SJR

4

STATE OF ALASKA

DEPARTMENT OF LAW

CRIMINAL DIVISION

STEVE COWPER, GOVERNOR

REPLY TO:

☒ *CRIMINAL DIVISION CENTRAL OFFICE*
P.O. BOX KC
JUNEAU, ALASKA 99811-0310
PHONE: (907) 465-3428

☐ *OFFICE OF SPECIAL PROSECUTIONS AND APPEALS*
1031 WEST 4TH AVENUE, SUITE 318
ANCHORAGE, ALASKA 99501-5993
PHONE: (907) 279-7424

February 12, 1989

Commissioner William G. Demmert
Department of Education
P.O. Box F
Juneau, Alaska 99811

Dear Commissioner Demmert:

You have asked whether school districts will be able to prohibit the possession of weapons on school property if the Alaska constitution is amended as set out SJR 4. It is our opinion that the proposed amendment could present a constitutional impediment to adoption of laws that infringe on the right to keep or bear arms, including regulation of weapons on school grounds.

As set out more fully in the attached letter to Senator Jan Faiks, to support a finding of constitutionality in the face of a challenge based on the proposed amendment, each law infringing on the right to keep and bear arms must be based on a compelling state interest. Although we believe that a compelling state interest can be shown for prohibiting young children from having weapons, we are concerned that the new amendment could limit the prohibiting of adults, or older students, from having weapons on school property.

We must emphasize that the legal effects of the proposed constitutional amendment can not be predicted with any degree of certainty. However, based on the broad reading the Alaska court gives to the provisions of our constitution, and the lack of any language in the amendment giving the legislature the authority to regulate the exercise of the constitutional right, it is much more likely than at present that laws regulating firearms will be declared unconstitutional.

The constitutional hurdle could easily be avoided if the legislature amends the language of SJR 4 to specifically reserve the right to reasonably regulate arms. Language that would accomplish this result is set out at page 37 of the attached

letter, as well as in the attached document entitled "Alternative Methods of Reserving the Right of the Legislature to Reasonably Regulate Arms in SJR 4."

Please let us know if you have any remaining questions about this important issue.

Very truly yours,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By: _____
Laurie H. Otto
Assistant Attorney General

Attachments: Letter to Senator Faiks, January 29, 1989
"Alternative Methods of Reserving the Right of the Legislature to Reasonably Regulate Arms in SJR4"

1/8/90 SFC

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: SJR 4
PUBLISH DATE: 4/21/90

FISCAL NOTE

REQUEST:

Revision Date: 12/8/89
Title: Const. Amend. - Right to keep and Bear Arms
Sponsor: Rodey
Requestor: Rodey

Agency Affected: Office of the Governor
BRU: Division of Elections

Components: II Elections
Primary & General Elections

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL	2.2*	-0-	-0-	-0-	-0-	-0-
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	2.2*	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	2.2*	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL	2.2*	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

* Costs included cover 2 to 3 pages in each Official Elections Pamphlet, for printing and typesetting, and costs estimated to cover computer programming requirements for vote counting purposes. (Continued)

Prepared by: Linda Edgeworth
Phone: 465-4611
Division: Division of Elections
Date: 12/8/89

Approved by Commissioner: David Valle (Acting)
Date: 12·11·89
Agency: Division of Elections

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

CONTINUATION Of FISCAL NOTE ANALYSIS

For Bill/Resolution No. SJR 4

However, these costs are based on the assumption that all candidates and issues will fit on three ballot cards, which is the norm. It should be noted, however that should the inclusion of this issue require a 4th ballot to be printed, the cost increase would have to be calculated at 16 cents per ballot x approximately 320,000 voters. The total cost of printing the additional ballot card would be $51.2

Under these circumstances the fiscal note would be:

53.4

1739 -----
u nbx

Peter —
For your information
HK

^PM-Right To Arms NPT,740(
^Judge Says Right To Bear Arms Means Felons Can Have Guns(
^ss2(

NORTH PLATTE, Neb. (AP) _ The new right-to-bear-arms amendment in Nebraska's Constitution grants felons the same rights as others to possess firearms, Lincoln County District Judge Don Rowlands ruled.

Rowlands said in a legal opinion Monday the law banning felons from possessing guns is unconstitutional in light of the new amendment.

His ruling was the second in the last few days to strike down gun-possession laws in the wake of voters' passage in November of Initiative 403, which was placed on the ballot by petition.

Last week, the 13th Judicial District's other district judge, John Murphy, ruled the statute that prohibits possession of a defaced firearm also is unconstitutional because of the new language.

The rulings are the first in the state to address the implication of the amendment. Other challenges over the wording are pending in Douglas County, including one that maintains the amendment makes the death penalty unconstitutional.

The challenge that led to Rowlands' ruling was filed by attorney Kent Florom on behalf of Larry Rush, who had been charged with being a felon in possession of a firearm and being a habitual criminal.

After Rowlands dismissed the weapons charge, the habitual criminal charge also was dismissed at County Attorney Kent Turnbull's request.

Turnbull said both the Lincoln County cases will be appealed to the Nebraska Supreme Court.

The language at issue in both cases is found in Article I, Section 1 of the Constitution. As amended by the voters it now says:

''All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, the pursuit of happiness, and the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof.''

Like his colleague Murphy, Rowlands said that courts can look only to the specific language of the Constitution in interpreting it. And like Murphy, Rowlands looked to a 1986 Nebraska Supreme Court case that upheld the validity of Initiative 300.

In that case, the state's high court wrote that courts cannot ''sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.

''Even more so,'' the Supreme Court said, ''in a case involving the people's amendment to their Constitution, we make no attempt to judge the wisdom or the desirability in enacting such amendments.''

Based on that reasoning, then, Rowlands wrote, his opinion on the desirability of the right-to-bear-arms language is ''entirely irrelevant.

''One may argue that the voters of the state of Nebraska were duped by a special interest group from outside the state to pass an amendment to the Nebraska Constitution which was unnecessary or imprecisely drafted,'' Rowlands wrote.

''Similarly, a logical person might argue that Initiative Measure No. 403 should have permitted the state of Nebraska to exercise reasonable restrictions to prevent the possession of: semiautomatic or automatic assault rifles originally developed for combat; plastic handguns designed to evade detection at airport security stations; other types of firearms which are unreasonably dangerous and without social utility in a civilized society; or firearms by persons previously convicted of a felony.

''Whatever the relative merits or demerits of those positions might be,'' he continued, ''they must be considered matters of public policy more properly left to debate and decision by the people of the state of Nebraska and their elected representatives. ... If the voters of this state are dissatisfied with their Constitution, they may modify the language at any time in their sole and absolute discretion.''

In this specific case, Rowlands said, Rush was not charged with using the firearm for any unlawful purpose, but rather just a ''status'' offense of possession of a firearm with a barrel less than 18 inches long.

''If the Nebraska Legislature passed a law after the adoption of Initiative Measure No. 403 prohibiting the possession of handguns but not shotguns and rifles

Re: NRA.

Omaha World-Herald
Editorial Page
Unsigned articles are the opinion of the World-Herald.

Nebraskans Were Warned

Ironic Use of Gun Law Shouldn't Be Surprise

Nebraskans shouldn't be surprised at the news that some defense attorneys are using the state's new right-to-bear-arms amendment to defend clients against gun-related criminal charges. Voters had adequate warning that the amendment could make it harder to prevent the misuse of firearms. Unfortunately, a majority chose to vote for the amendment anyway.

Omaha Police Chief Robert Wadman expressed concern before the Nov. 8 election. He called attention to the fact that the amendment, which was backed by the National Rifle Association, guarantees "all persons" an "inherent and inalienable" right to bear arms and lists a number of purposes for which the right to bear arms is protected. State and local governments are forbidden to deny or abridge the right.

"All people," as Wadman pointed out, could be construed to include felons. It could include children, drug addicts and the mentally deranged. The amendment left too many questions unanswered, Wadman and other opponents of the measure said, and therefore could undermine reasonable laws restricting the possession and use of firearms.

The NRA's response, in effect, was that nothing would go wrong. Former Nebraska State Sen. Gary Anderson, an Olympic gold medal rifleman and the NRA's director of operations, said that the amendment would not change restrictions that have been upheld in court.

"How does he know?" we asked in a July 2 editorial commenting on his assurance. "No one can accurately predict how the courts, under new constitutional language, might rule on questions concerning laws forbidding the ownership of machine guns, the carrying of concealed weapons and the purchase of firearms without a mandatory waiting period."

Recent news stories magnify the concerns. Among them:

— Attorneys for death row inmate C. Michael Anderson are using the amendment as a basis for appealing Anderson's death sentence in a 1975 murder. The attorneys contend that the amendment made the death penalty unconstitutional by forbidding government from abridging the rights to life, liberty and the pursuit of happiness and the right to bear arms.

— The amendment has been the basis of defense motions for two other defendants. One is charged with second-degree assault and the use of a weapon to commit a felony. The other is charged with being a felon in possession of a firearm.

— Lancaster County Public Defender Dennis Keefe has said: "Attorneys are going to be looking at any offense involving a firearm, given the amendment. The consensus of attorneys in our office is that there are serious questions about felon-in-possession charges and carrying-a-concealed-weapon charges that are going to have to be answered."

How ironic. The NRA and other backers of the amendment said they wanted to block future laws that would abridge the right of law-abiding people to bear arms. But no such laws have been contemplated. Now Nebraska is stuck with potentially far-reaching language in the constitution, where it can't be repealed or amended without another statewide vote.

Omaha World-Herald
Editorial Page
Unsigned articles are the opinion of the World-Herald.

Another Nebraska Vote Needed

Rulings on Gun Laws Show NRA Was Wrong

A statewide vote may be needed to clear up the mess that passage of Nebraska's right-to-bear-arms amendment has caused. But a petition campaign, which some people have suggested, should not be necessary. The Legislature should use its authority to place the issue on the 1990 ballot.

