Does the Second Amendment Protect the Gun Rights of Persons With Mental Illness?

Paul S. Appelbaum, M.D.

Under federal law, persons who have been involuntarily hospitalized for psychiatric reasons are permanently barred from gun possession. That policy was challenged in 2012 by a Michigan man who had been committed 25 years earlier and who was blocked in 2011 from buying a gun. Considering his claim, the Sixth Circuit held that people with mental illness are not categorically excluded from Second Amendment protection and that an irreversible lifetime ban was unconstitutional. Although many mental health organizations and practitioners favor gun restrictions, they oppose discriminatory treatment of persons with mental illness, creating ambivalence about the decision, which presages greater involvement of mental health professionals in decisions regarding gun rights restoration.

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In a country where guns are ubiquitous, Clifford Tyler is an unlikely person to be denied the right to purchase one. A 74-year-old married man, Tyler has no criminal record, does not abuse substances, held a steady job over many years, and seems like an otherwise ordinary citizen. However, when he tried to buy a gun in February 2011, a background check turned up a disqualifying blemish in his record: 25 years earlier, distraught over an impending divorce, he had been committed to a psychiatric hospital (1). Under federal law, that hospitalization, although he has had no subsequent psychiatric treatment, precludes Tyler from purchasing a firearm for the rest of his life. His situation exemplifies both the irrationalities that permeate our policies toward guns and the stigmatized status of mental illness in our society.

Regulating Access to Guns in the U.S.

For nearly the first 160 years of the nation's existence, no federal law regulated access to guns. This began to change in 1934, when the National Firearms Act was passed by Congress. It was aimed at restricting access to weapons, such as submachine guns, that were associated with the gangsters of the era. But it was not until 1968 that a more comprehensive federal regulatory structure was adopted. The Gun Control Act, which won congressional approval that year, prohibited sale of firearms to several classes of persons thought to be at higher risk of using them illegally—among them convicted felons, fugitives from justice, illegal aliens, dishonorably discharged veterans, unlawful users of controlled substances, and most relevant to Clifford Tyler, persons "adjudicated as a mental defective or committed to a mental institution" (2).

Notwithstanding the law, for a quarter-century after its adoption enforcement was lax. No database existed of people who were excluded from purchase or possession of a firearm. Identification of a potential purchaser as belonging to a prohibited class depended entirely on that person's self-disclosure. Indeed, there appears to have been no routine monitoring of whether the restrictions were being enforced. Only with the passage of the Brady Handgun Violence Prevention Act in 1993 did Congress mandate creation of a national database of prohibited purchasers—the National Instant Criminal Background Check System (NICS)—and require federally licensed firearms dealers to check the computerized database before selling a weapon (3). States have been inconsistent in their reporting to the NICS of persons who have been committed for psychiatric reasons. However, Clifford Tyler was hospitalized in Michigan, which appears to have reported his name to the NICS, resulting in the denial of his request to purchase a gun.

When the Gun Control Act was passed in 1968, Congress took into account the possibility that someone like Clifford Tyler might someday attempt to purchase a gun. Whatever reasons there might be to prohibit firearms access by someone who has recently been involuntarily committed, those grounds seem much more tenuous 25 years later, especially in the absence of any indication of ongoing problems. Hence, the statute includes a "relief from disabilities provision," allowing the director of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to remove someone from the category of precluded purchaser based on a finding that "the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be

contrary to the public interest" (4). Tyler might have been the ideal applicant for relief of this sort had Congress not defunded the program in 1992, barring the ATF from granting relief under any circumstances.

In most states, however, Tyler would have had another option. After the killings at Virginia Tech in 2007, Congress passed the NICS Improvement Amendments Act, which, among other provisions, incentivized states to submit names of involuntarily committed persons by providing funding to help set up and maintain reporting systems. However, to qualify for the funding, states were required to establish their own relief-from-disabilities programs to restore gun rights to persons excluded because of being "adjudicated as a mental defective or committed to a mental institution." Thirty-one states now have such programs, but some states have resisted establishing them, and Michigan is one of those states (1). Hence, there seemed to be no way for Clifford Tyler to acquire a firearm legally.

Are People With Mental Illness Protected by the Second Amendment?

With no other option, in 2012 Tyler brought suit in federal court alleging that the absence of a means for him to regain his right to own a firearm constituted a violation of his Second Amendment right to keep and bear arms. He also alleged that his rights to equal protection and due process were being infringed. The federal district court granted the governmental defendants' motion for summary judgment, finding that Congress's determination that judicial commitment to a psychiatric facility was sufficient to warrant a lifetime ban on gun possession was substantially enough related to the government's interest in protecting public safety to be constitutional. Tyler, not easily dissuaded, appealed to the Sixth Circuit Court of Appeals, where a three-judge panel overturned the district court's ruling. However, the federal government requested that the case be reheard by the entire appellate court ("en banc"), which the court agreed to do, nullifying the panel's ruling.

