

PHOTOCOPY
PRESERVATION

Texas case could shape the future of gun control

The Second Amendment establishes a right to possess firearms. The question is: Is it an individual right or a military necessity?

By Richard Willing
USA TODAY

A1

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.

— Second Amendment to the U.S. Constitution, 1791

Tucked inside this famous paragraph, amid the multiple clauses, odd punctuation and 18th-century syntax, lies the right that Americans both cherish and fear: the right to have a gun.

But whose right is it anyway? Is there an individual right to own a gun, like the individual right to freedom of speech or religion? Or does the Second Amendment mean only that Americans can defend themselves collectively through state militias, like the modern-day National Guard?

The debate over what the Second Amendment actually means has filled a forest of law review articles and scholarly papers over the past 10 years. Now it is about to spill out of the

ivory tower and into the real world of guns and gun control.

For the first time, a federal judge has ruled that the Second Amendment guarantees an individual's right to own a gun. In the process, the judge invalidated a 1994 federal law that denies guns to anyone who is under a restraining order to prevent him or her from harassing a spouse. The law was part of a measure aimed at reducing domestic violence by limiting access to guns.

If the decision by a federal district court judge last April in Texas is upheld on appeal, it could be a huge setback for gun control advocates, placing perhaps hundreds of laws in danger of being struck down. And it would be a victory for gun control opponents such as the National Rifle Association, which has consistently argued that an individual's right to a gun is protected by the Second Amendment.

An appeal of the case, *U.S. vs. Emerson*, begins with the filing of briefs in the U.S.

Court of Appeals for the Fifth Circuit in New Orleans today.

The case, which is likely to be argued next January or February, is unfolding as liberal scholars such as Harvard's Laurence Tribe, who has long been hostile to the individual-rights argument, have begun to move toward the NRA's position.

"The real-world consequences (of the Texas case) could be enormous," says Carl Bogus, a specialist on the Second Amendment at Roger Williams Law School in Bristol, R.I.

If the lower-court ruling is upheld, "it would stand the law on its head," Bogus says. It would destroy Congress' ability to create gun control laws. Anyone arrested under current (gun control) laws could argue they're unconstitutional. This is not just an academic exercise."

The renewed debate over the Second Amendment's meaning comes as recent shootings in Atlanta, Los Angeles and Littleton, Colo., have increased pressure for new gun control laws. This week, authorities in Los Angeles took the unprecedented step of banning sales of guns from the nation's largest gun show.

The very fact that there is a debate is likely to surprise many Americans, many of whom assume that the Second Amendment already guarantees them the right to own a gun. A CBS News poll Aug. 15 found that 48% of adults believe there is an individual right to a gun, while 38% do not.

Case began as domestic dispute

The case began last August when Sacha Emerson, 26, a nurse from San Angelo, Texas, filed for divorce. The local court placed a restraining order on her husband, physician Timothy Joe Emerson, 41, after she complained that he had verbally threatened her boyfriend.

Timothy Emerson owned a handgun, which automatically put him at odds with the federal law barring gun ownership by people under state restraining orders in domestic disputes. A federal grand jury indicted Emerson, who was "greatly surprised" to learn that he may have violated any law, according to his lawyer, David Guinn.

The case never got to trial. In April, U.S. District Court Judge Sam Cummings found that the law denying guns to those under a restraining order was an unconstitutional infringement of the "individual right to bear arms."

The federal law, Cummings wrote, "is unconstitutional because it allows a state court divorce proceeding, without particularized findings of the threat of future violence, to automatically deprive a citizen of his Second Amendment rights."

The decision took gun control advocates and opponents by surprise. Cummings, 54, who was appointed to the federal bench by President Reagan, had a reputation as a middle-of-the-road jurist who seldom set aside an indictment. And Emerson's lawyer, assistant federal public defender David Guinn, had raised the Second Amendment argument almost as an afterthought.

Both sides are taking the appeal very seriously. The National Association of Criminal Defense Lawyers and the NRA plan to file briefs supporting Emerson and his argument that there is an individual right. A consortium of 45 law professors and legal historians has filed on behalf of the other side.

The solicitor general's office in Washington, which handles appeals for the federal government, is helping federal prosecutor William Mateja with his argument that the domestic violence law should be upheld and the indictment reinstated.

Amendment is open to interpretation

Arguments about the meaning of the Second Amendment can be murky, because both sides rely on the amendment's wording to reach radically different conclusions.

Proponents of the theory that the Second Amendment confers only a collective right to bear arms focus on the mention of "militia" in the amendment's opening clause.

"Clearly, the reference to 'militia' is there for a reason," Bogus says. If the Amendment's drafters had "wanted an individual right, they wouldn't have needed to qualify it. That first (clause) is all-important. They're saying, 'Because there's a need for a militia, we're bringing up the subject of arms.'"

These theorists say that history, too, is in their favor. James Madison's original draft of the Second Amendment, the theorists note, exempted the "religiously scrupulous" — conscientious objectors — from bearing arms, indicating that the right protected only arms related to militia service.

