THE
NATIONAL LAW REVIEW

First Circuit on Gould v. Morgan: Guns In the Street

Article By
Catherine R. Connors
Pierce Atwood LLP

- Constitutional Law
- Litigation / Trial Practice

- 1st Circuit (incl. bankruptcy)

Saturday, November 10, 2018

With yet another mass shooting this week, it's timely to discuss a recent (Nov. 2) decision from the First Circuit, *Gould v. Morgan*. This involved a constitutional challenge to the Massachusetts firearms licensing statute, as implemented in Boston and Brookline. The district court upheld the statute and implementation, as did the panel, Judges Thompson, Selya and Kayatta, with the unanimous opinion written by Judge Selya.

Summing up in the introduction, Judge Selya wrote:

we hold that the challenged regime bears a substantial relationship to important governmental interests in promoting public safety and crime prevention without offending the plaintiffs' Second Amendment rights. Accordingly, we affirm the district court's entry of summary judgment for the defendants. In the last analysis, the plaintiffs simply do not have the right "to carry arms for any sort of confrontation" or "for whatever purpose" they may choose. *Id*. at 595, 626 (emphasis omitted).

The appeal was chock-a-block with amici and associate appellate lawyers. E.g., Bradley Arant, represented the NRA; state AGs lined up on both sides (guess which were on each side? Maine didn't weigh in either way); Mark Fleming and others from Wilmer Cutler filed on the side of the appellee, along with Hogan Lovells, Covington and Burling and Davis Polk.

The gravamen of the dispute is whether under the Constitution it's ok for the government to limit a license to carry to applicants who can distinguish their own

needs for self-defense from that of the general public – there must be a specific need (a "good reason"), beyond a generalized desire to be safe. Someone who can't meet this standard may still get a license, but subject to potential restrictions. The plaintiffs received restricted licenses that allowed them to carry firearms on their person and home and doing various other things elsewhere. They wanted an unrestricted license to carry firearms in public for self-defense. None of them tried to show their need for self-defense was different from that of the general public.

Basically, the First Circuit said that the right to use firearms to defend your home is stronger than the right to carry a gun in public. The Court noted that there is no national consensus, rooted in history (the relevant date appearing to be 1868, upon the ratification of the 14th Amendment, since this is a state law), concerning the right to public carriage of firearms. While data from the south suggests one view, other regions were more restrictive, citing a Massachusetts good cause statute from 1836. But assuming there was a Second Amendment right generally to carry guns in public, the core of the constitutional right focused on the home, with a diminished interest beyond that. Applying intermediate scrutiny, the statute and implementation passed muster. Massachusetts had a compelling interest in public safety and crime prevention, and the "good reason" test in its statute was substantially related to those interests.

In so concluding, the Court noted that Massachusetts "consistently has one of the lowest rates of gun-related deaths in the nation, and the Commonwealth attributes this salubrious state of affairs to its comprehensive firearms licensing regime. To buttress this point, the defendants have cited several studies indicating that states with more restrictive licensing schemes for the public carriage of firearms experience significantly lower rates of gun-related homicides and other violent crimes." (Discussing various studies, they noted that one study found that highly trained New York City police officers had an average accuracy rate of only 18% in gunfights.)

While the plaintiffs produced countervailing studies, arguing that more guns on the streets would deter criminals, the Court said that the fit was good enough to leave the decision to the legislature. The Court concluded:

Let us be perfectly clear. The problems associated with gun violence are grave. Shootings cut short tens of thousands of American lives each year. Massachusetts has made a reasoned attempt to reduce the risks of gun violence on public streets: it has democratically adopted a firearms licensing statute that takes account of the heightened needs of some individuals to carry firearms for self-defense and balances those needs against the demands of public safety. The Boston and Brookline policies fit seamlessly with these objectives.

To cinch the matter, the defendants have adduced evidence sufficient to show a substantial relationship between the challenged regime and important governmental interests. Though not incontrovertible, this evidence has considerable force — and the legislature was entitled to rely on it to guide its policy choices.

One last observation from yours truly. The senior judge on this panel was Judge Thompson, so she chose who wrote this opinion. Why did she pick her predecessor from Rhode Island, senior Judge Selya? One can only speculate, but Judge Selya was

appointed (twice, at the trial and appellate level) by Ronald Reagan.