

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 2003 TERM

UNITED STATES OF AMERICA,

Respondent,

vs.

JOHN JACKUBOWSKI and
LEROY BRANDON,

Petitioners.

On Petition for
Writ of Certiorari
to the United States
Court of Appeals for the
Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the convictions of the petitioners for being felons in possession of handguns in violation of 18 U.S.C. §922(g)(1) contravene the Second Amendment to the United States Constitution because that amendment reserves to the states the regulation of firearms of the types that were suitable for use by colonial militias, which includes handguns?

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Reports of Decisions Below:

United States v. John Jackubowski, Unpublished Order (*affirming district court judgment*), No. 02-3621, 7th Cir. April 30, 2003 (attached as Appendix One).

United States v. Leroy Brandon, Unpublished Order (*affirming district court judgment*), No. 03-1528, 7th Cir. July 2, 2003 (attached as Appendix Two).

Jurisdiction of the Supreme Court:

1. The orders of the Court of Appeals for the Seventh Circuit sought to be reviewed were decided on April 30, 2003 and July 2, 2003. On July 24, 2003, Justice Stevens granted an extension to September 27, 2003, for the filing of the petition for petitioner Jackubowski.
2. Jurisdiction to review the decision of the court of appeals in this case in conferred by 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved in the Case:

1. Constitution of the United States, Amendment II:

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.

2. 18 U.S.C. §922(g)(1) reads:

(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, to...possess in or affecting commerce, any firearm or ammunition...

STATEMENT OF THE CASE

Petitioner John Jackubowski was stopped on September 10, 2000, by an Oak Forest, Illinois police officer for driving a pickup truck erratically. During the course of the stop a field sobriety test was conducted and two handguns were found on the front passenger seat of the pickup truck. There were twenty bullets in the two handguns and 91 additional bullets in an ammunition box in the truck. Mr. Jackubowski was arrested for unlawful possession of firearms by a felon under Illinois law, and several traffic infractions.

Mr. Jackubowski was prosecuted and pleaded guilty in Illinois state court for being a felon in possession of firearms and received a three year sentence of imprisonment. All other charges were dismissed. The felony predicate for the foregoing conviction was Mr. Jackubowski's 1995 federal conviction for sale of a pipe bomb to an undercover agent and threats against President Clinton stated to the undercover agent, which threats were never acted on.

Upon release from the Illinois Department of Corrections on December 4, 2001, Mr. Jackubowski was taken into federal custody. He was charged under 18 U.S.C. §922 (g)(1) with being a felon in possession of two firearms for the same two handguns upon which his state court conviction had been based. He pleaded guilty and was sentenced by District Judge Ruben Castillo to 32 months imprisonment and three years supervised release. During the sentencing hearing, Judge Castillo asked the prosecutor, "Do you have any indication what Mr. Jackubowski was going to use these weapons and materials for? Is there any indication at all?" The Assistant U.S. Attorney responded, "No, your Honor. There is no indication other than, I think, the surrounding circumstances themselves, that he was driving drunk with two

loaded semi-automatic weapons and dozens of rounds of ammunition for the two – for the two firearms, your Honor. We do not have any other evidence.” Jurisdiction of the district court was based upon 18 U.S.C. § 3231.

Subsequent to this sentencing, Mr. Jackubowski was taken before U.S. District Court Judge David Coar and his supervised release for the 1995 conviction was revoked for possession of the two handguns. He was sentenced to 18 months imprisonment to be served consecutively to Judge Castillo’s sentence on the §922(g)(1) offense, and one year supervised release, to be served concurrently with Judge Castillo’s supervised release.

Petitioner Leroy Brandon is a 34 year black man who is an epileptic, who has been unable to overcome a longstanding addiction to drugs, who is now HIV positive, and who never finished high school or ever acquired the marketable job skills needed for a productive life. A close analysis of his criminal history shows that he has never engaged in violent crime resulting in physical harm to anyone. Rather, for many years he has taken actions to satisfy his drug habit, primarily selling drugs or taking other people’s property to acquire drugs. Through his drug habit he has become HIV positive.

