



MEMORANDUM

As UT-Austin considers implementing SB 11, the state's new campus carry law, we issue this memorandum¹ on a key provision of SB 11, Section 411.2031 (d)(1).² This provision mandates that the president of a public institution of higher education “consult[] with students, staff, and faculty” to establish “reasonable rules, regulations, or other provisions” for campus carry, so long as those rules do not “generally prohibit or have the effect of generally prohibiting” campus carry by license holders.

In our view, this provision: (a) permits restricting firearms carry in classrooms, which would be “reasonable” and consistent with not “generally prohibiting” campus carry; (b) requires Board (and Legislative) review, but not necessarily affirmative approval; and (c) calls on the University to establish formal procedures for consultation with the university community. The University should adhere to these procedures, which would require consideration of any regulations on campus carry, as an educational matter, by the full Faculty Council. Ultimately, the President's appointment of a Task Force to make recommendations cannot serve as a replacement for these procedures. Rather, Task Force recommendations should be presented to these bodies for their formal consideration as well.

SB 11 Permits a Firearms Ban in Classrooms

First, it is necessary to clarify that SB 11 clearly permits universities to ban firearms in sensitive areas like classrooms. A restriction on carry in classrooms would be a “reasonable rule” that does not “generally prohibit or have the effect of generally prohibiting license holders from carrying . . . on the campus of the institution.”

The Plain Text of SB 11 Does Not Definitely Prohibit Firearms Bans in Classrooms

¹ This memorandum is provided for informational purposes only, and should not be construed as legal advice. It is also not intended to provide an exhaustive review of the relevant law.

² Tex. Gov. Code § 411.2031 (d)(1). The full provision states: “After consulting with students, staff, and faculty of the institution regarding the nature of the student population, specific safety considerations, and the uniqueness of the campus environment, the president or other chief executive officer of an institution of higher education in this state shall establish reasonable rules, regulations, or other provisions regarding the carrying of concealed handguns by license holders on the campus of the institution or on premises located on the campus of the institution. The president or officer may not establish provisions that generally prohibit or have the effect of generally prohibiting license holders from carrying concealed handguns on the campus of the institution.” *Id.*

In no way can the plain text of this language be read as *definitively* prohibiting bans on firearms in classrooms; reasonable people can certainly interpret this broadly worded provision to contemplate exactly such a ban. Classrooms are only one part of “the campus of [an] institution.” UT-Austin, for example, has 431 acres on its main campus, and classrooms are but a small fraction of that space.³ Of course, it is an integral part of that space, but, particularly with the proper arrangements, to ban guns in classrooms specifically would amount to only a partial, not general prohibition of firearms on campus. Furthermore, the preservation of a gun-free academic environment in the classroom is a “reasonable” justification for prohibiting firearms in that setting.

Case Precedent Supports This Interpretation of “General Prohibition”

Indeed, this exact logic has already been recognized by at least one court, the Supreme Court of Virginia. In the case of *DiGiacinto v. Rectors and Visitors of George Mason University*, the Court upheld the firearms carry policy of GMU, which permitted firearms on the open grounds of the campus, but prohibited them in, among other places, academic buildings.⁴ Rejecting the appellant’s argument that the policy was “effectually a total ban” in violation of the state and federal constitutions, the Court stated:

The regulation does *not* impose a total ban of weapons on campus. Rather, the regulation is tailored, restricting weapons only in those places where people congregate and are most vulnerable – inside campus buildings and at campus events. Individuals may still carry or possess weapons on the open grounds of GMU, and in other places on campus not enumerated in the regulation.⁵

Other cases support the proposition that *restrictions* on firearms do not amount to a “general *prohibition*” on firearms.⁶ For example, in *Bonidy v. United States Postal Serv.*, the Tenth Court of Appeals upheld USPS’s prohibition on carry in its post office buildings and parking lots, against a Second Amendment challenge.⁷ The court did so in part after reasoning

³ See *Facts and Figures*, UNIVERSITY OF TEXAS AT AUSTIN, <https://www.utexas.edu/about/facts-and-figures> (last visited Oct. 30, 2015).

