The Heritage Foundation

LEGAL MEMORANDUM

No. 176 | MARCH 16, 2016

Appeals Court Ruling Could Threaten the Second Amendment Rights of American Citizens

Andrew Kloster

Abstract

The contours of Second Amendment rights are still being litigated, but the recent decision by the United States Court of Appeals for the Seventh Circuit in United States v. Mariano A. Meza-Rodriguez *continues an unbroken appeals court trend of upholding prohibitions on gun ownership by illegal aliens. By applying a mistaken approach to the Second Amendment, this decision threatens gun rights for American citizens. In order to minimize uncertainty, it is to be hoped that future courts, rather than applying a Fourteenth Amendment "balancing" approach, will hold conclusively either that illegal aliens are not included among "the people" protected by the Second Amendment or that prohibitions on the ownership of firearms by illegal aliens fall within a category of presumptively justifiable restrictions on gun ownership.*

On August 20, 2015, the United States Court of Appeals for the Seventh Circuit issued a decision in *United States v. Mariano A. Meza-Rodriguez*.[1] This case addresses two interesting questions:

- Do non-citizens have Second Amendment rights?
- Even if they do have such rights, can the government criminalize the possession of guns by illegal aliens?

The Seventh Circuit held that although illegal aliens are covered by the Second Amendment, the government nevertheless can constitutionally prohibit them from owning firearms and ammunition. Instead of applying a bright-line test, however, the court applied a

This paper, in its entirety, can be found at **http://report.heritage.org/lm176**

The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

Key Points

- *United States v. Mariano A. Meza-Rodriguez* addressed two interesting questions: Do non-citizens have Second Amendment rights? Even if they do, can the government criminalize gun possession by illegal aliens?
- The *Rodriguez* court held that although illegal aliens are covered by the Second Amendment, the government nevertheless can constitutionally prohibit them from owning firearms and ammunition.
- In *Rodriguez*, the Seventh Circuit held that the federal government's interest in "prohibiting persons who are difficult to track and who have an interest in eluding law enforcement" from owning firearms and ammunition is strong enough to pass constitutional muster.
- Even if illegal aliens are considered part of "the people" for Second Amendment purposes (or if a court declines to address the issue), the blanket prohibition on illegal aliens possessing firearms may properly be considered a traditional regulation that is *per se* constitutional under *Heller* and not subject to intermediate or heightened scrutiny.

balancing test that could threaten Second Amendment rights in other contexts.

The Second Amendment to the Constitution provides: "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] For decades, it was an unsettled question in Supreme Court case law whether the Second Amendment protected individual rights. However, in 2008, the Supreme Court of the United States held in the landmark case of *District of Columbia v. Heller* that the Second Amendment does protect an individual right to "possess a firearm unconnected with service in a militia, and to use that firearm for traditionally lawful purposes."[3]

In the wake of *Heller*, the Second Amendment has become an area of significant litigation, but there are still many unsettled areas of the law. For example:

- Can use or possession of so-called assault weapons be prohibited in all circumstances?
- Can handguns be prohibited in student housing on public university campuses?
- Can the government prohibit or impose burdensome regulations on the manufacture and sale of certain or all firearms?
- How difficult can state and local government make it for individuals to license their firearms before the regulatory regime becomes unconstitutional?
- Can government bar illegal aliens from possessing firearms?

Four different U.S. Circuit Courts of Appeals have answered this last question in the affirmative. The first three decisions reached this result by concluding that illegal aliens were not among "the people" covered by the Second Amendment. The fourth and most recent decision, *Meza-Rodriguez*, handed down in August 2015, concluded that illegal aliens were among "the people" but that they nevertheless could be barred from gun ownership consistent with the Fourteenth Amendment of the U.S. Constitution.

United States v. Mariano A. Meza-Rodriguez

In August 2013, police were called to a local bar where a man had been brandishing what looked to be a gun. Witnesses identified Meza-Rodriguez, a citizen of Mexico, who was later arrested after a foot chase. Upon frisking him, police found no gun, but they did find a .22 caliber cartridge in his shorts pocket. Meza-Rodriguez was charged with violating 18 U.S.C. § 922(g)(5), which makes it "unlawful for any person...who [is] an alien...illegally or unlawfully in the United States...to...possess in or affecting commerce, any firearm or ammunition."

Meza-Rodriguez moved to dismiss the indictment, claiming he had a Second Amendment right to possess firearms and ammunition. When this motion was denied by the district court, he pled guilty, reserving the right to raise his constitutional challenge on appeal. Upon conviction, Meza-Rodriguez was removed to Mexico.[4]

The first question the Seventh Circuit addressed was whether the Second Amendment even applied to Meza-Rodriguez. After all, the Second Amendment protects "the People." Notably, the Supreme Court had stressed in *Heller* that the Second Amendment protects "law-abiding citizens" in their use of weapons "for lawful purposes."[5] In other words, citizenship and Second Amendment rights appeared to go hand-in-hand in *Heller*.

