Stephen Gutowski (00:02.246)
All right. Welcome, ladies and gentlemen, to another episode of the Weekly Reload Podcast. I'm your host, Stephen Gutowski. I'm also a CNN contributor and the founder of thereload.com where you can head over and sign up for our free newsletter today. If you want to keep up to date with what's going on with guns in America this week, we have a major ruling from the Supreme Court. This one deals directly with the second amendment and it's the first one to do so in two years since the court handed down the landmark decision in the brewing case.

This case is US v. Rahimi and we have with us a second amendment scholar, somebody who actually filed a brief in the case, who's been on to discuss this whole ordeal previously and now is here to give us his reaction with David Kopel, who is with the Independence Institute. Welcome back to the show, David. Thank you so much for joining us.

Dave Kopel (00:50.962)
Thank you. I'm happy to be on the best video regarding the Second Amendment issue that exists in the known universe.

Stephen Gutowski (00:59.398)
Thank you. That's high praise. But can you tell people just a little bit more about yourself before we get going here?

Dave Kopel (01:06.546)
Sure, I'm the research director of the Independence Institute, which is the second oldest state -level think tank in the United States. I, since the 1980s, have been writing a lot on the gun issue. I've been cited, either me or my briefs have been cited in the US Supreme Court seven times and in lower courts over 100. I was part of the oral argument team in District of Columbia versus Heller and I...

In this case, I filed an amicus brief for the Independence Institute, the Second Amendment Law Center, and a bunch of Second Amendment professor experts such as Randy Barnett and Glenn Reynolds.

Stephen Gutowski (01:50.822)
And we'll get to that brief because I think it did come into play in this ruling. But first, can you just give people the base level understanding of the practical outcome of this case? What did the court hold?

Dave Kopel (02:01.618)
Sure. The federal law, 18 United States Code, Section 922 G, creates nine categories of people who can't have firearms or ammunition. One of those, G8, is about people with domestic violence restraining orders. In this case, and G8 has two parts in it.

The court in this case upheld part C1, which is the part that's applicable to Mr. Rahimi, which is he was given a domestic violence restraining order based on a finding by a judge that he in particular, based on actual conduct, posed a credible threat to a domestic partner. In this case, his ex -girlfriend with whom he had had a child.

Stephen Gutowski (03:00.966)
And now this was a facial challenge, right? So that means that he would have had to shown that the entire law was unconstitutional in all of its applications. And the court ruled that wasn't the case. And then they kind of took a step further and said, even in just the specific circumstances of Rahimi himself, even if he had brought an as applied challenge, they call it, he still would have lost. And why did they determine that?

Dave Kopel (03:28.306)
Sure. So, as you're saying, an as applied challenge says that this law, there's no set of circumstances under which this law is constitutional. So, if you had a law that said it is illegal to make fun of the president, then that would be an easy win under a facial challenge, because there's, you know, all making fun of the president is lawful. On the other hand, many cases,

are what's called an as -applied challenge, which says this law might be constitutional in general, but as applied to me, it's not. Rahimi didn't try an as -applied challenge because as his lawyers actually recognized, he's the last guy who

could ever win. First of all, he had the opportunity to participate in a hearing. He ended up just agreeing to the...

restraining order by consent, but he had an opportunity to appear in court and be heard. And the restraining order was based on actual evidence about...

an altercation involving when he was having a violent fight in public with his girlfriend and then a bystander noticed and he shot a gun at the bystander and then he told the girlfriend that if you tell anybody about this I'll kill you. And that was all undisputed evidence. So he's clearly not a guy who would have any chance on an as -applied challenge. The court importantly did not rule out.

possibility of as applied challenges in other cases. You know, for example, there are lots of possible cases where the evidence against the individual would be much weaker than in Rahimi's case. Or the parties might, a divorce and couple might have disagreed to a mutual protective order, not because they've really ever done anything violent to each other, but it was a form they filled out. It's like, yeah, you both stay away from each other and don't hurt each other.

