

**SJR**

**17**





# SENATOR DAVE DONLEY

ALASKA STATE LEGISLATURE

## MEMORANDUM

**TO:** Representative John Coghill, Chair  
House State Affairs Committee

**FROM:** Senator Dave Donley, Co-Chair  
Senate Finance Committee

**DATE:** April 2, 2001

**RE:** Hearing request for CS for SJR17, "Urging President Bush to renounce and reverse Clinton Justice Department anti-gun-ownership policies"

I request that you schedule Senate Joint Resolution 17, an act requesting that President Bush direct the United States Department of Justice to acknowledge ownership of firearms by individual, law-abiding American citizens as a constitutionally guaranteed, Second Amendment freedom, for a hearing at your earliest convenience.

Under President Clinton's Administration, the United States Department of Justice advocated the legal position that the Second Amendment of the United States Constitution afforded no protection to individual citizens. Furthermore, attorneys for the Justice Department argued in open court that the Second Amendment of the Constitution was consistent with the Clinton Administration's position that the United States government could, without explanation or rational justification, relieve otherwise law-abiding American citizens of any and all firearms.

Senate Joint Resolution 17 is consistent with the popularly enacted amendment to Article I, section 19 of the Alaska State Constitution, protecting the individual's right to keep and bear arms.

Attached are copies of CS for SJR 17, a sponsor statement and a comprehensive information packet.

If you have any questions, please contact Jomo Stewart of my staff at x2705.

Thank you for your consideration.

HR: April 2, 2001

DD/jlps

Co-Chair: Senate Finance Committee  
Vice-Chair: Senate Judiciary Committee

Member: Legislative Budget and Audit Committee • Legislative Council



# SENATOR DAVE DONLEY

ALASKA STATE LEGISLATURE

## SPONSOR STATEMENT

### SENATE JOINT RESOLUTION 17

#### "Urging President Bush to renounce and reverse Clinton Administration anti-gun-ownership policies"

Senate Joint Resolution 17 requests that President Bush direct the United States Justice Department to acknowledge gun-ownership to be the Constitutionally guaranteed freedom that the founding fathers intended. It reflects the belief of the Alaskan people that the writers of the United States Constitution fully intended the Second Amendment to irrevocably protect the right of individual American citizens to keep and bear arms.

Under President Clinton's Administration, the United States Department of Justice advocated the legal position that the Second Amendment of the United States Constitution afforded no protections to individual citizens: not even for members of the national Armed Services, the National Guards or states' militias. Furthermore, attorneys for the Justice Department argued in open court that the Second Amendment of the Constitution was consistent with their position that the United States government could, without explanation or rational justification, relieve otherwise law-abiding American citizens of any and all firearms. Guns liable for confiscation included not only handguns but muskets, rifles and shotguns: cherished firearms, traditionally used for hunting and self-protection, since the very inception of our nation.

From the body of historical evidence it is clear that the founding fathers of the United States were, one and all, gun users and gun owners: Mason, Madison, Monroe, Jefferson, Franklin, Hamilton, Paine, Henry, Webster, Samuel Adams, John Adams, Washington... Federalists and Anti-Federalists alike considered the right to own and bear arms, like freedom of religion, speech or the press, to be an inalienable natural right and a necessary check on the power of a potentially overreaching government.

The Alaskan people positively recognized the true spirit of the United States Constitution when they voted overwhelmingly to amend the Alaska State Constitution to specifically protect the right of individual citizens to keep and bear arms. Senate Joint Resolution 17 urges President Bush to bring renewed honor to the office of the Presidency by joining us in this reaffirmation of the true meaning of Article II of the Bill of Rights, the Second Amendment of the United States Constitution.

Senate Joint Resolution 17 was drafted in consultation with the National Rifle Association.

DD/jlps

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## TESTING THE LIMITS OF THE SECOND AMANDMENT

### United States v. Emerson

On August 28, 1998, Sacha Emerson filed a petition for a divorce from her estranged husband, Timothy Joe, in the 119<sup>th</sup> District Court of Tom Green County, Texas. At the same time she also submitted an application for a temporary restraining order to be placed against her husband pending divorce proceedings.

On September 4, 1998 the hearing on Mrs. Emerson's application for a temporary restraining was heard before the Honorable John E. Sutton. The court granted Mrs. Emerson's application for a temporary restraining order.

Unknown to Mr. Emerson, who had appeared at the hearing without council, being subject to the restraining order immediately barred him from the possession of firearms. Judge Sutton did not inform him of this fact and Mr. Emerson soon found himself indicted for possession of a firearm while being under a restraining order, in violation of **TITLE 18, Section 992 (g) (8)** of the U.S. Code.

The case was heard in United States District Court for the Northern District of Texas, San Angelo Division, the Honorable Sam R. Cummings presiding. Emerson asked that the charges be Dismissed because prosecution under 18 U.S.C. Sec. 992 (g) (8) would violate his Second Amendment freedoms.