"If the Second Amendment had been adopted as originally drafted by Madison, there'd be no question that its scope is limited to the possession of weapons for use in the militia," says David Yassky, a Brooklyn Law School professor who has filed a brief supporting the collective view in the Texas case.

Supporters of the militia interpretation also say that to accept an individual right to arms is to endorse anarchy.

"The Second Amendment can't mean that you have the right to form a private army," says Dennis Henigan, legal director of the Center to Prevent Handgun Violence.

"That's the logic of (Oklahoma City bomber) Timothy McVeigh," Henigan says. The framers of the Constitution "couldn't have intended to bestow a right to armed insurrection. That would have destroyed what they were trying to build."

Those who advocate the right of the individual to bear arms say their adversaries are misreading the Second Amendment.

"You've got to understand: The militia at the time (the amendment) was written was basically all able-bodied men," says Stephen Halbrook, a lawyer in Fairfax, Va., who has filed a pro-gun-rights brief in the Texas case.

When the framers "are talking about the 'militia,' they are talking about the 'people.' They'd be shocked if anybody thought they meant something different."

Russian bank fraud probe expanding

Millions missing from U.S.-Russia grain program

By Jack Kelley
USA TODAY

A1

WASHINGTON — U.S. investigators, alarmed by the extent of possible money laundering by Russian crime groups in U.S. and European banks, said Thursday that they were expanding their probe to include a wide array of U.S. aid programs to Russia.

"The more we dig, the more we find," said one senior U.S. official, part of the team investigating the illegal diversion of billions from a variety of Russian aid and loan programs.

He said the full extent of the money laundering could exceed \$15 billion and be spread over more than the current five accounts under investigation.

He and other investigators also disclosed that tens of millions of additional dollars were missing from a special bank account that was set up by the government of President Boris Yeltsin to deposit earnings from the sale of U.S. grain to Russia.

Under that agreement, begun by the Bush administration, the United States both donates grain and provides long-term loans for the Russian government to purchase grain, corn and other products.

The products would then be sold in Russia at market prices to local residents. The earnings were to have been deposited into a special account.

But investigators now believe

► Administration stands by IMF, 1B

► Banks vulnerable to launder schemes, 1B

that the earnings have been illegally diverted to an offshore bank, possibly by current or former members of Yeltsin's government.

In addition, U.S. and British investigators told USA TODAY that they suspect there are at least 12 current or former Russian officials who have diverted at least \$15 billion, including several billion in International Monetary Fund loans, through two New York banks.

Russian Finance Minister Mikhail Kasyanov has denied that the Russian government had any role in diverting loan money.

But Russia's acting prosecutor general, Vladimir Ustinov, said Thursday that he planned to join the probe into the accusations.

Also Thursday, U.S. and British officials said they were intensifying their search for Semion Mogilevich, a leader of Russia's largest crime group, who they believe was among those responsible for diverting the money.

Mogilevich disappeared last week from his office inside a Budapest, Hungary nightclub called the "Black and White Club." Two other suspects in the case have also disappeared.

Both sides say history supports them

Those in the individual-rights group also say history supports them, not their opponents.

"When the amendment was written and through most of the 19th century and into the 20th, it was assumed that the individual right (to a weapon) existed," says Robert Cottrol, a Second Amendment specialist at George Washington University law school and author of *Gun Control and the Constitution*.

"It wasn't until federal (gun control) laws were enacted, during Prohibition and later during the 1960s, that it even became an issue."

Akhil Reed Amar, a Yale University law professor and scholar of the Bill of Rights, says the right is neither collective nor individual but something in between: the right of a small community of family and friends to defend their homes, as the Minutemen had done during the American Revolution.

"They weren't thinking of establishing a right for the National Guard or for the Michigan militia," Amar says. "They were thinking about Lexington and Concord, where they stood with their families and friends to resist an imperial army. If you get Lexington and Concord, you get the Second Amendment."

America's courts have had

little to say about the debate. When they have weighed in, it has been on the side of those who say there's no individual right.

During Prohibition, Arkansas bootlegger Jack Miller was indicted under the first national gun control law for carrying a sawed-off shotgun across state lines.

Miller argued that the Second Amendment gave him the right to carry the

weapon and that the charge should be dismissed. But the Supreme Court disagreed, saying in a unanimous 1939 decision that the shotgun had no "reasonable relationship to the preservation or efficiency of a well-regulated militia" and was thus not protected by the amendment.

U.S. vs. Miller was the first and so far the only Supreme Court case to address the issue. Since then, the U.S. Courts of Appeal have used the case's reasoning to uphold gun restrictions in at least 21 separate cases.

"As long as a (gun control) law exempts the National Guard or police, it has passed muster," says Dennis Henigan of the Center to Prevent Handgun Violence. "The law has been all our way."

But liberal scholars, after backing the militia theorists for years, have begun to side with individual-rights proponents.

Sanford Levinson of the University of Texas law school began the trend 10 years ago with an influential law journal article that compared the Second Amendment to an "embarrassing relative, whose mention brings a quick change of subject."