Furthermore, in the wake of *Heller*, three federal appellate courts had ruled that the Second Amendment does not protect illegal aliens in the United States. The Fifth Circuit so held in 2011, the Eighth

1. No. 13-CR-192 (7th Cir. Aug. 20, 2015), *available at* http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2015/D08-20/C:14-3271:J:Flaum:con:T:fnOp:N:1608386:S:0.
2. U.S. Const. amend. II.
3. 554 U.S. 570, 577 (2008).
4. The appeals court in *Meza-Rodriguez* spent some time explaining how the plaintiff has a right to appeal, given that he pled guilty. The court held that his Second Amendment challenge was not moot because the success or failure of his appeal would bear on his ability to immigrate to the United States legally in the future. Those removed from the United States and convicted of an aggravated felony are permanently barred from reentry. 8 U.S.C. § 1182(a)(9)(A)(ii).
5. *Heller*, 554 U.S. at 625.

Circuit summarily agreed with the Fifth Circuit in a short *per curiam* opinion in late 2011, and the Fourth Circuit so held in 2012.[6] No circuit court had held that illegal aliens were a part of "the people" until the Seventh Circuit issued its decision.

Of particular interest is the Fourth Circuit case in *Carpio-Leon*. In that case, the court examined competing versions of the Second Amendment and Founding-Era documents in which "the people" and "citizens" were used interchangeably.[7] Citing another Seventh Circuit case, the Fourth Circuit noted: "[M]ost scholars of the Second Amendment agree that the right to bear arms was tied to the concept of a virtuous citizenry and that, accordingly, the government could disarm 'unvirtuous citizens.'"[8]

In addition to historical analysis, the Fourth Circuit also considered several Supreme Court cases in analyzing what is meant by the Second Amendment's protection of "the people." In *United States v. Verdugo-Urquidez*, which involved the Fourth Amendment, the Supreme Court explicitly noted that "the people" is a "term of art" that bears a similar meaning in the First, Second, Fourth, Ninth, and Tenth Amendments but a different meaning in the Fifth and Sixth Amendments.[9] Specifically, the *Verdugo-Urquidez* Court noted that "the people" in the Second Amendment context encompasses "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered a part of that community."[10]

This language was reiterated in *Heller* when the Court noted that the term "the people" "unambiguously refers to all members of the political community."[11] The appeals court in *Meza-Rodriguez*, however, ignored this judicial trend and came to the exact opposite conclusion, citing various Fifth Amendment cases and noting that unauthorized alien status cannot mean "*per se* exclusion from 'the people' protected by the Bill of Rights."

Nevertheless, what the *Meza-Rodriguez* court gave with one hand it took back with the other, upholding the constitutionality of 18 U.S.C. § 922(g)(5) under Fourteenth Amendment "intermediate scrutiny" (which requires, for the government prohibition to be upheld, that the government must establish that the law in question bears a substantial relationship to achieving an important governmental objective). Specifically, the Seventh Circuit held that the federal government has an interest in "prohibiting persons who are difficult to track and who have an interest in eluding law enforcement" from owning firearms and ammunition and that this interest is strong enough to pass constitutional muster.[12] The court relied entirely on the fact that illegal aliens live "largely outside the formal system of registration...[and] are harder to trace and more likely to assume a false identity" while summarily (and surprisingly) dismissing the notion that illegal aliens have "show[n] a willingness to defy our law" that makes them more likely to commit crimes in the future.[13]

Such a holding could risk Second Amendment freedoms. For example, the President has recently suggested that those on the "no fly" list maintained by the Federal Bureau of Investigation's Terrorist Screening Center should also not be permitted to purchase a gun.[14] If the balancing approach or