The need for action became clearer when two Lincoln County district judges ruled that two important Nebraska gun laws were unconstitutional. Judge Donald Rowlands II struck down a law prohibiting the possession of a handgun by a felon. Judge John P. Murphy threw out a law prohibiting the possession of a firearm with its serial number obliterated.

The judges said those laws are unconstitutional because the right-to-bear-arms amendment, approved by the voters in November, prohibits state government from denying or infringing on the right to bear arms.

One way of correcting the situation would be to repeal the amendment, as Nebraska Attorney General Robert Spire recommended. Spire said Nebraskans should consider repeal "for public safety reasons" unless the Lincoln County decisions are overturned.

The Legislature shouldn't wait for the Supreme Court to act, however. No one knows how long that would take.

Another approach that has been discussed is to draft substitute language. The idea would be to balance the concerns of people who want a right-to-bear-arms provision and the concerns of people who believe that the elected officials need the flexibility to pass gun laws that are needed to protect the public. Omaha Police Chief Robert Wadman and State Sen. Brad Ashford have said they will push for a vote that would repeal the current language and give the voters a chance to approve language that would guarantee the right of sportsmen to own firearms but leave room for reasonable gun regulations.

The Spire approach would be preferable, in our opinion. A number of Nebraskans, including the editors of this newspaper, have been concerned since the beginning of the right-to-bear-arms campaign about the risk of embedding the amendment's restrictive language in the constitution, where it is difficult to change or repeal.

The National Rifle Association and Nebraska backers of the amendment assured the public that such concerns were misplaced. The Lincoln County decisions demonstrate that the NRA was wrong. Another sign of trouble was a recent statement by Alan Stoler, a defense attorney who suggested that the voters inadvertently made the death penalty unconstitutional when they approved the right-to-bear-arms amendment.

Stoler said he believes the amendment opened the door for anyone to possess firearms -- children, felons, drug addicts and people who are mentally ill and dangerous. If Nebraskans are smart, Stoler said, "they'll get an initiative petition drive going right now ... to change it."

Ashford had proposed a seven-day waiting period for purchasers of handguns. In a recent World-Herald Poll, 79 percent of the 621 registered voters who were interviewed expressed support for a seven-day waiting period. Ashford says that, in view of the Lincoln County decisions, he now believes that a seven-day waiting period would be found unconstitutional.

Wadman, Ashford and Stoler mentioned a petition campaign. We hope it doesn't come to that. The Legislature has the authority to place the question of repealing the amendment before the voters and should do so this session.

IN THE DISTRICT COURT OF LINCOLN COUNTY, NEBRASKA

THE STATE OF NEBRASKA, Plaintiff,	)	Case No. 96-300
v.	)	ORDER
CHARLES A. COMEAU, Defendant.	)	

> "Democracy is the worst form of Government except all those other forms that have been tried from time to time."

Winston Churchill's words remind us of the occasional difficulties that arise in the continual evolution of the democratic process. That is so because in a democracy the government must bend to the will of the governed. This, by its very nature creates change and dynamism. The predictability of life where government controls those who are governed is not present in a democracy. This lack of predictability in democracy creates occasions where the exercise of the will of the people has unforeseen consequences and, perhaps, unfortunate results. But this does not mean we turn our back on the democratic process and ignore the results of democratic action.

The cornerstone of our nation and our state is the will of the people. Abraham Lincoln said:

> This country, with its institutions, belongs to the people who inhabit it. Whenever they shall grow weary of the existing government, they can exercise their constitutional right of amending it, or their revolutionary right to dismember or overthrow it.

So too, the Constitution of the State of Nebraska belongs to the people. It is not the legislature's constitution, the Governor's constitution, or the courts' constitution. It is the people's constitution and they may amend it as they see fit.

The argument has been advanced that the proponents of the amendment to Article I, Section 1, and the voters did not mean for it to be read too literally. The argument has been advanced that the amendment is poorly worded and overbroad. The argument has been advanced that the amendment was pushed to a vote by outside interests who had no concern for its full ramification on the state. All of these arguments may be fit and proper topics for debate, discussion, or editorials. They are not, however, fit topics for consideration by the courts of this state.

No court is free to presume that it can interpret the "will of the people." No court is free to substitute its judgment for that of the citizenry. No court can arrogate to itself the sole power to determine that the voters did not understand the full import of their vote. If the language of the amendment is clear, the duty of the courts to give free reign to that language is equally clear. To ignore the plain language of the amendment and to put restrictions upon the amendment by way of interpretation is to invite the replacement of the exercise of the people's will with judicial flat. That way lies tyranny.

This position finds expression in cases previously decided by the Nebraska Supreme Court. In Omaha National Bank v. Spire, 223 Neb. 209 (1986), the court stated

> "With regard to an initiative enactment, however, a different rule must apply. There is no meaningful way to determine the intent which motivates voters to sign a petition for the submission of an enactment, nor is there any real way to determine the intent of those voters who vote for the adoption of an enactment. The motivations and mental processes of the voter in Verdigre or the elector in Elkhorn cannot be determined - except from the words of the enactment itself. Beyond that, all that can be known by this court is that the voters have been subjected to tornadolike winds in voting on this highly

political question We hold that the intent of the voters adopting an initiative amendment to the Nebraska Constitution must be determined from the words of the initiative amendment itself.

What we do know, and may use in our interpretations of a part of our Constitution, are the historical or operative facts in connection with the adoption of a constitutional amendment. As stated in State ex rel. State Railway Commission v. Ramsey, 151 Neb. 333, 341, 37 N.W. 2d 502, 507 (1949), 'It is permissible to consider the facts of history in determining the meaning of language of the Constitution.'

In considering Omaha National's contentions in this regard, we must consider the words of the initiative petition, as the initiative petition signers submitted those words to the voters for enactment, and the words actually voted on and adopted by the voters. Any other approach would only be a selective choice, made by a reviewing court, of diametrically opposed allegations made by those favoring or opposing the enactment. The intent with which a statute is adopted by a small number of legislators, or even the intent with which a larger group in a constitutional convention adopt a Constitution, or a part thereof, may be divined from examination of the proceedings of such groups, but it is impossible to divine the intent of myriad voters who adopt a constitutional amendment."

More recently, in Banner County v. State Board of Equalization, 226 Neb. 236 (1987), the Nebraska Supreme Court once again stated:

"In determining the meaning of a Constitutional provision, we must look to the plain and clear language contained therein."

This Court, then, must look to the clear and plain language of the amendment in order to determine whether Section 28-1207 R.R.S. 1943, can withstand constitutional scrutiny.

The language that appeared on the ballot for Initiative Measure #403 is as follows:

"Shall Article I, Section 1, of the Constitution of Nebraska, be amended to establish a right to keep and bear arms for lawful purposes, and to provide that such

right shall not be infringed by the State or any subdivision of the State?"

The explanatory language contained on the ballot stated:

> "A vote 'FOR' will amend the Constitution of Nebraska to establish a right to keep and bear arms for lawful purposes, and to provide that such rights shall not be infringed by the State or any subdivision of the State.
>
> "A vote 'AGAINST' will not cause the Constitution of Nebraska to be amended in such a manner."

Article I, Section 1 of the Constitution of the State of Nebraska now states as follows:

> "All persons are by nature free and independent, and have certain inherent and inallenable rights; among these are life, liberty, the pursuit of happiness, and the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the State or any subdivision thereof."

It is obvious, that the people have decided that the possession of firearms is an inherent and inallenable right that may only be infringed upon by the State if the firearm is possessed for something other than a "lawful purpose".

Section 28-1207 R.R.S. (1943), makes the possession of a firearm that has been defaced a criminal offense. It is the possession, not the use of the weapon that is prohibited. It can not be said that the statute prohibits an unlawful purpose in regard to the possession of the firearm, and, therefore, logic leads to a determination that this statute is prohibited by the clear language of Article I, Section 1 of the Nebraska Constitution.

The legislature may prohibit unlawful uses of firearms, but may not prohibit their possession, unless that possession is for an unlawful

purpose. It may be argued that any statute that prohibits the possession of a weapon, unaccompanied by any affirmative act on the part of the possessor which is unlawful, cannot withstand constitutional scrutiny. The Court need not reach such a conclusion but only needs to determine the constitutionality of Section 28-1207 R.R.S. 1943. Since the defendant in this case in not charged with actually defacing a firearm, his mere passive possession of a firearm may not be prohibited.

Therefore, the Court finds that Section 28-1207, R.R.S. (1943) is unconstitutional and may not be the basis of an information filed against the Defendant in this case. Therefore, the Demurrer, which the Court treats as a Motion to Dismiss, is sustained; the Information dismissed at the State's costs; and the Defendant released from his recognizance.

SO ORDERED.

John P. Murphy
District Judge

IN THE DISTRICT COURT OF LINCOLN COUNTY, NEBRASKA

THE STATE OF NEBRASKA,

Plaintiff,

v.

LARRY L. RUSH,

Defendant.

CASE NO. 97-26

ORDER

NOW ON THIS 6th day of February, 1989, the above-captioned matter comes on for Disposition on the Demurrer to Count I of the Amended Information. The Demurrer filed by the Defendant asks this Court to declare that portion of Neb. Rev. Stat. Section 28-1206 (1) restricting possession of a firearm unconstitutional in light of the recent amendment to Article I, Section 1 of the Constitution of the State of Nebraska by Initiative Petition Measure #403.

