From: **CR Howard [air.man@att.net]**
Sent: Tuesday, April 20, 1999 3:52 PM
To: Recipient list suppressed
Subject: Good WSJ article on 2nd Amendment case

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Issue 57, April 19, 1999
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"Guns and the Constitution"
by Eugene Volokh, from the Wall Street Journal

A federal judge in Texas has just done something no federal court had done in more than 60 years: He held that the Second Amendment protects people's right to keep and bear arms. If this decision is affirmed by the Fifth Circuit Court of Appeals, the case has a very good chance of going to the Supreme Court, which hasn't yet resolved this issue. And behind the narrow Second Amendment matter lies a deeper question about the utility of a written Constitution.

As in many constitutional cases, the defendant -- Timothy Emerson, a San Angelo doctor -- isn't the best of fellows. During Dr. Emerson's divorce proceedings, his wife claimed he had threatened to kill her lover. The state divorce court apparently made no findings on this, but entered a boilerplate order barring Dr. Emerson from threatening his wife.

Though this state order said nothing about firearms, a little-known federal law bars gun possession by people who are under such orders. Dr. Emerson not only failed to dispose of his guns, as the law required, but eventually brandished one in front of his wife and daughter. He was then prosecuted under the federal law, though for gun possession rather than gun misuse.

The instinctive reaction here is that Dr. Emerson is the very sort we'd like to disarm, trouble waiting to happen. But when the divorce court issued its order, Dr. Emerson hadn't been found guilty of anything. Had he been convicted of a felony, all agree he would have lost his right to keep and bear arms as well as his right to remain at liberty. Here, though, there was no trial, no conviction, no finding of misconduct or future dangerousness. So when the federal law barred Dr. Emerson from possessing guns, he was a citizen with a clean record, just like you and me. Hence his Second Amendment defense.

The hot constitutional question is whether the

Second Amendment protects only states' rights to arm their own military forces, or whether it protects an individual right. If the states-rights view is correct, Dr. Emerson could have been disarmed with no constitutional worries -- and so could anyone else. But the Second Amendment's text and original meaning pretty clearly show that it protects individuals. The text, "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed," says the right belongs to people, not states. And in the Bill of Rights "the right of the people" refers to individuals, as we see in the First and Fourth Amendments.

Moreover, the Second Amendment is based on the British 1688 Bill of Rights and is related to right-to-bear-arms provisions in Framing-era state constitutions. The British right must have been individual; there were no states in England. Same for the state constitutional rights; a right mentioned in a state Bill of Rights, which protects citizens against the state government, can't belong to the state itself. So in the Framing era, the "right to bear arms" meant an individual right.

What about the militia? The Second Amendment secures a "right of the people," not of the militia; but in any event, as the Supreme Court held in 1939, the Framers used "militia" to refer to all adult able-bodied males under age 45. Even today, under the 1956 Militia Act, all male citizens between 18 and 45 are part of the militia. (Women are probably also included, given the Supreme Court's sex-equality precedents.) "Well-regulated militia" in late 1700s parlance meant the same thing -- "the body of the People capable of bearing Arms," which is how an early proposal for the amendment defined it. And the individual-rights view is the nearly unanimous judgment of all the leading 1700s and 1800s commentators and cases.

Based on this evidence, federal Judge Sam Cummings concluded Dr. Emerson's gun possession (though not his gun misuse) was constitutionally protected. If the Second Amendment is to be taken seriously, then Judge Cummings was right, and the other lower court cases holding the contrary were wrong.

If, that is, the Second Amendment is to be taken seriously. The notion of a written, binding Constitution tells us it should be, but cases like this lead some to wonder. Why, they ask, should today's decisions be bound by the dead hand of the past? If we have a "living Constitution" onto which courts may graft new rights, why can't they prune away obsolete ones?

These are genuinely tough questions, which go far beyond just the Second Amendment, and which have been

raised in past controversies by conservatives as well as liberals. Let me give a few responses.

First, government entirely by the sometimes hyperactive hand of the present also has flaws. The benefits of liberties, however real, are often less visible than the costs. When we see Dr. Emerson before the court, accused of making violent threats, it's tempting to treat the right to possess guns as a nuisance. But we don't as easily see the hundreds of thousands of people who use guns each year in self-defense, including separating spouses who defend themselves against would-be abusers.

Second, modern innovations that restrict traditional liberties are often oversold. Realistically, people willing to violate laws against violent crime will rarely be deterred by laws against gun possession. Conversely, if Dr. Emerson is the poster child for why some shouldn't have guns, he is equally an example of how the law could effectively punish people for misusing guns (by brandishing them in a threatening way) rather than just for having them. Maybe ignoring the Constitution is neither so valuable nor so necessary.

Third, while some think gun rights are "obsolete," others disagree. Since 1970, 15 states have enacted new state constitutional rights to bear arms or strengthened old ones; 44 constitutions now have such provisions. In the mid-1980s, nine states let pretty much all law-abiding adults get a license to carry concealed weapons; now the number is 31. A conclusion that the right is obsolete thus doesn't rest on any unambiguous consensus; it can rest only on the judge's personal policy preferences. Do we trust judges that much?

And finally, do we trust judges to determine when other provisions -- the Establishment Clause, the privilege against self-incrimination, the jury trial, the freedom of speech -- become obsolete, too?

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Eugene Volokh is your loyal editor; you can find links to his Second Amendment-related articles at http://www.law.ucla.edu/faculty/volokh/index.htm#GUNCONTROL He has collected a large set of original sources on the Second Amendment, available at http://www.law.ucla.edu/faculty/volokh/2amteach/sources.htm For the opposite view of the Second Amendment, see http://www.handguncontrol.org/ (Handgun Control, Inc.'s Web site), especially http://www.handguncontrol.org/legalaction/C2/c2rtarms.htm

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Federalist Society.
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Necessity is the plea for every infringement of human freedom.
It is the argument of tyrants.
It is the creed of slaves.
-William Pitt (Pitt the Younger)
Speech to the House of Commons, 18 November, 1783