Written by **Bob Adelmann** on February 3, 2017

Kansas District Court Judge Throws Out State's Second Amendment Protection Act

Two Kansans, Shane Cox and Jeremy Kettler, engaged in the purchase and sale of a silencer in October 2015, believing they were exempt from the 1934 National Firearms Act's requirements to register it and pay a $200 tax. They relied on the state's Second Amendment Protection Act (SAPA) which holds:

> Any act, law, treaty, order, rule or regulation of the government of the United States which violates the Second Amendment to the Constitution of the United States is null, void, and unenforceable in the state of Kansas.

This issue would never have been raised had not Kettler decided to post to his Facebook page a video of himself. Agents from the ATF noted the video, investigated, and brought charges against Kettler (the purchaser) and Cox (the supplier) of the silencer.

A jury found both of them guilty, and an appeal was filed. The case was directed to the attention of U.S. District Court Judge J. Thomas Marten by the attorney general of the state of Kansas, who got involved in it at the last minute, in the event that it would eventually wind up at the Supreme Court.

Marten knew the appeal would be covered widely, and so he took every effort, first, to explain his position as the district judge and, second, to cover his trail to avoid leaving holes that the men's defense team could exploit. His 13-page decision may be downloaded here.

His reasoning is classic precedent-following: The National Firearms Act is, according to the Supreme Court, constitutional. Because the Supremacy Clause of the Constitution holds that rulings by the Supreme Court become the law of the land, it overrides any such nonsense that Kansas might wish to promulgate to the contrary. End of story.

However, at least two holes remain, which become apparent upon reading the words of Marten. Because "this case has generated significant interest within the District of Kansas and beyond," wrote Marten, "I begin with a summary of the court's obligations, the relevant law, and how the law applies to the facts of this case." But, before proceeding, the judge noted that he was required to take this oath before assuming his office:

> I [name], do solemnly swear (or affirm) that I will administer justice without respect to person, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as [a judge] under the Constitution and the laws of the United States. So help me God.

And then he immediately bored two holes that could ultimately form the basis for a substantial challenge to the National Firearms Act of 1934:

> This oath requires a judge to uphold the Constitution and the laws of the United States, as interpreted by the United States Supreme Court and the Tenth Circuit Court of Appeals.
>
> Where there is a decision on any point of law from the Supreme Court of the Tenth Circuit, or both, I am bound to follow those decisions.

He refers to the Supremacy Clause (Article VI, Clause 2) to back his case, to wit:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof … shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

It's that little phrase *in pursuance thereof* that could give defense attorneys for Cox and Kettler the opening they might seek. What if a law is passed by the federal government that isn't *in pursuance thereof*? What if previous challenges to the constitutionality of the NFA were right after all: that the NFA is unconstitutional? Would Judge Marten still be required to "uphold" it?

Marten tossed the other defenses of Cox and Kettler relating to the Second and 10th Amendments, following the Supremacy Clause blindly. If the attorney general for the state of Kansas is right, and the decision is appealed, this case might ultimately wind up at the Supreme Court, representing the first significant challenge to the NFA in decades. This could be one of the first major cases decided by the Supreme Court operating at full strength — assuming the affirmation and the arrival of Justice Neil Gorsuch, known to be a stickler for such originalist positions.

Sometimes, it is said, big doors swing on little hinges.

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