This Court in deciding the issue advanced by the Defendant and opposed by the State of Nebraska is required to look to the decisions of the Nebraska Supreme Court for precedent. In so doing, the recent decision of Omaha National Bank v. Spire, 223 Neb. 209 (1986), is directly on point. In the Spire decision the Nebraska Supreme Court upheld the validity of Initiative 300 prohibiting corporate ownership of farm and ranch property and stated:

> "The judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.
>
> Even more so, in a case involving the people's amendment to their Constitution, we make no attempt to judge the wisdom or the desirability in enacting such amendments.
> ***

> The ultimate source of power in any democratic form of government is the people. Our Nebraska Constitution is a document belonging to the people. Subject only to the supremacy clause of the Unites States Constitution, the people may put in their document what they will. Even to the shock and dismay of constitutional theoreticians, the people may add provisions dealing with 'non-fundamental' rights, as well as provisions bearing the most tenuous of relationships to the notion of what constitutes the basic framework of go rnment. The people may add provisions which legal scholars might decry as legislative or statutory in nature. But the people may do it nonetheless."

It is apparent from a reading of the Spire decision that this Court's opinion as to the desirability of Initiative Measure #403 is entirely irrelevant. One may argue that the voters of the State of Nebraska were duped by a special interest group from outside the state to pass an amendment to the Nebraska Constitution which was unnecessary or imprecisely drafted. Similarly, a logical person might argue that Initiative Measure #403 should have permitted the State of Nebraska to exercise reasonable restrictions to prevent the possession of: semiautomatic or automatic assault rifles originally developed for combat; plastic handguns designed to evade detection at airport security stations; other types of firearms which are unreasonably dangerous and without social utility in a civilized society; or firearms by persons previously convicted of a felony.

Whatever the relative merits or demerits of those positions might be, they must be considered matters of public policy more properly left to debate and decision by the people of the State of Nebraska and their elected representatives in the Nebraska Unicameral. If the voters of this State are dissatisfied with their Constitution, they may modify the language at any time in their sole and absolute discretion.

The authority of the people of Nebraska to amend the Constitution of the State of Nebraska is set forth in Article III, Section 2, which provides in part:

> "The first power reserved by the people is the initiative whereby laws may be enacted and constitutional amendments adopted by the people independently of the Legislature. This power may be invoked by petition wherein the purposed measures shall be set forth at length."

The language that appeared on the general election ballot on November 8, 1988, for Initiative Measure #403 was as follows:

> "Shall Article I, Section 1, of the Constitution of Nebraska, be amended to establish a right to keep and bear arms for lawful purposes, and to provide that such right shall not be infringed by the State or any subdivision of the State?"

The explanatory language contained on the ballots stated:

> "A vote 'FOR' will amend the Constitution of Nebraska to establish a right to keep and bear arms for lawful purposes, and to provide that such rights shall not be infringed by the State or any subdivision of the State.
>
> "A vote 'AGAINST' will not cause the Constitution of Nebraska to be amended in such manner."

As a result of the passage of this measure, Article I, Section 1 of the Constitution of the State of Nebraska now states as follows:

> "All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, the pursuit of happiness, and the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof."

In this case, the defendant is not charged with using a firearm for any unlawful purpose. Rather, the defendant is charged with a "status" offense of possession of a firearm with a barrel less that 18

Inches in length.

If the Nebraska Legislature passed a law after the adoption of Initiative Measure #403 prohibiting the possession of handguns, but not shotguns and rifles, would the law be unconstitutional? The answer is obviously yes. Is there any language in #403 which prevents the possession of handguns by prior felons? The answer is an unfortunate no.

Neb. Rev. Stat. Section 28-1206 (1), is clearly unconstitutional in that it makes possession of a firearm with a barrel less than 18 inches in length by a prior felon a crime rather than prohibiting the unlawful use of that weapon. To illustrate the distinction one need only look to the preceding statutory section, Neb. Rev. Stat. Section 28-1205, which provides that any person who uses a firearm to commit any felony commits a Class III Felony, which is treated as a separate and distinct offense requiring the imposition of a consecutive sentence by the sentencing court.

Without a doubt Section 28-1205, remains as a significant deterrent to criminal activity which retains its validity despite the Court's ruling on today's date.

Frequently in the past, judges have been criticized by certain politicians and commentators for liberally interpreting the Constitution to read into it language or a result which could not be found within the "four corners" of the Constitution. This Court neither adopts a conservative nor liberal interpretation in this case, but rather reads the clear and unambiguous language of the Constitution of the State of Nebraska to determine the result. As further stated by the Nebraska

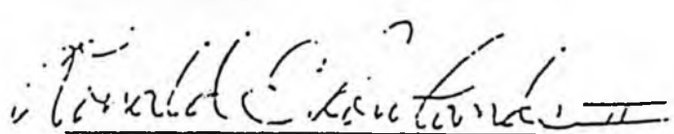
Supreme Court in the Spire decision:

> "In construing provision of a constitution, courts may examine debates and proceedings of a constitutional convention to determine the framers' intended meaning of words, phrases, or clauses of a constitution. (Citations omitted).
>
> With regard to an initiative enactment, however, a different rule must apply. There is no meaningful way to determine the intent which motivates voters to sign a petition for the submission of an enactment, nor is there any real way to determine the intent of those voters who vote for the adoption of an enactment. The motivations and mental processes of the voter in Verdigre or the elector in Elkhorn cannot be determined-except from the words of the enactment itself. Beyond that, all that can be known by this court is that the voters have been subjected to tornadolike winds in voting on this highly political question. We hold that the intent of the voters adopting an initiative amendment to the Nebraska Constitution must be determined from the words of the initiative amendment itself."

For the reasons stated above, this Court sustains the Demurrer filed by the Defendant to Count I of the Amended Information, treats it as a Motion to Dismiss, and dismisses Count I. I hold that Neb. Rev. Stat. Section 28-1206 (1) so far as it pertains to possession of a firearm with a barrel less than eighteen inches in length by a prior felon is unconstitutional in that it violates Article I, Section 1 of the Constitution of the State of Nebraska.

SO ORDERED.

BY THE COURT:



DONALD E. ROWLANDS II
District Judge

Alaska State Legislature

HOUSE OF REPRESENTATIVES

Representative Ann M. Spohnholz
District 13 Seat A

Official Business

P.O. Box V
State Capitol
Juneau, Alaska 99811
465-2435

MEMORANDUM

TO: Representative Peter Goll
Representative Max Gruenberg
Co-Chairs, House Judiciary Committee

FROM: Representative Ann M. Spohnholz AMS

DATE: February 16, 1989

RE: HJR 7 - Right to Keep and Bear Arms

I am forwarding to you a letter which I received from the staff of the Governor's Interim Commission on Children and Youth regarding HJR 7.

I am personally very concerned about this resolution as it stands. It will not allow for adequate protection of the young or otherwise dependent members of our society, nor will it allow us to limit the access to guns by minors.

I would appreciate the opportunity to testify to my concerns when this bill is scheduled for a hearing in your committee.

Thank you.

Myra Munson
Police Chiefs

STEVE COWPER
GOVERNOR

Office of the Governor
P.O. Box A
Juneau, Alaska 99811
465-3155

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU
INTERIM COMMISSION ON CHILDREN AND YOUTH

February 13, 1989

Honorable Ann Spohnholz
Alaska State House
P.O. Box V
Juneau, Alaska 99811

Dear Representative Spohnholz:

I've received your request for comments from the Commission on HJR7, which calls for a constitutional amendment related to the right to keep and bear arms.

Although the Commission's policy related to legislation prohibits us from taking a pro or con position on a specific bill, we have and do comment on legislation in a conceptual framework.

The Commission's main concern with respect to ready and individual access to weapons, with respect to this bill, is focused on two primary issues: the element of danger and access to guns by minors.

The Commission would be very concerned if this proposed constitutional amendment would have the effect of exposing children to dangerous situations, i.e., guns on school grounds, in school buildings, in shopping malls, etc.

It's my understanding that the proposed constitutional amendment could nullify any statutes currently in place related to use of weapons by minors. While the Commission is aware that there are some appropriate situations in which minors might use weapons (learning survival skills in the company of an adult, for example), use of weapons by minors should be regulated for reasons of health and safety.

Please feel free to contact me, or any member of the Commission, if you'd like additional comments.

Sincerely,

Carla Timpone
Program Coordinator
cc: Members, Commission on Children and Youth
Caren Robinson, Special Assistant, Governor's Office
Shari Kochman, Legislative Aide, Governor's Office

BACKUP HJR 7
Correspondence

January 25, 1989

Mr. Richard Ross
Chief of Police
Kenai Police Department
107 S. Willow St.
Kenai, AK 99611

Dear Rick:

Thank you for your Public Opinion Message regarding House Joint Resolution 7, concerning the right to keep and bear arms. I have forwarded your request to Representative Peter Goll, who chairs the House Judiciary Committee, to which the resolution is currently assigned.

If you wish to contact Representative Goll directly, his telephone number is 465-4925; his address is Box V, Juneau, 99801. Meanwhile, I will keep tabs on this resolution to ensure that it undergoes a legal review before it reaches the House floor.

Thank you for bringing this matter to my attention. I appreciate hearing from you.

Sincerely,

Mike Navarre
Representative

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE NAVARRE

NAME: RICHARD ROSS
TITLE: CHIEF OF POLICE
ADDRESS: 107 S. WILLOW ST
CITY: KENAI, ALASKA ZIP: 99611
PHONE: 283-7879
BILL NO: HJR 7
SUBJECT: RIGHT TO KEEP AND BEAR ARMS
MESSAGE: REQUEST THAT YOUR COMMITTEE NOT MOVE THIS RESOLUTION UNTIL IT HAS RECEIVED THOROUGH LEGAL REVIEW. THE CONCERN BEING THAT THE MINIMAL STATUATORY REGULATION CURRENTLY PLACED ON FIREARMS POSSESSION (IE FELON IN POSSESSION;POSSESSION ON LICENSED PREMISES; WHILE INTOXICATED; OF ILLEGAL WEAPONS; CONCEALED WEAPONS) MAY BE JUDICALLY NULLIFIED IF ADOPTED.

