PANELIST

*Jonathan E. Lowy**

Thanks very much. I wish I could take credit for successfully persuading Judge Bissell, thus causing him to render his excellent opinion, but one of the problems with speaking last is that I can't because he delivered the opinion before I spoke. But I do agree with his side of this issue, as well as Professor Yassky's.

We have heard a lot of discussion about the constitutional history of the Second Amendment. I want to talk a little about why we are really here today, which is the *Emerson* case[1] alluded to previously. The fact is, before the *Emerson* case, federal courts were uniform in their interpretation of the Second Amendment. They had heard all of the arguments that we have heard today, and they had been privy to all of this history for decades. There are no new diaries or transcripts of James Madison that have come out in this century. The Supreme Court, in several cases, has looked at all of this.[2] Every single circuit court of appeal in the country, one through eleven, including the D.C. Circuit Court, has looked at this record and these Second Amendment issues.[3]

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[1] *United States v. Emerson*, 46 F. Supp.2d 598 (N.D. Tex. 1999), *appeal pending*, 99-10331 (5th Cir. 2000).

[2] In *United States v. Miller*, 307 U.S. 174 (1939), the Supreme Court unanimously held that the "obvious purpose" of the Amendment was "to assure the continuation and render possible the effectiveness" of the state militia. The Court further held that the Amendment "must be interpreted and applied with that end in view." *Id.* at 178 (emphasis added). The Supreme Court has twice reaffirmed its holding in *Miller*. In *Lewis v. United States*, 445 U.S. 55 (1980), the Court held that 18 U.S.C. §1202 (a)(1), which criminalizes possession of a firearm by a convicted felon, "[did not] trench upon any constitutionally protected liberties." *Id.* at 65 n.8 (citing Miller and three lower court cases rejecting Second Amendment challenges). The Court also dismissed the appeal in Burton v. Sills, 248 A.2d 521 (N.J. 1968), in which the state court held that the second Amendment did not confer a right to bear arms unrelated to the militia service, for "want of a substantial federal question." Burton v. Sills, 394 U.S. 812 (1969). This dismissal would not have been appropriate if the Court felt that *Miller* Court's interpretation of the Second Amendment was open to question.

[3] The Fifth Circuit—the court now deciding whether the lower court in *Emerson* misconstrued the Second Amendment—has twice relied on *Miller*, and rejected out of hand defendants' Second Amendment challenges to their conviction for unlawful possession of a firearm. *United States v. Johnson*, 441 F.2d 1134 (5th Cir. 1971); *United States v. Wil-*

Countless federal district courts have looked at these issues and this history,[4] as well as numerous state courts, including the Supreme Court of New Jersey,[5] which was referred to in the excellent opinion of Judge Bissell—*Burton v.*

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liams, 446 F.2d 486 (5th Cir. 1971). *See also United States v. Broussard*, 80 F.3d 1025, 1041 (5th Cir. 1996) (noting the defendant's concession that the Second Amendment, "which concerns possession of weapons for a well-organized militia," was inapplicable, and refusing to "discover or declare a new constitutional right to possess weapons under the Ninth Amendment"). *See also Thomas v. City Council of Portland*, 730 F.2d 41, 42 (1st Cir. 1984) ("Established case law makes clear that the Federal Constitution grants appellant no right to carry a concealed handgun"); *United States v. Toner*, 728 F.2d 115, 128 (2d Cir. 1984) (gun possession not a fundamental right); *United States v. Graves*, 554 F.2d 65, 66 n.2 (3d Cir. 1977) (dicta) (Miller controlling on individual rights question); *Lover v. Pepersack*, 47 F.3d 120, 124 (4th Cir. 1995) (Second Amendment "does not confer an absolute individual right to bear any type of firearm"); *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971) (because Second Amendment right applies only to state militias, "there can be no serious claim to any express constitutional right of an individual to possess a firearm"); *Gillespie v. City of Indianapolis*, No. 98-2691, 1999 WL 463577, at *14 (7th Cir. July 9, 1999) (Second Amendment "establishes no right to possess a firearm from the role possession of the gun might play in maintaining a state militia") (upholding 18 U.S.C. § 922 (g)(9)); *United States v. Nelsen*, 859 F.2d 1318, 1320 (8th Cir. 1988) (no plausible claim that challenged statute "would impair any state militia"); *Hickman v. Block*, 81 F.3d 98, 101 (9th Cir. 1996) (Second Amendment "is a right held by the states, and does not protect the possession of a weapon by a private citizen"); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977) (individual right to gun possession "has long been rejected"); *see also United States v. Wright*, 117 F.3d 1265, 1273 (11th Cir.) (Second Amendment limited to "the possession or use of weapons that is reasonably related to a militia actively maintained and trained by the states"), *cert. denied*, 118 S. Ct. 584 (1997); *Fraternal Order of Police v. United States*, 173 F.3d 898, 906 (D.C. Cir. 1999) (no evidence presented on statute's "material impact on the militia").