⁴ *DiGiacinto v. Rectors and Visitors of George Mason University*, 704 S.E.2d 365 (Va. 2011). The policy stated: “Possession or carrying of any weapon by any person, except a police officer, is prohibited on university property in academic buildings, administrative office buildings, student residence buildings, dining facilities, or while attending sporting, entertainment or educational events. Entry upon the aforementioned university property in violation of this prohibition is expressly forbidden.” *Id.* at 367 (citing 8 Va. Admin. Code § 35-60-20).

⁵ *Id.* at 368, 370 (emphasis added).

⁶ See, e.g., *Tribble v. State Bd. of Educ.*, No. 11-0069 (Dist. Ct. Idaho Dec. 7, 2011) (upholding a prohibition on campus housing, in part, because the prohibition was “not city-wide or state-wide bans on the possession of firearms,” but “appl[ie]d only to University-owned housing units located on University property”), available at <http://smartgunlaws.org/wp-content/uploads/2012/06/TribbleDecision.pdf>. The court further stated that “[i]t was reasonable for the Regents to conclude that allowing firearms on University property could disrupt the University’s learning environment and compromise the safety of those present on campus”). *Id.*

⁷ *Bonidy v. United States Postal Serv.*, 790 F.3d 1121 (10th Cir. Colo. 2015).

that the restriction applied “only to discrete parcels of land” that constituted “a very limited spatial area.”⁸

The Legislative History Is Full of Contradiction and Opacity

We acknowledge that some legislators have suggested that SB 11 does not contemplate a classroom ban. Of course, any one legislator’s exhortation cannot speak for the legislature as a whole, as Justice Antonin Scalia has stated.⁹ The legislature as a whole voted to approve only the explicit language of the bill, and that language states only that “reasonable rules” on firearms may be promulgated so long as they do not “generally prohibit or have the effect of generally prohibiting” firearms on the “campus,” which extends far beyond classrooms.

But even if one engages in the legislative history, there is actually little indicating one way or the other how legislators felt about firearms in classrooms. Above all, neither the Senate nor the House ever voted to reject any particular provision of or amendment to SB 11 that would have explicitly maintained a ban on guns in classrooms. As far as recorded remarks by individual legislators, one legislator – Rep. Fletcher – did explicitly state that guns should not be banned in classrooms.¹⁰ But this is the remark of only one legislator.

Interpreting such a stray remark is particularly inadvisable in the context of SB 11, considering that the legislature actually did reject amendments that would have explicitly maintained bans on guns in *other* locations – even though stray legislators who voted to reject, (including Rep. Fletcher) later made remarks *supporting* several of those amendments.

For example, the Senate tabled at least two amendments to SB 11 that had the sole purpose of explicitly banning firearms in hospitals and clinics maintained by universities.¹¹ It also tabled an amendment that had the sole purpose of explicitly banning firearms in child care facilities maintained by universities.¹² Finally, it tabled another amendment that had the sole purpose of explicitly banning firearms in campuses shared with K-12 schools.¹³

Yet, in his remarks during House debate on the Conference Committee Report, Rep. Fletcher – who rejected these amendments and supported SB 11 – referred to these ideas about daycares and hospitals as “good common sense suggestions.”¹⁴

⁸ *Id.* at 1127. *See also United States v. Dorosan*, No. 08-042, 2008 WL 2622996, at *6 (E.D. La. June. 30, 2008) (distinguishing law that “totally bans handgun possession” within a municipality from a “far more limited” ban on handgun possession within postal property).

⁹ As Justice Scalia has stated in the federal context: “[I]t is utterly impossible to discern what the Members of Congress intended except to the extent that intent is manifested in the only remnant of ‘history’ that bears the unanimous endorsement of the majority in each House: the text of the enrolled bill that became law.” *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 US 280, 302 (2010) (Scalia, J., concurring) (emphasis added).

¹⁰ Rep. Fletcher Remarks on Conference Committee Report, May 31, 2015.

¹¹ Senate Floor Amendment No. 8 (Sen. Rodriguez), Senate Floor Amendment No. 11 (Sen. Zaffirini).

¹² Senate Floor Amendment No. 20 (Sen. Zaffirini).