In this case, defendant Brandon was arrested by two Chicago police officers on May 2, 2002, while emerging from a drug house at 2221 South Springfield, Chicago, Illinois, holding a revolver in his right hand. He was charged with being a felon in possession of a firearm and with being an armed career offender. He pleaded guilty and was sentenced by District Judge Charles Norgle to 234 months imprisonment (one month below the high end of the applicable federal sentencing guideline range) and five years supervised release. The government filed a motion for upward departure, based upon defendant Brandon’s criminal history, which Judge Norgle denied. Jurisdiction

of the district court was based upon 18 U.S.C. § 3231.

ARGUMENT

At the time of its adoption, the Second Amendment was understood to bar the federal government from regulating possession and use ("keeping" and "bearing") of handguns and rifles, firearms suitable for militia use at that time.

An 1825 treatise on the Constitution by William Rawle, whom the article notes was George Washington's first choice to be the first Attorney General, states:

...the right of the people to keep and bear arms shall not be infringed. The prohibition is general. No clause in the Constitution could by any rule of construction be conceived to give congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretense by a state legislature. William Rawle, *A View of the Constitution of the United States of America* (Phil. 1825), quoted in Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign*, 36 Okla. L. Rev. 65, 85 (1983).

Indeed, prior to the Civil War, "there was no federal legislation restricting firearms ownership, and since *Barron v. Baltimore* (1833) held that the Bill of Rights only limited the power of the federal government, there was no occasion before the Civil War for the federal courts to pronounce on" the constitutionality of state firearms legislation. R. Cottrol & R. Diamond, *Public Safety and Right to Bear Arms*, p. 78, in *The Bill of Rights in Modern America*, Indiana U. Press (1993).

Indeed, petitioners submit that the Second Amendment did not then, and does not now, impose any constraint on the regulations of such firearms by the several states. Not only do all states now have laws regulating possession of firearms, but "every state had gun control legislation on its books at the time the Second Amendment was approved." C. Massey, *Guns, Extremists, and the Constitution*, 57 Washington and Lee L. Rev. 1095, 1115 (2000).

The Second Amendment does, however, restrict the federal government. The amendment guarantees that the right of the people to keep and bear arms shall not be infringed, following the prefatory clause that states that a well regulated militia is necessary to the security of a free state. However, as this Court has observed, at the time of the amendment's adoption "the Militia comprised all males physically capable of acting in concert for the common defense....And further, that ordinarily when called upon for service these men were expected to appear bearing arms supplied by themselves..." *United States v. Miller*, 307 U.S. 174, 179, 59 S.Ct. 816 (1939). Thus, at that time, the militia consisted of the whole citizenry, and amendment barred the federal government from disarming that citizenry. Today, of course, the citizenry includes women and minorities. Therefore, at the time of its adoption the amendment meant that the federal government could not disarm the citizenry, and it should be found to mean the same today.

The prescription of the Second Amendment constituted an integral part of the conception of the republican government created by the Constitution. At the time of the adoption of the Second Amendment the role of the militia has been described as follows:

The Second Amendment...sought to protect local democracy by protecting popular, public military bodies. The states would always have an armed populace from which they could form an armed militia. The federal government could regulate the use of that militia, but could not disarm or disband it.

Over concentration of power in the central government was not, however, the only fear from which the militia offered protection. Republicans hoped that the militia would check state government as well as federal. Many hoped that Congress itself would rely on a militia, rather than a standing army. Even apart from its association with local governments, therefore, the militia promised virtuous control of force. This trust in the virtue of the militia rested on its rhetorical identification with the whole of its citizenry....

The militia's two features - decentralization and universality - both

proceed from the same fear that a small group of powerful citizens (in an oligarchic central government) could come to dominate the republic by control of the means of coercion (held by a select militia or standing army). The solution was to vest arms in a universal body under the control of democratic local legislatures.

D. Williams, Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment, pp. *The Yale Law Journal*, vol. 101, no.3 (1991).

The foregoing is reflective of the more fundamental purposes of the new American government. As James Madison wrote in Federalist No. XLV (1788),

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State government's are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

This reservation of the maintenance of internal order to the States should inform this Court's interpretation of the Second Amendment, as it has similarly guided the Court's recent Commerce Clause opinions.