[4] *See, e.g., Vietnamese Fisherman's Association v. Knights of the Ku Klux Klan*, 543 F. Supp. 198, 210 (S.D. Tex. 1982) (court held that enjoining the activities of a paramilitary affiliate of the Ku Klux Klan would not implicate the Second Amendment, because the "Second Amendment does not imply any general constitutional right for individuals to bear arms and form private armies"); *Moscowitz v. Brown*, 850 F. Supp. 1185 (S.D.N.Y. 1994); *United States v. Kozerski*, 518 F. Supp. 1082 (D. N.H. 1981), *cert. denied*, 496 U.S. 842 (1984); *Thompson v. Dereta*, 549 F. Supp. 297 (D. Utah 1982); *United States v. Kraase*, 340 F. Supp. 147 (E.D. Wis. 1972); *United States v. Gross*, 313 F. Supp. 1330 (S.D. Ind. 1970), *aff'd on other grounds*, 451 F.2d 1355 (7th Cir. 1971).

[5] *Burton v. Sills*, 248 A.2d 521 (N.J. 1968), *appeal dismissed*, 394 U.S. 812 (1969). *See also Arnold v. Cleveland*, 616 N.E. 2d 163 (Ohio 1993); *State v. Fennel*, 382 S.E.2d 231 (N.C. 1968); *United States v. Sandidge*, 520 A.2d 1057 (D.C.), *cert. den.*, 108 S. Ct. 193 (1987); *Kalodimos v. Village of Morton Grove*, 470 N.E.2d 266 (Ill. 1984); *Masters v. States*, 653 S.W. 2d 944 (Tex. App. 1983); *State v. Vlacil*, 645 P.2d 677 (Nev. 1967); *In re Atkinson*, 291 N.W.2d 396 (Minn. 1980); *Commonwealth v. Davis*, 343 N.E.2d 847 (Mass. 1976); *Harris v. State*, 432 P.2d 929 (Nev. 1967).

Sills, 248 A.2d 521 (N.J. 1968), appeal dismissed, 394 U.S. 812 (1968). Before the *Emerson* case, every single one of these courts agreed with the view of the Second Amendment set forth by Professor Yassky and Judge Bissell: that the Second Amendment relates only to well-regulated, state-sanctioned militias (armies) and does not give individual civilians any right to use or possess guns. Every single one. That is why the Second Amendment was pretty much a dead issue. Furthermore, other commentators have stated that the Second Amendment does not give individuals a right to own or use guns, absent a relation to a state-sanctioned militia, and have said so in rather stark terms.[6] Former Chief Justice Burger, whom Judge Bissell referred to, is certainly no raging liberal. While a professed gun-man all his life, Justice Burger stated that "one of the frauds—and I use the term advisedly—on the American people has been the campaigning to mislead the public about the Second Amendment. The Second Amendment doesn't guarantee the right to have firearms at all. [The Framers] wanted the Bill of Rights to make sure that there was no standing army in this country, but that there would be state armies." Justice Burger went on to say "this has been the subject of one of the greatest pieces of fraud, and I repeat the word fraud, on the American public by special interest groups that I have ever seen in my lifetime."[7] Rather strong words from a usually reserved Justice Burger.

