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Gun Owners Foundation

Report on 2015 Legal Activity

Firearms-Related Amicus Briefs

1. Jackson v. San Francisco [SCOTUS Petition Stage] (January 15, 2015)
http://www.lawandfreedom.com/site/firearms/Jackson%20GOA%20Amicus%20Brief_2015.pdf

Second Amendment challenge to San Francisco's firearm storage requirements and ban on certain types of ammunition. *The decision of the Ninth Circuit below was another in a long string of decisions wherein the lower federal courts simply have refused to implement the decision of the U.S. Supreme Court in Heller. GOF's brief argued that at each and every opportunity, the Ninth Circuit did exactly what the Supreme Court in Heller specifically told federal courts they could not do. In this case, the Ninth Circuit went even further than other courts, upholding an ordinance nearly identical to the one struck down in Heller. GOF's brief argued that the Supreme Court must step in and quash the lower courts' uprising against Heller so that constitutional rights are uniform across the country.*

2. Peruta v. San Diego [Ninth Circuit] (April 30, 2015)
http://www.lawandfreedom.com/site/firearms/Peruta%20v%20San%20Diego%20GOA%20Amicus%20Brief%20as%20filed.pdf

Second Amendment challenge to California law which almost completely prevents ordinary persons from carrying firearms in public under a "may issue" system. *GOF's brief argued that the Second Amendment explains when and how it applies, and comes with its own standard of review – "shall not be infringed." Here, the Plaintiffs are members of "the People," their weapons are protected "arms," and they wish to "bear" those arms for what the Supreme Court has confirmed is a "legitimate" and constitutional purpose – self defense. California's permit system clearly "infringes" on the exercise of that right. GOF's brief argued against the use of any judicial "balancing test," or judicial evaluation of "burden" on gun owners, or judicial consideration of how important California thinks its law is – the plain text of the Second Amendment requires that the law be struck down.*

3. Silvester v. Harris [Ninth Circuit] (June 2, 2015)
http://www.lawandfreedom.com/site/firearms/Silvester%20GOA%20amicus%20brief.pdf

> ***Second Amendment challenge to California's 10-day waiting period for firearm purchases***. *One of the most draconian states when it comes to Second Amendment rights, California forces its residents to wait 10 days after a purchase before a lawful buyer may acquire a lawful firearm. GOF's brief dispelled the notion that California's waiting period is "presumptively lawful" under Heller as a "condition on commercial sales of arms." Second, the brief showed that waiting periods for firearm purchases do not fall within any of Heller's "presumptively lawful" categories of regulations. Finally, GOF's brief argued that, while the district court below correctly determined that the waiting period is unconstitutional, it did so for the wrong reasons. The district court based its decision not on the text and context of the Second Amendment, but on the same type of judicially-devised interest balancing test that the Supreme Court rejected in Heller.*

4. Hollis v. Lynch [Fifth Circuit] (November 2, 2015)
http://lawandfreedom.com/wordpress/wp-content/uploads/2015/11/Hollis-v-Lynch-amicus-brief.pdf

> ***Second Amendment challenge to the federal machine gun ban, ironically passed as part of the 1986 Firearm Owners Protection Act***. *Under the Gun Control Act ("GCA"), "persons" are generally prohibited from possessing machineguns. A "person" is defined to include entities such as a corporation or partnership – but the definition does not include a trust. Moreover, in 2014, ATF took the position that "unincorporated trusts are not 'persons' under the GCA." Based on that understanding that trusts are not persons, a trust applied to manufacture a machinegun, and then sued when ATF denied permission. GOF's brief argued that not only did Heller and Miller not "foreclose" the argument the argument that machineguns are "arms," but rather they support it. Indeed, Heller explicitly stated that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms." And Miller stated that weapons which are "part of the ordinary military equipment" (like the M-16) are the sorts protected by the Second Amendment. GOF's brief also critiqued the district court's absurd use of founding era militia requirements to support its holding. Those statutes established minimum requirements on the sorts of weapons people "would be required" to have, not maximum limits on the types of weapons people "could" have. As our brief argued, the idea is laughable that, if someone showed up at Lexington and Concord with an M-16, his commanders would have turned him away, saying "Take it home, that's far too effective a weapon to use against the Redcoats." GOF's brief ridiculed those who say that fully-automatic machineguns are far too terrifying and powerful for ordinary people to own. Indeed, over the course of U.S. history, developments like the semi-automatic M-1 Garand, the lever action Henry Arms*

repeating rifle – and even the firearm cartridge itself – all were vast improvements in rate of fire and lethality over their predecessors.

