# Should Rahimi Be the Poster Child For the Second Amendment?

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- Under what conditions can you legitimately loose your right to keep and bear arms?
- If you wanted to challenge federal law that prohibited your right to keep and bear arms, would you want Zackey Rahimi to be the face of your case?
- The case Rahimi v. United States challenged 18 U.S.C. §922(g)(8) which prohibits someone subject to a domestic violence protection order from possessing a firearm.

There's an adage in the legal profession: "Hard cases make bad law." It can also be said that bad cases make bad law, and the case of United States v. Rahimi is one of those bad cases. The question is legitimate: Does 18 U. S. C. §922(g)(8), which prohibits a person under a domestic violence restraining order from possessing a firearm or ammunition, violate the Second Amendment? For those of you who are thinking the answer is yes, Zackey Rahimi is not the person you would want leading this case.

**Background**

Federal limitations on gun possession have been a sticking point among the Second Amendment community for decades. I know several groups and law firms that have been looking for the

perfect case to challenge these laws. Instead, Zackey Rahimi got his case to the Supreme Court first.

Respondent Zackey Rahimi was indicted under 18 U. S. C. §922(g)(8), a federal statute that prohibits individuals subject to a domestic violence restraining order from possessing a firearm.

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Zackey Rahimi was indicted under §922(g)(8), meaning he is accused of possession of a firearm while subject to a domestic violence restraining order. This law requires that several conditions are met regarding the restraining order before §922(g)(8) can be enforced.

In particular, the order must either contain a finding that the defendant "represents a credible threat to the physical safety" of his intimate partner or his or his partner's child, §922(g)(8)(C)(i), or "by its terms explicitly prohibit[ ] the use," attempted use, or threatened use of "physical force" against those individuals, §922(g)(8)(C)(ii).

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Based on that, the first question that needs to be asked is: Did the restraining order against Mr. Rahimi meet those requirements?

Rahimi concedes here that the restraining order against him satisfies the statutory criteria, but argues that on its face Section 922(g)(8) violates the Second Amendment.

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Even Mr. Rahimi concedes that the restraining order against him meets the requirements of §922(g)(8). However, he contends that §922(g)(8) facially violates the Second Amendment. There's a bit of a twist to this case though:

The District Court denied Rahimi's motion to dismiss the indictment on Second Amendment grounds. While Rahimi's case was on appeal, the Supreme Court decided New York State Rifle & Pistol Assn., Inc. v. Bruen.

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After the District Court denied Rahimi's motion, the Supreme Court decided New York State Rifle & Pistol Assn., Inc. v. Bruen. This is important because in Bruen the court stated that a law that falls within the Second Amendment is unconstitutional unless there is evidence that it fits within traditional firearm regulations at the time the Bill of Rights and the Fourteenth Amendment were adopted. This led to a different decision by the Circuit Court.

In light of Bruen, the Fifth Circuit reversed, concluding that the Government had not shown that Section 922(g)(8) "fits within our Nation's historical tradition of firearm regulation."

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**Opinion**

Which brings us to the decision of the vast majority of the court.

Held: When an individual has been found by a court to pose a credible threat to the physical safety of another, that individual may be temporarily disarmed consistent with the Second Amendment.

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Eight of the nine justices agreed with this decision. Six of those eight, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett, and Jackson either filed or joined in concurrences. A 8-1 decision is fairly rare at the Supreme Court, even if six of the eight disagree with some part of how the court got to it.

Since the Founding, the Nation's firearm laws have included regulations to stop individuals who threaten physical harm to others from misusing firearms. As applied to the facts here, Section 922(g)(8) fits within this tradition.

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Yes, there have been laws in our nation's tradition that stop individuals who threaten to harm others. But does §922(g)(8) meet that standard?

Rahimi's facial challenge to Section 922(g)(8) requires him to "establish that no set of circumstances exists under which the Act would be valid." … Here, Section 922(g)(8) is constitutional as applied to the facts of Rahimi's own case. Rahimi has been found by a court to pose a credible threat to the physical safety of others, … and the Government offers ample evidence that the Second Amendment permits such individuals to be disarmed.

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Even Rahimi concedes that the restraining order against him meets the §922(g)(8) standard, which includes a finding that "such person represents a credible threat to the physical safety of such intimate partner or child . . . ."

**Barrent Concurrence**

As I mentioned, six of the eight justices either filed or joined a concurrence. While all six of those justices agree with the opinion, noting relatively minor differences in their concurrences, Justice Barrett did make one statement I think worth commenting on.

Despite its unqualified text, the Second Amendment is not absolute. It codified a pre-existing right, and preexisting limits on that right are part and parcel of it.

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Even though Justice Barrett notes that the text of the Second Amendment is unqualified, she wants to put qualifications on it. Here's the problem I have with that: Justice Barrett is simply ignoring the text of the Constitution she doesn't like. Yes, the Second Amendment is unqualified, just as the First, Fourth, Sixth, Seventh, Eighth, Ninth, and Tenth are, but that doesn't mean there are not situations where an individual cannot exercise their rights. As Benjamin Franklin, writing as Silence Dogood said:

Without Freedom of Thought, there can be no such Thing as Wisdom; and no such Thing as publick Liberty, without Freedom of Speech; which is the Right of every Man, as far as by it, he does not hurt or controul the Right of another: And this is the only Check it ought to suffer, and the only Bounds it ought to know.