The Second Amendment reemerged from this settled state in the *Emerson* case. Let me tell you about that case. There are a number of individuals in this country who are banned from possessing handguns, including felons, juveniles, and people who have been committed to mental hospitals. That prohibition was expanded to include people who were subject to restraining orders, such as domestic restraining orders.[8] Which brings us to Timothy Joe Emerson. Mr. Emerson and his wife, Sasha, were in the mist of a heated divorce proceeding.[9] At that proceeding, Sasha testified that Mr. Emerson had threat-

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[6] *See, e.g.*, David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991); Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309 (1998).

[7] Speech of Justice Warren Burger at news conference announcing introduction of the Public Health and Safety Act of 1992, June 26, 1992. *See also* Burger, *The Right to Bear Arms*, PARADE MAGAZINE, January 14, 1990, Interview with Burger on *McNeil/Lehrer News Hour*, December 16, 1991; Burger, *The Meaning and Distortion of the Second Amendment*, KEANE SENTINEL, November 26, 1991.

[8] 18 U.S.C. § 922 (g)(8).

[9] The facts of Emerson's conduct are discussed in Brief for Appellant United States of America, *United States v. Emerson* (5th Cir. 99-10331), filed August 27, 1999, at 3-8. *See also* Reply Brief for Appellant, *supra*, filed January 27, 200, at 42-43.

ened to kill a friend of hers. She sought a restraining order from the judge to keep Emerson from threatening her or their four year old daughter. Mr. Emerson did not present evidence to refute these claims at the hearing. He did say at the hearing that he did not feel he was mentally capable of taking care of patients at the present time. He was a doctor. Therefore, the restraining order was entered. Two months later Sasha and the four year old daughter went to Emerson's medical office to get an insurance payment. They got into an argument and Emerson pulled out his Beretta pistol from his desk drawer. He pointed it at the four year old and his wife. Sasha said they would leave, but she just had to get their daughter's shoes from the back room. Mr. Emerson said not to go there and cocked the gun, preparing to fire. He pointed it at Sasha and the four year old. They then left. That day, Mr. Emerson told a coworker at lunch that he needed to get rid of Sasha and that he had an assault weapon and just needed to get bullets. Two weeks later, Mr. Emerson complained about Sasha's friends towing cars from his office. The police then called the judge who was handling the divorce proceedings, and learned about the protective order. They also learned that Sasha's friends had permission to tow these cars. Emerson then told the police that he had an assault weapon and a 9 millimeter handgun in his office. He said something about shooting his wife and her new boyfriend. He also said that if any of his wife's friends set foot on his property, they would be found dead on the parking lot.

A week later, Emerson was indicted for illegally possessing not just the Beretta pistol but another 9 millimeter pistol, as well as a military issue semi-automatic M1 carbine, a semi-automatic SKS assault rifle with a bayonet and a semi-automatic M14 assault rifle. Any one of these guns would have made him a felon under federal law. The federal judge, Judge Cummings, then threw out the indictment on the grounds that in Judge Cumming's view, the law restricting Mr. Emerson's possession of guns violated the Second Amendment. That case has been appealed to the 5th Circuit Court of Appeals and my organization, the Center to Prevent Handgun Violence filed an Amicus Brief on behalf of the government, seeking to overturn Judge Cumming's decision. Professor Yaskey wrote another Amicus Brief on behalf of academics who also contend that it was constitutional to prohibit Mr. Emerson from possessing his arsenal. There were briefs filed on behalf of the NRA, Mr. Warner's organization, and another group of academics, advocating the view to which I believe some of the panelists here ascribe, that is, that the constitution does not permit the government to restrict Mr. Emerson's ability to possess his arsenal. Oral argument has not yet been set in that case.

