally disturbed tenant with a gun.[2]

The rest of the decision is full of nonsense and absurd arguments (these are judges, after all), but this single position—that it is a "reasonable" regulation of the right to keep and bear arms to prohibit a person from having a gun in their own home—that's the danger of the "reasonable regulation" theory. Would it be "reasonable" to allow the state to prohibit tenants from publishing a newsletter out of their apartment? Would it be "reasonable" to require public housing tenants to allow random searches to look for drugs? There comes a certain point where the government regulates a right so severely that the right does not mean anything anymore.

I don't see any easy way out of this mess. "Reasonable regulation" is here to stay; there are just too many situations where a rigid application of the Bill of Rights produces bizarre and sometimes destructive results. (Why, for example, do we deny people arrested for a crime the freedom to travel, the right to bear arms, and freedom of speech? They haven't been convicted of anything yet.) When you get results like this from the Michigan Court of Appeals, it is a reminder that the best solution of all is to have judges with enough common sense to recognize "unreasonable" when they see it.

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[2] *Lincoln Park Housing Commission* v. *Andrew*, No. 244259 (Mich.App. 2004), available at

http://www.michbar.org/opinions/appeals/2004/032304/22562.pdf, last accessed March 30, 2004.