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COPIES: REPRESENTATIVE SENATOR

SWACKHAMMER FISCHER

Copy Rep. Goll

FROM MARIE
OTTO - 1/31/89

STATE OF ALASKA

DEPARTMENT OF LAW

CRIMINAL DIVISION

STEVE COWPER, GOVERNOR

REPLY TO

X *CRIMINAL DIVISION CENTRAL OFFICE*
P.O. BOX KC
JUNEAU, ALASKA 99811-0310
PHONE: (907) 465-3428

☐ *OFFICE OF SPECIAL PROSECUTIONS AND APPEALS*
1031 WEST 4TH AVENUE. SUITE 318
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PHONE: (907) 279-7424

January 29, 1989

The Honorable Jan Faiks
Alaska State Senator
P.O. Box V
Juneau, Alaska 99811

Dear Senator Faiks:

Thank you for the opportunity to review SJR 4, relating to a proposed amendment to the constitutional right to bear arms in Alaska. After considerable research regarding the law in Alaska and other states on this issue, it is our opinion that the existing constitutional provision protecting the right to bear arms should not be, nor does it need to be, amended.

In summary, our analysis is:

1. In Alaska, the right of the people to bear arms for legitimate purposes has never been infringed. In the absence of specific need to amend the constitution, it may be wise to follow the adage "If it ain't broke, don't fix it."

2. In a wide variety of contexts, the Alaska Supreme Court has interpreted individual rights under the state constitution more broadly than the federal constitution, and there is no reason to believe the court would not interpret the existing right to bear arms provision in an equally broad manner.

3. The legal effects of the proposed constitutional amendment can not be predicted with any degree of certainty. The recent experiences of West Virginia illustrate the unreliability of political statements made by proponents of this type of amendment.

4. The only effect of the amendment that can be stated with certainty is that it transfers power currently in the hands of the legislature to the judiciary. A similar and well-known example of such a power transfer occurred when the constitution was amended to specifically mention the right of privacy. The legislature is still struggling with the resulting supreme court opinion which recognized a constitutional right to use marijuana.

5. Based on the broad reading the Alaska court gives to the provisions of our constitution, and the lack of any language in the amendment giving the legislature the authority to regulate the exercise of the constitutional right, it is more likely that portions of Alaska's statutes regulating firearms will be declared unconstitutional. Case authority exists as legal precedent for invalidating, or seriously weakening, both the state statute prohibiting all felons from having firearms, and the Anchorage municipal ordinance against carrying concealed weapons in automobiles.

6. If the Legislature decides to approve a constitutional amendment modifying the right to bear arms in Alaska, the language of the amendment should affirmatively state

that the legislature continues to have the authority to reasonably regulate firearms by law.

1. The Right to Keep and Bear Arms in Alaska

The Alaska Constitution addresses the right of the people to keep and bear arms at Article I, Section 19. It provides: "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." Although this section of the constitution has never been interpreted by the Alaska Supreme Court, existing law grants Alaskans broad and relatively unrestricted rights to keep and bear arms.

Alaska's right to bear arms provision is virtually identical to language found in the Second Amendment to the United States Constitution. However, as noted by Legislative Counsel Tamara Brandt Cook in her memorandum to Senator Rodey dated April 14, 1983, "the [United States] Supreme Court has never directly considered whether the Second Amendment provides any protection to the private ownership of arms for lawful purposes." There is ample legal authority for the proposition that protection of the individual right to bear arms is provided by the language of both the Second Amendment and Section 19 of the Alaska Constitution.

For example, in one scholarly article,[1] the author demonstrated that the amendments guarantee the individual right to keep and bear arms for the following purposes: (1) to enable the individual to perform militia duties; (2) to deter governmental oppression; (3) to maintain public order; and (4) to enable the individual to exercise the right to self-defense. The author concluded his analysis by clearly stating that, under language identical to the Alaska Constitution, common and traditional users of private firearms are protected and that it would be unconstitutional to enact

> (1) any law that infringes the right of the people (excepting those people who fall into a traditional high-risk category, such as felons, the mentally deficient, and infants) to keep any arms commonly used for personal protection or any of the modern equivalent of arms that were fairly commonly possessed by the people at the adoption of the Constitution, or (2) any law that infringes the right to bear those arms for traditional lawful purposes.[2]

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[1]Dowlut, "The Right to Arms: Does the Constitution or the Predilection of Judges Reign?," 36 Oklahoma Law Review 65 (1983).

[2]Id. at 101. The following articles have been cited as authority for the proposition that the Second Amendment guarantees an individual right to bear arms: S.P. Halbrook, That Every Man Be Armed: The Evolution of a Constitutional Right (Univ. of N. Mex. Press 1984); Dowlut, "The Current Relevancy of Keeping and Bearing Arms," 15 U. Balt. L. F. 32 (1984); Kates, "Handgun Prohibition and the Original Meaning of the Second Amendment," 82 Mich. L. Rev. 204 (1983); Malcolm, "The Right of the People to Keep and Bear Arms: The Common Law Tradition, 10 Hastings Const. L. Q. 285 (1983); Caplan, "The Right of the Individual to Bear Arms: A Recent Judicial Trend," 1982 Detroit Col. L. Rev. 789; Shalhope, "The Ideological Origins of the Second Amendment," 69 J. Am. History 599 (1982); Halbrook, "To Keep and Bear Their Private Arms: The Adoption of the Second Amendment, 1787-1791," 10 N. Ky. L. Rev. 13 (1982); Gardiner, "To Preserve Liberty--A Look at The Right to Keep and Bear Arms," 10 N. Ky. L. Rev. 63 (1982); Halbrook, "The

An analysis of the constitutional right to bear arms in Alaska must of necessity consider the history of gun regulation in the state.[3] The right of the people to bear arms for legitimate purposes is widely recognized in Alaska, and has never been

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Jurisprudence of the Second and Fourteenth Amendments," 4 Geo. Mason U.L. Rev. 1 (1981); Cantrell, "The Right to Bear Arms," 53 Wis. Bar Bull. 21 (Oct. 1980); Caplan, "Handgun Control: Constitutional or Unconstitutional?," 10 N.C. Central L. J. 53 (1978); Caplan, "Restoring The Balance: The Second Amendment Revisited," 5 Fordham Urban L.J. 31 (1976); Whisker, "Historical Development and Subsequent Erosion of the Right to Keep and Bear Arms," 78 W. Va. L. Rev. 171 (1976); Weiss, "A Reply to Advocates of Gun Control Law," 52 Jour. Urban Law 577 (1974); Hardy & Stompoly, "Of Arms and the Law," 51 Chi.-Kent L. Rev. 62 (1974); McClure, "Firearms and Federalism," 7 Idaho L. Rev. 197 (1970); Levine & Saxe, "The Second Amendment: The Right to Bear Arms," 7 Houston L. Rev. 1 (1969); Olds, "The Second Amendment and The Right to Keep and Bear Arms," 46 Mich. St. Bar. J. 15 (Oct. 1967); Comment, "The Right to Keep and Bear Arms: A Necessary Constitutional Guarantee or an Outmoded Provision of the Bill of Rights?," 31 Albany L. Rev. 74 (1967); Sprecher, "The Lost Amendment," 51 Am. Bar Assn. J. 554 and 665 (1965); and Hays, "The Right to Bear Arms: A Study in Judicial Misinterpretation," 2 Wm. & Mary L. Rev. 381 (1960).

[3]See, e.g., Hootch v. Alaska State-Operated School System, 536 P.2d 793, 800 (Alaska 1975): "In determining the scope of a constitutional right, the focus of the court's inquiry is not, however, on the question of whether there is a burden on the exercise of that right. We must look to the intent of the framers of the constitution concerning the nature of the right itself, the problems which they were addressing and the remedies they sought. While prior practice and the framers' purposes are not necessarily conclusive, an historical perspective is essential to an enlightened contemporary interpretation of our constitution."

infringed.[4] Alaska and Vermont share the distinction of having the least restrictive firearms laws in United States.[5]

Proponents of the amendment indicate it is not proposed to rectify a current injustice nor to overturn existing guns laws or regulations, but to protect the rights of individuals to keep and bear arms against the caprice of an irresponsible legislature. We believe the protection of the existing constitution and the respect and restraint historically shown by the Alaska legislature and courts for the people's right to bear arms renders the proposed amendment unnecessary, and worse, the amendment interjects the uncertainty of judicial interpretation into a new and uncharted area.

2. Constitutional Interpretation in Alaska

It is often difficult to predict how a court will interpret the scope and effect of a new constitutional amendment, and how the power of the legislature will thereafter be limited. This unpredictability is very familiar to Alaskans. In 1972, the

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[4]In previous years, a 1983 informal Attorney General's opinion has been cited as proof of the need for a constitutional amendment. The opinion addressed whether a landlord could prohibit a tenant from having firearms. This analysis of the right to bear arms, rendered in the context of a contractual relationship between private parties, did not comprehensively address the issue of governmental regulation of arms.

[5]Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, State Laws and Published Ordinances: Firearms (18th Ed. 1988).

people explicitly recognized the right to privacy in Alaska by approving a constitutional amendment. In the first major case interpreting the privacy amendment, the Alaska Supreme Court in Ravin v. State,[6] struck down the law that criminalized possession of marijuana in the home for personal use. The legislature has been struggling for many years to deal with this unique interpretation of our constitution.[7]

Ravin is only one example of the propensity of the state supreme court to interpret the Alaska constitution as giving broader protection to individual rights than similar constitutional provisions in other jurisdictions. As a result, the judicial decisions of other states interpreting individual rights cannot be

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[6]537 P.2d 494 (Alaska 1975).

[7]Although other states, including Arizona, California, Florida, Hawaii, Louisiana, Montana, South Carolina, and Washington, have adopted similar constitutional provisions recognizing the right to privacy, the Alaska court stands alone in its conclusion that the right to privacy protects the right to possess marijuana in the home.

heavily relied upon in predicting what will happen when the Alaska courts are asked to analyze identical issues.[8]

With respect to the actions of individual citizens, Alaska court decisions frequently rely on the privacy amendment to justify constitutional interpretations that are significantly broader than those reached by other courts. Our court has repeatedly determined that the effect of the right of privacy is to amplify the protections afforded by other constitutional rights. The complexity of anticipating the court's interpretation of a right to bear arms is compounded by the potentially augmenting effect of the explicit right to privacy.