Silence Dogood, No. 8, 9 July 1722

The limitations of the exercise of our rights does not extend to harming or controlling another. For example, in the case Schenck v. United States, the Supreme Court recognized that a person could not use the First Amendment to defend false claims meant to hurt others, also known as the "fire in a crowded theater" situation. And just as a person cannot use their freedom of speech to harm others, neither can someone use their right to keep and bear arms for such a purpose. And according to Benjamin Franklin, that is the only check it ought to suffer.

**Thomas Dissent**

While Justice Thomas was the only dissenter, his dissent is worth reading.

After New York State Rifle & Pistol Assn., Inc. v. Bruen, … this Court's directive was clear: A firearm regulation that falls within the Second Amendment's plain text is unconstitutional unless it is consistent with the Nation's

historical tradition of firearm regulation. Not a single historical regulation justifies the statute at issue, 18 U. S. C. §922(g)(8). Therefore, I respectfully dissent.

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Unlike the rest of the court, Justice Thomas says there is not historical analog to justify §922(g)(8).

Just as important as §922(g)(8)'s express terms is what it leaves unsaid. Section 922(g)(8) does not require a finding that a person has ever committed a crime of domestic violence.

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As Justice Thomas points out, there is no requirement that a person be found guilty of domestic violence before §922(g)(8) can be enforced. This makes it different than other parts of §922(g).

It is not triggered by a criminal conviction or a person's criminal history, unlike other §922(g) subsections. … And, §922(g)(8) does not distinguish contested orders from joint orders—for example, when parties voluntarily enter a no-contact agreement or when both parties seek a restraining order.

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If both parties seek a restraining order, would said order include a finding of a credible threat to the physical safety of one of the parties?

In addition, §922(g)(8) strips an individual of his ability to possess firearms and ammunition without any due process. Rather, the ban is an automatic, uncontestable consequence of certain orders. … There is no hearing or opportunity to be heard on the statute's applicability, and a court need not decide whether a person should be disarmed under §922(g)(8). The only process §922(g)(8) requires is that provided (or not)

for the underlying restraining order.

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Justice Thomas says that §922(g)(8) strips a person of a right protected by the Constitution without due process. It's the due process that's important, because the Fifth Amendment states;

No person shall … be deprived of life, liberty, or property, without due process of law;

U.S. Constitution, Amendment V

While there is no hearing regarding §922(g)(8), the protective order that triggers it does require the person be notified and have the opportunity to participate in the hearing. Does that satisfy the due process requirement?

**Conclusion**

This case seems to be full of contradictions. On the one hand, we have §922(g)(8), which states that someone who has a court order of protection because of a finding of a credible threat to the physical safety of another, cannot lawfully possess a firearm or ammunition. However, even though the subject of the order must have the opportunity to participate in a hearing before the order is issued, there is apparently no requirement that they receive due process during the hearing. They don't have the right to counsel, to confront their accuser, or to compel witnesses in their favor. It's not as if a disgruntled spouse or neighbor hasn't accused someone of being a physical threat without any threat being made. And just how does the federal government get to use the actions of state courts to claim a justification of a criminal statute? Since the Second Amendment prohibits the infringement on the right of a person to keep and bear arms, shouldn't it be the court finding the facts of this case that determines if the punishment is just for the subject? After all, if a judge issued an order

depriving someone of a right protected by the Constitution without due process, they would be violating the Constitution.

I'm also a bit disappointed with this case as a whole. Yes, Mr. Rahimi deserves his grievance be heard, but of all the cases of infringement on the Second Amendment by court order, I would have preferred a less unsavory subject. After all, he did agree that he posed a threat of physical harm to an intimate partner.

There are two subsections of §922 I would like to see brought before the court.

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

18 U.S.C. §922(g)(1)

There are plenty of non-violent crimes through out the states and federal government that are punishable by a year or more of imprisonment. Should someone be deprived of their right to keep and bear arms for being convicted of a non-violent crime, simply because of how long a sentence they could have received?

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

18 U.S.C. §922(g)(9)

So if someone is convicted of felony domestic violence, they are not subject to §922? How does that make any sense?

While part of me recognizes that people who are threatened don't want those who threaten them to have legal access to firearms, I also recognize that does not always prevent the subject from actually having firearms. At the same time, I recognize that the accused is not the convicted, and we have a policy of innocent until proven guilty in this country.

Where do I come down on this decision? I would have liked to see a discussion on the constitutionality of the federal government adding punishments to state crimes and court orders. Reluctantly, based solely on the facts of the case, I have to come down with the majority. In the competition between due process and physical safety, our right to life must take precedence. While the temporary loss of rights is an infringement, I think the law strikes a balance by requiring that the accused be able to participate in the hearing, and that a judge comes to a finding that they represent a credible threat to the physical safety of another. That said, I am saddened by the fact that the court order is just a piece of paper, and can do nothing to prevent someone found to be a threat from actually acquiring a firearm and sadly, using it.

While not within the jurisdiction of the court, I think §922(g), and in fact other parts of §922, have some serious constitutional problems. I see no power delegated to the United States to add federal penalties to state laws, nor to regulate firearms ownership, only foreign and interstate commerce.



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