Stephen Gutowski (05:35.046)
Right. Yeah, because the finding itself seems fairly narrow in the sense that it only applies to somebody who's been found by a court to be an actual genuine threat to somebody else. And also that the order is only temporary was another aspect of their finding too, right? That this wasn't a permanent ban. It was only for the length of the...

restraining order itself, which I guess they said was one to two years. So it seemed like they did leave the door open to a lot of these other kinds of challenges. Is that how you read it?

Dave Kopel (06:12.562)
Yes, and I think that is overall good. There's been, in the lower federal courts, some have said you can never have an as -applied challenge to any of the 922 -G prohibitors. And the courts certainly didn't adopt that theory. So that was positive. And importantly, the court, to a degree, followed an idea that was presented only in the amicus brief that I wrote.

which said that on G8 there's two categories in it. And Brahimi was in category C1, which is where you have a judge making factual findings about the individual, about violence, and about danger. Then C2 is also a prohibitor, but that doesn't require any factual findings. It simply requires that there was an order that says, you know, don't injure or attack.

this other domestic person. And my brief said, C1 is fine, because that's based on an individualized finding of danger, but C2 is not, because there's no findings at all in it. And it was the only brief that took that approach. And notably, the court said, this is only about C1. We're not deciding anything on C2. So I think that leaves the way open for lots of things.

at least as applied challenges, certainly, for people subject to C2 orders.

Stephen Gutowski (07:47.334)
Yeah, yeah, it certainly seemed like they didn't necessarily resolve the question, but it feels like they're implying that any of these restraining orders that take away gun rights that don't involve an actual hearing with evidence and an individualized finding of dangerousness are probably not constitutional.

Dave Kopel (08:07.09)
Yes.

Dave Kopel (08:11.026)
Well, one can hope so. And, you know, there's no reason to have an order that doesn't have a finding that the individual is a threat. I mean, why else would you be issuing it? You know, so courts that want to make sure their orders are valid going forward can just make sure to follow the procedures involved in C -1, which requires an on -the -record finding by a court.

Stephen Gutowski (08:34.95)
And so in addition to this upholding that C1 basis at least, like we've noted here, they didn't explicitly get into anything beyond that, because that's not what the case required. The case was a facial challenge. They found at least one aspect where it's constitutional happens to be the aspect the defendant himself fits into. So they didn't need to go any further than that. Is that why you think they'd?

perhaps didn't make conclusions about, I mean, that's sort of what Gorsuch said in his concurrence, or is there any other reason you could see for them not being more explicit on that front?

Dave Kopel (09:11.826)
No, I think you hit it exactly, is that this is a Brahimi's case. He's a C1 guy. And that's the case that they had to decide in front of them. And that it's generally prudent for courts to only decide what they have to decide in that case, rather than going out to another section of a statute where you might have a different result. But in any case, that's not what this case is about.

Stephen Gutowski (09:39.878)
Yeah, I mean, it seems like they were very clear about, we're only holding this one specific, fairly narrow thing here in this case, which is that somebody who's been found by a court to be dangerous can be temporarily disarmed. And that fits within the historical tradition of gun regulation under the second amendment. Is that a fair assessment of where they come down?

Dave Kopel (09:45.65)
Yes.

Dave Kopel (10:03.09)
That is a perfect assessment. And of course, the difference between the majority of eight versus Justice Thomas' dissent is the level of generality at which you read the history and tradition and the precedents and the analogs. But even at that, the court was looser than Justice Thomas thinks it should have been, but was not wide open.

about that. They looked for strong analogues in historical practice from the time of the Framon.

Stephen Gutowski (10:40.678)
Yeah, and I will definitely get more into that aspect of this. But there was one other thing that the court found that I think is what I want to get your take on and I'm interested in. And that had to do with the government's argument, whether in their brief or at oral arguments, about sort of responsible citizens or the only ones who have their gun rights protected by the Second Amendment. And they sort of maybe.

even kind of went out of their way to say that they don't hold that view.

