

ALASKA LEGISLATURE COMMITTEE FILES 1983-1984

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peal, the Supreme Court reversed, emphasizing that the defendants had merely attacked the indictment (and, therefore, the statute) on its face, without any attempt at a factual demonstration that sawed-off shotguns were the kind of weapons contemplated by the amendment. The Court followed the reasoning of those nineteenth-century courts and commentators who construed the right to arms as individual but applicable only to those weapons commonly used for militia purposes:

In the absence of any evidence tending to show that possession or use of any "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense. *Aymette v. State*, 2 Humphreys (Tenn.) 154, 158.¹⁸⁸

This holding has been widely misunderstood, most surprisingly by proponents of the individual right position. They have even gone so far as to denigrate its authority by pointing out that it was rendered on the basis of only the Government's one-sided briefing.¹⁸⁹ Additionally, critics have attacked what they suppose to be the opinion's factual basis, pointing out that shotguns were used by regular troops in World War I and Vietnam, and by guerrillas, commandos, and so on in World War II and other twentieth-century conflicts.¹⁹⁰

Equally surprising, state's right proponents have acclaimed the opinion. Ignoring the fact that its holding focuses entirely on the weapon, they have emphasized its language linking the amendment's purpose to the "militia": "With obvious purpose to assure the continuation and render possible the effectiveness of [militia] forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view."¹⁹¹ But this statement, which appears at approximately the median point of the opinion, in fact repudiates the state's right argument when read in the context of what the Court indicated "the militia" to be. The ensuing half of the opinion is given over to exhaustive citations of original and secondary sources that demonstrated to the Court that:

The signification attributed to the term Militia appears from the de-

188. 307 U.S. at 178; see also note 173 *supra*.

189. See, e.g., Caplan, *supra* note 10, at 44-48; Gardiner, *supra* note 10, at 88. Having been released by the trial court, the defendants filed no brief on appeal, but simply disappeared into the criminal milieu from which they had involuntarily surfaced.

190. See *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942); Black, *From Trenches to Squad Cars*, AM. RIFLEMAN, June 1982, at 30, 72-73.

191. 307 U.S. at 178.

bates in the [Constitutional] Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised *all males physically capable of acting in concert for the common defense* . . . [and] further, that ordinarily when called for service these men were expected to appear bearing *arms supplied by themselves* and of the kind in common use at the time.¹⁹²

Perhaps *Miller* has been so misunderstood by zealous partisans because it steers an almost perfect middle course between today's contending extremes — those who claim that the amendment guarantees nothing to individuals versus those who claim that its guarantee is unlimited. Far from upholding the state's right position, the Court clearly recognized that the defendants could claim the amendment's protection as individuals, and that, in doing so, they need not prove themselves members of some formal military unit like the National Guard.¹⁹³ At the same time the Court's focus on the weapon

192. 307 U.S. at 179 (emphasis added). The real difficulty with *Miller's* flawed militia-centric interpretation is not that it diminishes the individual right approach, but that it tends to exaggerate to absurdity the extent of the right afforded. *Miller's* concentration on militia-type weaponry has sometimes been taken as suggesting the unwelcome conclusion that private citizens have a guaranteed right to own all the mass destructive weaponry of sophisticated modern warfare, from tanks and rocket launchers to ICBMs and nuclear devices. When the amendment's other two purposes of personal self-defense and law enforcement are recognized, however, it becomes possible to conclude that the guarantee applies only to such military-type small arms as can reasonably be used also in law enforcement and civilian self defense. See notes 238-41 *infra* and accompanying text.

193. Although the opinion contains no such language, its flawed militia-centric rationale plausibly leads to the conclusion that the amendment right is limited to the military-aged male population, which makes up the constitutional militia. Such a limitation ill accords with the amendment's intention and text, however. See notes 53-54 *supra*. Nor does it follow *Miller's* axis of limitation, which revolves around the question of what kind of arms are by right protected, rather than what individuals enjoy that right. The court probably eschewed any discussion of the latter question as unnecessary because the defendants, being adult male citizens, were presumptively members of the constitutional militia.