¹³ Senate Floor Amendment No. 16 (Sen. Lucio).

¹⁴ Rep. Fletcher Remarks on Conference Committee Report, May 31, 2015.

In addition, the Senate tabled an amendment that had the sole purpose of explicitly banning firearms on campus premises used for providing healthcare services to adults or juveniles who are confined in correctional facilities.¹⁵

Yet, in his remarks during Senate debate on the Conference Committee Report, Sen. Birdwell – who rejected this amendment and supported SB 11 – explicitly expressed support for this kind of ban, referencing universities that conduct medical treatment of TDCJ inmates on campus.¹⁶

Finally, the Senate also failed to pass an introduced amendment to SB 11 that had the sole purpose of explicitly banning firearms in national bio-containment labs maintained by universities; such an amendment was read, but then withdrawn and never revived.¹⁷

Yet, in his same remarks during Senate debate on the Conference Committee Report, Sen. Birdwell explicitly referenced this particular amendment – introduced by Sen. Taylor of Galveston, where the National Biocontainment Lab at UTMB is located – as still very much contemplated by SB 11.¹⁸

This tortured legislative history only further supports the idea that SB 11 permits a ban on firearms in classrooms.

The History of Campus Carry Laws in Texas Shows That SB 11 Serves a Different Purpose

Prohibiting firearms in classrooms – indeed, buildings in general – is also fully consistent with what might be considered the actual primary goal of SB 11: to restrict the power of universities to prohibit firearms outdoors. It is important to note that universities continued to possess this power even *after* this particular practice was decriminalized. Of note, Sec. 46.03 of the Texas Penal Code has long prohibited carry of firearms “on the physical premises of a school or educational institution.”¹⁹ At some point, the Penal Code was amended to clarify that “premises” means “a building or a portion of a building,” but excludes “any public or private driveway, street, sidewalk or walkway, parking lot, parking garage, or other parking area.”²⁰ After this change, the *criminal* code no longer prohibited otherwise lawful carry outdoors. Nevertheless, universities continued to have the power to ban firearms outdoors. People who violated the ban might still have been ejected from campus, even if they were no longer subject to criminal penalty.

¹⁵ Senate Floor Amendment No. 15 (Sen. Zaffirini).

¹⁶ Sen. Birdwell Remarks on Conference Committee Report, May 29, 2015.

¹⁷ Senate Floor Amendment No. 13 (Sen. L. Taylor).

¹⁸ Sen. Birdwell Remarks on Conference Committee Report, May 29, 2015.

¹⁹ Tex. Pen. Code § 46.03(a)(1), available at <http://www.statutes.legis.state.tx.us/Docs/PE/pdf/PE.46.pdf>.

²⁰ Tex. Pen. Code § 46.035 (2005) (cited by *Id.* § 46.03(c) (“‘Premises’ has the meaning assigned by Section 46.035”)), available at <http://law.justia.com/codes/texas/2005/pe/010.00.000046.00.html>. Cf. Tex. Att’y Gen. Op. No. 96-009 (Jan. 26, 1996) (defining premises as including buildings and land), available at <https://www.texasattorneygeneral.gov/opinions/opinions/48morales/lo/1996/htm/lo1996009.htm>.

SB 11 thus serves a purpose: to scale back the power of universities to enact non-criminal bans on carrying outdoors. In this way, SB 11 builds on SB 1907. Passed in 2013, this bill removed the power of universities to prohibit otherwise lawful “storage or transportation of a firearm or ammunition in a locked, privately owned” vehicle on campus.²¹ Occurring outdoors, this was a practice that had already been decriminalized. Nevertheless, the Legislature chose to foreclose the possibility that universities might exercise their own authority to enact a non-criminal prohibition.

In this sense, it is uncertain whether the popular argument that students have already been carrying guns on campus, even in classrooms, holds water. Rep. Fletcher put forth this argument particularly during House debate on the Conference Committee Report, to support his contention that SB 11 would serve the purpose of ensuring that students, who were purportedly already engaging in this practice, would simply not be criminalized for doing so.²² In the end, permitting firearms in classrooms is a far larger departure from practice than such remarks would indicate.

