

# Hard Cases Make Bad Precedent



By Paul Engel

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- Under what circumstances can the government suspend your right to keep and bear arms?
- What rights does someone subject to a restraining order have?
- Will a case with an unsavory party be used to deny the right of others?

There is an adage in the legal profession, “Hard cases make bad law.” Well, since court cases in this country are not law, only precedent, you might be tempted to dismiss this saying. However, since our courts are so devoted to their precedent, we should be very careful when hard cases come to the Supreme Court. For example, one case heard by the court has a very unsavory respondent. The question is, will Mr. Zackey Rahimi’s past be used to infringe on the rights of the rest of the American people?

For months I’ve been hearing the Second Amendment community talk about the case [United States v. Rahmimi](#). The question at hand in this case is:

Whether 18 U.S.C. 922(g)(8), which prohibits the possession of firearms by persons subject to domestic-violence restraining orders, violates the Second Amendment on its face.

[United States v. Rahimi – Petition for Certiorari](#)

While many in the Second Amendment community are happy to see the question brought to the court, the specifics of Mr.

Rahimi's case may leave such a bad taste in the justice's mouths we may not get a constitutionally sound answer. Now that the court has heard oral arguments, I thought it was time to discuss the case.

## **Facts of the Case**

The heart of the case is the question of when it is constitutional to prohibit someone from being able to keep and bear arms. If you were looking for a poster child for this question, Zackey Rahimi is just about the last person you would choose.

Respondent Zackey Rahimi was a drug dealer who "mostly sold marijuana and occasionally sold cocaine." ... In December 2019, Rahimi and his girlfriend C.M. had an argument in a parking lot in Arlington, Texas. ... C.M. tried to leave, but Rahimi grabbed her wrist, knocking her to the ground. ... He then dragged her back to his car, picked her up, and pushed her inside, causing her to hit her head on the dashboard. Realizing that a bystander had seen him, he retrieved a gun and fired a shot. ... In the meantime, C.M. escaped the car and fled the scene. ... Rahimi later called her and threatened to shoot her if she told anyone about the assault.

## [United States v. Rahimi – Petition for Certiorari](#)

I think it's safe to say that Zackey Rahimi is not a nice guy. In fact, Mr. Rahimi seems to be a perfect example of someone for whom the possession of a firearm would be considered a danger to others. This fact did not escape the Texas legal system.

In February 2020, after giving Rahimi notice and an opportunity for a hearing, a Texas state court granted C.M. a restraining order, which was valid for two years. ... The court found that Rahimi had "committed family violence" and that such violence was "likely to occur again in the future." ... The court accordingly prohibited Rahimi from committing family

violence and from threatening, harassing, or approaching C.M. or her family. ... The order also suspended Rahimi's handgun license, prohibited him from possessing a firearm, and warned him that possessing a firearm while the order remained in effect may be a federal felony. ... Rahimi signed an acknowledgement that he had "received a copy of this protective order in open court at the close of the hearing in this matter."

### [United States v. Rahimi – Petition for Certiorari](#)

It may not surprise you that Mr. Rahimi did not take this opportunity to reform his life. In August of 2020, Mr. Rahimi not only contacted C.M. via social media, but went to her house in the middle of the night. Then, in November of 2020, he threatened another woman with a gun, for which he was charged by the State of Texas with aggravated assault with a deadly weapon. Between December 2020 and January 2021, it also appears Mr. Rahimi participated in a series of five shootings. After being identified as a suspect in those shootings, police executed a search warrant, where they found a pistol, rifle, magazines, and ammunition. This led to Mr. Rahimi's federal case.

A federal grand jury in the Northern District of Texas indicted Rahimi for violating 18 U.S.C. 922(g)(8) and 924(a)(2). ... Section 922(g)(8), which Congress enacted in 1994, prohibits a person who is subject to a domestic-violence restraining order from possessing a firearm in or affecting commerce. At the time of Rahimi's conduct, a knowing violation of Section 922(g)(8) was punishable by up to ten years of imprisonment.

### [United States v. Rahimi – Petition for Certiorari](#)

So what does 18 USC 922(g)(8) say? Rather than quote you the details, I'll let the Solicitor General's words from the petition describe it.