6. United States v. Portillo-Munoz, 643 F.3d 437 (5th Cir. 2011); United States v. Flores, 663 F.3d 974 (8th Cir. 2011); United States v. Carpio-Leon, 701 F.3d 974 (4th Cir. 2012).
7. *Carpio-Leon*, 701 F.3d at 979–81.
8. *Id.* at 979 (citing United States v. Yancey, 621 F.3d 681 (7th Cir. 2010)).
9. 494 U.S. 259, 265–66 (1990).
10. *Id*. at 265 (explaining that this definition applies in the First, Second, and Fourth Amendment contexts).
11. *Heller*, 554 U.S. at 580.
12. *Meza-Rodriguez* at *16–17.
13. The claim that there is an important enough governmental interest in barring "persons who are difficult to track" from gun ownership to satisfy the Second Amendment is itself suspect. Certainly, things like public safety can represent important, substantial, or legitimate governmental interests, but it is hard to see why the government has any interest in law enforcement being able to track people we do not have reason to believe committed a crime in the first place simply on account of their status. Holding that the rights of persons the government has difficulty tracking are less than others seems antithetical to our system of American liberty.
14. The Editorial Board, *Should No-Fly Mean No Buy?: Our View*, USA Today, Dec. 10, 2015 ("[D]enying a constitutional right for certain citizens, based on a secret government list, just doesn't meet the test of American values"), *available at* http://www.usatoday.com/story/opinion/2015/12/10/no-fly-list-guns-terror-watch-list-congress-editorials-debates/77113240/.

holding in *Meza-Rodriguez* was followed, one could arguably justify this position: Persons on the list, even if they are mistakenly on the list and even if they are citizens, have "an interest in eluding law enforcement." Indeed, that interest could be perfectly justified: Law enforcement might have targeted them unreasonably, and this could serve as a smoke screen for justifying the policy as constitutional.

A Balancing Approach or a Simple Bright-Line Approach?

Does it matter that the *Meza-Rodriguez* court employed a different approach from the other three appeals courts, since the substantive outcome was the same in all four cases? Perhaps it does. A Fourteenth Amendment "balancing" approach, such as the one adopted by the *Meza-Rodriguez* court, is inherently uncertain in application, complicated, and often counterproductive. A simple bright-line approach (an approach with a strong constitutional pedigree) that categorically excludes illegal aliens from being included among "the people" for Second Amendment purposes would be sounder.

There is an alternative approach available that also avoids a Fourteenth Amendment balancing test. The *Heller* Court recognized the inherent constitutionality of traditional government limitations on gun ownership, including prohibitions against gun possession by felons and the mentally ill, restrictions on the possession of firearms in schools and government buildings, and certain conditions on the commercial sale of arms. Thus, even if illegal aliens are considered part of "the people" for Second Amendment purposes (or if a court declines to address the issue), a blanket prohibition on the possession of firearms by illegal aliens may properly be considered a traditional regulation that is *per se* constitutional under *Heller* and not subject to intermediate or heightened scrutiny.[15] Along with prohibiting gun ownership by felons and the mentally ill, prohibiting such ownership by illegal aliens has a long pedigree.[16]

The categorical approach also has benefits for the substance of Second Amendment rights. Instead of taking an all-things-considered approach that might water down these rights, focusing on the core group benefiting from the Second Amendment—law-abiding citizens—enables courts to see the rights as strong by giving them additional context. By contrast, a balancing approach forces courts to view Second Amendment rights in a vacuum and to weigh decisions about the merits of gun rights that the Founders made for us.

Conclusion

In a post-*Heller* world, the contours of Second Amendment rights are still being litigated, but the Seventh Circuit decision in *United States v. Mariano A. Meza-Rodriguez* continues an unbroken appeals court trend of upholding prohibitions on gun ownership by illegal aliens. Regrettably, the court reached its decision by applying a flawed "balancing" approach that threatens Second Amendment rights in other contexts. It is to be hoped that to minimize uncertainty, future courts will eschew applying a Fourteenth Amendment "balancing" approach and hold conclusively either that illegal aliens are not included among "the people" protected by the Second Amendment or that prohibitions on the ownership of firearms by illegal aliens fall within a category of presumptively justifiable restrictions on gun ownership.

*—**Andrew Kloster** is a Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation.*

15. 18 U.S.C. § 922(g)(5) has been federal law only since the Firearm Owners' Protection Act of 1986. However, even if courts decide to hold illegal aliens as part of "the people" for Second Amendment purposes, the Founding-Era statements referencing citizenship, the precatory phrase in the Second Amendment noting the purpose of the Amendment as being to secure "a free State," and the suggestion that the Second Amendment ought to have been incorporated against the states as a part of the "privileges or immunities of citizens" clause in the Fourteenth Amendment all vitiate in favor of this conclusion. *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742 (2010) (Thomas, J., concurring).
16. The seizure of Loyalist weapons following the Revolutionary War and the limitation of militia membership to citizens are two Founding-Era examples of such prohibitions. *See also* Town of Greece v. Galloway, 134 Sup. Ct. 1811, 1819 (2014) ("Any test the [Supreme] Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change."). Justice Kennedy's opinion, even though *Town of Greece* was an Establishment Clause case, is instructive for Originalist practice. When a practice is longstanding, searching out tiers of scrutiny and applying them to a set of facts is often counterproductive. It is better practice to start with the obvious constitutionality of a traditional practice and work backwards.