Practical and Logistical Considerations Indicate That Classroom Bans Would Not Amount to a General Prohibition

Like SB 1907, SB 11 should be interpreted as further restricting the power of universities to prohibit guns outdoors. It should not be interpreted as restricting the power of universities to prohibit guns indoors, particularly in classrooms. The University is already contemplating a continuing ban on weapons in indoor locations like healthcare facilities or research laboratories, even though classes also take place in these locations. Such a policy would also effectively require faculty, staff, and students to leave their firearms at home or in their cars, remaining unarmed while in transit.

A continuing ban on weapons in other indoor locations, particularly other classrooms, creates little more of a burden (and such a ban is no less justified). While classrooms are certainly integral to a campus, they are, at the end of the day, small, discrete units of a campus. A ban on guns in classrooms is further supportable with the proper arrangements, such as accessible storage spaces, or more limited bans on firearms only during times when classes are in session. To that end, SB 11 also should not be read as prohibiting the University from allowing professors who object to firearms in their classrooms from establishing classroom-specific policies that have the effect of prohibiting firearms in only specific times and locations.

SB 11 Requires Board (and Legislative) Review, But Not Affirmative Approval

²¹ Tex. Gov. Code § 411.2032(b), available at <http://www.statutes.legis.state.tx.us/Docs/GV/htm/GV.411.htm>.

²² He stated: “Many folks have said that they, under no circumstances, want this bill to allow someone to carry on campus in a classroom. But, with all due respect, it’s my contention that they’re already carrying on campus.” Rep. Fletcher Remarks on Conference Committee Report, May 31, 2015. In response to Rep. Giddings, who argued that firearms were still prohibited on campus, Rep. Fletcher further responded: “No ma’am, they are not prohibited from doing so. They’re allowed to carry, under law, on campus. They’re prohibited from going into the classroom, and that’s where the breakdown is.” *Id.*

Second, SB 11 mandates Board (and Legislative) review of the policy set by the President, but not affirmative approval.

The Plain Text of SB 11 Definitively Establishes This Interpretation

This is clear from the plain text of the bill, which states in Subsection (d-1):

The provisions *take effect* as determined by the president or officer *unless subsequently amended* by the board of regents or other governing board under Subsection (d-2).²³

Furthermore, Subsection (d-2) states:

[T]he board of regents or other governing board of the institution of higher education shall *review* the provisions. The board of regents or other governing board may, by a vote of not less than two-thirds of the board, *amend* wholly or partly the provisions established under Subsection (d-1). *If amended* under this subsection, the provisions are considered to be those of the institution as established under Subsection (d-1).²⁴

The plain text of the language in both (d-1) and (d-2) – when the two provisions are read either separately or in conjunction – makes clear that the Board must *review* the President’s policy. However, unlike other many other provisions within Texas Statutes that require a body to “review *and* approve” a rule or regulation,²⁵ the Board is not required affirmatively to *approve* the policy. If two-thirds of the Board votes to do so, it may *amend* the policy. However, *unless* amended, the provisions definitively “*take effect* as determined by the president or officer.”

It should also be noted that SB 11 also does not require that the legislature approve any particular rule either. Subsection (d-4) does state that each institution must submit a report to the legislature every other year, describing its rules and explaining its reasons for those rules.²⁶ Nevertheless, that is all that (d-4) requires to be done, by any entity; it identifies no particular action that the legislature must take, and certainly requires no approval on its part of these rules.

Legislative History Also Supports This Interpretation

The text of the bill is clear enough on its own, leaving no need to resort to legislative history to interpret it. But even if one engaged in this exercise, it would only support this interpretation of SB 11: it was the House that initially introduced Subsection (d-1) – and that version stated that the rules and regulations were “[s]ubject to the *approval* of not less than two-thirds of the board of regents or other governing board of the institution.”²⁷ But the Senate

²³ Tex. Gov. Code § 411.2031 (d)(1) (emphasis added).

²⁴ *Id.* § 411.2031 (d)(2) (emphasis added).

²⁵ *See, e.g., id.* § 321.013 (c) (“[t]he committee shall review and approve the plan”); § 442.006 (c) (“[t]he commission shall review and approve or reject the final form”); § 531.0248 (c) (“[a] health and human services agency . . . shall submit the initiative to the commission for review and approval”).