5. Watson v. United States [Third Circuit] (December 9, 2015)
http://lawandfreedom.com/wordpress/wp-content/uploads/2015/12/Watson-GOA-amicus-brief.pdf

Second Amendment challenge to the federal machine gun ban, involving similar issues to the Hollis brief filed in November. *GOF's brief argued that Heller supports exactly the opposite position than the one advanced by the district court and, indeed, that machine guns are protected arms. Heller stated that "all instruments that constitute bearable arms" (like an M16) are protected by the Second Amendment, unless proved otherwise. Indeed, Heller noted that the definition of what is and what is not a protected arm does not turn on whether a weapon has a military or nonmilitary use. Indeed, in U.S. v. Miller (1939), the Court indicated that weapons which are "ordinary military equipment" (like the M16) are protected. And Heller followed that up by noting that military-grade weapons are not the only sorts of weapons that are protected. Rather, the Second Amendment protects a whole variety of "arms," including those used for private self-defense, hunting, target shooting and — most importantly — military grade weapons (like the M16) for defense of the free state against tyranny. Finally, GOF's brief attacked the "judge-empowering, interest-balancing" tests that the Heller Court explicitly rejected, but that lower federal court judges continue to use in Second Amendment cases to blatantly permit the "infringement" of a right that "shall not be infringed."*

6. Voisine v. United States [SCOTUS Petition Stage] (December 23, 2015)
http://lawandfreedom.com/wordpress/wp-content/uploads/2015/12/Voisine-GOF-amicus-brief.pdf

Legal challenge regarding whether a state statute is, for federal purposes, a misdemeanor crime of domestic violence under federal law, having proof of "use … or threatened use of physical force." *Just two years ago, the Court had found that a Tennessee law prohibiting a simple assault is a misdemeanor crime of domestic violence, even though that statute only required proof of an intent to cause an offensive touching. The Maine statute in this case did not even require that much, but only an act that was grossly negligent, and that as a result, Voisine's domestic partner was offensively touched. GOF's brief asserted that the fixed rule outlawing "physical force," as set forth in the statute, has been corrupted by an evolving standard that empowers courts and juries to change the law to fit changing times. GOF's brief then reminds the Court of its own precedents that prohibit deprivation of an American citizen's rights except upon proof of voluntary relinquishment of those rights — not conviction of a misdemeanor.*

Other Constitutional Amicus Briefs

1. Los Angeles v. Patel [SCOTUS Merits Stage] (January 30, 2015)
http://www.lawandfreedom.com/site/firearms/Patel%20GOA%20Amicus%20Brief.pdf

> ***Fourth Amendment challenge to the city of Los Angeles' claim that police could search through a hotel's guest register at will***. *The decisions of the lower courts had been based around whether a hotelier has a "reasonable expectation of privacy" in his records, that he is required to keep by statute. GOF's brief argued that business records located in commercial establishments and personal papers located in a private residence are both "property," and that both are equally protected by the Fourth Amendment. Indeed, the very roots of the Fourth Amendment can be traced directly to James Otis' 1761 opposition to the Crown's use of writs of assistance against merchants — allegedly to deter smuggling and other crimes.*

2. Jewel v. NSA [Ninth Circuit] (August 17, 2015)
http://www.lawandfreedom.com/site/constitutional/Jewel%20USJF%20amicus%20brief.pdf

> ***Fourth Amendment challenge to the NSA's dragnet surveillance program over the communications of Americans***. *This is the second time this case has come to the Ninth Circuit, after it was twice dismissed by the district court for lack of standing. GOF's brief noted that the Court of Appeals previously had determined Plaintiffs had standing because they alleged that the government* ***seized*** *their communications. Thus, it did not matter (as the district court had contended) that plaintiffs had not proved how the government* ***searched*** *their communications after they were seized. GOF's brief argued that the NSA's mass surveillance state is per se an unreasonable search and seizure under the Fourth Amendment. As the Supreme Court recently re-recognized in U.S. v. Jones and Florida v. Jardines, the Fourth Amendment foremost protects "property" — not an amorphous expectation of "privacy." A digital dragnet of Internet communications violates the senders' and recipients' property rights by trespassing on the communications that they have a contracted with their Internet provider to send. It does not matter whether the government physically intruded on plaintiffs' property, as the Supreme Court has recognized that trespasses can occur even when they are not visible to the naked eye. Further, GOF's brief argued that NSA mass surveillance is nothing more than a general warrant to rummage around in the private affairs of Americans looking for evidence of anything at all and nothing in particular. Finally, GOF's brief countered the district court's position that the government could hide behind the "state secrets doctrine" to cover up grave, unprecedented, and ongoing constitutional violations. Indeed, protection of the Constitution is our country's foremost national security interest.*

3. Luis v. United States [SCOTUS Petition Stage] (August 25, 2015)
http://www.lawandfreedom.com/site/constitutional/Luis%20USJF%20Amicus%20Brief%20Merits.pdf

> ***GOF's second amicus brief in support of Sixth Amendment challenge to the government's pretrial asset seizure of assets unrelated to the charges, depriving a defendant of the opportunity to hire private counsel to defend herself against federal charges***. *GOF's brief argued that the federal government has no right to seize the "untainted" assets of a criminal defendant. Depriving the defendant of assets prevents her from retaining legal counsel of her choice, violating her right to counsel under the Sixth Amendment — a right on which hangs the integrity of the criminal justice system. GOF's brief explained that to seize assets, the government is required to demonstrate that it has a superior property interest in the assets to be seized, and does not require the defendant to prove anything. GOF's brief further argued that asset forfeiture is disfavored in the law, and that the modern criminal justice system — which has created procedures resulting in a dramatic increase in criminal forfeiture judgments — operates oppressively against the People of the United States. Finally, the brief stressed that the Sixth Amendment guarantee of the right to have the assistance of counsel in all criminal prosecutions, like all the rights spelled out in the 1791 federal Bill of Rights, protects a preexisting right — the right to counsel in criminal cases.*