To trigger Section 922(g)(8), a restraining order must satisfy three conditions. First, a court must have issued the order after giving the person subject to it notice and an opportunity to be heard. 18 U.S.C. 922(g)(8)(A). Second, the order must forbid the person from harassing, stalking, or threatening an “intimate partner,” the person’s child, or an intimate partner’s child. 18 U.S.C. 922(g)(8)(B); ... Third, the order must either (1) include a finding that the person poses a “credible threat” to the physical safety of the intimate partner or child or (2) explicitly prohibit the use, attempted use, or threatened use of physical force against the intimate partner or child. 18 U.S.C. 922(g)(8)(C).

### [United States v. Rahimi – Petition for Certiorari](#)

I read §922(g)(8) and the Solicitor General accurately describes the trigger portions of law. I thought it would be easier to read than the text of the law, which you can find [here](#). Did the restraining order against Mr. Rahimi meet those requirements?

The restraining order in this case satisfied each of those requirements. Rahimi received notice and an opportunity to be heard. ... C.M. was Rahimi’s intimate partner because they had a child together. ... And the order both contained a finding that Rahimi posed a credible threat to C.M.’s physical safety and prohibited the threatened use of physical force against C.M.

### [United States v. Rahimi – Petition for Certiorari](#)

At this point in the narrative, there’s a restraining order against Mr. Rahimi. Because it involves domestic-violence, he is prohibited from possessing firearms, or at least that’s what the United States is claiming. So how did we get to this case?

Rahimi moved to dismiss the indictment, arguing that Section 922(g)(8) violates the Second Amendment on its face.

## [United States v. Rahimi – Petition for Certiorari](#)

The district court denied the motion, but the Fifth Circuit affirmed, at first. After the Supreme Court *NYSRPA v. Bruen* the Fifth Circuit withdrew its opinion. After receiving a supplemental briefing on *Bruen*, the Fifth Circuit again reversed the lower court's decision, holding that §922(g)(8) violates the Second Amendment. This is the state of the case when oral arguments were heard by the Supreme Court on November 7, 2023.

### **Oral Arguments**

As you would expect, the two parties to the case, the United States and Mr. Rahimi, see things very differently. Solicitor General Elizabeth Prelogar argued on behalf of the United States:

Guns and domestic abuse are a deadly combination. As this Court has said, all too often, the only difference between a battered woman and a dead woman is the presence of a gun. Armed abusers also pose grave danger to police officers responding to domestic violence calls and to the public at large, as Zackey Rahimi's own conduct shows.

To address that acute threat, Congress and 48 states and territories temporarily disarm individuals subject to domestic violence protective orders. Congress designed Section 922(g)(8) to target the most dangerous domestic abusers. It applies only if, after notice and a hearing, a court makes an express finding that the person poses a credible threat to an intimate partner's physical safety or imposes a specific prohibition on the use of physical force, and the disarmament lasts only as long as the order remains in effect.

## [United States v. Rahimi – Oral Arguments](#)

"Guns and domestic abuse are a deadly combination." So are knives, clubs, and motor vehicles, though none of them are

prohibited for those under a restraining order. It seems, in her haste to condemn the possession of firearms, Ms. Prelogar has conveniently ignored all of the other weapons frequently used to harm not only the victims of domestic abuse, but police officers and the public at large.

Mr. Wright, the public defender representing Mr. Rahimi, was not nearly as articulate in the opening of his argument.

My friend described several times the government's principle that in this case, they are not relying on any analogues that were directed at people who were not part of the people, outside the community, the national or political community entirely.

#### [United States v. Rahimi – Oral Arguments](#)

Mr. Wright went on to respond to some questions that had been raised by the bench during his opponent's oral arguments. He closed his opening statement with:

When Congress enacted Section 922(g)(8) in 1994, it acted without the benefit of Heller, McDonald, and Bruen, so we shouldn't be surprised that they missed the mark. They made a one-sided proceeding that is short a complete proxy for a total denial of a fundamental and individual constitutional right.

#### [United States v. Rahimi – Oral Arguments](#)

In short, Mr. Wright said Congress got it wrong because they did not have the benefit of the court's opinions in previous Second Amendment cases. Overall, I think the government made a better case. Mr. Wright's primary assertion seems to be based on Bruen's "text and history" standard, where the court seeks to see if the law in question has any basis in the text or history of the nation around the time of the ratifications of the Bill of Rights or the Fourteenth Amendment.

## **Analyzing the Case**

When I first looked at this case, I saw something different. First, I saw this not so much as a Second Amendment issue, but a violation of the Fifth Amendment's Due Process Clause. Just like any other property, the government can only take away a right following Due Process of law, which the Free Legal Dictionary defines as:

An established course for judicial proceedings or other governmental activities designed to safeguard the legal rights of the individual.