"This will no longer do," Levinson wrote, concluding that the individual-rights argument had a historical basis.

Others picked up on that argument.

"If you're going to look at (the Second Amendment) fairly, you have to conclude that it means a lot more than its critics say," Amar of Yale says. "It's there in the middle of the Bill of Rights for a reason."

In a striking departure, Harvard University's Tribe now concludes that the Second Amendment guarantees more

than a militia right and includes an individual right to own firearms. Tribe's new view is included in an updated version of his treatise *American Constitutional Law*, which is out this month.

"Some very serious scholars are concluding that it is too simplistic to say that the Second Amendment only protects the militia," Tribe says. "It's not just the 'hired guns' for the NRA."

The stakes are large. If the Fifth Circuit upholds the individual right to own guns, it would conflict with decisions in other appeals courts over the years. This probably would prompt a review by the U.S. Supreme Court.

And if the individual-right theory is upheld there, state and federal legislatures could have a much harder time passing gun control laws. Current laws, too, would be open to challenge. Courts probably would impose a "balancing test" to determine whether a proposed gun control law unduly restricts an individual's rights. Essentially, courts would weigh the justification for the gun control stat-

ute against the restriction imposed on the individual citizen.

"To date, any restriction short of prohibition (of private gun ownership) has been deemed acceptable by the courts," George Washington University's Cottrol says. "If a right is involved, presumably the whole picture changes. Any law impacting on that right might have to pass a much stricter test."

No one is making book on how the Fifth Circuit will rule. Mateja says he'll argue that the militia rights view is "well settled" in law and that Judge Cummings' decision was "flat wrong."

Guinn says he'll fall back on the language of the Second Amendment and its promise of the "right of the people to keep and bear arms."

"The 'people' means the people," he says. "What else could it mean?"

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Angry Reno says Waco has hurt her credibility

By Kevin Johnson
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A1

WASHINGTON — Attorney General Janet Reno said Thursday that her credibility had been hurt by the FBI's acknowledgement that potentially flammable tear-gas canisters had been lobbed near the Branch Davidian compound

near Waco, Texas, hours before it burned to the ground.

"I don't think it's very good for my credibility," an angry Reno told reporters. "I'm very, very upset."

Until this week, Reno and other officials had denied that flammable devices were used in the assault. Eighty people died in the siege six years ago.

Reno said a new review would "get to the bottom" of the FBI's revelation. The investigation will include an examination of the role of the Delta Force, an elite Defense Department unit involved in the siege.

An FBI memo prepared as early as 1996 said authorities launched military-style gas canisters into a concrete bunker about six hours before the fire erupted. The canisters bounced off the concrete and landed some distance away.

Reno said the disclosures would not change the conclusion that the Davidians and cult leader David Koresh were responsible for the fires.

Lawyer Dick DeGuerin, who represented Koresh, said: "I'm glad to see it's finally coming out. Every (survivor) said that hundreds of projectiles were being shot through the walls."

Southeast on storm watch: 1, 2 or 3 A1

One or more of the three storms churning in the Atlantic Ocean could strike the southeastern United States this weekend — or they could all just turn away.

The National Hurricane Center in Miami said the closest storm, Hurricane Dennis, stalled about 200 miles southeast of the Bahamas Thursday but could move across the Bahamas today and then toward the USA over the weekend.

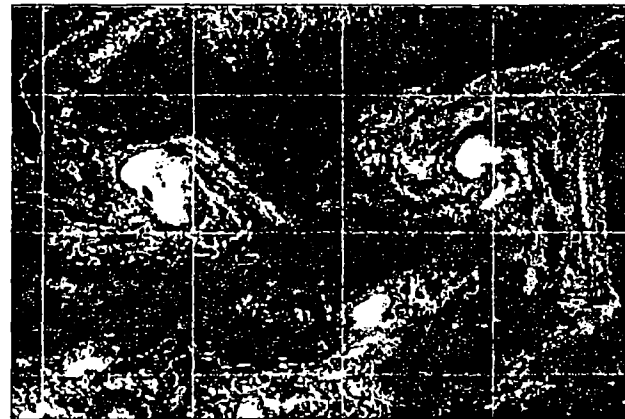
Eleuthera Island in the Bahamas was preparing for the worst. "People still remember Hurricane Andrew here from 1992, so we're keeping an eye out for it," hotel owner Harcourt Cambridge said.

► Hurricane Dennis: Projected path, 3A

Winds could reach 110 mph as the storm nears the Carolinas Sunday. Or maybe not. Residents along the coast as far south as Miami and the Florida Keys should monitor Dennis closely, forecasters said.

Two other storms posed little immediate threat. Hurricane Cindy is huge but is nearly 1,000 miles southeast of Bermuda. Emily, several hundred miles away to the east, was downgraded to a tropical depression Thursday.

Contributing: Associated Press



Turbulence in the Atlantic: Hurricane Dennis, tropical depression Emily and Hurricane Cindy, left to right.