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Opinion No. 03-165

Constitutional Right to Keep and Bear Arms

QUESTIONS

1. To what extent does the Second Amendment to the United States Constitution limit the power of the Tennessee Legislature to pass laws relative to the rights of the people to keep and bear arms?

2. Does the Second Amendment to the United States Constitution guarantee an individual right of the people to keep and bear arms, and, if so,

(a) what is the scope of the right, and
(b) does that guarantee preempt Tennessee state law?

3. To what extent does the Fourteenth Amendment to the United States Constitution make the provisions of the Bill of Rights, including the Second Amendment, applicable to the State of Tennessee?

OPINIONS

1. The United States Supreme Court has concluded that the Second Amendment does not apply to the states. While the rationale underlying these opinions has recently been questioned, they have not been overruled.

2. (a) United States Courts of Appeals are split on whether the Second Amendment to the United States Constitution guarantees an individual right to keep and bear arms. The United States Court of Appeals for the Sixth Circuit, of which Tennessee is a part, has concluded that the Second Amendment does not guarantee an individual right. The Court of Appeals for the Fifth Circuit, on the other hand, has concluded that the Second Amendment does guarantee an individual right to bear arms, but that this right is subject to any limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country. The United States Attorney General has endorsed the Fifth Circuit's reasoning but has reiterated his intention of defending all current federal laws regulating firearms.

(b) As discussed in Question 1, the United States Supreme Court has concluded that the Second Amendment does not apply to the states. If the United States Supreme Court decides that the Second Amendment protects an individual right to keep and bear arms, and that the Second Amendment applies to the states, then, under the Supremacy Clause, Tennessee law could not unconstitutionally encroach on that right.

3. The United States Supreme Court has determined that several different provisions of the Bill of Rights apply to the states through the Due Process Clause of the Fourteenth Amendment. It is conceivable that, if the United States Supreme Court finds that the Second Amendment does protect an individual right to keep and bear arms, it would also find that the provision applies to the states through the Fourteenth Amendment. But that Court has never overruled its conclusion that the Second Amendment does not apply to the states through the Fourteenth Amendment.

ANALYSIS

1. Applicability of the Second Amendment of the United States Constitution to the States

This opinion addresses several questions about the Second Amendment to the United States Constitution. That provision states:

> **Right to bear arms. —** 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. 2. The United States Supreme Court has concluded that the Second Amendment is a limitation only upon the power of Congress and the national government, and not upon that of the states. *Presser v. State of Illinois*, 116 U.S. 252, 6 S.Ct. 580, 584, 29 L.Ed. 615 (1886); *United States v. Cruikshank*, 92 U.S. 542, 553, 23 L.Ed. 588 (1875). Recently some courts have questioned the continued validity of these opinions in *dicta*. *See, e.g., Silveira v. Lockyer*, 312 F.3d 1052, n. 17 (9th Cir. 2003), *rehearing en banc denied*, 828 F.3d 567 (9th Cir. 2003), *petition for certiorari pending*; *United States v. Emerson*, 270 F.3d 203, n. 13 (5th Cir. 2001), *rehearing and rehearing en banc denied*, 281 F.3d 1281 (5th Cir. 2001), *cert. denied*, 536 U.S. 907, 122 S.Ct. 2362, 153 L.Ed.2d 184 (2002). But until the Supreme Court directly overrules these opinions, they remain binding. *See, e.g., Fresno Rifle and Pistol Club, Inc. v. Van de Kamp*, 965 F.2d 723 (9th Cir. 1992).

2. Individual Right to Bear Arms

The next question is whether the Second Amendment to the United States Constitution guarantees an individual right of the people to keep and bear arms. The United States Courts of Appeals are split on this issue. The United States Court of Appeals for the Sixth Circuit, of which Tennessee is a part, continues to hold that the Second Amendment guarantees the collective right of the State to maintain a militia rather than an individual right to keep and bear arms. *United States v. Bournes*, 339 F.3d 396 (6th Cir. 2003), *petition for certiorari pending*; *United States v. Napier*,