In **Judge Cummings' opinion**, "only if the Second Amendment guarantees Emerson a personal right to bear arms can he claim a constitutional violation." The Memorandum Opinion that followed analyzed this question on several levels: scholastically, textually, historically, structurally and in the light of contemporary societal concern. In the end, Judge Cummings dismissed the case against Emerson concluding that **the Second Amendment of the Constitution was intended to, and did indeed, protect a personal and individual right of firearm ownership.**

The United States appealed Judge Cummings' decision to the **5<sup>th</sup> Circuit, U.S. Court of Appeals**. At these proceedings, Assistant United States Attorney William Mateja argued that it was the opinion of the United States government that the Second Amendment does not protect individual gun-ownership rights.

In response to a letter of inquiry sent by members of the NRA, asking if Assistant U.S. Attorney Mateja had accurately represented the policy position of the Justice Department, former **Solicitor General Seth P. Waxman** responded that it definitely was the opinion of the DOJ that the Second Amendment did not protect individual gun-ownership rights.

**TITLE 18 USC Sec. 922 (g) (8)**

**TITLE 18 - CRIMES AND CRIMINAL PROCEDURE**

**PART I - CRIMES**

**CHAPTER 44 - FIREARMS**

**Sec. 922 - UNLAWFUL ACTS**

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(g) It shall be unlawful for any person -

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien -

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

**(8) who is subject to a court order that -**

**(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to**

participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Information and opinion unrelated to Second Amendment not included.

Expanded opinion available upon request.

## KEY QUOTES:

### U.S. v. EMERSON

"In retrospect, the framers designed the Second Amendment to guarantee an individual's right to arms for self-defense. Such an individual right was the legacy of the English Bill of Rights. American colonial practice, the constitutional ratification debates, and state proposals over the amendment all bear this out. *Id.* at 162. The American Second Amendment also expanded upon the English Bill of Rights' protection; while English law allowed weapons "suitable to a person's condition" "as allowed by law", the American right forbade any "infringement" upon the right of the people to keep and bear arms. *Id.*

"Justice Scalia concludes by stating that "[i]t is very likely that modern Americans no longer look contemptuously, as Madison did, upon the governments of Europe that 'are afraid to trust the people with arms,' The Federalist No. 46; and the . . . Constitution that Professor Tribe espouses will probably give effect to that new sentiment by effectively eliminating the Second Amendment. But there is no need to deceive ourselves as to what the original Second Amendment said and meant. Of course, properly understood, it is no limitation upon arms control by the states." *Id.*

Thus, concerns about the social costs of enforcing the Second Amendment must be outweighed by considering the lengths to which the federal courts have gone to uphold other rights in the Constitution. The rights of the Second Amendment should be as zealously guarded as the other individual liberties enshrined in the Bill of Rights."

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"The structure of the Second Amendment within the Bill of Rights proves that the right to bear arms is an individual right, rather than a collective one. The collective rights' idea that the Second Amendment can only be viewed in terms of state or federal power "ignores the implication that might be drawn from the Second, Ninth, and Tenth Amendments: the citizenry itself can be viewed as an important third component of republican governance as far as it stands ready to defend republican liberty against the depredations of the other two structures, however futile that might appear as a practical matter." Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 651 (1989)."

"It is absurd that a boilerplate state court divorce order can collaterally and automatically extinguish a law-abiding citizen's Second Amendment rights, particularly when neither the judge issuing the order, nor the parties nor their attorneys are aware of the federal criminal penalties arising from firearm possession after entry of the restraining order. That such a routine civil order has such extensive consequences totally attenuated from divorce proceedings makes the statute unconstitutional. There must be a limit to government regulation on lawful firearm possession. This statute exceeds that limit, and therefore it is unconstitutional."

On February 26, 1999, the Court granted Defendant's Motion to Dismiss. The following is the Court's memorandum opinion of the Order.

UNITED STATES DISTRICT COURT  
for the  
NORTHERN DISTRICT OF TEXAS  
SAN ANGELO DIVISION

UNITED STATES OF AMERICA v. TIMOTHY JOE EMERSON

Judge Samuel E. Cummings

**MEMORANDUM OPINION**

**Second Amendment**

Emerson claims that 18 U.S.C. § 922(g)(8) violates his rights under the Second Amendment to the United States Constitution. The Second Amendment states that:

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.

U.S. CONST. amend. II.

Only if the Second Amendment guarantees Emerson a personal right to bear arms can he claim a constitutional violation. Whether the Second Amendment recognizes an individual right to keep and bear arms is an issue of first impression within the Fifth Circuit. Emerson claims that he has a personal right to bear arms which the Act infringes, while at oral argument on the Motion to Dismiss, the Government claimed it is "well settled" that the Second Amendment creates a right held by the States and does not protect an individual right to bear arms.

**1.**

**Second Amendment Schools of Thought**

Two main schools of thought have developed on the issue of whether the Second Amendment recognizes individual or collective rights. These schools of thought are referred to as the "states' rights", or "collective rights", school and the "individual rights" school. The former group cites the opening phrase of the amendment, along with subsequent case law, as authority for the idea that the right only allows states to establish and maintain militias, and in no way creates or protects an individual right to own arms. David E. Johnson, Note, *Taking a Second Look at the Second Amendment and Modern Gun Control Laws*, 86 KY. L.J. 197, 198 (1997-98) (citing Andrew D. Herz, *Gun Crazy: Constitutional! False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U.L. REV. 57 (1995)). Due to changes in the political climate over the last two centuries and the rise of National Guard organizations among the states, states' rights theorists argue that the Second Amendment is an anachronism, and

that there is no longer a need to protect any right to private gun ownership.