### [Due Process – The Free Legal Dictionary](#)

In order to suspend the right of Mr. Rahimi to keep and bear arms, the government must show that it followed a process that protected his rights. The first right to look at is the right to be considered innocent until proven guilty. While not specifically called out in the Bill of Rights, it is recognized under the Ninth Amendment.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

### [U.S. Constitution, Amendment IX](#)

The most fundamental aspect of innocent until proven guilty is the prohibition of punishment until an actual finding of guilt. That's not to say the accused cannot be detained or otherwise restricted, but that it should be based on probable cause in the details of the case at hand. As was stated by the Solicitor General in the petition for certiorari, in order for a court order to prohibit the possession of a firearm under §922(g)(8), it must fulfill three criteria. First, there had to have been a hearing at which the accused had an opportunity to participate. While Mr. Rahimi was notified about the hearing and did participate, that's not a finding of guilt,

but seems to have provided evidence of probable cause. Second, the order must restrain someone from threatening an “intimate partner”. This would seem to violate the concept of equal protection, since a restraining order against a stalker, business associate, or neighbor would not qualify. Again, while the Equal Protection Clause of the Fourteenth Amendment is limited to the states, the right to equal protection in federal law is just as protected by the Ninth Amendment. The third criteria for an order to trigger §922(g)(8) has two components, either of which is necessary. Either the order specifically prohibits the use or attempted use of physical force, or a finding that the accused represents a credible threat to the physical safety of the intimate partner or child. The former is dubious because the prohibition against a use of force can be included in a court order whether the accused has been shown to be violent or not. I’m not fully behind the latter because a judge’s finding may be subjective and not based on probable cause from the accused’s actions.

Looking at §922(g) as a whole though, I found a more serious problem with the law.

(g) It shall be unlawful for any person- ...

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

[18 USC §922\(g\)](#)

Article I, Section 8, Clause 3 of the Constitution authorized Congress to regulate interstate and foreign commerce, not to regulate anything that passes through said commerce.

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

[U.S. Constitution, Article I, Section 8](#), Clause 3



Since Congress only has the power to regulate interstate commerce, and this law does not regulate commerce of any kind, 18 USC §922 violates both Article I, Section 8, Clause 3 and the Tenth Amendment of the Constitution and is therefore void.

An unconstitutional law is void, and is as no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment.

[Ex parte Siebold :: 100 U.S. 371 \(1879\)](#)

## **Conclusion**

Let's step back and look at the big picture. Should people who are under a credible threat of serious physical harm or death be granted a restraining order? Absolutely, but we need to remember that those orders are nothing but ink on paper. The order cannot protect you, but it can help law enforcement restrain a person if they violate the order. Should someone have their right to keep and bear arms suspended if they are subject to such an order? Only after they have received due process. There must be a hearing where the accused not only can participate, but bring evidence in their favor. If the finding of such a hearing is that there is probable cause that said person is dangerous to themselves or others, then more should be done than simply depriving them of legal access to firearms. As this case shows, a restraining order did nothing to prevent Mr. Rahimi from contacting and approaching C.M. Even after Mr. Rahimi was arrested for violating the restraining order, he is accused of participating in five additional shootings.

I think I have shown that §922(g) is unconstitutional, not because it violates the Second Amendment, but because it violates Article I, Section 8, Clause 3 and the Tenth Amendment. While §922(g) may be unconstitutional and void, that's not to say that state laws suspending the right to keep

and bear arms to those under a “domestic violence restraining order” are unconstitutional. Just as with federal law, the state must insure that the accused receives due process before issuing such a penalty. Otherwise, they would be in violation of the Fourteenth Amendment’s Due Process Clause.

nor shall any State deprive any person of life, liberty, or property, without due process of law;

#### [U.S. Constitution, Amendment XIV](#)

While I am disappointed by both attorney’s arguments, we’ll have to wait and see how the court decides. Sadly, I’m not expecting the court to come to a constitutional decision. First, there’s the issue of neither side bringing up the fundament flaw in §922(g). What the court has not heard, it’s unlikely to consider in its deliberations. Second, Mr. Rahimi appears to be the perfect example of why such a law, at the state level, may be helpful. While it obviously did not stop Mr. Rahimi from carrying firearms, it would have added an additional charge to his arrest in 2020 when he violated the order. That might have meant that Mr. Rahimi would not have been on the streets in November 2020 to assault another woman with a firearm, or to participate in the other shootings of which he is accused.

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