Dave Kopel (11:13.586)
That's right, and as Justice Thomas pointed out, this responsible theory didn't get support from a single justice on the court.

Stephen Gutowski (11:24.878)
Right, because there's like a million concurrences in this case, right? Pretty much everybody voted concurrence.

Dave Kopel (11:28.178)
Right. And so from the Solicitor General's point of view is, well, we won the case, but they hated our brief. So what this goes back to is starting with Heller, you have a lot of references to law abiding responsible citizens. And the Solicitor General's office said, that creates a rule. So anybody who, any class of people who,

Congress or a state legislature says is not responsible, well, then they can be divested of all their Second Amendment rights. And obviously the Solicitor General was in doing this looking forward. For example, currently pending before the court on a cert petition is United States v. Daniels. That's a case from the Fifth Circuit where there was a guy.

who admitted he was a marijuana user and also a gun owner, but there was zero evidence that he'd ever used or carried a gun while he was under the influence of marijuana. And the Fifth Circuit said, as applied to Mr. Daniels, the ban on firearms possession by someone who is a user of a controlled, an unlawful user of a controlled substance, which it is, he was under federal law.

That's a violation of the Second Amendment. And likewise, there's also a cert petition pending from a case called United States v. Range. That comes out of the Third Circuit, where there was a guy who committed $2 ,000 of food stamp fraud in the early 1990s. Since then has gone straight, no blemishes on his record. And the majority of the Third Circuit en banc said,

as applied to him, considering A, it was a nonviolent offense to begin with, and the lapse of time since it happened. There's no plausible way you can say he's more dangerous than the average guy walking down the street. And the Solicitor General's office doesn't like either of those opinions, and they were hoping to get responsible, established as the standard, which they can then say, well, you know, he committed misdemeanor food stamp fraud.

Dave Kopel (13:53.554)
So he's not responsible. And this other guy, he's using marijuana in violation of federal law. So he's not responsible. And the court firmly rejected that. Zero support in the court for that approach.

Stephen Gutowski (14:08.838)
Right. And at oral arguments, the Solicitor General seemed to kind of try and backtrack a little bit and rely more on this categorical dangerousness. Like if you're in a certain category that Congress has deemed to be dangerous and irresponsible, that you can't own guns. What was your take on the court's opinion on that aspect?

Dave Kopel (14:29.01)
They didn't think much of it. Well, as was pointed out, the Solicitor General literal argument backpedaled heavily and under pressure said, when we said responsible all those times in the brief, what we really meant was dangerous, which would be a much better standard. But the court didn't even really get into that meta issue of, you know, describe the entire class category of people who can be disarmed.

And the court could have said, well, anybody who's dangerous. And you could look at that, whether that's by class of people or by an individualized finding. But the court didn't do that. They wrote a narrow opinion that said this statute is constitutional because it disarms a guy who's individually been found to be dangerous.

Stephen Gutowski (15:24.518)
Yeah, I thought that was, I don't know, it's interesting because they wrote about, well, obviously, like you just said, their determination was on an individual basis for Rahimi himself because he had a personal individual hearing about whether he was a threat to his mother of his child. But they're sort of a passing reference, I guess, in the majority opinion about, it doesn't necessarily mean that they're saying there couldn't be categorical dangerousness standards. They're just not getting into it really.