The individual rights theorists, supporting what has become known in the academic literature as the "Standard Model", argue that the amendment protects an individual right inherent in the concept of ordered liberty, and resist any attempt to circumscribe such a right. *Id.* (citing Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 464-88 (1995); Robert Dowlut, *The Right to Keep and Bear Arms: A Right to Self-Defense Against Criminals and Despots*, 8 STAN. L. & POL'Y REV. 25 (1997))

## 2.

### Textual Analysis

A textual analysis of the Second Amendment supports an individual right to bear arms. A distinguishing characteristic of the Second Amendment is the inclusion of an opening clause or preamble, which sets out its purpose. No similar clause is found in any other amendment. Stanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 644 (1989). While states' rights theorists seize upon this first clause to the exclusion of the second, both clauses should be read in *pari materia*, to give effect and harmonize both clauses, rather than construe them as being mutually exclusive.

The amendment reads "[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." U.S. CONST. amend. II. Within the amendment are two distinct clauses, the first subordinate and the second independent. If the amendment consisted solely of its independent clause, "the right of the people to keep and bear Arms, shall not be infringed", then there would be no question whether the right is individual in nature. David E. Johnson, Note, *Taking a Second Look at the Second Amendment and Modern Gun Control Laws*, 86 KY. L.J. 197, 200 (1997-98).

Collective rights theorists argue that addition of the subordinate clause qualifies the rest of the amendment by placing a limitation on the people's right to bear arms. *Id.* However, if the amendment truly meant what collective rights advocates propose, then the text would read "[a] well regulated Militia, being necessary to the security of a free State, the right of the *States* to keep and bear Arms, shall not be infringed." However, that is not what the framers of the amendment drafted. The plain language of the amendment, without attenuate inferences therefrom, shows that the function of the subordinate clause was not to qualify the right, but instead to show why it must be protected. *Id.* The right exists independent of the existence of the militia. If this right were not protected, the existence of the militia, and consequently the security of the state, would be jeopardized. *Id.* at 201.

The Supreme Court recently interpreted the text of the Second Amendment and noted that the phrase "the people" in the Second Amendment has the same meaning in both the Preamble to the Constitution and in the First, Fourth, Fifth, and Ninth Amendments. <http://www.supremecourt.gov/supremecourt.html?&court=US&case=/us/494/259.html> "*United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990). The Court held that the phrase "the people" "seems to have been a term of art employed in select parts of the Constitution."

The Second Amendment protects "the right of the people to keep and bear Arms", and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people."

\* \* \*

While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community. See *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904).

The Court has also held that given their contemporaneous proposal and passage, the amendments of the Bill of Rights should be read in *pari materia*, and amendments which contain similar language should be construed similarly. *Patton v. United States*, 281 U.S. 276, 298 (1930), cited by David Harmer, *Securing a Free State: Why the Second Amendment Matters*, 1998 BYU L. REV. 55, 61 (1998). The Court's construction of "the people" as used in the Second Amendment supports a holding that the right to keep and bear arms is a personal right retained by the people, as opposed to a collective right held by the States. Thus, a textual analysis of the Second Amendment clearly declares a substantive right to bear arms recognized in the people of the United States.

### 3.

#### Historical Analysis

"[T]here is a long tradition of widespread lawful gun ownership by private individuals in this country."

[&graphurl=&court=US&case=/us/000/u10420.html](#)" *Staples v. United States*, 511 U.S. 600, 610 (1994). A historical examination of the right to bear arms, from English antecedents to the drafting of the Second Amendment, bears proof that the right to bear arms has consistently been, and should still be, construed as an individual right.

#### a.

##### English History

A review of English history explains the founders' intent in drafting the Second Amendment. As long ago as 690 A.D., Englishmen were required to possess arms and to serve in the military. David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 559, 562 (1986) (citing 1 JOHN J. BAGLEY & PETER B. ROWLEY, A DOCUMENTARY

HISTORY OF ENGLAND 1066-1540, at 152 (1965)). This obligation continued for centuries, requiring nobility, and later commoners, to keep arms and participate in the militia. *Id.* at 563-65. The obligation to keep arms was not simply to provide military service in the king's army; English citizens were also required to provide local police services, such as pursuing criminals and guarding their villages. CLAYTON E. CRAMER, FOR THE DEFENSE OF THEMSELVES AND THE STATE: THE ORIGINAL INTENT AND JUDICIAL INTERPRETATION OF THE RIGHT TO KEEP AND BEAR ARMS 24-25 (1994); JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 2 (1994).