The adoption of the Second Amendment and the other provisions of the Bill of Rights was central to the adoption of the Constitution itself. The support of the Anti-Federalists for the Constitution was won in large part by the commitment during the debate on the Constitution to the adoption the Bill of Rights. *United States v. Emerson*, 270 F.3d 203, 236 *et seq.* (5th Cir. 2001), *cert. denied*, 122 S.Ct. 2362 (2002). One of the Anti-Federalists' great fears was a federal government imposing despotic control over the states through a federal standing army and subservient state militias. The Anti-Federalists were determined that King George III not be replaced by King George Washington.

This concern is evident from the debate in the First Congress on the Second Amendment relating to the proposal to exempt "religiously scrupulous" persons from service in the militias. The Fifth Circuit has noted that

Massachusetts Congressman Gerry "feared that the federal government would use the (religiously scrupulous) clause to destroy the militia by declaring a large number of people religiously scrupulous and, therefore, ineligible for militia service. This would pave the way for oppression by the federal government's standing army." *United States v. Emerson, supra*, 270 F.3d at 247. Two legal historians, H. Richard Uviller and William Merkel, have further described Gerry's concerns during the debate in the House of Representatives on the proposed Second Amendment: "Gerry feared that the proposed clause would empower the federal government to declare per se rules as to conscientious ineligibility, thereby excluding whole groups from military service and effectively disarming the militia. 'I am apprehensive,' Gerry told the House,...'Whenever Governments mean to invade the rights and liberties of the people, they always attempt to destroy the militia, in order to raise an army upon their ruins.'" Uviller & Merkel, *The Second Amendment in Context*, 76 Chicago-Kent L. Rev. 403, 500.

Analogously, if the federal government could selectively disarm the populace, it could similarly control the membership of the state militias. The solution provided by the Second Amendment was to preclude the federal government entirely from interfering with the citizenry's possession and keeping of firearms, or, at least, those suitable for use in the militia.

The Ninth Circuit has noted that "(a) robust constitutional debate is currently taking place in this nation regarding the scope of the Second Amendment..." *Sean Silveira, et al. v. Bill Lockyer and Gray Davis*, 312 F.3d 1152, (9th Cir. 2002, as amended Jan. 27, 2003). *Silveira* upholds a California statute restricting possession, use, and transfer of semi-automatic weapons, popularly known as "assault weapons." The Fifth Circuit, on the other hand,

has recognized a limited right of individuals to possess firearms under the Second Amendment. *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 2362 (2002). The Department of Justice has jumped into the fray, informing this Court in its brief in opposition to certiorari in *Emerson* of its new position that the Second Amendment "more broadly protects the rights of individuals, including persons who are not members of any militia or engaged in active military service or training, to possess or bear their own firearms, subject to reasonable restrictions..." Opposition to Petition for Certiorari, *United States v. Emerson*, 01-8780, at 19, n. 3.

The position of petitioners is wholly consistent with the historical analysis in *Silveira* and *Emerson*. Petitioners further agree with the Ninth Circuit that the Second Amendment imposes no impediment to California's regulation of assault weapons. Petitions moreover contend that their position avoids the fundamental problem of *Emerson*, that that court upholds federal restrictions on handgun possession based essentially on prior cases upholding state court regulation of such firearms. *Emerson*, 270 F.3d at 226, n. 21 and 261. Thus, petitioners submit that their interpretation of the Second Amendment is consistent with *Silveira* and avoids the problems of *Emerson*.

COMMERCE CLAUSE CASES

Petitioners' position is further supported by this Court's recent Commerce Clause opinions. The Court has recognized the importance of not upsetting the balance between federal and state law enforcement functions and authority. "Under our Federal system, the 'States possess primary authority for defining and enforcing the criminal law'... When Congress criminalizes conduct already denounced as criminal by the States, it effects a 'change in the sensitive relation between federal and state criminal jurisdiction.'" *United States*

v. Lopez, 514 U.S. 549, 561 N.3, 115 S.Ct. 1624, 1631 (1995). Similarly, Justice Kennedy's concurring opinion states, "If a State or municipality determines that harsh criminal sanctions are necessary and wise to deter students from carrying guns on school premises, the reserved powers of the States are sufficient to enact those measures. Indeed, over 40 States already have criminal laws outlawing the possession of firearms on or near school grounds....The statute now before us forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term." *United States v. Lopez*, 514 U.S. 549, 581-583, 115 S.Ct. 1624, 1641 (1995).