Dave Kopel (15:52.978)
Precisely, it's just one sentence and they brush it off. But even at that, it's notable they didn't rely on any of the categories. So to take a step back for the audience, you can have disarmament under federal law sort of based on in two ways. One is, as in this case, a court has actually found that you're dangerous. Or it can be,

you're in a class of people who the court considers to be dangerous. For example, unlawful drug users, persons who have been dishonorably discharged from the military, people who have renounced their citizenship, people with various categories of convictions. And a lot of the argument from the Solicitor General and the amici on the SG side was to blend those together.

and to create a grand tradition of disarmament, some of it based on categories, some of it based on individualized decisions. And the court didn't go for that. They could have looked at disarmament based on categories, such as during

the American Revolution, people who were loyal to the tyrannical British government and wouldn't take a loyalty oath to the United States. And they...

They were disarmed and had their guns taken and given to the local militia. But the court didn't rely on any of those categorical things to justify the statute involving Rahimi. The court relied solely on historical examples based on a government official disarming that a deciding that a particular individual was dangerous.

Stephen Gutowski (17:47.078)
Right. So let's get into those, those historical examples the court did use because that's where a lot of the disagreement was between the majority here and Thomas, which is, you know, it was kind of an interesting eight one ruling here. Thomas is the one who wrote Bruin, right? and he's the only dissenter in this case. And his main objection, as you noted earlier, was not necessarily over the standard that they were applying, but how they applied it, how they looked at these, these two laws sureties.

Dave Kopel (17:57.522)
Right.

Stephen Gutowski (18:16.678)
and going armed to the terror of the people restrictions and applied those to this domestic, the modern domestic violence restraining order prohibition. So can you just maybe give the audience an overview in your mind of what each side was arguing?

Dave Kopel (18:35.378)
Sure, so when the court was looking, the majority, at what kind of historical precedents can justify this and applying their view of the Bruin standard, which is you don't have to have a historical twin, but it doesn't have to be a dead ringer. But it's got to be something from which you can draw reasonable inferences. So one thing is something that...

in the modern form, started getting enacted in Massachusetts in the 1830s and was copied by maybe eight or nine other states, which is called the Surity of the Peace Statutes. And these, as the court in an impressive historical section, trace these back all the way to English practice, back to the 1200s. And the basic point is,

If somebody is behaving in a way that is a real threat or actually has committed violence, one of the things that you can do is bring that person into court and say you have to post a bond to show that you're going to keep the peace. And it could be a substantial amount of money, or it might be less, but you have to put up some kind of sum for your good behavior in

in behaving peaceably. And if you don't over, say, the next six months or the next year, whatever, then that bond will be forfeit. So that's one of the key things they drew on. And another thing they drew on was something that was enacted by some American colonial and post -independence states and also had very strong roots in the common law.

which is if you are going armed in a way that terrifies the people, then your weapon will be forfeit and you might end up being imprisoned. So...

Dave Kopel (20:52.434)
Easy example, if you were, you know, you're some night and you go riding through the Saturday market swinging a mace and screaming at people, you might lose your mace and you might get imprisoned. And it's a similar thing here. If you, it's contrary to what some of the anti -gun...

Dave Kopel (21:22.226)
semi -fictional scholars claim. They say, well, that means that people were so scared of guns that if you were just like, you know, you walk to the market with a handgun and a holster on your hip, that terrified people and they'd all run away screaming. That wasn't really what the laws said. And these got discussed in Berlin too. But if you're acting with a weapon in a way that does actually understandably terrify people, then you can lose the weapon and you...

you might end up in jail. So the court took those things and combined them to say that these are good enough historical analogs and precedents for G8C1.

Stephen Gutowski (22:09.158)
Right, because I guess they are saying that those both involved in individualized finding of somebody being dangerous, and then the punishment for at least for the going armed to the terror of people could be imprisonment, which is they consider to be even beyond gun, temporary gun confiscation, right?

Dave Kopel (22:28.946)
Precisely. And Justice Thomas resists that and he points the language in Bruin that yes, you're not stuck with exact twins.

But whatever analogies you draw, you've got to have the same purpose. It has to be based on the same purpose and the same means, approximately at least. And he didn't think either of those were close enough. For example, the Surrey of the Peace statutes, it would definitely restrict you from bearing arms. Instead, you can't carry unless you post a bond. But if you do post a bond, you can go on carrying.