Judge Cummings is the second federal judge in American history to interpret the Second Amendment in this way and to hold that the constitution entitles individuals to possess guns without any relation to participation in a state-sanctioned militia. The first judge was the trial judge in *United States v.*

Miller, which was then thrown out by the Supreme Court's reversal.[10] That is why we are here today. I think that context is important because the law, and the Second Amendment, has implications in the real world. In *Emerson* we are talking about whether Mr. Emerson has a right to have his semi-automatic arsenal. In other cases, the NRA has contested bans on civilians possessing machine guns and civilians possessing assault weapons. Those were cases where the NRA took the position that there was a Second Amendment right for individuals to possess those weapons.[11] We took the contrary view. Another real case involving the Second Amendment was one in which the KKK had a paramilitary force, which they claimed to be a modern militia.[12] They were probably closer to this other view of the Second Amendment than Mr. Emerson because they said that they were very similar to a militia. They also believed in possessing arms to insurrect against the government. There was a law in Texas, which prohibited private armies. The KKK said that the law was an unconstitutional violation of the Second Amendment. The KKK lost because the judge ascribed to the view of the Second Amendment as stated by Professor Yassky and Judge Bissell.

So that is the reality behind the Second Amendment debate. Professor Malcolm mentioned that there were recent articles stating that there is a changing tide scholarship about the Second Amendment. I'm not really sure if that is true.[13] I do think that the most relevant fact about the Second Amendment in society today is not what it means in the court room, because that is remarkably settled—other than Judge Cummings' opinion. I am firmly convinced that the 5th Circuit is going to reverse Judge Cummings. I do not expect the Supreme Court to take the case because there is no conflict in the circuits. All circuits are in remarkable agreement that the Second Amendment only relates to state-sanctioned militias, and does not entitle civilians to own or possess guns absent their participation in such militias.

The reality and real import of the Second Amendment is that many people believe that there is a Second Amendment right to own guns which has nothing to with the militia. Those people are wrong. They do not understand the Sec-

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[10] *Miller*, 307 U.S. 174.

[11] *See e.g., Arnold v. City of Cleveland*, 616 N.E.2d 163 (Ohio 1993) (rejecting NRA claim that civilian possession of assault weapons is constitutionally protected).

[12] *Vietnamese Fisherman's Assoc. v. Knights of the Ku Klux Klan*, 543 F. Supp. 198, 210 *S.D. Tex. 1982).

[13] See Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 KENT L. REV. _ (2000) (forthcoming) (disputing claim that there is a "new consensus" of academics supporting the "individualist" view of the Second Amendment).

ond Amendment better than every Circuit Court of Appeal in the country or the Supreme Court. But, as Judge Burger noted, much of the public has this misperception. Polls show that an overwhelming percentage of the American people support very strong gun laws. This high majority includes gun owners. Yet these same people say that while they would like strong gun laws to be enacted, including licensing and registration requirements, they believe that there is this Constitutional amendment that keeps us from doing that. That is the Second Amendment. Consequently, this misperception is actually preventing effective policies from being enacted. In a real way, perpetuating this misperception of the Second Amendment can be a very harmful thing to society. And so I think it is important to study the Second Amendment, to review all of these cases, and not to let it act as a gloss, which prevents us from passing reasonable gun laws.

I would like to very briefly touch on some of the historical record, which has not been mentioned. As Professor Yaskey in particular noted, the entire context of the Second Amendment, according to the Framers, was a military one. The whole issue was how to divide power between the state government and the federal government. There was no issue about how to divide power or rights between individuals and governments. That was not discussed among the Framers with respect to the Second Amendment. Additionally, there were laws in colonial times which greatly restricted the possession of guns, which would be inconceivable under the "individualist," alternative, view of the Second Amendment.[14] In colonial times, Maryland forbade ownership of guns by Catholics.[15] Other jurisdictions seized weapons of eligible males who refused to serve in the militia because ownership of guns was closely tied to the mili-