If *Miller* is confined strictly to its facts, it goes no further than implicitly recognizing that the home possession of firearms by one who is presumptively a member of the constitutional militia preserves the efficiency thereof under modern conditions. Such a view follows from current military thinking that considers militiamen as a resource only for times of dire necessity, e.g., keeping order when both the Army and the federalized National Guard have been committed overseas and/or in the aftermath of an atomic attack. Given that the very circumstances which require the calling up of militiamen today may also preclude their drawing arms from centralized armories, their home possession of arms facilitates militia service today no less than in the 18th century. Moreover, the home possession of firearms by potential militia members would presumably facilitate familiarity with at least those weapons. To be able to call upon a cadre of people already familiar with weapons (particularly those weapons they would actually be using) would seem particularly important for the militia today, in the absence of a compulsory training requirement like those that existed in the 18th century. See text at note 49 *supra*.

Significantly, home and/or individual possession of firearms is the rule today in nations like Israel and Switzerland, which continue to rely substantially upon the militia concept. In Switzerland, every man of military age is required to keep a fully automatic assault rifle (or, if an officer, a pistol) in his home, along with ammunition, and the shooting sports are strongly encouraged for the entire population. C. GREENWOOD, *supra* note 44, at 4; J. STINBURG, *WHY SWITZERLAND?* ch. 6 (1976). In Israel, voluntary ownership of firearms is encouraged for

suggests rational limitations on the kinds of arms that the amendment guarantees to individuals. Such arms must be both of the kind in "common use" at the present time and provably "part of the ordinary military equipment."¹⁹⁴ Those who have accused the Court of factual inaccuracy have simply misunderstood its legal conclusion as a finding of fact. *Miller* does not characterize shotguns (or even sawed-off shotguns) as outside the amendment's protection *per se*. *Miller* rests on the obvious proposition that it is not judicially noticeable, in the absence of factual proof, that sawed-off shotguns are "in common use" and form "part of the ordinary military equipment."¹⁹⁵ The *Miller* Court therefore returned the case to the trial court, where the defendants could have attempted the unenviable feat of demonstrating that sawed-off shotguns fell within the limiting criteria that *Miller* enunciated as defining the weaponry protected by the amendment.¹⁹⁶

Miller is the Supreme Court's first and last extended treatment of the second amendment. This may seem surprising in light of the amount of legislation which the previous twenty-five years had seen on this controversial subject. But federal law has never gone beyond denying firearms to criminals, the mentally unstable and juveniles. Nor, until recently, has any state or local jurisdiction attempted to deny responsible adults the possession of firearms for lawful purposes. So the cases have involved only various provisions of the federal Gun Control Act of 1968. Challenges to these under the amendment have been summarily rejected by lower federal courts. Typical, and often repeated, are observations to the effect that "there is no showing that prohibiting possession of firearms by felons," the mentally unsound, children, or narcotics addicts "obstructs the maintenance of a 'well regulated militia.'"¹⁹⁷

In 1981, Morton Grove, Illinois, banned the civilian possession of

the entire population while the government has donated firearms to kibbutzim and other farming villages in areas likely to be subject to terrorist or military attack. Reservists are encouraged to carry their submachine guns or assault rifles with them at all times, particularly when traveling on the public streets. See Bruce-Briggs, *supra* note 9, at 56-57; *Order by Israel Puts Even More Guns on Street*, L.A. Times July 5, 1978, at 1, col. 3.

194. On the limitations of the individual right, see notes 235-71 *infra* and accompanying text.

195. See text accompanying note 187 *supra*. As to standards for judicial notice, see generally C. Mc CORMICK, HANDBOOK OF THE LAW OF EVIDENCE 687; 9 J. WIGMORE, EVIDENCE §§ 2565-83 (1940).

196. On the applicability of these criteria to handguns, see notes 239-40 *infra* and accompanying text.

197. *United States v. Synnes*, 438 F.2d 764, 772 (8th Cir. 1971), *vacated on other grounds*, 404 U.S. 1009 (1972); see also *United States v. Warin*, 530 F.2d 103, 306 (6th Cir.), *cert. denied*, 426 U.S. 948 (1976).

handguns,¹⁹⁸ thus becoming the only American jurisdiction to have attempted the confiscation of a common form of civilian armament since the Civil War.¹⁹⁹ The district court rejected a second amendment challenge to that ordinance without endorsing or accepting either the state's right or the individual right interpretation.²⁰⁰ It felt bound by *Presser* and other nineteenth-century holdings that the amendment was inapplicable against the states. Many state courts have also endorsed this proposition in rejecting second amendment challenges.²⁰¹