Stephen Gutowski (22:57.99)
Yeah.

Dave Kopel (23:09.842)
Or if you don't want to post a bond, fine, don't carry a weapon. But it didn't make it illegal for a person to have a firearm in their own home.

Stephen Gutowski (00:03.844)
All right. So, you know, obviously Thomas takes a pretty hard line against the majority in this area where he's saying that the way that they've interpreted these two laws could cause, you know, serious problems down the line. In other cases, in other second amendment cases, it could severely restrict what the amendment actually offers in the way of protections. Can you just get, guide us through why he thinks that?

Dave Kopel (00:33.304)
Well, yes, and he does make that warning. Notably, he doesn't go through some list of horrors of specific things he thinks might happen. But the broader point is that he thinks the majority has been too lax about stitching together valid disarmament precedents and out of the two building more than

even one plus one can really support. And that they haven't been rigorous about following what Bruin says, which is on an analogy, of course it doesn't have to be a twin, but you've got to have the same reason and approximately the same way of doing it, or the same consequence. You know, like you can't bear arms, for example. That those have to be a match.

on both sides. And he says, you know, really you're taking something where you got the right purpose on one and then you got the right outcome on another and you're putting them together too loosely. And so who knows what creative things can be done by that kind of stitching, but we will soon find out because realistically in this country.

with no denigration to the Solicitor General, at the most of the state and local gun control cases are really heavily run by the two big national gun ban groups, either overtly as counsel or often behind the scenes as advisors, the Bloomberg lobby and the Giffords group. So they won't be slow.

in figuring out how to push this to its max. And of course, there'll be lawyers on the other side, like sometimes me and lots of other folks, who will be saying, no, you're really over -reading the majority opinion, and you can't be as loose as you're trying to be in some other case.

Stephen Gutowski (02:49.7)
Right. I mean, I imagine that you and others on the pro -gun side would probably already argue that a lot of our courts

are doing exactly what Thomas is worrying about, right?

Dave Kopel (02:59.656)
well, they were doing it before. They were coming up with ridiculous opinions even before this. I don't think this really... I think that courts that were determined to come to anti -gun results just because they didn't think... thought the Second Amendment was wrong as a matter of policy and that they have the authority to do something about it, they didn't need this case to do that.

There were plenty been doing that a lot, but most notably Judge Frank Easterbrook of the Seventh Circuit, among others.

Stephen Gutowski (03:38.02)
And reading through the concurrences of which, as mentioned earlier, there are quite a lot of them. I got the feeling that one, the liberal justices, especially Justice Jackson, this is kind of one of her first times really talking about the Second Amendment, the core concept of it, and since she's been on the court and while she seems to come down on the side that doesn't protect individual right and Bruin was wrong, Helen, sorry, Heller was wrong.

McDonald was wrong, but the liberals still want to more or less get rid of Bruin if they could. They may have joined in this opinion to try and sort of limit its scope a bit, but they would prefer to get rid of it. And then the conservative concurrences that we saw from Barrett and Kavanaugh and Gorsuch, I think went a long way in trying to say we're not getting rid of Bruin, right? We're sticking with the history and tradition test.

But, and Gorsuch, I believe, responds directly to Thomas at one point. And he's just, he tries to paint it as, there's just a disagreement here about whether this particular analog fits and how broad we should go in considering what is a proper tradition that modern laws can fall under. Is that a fair reading?

Dave Kopel (05:00.024)
Yeah, and I think that's a very important takeaway. You can get into the minutiae of language in cases, and that's important because all the minutiae is going to show up in briefs and in judicial opinions. But there's a bigger thing, which is ever since Bruin was decided, it's been under vehement attack by a great deal of the legal academy, which these days, I mean, there are a few...

