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The Second Amendment Permits The Disarming of "Dangerous" Felons

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Each year, more than 8,000 people are convicted for unlawful possession of a firearm under 18 U.S.C. § 922(g). About 90% of those cases arose from gun possession by a felon. Firearm prosecutions are reportedly "the third most common federal offense." Such prosecutions are even more common in some districts, including the Middle District of Tennessee where over 42% of cases involve § 922(g). Section 922(g) is the law that prohibits felons, and certain other groups, from possessing firearms. The Sixth Circuit has now taken a big step in defining the constitutionality of the law, holding that a person only loses his Second Amendment rights under § 922(g) by committing a crime that involves danger to others or the community.

As our readers know, *Bruen* held that government regulation of conduct that "the Second Amendment's plain text covers" must be "consistent with this Nation's historical tradition of firearm regulation." That methodological approach to Second Amendment cases represented an express rejection of the courts of appeals'—including the Sixth Circuit's—consensus "two-step test," where courts would often balance the government's prosecutorial interest against the defendant's individual-liberty interest. Put (over)simply, the Supreme Court replaced interest balancing with historical inquiry.

This past term, the Supreme Court reinforced *Bruen*'s holding: "the appropriate analysis," *Rahimi* explained, "involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition." *Rahimi* rejected a facial challenge to Section 922(g)(8)'s disarmament of persons subject to a domestic violence restraining order, extracting from history a tradition of disarming "an individual [who] poses a clear threat of physical violence to another."

Meanwhile, the lower courts have wrestled with *Bruen*'s applicationto Section 922(g)'s centerpiece—the ban on felons from possessing firearms. Results vary—not least in the district courts within the Sixth Circuit. But save for plain error cases the Sixth Circuit itself had not applied *Bruen* to the felon-dispossession law. Last week it finally confronted the issue head on.

Erick Williams both owned a gun and had been convicted of aggravated-robbery. That combination

produced a felon-in-possession indictment, which Williams challenged by asserting the Second Amendment. In *United States v. Williams*, a decision written by Judge Thapar, the Sixth Circuit rejected his defense that Section 922(g)(1) is unconstitutional, both facially and as-applied.

Before *Bruen,* the circuits (including the Sixth) relied on a two-step balancing framework to uphold the constitutionality of felon-dispossession ban. After *Bruen*, some circuits refused to re-analyze the issue because analogous "pre-*Bruen* precedents controlled post-*Bruen* challenges." But Judge Thapar's opinion explained that *Bruen's* "new analytical framework" required a new analysis because the old precedent was "inconsistent with *Bruen*'s mandate to consult historical analogs." *Bruen*, of course, places the burden on the Government to show an American "historical tradition of regulating firearms" in a "relevantly similar" manner.

Judge Thapar's historical analysis reviewed English disarmament laws from as early as the First War of Scottish Independence and the time of Magna Carta, through the Middle Ages, to colonial America, to the ratification of the Constitution and Bill of Rights, culminating in the Reconstruction era after the Civil War. The take-away from this historical analysis was that Governments have "long disarmed groups that they deemed to be dangerous." But always, the court clarified, the disarmed "could demonstrate that their particular possession of a weapon posed no danger to peace." The answer to the historical question was therefore that Congress has the power to disarm "dangerous" people.

But who is dangerous? The Sixth Circuit's answer is that judges should make individualized determinations and "should [not] simply defer to Congress," lest the legislature "define away a fundamental right." The decision notes that Congress could also allow the Executive Branch to make a decision on dangerousness, and that Congress even created "rearmament" program through the Bureau of Alcohol, Tobacco, and Firearms. But since Congress has refused to fund the program so it is unavailable as a solution.

And who has the burden of proving dangerousness? The opinion places the burden on the defendant, deferring to Congress' presumption that anyone convicted of a felony is dangerous. This is also a result of its historical inquiry: "Our nation's history shows that the government may require individuals in a disarmed class to prove they aren't dangerous in order to regain their right to possess arms." And when considering the issue, a "defendant's entire criminal record" is fair game. In sum, the Sixth Circuit now requires that courts give felons "a reasonable opportunity to prove that they don't fit the class-wide generalization" of dangerousness imposed by Congress.

Did Mr. Williams convince the court that he was not dangerous? Not even close. After all, he had previously "robbed two people at gunpoint, stealing cash, a watch, and clothing" and had also "agreed to stash a pistol that was used to murder a police officer." It seems unlikely he will ever legally own a gun.

But many cases will be more difficult, so the opinion gives advice that will no doubt be welcome to district courts that must now review dangerousness. It stated that crimes are dangerous if they are against "the body of another human being," like murder, rape, assault, and robbery, or "inherently" pose "a significant threat of danger," like drug trafficking and burglary. It explained that a person in those categories "will have a very difficult time, to say the least, of showing he is not dangerous." The opinion then says that claims with no physical danger, like "mail fraud, tax fraud, or making false statements," are a "more difficult category" that may not cause disarmament.

This new standard will likely take time to settle. The panel's analysis requires a holistic,

individualized analysis of each defendant's criminal record. Drug crimes will likely be particularly difficult—for example, where a defendant has a prior possession conviction, but the amount of drugs was very high. Or a trafficking conviction with no gun charge and very small amounts. Courts will also wrestle with encounters with the justice system that do not lead to convictions, such as arrests and dismissed charges, but which sometimes can create a strong evidentiary record of dangerousness.

Another issue is notice. Someone may be convicted of, for example, felony perjury, and then have no idea afterwards whether they can own a gun. State and federal trial courts should consider giving explicit instructions on the issue during sentencing. They may also consider whether to make findings about how *long* afterwards the person should be considered dangerous, assuming that they have no further convictions. Certainly, the defense bar will argue that some felony convictions, especially those that are on the edge of dangerousness, should have a reasonable time-limit on disarmament.

Judge Thapar's opinion strikes us as presenting a compelling reading of the historical record, combined with a reasonable compromise regarding felons and the Second Amendment. But there is a long way to go before these issues will be resolved.

Finally, Judge Davis concurred in the judgment. Her view was that the majority's historical analysis was unnecessary because "the presumption of lawfulness [of felon dispossession] set forth in *Heller, Bruen*, and now *Rahimi*, is sufficient," and she argued that the court's pre-*Bruen* precedent remains good law. She would thus avoid the "dangerousness" issue altogether.

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