A few state or federal cases have gone beyond upholding gun laws on these limited grounds, or those suggested in *Miller*, to embrace the exclusively state's right viewpoint.²⁰² At least one of these cases, holding that the amendment provides for no individual right, expressly divorces itself from *Miller*.²⁰³ But a number of other such cases actually cite *Miller* as their authority.²⁰⁴ This is startling in light of the inconsistency between their usage of "militia" as a particular military force and *Miller's* exhaustive exposition of the eighteenth-century definition of "militia" as comprising "all [militarily capable] males . . . bearing arms supplied by themselves."²⁰⁵

198. Morton Grove ordinance 81-11. In 1982 the cities of San Francisco and Berkeley, California, followed suit, but their ordinances were quickly invalidated on state statutory grounds. *Doe v. City and County of San Francisco*, 136 Cal. App. 3d 509, 186 Cal. Rptr. 380 (1982).

199. In 1861 the secessionist legislature of Tennessee ordered the confiscation of all firearms. This was intended both to disarm the state's substantial Unionist minority and to gather arms for the Confederates. See Moon, *A Brief Historical Note on Gun Control in Tennessee*, 82 CASE & COM. 38 (1977). The enactment was declared unconstitutional shortly after the war's end. *Smith v. Ishenhour*, 43 Tenn. (3 Cold.) 214 (1856). Detailed discussions of the history of American firearms legislation, both state and federal, appear in L. KENNETH & J. ANDERSON, *supra* note 23, ch. 8, and Kates, *Toward a History of Handgun Prohibition in the United States*, in *RESTRICTING HANDGUNS*, *supra* note 6.

200. See *Quilici v. Morton Grove*, 532 F. Supp. 1169 (N.D. Ill. 1981), *aff'd*, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 52 U.S.L.W. 3266 (U.S. Oct. 3, 1983) (No. 82-1822).

201. *E.g.*, *Galvan v. Superior Court*, 70 Cal. 2d 851, 452 P.2d 930, 76 Cal. Rptr. 642 (1969); *State v. Ainos*, 343 So. 2d 166 (La. 1977); *Hardison v. State*, 84 Nev. 125, 437 P.2d 868 (1968); *Harris v. State*, 83 Nev. 404, 52 P.2d 929 (1967); *Burson v. Sills*, 53 N.J. 86, 248 A.2d 426 (1967), *appeal dismissed*, 34 U.S. 812 (1969).

202. *E.g.*, *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977); *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971); *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942); *United States v. Tot*, 131 F.2d 261, 266 (3d Cir. 1942), *re'vd on other grounds*, 319 U.S. 463 (1943).

203. *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942).

204. See *Quilici v. Morton Grove*, 695 F.2d 261, 270 (7th Cir. 1982), *cert. denied*, 52 U.S.L.W. 3266 (U.S. Oct. 3, 1983) (No. 82-1822); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977); *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971).

205. 307 U.S. at 179; see text accompanying notes 35-56 & 191-93 *supra*.

III. ON THE QUESTION OF INCORPORATION AGAINST THE STATES

The discussion thus far has focused almost entirely upon the second amendment as a restraint upon federal governmental activity. The cases just mentioned suggest that state or municipal regulation is not within the scope of the amendment. As a practical matter, however, although the kind of prohibitory-confiscatory legislation that the amendment forbids,²⁰⁶ has been proposed at the federal level, it has never come close to enactment there. Nor does this seem likely in the foreseeable future.²⁰⁷ From time to time, a few states have enacted legislation which could conceivably be subject to second amendment objection,²⁰⁸ but in recent years legislative activity raising questions central to the second amendment has been limited to the municipal level. The most drastic example is the complete prohibition on home possession of handguns recently enacted by Morton Grove, Illinois.²⁰⁹ This legislation clearly raises the question of whether the amendment should be considered incorporated against state and local governments through the due process clause of the fourteenth amendment.