There's a little bit of diversity left in the legal academy intellectually, but overwhelmingly the ranges opinion, the ranges from traditional old style liberals, you know, Hubert Humphrey, Walter Mondale, John F. Kennedy, civil libertarian point of view, versus the more so -called progressives, but more precisely ill liberals, people who just don't like rights at all.

except they do like power for their favorite groups. But anyway, a lot of them have been coming together to criticize Bruin and the history, tradition, text approach to things. And the court has quite firmly said, no, we think we have the right approach and we're sticking to it.

Stephen Gutowski (06:15.524)
Hmm. And you know, it seems to me this case, the majority opinion is kind of about pointing out where some of the lower courts have gone too far in trying to require, you know, a twin as, as broom would have called it, in, in its historical analysis. Do you think that they're going to do the opposite now or that they should do the opposite and, and find a lower court case where, where the, the judges have gone too broad.

Dave Kopel (06:46.296)
Well, they certainly have the opportunity to. And one of the things for which there's a cert petition pending is the Illinois cases coming out of Illinois' ban on so -called assault weapons, which is the most drastic in the nation, just an absolute disaster. And there's a petition for certiorari on that one.

However, that was a case that came out of, there was a decision by the Seventh Circuit Court of Appeals, and then it was remanded to the U .S. District Courts for further factual findings. The court in general likes to take, the Supreme

Court likes to take cases that are all wrapped up and there's really nothing more to do at the fact -finding level. So.

Maybe they'll take it, maybe they won't, but certainly those are some cases of egregious defiance of Supreme Court precedent.

Stephen Gutowski (07:50.724)
Well, one of the things that everybody seemed to agree on in this ruling was the fact that the court still has a lot of questions to answer when it comes to how to apply the Bruin test and that its jurisprudence on the Second Amendment is still pretty young, right? Especially compared to things like the First Amendment or the Fourth Amendment.

Dave Kopel (08:09.88)
Well, sure, and I'll compliment myself with an analogy. I was at a Duke Law School symposium. Duke and Wyoming law schools have annual symposium for Second Amendment scholars, and Joseph Locher, who's the head of Duke's Farms Law Program, and he's an overall pro -gun control guy, but one who accepts.

that Heller is the law of the land and wants to, you know, study it within the, study the Second Amendment within the parameters of a meaningful right existing. And so Joe said to me when we're at a minor league baseball game, he said, you're the Zechariah Chafee of the First Amendment. And many of our viewers don't know who Zechariah Chafee was, but he was the Harvard Law professor in the,

from the 1920s and 30s and 40s, who was the guy who did the most to get the First Amendment on its feet and be recognized and taken seriously by the courts and now provide substantial protection for free speech. So as Joe said, you know, the Second Amendment is a century behind the first because it's only in the 1920s where you start to get the first Supreme Court opinions saying, this actually is a real right.

and some things the government does violate that right. And in the 30s, you get more opinions, but still a fairly finite number. And it takes decades for the court to find its way through things. So with the U .S. Supreme Court, you know, ever since the early days, they would from time to time have something nice to say about the Second Amendment, recognizing it as an individual right.

but actually enforcing it and saying that something violates the Second Amendment, that didn't happen until 2008 with the Heller decision. So we're still in the early stages of this. And it's probably prudent for courts not to try to decide everything. This mass of First Amendment theory, which we now have after a century, is great.

Dave Kopel (10:37.752)
But it wouldn't have been right to expect a judge in 1938 or even 1950 to be able to lay out all those contours. It needed to be decided by case by case by exposition and figuring out one problem at a time rather than having some announcing some grand theory of everything that would supposedly resolve all the cases.

Stephen Gutowski (11:00.548)
Hmm. Yeah. Good point. so in that vein, do you think they're going to start taking more second amendment cases? And this is, it's only been two years since Bruin. I know that's a long time for the average person. It seems like the court moves in a glacial pace, but that's pretty fast compared to the number of years it took between Heller and Bruin, right?

