

October 8, 2024

**The Delaware Association of Second Amendment Lawyers’
and the Delaware Lawyers’ Chapter of the Federalist Society**

**ELEVENTH ANNUAL
DELAWARE FIREARMS LAW SEMINAR**

Sheraton Hotel, Wilmington, Delaware

***Key Delaware Firearms Cases on the Right to Keep and Bear Arms under
Delaware Law, and Decisions Striking Overbearing Regulations on that
Fundamental Right¹***

1) *Doe v. Wilmington Housing Authority*, 88 A.3d 654 (Del. 2014):

- Unanimous *en banc* decision of the Delaware Supreme Court.
- Article I, Section 20 of the Delaware Constitution is intentionally broader than the Second Amendment, and protects the right to bear arms outside the home, including for hunting and recreation.
- The Delaware Supreme Court applied intermediate scrutiny because the regulation at issue did not involve a total ban.²
- Court rejected the bizarre position of WHA (a government agency) that despite express terms of the Delaware State Constitution, there was no right to bear arms outside of home. (*See, e.g.*, right to bear arms to hunt expressly stated in Section 20.)
- Explained Delaware’s historical recognition of the natural right to self-defense since the 1700s.
- Recognized right to bear arms in “common areas” of public housing outside residents’ apartments.

¹ We have won all the cases we have filed after all appeals have been exhausted in all the Second Amendment-related cases we litigated that have addressed the merits. Five new cases are still at the trial court stage or the appeal or remand stage.

² Note that 2022 SCOTUS decision in *Bruen* rejected the intermediate scrutiny approach for Second Amendment challenges. The 2024 SCOTUS decision in *Rahimi*, reiterated the *Bruen* standard. In my view, the *Bruen* standard, based on the Supremacy Clause, and the Delaware Supreme Court’s own reasoning, must supersede the less rigorous intermediate standard used in *Doe v. WHA*.

- Plaintiff, a female senior citizen, was a resident of public housing who wanted gun for self-defense--but the terms of her lease barred possession of firearms.
- Court recognized Delaware as “open carry” state
- Tortuous (not tortious) procedural history (five state and federal courts over a four-year period before final ruling).
- At oral argument, Court asked why residents of public housing should have fewer rights to protect themselves in their homes than other citizens.
- Penalty for having a gun in apartment was eviction. For public housing residents, eviction usually results in homelessness.

2) ***Bridgeville Rifle and Pistol Club v. Small***, 176 A.3d 632 (Del. 2017):

- Invalidated decades-old regulations broadly banning (except for a narrow allowance for occasional hunting) possession of firearms in State Parks and Forests as unconstitutional pursuant to Article I, Section 20 of the Delaware Constitution.
- Article I, Section 20 protects 12 distinct rights related to keeping and bearing arms for 6 purposes: protection of: (i) self; (ii) home; (iii) family (iv) State; (v) hunting; and (vi) recreational purposes.
- Extensive reasoning and analysis
- 60-page majority opinion explains fundamental right
- Self-defense is basis for right to bear arms, and Constitution does not grant it—rather: Constitution merely recognizes it as a natural right that each person has at birth
- Further recognition of right to bear arms outside of home
- Deep-dive into centuries-old origin of these fundamental rights in Delaware and in U.S.
- 100-plus page dissent would distinguish or reject unanimous Delaware Supreme Court decision of only a few years earlier, *Doe v. WHA*, *supra*.
- Majority followed unanimous *Doe v. WHA* and expanded on it.
- Composition of Court all new in 2017 compared to 2014 in *Doe* unanimous opinion. This opinion on a similar issue was only 3-2.

3) ***Delaware State Sportsmen’s Association, et al. v. Garvin (Garvin I)***
196 A.3d 1254 (Del. Super. 2018) (*not appealed by State*)

Background This case follows on the heels of *Bridgeville Rifle and Pistol Club v. Small*, 176 A.3d 632 (Del. 2017), in which the Delaware Supreme Court

invalidated decades-old regulations prohibiting firearm possession in Delaware State Parks and Forests. In light of the Supreme Court's decision in *Bridgeville*, the Agencies promulgated regulations which, in part, restricted firearm possession in the most commonly-used areas of the parks and forests, which they falsely designated as sensitive areas where visitors (other than concealed carry permit holders and active and qualified retired law enforcement officers) were barred from possessing firearms.

Burden of Proof: While the burden of proof would typically fall on the Plaintiffs in challenging the legality of the regulations, in the context of a challenge to regulations based upon their alleged constitutionality, the burden shifts to the State to establish their constitutionality. 196 A.3d at 1261.

