

Rights After Conviction



By Paul Engel

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- Do you permanently lose your rights when convicted of a crime?
- Can the federal government take away your rights protected by the Second Amendment for a crime punishable by a year in jail?
- What are the potential violations of the Constitution this law presents?

According to federal law, if someone is convicted of a crime and punished with more than one year in jail, they lose their rights protected under the Second Amendment. A recent decision by the Ninth Circuit Court not only brought that federal law into question, but decided it was wrong. The court didn't find that this federal law violated the Constitution, rather they found it violated Supreme Court's Bruen decision. Is that all this federal law violates?

The question about the constitutionality of convicted felons losing their voting and gun rights for life comes up regularly here at the Constitution Study. In response, I point out that James Madison said:

In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.

[James Madison – For the National Gazette, 27 March 1792](#)

If our rights are our property, then they are protected under

the Fifth Amendment's Due Process Clause. However, the Fifth Amendment doesn't say you cannot be deprived of the property you have in your rights, only that it has to be done via due process. If a person is charged, given a speedy and public trial by a jury of their peers, and convicted with due process, then the protections under that Fifth Amendment have been served. The problem I have is the way this is implemented, especially at the federal level.

The Federal Law

Let's start out by looking at the law in question in this case.

18 U.S.C. § 922(g)(1) makes it a crime for any person to possess a firearm if he has been convicted of an offense "punishable by imprisonment for a term exceeding one year."

[United States v. Duarte – Ninth Circuit Court Opinion](#)

As always, we need to look not only at the statute cited, but its context. For example, §922(g) states:

(g) It shall be unlawful for any person-

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; ...

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\(g\)](#)

Let's break this down. First, a person described in subsection (g), which includes a laundry list of prohibited possessors, is not allowed to ship or transport firearms or ammunition in interstate or foreign commerce. This comes under the Commerce Clause in Article 1, Section 8, Clause 3.

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

[U.S. Constitution – Article 1, Section 8, Clause 3](#)

Subsection (g) also prohibits those listed from:

possess in or affecting commerce, any firearm or ammunition;

[18 USC §922\(g\)](#)

This is a problem, since Congress is not authorized to regulate commerce in general, only interstate and foreign commerce.

or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

[18 USC §922\(g\)](#)

Neither is Congress authorized to regulate items which have been shipped through interstate or foreign commerce, only said commerce itself. This means that most of 18 USC §922(g) is unconstitutional, and therefore void. The Supreme Court recognized this in several cases, including *ex parte Siebold*:

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 \(1879\)](#)

Ninth Circuit Opinion

Unfortunately, this is not what the Ninth Circuit panel found.

Steven Duarte, who has five prior non-violent state criminal convictions—all punishable for more than a year— was charged and convicted under § 922(g)(1) after police saw him toss a handgun out of the window of a moving car.

[United States v. Duarte – Ninth Circuit Court Opinion](#)

It doesn't sound like Steven Duarte is a very nice man. Five times he has been convicted of non-violent crimes punishable by more than one year in prison. Like anyone else though, Mr. Duarte's rights should be protected, and we, as a people, should do all we can to insure that.

Duarte now challenges the constitutionality of his conviction. He argues that, under the Supreme Court's recent decision in *New York State Rifle & Pistol Ass'n v. Bruen*, ... § 922(g)(1) violates the Second Amendment as applied to him, a non-violent offender who has served his time in prison and reentered society. We agree.

[United States v. Duarte – Ninth Circuit Court Opinion](#)

Notice that Mr. Duarte isn't challenging his conviction because it violates the Second, Fifth, and possibly the Eighth Amendments to the Constitution, but because it violates the Supreme Court's decision in *New York State Rifle & Pistol Ass'n v. Bruen*, which says it violates the Second Amendment. Not surprisingly, the federal government disagrees with Mr. Durante.

We reject the Government's position that our pre-*Bruen* decision in *United States v. Vongxay*, 594 F.3d 1111 (9th Cir. 2010), forecloses Duarte's Second Amendment challenge. *Vongxay* is clearly irreconcilable with *Bruen* and therefore no longer controls because *Vongxay* held that § 922(g)(1) comported with the Second Amendment without applying the mode of analysis that *Bruen* later established and now requires courts to perform.

[United States v. Duarte – Ninth Circuit Court Opinion](#)

Again, the court doesn't find for Mr. Durante because of what the Constitution says, but because of what the Supreme Court said. This may explain the dissenting opinion:

Judge M. Smith dissented. He wrote that until an intervening higher authority that is clearly irreconcilable with *Vongxay* is handed down, a three-judge panel is bound by that decision.

[United States v. Duarte – Ninth Circuit Court Opinion](#)

In Judge Smith's opinion, until the Supreme Court (the only intervening higher authority in the judicial branch), says that *Bruen* or some other decision specifically overturns *Vongxay*, the court has to follow it. Apparently, his oath to support the Constitution of the United States isn't a high enough authority to intervene over their previous decision.