Dave Kopel (11:22.424)
Well, right, and there were two things for that, reasons for that long delay. One is you had Heller in 2008, which says, yes, it's a real individual right. And of course, that includes sort of the most common typical application of the right, you know, to have a handgun in your home. And then in 2010, they say, and that right is enforceable against the states by the 14th Amendment, which based on the court's precedence was a very

straightforward thing to do. And then after that we go a long time without anything happening. And that is what the court watchers say is that on both sides, you know, the four who were generally pro -second amendment and then you had four who were anti in having any meaningful existence. And then you had Justice Kennedy in the middle and both sides were scared of what he would do so they didn't want to take a chance.

that you have Kennedy retiring, he gets replaced by Kavanaugh. But then, around 2020, when the court actually took a Second Amendment case involving New York City, and New York City at the last minute got rid of the rule, and Senator Blumenthal and others wrote a threat letter in the form of an amicus brief to the Supreme Court.

and said, if you decide this case, we're going to pack the court. And Chief Justice Roberts chickened out and according to reporting by CNN, also convinced his colleagues not to take a number of other important Second Amendment cases for which cert petitions had been filed. So now we get to then when Justice Barrett joins the court and that seems to give...

have resulted in a court that is willing to do what Justice Thomas had been saying for a while, which is, look, you know, look how many Fourth Amendment cases we've taken in the past five years. Look how many First Amendment cases we've been taking. And we haven't been doing anything on the Second Amendment. And so we we now seem to be moving to a more normal world where we'll get Second Amendment cases with more frequency. But we'll know a lot more about that next week after we see what happens to the cert petitions.

Stephen Gutowski (13:49.348)
Right, yeah, because I mean, although I guess the counterpoint is we only had one actual Second Amendment case. We had a couple of gun related cases, but only one Second Amendment case this last session. So I don't know. I guess like you said, we'll have to stay. Yeah.

Dave Kopel (14:02.616)
If we can get one per term, that's a faster pace than we've been used to. Yeah.

Stephen Gutowski (14:09.092)
won every 14 years. Right. Fair point. Fair point. Now, you know, we've gone through sort of what all the justices have been saying. I'm interested in what you think this is going to mean. We went from having not a lot of written words from the court on the Second Amendment to, I mean, this, I think it took, I don't know how many thousands of words are in this.

from the, I mean, the majority opinion to be fair, I guess, is not super long, but there's a lot of concurrence. There's a lot more thought that the justices are putting down on paper on the second amendment. Now, where do you think this all comes out in how the lower courts are gonna approach the second amendment post -Rahimi?

Dave Kopel (14:54.68)
Well, there's plenty of stuff in the anti -rights concurrences by Justice Sotomayor joined by Kagan and by Justice Jackson on her own for anti -rights courts to use. There's also plenty of good language from Justice Gore, such as concurrence and also the Kavanaugh concurrence, which is the longest one, and talks about originalism as the end.

text history traditions methodology and Justice Barrett goes into that as well. So it'll keep lawyers busy finding straight phrases to pick out. But to the extent the courts are mainly focused on what the majority opinion says, which I think is it's exactly as long as it needs to be to make its straightforward case that they are going to be.

a little more relaxed about upholding some gun laws on the margins. But they were re -instructed that Bruin is the right way to go about things.

Stephen Gutowski (16:06.084)
Okay, interesting. So you, I mean, you still see this as overall a positive development for Bruen as a standard.

Dave Kopel (16:13.592)
absolutely. It's a very important reaffirmation of Bruen as a standard and not one of the justices of the six who voted for Bruin shows the slightest inclination to back away from it. So I think that it really solidifies that. Let's remember that from the pro -Second Amendment point of view, this was inherently a terrible case, which is one of the reasons the Solicitor General brought it. The Solicitor General prelogue is a very smart person, both at the level of the words you

put in a particular brief, how to oral argue in front of the Supreme Court, and about litigation strategy.