For example, the Alaska constitutional guarantee against unreasonable searches and seizures is held to be broader in scope than identical guarantees under the federal constitution, in part because of the right to privacy.[9] Despite considerable authority

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[8]In addition to the cases discussed below, the Alaska Supreme Court has held that the Alaska Constitution provides greater protection in areas ranging from the free exercise of one's religious beliefs, Frank v. State, 604 P.2d 1068 (Alaska 1979) (defendant entitled to exemption from fish and game regulations on account of his religious beliefs even though the charges against defendant would have been upheld under the federal constitution) to the right to counsel, Resek v. State, 706 P.2d 288 (Alaska 1985) ("the right to counsel under the Alaska Constitution is more expansive than the corresponding right under the sixth amendment to the United States Constitution.").

[9]Reeves v. State, 599 P.2d 727, 734 (Alaska 1979). In this case, the court reversed a conviction for possession of heroin. The defendant had been arrested for driving while intoxicated, and a correctional officer discovered the heroin inside a balloon in

to the contrary in other jurisdictions, the Alaska court has held that the state constitution prohibits warrantless administrative inspections of private business premises.[10] The warrantless monitoring of private conversations with the consent of one participant, acceptable under federal constitutional standards, is held in Alaska to be an unreasonable search and seizure in light of the combined effect of the Alaska constitutional prohibition against unreasonable searches and seizures, and the Alaska constitutional right of privacy.[11]

The Alaska court has also forged new legal ground in interpreting the equal protection clause of the state constitution. This amendment provides additional protection for the exercise of constitutional rights such as the right to bear arms because it is used by the court in evaluating whether legislation is

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the defendant's pocket. Although it was permissible for the officer to take the balloon away from the defendant before he was booked into the jail, the court held that the defendant's right to privacy and right to be free from unreasonable searches and seizures was violated when the officer looked inside the balloon.

[10]Woods & Rohde, Inc. v. State, 565 P.2d 138 (Alaska 1977).

[11]In the cases of Coffey v. State, 585 P.2d 514 (Alaska 1978) (court reversed conviction of marijuana dealer); Aldridge v. State, 584 P.2d 1105 (Alaska 1978) (court reversed conviction of heroin dealer); State v. Glass, 583 P.2d 872 (Alaska 1978) (court agreed charges against heroin dealer should be dismissed), the decisions were based on the court's broad interpretation of Alaska's constitutional rights to privacy and to be free from unreasonable searches and seizures. Federal courts faced with the same issues have interpreted similar federal constitutional guarantees relating to searches and seizures differently, and would have upheld the convictions.

constitutional. In developing its own equal protection analysis, our court rejected the deferential test applied by the United States Supreme Court, holding instead that the Alaska Constitution requires social and economic legislation to pass a more rigorous test.[12]

In Herrick's Aero-Auto-Aqua Repair v. DOT, 754 P.2d 1111 (1988), the court explained its expansive equal protection analysis as follows:

> In reviewing equal protection claims under the Alaska constitution ... the minimum burden that the state must meet when defending legislation challenged on equal protection grounds under the Alaska constitution is greater than that required under the United States Constitution. The burden on the state increases in proportion to the primacy of the interest involved. Eventually this burden reaches the functional equivalent of the federal compelling state interest test in those cases where fundamental rights and suspect categories are at issue.[13]

Another liberal interpretation of Alaska's constitution was set out in Vogler v. Miller, 651 P.2d 1 (Alaska 1982). In this case the court invalidated statutes relating to ballot access by

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[12]Isakson v. Rickey, 550 P.2d 359 (Alaska 1976).

[13]754 P.2d at 1114. The court in Herrick also pointed to an additional burden placed on the state in defending against an equal protection challenge. "[T]he rational basis test articulated by the Supreme Court allows a court to 'hypothesize' facts. Under that test, a party challenging legislation on equal protection grounds, cannot prevail so long as 'it is evident from all the considerations presented to [the legislature], and those of which we may take judicial notice, that the question is at least debatable." Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981). In Alaska, the court will not hypothesize facts.

candidates of small parties. The court relied on the free speech and equal protection provisions of the Alaska constitution, and acknowledged that the statutes would have been upheld under the interpretation the federal courts have given to identical provisions of the United States constitution. The court declared that Alaska restrictions on the right to associate in pursuit of political beliefs are permissible only where the government is able to show that the restrictions are justified by compelling governmental interests. Further, the restrictions must be no broader than needed to accomplish the governmental interests which justify them.[14]

Thus, any effort to predict the interpretation of any amendment relating to an individual right in the Alaska court must be mindful of the court's tendency to interpret individual rights broadly, in often unexpected contexts, and the court's frequent insistence that regulatory schemes satisfy a compelling state interest test.

3. The West Virginia Experience

Despite Alaska's unique constitution and the willingness of our court to adopt novel legal interpretations, we have also considered the experience of other states with right to bear arms amendments. For example, based on its newly-enacted right to bear

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[14]651 P.2d at 5.

arms amendment, the West Virginia Supreme Court recently struck down a statute that prohibited carrying dangerous or deadly weapons without a license.

Proponents of the amendment had argued during legislative hearings that existing laws would not be affected by the amendment, but when an existing law was challenged, the proponents switched positions and argued for the unconstitutionality of the West Virginia law. This case shows the dangers that arise when a legislature approves a constitutional amendment that does not spell out in plain language its precise intent. A detailed description of what happened in West Virginia is therefore important because many of the same issues are currently being discussed in the context of your consideration of SJR4.

a. Legislative History

In 1986, West Virginia amended its constitution to expand the right to keep and bear arms. The new constitutional provision stated, "A person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreation use."

Despite the popularity of the right to keep and bear arms amendment in the West Virginia legislature, the legislative process "failed to give the amendment's language any real definition beyond

a general sense that passage of the amendment would leave undisturbed current law and constitutionalize existing state law prohibiting municipal governments from banning the ownership of weapons or ammunition. The very popularity of the concept seemed to insulate the proposed amendment from the 'hard look' analysis appropriate for amendments to a constitution."[15]

No significant statement of legislative intent was prepared by any of the committees that considered the proposal, nor was any substantive research done by the legislative committees that recommended the measure for passage. As a result, there was little in the legislative history to assist the court in fixing any specific meaning to the words, phrases, or the intent of the amendment. In researching the legislative history, McNeely concluded, "All that can be said without question was that legislative proponents consistently took the position that the amendment, if adopted, would not change existing laws, and that legislative opponents consistently attempted, with no ultimate success, to amend the measure to assure that the state would retain its ability to maintain the existing state of the law."[16]

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[15]McNeely, "The Right of Who to Bear What, When, and Where - West Virginia's Firearms Law v. The Right-To-Bear-Arms Amendment," 89 West Virginia Law Review 1125 (1987) at 1160.

[16]McNeely at 1152.

In an analysis provided to the West Virginia legislature by the National Rifle Association, the proponents argued that under the amendment the bearing of constitutionally-protected arms "may be regulated." The analysis described the various statutes that the NRA believed would be upheld if the proposed amendment were adopted, and specifically stated that "a license may be required to carry a pistol away from one's home, place of business, or land."[17]

In attempting to predict the effect the court would give to the amendment, McNeely predicted that,

> Given the legislature's failure to provide clear legislative intent in any formal sense, it shall be up to the judicial branch of the state to interpret the amendment consistent with its language and demonstrated intent. With that interpretation, the court may continue the state's traditional legal attitude toward firearms by finding the amendment consistent with state law, or it may embark the state on an uncharted course of repeal and revision of long-standing statutes and case law ... It is, perhaps, ironic that such a lack of legislative research and formal legislative findings, coupled with the broad, unqualified

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[17]The National Rifle Association "Analysis of Proposed West Virginia Constitutional Guarantee to Keep and Bear Arms" is set out as Appendix H to the McNeely article at 1176-78. It is virtually identical to the "Analysis of Proposed Alaska Constitutional Guarantee to Keep and Bear Arms" contained in the Senate Judiciary file for SJR4.

In addition, at least one advertisement by the NRA for the amendment in West Virginia contained "a prominent statement that no existing federal or state law would be repealed by passage, with the statement reading 'Amendment 1 keeps Federal and State firearms laws the law.'" McNeely at 1148.

> language of Amendment No. 1, have combined to place the future of firearms regulation, heretofore primarily a legislative activity, in the hands of the judicial branch of state government.[18]

b. Princeton v. Buckner

The case of Princeton v. Buckner[19] began when a police officer searched a drunk driver who had been placed under arrest, and found a .22 caliber automatic pistol concealed in the driver's pocket. Under existing West Virginia law, a license was required to carry a concealed weapon. Although the drunk driver did not have a license, the magistrate refused to issue charges for illegally carrying a firearm because he concluded that the licensing law was unconstitutional under the newly-enacted right to bear arms amendment to the West Virginia Constitution.

Despite the assertions during the legislative and public debates that existing West Virginia firearms laws would not be affected, the challengers to the law in Buckner lost little time in proving the non-binding nature of such statements.[20] In their analysis of legislative intent, the challengers pointed to the

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[18]McNeely at 1162.

[19]Case No. CC972, West Virginia Supreme Court of Appeals, July 1, 1988, reconsideration denied December 20, 1988.

[20]The National Rifle Association filed an amicus brief in the Buckner case on behalf of its West Virginia members, which concluded: "... the licensing statute is unconstitutional because it frustrates rather than regulates the right to bear arms."

legislature's refusal to modify the amendment to specifically state that the legislature retained the power to regulate firearms.