Holdings

- The administrative record does not support a finding that the Agencies' designation of camping areas as sensitive survives intermediate scrutiny. *Id.* at 1271.
- Prohibiting the right to possess a firearm while camping overnight would face a high hurdle in passing intermediate scrutiny. *Id.* Therefore, the regulations banning firearms in camping areas and lodges do not survive intermediate scrutiny. *Id.* at 1272-73.
- Very little state or federal case law on what is a "sensitive area" for purposes of restricting the right to bear arms. This case is noteworthy on that point.
- The Court distilled a three-part test to determine whether an area's designation as "sensitive" satisfies intermediate scrutiny: whether the area is (1) one with a controlled entry point; (2) where visitors are screened by security; and (3) where an area is supervised by law enforcement personnel or easily accessible to law enforcement and other emergency responders. *Id.* at 1271.
- The Agencies are not prohibited from regulating firearm use within respective areas they have responsibility for simply because the General Assembly has extensively regulated firearms through statutes, and therefore, the Agencies are not prohibited from adopting firearms regulations because the field is preempted. *Id.* at 1268. This point deserves further analysis in a future case and potentially warrants a challenge.

- Portions of the regulations required a State Park or Forest guest to produce identification to law enforcement--even absent reasonable articulable suspicion of illegal activity in violation of the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 6 of the Delaware Constitution. *Id.* at 1258-59.
- A regulation giving blanket authority to a law enforcement officer in a State Park or Forest to demand identification based upon the unfettered discretion of a law enforcement officer is facially unconstitutional. *Id.* at 1277.
- The regulations enabling the Agencies to recognize out-of-state concealed carry permits for visitors of State Parks and Forests are preempted by the statute that gives the Delaware Attorney General the sole authority to issue temporary concealed carry permits pursuant to the standards outlined in 11 *Del. C.* § 1441(k). *See* 196 A.3d at 1278. Conversely, the Court held that the ability for the Director to grant “day passes” for possession of firearms within designated areas was not preempted. *Id.* at 1278-79. This last point deserves closer examination.

Intermediate Scrutiny:³ To satisfy intermediate scrutiny, the government must: (i) articulate important governmental objectives, and then (ii) demonstrate that the regulations are substantially related to achieving those objectives--*without burdening the fundamental right to self-defense more than reasonably necessary.* *Id.* at 1272 (emphasis added).

4) ***Delaware State Sportsmen’s Assn. v. Garvin (Garvin II)***
 Del. Super., C.A. No. K19C-11-001 NEP (Transcript Ruling)
 (Feb. 14, 2020) (*not appealed by State*):

- Challenge to *sub silentio* regulation in Annual Hunting Guide because: (i) The Administrative Procedure Act not followed; (ii) No statutory authority; (iii) Violation of Delaware Constitution, re: legislature determines policy
- Bench ruling denied State’s Motion to Dismiss challenge, based largely on standing, to DNREC’s Hunting Guide that imposed new restrictions on the

³ Note that 2022 SCOTUS decision in *Bruen* rejected this standard, and Delaware must now follow the higher level of minimum rights afforded by the *Bruen* standard for review of challenges based on the Second Amendment.

types of firearms that could be used for deer hunting contrary to 2018 amendment to statute expanding types of firearms eligible for deer hunting.

5) *Delaware State Sportsmen’s Assn. v. Garvin (Garvin III)*

Del. Super., C.A. No. K19C-11-001 NEP (Nov. 18, 2020) (*not appealed by State*)

Synopsis:

- This case involved a challenge to the portions of the Annual Hunting Guide published by the Delaware Department of Natural Resources and Environmental Control (“DNREC”) which amounted to a *sub silentio* regulation which purported to interpret a recent statute regulating the types of firearms that could be used in hunting in Delaware, but which the court found was a regulation that did not follow the requirements of the Administrative Procedures Act (“APA”).
- After explaining why the court rejected the challenge to the standing of the Delaware State Sportsmen’s Association and Bridgeville Rifle and Pistol Club, Ltd., as a follow-up to its transcript ruling on the motion to dismiss and the decision in *Garvin I*, the court explained why the Hunting Guide included a *de facto* regulation which did not follow the procedures of the APA which requires that certain prerequisites be followed before a regulation is implemented. The court also rejected a statute of limitations argument because the defendants ignored the APA requirements and therefore the 30-day clock to challenge a regulation never began to run.
- The court also explained why the *de facto* regulation in the Hunting Guide was invalid based on the separate reasoning that the **State** in DNREC’s Hunting Guide conflated and **failed to recognize the distinction between an automatic firearm and a semi-automatic firearm**, a basic and fundamental distinction that is recognized in federal statutes.
- Although the court did not address the constitutional challenge, the court separately explained the basis for invalidating the *de facto* regulation based on the reasoning that the *de facto* regulation exceeded the authority of DNREC because the *de facto* regulation was “inconsistent with the laws of Delaware.”