By the middle of the seventeenth century, however, the sovereign jeopardized the individual right to bear arms. Charles II, and later James II, began to disarm many of their Protestant subjects. Hardy, *supra*, at 574-79. James II was an unpopular king whose policies stirred great resentment among both the political and religious communities of England. David E. Murley, *Private Enforcement of the Social Contract: Deshaney and the Second Amendment: Right to Own Firearms*, 36 DUQ. L. REV. 15, 19 (1997). Eventually, James II fled England during what was later termed the Glorious Revolution. Hardy, *supra*, at 579. In the aftermath of the Glorious Revolution, Parliament passed the English Bill of Rights in 1689, codifying the individual right to bear arms. *Id.* at 580. The Bill of Rights provided that "the subjects which are Protestant may have arms for their defense suitable to their conditions and as allowed by law." *Id.* at 581.

b.

### **The Colonial Right To Bear Arms**

The American colonists exercised their right to bear arms under the English Bill of Rights. Indeed, the English government's success in luring Englishmen to America was due in part to pledges that the immigrants and their children would continue to possess "all the rights of natural subjects, as if born and abiding in England." MALCOLM, *supra*, at 138. As in England, the colonial militia played primarily a defensive role, with armies of volunteers organized whenever a campaign was necessary. *Id.* at 139. Statutes in effect bore evidence of an individual right to bear arms during colonial times. For example, a 1640 Virginia statute required "all masters of families" to furnish themselves and "all those of their families which shall be capable of arms . . . with arms both offensive and defensive." *Id.* (citing THE OLD DOMINION IN THE SEVENTEENTH CENTURY: A DOCUMENTARY HISTORY OF VIRGINIA, 1606-1689, at 172 (Warren M. Billings ed., 1975)). A 1631 Virginia law required "all men that are fittinge to beare armes, shall bring their pieces to church . . . for drill and target practice." Hardy, *supra*, at 588 (quoting 1 WILLIAM W. HENING, THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 173-74 (reprint. 1969) (1823)). These laws served the twofold purpose of providing individual self-defense while giving England a reserve force available in time of war. Murley, *supra*, at 20.

Following the French and Indian War, England increased taxes and stationed a large army in the colonies. On April 3, 1769, the *Boston Evening Post* announced that colonial authorities urged the citizenry to take up arms. In reply to the claim that this request was unlawful, the newspaper observed that:

It is certainly beyond human art and sophistry, to prove the British subjects, to whom the privilege of possessing arms as expressly recognized by the Bill of Rights, and who live in a province where the law requires them to be equipped with arms, are guilty of an illegal act, in calling upon one another to be provided with them, as the law directs.

Hardy, *supra*, at 589-90 (quoting OLIVER M. DICKERSON, BOSTON UNDER MILITARY RULE 61 (1936)). Shortly after the "Boston Tea Party", British soldiers, led by General Gage, attempted to disarm the colonists. MALCOLM, *supra*, at 144. The British Parliament banned all exports of muskets and ammunition to the colonies and began seizing the colonists' weapons and ammunition. *Id.* The British efforts to disarm the colonists hardened American resistance. At that point, the colonists began to form the "minutemen", a nationwide select militia organization. Hardy, *supra* at 890. In February 1775, a colonial militia prevented the British from seizing weapons at an armory in Salem, Massachusetts. Two months later, the colonists defeated British troops at Concord. *Id.* at 591. Distinguished colonial leaders, such as George Washington and Samuel Adams, strongly influenced the organization of these local militias. STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 60-61 (1984).

The "militia" which won the Revolutionary War consisted of all who were treated as full citizens of the community. George Mason stated, "Who are the militia? They consist now of the whole people." Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637, 647 (1989) (citing statement of George Mason (June 14, 1788), in 3 JONATHAN ELLIOTT, DEBATES IN THE GENERAL STATE CONVENTIONS 425 (3d ed. 1937)). Similarly, the Federal Farmer referred to a "militia, when properly formed, [as] in fact the people themselves." *Id.* (quoting RICHARD HENRY LEE, OBSERVATIONS LEADING TO A FAIR EXAMINATION OF THE SYSTEM OF GOVERNMENT PROPOSED BY THE LATE CONVENTION: LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 123 (Walter H. Bennett ed., 1978)).

The individual right to bear arms, a right recognized in both England and the colonies, was a crucial factor in the colonists' victory over the British army in the Revolutionary War. Without that individual right, the colonists never could have won the Revolutionary War. After declaring independence from England and establishing a new government through the Constitution, the American founders sought to codify the individual right to bear arms, as did their forebears one hundred years earlier in the English Bill of Rights.

### c.

#### The Ratification Debates

A foundation of American political thought during the Revolutionary period was the well justified concern about political corruption and governmental tyranny. Even the federalists, fending off their opponents who accused them of creating an

oppressive regime, were careful to acknowledge the risks of tyranny. Against that backdrop, the framers saw the personal right to bear arms as a potential check against tyranny. Theodore Sedgwick of Massachusetts expressed this sentiment by declaring that it is "a chimerical idea to suppose that a country like this could ever be enslaved . . . Is it possible . . . that an army could be raised for the purpose of enslaving themselves or their brethren? or, if raised whether they could subdue a nation of freemen, who know how to prize liberty and who have arms in their hands?" MALCOLM, *supra* at 157 (citing 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 97 (2d ed. 1863)). Noah Webster similarly argued:

Before a standing army can rule the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretence, raised in the United States.