For example, in his brief to the Supreme Court, Buckner argued as follows:

> The State, in its brief, concludes that "it is clear that the Right to Keep and Bear [Arms] Amendment to the West Virginia Constitution was not meant to nullify existing laws." This conclusion is without factual support or logic. Had the efforts of Delegate McNeely to add the word "lawful" and had the efforts of Delegate Knight to make the amendment subject to the "police power" of the State, or either of these efforts, been successful, then the argument of the State might bear some logic. The fact that both of these efforts were specifically turned down by the Legislature indicates clearly that the Legislature had no such intent as stated by the State. Had that been the clear intent of the Legislature in passing the resolution, it could have simply added language to that effect, or adopted on of the amendments referred to. (emphasis added) Brief of Respondent Buckner at 4.
>
> The basis of the argument of the State is that the proponents took the position that the right to bear arms amendment did not change existing laws. The fact of the matter is that the opponents of the amendment took the position that it would, in fact, change existing law and the Legislature refused, although given opportunity to do so, to word the amendment in such a fashion so as to deal with that question. (emphasis added) Brief of Respondent Buckner at 5.

In addition to pointing out that the legislature refused to address the extent to which it retained the power to pass firearms legislation, the challengers concluded that the

legislature and the people must have wanted to place restraints on the legislature. At page 6 of his brief, Buckner argued that if the constitutional amendment "means anything, it has to mean that the people of the State wanted to change the law in existence at the time, and place restraints upon the Legislature. Any other conclusion is illogical and would render the act of the Legislature and the people in adopting the constitutional provision an exercise in futility." In other words, it doesn't matter what the supporters of the bill said; it only mattered what the legislature itself said in the language of the amendment.

The West Virginia Supreme Court accepted the arguments presented by the challengers, and held that a "constitutional amendment will supersede any inconsistent portions of antecedent constitutional or statutory provisions, as 'the latest expression of the will of the people.'"[21] The court rejected the position taken by the state that "West Virginia's licensing statute evinces an intent to control, but not prohibit, carrying weapons, such as handguns, which are both easily concealable and deadly."[22]

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[21] Princeton v. Buckner, at page 10.

[22] Brief of Petitioner State of West Virginia, at 15.
On December 20, 1988, the West Virginia Supreme Court reaffirmed its holding that the statute was unconstitutional. The opinion did not isolate the specific provisions of this statute, or the related licensing requirements, which rendered the statute violative of the right to keep and bear arms amendment. Instead, the court declared that the prohibition against carrying a dangerous or deadly weapon for defensive purposes without a license or other statutory authorization was overly broad.

c. Current Status of West Virginia Gun Law

Similar to the current situation in Alaska where the legislature is trying to pass a constitutional statute prohibiting people from possessing marijuana in their homes, the West Virginia legislature is now working on developing a constitutional statute relating to the carrying of deadly and dangerous weapons.[23] In the meantime, unless a person commits a separate criminal offense with a firearm, West Virginia law enforcement authorities are prohibited from arresting persons for, or protecting persons from, carrying concealed weapons, regardless of whether the offender is carrying the weapon for defensive or other purposes. (Source--West Virginia Department of Public Safety)[24]

Although the court acknowledged that the legislature "may, through the valid exercise of its police power, reasonably regulate the right of a person to keep and bear arms in order to promote the health, safety and welfare of all citizens of this State, provided that the restrictions or regulations imposed do not frustrate the constitutional freedoms guaranteed by...the Right to Keep and Bear Arms Amendment," the court recognized that each statute regulating firearms would need to be evaluated in light of the new constitutional provisions. The court cautioned that "a governmental purpose to control or prohibit certain activities, which may be constitutionally subject to state regulation under the police power, may not be achieved by means which sweep unnecessarily broadly and thereby invade the realm of protected freedoms, such as the right to keep and bear arms guaranteed by our State Constitution." (emphasis added)

[23]Telephone conversation, Steve Hernden, West Virginia Assistant Attorney General.

[24]Petition for Reconsideration of Remedy filed by the State of West Virginia at pages 1-2.

4. The Proposed Alaska Amendment

The proposed amendment to the Alaska constitution states that "The individual right to keep and bear arms shall not be denied or infringed by the state or a political subdivision of the state."

The first and most significant effect of the constitutional amendment proposed in SJR4 is to limit the legislative authority to regulate the right to bear arms. The amendment takes authority away from the people's elected representatives as to what policies the state will follow concerning the right to keep and bear arms and, shifts to the courts the ultimate authority to decide state policy through the uncertain course of constitutional interpretation.

The sweeping but ambiguous language of the proposed amendment means that, if passed, it can be expected to trigger a great deal of litigation in a number of different contexts. If the courts were to construe the amendment in a fashion that the Legislature felt was harmful to the public interest, the only way that the law could be changed, without inducing the court to change its own position, would be through another constitutional amendment. Thus, the amendment would give the courts a much greater role in interpreting the regulatory authority of the Legislature than it has at present.

As discussed above, relying on legal precedents from the courts of other states to predict what the Alaska court may decide under the proposed amendment is fraught with difficulty. Although proponents of amending Alaska's constitution argue that at least 42 states have constitutional provisions guaranteeing a right to bear arms, and that all firearms laws have been upheld in every state, this assertion is incorrect and misleading, as discussed below.

Most constitutional provisions enacted by other states differ from SJR4 because they either define the circumstances in which the constitutional right applies, or they expressly recognize that the constitutional provision is subject to legislative regulation.[25] Only Rhode Island has a constitutional provision, like SJR4, that grants an apparently unfettered right to keep and bear arms.[26]

Each of the 50 state supreme courts interpret its own constitutional provisions consistent with the legal precedents of that state. Decisions made by courts of sister states may be

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[25]See R. Dowlut & J. Knoop, "State Constitutions and the Right to Keep and Bear Arms," 7 Okla. City U.L. Rev. 177, 236-240 (1982).

[26]We have been unable to find any cases in which the Rhode Island Supreme Court has directly interpreted this constitutional provision.

informative, yet are not persuasive or conclusive authority from which one can predict the result in a different jurisdiction. For example, the West Virginia court struck down its licensing statute after considering and rejecting an Indiana Supreme Court decision that reached the opposition conclusion.[27] In the Indiana decision, the dissent noted that "The decisions from other jurisdictions are not uniform on the right to keep and bear arms any more than the constitutional provisions are stated in the same language."

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[27]An Indiana statute which imposed licensing requirements on handguns similar to those of West Virginia was addressed in Matthews v State, 148 N.E. 2d 334 (1958). As in West Virginia, the Indiana statute placed no restrictions on possessing or carrying a weapon on one's own premises, but to carry a gun elsewhere required a license conditioned on a showing that, among other things, "the applicant has a proper reason for carrying a pistol and is of good character and reputation and a suitable person to be so licensed." 148 N.E.2d at 336. The Indiana constitution provided that "the people shall have a right to bear arms, for the defense of themselves and the State." The Matthews court affirmed the statute and held that the licensing statute was a legitimate exercise of the legislative power to provide for the public safety and welfare.

In a subsequent case, Schubert v. DeBard, 398 N.E.2d 1339 (Indiana App. 1980), the Indiana court relied on the constitutional right to bear arms provision in reversing the denial of a license to carry a handgun made by an applicant who claimed he needed a gun for self-defense. The authorities had denied the license after reviewing evidence showing that the applicant "was a 'chronic liar' suffering from a 'gigantic police complex.'" Evidence also showed that when the applicant had previously held a license, he "had carried and displayed his pistol at inappropriate times." Other witnesses testified that the applicant had "mental problems."

The Schubert court reiterated that establishing a licensing procedure for handguns is not violative of the constitution. However, the court ruled that once a person makes the claim that a gun is needed for self-defense, the constitutional right to bear arms provision prohibits authorities from withholding the license, or even making a factual determination as to whether the person actually needs a gun.

Since the analysis of each case turns on the precise wording of each constitutional provision, it is difficult to use the cases for purposes of comparison. For example, the court's reasons for upholding a challenged statute in State v. Grob, 690 P.2d 951 (Idaho App. 1984) are illustrative of the limited precedential value out-of-state decisions would have in Alaska. In this case, the defendant argued that a statute providing a mandatory sentence for using a firearm while engaged in kidnapping or aggravated battery violated his constitutional right to bear arms. Since Idaho's constitutional right to bear arms provision was amended in 1978, the court looked to the language of both the pre-1978 and post-1978 constitutions. The court found that the statute was constitutional under the pre-1978 language because the provision specifically stated "the legislature shall regulate the exercise of this right by law." Similarly, the statute was found to be constitutional under the post-1978 language based on the specific authorization given the legislature to prescribe "minimum sentences for crimes committed while in possession of a firearm" and to punish the unlawful "use of a firearm."[28]

5. The Risk to Specific Alaska Statutes

a. Constitutionality of Concealed Weapons Statutes

Despite the assertions of supporters of this amendment, it is by no means certain that a new right to bear arms amendment

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[28]State v. Grob, 690 P.2d 951, 953-54 (Idaho App. 1984)

would leave current Alaska statutes prohibiting the carrying of concealed weapons untouched. If the Alaska courts interpreted the amendment to permit the carrying of concealed weapons, AS 11.61.220(a)(1) would be unconstitutional. On the other hand, it cannot be said that the Alaska Supreme Court would hold that this was an area beyond legislative regulation. The matter is simply uncertain.

An article published by Robert Dowlut, General Counsel for the National Rifle Association,[29] gives rise to concern about the constitutionality of an Anchorage municipal ordinance, if the proposed amendment to the Alaska constitution were approved. Dowlut asserts that the right to keep and bear arms includes the right to carry weapons in private vehicles,[30] something which is now prohibited by Anchorage Municipal Code 8.05.070(A), as interpreted in Municipality of Anchorage v. Lloyd, 679 P.2d 486 (Alaska App. 1984).[31]

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[29]Dowlut & Knoop, "State Constitutions and the Right to Keep and Bear Arms," 7 Oklahoma City University Law Review 177 (1982).