- It was inconsistent with the laws of Delaware because it was based on the faulty assumption that Delaware law limits the type of rifles that deer hunters may use, which is a faulty interpretation of Section 704(g) of Title 7 of the Delaware Code. The court also determined that Section 704(g) was not ambiguous, and therefore, the position of DNREC was without merit.
- The court also held that Section 704(g) does not limit rifles based on the commercial production of a handgun that uses the same ammunition, and therefore, the *de facto* regulation in the Hunting Guide to the contrary was invalid.
- The 22-page decision provides copious footnotes that explain the very detailed and nuanced aspects of Section 704(g) that was an amendment to a statute passed in 2018, that was intended to expand the types of handguns that could be used for deer hunting--not restrict them.

Recent U.S. Supreme Court Decision

Other speakers at this session will discuss the *Bruen* decision by the U.S. Supreme Court in June 2022, and the 2024 SCOTUS decision in *Rahimi*, and related decisions that are milestones in Second Amendment jurisprudence.

Five Pending Cases Challenging Recent Anti-Gun Delaware Statutes

There are currently five pending cases filed by DSSA and other co-plaintiffs to challenge four anti-gun statutes that were passed by the Delaware legislature between the summer of 2022 and May of 2024.

After an initial filing in July 2022, in early September 2022, the DSSA and others filed a 99-page Amended Complaint as well as a Motion for Preliminary Injunction to challenge the constitutionality of several recently, and hastily, passed statutes that prohibit: (1) the possession and transfer of common semi-automatic firearms used by law-abiding persons for lawful purposes (HB 450); and (2) common magazines used by law-abiding persons for lawful purposes (SS 1 for SB 6).

The denial of a preliminary injunction to enjoin HB 450 on federal grounds was appealed to the U.S. Court of Appeals for the Third Circuit. Four separate *amici curiae* briefs were filed in support of our appeal, including the Attorney Generals for twenty states and the leading Second Amendment scholars and

advocates in the country, including the lawyers who won the *Bruen* opinion in 2022 before the U.S. Supreme Court. Because of procedural entanglements enabled by the State, we had to file a second, separate lawsuit in state court in both cases to challenge the same statute on state-law grounds.

Without addressing the merits, in July 2024, the Third Circuit on procedural grounds found that the requirements for a P.I. were not met and remanded for a trial on the merits. An appeal to the U.S. Supreme Court seeking certiorari was filed in September 2024.

Another lawsuit was filed to challenge HB 451, which prohibits the purchase of firearms by persons 18 to 20 years-old. For similar reasons, we now have a separate case pending in federal court to challenge the statute on federal grounds and a separate lawsuit in state court challenging the statute on state constitutional grounds.

Then, in May of 2024, we filed a challenge to a new “permit-to-purchase” statute, the same day it was signed by the governor, that would require a permit to be obtained before a firearm is purchased. The State’s response was filed on Sept. 27, 2024.

Recent Second Amendment Decision in Delaware

In September 2022, the U.S. District Court for the District of Delaware issued a preliminary injunction to bar the enforcement, based only on the Second Amendment, of a recently passed Delaware statute that banned the manufacture, possession or transfer of firearms manufactured, for example, by 3-D printers at home, without serial numbers.

Postscript:

The court decisions that now form the foundation for Delaware jurisprudence on this topic, based on the Delaware Constitution, and that explain fundamental Delaware constitutional rights, would not be in existence without the scholarship, research, funding, stamina, vision, and other resources made available by the Delaware State Sportsmen’s Association; Bridgeville Rifle & Pistol Club; National Rifle Association; John Sigler; Jeff Hague; and many others.

Supplemental Materials:

Books recently published by two of our speakers, Professors Cottrol and Yamani, on the Second Amendment should be on your must-reading list.

One of many recent books by Stephen Halbrook, a speaker at several of these seminars and a prolific Second Amendment scholar, entitled “The Right to Bear Arms,” provides key insights on the issues raised in the referenced cases. For example: explaining that the Second Amendment was great help to freed slaves, and in contrast, the history of gun regulation has historical roots in discrimination against minorities.

Many scholars have observed that similar to post-*Heller* case law, some lower courts are engaged in a massive resistance to evade the law pronounced in *Bruen* and its SCOTUS progeny.