*Id.* (citing NOAH WEBSTER, AN EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION (1787), reprinted in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, at 56 (Paul L. Ford, ed. 1971) (1888)). Richard Lee Henry's view that a well regulated militia was the entire armed populace rather than a select body of men was reiterated by proponents to a bill of rights. As "M.T. Cicero" wrote to "The Citizens of America":

Whenever, therefore, the profession of arms becomes a distinct order in the state . . . the end of the social compact is defeated . . . No free government was ever founded, or ever preserved its liberty, without uniting the characters of the citizen and the soldier in those destined for the defence of the state . . . Such are a well regulated militia, composed of the freeholders, citizen and husbandman, who take up arms to preserve their property, as individuals, and their rights as freemen.

HALBROOK, *supra* at 72 (citing STATE GAZETTE (Charleston), Sept. 8, 1788).

George Mason argued the importance of the militia and right to bear arms by reminding his compatriots of England's efforts "to disarm the people; that it was the best and most effectual way to enslave them . . . by totally disusing and neglecting the militia." *Id.* at 74 (citing 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL

CONSTITUTION 380 (2d ed. 1863)). He also clarified that under prevailing practice the militia included all people, rich and poor. "Who are the militia? They consist now of the whole people, except a few public officers." *Id.* (citing 3 ELLIOT at 425-26). Because all were members of the militia, all enjoyed the right to individually bear arms to serve therein.

The framers thought the personal right to bear arms to be a paramount right by which other rights could be protected. Therefore, writing after the ratification of the Constitution, but before the election of the first Congress, James Monroe included "the right to keep and bear arms" in a list of basic "human rights" which he proposed to be added to the Constitution. HALBROOK, *supra* at 223 n. 145 (citing James Monroe Papers, New York Public Library (Miscellaneous Papers of James Monroe)).

The framers also saw an armed populace as the safeguard of religious liberty. Zachariah Johnson told the Virginia convention their liberties would be safe because

the people are not to be disarmed of their weapons. They are left in full possession of them. The government is administered by the representatives of the people, voluntarily and freely chosen. Under these circumstances should anyone attempt to establish their own system [of religion], in prejudice of the rest, they would be universally detested and opposed, and easily frustrated. This is the principle which secures religious liberty most firmly. The government will depend on the assistance of the people in the day of distress.

MALCOLM, *supra* at 157 (citing 3 ELLIOT 646)).

Patrick Henry, also in the Virginia convention, eloquently argued for the dual rights to arms and resistance to oppression: "Guard with jealous attention the public liberty. Suspect everyone who approaches that jewel. Unfortunately, nothing will preserve it but downright force. Whenever you give up that force, you are ruined." HALBROOK, *supra* at 73 (citing 3 ELLIOT at 45). Thus, the federalists agreed with Blackstone that an armed populace was the ultimate check on tyranny. MALCOLM, *supra* at 157.

While both Monroe and Adams supported ratification of the Constitution, its most influential framer was James Madison. In *The Federalist* No. 46, he confidently contrasted the federal government of the United States to the European despotisms which he contemptuously described as "afraid to trust the people with arms." He assured his fellow citizens that they need never fear their government because of "the advantage of being armed." Don B. Kates, Jr., *Handgun Prohibition and The Original Meaning of The Second Amendment*, 82 MICH. L. REV. 204, 228 (1983) (quoting THE FEDERALIST NO. 46, at 371 (James Madison) (John C. Hamilton ed., 1864)). Many years later, Madison restated the sentiments of *The Federalist* No. 46 by declaring: "[A] government resting on a minority is an aristocracy, not a Republic, and could not be safe with a numerical and physical force against it, without a standing army, an enslaved press, and a disarmed populace." *Id.* (quoting RALPH L. KETCHAM, JAMES MADISON: A BIOGRAPHY 64, 640 (1971)).

Although on the other side of the ratification debate, Anti-Federalist Patrick Henry was unequivocal on the individual right to bear arms. During the Virginia ratification convention, he objected to the Constitution's inclusion of clauses specifically authorizing a standing army and giving the federal government control of the militia. He also objected to the omission of a clause forbidding disarmament of the individual citizen. "The great object is that every man be armed. O. [e]veryone who is able may have a gun." *Id.* at 229 (citing 3 J. ELLIOTT, *supra*, at 45).

By January of 1788, Delaware, Pennsylvania, New Jersey, Georgia and Connecticut ratified the Constitution without insisting upon amendments. Several specific amendments were proposed, but were not adopted at the time the Constitution was ratified. The Pennsylvania convention, for example, debated fifteen amendments, one of which concerned the right of the people to be armed, another with the militia. The amendment on the right to bear arms read:

That the people have a right to bear arms for the defence of themselves and their own State, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to and be governed by the civil power.

MALCOLM, *supra* at 158 (citing PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1787-1788, at 422).

The Massachusetts convention also ratified the Constitution with an attached list of proposed amendments. *Id.* In the end, the ratification convention was so evenly divided between those for and against the Constitution that the federalists agreed to amendments to assure ratification. *Id.* Samuel Adams proposed that the Constitution

[B]e never construed to authorize Congress to infringe the just liberty of the press, or the rights of conscience; or to prevent the people of the United States, who are peaceable citizens, from keeping their own arms; or to raise standing armies, unless when necessary for the defence of the United States, or of some one or more of them; or to prevent the people from petitioning, in a peaceable and orderly manner, the federal legislature, for a redress of their grievances: or to subject the people to unreasonable searches and seizures.

