WAYLAND ROD & GUN CLUB INC.

OnTarget

SPRING 2002

Emerson Has Appealed: Will the Supreme Court Take the Case?

By Jean Drew

On October 16, 2001 a three-judge panel of the Fifth Circuit Court of Appeals handed down its decision in *United States* v. *Emerson*. The majority ruled — Judge William Garwood (Reagan appointee) writing, Judge Harold DeMoss, Jr. (Bush I appointee) concurring — the Second Amendment's right to keep and bear firearms refers to a constitutionally protected individual right, not a right of the states to maintain militias. As expected Judge Robert Parker (Clinton appointee), in a minority opinion, basically reiterated the "collective right" interpretation of the Second Amendment (*see below*).

Notwithstanding the wonderful news, this was a "mixed decision": the Court reversed and remanded the Emerson case back to federal district court for retrial. Although the majority recognized the right to keep and bear arms as a personal right, it was not prepared to concur with the opinion of U.S. District Court Judge Sam Cummings (Reagan appointee) that 18 U.S.C., §922(g)(h) is unconstitutional on Fifth Amendment due process grounds.

Some background on this vital case, courtesy of a press release from the Brady Center, formerly Handgun Control, Inc. — which is extremely unhappy with the Fifth Circuit's ruling, now that it's binding federal law within the jurisdictions of Louisiana, Mississippi, and Texas:

"[Dr.] Timothy Joe Emerson was subject to a domestic violence restraining order that required him not to come near his estranged wife or her young daughter, and was therefore prohibited by federal law, 18 U.S.C. §922(g)(8), from possessing a firearm. He was indicted for violating that provision after an incident in which he allegedly threatened his wife with a Beretta pistol and pointed it at her child. Judge Samuel Cummings of the U.S. District Court for the Northern District of Texas dismissed the indictment and ruled that the federal law denying guns to those under restraining orders is an unconstitutional infringement of the Second Amendment."

The Reno Justice department appealed. (Rumor has it Assistant U.S. Attorney William Mateja, who represented the government before the Fifth Circuit, doesn't have much of a future with the Ashcroft Justice department these days: He was expecting a promotion, which he pointedly did not get.)

> *In the 1960s and 1970s, we were often told that the Second Amendment didn't protect a right of individuals to own guns, but rather only a 'collective right' of the states to have militias…. Like collective property in a Communist country, the 'collective' Second Amendment right belonged to everyone at once in theory, but only to the government in practice....*

The "Collective Right" Interpretation

The Brady Center's Dennis Henigan explains the substance of the case Mateja presented on appeal:

"In concluding that the Second Amendment confers an individual right to firearm possession unrelated to militia service, Judge Cummings directly contradicted clear rulings of the U.S. Supreme Court and every other federal and state court that has ever considered the issue. All other courts have unanimously agreed that the Second Amendment's plain language and history confirm its purpose is merely to preserve to the states their security and freedom by means of a well-regulated militia. A number of other federal district and appellate courts have decided Second Amendment cases since Judge Cummings issued his decision in Emerson, and none has followed his misguided lead."

Arguably, this assessment is both tendentious and grossly misleading. David Kopel, law professor, University of Tennessee, rebuts Mr. Henigan's understanding of the matter thusly:

"…*United States* v. *Emerson*…recognized

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that the Second Amendment to the U.S. Constitution guarantees individuals a right to own guns…. It might seem surprising that such a decision would be controversial; polls routinely indicate that a large majority of citizens believe they have a constitutional right to own a gun, and the language of the Second Amendment itself would seem to support that belief. Yet, in the second half of the 20th century, the notion of a right to arms under the Second Amendment got little respect among the chattering classes.

"In the 1960s and 1970s, we were often told that the Second Amendment didn't protect a right of individuals to own guns, but rather only a 'collective right' of the states to have militias…. Like collective property in a Communist country, the 'collective' Second Amendment right belonged to everyone at once *in theory*, but only to the government *in practice*, and [this understanding is] thus a nullity — the opposite of a genuine right."

In three states the right to keep and bear arms has been found to be a constitutionally grounded and protected personal right; in the other 47, the meaning of the Second Amendment is still up in the air. Only a Supreme Court ruling can provide uniformity of law in all 50 states.

Timothy Joe's Turn to Appeal

Dr. Emerson filed both a petition for rehearing and for rehearing *en banc* on November 13, 2001, on grounds that the Fifth Circuit's decision was "flawed inasmuch as it is incomplete and applies the incorrect standard for determining whether a statute infringes upon a right of constitutional magnitude. It has long been the case that when a fundamental right has been trod upon by legislative enactment, either by a State or by Congress, the federal judiciary will subject such an enactment to strict scrutiny, allowing it to stand only if: (1) it is narrowly tailored, and (2) serves a compelling governmental interest…. In the case at bar, the Court properly found that the Second Amendment protects an individual right, but despite the Constitutional origin of the right, the Court did not subject 18 U.S.C. §922(g)(8) to strict scrutiny. The Court instead applied a 'reasonable restriction' standard that appears to be akin to the 'rational basis' standard applied to statutes that restrict *non-fundamental* rights."