4. Sissel v. DHHS [SCOTUS Petition Stage] (November 25, 2015)
http://lawandfreedom.com/wordpress/wp-content/uploads/2015/11/Sissel-USJF-amicus-brief.pdf

> ***Challenge to Obamacare regarding the Origination Clause, which requires that if a bill is a "bill[] for raising revenue," then it must "originate in the House of Representatives***. *When Obamacare was initially introduced in Congress, it was assumed that it was simply a bill regulating the health insurance industry, and thus not subject to the origination requirement. However, by the time Obamacare penalty reached the Supreme court, the Government was instead justifying it as a "tax" in a desperate attempt to save the law from being overturned. But if it is a tax, then Obamacare had not originated in the House. Rather, the Senate had completely gutted a House bill, so that the only thing left was the bill number, and then Senate's Obamacare bill was poured into the empty shell. GOF's brief cut through this legal legerdemain, urging the Court to begin its analysis of the constitutional text by calling to remembrance the historical purpose of the origination clause — to give constitutional protection to the principle of "no taxation without representation." Requiring revenue raising bills to originate in the House, rather than the Senate, ensured that the people would not be taxed unless the people's House, not the states' Senate, would be primarily responsible for exacting taxes. After all, the House was the closest to the people, directly elected by them for only two-year terms.*

Firearms Litigation

1. Gun Owners Foundation v. BATFE; U.S. District Court for the District of Columbia
The End of a Three-and-a-Half Year Battle

In April of 2011, GOF submitted an FOIA request to the ATF, requesting certain records about how it responded to Congressional inquiries after the Fast and Furious scandal broke. Getting nowhere with ATF, GOF was forced to file suit against ATF in June of 2012. For more than two years, the federal judge assigned the case denied GOF's requests to force ATF to respond to its requests, calling the agency's unlawful delays "perfectly reasonable." In October 2014, however, the judge's patience ran out, when the judge indicated her intention to move GOF's case forward much more quickly. During the next several months, ATF completed production of documents, and produced a Vaughn index explaining which documents it was withholding and why. After determining that the government's withholdings were documents GOF would not be interested in obtaining, GOF and the government came to an agreement whereby GOF would dismiss the case, and the government would pay GOF attorney's fees and costs for having had to file the lawsuit. On January 8, 2016, a stipulation of dismissal was filed, ending the case.

2. United States v. Robert Arwady; U.S. District Court for the Southern District of Texas

For a number of years, GOF has been providing financial and legal assistance to Robert Arwady against federal criminal charges he was facing in Texas. Mr. Arwady was charged with engaging in the business of dealing in firearms without a license and for engaging in straw purchases. In reality, Mr. Arwady was liquidating a personal collection of firearms left over from his prior tenure as an FFL, and the alleged "straw purchase" was nothing of the sort. In 2014 and 2015, our firm assisted Arwady's lawyer, Robert Sanders, Esquire of Winston-Salem, North Carolina, with the drafting of various pretrial motions, including various motions to dismiss, a motion to strike, and a motion to sever. Rob Olson drafted several pre-trial motions and memoranda of law, and made three trips to Houston, Texas to assist in Mr. Arwady's defense. Less than a week before trial was scheduled to begin, the government dropped the "dealing" charges, perhaps finally having come to the realization of the strength of our motions to dismiss. Moving forward on the "straw purchase" charges, the case went to trial on October 20, 2015. After a two-day trial and a masterful defense, the jury returned a verdict of not guilty on all counts. This is the second time the government has pursued criminal charges against Mr. Arwady, and the second time a jury has found him not guilty. Mr. Arwady now faces the daunting task of trying to get the federal government to return all the firearms that it seized from him, and then forcing ATF to pay for the guns it "lost" or damaged.

Other Firearms Projects

1. GOF comments to State Regarding ITAR Regs (August 3, 2015)
http://www.lawandfreedom.com/site/firearms/GOF%20Comments%20to%20HHS%20on%20HIPAA%20and%20NICS.pdf

GOF filed comments with the State Department in response to State's Proposed Rulemaking ("PR") regarding revisions to International Traffic in Arms ("ITAR") Regulations, which control the export of "defense articles and services." In the past, there has been little need for ordinary Americans to be concerned with the AECA or ITAR, aside from restrictions on physically taking certain items to other countries. However, the State Department also purports to control "technical data," which includes information transmitted over the internet (and which often is unknowingly routed through foreign countries). The PR expands the definition of "technical data" and would possibly include everything from blueprints of nuclear weapons to a cleaning guide for certain firearms. GOF's comments noted that no ordinary person could ever hope to understand or comply with the highly technical ITAR, yet ITAR now may apply to ordinary persons doing ordinary things. GOF's comments argued that ITAR cannot be expanded in such a way as to prohibit Americans from engaging in First Amendment speech about Second Amendment protected activities.