[30]Id. at 220.

[31]Support for amending Alaska's constitutional right to bear arms provision has been predicated on an unwarranted assumption that the amendment will not have an effect on existing state or municipal laws. For example, Resolution No. AR 87-238, dated September 29, 1987 and passed by the Anchorage Assembly, included the bald assertion that the amendment "will not invalidate existing municipal public safety measures regulating the use and possession of firearms."

In the document entitled "Analysis of Proposed Alaska Constitutional Guarantee to Keep and Bear Arms," which was written by Dowlut and provided to members of the Senate Judiciary Committee, the assertion is made that "concealed carrying statutes ... are routinely upheld." A review of the cases cited in support of this proposition highlights the problems involved in relying on judicial decisions in jurisdictions outside the state of Alaska to predict how our court would interpret the proposed constitutional amendment.

For example, Dowlut cites Holland v. Commonwealth, 294 S.W.2d 83 (Ky. 1956) as standing for the proposition that concealed weapons statutes are constitutional despite the broadly drafted language of SJR4. However, a review of the case shows that the Kentucky constitution explicitly declares that the right to bear arms is "subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons," a phrase not included SJR4. The court upheld the concealed weapons statute because it found that "the meaning of the constitutional provision is plain and the legislature has exercised the power granted to it by enacting [the concealed weapons statute]." Id. at 85.

Similarly, Dowlut claims that State v. Kessler, 614 P.2d 94, 99 (Oregon 1980) is another case in which a concealed weapons statute was "routinely upheld." In fact, the court in Kessler

struck down a statute that prohibited possessing billy clubs. Despite Dowlut's claim, the court did not address the constitutionality of concealed weapons laws, although it noted in passing that the court in State v. Hart, 157 P.2d 72 (Idaho 1945) upheld a concealed weapons statute.

In Hart the Idaho court specifically based its decision to uphold the ordinance on the language of Idaho's constitutional right to bear arms provision. At the time Hart was decided, the Idaho constitution stated "The people have the right to bear arms for their security and defense; but the legislature shall regulate the exercise of this right by law."

The final case cited by Dowlut to support his claim that Alaska's courts will uphold concealed weapons statutes is State v. McAdams, 714 P.2d 1236 (Wyo. 1986). However, once again, the constitutional provision that was analyzed in McAdams is significantly narrower than the proposed amendment contained in SJR4. The Wyoming constitution provides, "The right of citizens to bear arms in defense of themselves and of the state shall not be denied." The court upheld the concealed weapons statute because it did not believe that the law placed unnecessary restraints on the right to possess arms for self defense: "We are cognizant of the fact that our concealed deadly weapons statute imposes some limitation on a person's right to bear arms in defense of himself;

but, when balanced against the object of the statute, we do not find the limitation unreasonable." Id. at 1238.

b. Constitutionality of Felon in Possession Statutes

It is also by no means certain that the Alaska Supreme Court would uphold current laws controlling or prohibiting convicted felons from owning or possessing weapons if SJR4 were adopted. Felons convicted of bootlegging or drug dealing would be allowed to possess firearms with impunity if the opinion expressed by the General Counsel of the National Rifle Association, and discussed below, were adopted in this state. Moreover, the Colorado Supreme Court has interpreted its constitutional right to bear arms as providing a defense to the charge of felon in possession. If the Alaska courts reached a similar interpretation, the ability to prosecute felons for possessing firearms would certainly be impaired.

The supporters of SJR4 have provided you with the "Analysis of Proposed Alaska Constitutional Guarantee to Keep and Bear Arms" which implies that Alaska's felon in possession statute would withstand constitutional scrutiny. However, Robert Dowlut, General Counsel for the National Rifle Association, has previously published contrary statements. In a law review article, he stated, "To prevent the people from being disarmed by the expedient of classifying regulatory offenses as felonies, the disqualification

for felons should be restricted to common law felonies and their modern equivalents and to offenses requiring some state of mind above strict liability which are inherently inimical to life and property."[32] (emphasis added). Thus, under Dowlut's view, felons charged with drug dealing and bootlegging, which are not "common law felonies," could legally carry weapons.

Under current AS 11.61.200, all persons convicted of any felony are prohibited from possessing a firearm capable of being concealed on the person, and this law applies to persons convicted of regulatory offenses such as bootlegging and drug dealing, as well as the common law felonies such as murder, assault or kidnapping. If Dowlut's interpretation were adopted, Alaska's statute would be overbroad, and struck down as unconstitutional.

A conviction for being a felon in possession of a firearm was reversed by the Colorado Supreme Court in People v. Ford, 568 P.2d 26 (Colorado 1977), based on the "right to bear arms" provision of the Colorado Constitution. The court held that the constitutional protection extends to a defendant "who presents competent evidence showing that his purpose in possessing weapons was the defense of his home, person, and property" and that this type of evidence provides a complete defense to a felon-in-

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[32]Dowlut & Knoop at 192.

possession charge.[33] Once the defendant has raised the issue as a defense, the prosecution must prove, beyond a reasonable doubt, that the defendant's purpose in possessing firearms was not for defense. Thus, unless the felon is committing a crime with the gun, it is virtually impossible to prove that the weapon was not for "defense." As a practical matter, the teeth have been taken out of the law because of the problems of proving that a felon in possession of a gun at the felon's home, on the felon's person, or on the felon's property is using it other than for defense.

As with the concealed weapons statutes, there are problems in relying on the judicial decisions of other states in reaching the conclusion that Alaska's statute would withstand constitutional scrutiny. For example, in the North Dakota case distributed to the Senate Judiciary Committee, State v. Ricehill[34], the statute only prohibited persons "convicted anywhere for a felony involving violence or intimidation" from owning firearms. Unlike current Alaska law, North Dakota's narrower felon in possession statute would fall within the category of felon in possession statutes that Dowlut considers to be constitutional, in

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[33]The court noted at page 28 that this affirmative defense is available in cases involving the charge of carrying a concealed weapon.

[34]415 N.W.2d 481 (N.D. 1987).

that it only prohibits felons convicted of common law felonies from having firearms.[35]

Other state courts have upheld felon in possession statutes based on express constitutional language that preserved the right of the legislature to regulate arms. In Landers v. State, 299 S.E 2d 707 (Ga. 1983), the court affirmed the conviction of a felon charged with possessing a firearm, and held "Where a State constitution in terms provides, in connection with the right to bear arms, that the State may regulate this right, or may regulate the manner of bearing arms, these words expressly

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[35]See also, Dickerson v. State, 517 So.2d 625 (Ala. Cr. App. 1986), Bristow v. State, 418 So.2d 927 (Ala. Cr. App. 1982) and Mason v. State, 103 So.2d 337 (Ala.App. (1956), aff'd 103 So.2d 341 (1958)(Statute prohibited "a person who has been convicted of a crime of violence from owning or possessing a pistol); State v. Krantz, 164 P.2d 453 (Wash. 1945) and State v. Tully, 89 P.2d 517 (Wash. 1939) (Statute prohibited possession of a firearm after having been convicted of a crime of violence); Carfield v. State, 649 P.2d 865 (Wyo. 1982) (Statute prohibited persons convicted of "murder, voluntary manslaughter, assault to commit murder, aggravated assault, robbery, burglary or sexual assault in the first or second degree, or mayhem" to possess any firearms.); State v. Noel, 414 P.2d 162 (Ariz. 1966) and State v. Rascon, 519 P.2d 37 (Ariz. 1974) (Statute prohibited any person convicted of a crime of violence from possessing a pistol); Sheppard v. State, 586 S.W.2d 500 (Tex. Crim. App. 1979), McGuire v. State, 537 S.W.2d 26 (Tex. Cr. App. 1976) and Webb v. State, 439 S.W.2d 342 (Tex. Cr. App. 1969) (Statute prohibited persons convicted of "a felony involving an act of violence or threatened violence to a person or property" from possessing firearms "away from the premises where he lives."); State v. Cartwright, 418 P.2d 822 (Ore. 1966) (Statute prohibited possession where convicted of "a felony against the person or property of another."

recognize the police power in direct connection with the constitutional declaration as to the right."[36]

Similarly, in Nelson v. State, 195 So. 2d 853 (Fla. 1967), the conviction for possession of a pistol by a defendant who had previously been convicted of a felony was upheld. Although the statute applied to persons convicted of all felonies, Florida's constitutional provision said "The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law."

The court in Amos v. State, 343 So.2d 166 (La. 1977) upheld charges for felon in possession of a firearm because the "purpose [of the statute] is to limit the possession of firearms by person who, by their past commission of certain specified serious felonies, have demonstrated a dangerous disregard for the law and present a potential threat of further or future criminal activity." However, two justices of the Louisiana Supreme Court dissented from the opinion, believing that the statute impermissibly infringed on the right to bear arms.

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[36]Georgia's constitution states "The right of the people to keep and bear arms shall not be infringed but the General Assembly shall have power to prescribe the manner in which arms may be borne."

The reasoning of the two dissenting justices in Amos is important, since if this position were adopted in Alaska, AS 11.61.200 would be struck down. The dissenters stated that the felon in possession statute "impermissibly limits the affirmative constitutional guarantee and as such is not a valid exercise of the police power." The dissenters looked at other state decisions upholding felon in possession laws and concluded "These states, however, have constitutional provisions different from ours. Every one of these constitutions link the right to bear arms to the need for a militia. Unlike these provisions, the Louisiana Constitution of 1974 expressly grants to each citizen the 'right to keep and bear arms,' a right which 'no law' shall abridge. This constitutional guarantee is not limited by linking it to a militia or a defense for the people as a whole. It is limited only by one state exception: the legislature has the authority to prohibit the concealment of weapons on the person. Otherwise, the legislature lacks the authority to nullify the right of Louisiana citizens to keep and bear arms."