The Right and Wrong Way to "Infringe"

Emerson appears to be arguing that the government may not infringe a right of "constitutional magnitude" — the fundamental right to keep and bear personal arms — using prior restraint without a showing of reasonable suspicion or probable cause. No one is arguing that the right to keep and bear arms is an absolute right. But in order for the government to infringe the right, it must do so on a case-by-case basis, and it must have a specific and compelling reason for doing so. On this line of reasoning, a "blanket" restraint of the type represented by 18 U.S.C. §922(g)(8) is facially unconstitutional with respect to the fundamental right it seeks to infringe.

We must not forget that the rights protected in the Bill of Rights are not grants of the federal government. They are powers retained by the people from the inception of the Constitution itself. Thus, what the government did not confer it may not take away — absent compelling reasons and individual due process.

And while we're at it, let's also not forget, the jist of the Emerson dispute and its ramifications historically have been considered matters of compelling *state*, not federal, interest (e.g., domestic relations, divorce, child protection).

The Fifth Circuit denied both petitions for rehearing on November 30, 2001. So, as expected….

Emerson Turns to a "Higher Authority"

On February 26, 2002, Emerson petitioned the U.S. Supreme Court to review the case.

Will the Supreme Court hear the case? There are two schools of thought on this.

One, no it won't, because the Fifth Circuit didn't find 18 U.S.C., §922(g)(h) to be unconstitutional, so there's nothing for it to review.

Two, yes it will, because we now have a situation where federal law varies from jurisdiction to jurisdiction. Remember, Circuit Court of Appeals rulings bind only the courts within the Circuit's geographical territory. The Fifth Circuit is only one of ten circuits. In three states the right to keep and bear arms has been found to be a constitutionally grounded and protected personal right; in the other 47, the meaning of the Second Amendment is still up in the air. Only a Supreme Court ruling can provide uniformity of law in all 50 states.

Personally, I have a hunch the Supremes will take this case. But we'll just have to wait and see. *WR*

ANNUAL HAM SHOOT

April 20th, 10 a.m. — Rain Date April 27th
"*Lucky targets*!!!" @ 50 & 100 yds.
Pistols · Rifles · Shotguns

BE there or be Square!

No Need for More Gun Laws

By Evelyn Logan, New Hampshire State Coordinator, Second Amendment Sisters

The following is an editorial reprinted from New Hampshire's Foster's Daily Democrat. *Written by Evelyn Logan of Second Amendment Sisters fame — a national organization of women concerned about protecting our Bill of Rights liberties, especially the right to keep and bear arms — it fairly outlines the Progressive Left's standard mode of attack against historic American liberties in the name of "responsible gun control."*

New Hampshire Senate Bill 376 illustrates the familiar M.O.: "Liberal academia" working hand-in-glove with "public policy groups" influencing the political process through like-minded legislators, patiently working in incremental stages toward the goal of disarming citizens on whatever pretext can be made to "sell." Fortunately, the bill was defeated. But in all likelihood, there will be repeated future attempts. The moral of the story is: It really does matter who you help elect to political office. And it really is important to speak out and to hold your political representatives' feet to the fire on the issues YOU care about.

I WOULD BE VERY INTERESTED IN KNOWING THE ACTUAL wording of that University of New Hampshire poll that shows support for stricter gun sale laws. Polls are funny things, as you no doubt know. The first and most obvious way to skew results is to call only people who will answer the way you wish. The second is to word the question(s) in such a way that what you're really asking is hidden.

For instance, I support safety courses for those who wish to carry concealed weapons, and in fact for everyone, whether they ever intend to own a gun or not. However, I do not believe that it can be required by law as a condition for getting a CCL. It is illegal to infringe on the right to keep and bear arms ... it is a violation of civil rights, under Constitutional law. To use a poll to then conclude that we should require training before issuing CCLs is ludicrous and just plain wrong.

I believe that was the case with this poll, especially if it's supported by the anti-gun rights group NH Ceasefire. Mr. Drew knows very well that New Hampshire gun owners do not support the legislation he is talking about, which is why they showed up to testify against it in Concord.

Did you research this bill, SB 376?

The bill he was referring to prevents anyone ever treated for a "mental illness" from owning a gun. One of the state senators testifying against the bill said that he would be excluded, since he was treated for depression while his beloved wife was dying of cancer. Additionally, a long list of prescription medicines was added, including Prozac, Fen-fen and Redux. Not that you would be prohibited from carrying a gun while on the medication, but forever after it was prescribed.

