

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

RUDOLPH DIGIACINTO

Plaintiff,

v.

**THE RECTOR AND VISITORS OF GEORGE
MASON UNIVERSITY**

Defendant.

)
)
)
) Case No. CL-2008-14054
)
)
)
)
)
)
)

PLAINTIFF’S REPLY TO DEFENDANTS RESPONSE BRIEF

COMES NOW the Plaintiff, Mr. Rudolph DiGiacinto, *pro se*, respectfully submits this Reply to the Defendant’s Response Brief.

INTRODUCTION

“It must never be forgotten, however, that the liberties of the people are not so safe under the gracious manner of government, as by the limitation of power.” Richard Henry Lee to Patrick Henry (May 28, 1789) in 2 *The Letters of Richard Henry Lee*, 487 (James C. Ballagh ed. 1914). “For, by this means, tyranny has been sapped, the departments kept within their own spheres, the citizens protected, and general liberty promoted.” *Commonwealth v. Caton & al.*, 8 Va. (4 Call) 5, 7 (1782).

REPLY

Sovereign immunity has been waived by the people for any statute or regulation that affects Mr. DiGiacinto’s Constitutional right to keep and bear arms under the self-executing provisions of Va. Const. Art I, § 13. *Gray v. Virginia Secretary of Transportation*, 276 Va. 93, 106, 662 S.E.2d 66, 73 (2008). Sovereign immunity has been waived by the people for any law

that affects Mr. DiGiacinto's right to uniform government under the self-executing provisions of Va. Const. Art. I, § 14. *Gray, Id.* See Plaintiff's Opening Brief pages 17-20.

The Commonwealth's sovereign immunity is also removed by the U. S. Const. amend. XIV. *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997); *Ex Parte Virginia*, 100 U.S. 339, 347 (1879). Immunity does not protect state actors when operating outside their authority to act. *Poindexter v. Greenhow*, 114 U.S. 270, 290-291 (1885). Agencies of the Commonwealth are commonly sued to determine whether they are complying with constitutional or statutory authority to issue regulations under the Virginia Administrative Process Act through Va. Code § 2.2-4027. *Johnston-Willis Ltd. v. Kenley*, 6 Va. App. 231, 241-242, 369 S.E.2d 1, 6-7 (1988). “[c]ourts must construe and determine compliance with the statutes governing adoption of administrative regulation irrespective of the agency’s construction, and not merely rubber-stamp an agency determination. Agency action, even when supported by substantial evidence, must be set aside if judicial review reveals a failure... to comply with statutory authority.” *Jackson v. Marshall*, 19 Va. App. 628, 634, 454 S.E.2d 23, 26 (1995). “[w]hen the legislature delegates authority to an administrative agency to promulgate regulations, those regulations must neither exceed the scope of the authority delegated nor be inconsistent with it.” *Avalon Assisted Living Facilities v. Zager*, 39 Va. App. 484, 508, 574 S.E.2d 298, 309 (2002).

The instrument by which the government is thus established, and the powers, or more properly the duties, of the public functionaries and agents, are defined and limited, is the visible constitution of the state...Hence every attempt in any government to change the constitution (otherwise than in that mode which the constitution may prescribe) is in fact a subversion of the foundations of its own authority. 1 *St. George Tucker Blackstone's Commentaries*, 19-20 (William W. Birch & Adam Small 1803).

GMU rightly claims on Page 5 of their Response Brief that they are not “purely an administrative agency” and therefore any claim of deference that a true agency has to the

interpretation or promulgation of regulations is untenable. *Johnston-Willis Ltd., Id.*, at 231, 243-244, 369 S.E.2d 1, 8. “There is, however, a difference between an administrative agency, and an agency with the power to make administrative decisions... Considering the nature of the entity making the decision rather than the substance of the decision itself, GMU is not purely an administrative agency.” *George Mason University v. Floyd*, 275 Va. 32, 37, 654 S.E.2d 556, 558 (2008). GMU “[s]hall be subject at all times to the control of the General Assembly” and has no explicit or implied authority in its enabling legislation to restrict handguns. *Phillips v. Rector and Visitors of Univ. of Va.*, 97 Va. 472, 475, 34 S.E. 66, 67 (1899); *University of Utah v. Shurtleff*, 144 P.3d 1109, 1121 (Utah 2006). GMU has correctly cited where firearms are explicitly mentioned under Va. Code § 15.2-915 for the governing of localities. GMU has yet to cite the same under its own enabling legislation and claims broad implied powers only limited by their own desires. GMU by regulation cannot amend its own enabling legislation to give itself authority that the Constitution or the legislature has withheld. *Cf.* § 29.1-100 *et seq.*

