Two Courts Take Opposite Views of Second Amendment


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Chief Justice J. Michael Seabright — a George W. Bush appointee — of Hawaii's District Court blasted two of Hawaii's more ridiculous infringements of the Second Amendment last week, claiming that they had no basis in fact, or history, or common sense.

Seabright declared that Hawaii "has entirely failed to demonstrate how each law effectuates its asserted interest in public safety [and therefore] neither law can pass constitutional muster."

At issue are two parts of Hawaii's Revised Statutes: 1) that requires an individual to obtain permission to purchase a firearm and that that permission expires 10 days later if it isn't exercised; and 2) that a firearm thus purchased must be taken in person to the police department for inspection and registration five days after purchase.

Plaintiffs brought suit last October when they alleged that these provisions violated their rights guaranteed by the Second Amendment of the U.S. Constitution.

Seabright excoriated attorneys defending Hawaii's laws, declaring that "there is no evidence in the record suggesting that these laws are tethered — in any way — to the 'original meaning of the American right to keep and bear arms.'" They tried to hold that the 10-day permit somehow "furthers the 'important government interest' of public safety … but [they] failed to demonstrate *how* the 10-day permit use furthers that interest.… The government provides no empirical evidence or case law suggesting that a 10-day permit use period would enhance public safety." (Emphasis in original.)

He nailed shut his decision: "It is worth nothing that if it really were common sense that a 10-day permit use period promoted public safety, Hawaii likely would not be the *only* state in the nation to maintain such a restrictive requirement." (Emphasis in original.)

He obliterated the second part of the law requiring inspection and registration of the firearm after purchase: "The Government has provided absolutely no evidence suggesting that in-person inspection and registration was historically understood as an appropriate regulation on the right to bear arms."

He dismissed the defendant's attorneys' claim that such a requirement "ensures that the registration information is accurate, [that] it ensures that the firearm complies with Hawaii law, and [that] it confirms the identity of the firearm so as to facilitate tracing by law enforcement." Wrote Seabright:

> The Government wholly fails to demonstrate *how* the in-person inspection and registration requirement furthers [Hawaii's] interests [in public safety].…

> In the absence of concrete evidence, the only support that the Government offers is conjecture. [Emphasis in original.]

He added:

> It appears that the Government's only permissible argument is that common sense shows the law is reasonably related to its interest in promoting public safety.
>
> But the notion that in-person inspection and registration promotes public safety is not a matter of common sense.…
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> If it were truly a matter of common sense that in-person inspection and registration promoted public safety … one would expect additional states to maintain similar requirements.
>
> The Government has failed to show that the in-person inspection and registration requirement is reasonably tailored to a significant, substantial, or important government interest. [Thus, Hawaii's statute] does not survive intermediate scrutiny.

Seabright's ruling follows a ruling by the Ninth Circuit Court of Appeals (in *Young v. State of Hawaii*), which declared that Hawaii's total and complete ban on carrying a firearm, open or concealed, in public places was constitutional. In fact, the court ruled, 7-4, that the Second Amendment had no bearing on the matter at all!

Wrote Judge Jay Bybee, also a George W. Bush appointee,

> There is no right to carry arms openly in public; nor is any such right within the scope of the Second Amendment.…
>
> The overwhelming evidence from the states' constitutions and statutes [at the time of the nation's founding], the cases, and the commentaries confirms that we have never assumed that individuals have an unfettered right to carry weapons in public spaces.

In dissent, Judge Ryan Nelson, a Trump appointee, wrote:

> The Second Amendment *does* protect a right to carry a firearm openly for self-defense in public — and Hawaii's near complete ban on the open carry of handguns cannot stand.
>
> I cannot join an opinion that would flout the Constitution by holding, in effect, that "in regulating the manner of bearing arms, the authority of [the State of Hawaii] has no other limit than its own discretion." [Emphasis in original.]

Another dissenter, Judge Diarmuid O'Scannlain, a Reagan appointee, took the majority to task as well:

> The Second Amendment to the United States Constitution guarantees "the right of the people to keep *and bear* Arms."
>
> Today, a majority of our court has decided that the Second Amendment does not mean what it says. Instead, the majority holds that while the Second Amendment may guarantee the

> right to keep a firearm for self-defense within one's home, it provides no right whatsoever to bear — i.e., to carry — that same firearm for self-defense in any other place.
>
> This holding is as unprecedented as it is extreme. While our sister circuits have grappled with — and disagreed over — the question of whether public firearms carry falls within the inner "core" of the Second Amendment, we now become the first and only court of appeals to hold that public carry falls entirely outside the scope of the Amendment's protections.
>
> In so holding, the majority reduces the right to "bear Arms" to a mere inkblot. The majority's decision undermines not only the Constitution's text, but also half a millennium of Anglo-American legal history, the Supreme Court's decisions in *District of Columbia v. Heller* and *McDonald v. City of Chicago*, and the foundational principles of American popular sovereignty itself. [Emphasis in original.]

In stark relief, these two diametrically opposed decisions make an increasingly strong case for appeals to the Supreme Court to sort them out. Gun-rights attorney Alan Beck, who represents Young, said, "The Second Amendment can't mean one thing in California, in Texas it means something else, and then in Tennessee something different entirely."

He plans to appeal to the Supreme Court. As of this writing, it's unclear whether Hawaii will appeal the ruling against its permit and registration requirements to the high court. But the time is certainly ripe for such a conflict to be resolved.