233 F.3d 394, 402 (6th Cir. 2000). By contrast, the United States Court of Appeals for the Fifth Circuit recently found that the Second Amendment does protect an individual right to keep and bear arms. *United States v. Emerson,* 270 F.3d 203 (5th Cir. 2001), *rehearing and rehearing en banc denied,* 281 F.3d 1281 (5th Cir. 2001), *cert. denied,* 536 U.S. 907, 122 S.Ct. 2362, 153 L.Ed.2d 184 (2002). In that case, an individual challenged a federal statute making it a crime to possess a firearm while subject to a court order prohibiting the use, attempted use, or threatened use of physical force against an intimate partner or child. The individual asserted that, among other grounds, the statute violated his Second Amendment right to keep and bear arms. The Court examined the text and the history of the Second Amendment, and concluded that it "protects individual Americans in their right to keep and bear arms whether or not they are a member of a select militia or performing active military service or training." 270 F.3d at 260. The Court also concluded, however, that this right is subject to regulation. The Court stated:

> Although, as we have held, the Second Amendment *does* protect individual rights, that does not mean that those rights may never be made subject to any limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country.

270 F.3d at 261 (emphasis in text). The Court examined the procedure under which restraining orders were issued in Texas, and pointed out that it provided for notice and a hearing. The Court also found that, under Texas law, the order could not issue unless the court concluded, based on adequate evidence at the hearing, that the party restrained would otherwise pose a realistic threat of imminent physical danger to the protected party. The Court stated:

> In such a case, we conclude that the nexus between firearm possession by the party so enjoined and the threat of lawless violence, is sufficient, though likely barely so, to support the deprivation, while the order remains in effect, of the enjoined party's Second Amendment right to keep and bear arms, and that this is so even though the party enjoined may not collaterally attack the particular predicate order in the . . . prosecution [under the challenged federal law], at least so long as the order, as here, is not so transparently invalid as to have only a frivolous pretense to validity.

270 F.3d 264.

Other circuits of the United States Court of Appeals, including the Sixth Circuit, have not adopted the reasoning in *Emerson.* The United States Attorney General has endorsed the reasoning of this case in a memorandum to all United States Attorneys dated November 9, 2001, and has since adopted it in briefs opposing petitions for certiorari before the Supreme Court in the *Emerson* case and in *United States v. Haney,* 264 F.3d 1161 (10th Cir. 2001), *cert denied,* 536 U.S. 907, 122 S.Ct. 2362, 153 L.Ed.2d 153 (2002). At the same time, however, the Attorney General expressed the Department's intent to defend all existing federal firearms laws.

Emerson is not binding within this jurisdiction. Further, the United States Supreme Court has found that the Second Amendment does not apply to the states. If the United States Supreme Court finds that the Second Amendment protects an individual right to keep and bear arms, and that the Second Amendment applies to the states, then, under the Supremacy Clause, Tennessee law could not unconstitutionally encroach upon that right.

3. Application of the Bill of Rights to the States

The last question is the extent to which the Bill of Rights in the United States Constitution applies to the states through the Fourteenth Amendment to the United States Constitution. The United States Supreme Court has concluded that a number of provisions of the Bill of Rights apply to the states through the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *School District of Abington Township v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) (Establishment Clause of the First Amendment); *New York Times Co. v. Sullivan*, 376 U.S. 254, 277, 84 S. Ct. 710, 11 L.Ed.2d 686 (1964) (freedom of speech under the First Amendment); *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 684, 691, 5 L.Ed.2d 90 (1961), *rehearing denied*, 368 U.S. 871, 82 S.Ct. 23, 7 L.Ed.2d 72 (1961) (Fourth Amendment); *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (Sixth Amendment); *Williamson County Reg. Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 3111 n. 1, 87 L.Ed.2d 126 (1985) (Fifth Amendment). The reasoning behind these cases is that these rights are part of the fundamental concept of liberty embodied in the Due Process Clause of the Fourteenth Amendment. It is conceivable that, if the United States Supreme Court finds that the Second Amendment does protect an individual right to keep and bear arms, it would also find that the provision applies to the states through the Due Process Clause of the Fourteenth Amendment. But, as discussed above, the United States Supreme Court has concluded in the past that the Second Amendment does not apply to the states. These cases have not been overruled.

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