Supplementary Material

Chapter 7: The Republican Era—Individual Rights/Guns

Presser v. People of State of Ill., 116 U.S. 252 (1886)

Herman Presser was the military commander of the Lehr and Wehr Verein, a paramilitary, socialist organization. On September 24, he and his companions, all armed with rifles, staged a parade in Chicago. Presser was immediate indicted and charged with violating a state law forbidding private military groups from drilling or parading without a license from the governor. The trial court rejected Presser's claim that the law violated his Second and Fourteenth Amendment right to bear arms. He was convicted and sentenced to pay a $10 fine. After his appeal was rejected by the Supreme Court of Illinois, Presser appealed to the Supreme Court of the United States. One of his lawyers, Lyman Trumbull, played a major role in the framing of the post–Civil War amendments.

The Supreme Court unanimously upheld Presser's conviction. Justice Woods reaffirmed precedents holding that the Fourteenth Amendment did not protect the right to bear arms. Why did Woods reach that conclusion? Why do you think by 1886 no justice dissented from this ruling? Did Woods leave any room open for claims that state gun laws violated the Constitution?

JUSTICE WOODS

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We think it clear that the sections under consideration, which only forbid bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law, do not infringe the right of the people to keep and bear arms. But a conclusive answer to the contention that this amendment prohibits the legislation in question lies in the fact that the amendment is a limitation only upon the power of congress and the national government, and not upon that of the state. It was so held by this court in the case of *U. S.* v. *Cruikshank* [1875] in which the chief justice, in delivering the judgment of the court, said that the right of the people to keep and bear arms "is not a right granted by the constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed, but this, as has been seen, means no more than that it shall not be infringed by congress. This is one of the amendments that has no other effect than to restrict the powers of the national government. . . ."

It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the states, and, in view of this prerogative of the general government, as well as of its general powers, the states cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government. But, as already stated, we think it clear that the sections under consideration do not have this effect.

The plaintiff in error next insists that the sections of the Military Code of Illinois under which he was indicted are an invasion of that clause of the first section of the fourteenth amendment to the constitution of the United States which declares: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." It is only the privileges and immunities of citizens of the United States that the clause relied on was intended to protect. A state may pass laws to regulate the privileges and immunities of its own citizens, provided that in so doing it does

not abridge their privileges and immunities as citizens of the United States. The inquiry is therefore pertinent, what privilege or immunity of a citizen of the United States is abridged by sections 5 and 6 of article 11 of the Military Code of Illinois? The plaintiff in error was not a member of the organized volunteer militia of the state of Illinois, nor did he belong to the troops of the United States or to any organization under the militia law of the United States. On the contrary, the fact that he did not belong to the organized militia or the troops of the United States was an ingredient in the offense for which he was convicted and sentenced. The question is, therefore, had he a right as a citizen of the United States, in disobedience of the state law, to associate with others as a military company, and to drill and parade with arms in the towns and cities of the state? If the plaintiff in error has any such privilege, he must be able to point to the provision of the constitution or statutes of the United States by which it is conferred. . . .

We have not been referred to any statute of the United States which confers upon the plaintiff in error the privilege which he asserts. The only clause in the constitution which, upon any pretense, could be said to have any relation whatever to his right to associate with others as a military company, is found in the first amendment, which declares that "congress shall make no laws . . . abridging . . . the right of the people peaceably to assemble and to petition the government for a redress of grievances." This is a right which it was held in *U. S.* v. *Cruikshank* . . . was an attribute of national citizenship, and, as such, under the protection of, and guarantied by, the United States. But it was held in the same case that the right peaceably to assemble was not protected by the clause referred to, unless the purpose of the assembly was to petition the government for a redress of grievances. The right voluntarily to associate together as a military company or organization, or to drill or parade with arms, without, and independent of, an act of congress or law of the state authorizing the same, is not an attribute of national citizenship. Military organization and military drill and parade under arms are subjects especially under the control of the government of every country. They cannot be claimed as a right independent of law. Under our political system they are subject to the regulation and control of the state and federal governments, acting in due regard to their respective prerogatives and powers. The constitution and laws of the United States will be searched in vain for any support to the view that these rights are privileges and immunities of citizens of the United States independent of some specific legislation on the subject.

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The argument of the plaintiff in error that the legislation mentioned deprives him of either life, liberty, or property without due process of law, or that it is a bill of attainder or *ex post facto* law, is so clearly untenable as to require no discussion.

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