*Id.* (citing DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS, HELD IN THE YEAR 1788, at 198-99 (Bradford Pierce and Charles Hale, ed., 1856)).

Other states which had not yet ratified the Constitution followed the Maryland convention's practice of ratifying the Constitution while submitting proposed amendments. The New Hampshire convention, for example, adopted the nine Massachusetts amendments and added three others: one to limit standing armies, a second to ensure an individual right to bear arms, and a third to protect freedom of conscience. *Id.* The proposed amendment on freedom to bear arms read: "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion." *Id.* at 158-59 (citing 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES, 1787-1870, at 143 (1894)).

d.

#### Drafting the Second Amendment

When the first Congress convened on March 4, 1789, James Madison, who had previously advocated passage of the Constitution without amendments, now pressed his colleagues to act on a bill of rights. MALCOLM, *supra* at 159. When his initial efforts failed to produce any response, he drafted his own version of a bill of rights and presented them to members of Congress on June 8 of that year. *Id.* He explained to Jefferson that he deliberately drafted the amendments to be unexceptional and therefore likely to win approval. *Id.* (citing RONALD RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 209 (1991)). His version of what would later be the second amendment read:

The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.

MALCOLM, *supra* at 159.

That Madison envisioned a personal right to bear arms, rather than merely a right for the states to organize militias, is evident from his desired placement of the right in the Constitution. Madison's original plan was to designate the amendments as inserts between specific sections of the existing Constitution, rather than as separate amendments added to the end of the document. Hardy, *supra* at 609 (citing 1 ANNALS OF CONGRESS 707-08 (Joseph Gales ed., 1789)). Madison did not designate the right to keep and bear arms as a limitation of the militia clause of Section 8 of Article I. Rather, he placed it as part of a group of provisions (with freedom of speech and the press) to be inserted in "Article 1st, Section 9, between Clauses 3 and 4." *Id.* (quoting 5 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 186-87 (1905)). Such a designation would have placed this right immediately following the few individual rights protected in the original Constitution, dealing with the suspension of bills of attainder, habeas corpus, and ex post facto laws. Thus Madison aligned the right to bear arms along with the other individual rights of freedom of religion and the press, rather than with congressional power to regulate the militia. *Id.* This suggested placement of the Second Amendment reflected recognition of an individual right, rather than a right dependent upon the existence of the militia.

At that point, the Senate took up the Bill of Rights. Unfortunately, Senate debate on the issue was held in secret, and therefore no record exists of that body's deliberations. CRAMER, *supra* at 58 (citing HELEN VEIT ET AL., *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS* xix (1991)). The Senate form of the second amendment now described the militia not as "the best security" of a free state, but as "necessary to the security" of a free state, an even stronger endorsement than Madison's original description. MALCOLM, *supra* at 161. The Senators also omitted the phrase describing the militia as "composed of the body of the people." Elbridge Gerry's fear that future Congresses might expand on the religious exemption clause evidently convinced the Senate to eliminate that clause as well. *Id.* Even more important, however, was the Senate's refusal of a motion to add "for the common defense" after the phrase "to keep and bear arms." *Id.* (citing HALBROOK, *supra* at 81, n. 167). Thus the American Bill of Rights, like the English Bill of Rights, recognized the individual's right to have weapons for his own defense, rather than for collective defense. *Id.* In this form, Congress approved the Second Amendment and sent the Bill of Rights to the state legislatures for ratification. *Id.*

In retrospect, the framers designed the Second Amendment to guarantee an individual's right to arms for self-defense. Such an individual right was the legacy of the English Bill of Rights. American colonial practice, the constitutional ratification debates, and state proposals over the amendment all bear this out. *Id.* at 162. The American Second Amendment also expanded upon the English Bill of Rights' protection; while English law allowed weapons "suitable to a person's condition" "as allowed by law", the American right forbade any "infringement" upon the right of the people to keep and bear arms. *Id.*

In his influential *Commentaries on the Constitution*, Joseph Story emphasized the importance of the Second Amendment. He described the militia as the "natural defence of a free country" not only "against sudden foreign invasions" and "domestic insurrections", but also against "domestic usurpations of power by rulers." He went on to state that "[t]he right of the citizens to keep and bear arms has justly been considered as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them." 3 J. Story, *Commentaries* § 1890, p. 746 (1833).

#### 4.

### Structural Analysis

The structure of the Second Amendment within the Bill of Rights proves that the right to bear arms is an individual right, rather than a collective one. The collective rights' idea that the Second Amendment can only be viewed in terms of state or federal power "ignores the implication that might be drawn from the Second, Ninth, and Tenth Amendments: the citizenry itself can be viewed as an important third component of republican governance as far as it stands ready to defend republican liberty against the depredations of the other two structures, however futile that might appear as a practical matter." Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 651 (1989).