Va. Code §18.2-287.4 is not exclusive to public parks and includes “or any other place of *whatever nature* that is open to the public...” A public university’s lands “are public property... that its **grounds and buildings** are wholly dedicated to public uses; and that the interest of the public constitutes its ends and aims.” *Jones v. Commonwealth*, 267 Va. 218, 222-223, 591 S.E.2d 72, 75 (2004). The opinion by the Attorney General on State Parks in interpreting the Virginia Department of Conservation and Recreation’s regulation held: “It is within the sole discretion of the General Assembly to limit the carrying of firearms...beyond that restricted by § 18.2-287.4.” Op. Va. Att’y Gen. No. 08-43 (2008). Furthermore GMU’s regulations may not be inconsistent with state law or the public policy of the state. *Chauncey Hutter, Inc. v. VEC*, 50 Va. App. 590, 600, 652 S.E.2d 151, 156 (2007); *United States v. Blackman*, 270 Va. 68, 79-80, 613 S.E.2d 442, 447 (2005).

Public buildings in the Colony of Virginia were not off limits to full citizens of Virginia who were armed. Concealed arms were protected by Va. Const. Art. I, § 13. It is self-evident under Virginia's climate, the properties of gunpowder and oxidation that arms were concealed during inclement weather. See Va. Code. § 18.2-308(B)(6). Pocket pistols were also legal to own, buy and carry. *Virginia Gazette*, (Dixon & Hunter) No. 1389., Nov. 14, 1777, at 3, col. 1. The open carry of firearms must therefore at least include concealment of arms during inclement weather ("stormy; rigorously cold etc." *Webster's Revised Unabridged Dictionary*, 744 (1913)).

Mr. Alexander, after refusing to accept a Challenge, and professing to act upon the defensive, added fresh Injurys to those he had already offered, and continued to insult & abuse Mr. Washington, in the grossest Manner: and when they afterwards met at a public Place, and walked out together, fired his Pistol first (at not more than a yard's Distance) with a manifest Intention to kill the other, before he knew whether it was Mr. Washington's Design to act offensively, or not. The Ball miss'd him, tho' so very close, that the Powder bu[r]n'd his Face. Mr. Washington instantly step'd back, and drawing a Pistol from his Belt, under his Great Coat, shot the other in the Body; which brought him to the Ground... This was done in the Sight of many People; and I think proves, that Mr. Washington, in firing his Pistol, acted upon the defensive. Letter of Colonel George Mason to General George Washington (March 19, 1783) in 2 *The Papers of George Mason*, 763-765 (Robert A. Rutland ed. 1970). Mr. Washington was not convicted of any offence. *Id.* at 765.

GMU's regulation violates the Constitution of Virginia (Art. I, §§ 13 & 14), the Constitution of the United States (amends. II & XIV) and is inconsistent with the public policy of the state under Va. Code § 18.2-287.4 and Va. Code § 55-248.9(A)(6).

[f]irmly determined, at the hazard of our Lives, to transmit to our Children & Posterity those sacred Rights to which ourselves were born; and thoroughly convinced that a well regulated Militia, composed of the Gentlemen Freeholders, and other Freemen, is the natural Strength and only safe & stable security of a free Government. *Fairfax County Militia Plan for Embodying the People*, (February 1775) in 1 *The Papers of George Mason, supra* at 215-216.

GMU's regulation is not narrowly tailored for there is a less restrictive means available to gain safety under Va. Const. Art. I, §13. Training the students and citizens to arms. The

regulation is not narrowly tailored because it is by its very nature pernicious and allows armed felons under the color of law to possess arms and at the same time denies law-abiding citizens their constitutional rights. 1 *St. George Tucker Blackstone's Commentaries, supra* at 12; U.S. Const. amend. XIV(equal protection). The regulation is an *ultra vires* act and void *ab initio*. “[a] court should look to the history of the times and examine the state of things existing when the constitution was framed and adopted by those who wrote it in order to ascertain the prior law, the mischief, and the remedy.” *Almond v. Day*, 197 Va. 782, 787, 91 S.E.2d 660, 664 (1956). “Ours is a government whose powers are limited by the constitution. Where statutory enactments and common law rules come into conflict with constitutional principles, the latter must prevail.” *Commonwealth v. Owens-Corning Fiberglass*, 238 Va. 595, 600, 385 S.E. 2d 865, 868 (1989).

The government of Virginia, he remarked, was drawn from the people; yet there were certain great and important rights, which the people by their bill of rights declared to be paramount to the power of the legislature...He declared, that artful sophistry and evasions could not satisfy him...Unless there were a bill of rights, implication might swallow up all our rights. Statement of George Mason on the Ratification of the United States Constitution (June 16, 1788), in 3 *The Papers of George Mason, supra* at 1083-1085.

CONCLUSION

WHEREFORE, Plaintiff, Rudolph DiGiacinto, for the reasons cited above and in his Opening and Response briefs, prays that he have judgment against Defendant, The Rector and Visitors of George Mason University.

Respectfully Submitted,

By: _____
Rudolph DiGiacinto, *pro se*