This sort of law has already been used to deny U.S. military veterans the right to own a gun because they were once diagnosed — not treated, nor hospitalized, nor medicated, but simply diagnosed — with post-traumatic stress. Every rape survivor, every accident or mugging or assault survivor, falls under that same onus. The brave men and women who have worked at Ground Zero, and all of the survivors of 9-11, could potentially be denied the right to ever own a firearm of any kind.

Do not feed this dog, sir, because it will take your hand off at the shoulder.

Also remember, if this had been put into effect, those guns already owned by law-abiding citizens in this state would be subject to confiscation, forcibly in many cases. It was a stupid bill, poorly-worded and pushed through by people who are paid to continue to assault our right to own valuable tools for self-defense.

By the way background checks are conducted for all gun sales at gun shows, with the exception of private sales, which are forbidden by the gun show promoters. The bill requiring training before obtaining a CCL was voted down because it is unconstitutional, as was the age requirement of 21. And rightly so.

We are a free nation, and a free state, and we intend to remain so. No cleverly-worded polls are going to change that, nor are they going to fool anyone all of the time, nor most of us any of the time. The people of this state, and their elected representatives, are just not as stupid as some folks think we are.

And from the Peoples' Republic of Maryland....

Baltimore City Council on Monday (March 18) considered prohibiting "the possession of air rifles, air guns, and BB guns, as well as their sale or transfer or their discharge" — then took their best shot, introducing further legislation prohibiting the "possession, sale or transfer, or discharge of paintball guns and similar devices." We guess next the councilors will ban finger pointing! A joint delegation from the NRA and Fisher-Price announced plans to appeal. Hey, low-caliber officeholders are almost always more dangerous than high-caliber weapons!

— *The Federalist Digest*

Wayland Rod & Gun Club

2002 CLUB CALENDAR AT-A-GLANCE

January

S	M	T	W	T	F	S
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

February

S	M	T	W	T	F	S
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28		

March

S	M	T	W	T	F	S
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24/31	25	26	27	28	29	30

April

S	M	T	W	T	F	S
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	**20** Ham
21	22	23	24	25	26	27
28	29	30				

May

S	M	T	W	T	F	S
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30	31	

June

S	M	T	W	T	F	S
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	**22** Combo
23/30	24	25	26	27	28	29

July

S	M	T	W	T	F	S
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30	31			

August

S	M	T	W	T	F	S
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18 BBQ	19	20	21	22	23	24
25	26	27	28	29	30	31

September

S	M	T	W	T	F	S
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	**28** Mystery!
29	30					

October

S	M	T	W	T	F	S
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

November

S	M	T	W	T	F	S
					1	2
3	4	5	6	7	8	**9** Turkey
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30

December

S	M	T	W	T	F	S
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17 Holiday Collation	18	19	20	21
22 Santa's Ride	23	24	25	26	27	28
29	30	31				

LEGEND: E-Board Meeting | Gen'l Membership Meeting | Work Party | Club Shoot | Special Event

A HELPING HAND....

THIS YEAR, THE CLUB WILL NEED TO MAKE CERTAIN repairs/improvements to our facilities. In particular, on **May 18th**, a Work Party has been scheduled for the purpose of installing new fencing to secure the Outdoor Range. The Range Bench on the Outdoor Range needs a serious rebuild as well. The latter task has been scheduled for **September 21st**, in anticipation of the September 28th "Magical Mystery Shoot." Several other Work Parties have been scheduled for general clean-up and maintenance chores (see *2002 Club Calendar-At-A-Glance* on page 3 for dates). You'll note that all such events fall on Saturdays. All have starting times of 9 a.m.

Help support your Club by showing up for a Work Party! Don't forget, each Work Party you contribute your time and energy to gets you an additional chance to win the annual Club raffle — which always includes at least one fine firearm. Plus it's a fun way to help build a better, stronger Wayland Rod & Gun Club.

NEW!!! VISIT WAYLAND ROD & GUN CLUB'S WEB SITE

JUST GO TO **www.waylandgc.org** AND TAKE A LOOK!

The web site is up and running, yet still under development. We're eager to hear your suggestions for ways to make it truly useful to members of WR&GC.

Soon you'll be able to download current and past issues of the Club newsletter, including various articles of interest to hunters and sportsmen authored by such members as Steve Garanin and Jared Nedzel.

The web site promises to be an excellent Club resource, facilitating the exchange of information among our members, and presenting a "public face" to the world beyond. Interestingly, certain new members of the Club "found us" while surfing the 'Net: They logged onto our site, found out about us, and joined up!

Webmaster **Dave Jabs** invites your ideas and contributions. **www.waylandgc.org** promises to be a great tool for fostering communications among the membership. So log on — and tell us what you think!