And so she knows there is no point, given the current court, of doing some frontal assault on Second Amendment rights. But when, from her point of view, she had the fortunate situation of the Fifth Circuit deciding the case in favor of Rahimi and holding 922G8 unconstitutional.

says first of all, well, when federal statutes are held unconstitutional, that's the classic thing that we bring to the Supreme Court and ask them to reverse and say that the law isn't constitutional. You know, anything that meets that description I just gave has a very good chance of a cert grant. And then on top of it, in a Second Amendment context, Rahimi is so obviously the kind of person who shouldn't have a gun.

that it's a great factual situation. So from her point of view, this is A, it's my job to defend this federal statute and B, considering what a terrible guy Rahimi is, maybe we can convince the court to weaken its second amendment precedents without overturning them. And I think the good thing is even if you would say as Justice Thomas did that the Bruin was weakened.

it was only in a very slight way and Bruins in its general sense is very much reaffirmed. So this could have been much, much more damaging than it was. And I don't see this as an important problem for pro -Second Amendment litigation going forward.

Stephen Gutowski (19:43.78)
Well, yeah, I mean, that makes a lot of sense. And I think it's really good to be able to hear your point of view on this as somebody who was not just involved in the case, but has been long involved in the fight for Second Amendment rights. So, you know, I'm really glad that you were able to come on and give us your reaction to Rahimi and to this ruling. And I think it'll be one that that people will be.

intrigued by and value a lot. You know, if people want to find, follow more of your writing, what's the best way to do that?

Dave Kopel (20:20.536)
go to my website which is davekopel.org, and there's a tremendous amount of material there for people to read. And also I'm on Twitter at davekopel. So come and it's all free.

Stephen Gutowski (20:42.212)
Wonderful. Well, we appreciate you coming on and we'll have to have you back on again once there's another perhaps second amendment case at the court or in the lower courts. There's something other, there's a lot of cases obviously floating through the lower courts that are of interest and it'll be really fascinating to see what the lower courts do with this ruling. Probably my guess is it'll be a lot like what you described with, it depends on how the judges themselves view the second amendment overall, but.

Yeah, we look forward to that and love to have you back on in the future. All right. Well, this week's episode is sponsored once again by The Dispatch. I'm going to send you guys over to myself to tell you a little bit more about that.

Dave Kopel (21:15.32)
Great, thank you.

That's right: this episode is brought to you by The Dispatch. We're doing one of these classic promo swaps with them, actually on Kevin Williamson's newsletter, which is one that I personally subscribed to and read pretty much every time it comes out. I've actually been a paying subscriber to The Dispatch since they launched. They have over 400,000 readers now. You know, Jonah Goldberg, and Steve Hayes, and Chris Stirewalt, and Allahpundit, and there's so many people who write over there that I've long followed and respected and enjoyed their perspective. And of course, in addition to a lot of the great commentary that they have from people that you probably know better than me, the people who are more well known than I, they also have a lot of really deep and original news reporting that they do. And so that's why I've been happy to have them as one of our sponsors as a promo swap. I definitely stand behind their work

and recommend it to you guys in a way that I couldn't say for a lot of other publications out there. So, you know, if you're interested in checking out The Dispatch, if you haven't heard of it before, or you haven't taken the time to go over and examine what they're bringing into the world from a journalistic standpoint, I think you should do it. And in fact, part of our promo swap includes a 30-day free trial for their paid version. So you'll get access to everything they have for free for 30 days so you can read it and make up your own mind. Just follow the link in the description here or in our newsletter this week at The Reload. Honestly, I just do legitimately recommend them and so I'm glad to do this ort of promo swap because they're one of my favorite publications, and I think you guys will enjoy them if you enjoy what we do here at The Reload. So check out The Dispatch today at the link in our description.