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[14] *See Generally* Saul Cornell, *Commonplace or Anachronism*, 16 CONST. COMMENTARY 221 (1999); Don Higginbotham, *The Second Amendment in Historical Context*, 16 CONST. COMMENTARY 263 (1999); Michael Bellesiles, *Suicide Pact: New Readings of the Second Amendment*, 16 CONST. COMMENTARY 247 (1999). The English legal tradition from which the American system was derived also restricted the citizenry's possession of firearms. *See e.g.*, 1 Bernard Schwartz, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 43 (1971) ("that 'the subjects which are Protestants may have arms for their defense suitable to their conditions and as allowed by law'") (quoting the ENGLISH BILL OF RIGHTS); Michael A. Bellesiles, *Gun Laws in Early America: The Regulation of Firearms Ownership*, 1607-1794, 16 LAW & HIST. REV. 567, 571 (1998) ("Within weeks of the completion of the Bill of Rights, Parliament voted to diarm Catholics . . . [and later passed] the militia acts that granted the lords lieutenant the power to disarm anyone whenever they considered it necessary for public peace"); P.B. Munsche, GENTLEMEN AND POACHERS: THE ENGLISH GAME LAWS 1961-1831 (1981) at 12 (Game Act of 1671 authorized seizure of all guns kept on a manor by those who failed to meet property qualifications for hunting).

[15] In the mid-eighteenth century, Maryland forbade ownership of guns by Catholics and seized the weapons of any eligible male who refused to serve in the militia. *See* Archives of Maryland 52:448-74 (William H. Browne et al. eds., 1885-96).

tia.[16] Other colonial legislators mandated that the guns be stored communally and could be removed in times of crisis or muster day.[17] Another held that only those who swore an oath to the state were allowed to bear arms. So these colonial legislatures did not recognize an individual right to possess guns.[18]

I will leave by saying that when you think about the alternative view of the Second Amendment, which has been called the insurrectionist view of the Second Amendment, I think you have to answer some tough questions. For example, if you feel that the Second Amendment gives people a right to keep and bear arms, one must recognize that the right is not only to bear arms, but it includes the right to use them. The phrase to keep and bear was a military term. You are talking about a constitutional right for individuals to use weapons. Such an interpretation makes a host of laws against the use or firing of weapons unconstitutional.

Further, subscribers to the broad, insurrectionist view of the Second Amendment consider the core of this right to allow people to engage in insurrection against the government. Under this view, if anything is unconstitutional, violent acts of treason are unconstitutional. However, treason is the one crime that is defined specifically in the Constitution.[19]

If you subscribe to this view, you also have to answer, what do we mean by "arms?" The term "arms" means military weapons.[20] So if you say you have this individual constitutional right to keep and bear arms, then I would think you are saying you have a right to possess and/or use machine guns and assault

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[16] Even during the American Revolution, Connecticut and North Carolina impressed firearms without hesitation. *See* J.H. Trumbull et al., eds., *The Public Records of the Colony of Connecticut Prior to the Union with New Haven Colony* (1850-59); Walter Clark, ed., *The State Records of North Carolina* (1901-03).

[17] Colonial legislatures from New Hampshire to South Carolina imposed communal storage of firearms and permitted them to be removed only in times of crisis or for muster day. *See* Harold L. Peterson, ARMS AND ARMOR IN COLONIAL AMERICA 1526-1783 (1956), at 321-35.

[18] Saul Cornell, Commonplace or Anachronism, 16 Const. Commentary 221 (1999) (discussing Pennsylvania law).

[19] U.S. CONST. art. III, sect. 3.

[20] *See, e.g.*, DYCHE ENGLISH DICTIONARY (1974) (defining arms as "all manner of warlike instruments.") The phrase "bear arms" has an entirely military meaning. *See Aymette v. State*, 21 Tenn. 154, 161 (1840) ("A man in pursuit of deer, elk and buffaloes might carry his rifle every day, for forty years, and, yet, it would never be said of him, that he had borne arms . . . ."); Garry Wills, *To Keep and Bear Arms*, N.Y. REV. OF BOOKS, Sept. 21, 1995 (noting that "[o]ne does not bear arms against a rabbit.")

weapons, similar to the position taken by the NRA. Under this view, do you have a constitutional right to possess and/or use rocket launchers or nuclear weapons? It may sound funny, but these are serious questions and if you are putting forward this view of the Second Amendment, you have to explain where you draw the line in the definition of arms and what is your constitutional basis for doing so. I think those are very difficult questions to answer.

Thank you very much for staying up late enough to hear the last speaker.