An analysis of the effect the proposed right to bear arms amendment will have on the state's felon in possession statute must be undertaken with both the right to privacy and the Alaska Supreme Court's expansive equal protection standard in mind. Alaska law prohibits all felons, including persons convicted of non-violent felonies such as embezzlement and certain sex offenses, from

possessing firearms. If SJR4 were adopted, the court would require the state to prove that the law is based on a compelling state interest. In relation to non-violent felons, it is not unlikely that the state would be unable to meet the burden of proving it had a compelling state interest in prohibiting the possession of firearms by non-violent felons.

c. Constitutionality of Prohibited Weapons Statutes

The possession of certain classes of weapons is prohibited in Alaska.[37] Included in the category of prohibited weapons are switchblades, gravity knives, and metal knuckles. Under SJR4, this law would be unconstitutional, if the court in this state accepted the analysis of the Oregon Supreme Court in State v. Delgado, 692 P.2d 610 (Ore. 1984); State v. Blocker, 630 P.2d 824 (Ore. 1981); and State v. Kessler, 614 P.2d 94 (Ore. 1980).

In Delgado, the Oregon court held that a statute prohibiting mere possession of a switchblade was unconstitutional under the right to bear arms provision of the Oregon constitution.[38] The court first determined that the drafters of Oregon's constitution "intended that the private citizen have the

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[37]AS 11.61.200(e).

[38]Article I, section 27, of the Oregon Constitution provides: "The people shall have the right to bear arms for the defence of themselves, and the State..."

right to possess arms for the defense of person and property."[39] Next, the court reasoned that switchblades were arms, and as a result, possession of a switchblade is a constitutionally protected in Oregon and the statute making such possession a crime is unconstitutional.

d. Constitutionality of Game Regulations

Alaska's regulatory scheme relating to the lawful methods of taking game is potentially at risk if the proposed amendment is adopted.[40] Since each of the game regulations infringes on the right to bear a particular type of arm, in order for the regulation to withstand constitutional scrutiny, the state would need to prove that it had a compelling state interest for adopting the regulation.

For example, under 5 AAC 92.100(a)(1), it is illegal to shoot waterfowl with a rifle or pistol. The purpose of the regulation is to make hunting waterfowl less efficient, and more

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[39] Delgado at 611.

[40] 5 AAC 92.075 (the permissible weapons for taking big game are a shotgun, a muzzle-loading rifle, or a rifle or pistol using a center-firing cartridge); 5 AAC 92.080 (it is prohibited to take game with the use or aid of a machine gun, set gun, or a shotgun larger than 10 gauge); and 5 AAC 92.100 (it is prohibited to take waterfowl, snipe and cranes with a rifle or pistol, a shotgun larger than 10 gauge, or a shotgun not plugged to a three shell capacity).

sporting.[41] However, many biologists have argued that the regulation is unnecessary as it doesn't matter how a bird is killed, it only matters how many animals are shot, and whether the appropriate bag limit was exceeded.[42] In the face of this type of expert testimony, it is not unlikely that a court would strike down 5 AAC 92.100(a)(1) as an infringement of the right to bear arms.

6. The Legislature Should Affirmatively State Its Intent

The State, through exercise of its police power, is vested with the authority to enact laws, within constitutional limits, to promote the general welfare of its citizenry. The Alaska Supreme Court examined the state's police power in light of express constitutional limitations on regulatory authority in Matthews v. Quinton.[43] In this case, the court analyzed whether a statute providing for the transportation of children to nonpublic schools at public expense was in contravention of a constitutional prohibition against the appropriation of public funds for the support of private schools. Since the statute had been on the books before the constitutional provision was adopted, the court

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[41]Telephone conversation with James Sheridan, Assistant Special Agent in Charge, Law Enforcement, Alaska Region, United States Fish and Wildlife Service.

[42]Id.

[43]362 P.2d 932, app. dism., cert. den. 82 S.Ct. 530, 368 U.S. 517, 7 L.Ed.2d 522 (Alaska 1961)

considered the effect of subsequently adopted constitutional provisions on existing statutes.

The court concluded that for a constitutional provision to operate retrospectively to validate antecedent legislation in the face of claimed unconstitutionality, "the validating constitutional provision must make some reference, however slight or inferential, to the statute intended to be validated." The statute authorizing transportation of private school pupils was declared void because the newly adopted constitutional provision did "not show by the language used, either directly or by necessary implication, that it was intended to operate retrospectively so as to validate [the statute]." Id. at 939.

Whether the statute was a valid exercise of the police power of the state was also considered in Matthews. The court noted that "the police power -- broad and comprehensive though it is -- may not be exercised in contravention of plain and unambiguous constitutional inhibitions." Although the state has "inherent and reserved police power to enact laws to promote the safety, health and general welfare of society," the court emphasized that "this power must be exercised within constitutional limits." Id. at 944.

During the Fourteenth and Fifteenth Legislatures, versions of the right to bear arms amendment contained a general statement of "legislative intent" indicating that the constitutional amendment, if adopted, "should not be construed to preclude the regulation of the manner in which arms may be borne, carried, or used." We are concerned that this indirect statement of legislative intent will not be effective to preserve the present power to reasonably regulate the possession and use of weapons.

As a general rule, a statute or constitutional provision will be interpreted according to the plain meaning of the language on its face. If the intent behind the adoption of the amendment were to later become an issue, it is the intent of the voters who adopted the measure that will be relevant, rather than the intent of the legislators who drafted it. Although last session's resolution directed the Legislative Affairs Agency to consider the stated "legislative intent" when preparing its neutral summary for the election pamphlet, the intent language would not appear on the ballot itself, and might not be contained verbatim in the election pamphlet. See art. XIII, sec. 1 of the Alaska Constitution and AS 15.58.010.

Conclusion

It is our belief that the present provision of the Alaska constitution and the traditional restraint of the legislature in

regulating firearms adequately protect the right to bear arms. However, if the legislature believes this issue should be placed before the people in the form of a constitutional amendment, that amendment should be drafted to explicitly recognize the legislature's regulatory authority with regard to arms.

Both legal principles and common sense dictate that a well-drafted statute or constitutional provision should reduce uncertainty and disputes about interpretation. Statements of "legislative intent" are not an adequate substitute for clear, unambiguous language in the proposed constitutional amendment. A more precisely drafted amendment would minimize the possibility that a criminal defendant would later be able to successfully convince a court, as has been done in other that states, that a statute, regulation, or ordinance is unconstitutional.

As alternatives to SJR4, we suggest language such as:

> The individual right to keep and bear arms shall not be denied or infringed by the state or a political subdivision of the state, <u>except that the state or a political subdivision of the state may regulate the manner in which arms may be kept, borne, or used</u>.

or

> The individual right to keep and bear arms shall not be denied or infringed by the state or a political subdivision of the state, <u>except that the exercise of this right may be regulated by law</u>.

We appreciate your consideration of our comments, and trust that we can work together to accomplish your goals in a way that does not detrimentally affect our ability to prosecute activities that we all agree should be against the law.

Respectfully submitted,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By: _____
Laurie H. Otto
Assistant Attorney General

cc: The Honorable Pat Rodey
The Honorable Peter Goll
The Honorable Max Gruenberg
The Honorable Dave Donley
Grace Berg Schaible
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FACSIMILE TRANSMISSION

DATE Nov. 29, 1989

2 PAGES INCLUDING THIS COVER PAGE.

DELIVER TO: Laurie Otto

MESSAGE: Laurie — please review the attached draft and see if I have the wording accurately as we discussed. You can fax me back any changes, corrections etc. Thanks,

Rupe

IF THERE ARE ANY PAGES MISSING, CALL (907) 789-7422

For: Laurie Otto

DRAFT: November 21, 1989

IN THE HOUSE BY THE STATE AFFAIRS COMMITTEE

CS FOR HOUSE JOINT RESOLUTION NO. 7 (State Affairs)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SESSION

Proposing an amendment to the Constitution of the State of Alaska relating to the individual right to keep and bear arms.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. Article I, sec. 19, Constitution of the State of Alaska, is amended to read:

SECTION 19. RIGHT TO KEEP AND BEAR ARMS. The individual [A WELL-REGULATED MILITIA BEING NECESSARY TO THE SECURITY OF A FREE STATE, THE] right [OF THE PEOPLE] to keep and bear arms shall not be denied or infringed by the state or a political subdivision of the state except that the exercise of this right may be reasonably regulated by law. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms.

* Sec. 2. The amendment proposed by this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

ALTERNATIVE METHODS OF RESERVING THE RIGHT OF THE LEGISLATURE TO REASONABLY REGULATE ARMS IN SJR 4

The individual right to keep and bear arms shall not be denied or infringed by the state or a political subdivision of the state,

1. ... except that the state or a political subdivision of the state may regulate the manner in which arms may be kept, borne, or used.

2. ... except that the state or a political subdivision of the state may reasonably regulate the manner in which arms may be kept, borne, or used.

3. ... except that the exercise of this right may be regulated by law.

4. ... except that the exercise of this right may be reasonably regulated by law.

5. ... except that the state or a political subdivision of the state may regulate the manner in which arms may be kept, borne, or used. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms.

6. ... except that the state or a political subdivision of the state may reasonably regulate the manner in which arms may be kept, borne, or used. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms.

7. ... except that the exercise of this right may be regulated by law. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms.

8. ... except that the exercise of this right may be reasonably regulated by law. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms.

PHONE MEMO

TO Peter

DATE 2/16 TIME 9:45 AM

FROM M Dale FloRian

AREA CODE NUMBER w: 474-7721

OF Fairbanks

EXTENSION h: 479-8164

MESSAGE

=V-Pres, AK Peace Officers

re: another state constitution (in Nebraska) has been found unconstitutional yesterday & effects AK law

SIGNED DD

PHONED ☒ CALL BACK ☒ RETURNED CALL ☐ WANTS TO SEE YOU ☐ WILL CALL AGAIN ☐ URGENT ☐ WAS IN ☐

MONARCH M5176