

# Opinion Hunter Biden might have Clarence Thomas to thank for his gun plea deal



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Hunter Biden was [charged this week](#) with a felony, but under his agreement with federal prosecutors, he will likely avoid being branded a felon. That situation is unusual in the federal criminal system, and many conservatives understandably wonder whether President Biden's Justice Department went easier on the president's son than it would have on a similarly situated political [rival](#).

But if Hunter Biden has a guardian angel in the federal government, the leading candidate is not Attorney General Merrick Garland — it's Justice Clarence Thomas. The justice's [2022 majority opinion](#) in *New York State Rifle & Pistol Association Inc. v. Bruen* expanding the scope of Second Amendment protections created uncertainty about the constitutionality of the felony gun charge against the younger Biden. That might well have been what deterred prosecutors from seeking a conviction.

Biden [agreed with the U.S. attorney for Delaware](#) to plead guilty to two misdemeanor tax crimes. But he was also [charged with a felony](#) under section 922(g)(3) of the criminal code for possessing a gun in 2018 while he was a “user” of controlled substances. That offense carries a draconian 10-year maximum sentence. Instead of pleading guilty, Hunter Biden accepted the government's offer of pretrial diversion under which he won't be prosecuted if he meets certain conditions.

Diversion is rare in the federal courts, according to Mark H. Allenbaugh, a former attorney with the U.S. Sentencing Commission who co-founded [Sentencing Stats](#), a data firm. [The U.S. courts website says](#) diversion “accounted for less than 1 percent of activated cases” in 2022.

Gun defendants aren't typically candidates for diversion. "The most common type of offense for which defendants are offered diversion is a low-level financial crime (fraud, theft, embezzlement)," according to a [2017 article in the Berkeley Journal of Criminal Law](#). Allenbaugh can find records of more than 6,000 criminal case dockets involving 922(g)(3) since 1993 — and only 18 where pretrial diversion was mentioned. The frequency of the practice varies by region, but Biden's case appears to be the first time the U.S. attorney for Delaware has mentioned diversion [in a news release since 2013](#).



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To be sure, 922(g)(3) is not routinely used by prosecutors. The people who are charged with it often have a criminal history or also are facing more-serious charges or had multiple guns or endangered others. The investigation into Biden's handgun [reportedly began](#) after a girlfriend threw it in a trash can near a high school. Every case has unique facts, and Biden's criminal culpability was clearly low by the standards of federal gun charges. But prosecutors could have recognized this by recommending only probation in exchange for a guilty plea. Instead, they're letting him avoid a felony conviction altogether.

Was this liberal favoritism — or conservative constitutionalism? Betsy Woodruff Swan [reported in Politico](#) this month that Biden's lawyers planned to challenge a gun charge brought against him on Second Amendment grounds, exploiting the ambiguities created by *Bruen*. There is "robust debate in the lower courts right now over the constitutionality" of criminal gun regulations such as 922(g)(3), said Douglas A. Berman, a law professor at Ohio State University who studies sentencing.

[The Daily Beast quotes](#) from a recent lower-court opinion in favor of a defendant charged under the same statute in Texas. [The judge wrote](#) that the statute "disarms those who engage in criminal conduct that would give rise to misdemeanor charges, without affording them the procedural protections enshrined in our criminal justice system."

Berman wrote in an email that the "prospect of constitutional challenge" likely made diversion appealing to both Hunter Biden's legal team and the government. His lawyers would have had every reason to mount a Second Amendment challenge to prevent their client from being convicted with a felony. And they would have had the legal wind at their backs: This month, the U.S. Court of Appeals for the 3rd Circuit, which encompasses Delaware, [invalidated the total ban](#) on felons owning guns. It relied, of course, on Thomas's originalist analysis in *Bruen*, which required that restrictions on Second Amendment rights be rooted in the nation's history and traditions.

If not for *Bruen*, the Justice Department might have been more inclined to try to convict Biden for a firearms offense once his frequent cocaine use and gun possession were widely publicized. But now that the underlying law is in doubt, any conviction would take more time and resources to defend on appeal. The Justice Department had "lots of good reasons to want to avoid this fight in a high-profile setting," Berman added.

It's fair to ask whether the Justice Department might actually relish such a Second Amendment court fight if the defendant accused of wrongful gun possession were, say, Donald Trump Jr. Charges against political figures and their families tend to be politically destructive.

The Hunter Biden plea has produced plenty of partisan bickering, but the real contradiction in progressive gun policy shouldn't be lost in the noise. President Biden last year signed a bill that increases to 15 from 10 years the maximum sentence for buying a gun for a person who is ineligible. He has lacerated Republicans for failing to pass additional gun control laws, which would result in more prison sentences if enforced.

Yet the relaxed enforcement of existing law against his own son must have been a relief to the president. Meanwhile, as one Slate writer argued, liberal lower-court judges may increasingly view Thomas's Second Amendment jurisprudence "as a weapon against over-policing and mass incarceration." Democrats despise Clarence Thomas, but his constitutional consistency sure can come in handy.