Furthermore, the very inclusion of the right to keep and bear arms in the Bill of Rights shows that the framers of the Constitution considered it an individual right. "After all, the Bill of Rights is not a bill of states' rights, but the bill of rights retained by the people." David Harmer, *Securing a Free State: Why The Second Amendment Matters*, 1998 BYU L. REV. 55, 60 (1998). Of the first ten amendments to the Constitution, only the Tenth concerns itself with the rights of the states, and refers to such rights in addition to, not instead of, individual rights. *Id.* Thus the structure of the Second Amendment, viewed in the context of the entire Bill of Rights, evinces an intent to recognize an individual right retained by the people.

## 5.

### Prudential Concerns

Some scholars have argued that even if the original intent of the Second Amendment was to provide an individual right to bear arms, modern-day prudential concerns about social costs outweigh such original intent and should govern current review of the amendment. However, there is a problem with such reasoning. If one accepts the plausibility of any of the arguments on behalf of a strong reading of the Second Amendment, but, nevertheless, rejects them in the name of social prudence and the present-day consequences of an individual right to bear arms, why do we not apply such consequentialist criteria to each and every part of the Bill of Rights? Levinson, *supra* at 658.

As Professor Ronald Dworkin has argued, what it means to take rights seriously is that one will honor them even when there is significant social cost in doing so. Protecting freedom of speech, the rights of criminal defendants, or any other part of the Bill of Rights has significant costs---criminals going free, oppressed groups having to hear viciously racist speech and so on--- consequences which we take for granted in defending the Bill of Rights. This mind-set changes, however, when the Second Amendment is concerned. "Cost-benefit" analysis, rightly or wrongly, has become viewed as a "conservative" weapon to attack liberal rights. Yet the tables are strikingly turned when the Second Amendment comes into play. Here "conservatives" argue in effect that social costs are irrelevant and "liberals" argue for a notion of the "living Constitution" and "changed circumstances" that would have the practical consequence of erasing the Second Amendment from the Constitution. Levinson, *supra* at 657-58.

Other commentators, including Justice Scalia, have argued that even if there would be "few tears shed if and when the Second Amendment is held to guarantee nothing more than the state National Guard, this would simply show that the Founders were right when they feared that some future generation might wish to abandon liberties that they considered essential, and so sought to protect those liberties in a Bill of Rights. We may tolerate the abridgement of property rights and the elimination of a right to bear arms; but we should not pretend that these are not reductions of rights." Sanford Levinson, *Is the Second Amendment Finally Becoming Recognized As Part of the Constitution? Voices from the Courts*, 1998 BYU L. REV. 127, 132 (1998) (quoting Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, in A Matter of Interpretation: Federal Courts and the Law* 3, 43 (Amy Gutmann, ed. 1997).

In response to arguments propounded by Professor Laurence Tribe and others describing the Second Amendment as being simply "seemingly state-militia-based" rather than "supporting broad principles" of private ownership of guns, Justice Scalia pointed out that it is incorrect to assume that the word "militia" refers only to "a select group of citizen-soldiers . . . rather than, as the Virginia Bill of Rights of June 1776 defined it, 'the body of the people, trained to arms.'" Antonin Scalia, *Response, in A Matter of Interpretation, supra* at 129, 136 n.13 (quoting JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS* 136, 148 (1994)).

Justice Scalia also notes that "[t]his was also the conception of 'militia' entertained by James Madison", citing *The Federalist* No. 46 for support. *Id.* "It would also be strange", he goes on to say, "to find in the midst of a catalog of the rights of individuals a provision securing to the states the right to maintain a designated 'Militia.' Dispassionate scholarship suggests quite strongly that the right of the people to keep and bear arms meant just that." *Id.* at 137 n.13 (citing JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS* (1994); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 *DUKE L.J.* 1236 (1994)).

Justice Scalia concludes by stating that "[i]t is very likely that modern Americans no longer look contemptuously, as Madison did, upon the governments of Europe that 'are afraid to trust the people with arms,' *The Federalist* No. 46; and the . . . Constitution that Professor Tribe espouses will probably give effect to that new sentiment by effectively eliminating the Second Amendment. But there is no need to deceive ourselves as to what the original Second Amendment said and meant. Of course, properly understood, it is no limitation upon arms control by the states." *Id.*

Thus, concerns about the social costs of enforcing the Second Amendment must be outweighed by considering the lengths to which the federal courts have gone to uphold other rights in the Constitution. The rights of the Second Amendment should be as zealously guarded as the other individual liberties enshrined in the Bill of Rights.

## CONCLUSION

Because 18 U.S.C. § 922(g)(8) violates the Second and Fifth Amendments to the United States Constitution the court **GRANTS** Emerson's Motion to Dismiss the Indictment. A judgement shall be entered in conformity with this opinion.

SO ORDERED.

Dated March 30, 1999.

United States V. Emerson  
5th Circuit Court of Appeals, New Orleans  
June, 13 2000

Presiding Judges: Garwood, DeMoss & Parker  
Council for the

United States: Assistant U.S. Attorney William Mateja

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Judge DeMoss: I have a 16 gauge shotgun in my closet at home. I have a 20-gauge shotgun. I also have a 30-caliber rifle at home. Are you saying these are "in or affecting interstate commerce"?