²⁶ *Id.* § 411.2031 (d)(4) (emphasis added).

²⁷ House Amendment No. 1 (emphasis added).

refused the amendments adopted by the House. The resulting Conference Committee version – which was eventually enrolled – included only the current language of (d-1).

The same applies to Subsection (d-4). The House, in initially introducing (d-4), had explicitly included a provision requiring that the House Speaker and Lieutenant Governor affirmatively delegate standing committees to monitor the implementation by universities of SB 11.²⁸ But, again, the Senate refused the amendments adopted by the House, and the resulting Conference Committee version included only the current language of (d-4) – which requires no such affirmative action on the part of the legislature. To the extent, then, that legislative history does matter, it only supports this interpretation of SB 11.

This Interpretation Is Consistent with General Principles of Institutional Governance

This plain reading of SB 11 is also consistent with the fact that universities make many important decisions, without having to acquire affirmative Board (or certainly Legislative) approval. Like with many of these decisions, the decision as to where firearms will or will not be allowed on a particular school is best determined by the school itself. SB 11 recognizes this, in mandating Board (and Legislative) review and permitting amendment, but not approval.

Implementation of SB 11 Should Not Circumvent Established Procedures for Faculty/Staff Consultation

Finally, in requiring that university presidents adopt a firearms policy only “[a]fter consulting with students, staff, and faculty of the institution,” SB 11 should be read as calling on the President to adhere to the University’s own procedures for adopting rules and regulations for the governance of the institution. Specifically, SB 11 mandates consultation with these groups “regarding the nature of the student population, specific safety considerations, and the uniqueness of the campus environment.”²⁹ Issuing this mandate to presidents to consider the specific needs of their respective institutions, SB 11 should be read in concert with the procedures that each institution has *already* established for internal governance.

University Policies Require Formal Consultation of Faculty Governing Bodies

In particular, the Handbook of Operating Procedures indicates that “policies pertaining to the general academic and welfare [of the university] . . . *must be approved* by either the University’s Faculty Council or its General Faculty, or both.”³⁰ This policy follows the mandate of Regents Rule 40101, which explicitly indicates that faculty shall have a major role governing the “general academic policies and welfare” (as well as “student life and activities”) of their

²⁸ *Id.*

²⁹ *See supra* note 2.

³⁰ UNIVERSITY OF TEXAS AT AUSTIN, HANDBOOK OF OPERATING PROCEDURES 3-1510, para. VII (D) (2015) (emphasis added), available at <https://www.policies.utexas.edu/policies/developing-and-maintaining-policies-handbook-operating-procedures>.

respective institutions.³¹ The possibility of firearms in the classroom environment must be classified as in the scope of these matters, and so the Faculty Council must be formally consulted in the formulation and approval of UT-Austin's campus carry policy.

The Task Force Does Not Replace This Formal Consultation

In the end, the Task Force cannot serve as a substitute for consideration of this matter by the full Faculty Council. This is particularly the case because the Task Force, while having some representation by members of the Faculty Council, has far from *full* representation by members of these bodies. The entirety of these bodies should be allowed to give full consideration to the Task Force recommendations.

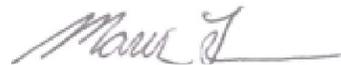
Conclusion

In closing, UT-Austin should carefully consider the exact mandate that SB 11 places on the institution. A fair reading of SB 11 does not require universities to permit the carry of firearms in classrooms. It also does not require universities to obtain affirmative Board or Legislative approval for their policies. Finally, SB 11 should be read as calling on universities to adhere to their established procedures for adopting rules and regulations. SB 11 recognizes the importance of process; here, as per existing UT-Austin procedures, this means that representative faculty and staff bodies should have the opportunity to consider Task Force recommendations.

Respectfully submitted,



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³¹ UTS BOARD OF REGENTS, REGENTS RULES AND REGULATIONS 40101 (2015), *available at* <https://www.utsystem.edu/board-of-regents/rules/40101-faculty-role-educational-policy-formulation>.