Law Abiding Citizens

Judge Smith did bring up a point I want to dig into deeper.

Instead, *Bruen* reiterates that the Second Amendment right belongs only to law-abiding citizens. Duarte's Second Amendment challenge to 18 U.S.C. § 922(g)(1), as applied to nonviolent offenders, is therefore foreclosed.

[United States v. Duarte – Ninth Circuit Court Opinion](#)

If someone is convicted of a crime, does that mean they are forever labeled as not a law-abiding citizen? Does a single conviction, even of a non-violent crime, leave someone with something equivalent to the mark of Cain, forever labelled a criminal? What about those who "fulfill their debt to society"? Does completing their sentence fulfill their debt? Are they forever held liable for their transgression of the law?

I can see a rational behind prohibiting those with violent felony convictions, especially multiple such convictions, from possessing firearms, but we still have issues with §922(g). Because §922(g) does not ban "felons in possession", as many refer to it, but people who have been convicted of crimes punishable by more than a year in prison. I believe there are

several states that have misdemeanors which can carry punishments of a year or more in prison. I do not believe the opinion of the court states whether or not Mr. Duarte's convictions were felonies or not, only that he was sentenced to more than a year in prison for each of them.

Other Problems with §922(g)

If we can agree that there are crimes and situations where the punishment should include the loss of certain rights, such as the right to the possession of firearms, what is the proper way to go about it?

First of all, except for Washington, D.C. and land purchased from the states, Congress does not have the authority to write general legislation for the nation. Congress does have the authority to regulate interstate and foreign commerce, but the attempt to boot-strap this legislation by claiming to regulate everything that passes through interstate or foreign commerce would be laughable if so many courts didn't follow along. If Congress can claim the power to regulate everything that passes through commerce, then they can regulate just about everything in our lives. This reminds me of the warning James Madison gave about the General Welfare Clause.

In short, every thing, from the highest object of State legislation, down to the most minute object of police, would be thrown under the power of Congress; for every object I have mentioned would admit the application of money, and might be called, if Congress pleased, provisions for the general welfare.

[James Madison – Bounty Payments for Cod Fisheries](#)

If everything that passes through interstate or foreign commerce can be regulated by Congress, then everything you buy can be regulated through commerce. Even worse, since §922(g) doesn't simply claim to regulate commerce, but the rights of people to possess a product that passed through interstate

commerce at some point, it is pretty much everything we purchase in this day and age.

So Congress does not have the authority to pass general legislation outside of legitimate federal land, neither does it have the authority to regulate products. Only commerce. So it appears §922(g) is unconstitutional and therefore invalid.

There are more questions we should be asking. For example, when someone is sentenced, is that the limit of the punishment? Is it due process for Congress to impose a penalty via legislation beyond what is imposed by the judge? How can a law passed by Congress consider the circumstances in a specific case? When should someone be deprived of their rights as punishment for a crime? Should someone be shown to be a danger to society before government deprives them of their rights? Is the punishment of permanent loss of rights cruel or unusual?

Brown v. United States

Interestingly, later the same month the Supreme Court decided another case involving the Armed Career Criminal Act, *Brown v. United States*.

These cases concern the application of the Armed Career Criminal Act to state drug convictions that occurred before recent technical amendments to the federal drug schedules.

[Brown v. United States – Supreme Court Opinion](#)

This case revolves around the question of whether the conviction in state court by the two defendants, Justin Rashaad Brown and Eugene Jackson, qualified as “serious drug offenses”.

In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions

different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

[18 U.S.C. §924\(e\)\(1\)](#)

The Supreme Court found the following:

Held: A state drug conviction counts as an ACCA predicate if it involved a drug on the federal schedules at the time of that conviction.

[Brown v. United States – Supreme Court Opinion](#)

Conclusion

Once again we see the courts coming to the correct decision for the wrong reasons. The Circuit Court didn't find that §922(g) violated the Constitution so much as it violated the Supreme Court's opinion in Bruen. It didn't even touch on the Fifth or Eighth Amendment issues. Don't get me wrong, I believe the court is correct in finding §922(g) unconstitutional, but I have to wonder what the unintended consequences are the rationale are going to be. I would not be surprised if this gets appealed to the Supreme Court, and who knows how they might decide the case.

Speaking of the Supreme Court, since their decision was not based on the constitutionality of §922(g), but whether the crimes committed by the two defendants rose to the level of serious drug offense under §924(e)(1), I don't think there's enough information to speculate how the court might find. If the United States appeals the Ninth Circuit's decision, I believe the court's decision will be influenced by the argument for Mr. Duarte. If his attorney continues with the Bruen based defense, that might appeal to the judicial

supremacy that the justices frequently exhibit. I wonder what would happen if the Fifth and Eighth Amendment issues were added to the argument. Since we do not have a crystal ball, we will all have to wait and see if the case is appealed and accepted.

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