In the background of the case was the U.S. Supreme Court's 2008 decision in *District of Columbia v. Heller* (5). The *Heller* court struck down the District of Columbia's ban on possession of handguns for personal protection, even in the home, holding that this was a core right protected by the Second Amendment. However, in a footnote in the opinion, the majority noted that "nothing in [the] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill." Because the earliest bar on firearm access by persons with mental illness dates only to 1968, it is not entirely clear to which "longstanding prohibition" the Court was referring (6). But the Sixth Circuit's first task was to determine whether that footnote put persons with mental illness outside the scope of protections of the Second Amendment. The court concluded that the government had not met its burden of proving that gun possession by persons with mental illness was "categorically unprotected," because historical accounts, the text of the amendment itself, and traditional interpretations were inconclusive.

Having established that mental illness did not negate Second Amendment rights in all circumstances, the court turned to consider whether the government's rationale for a lifetime exclusion with no possibility of restoration—the situation that confronted Tyler—was defensible. The judges decided that "intermediate scrutiny" should be applied to determine whether Tyler's constitutional rights had been violated, a standard that requires the government's interest to be substantial and the challenged regulation to manifest a reasonable fit with the purported objective. Not surprisingly, the majority concluded that government had a substantial interest in "keep[ing] firearms out of the hands of presumptively risky people." The key question, however, was whether lifetime exclusion with no possibility of restoration reasonably promoted that interest. In the end, they concluded that it did not, and the conclusive evidence came from Congress's own actions. Both in establishing a relief-from-disabilities program as part of the 1968 Gun Control Act and in requiring states to develop such programs to qualify for incentive payments under the 2008 NICS Improvement Amendments Act, Congress indicated its conclusion that a lifetime prohibition was not warranted in all cases.

On the basis of that view, the majority of the Sixth Circuit held that failure to provide Tyler with an opportunity to have his gun rights restored violated the Second Amendment. They ordered the case sent back to the district court for a determination of whether Tyler should, in fact, continue to be deprived of the right to own a gun. As of this writing, that hearing has not taken place. For the 19 states without their own relief-from-disabilities programs, however, the court's message (assuming it is endorsed by the other federal circuits) seems clear: these states cannot continue to deny their citizens an opportunity to contest gun restrictions based on temporally distant commitment to a psychiatric hospital.

Restoration of Gun Rights: Psychiatric Dilemmas

The decision in *Tyler* is not without a strong rationale: if the government's right to restrict gun possession by persons who have been committed to a psychiatric facility is premised on the greater risk they embody to themselves and others, that justification diminishes over time in the absence of further indications of mental illness and dangerousness. As the Sixth Circuit's majority opinion noted, none of the data presented by the government to demonstrate increased risk of violence and self-harm associated with mental illness spoke to the degree of risk of someone who had a single episode of illness many years in the past and no problems since. Indeed, existing data suggest that the risk of violence to others drops quickly over the first several months after release from a psychiatric hospitalization (7).

For psychiatrists and other mental health professionals, however, *Tyler* presents at least two dilemmas. Most, though

by no means all, mental health organizations and professionals lean toward more restrictive approaches to gun possession, based in part on data showing increased risk of gun violence and suicide in households with guns (8). Thus they usually find themselves supporting policies, such as universal NICS background checks prior to gun purchases (sales at gun shows and private transfers are excluded from the background check requirement under federal law, although some states have moved to close that loophole) that reduce the likelihood that guns will end up in the hands of people with mental illness and other precluded purchasers. However, these same organizations and individuals are extremely sensitive to discriminatory treatment of people with mental illness, including unjustified restrictions on rights granted other citizens. There is likely, therefore, to be a certain amount of ambivalence about endorsing an approach that will restore gun access to at least some people with histories of involuntary hospitalization, even if doing so enhances the extent to which they are treated as ordinary members of society—otherwise an important goal.

A parallel dilemma likely to arise in the wake of *Tyler* will be the demand for psychiatrists and psychologists to become involved in determining when it is safe to restore firearm access. States that have developed relief-from-disabilities programs vary in the procedure used. Some ask the courts to adjudicate petitions for restoration of gun rights with no psychiatric input required (9). In other states, however, clinicians are asked to perform an evaluation of whether gun access should be restored, a task for which few of them have been trained, in the context of unclear predictors of success and high stakes associated with failure. A literature is beginning to develop on the conduct of these evaluations (8,10), and several groups of experts have urged that input from clinicians be sought (11). Although the involvement of mental health professionals in these evaluations may be helpful to the ultimate decision makers, clinicians have understandable concerns about the risk of liability, adverse publicity, and sanctions should their decisions turn out to be wrong.

But the implications of *Tyler* transcend the clinical professions and extend beyond people with mental illness. Consistent with current interpretations of the Second Amendment, regulation of firearm access has focused on excluding classes of people, for example, persons dishonorably discharged from the armed forces, illegal aliens, or those with past convictions of misdemeanors involving domestic violence, whose status may bear little relationship to their current risk of violence. The decision in *Tyler* suggests that we may be moving toward more individualized determinations of risk for larger groups of people, for whom the predictors of violence are even less well specified. If that's true, the odds are that mental health professionals will once again be asked to undertake that role.

AUTHOR AND ARTICLE INFORMATION

Dr. Appelbaum, who is editor of this column, is the Elizabeth K. Dollard Professor of Psychiatry, Medicine and Law, Department of Psychiatry, Columbia University, New York City (e-mail: psa21@columbia.edu).

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