The Department of Justice has begun taking gun cases from state courts in large numbers. In petitioner Brandon's case, the defense brought of the attention of the Seventh Circuit that on one day in 2002, the United States Attorney's Office for the Northern District of Illinois filed 21 cases in one day in which arrests had originally been made by state or local law enforcement officers. Indeed, both petitioners Brandon and Jackubowski were arrested by local police officers. And petitioner Jackubowski was charged and convicted by the Illinois courts for being a felon in possession under Illinois law. Upon his release from an Illinois prison, he was taken into federal custody and re-prosecuted for being a felon in possession under federal law for the very same two handguns. Petitioner Jackubowski's case demonstrates that state and local authorities are quite capable of addressing these matters.

Some lower court judges have expressed their dismay at the federalization of gun cases. A district judge in Richmond, Virginia stated about Project Exile, the name for one approach the Department of Justice has

promoted for bringing federal prosecutions in gun cases, "Project Exile raises serious questions respecting basic principles of federalism...As a comparative examination of the state and federal systems will indicate, local law enforcement authorities suffer from no inherent incapacity to redress the problems Project Exile targets. However, instead of bringing the resources of the Commonwealth to bear, local authorities have abdicated their responsibility to the federal government....In his year-end report on the federal judiciary to Congress, Chief Justice William Rehnquist warned that '(t)he trend to federalize crimes that traditionally have been handled in state courts...threatens to change entirely the nature of our federal system'....There is no compelling reason to suspect that a comparable effort by local prosecutors would not achieve a comparable effect...Despite its laudable purpose, Project Exile represents a substantial federal incursion into a sovereign state's area of authority and responsibility. That the incursion has been acquiesced in, or even invited by, state law enforcement officers makes it no less troublesome." *United States v. Jones*, 36 F.Supp.3d 304, 313-316 (E.D.Va. 1999).

In another forum, Chief Justice Rehnquist wrote further about efforts by both Congress and the Department of Justice to prosecute more "street crimes" in federal court:

Most federal judges have serious concerns about the numbers and types of crimes now being funneled into the federal courts. They question the appropriateness of handling "street crimes" formerly handled by state systems; they note the impact on their civil caseloads; and they point out the serious drain on the judiciary's resources....Continuation of the current trend toward large-scale federalization of the criminal law has enormous potential for changing the character of the federal judiciary. Therefore, the Long Range Planning Committee hopes that there will be wide-scale debate over two important questions: What should be required to make an offense a federal crime?; and Should certain categories of criminal offenses now prosecuted in federal courts more appropriately be shifted to the state courts?

W. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 U. Wisc. L. Rev. 1, 6-7. See also, S. Beale, *The Unintended*

Consequences of Enhancing Gun Penalties: Shooting Down the Commerce Clause and Arming Federal Prosecutors, 51 Duke L.J. 1641 (2002).

Former Attorney General Dick Thornburgh has written,

Lawyers and judges have long been concerned about the federalization of criminal law...(A) task force of the American Bar Association suggested that this federalization has undermined the federal courts, the federal prison system, state-federal relations, and the constitutional balance of powers.

Now, with the threat of terrorism within the United States clear to everyone, continuing to ask federal law enforcement agents to duplicate the efforts of state and local police threatens to stretch thin the very agencies that are best suited to preventing terrorist attacks. State and local police are up to the task of enforcing state laws about street crime... D. Thornburgh, *Well Before Sept. 11, Congress Overtaxed the F.B.I.*, The New York Times, June 29, 2002, p. A27.

In sum, the clear history of the Second Amendment, supported by Commerce Clause precedent, as well as sound principals pertaining to the proper role of the federal courts and the appropriate allocation of responsibilities between federal and state authorities, all support petitioners' contention that the Second Amendment bars the federal government from bringing prosecutions for possession of handguns or rifles.

WHEREFORE petitioners Jackubowski and Brandon ask this court to hear their case and to order that their convictions be reversed on the grounds that they were obtained in violation of the Second Amendment.

Respectfully submitted,

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