Mateja: Yes.

Judge Garwood: You are saying that the Second Amendment is consistent with a position that you can take guns away from the public? You can restrict ownership of rifles, pistols and shotguns from all people? Is that the position of the United States?

Mateja: Yes.

Judge Garwood: Is it the position of the United States that persons who are not in the National Guard are afforded no protections under the Second Amendment?

Mateja: Exactly.

Mateja then said that even membership in the National Guard isn't enough to protect the private ownership of a firearm. It wouldn't protect the guns owned at the home of someone in the National Guard.

Judge Garwood: Membership in the National Guard isn't enough? What else is needed?

Mateja: The weapon in question must be used in the National Guard. No one, even if a member of the National Guard, has a right to own guns privately.

U. S. Department of Justice  
Office of the Solicitor General  
Solicitor General  
Washington, D.C. 20530

August 22, 2000

Dear Mr. (Name Deleted):

Thank you for your letter dated August 11, 2000, in which you question certain statements you understand to have been made by an attorney for the United States during oral argument before the Fifth Circuit in *United States v. Emerson*. Your letter states that the attorney indicated that the United States believes "that it could 'take guns away from the public,' and 'restrict ownership of rifles, pistols and shotguns from all people.'" You ask whether the response of the attorney for the United States accurately reflects the position of the Department of Justice and whether it is indeed the government's position "that the Second Amendment of the Constitution does not extend to the people as an individual right."

I was not present at the oral argument you reference, and I have been informed that the court of appeals will not make the transcript or tape of the argument available to the public (or to the Department of Justice). I am informed, however, that counsel for the United States in *United States v.*

*Emerson*, Assistant United States Attorney William Mateja, did indeed take the position that the Second Amendment does not extend an individual right to keep and bear arms.

That position is consistent with the view of the Amendment taken both by the federal appellate courts and successive Administrations. More specifically, the Supreme Court and eight United States Courts of Appeals have considered the scope of the Second Amendment and have uniformly rejected arguments that it extends firearms rights to individuals independent of the collective need to ensure a well-regulated militia. See *United States v. Miller*, 307 U.S. 174 (1939) (the "obvious purpose" of the Second Amendment was to effectuate Congress's power to "call forth the Militia to execute the Laws of the Union," not to provide an individual right to bear arms contrary to federal law"); *Cases v. United States*, 131 F.2d 916, 921 (1st Cir. 1942) ("The right to keep and bear arms is not a right conferred upon the people by the federal constitution."); *Eckert v. City of Philadelphia*, 477 F.2d 610 (3rd Cir. 1973) ("It must be remembered that the right to keep and bear arms is not a right given by the United States Constitution."); *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974); *United States v. Warin*, 530 F.2d 103, 106-07 (6th Cir. 1976) ("We conclude that the defendant has no private right to keep and bear arms under the Second Amendment."); *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971) ("There can be no serious claim to any express constitutional right of an individual to possess a firearm."); *Ouilici v. Village of*

Morton Grove, 695 F.2d 261, 270 (7th Cir. 1982) ("The right to keep and bear handguns is not guaranteed by the second amendment."); United States v. Hale, 978 F.2d 1016, 1019 (8th Cir. 1992) ("The rule emerging from Miller is that, absent a showing that the possession of a certain weapon has some relationship to the preservation or efficiency of regulated militia, the Second Amendment does not guarantee the right to possess the weapon."); United States v. Tomlin, 454 F.2d 176 (9th Cir. 1972); United States v. Swinton, 521 F.2d 1255, 1259 (10th Cir. 1975) ("There is no absolute constitutional right of an individual to possess a firearm.").

Thus, rather than holding that the Second Amendment protects individual firearms rights, these courts have uniformly held that it precludes only federal attempts to disarm, abolish, or disable the ability to call up the organized state militia. Similarly, almost three decades ago, the Department of Justice's Office of Legal Counsel explained:

The language of the Second Amendment, when it was first presented to the Congress, makes it quite clear that it was the right of the States to maintain a militia that was being preserved, not the rights of an individual to own a gun...[and] [there is no indication that Congress altered its purpose to protect state militias, not individual gun ownership [upon consideration of the Amendment] . . . . Courts...have viewed the Second Amendment as limited to the militia and have held that it does not create a personal right to own or use a gun . . . . In light of the constitutional history, it must be considered as settled that there is no personal constitutional right, under the Second Amendment, to own or to use a gun.

Letter from Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal Counsel, to George Bush, Chairman, Republican National Committee (July 19, 1973) (citing, inter alia, Presser v. Illinois, 116 U.S. 252 (1886), and United States v. Miller, 307 U.S. 174 (1939)). See also, e.g., Federal Firearms Act, Hearings before the Subcommittee to Investigate Juvenile Delinquency of the Committee on the Judiciary, United States Senate 41 (1965) (Statement of Attorney General Katzenbach) ("With respect to the second amendment, the Supreme Court of the United States long ago made it clear that the amendment did not guarantee to any individuals the right to bear arms.").

I hope this answers your question. Thank you again for writing.

Yours sincerely,

Seth P. Waxman