The numerous cases citing *Presser v. Illinois* and *Miller v. Texas* for the proposition that the amendment is not incorporated²¹⁰ cannot survive rigorous analysis. The *Presser/Miller* view derives from a concept of federalism (*i.e.*, that civil liberties are guaranteed only against the federal government and that their infringement by the states is not the business of the federal judiciary) that has long been

206. See notes 235-41 *infra* and accompanying text.

207. H.R. 40, 97th Cong., 1st Sess., 127 CONG. REC. 1132 (daily ed. Jan. 5, 1981), introduced by Representatives Bingham and Yates, would have completely prohibited the home possession of handguns by civilians. It was apparently never introduced into the Senate and was not expected to pass out of committee even in the House of Representatives. Back in 1972 a more modest bill, which would have prohibited new sales of nonsporting handguns (but not confiscated those already in circulation), passed the Senate, but failed to pass the House. This bill represents the high water mark for prohibitionist legislation.

208. Compare 1886-1887 Ala. Acts No. 4 § 17; 1881 Ark. Acts ch. 96 § 3; 1901 S.C. Acts No. 435; 1879 Tenn. Pub. Acts ch. 96 (banning the sale of "Saturday night special"-type pistols), with 1923 Ark. Acts No. 430, § 1; 1933-34 Hawaii Sess. Laws ch. 26, § 3; 1925 Mich. Pub. Acts No. 313; 1921 Mo. Laws § 69,691 § 3; 1911 N.Y. Laws ch. 195; 1919 N.C. Sess. Laws ch. 197, § 1; 1913 Or. Laws ch. 256, § 1 (requiring permits for the sale and/or ownership of pistols). Most of these laws appear to have been at least partially motivated by desire to deny access to firearms to racial or ethnic minorities and political dissenters. Whether in repudiation of these purposes or for other reasons, the Oregon, Arkansas, Tennessee and Alabama laws have been repealed. See Katz, *supra* note 11, at 14-22. Minnesota and Illinois have recently passed laws aimed at prohibiting the sale of "Saturday Night specials" variously defined. See ILL. ANN. STAT. ch. 38, § 24-3(g) (Smith-Hurd 1977); MINN. STAT. ANN. § 624-716 (West Supp. 1983). For a discussion of this legislation and its validity within the second amendment, see note 240 *infra* and accompanying text.

209. See note 198 *supra*.

210. See note 201 *supra*.

discredited.²¹¹ Moreover, strictly speaking, the suggestion that *Presser v. Illinois* and *Miller v. Texas* reject *due process* incorporation misreads the actual holdings in those cases. What they literally held was only that the Bill of Rights did not apply against the states *ab initio* and was not incorporated against them by the *privileges and immunities* clause of the fourteenth amendment. Presumably the attitude toward federalism which led the nineteenth-century Court to reject privileges and immunities incorporation would equally have led it to reject *due process* incorporation, if anyone had then imagined it.²¹² But to apply the *Presser/Miller* reasoning to negate *due process* incorporation of the second amendment today is to extend those cases beyond their holdings. However logical that extension might have seemed in 1886, it is absurd today when the result would be to contradict the entire doctrinal basis of modern incorporation of the Bill of Rights against state and local government.²¹³

Absent the misleading spectre of *Presser* and *Miller*, the weakness of the argument against application of the second amendment

211. Compare *Miller v. Texas*, 157 U.S. 535, 538 (1894) ("[I]t is well-settled that the restrictions of the [second and fourth] amendments operate only on the Federal power and have no reference whatever to proceedings in state courts."); *Presser v. Illinois*, 116 U.S. 252, 265 (1886) ("[T]he [second] amendment is a limitation only upon . . . the National government, and not upon . . . the States."); with *Duncan v. Louisiana*, 391 U.S. 145, 147-50 (1968) ("[M]any of the rights guaranteed by the first eight amendments . . . have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment."); *Mapp v. Ohio* 367 U.S. 643, 650-51 (1961) (holding the fourth amendment search and seizure protections applicable to the states through the fourteenth amendment); *Gillow v. New York*, 268 U.S. 652, 666 (1925) (holding the first amendment freedom of speech binding on the state through the fourteenth amendment); *Twining v. New Jersey*, 211 U.S. 78, 99 (1908) ("it is possible that some of the personal rights safeguarded by the first eight Amendments against the National action may also be safeguarded against state action")

212. *Due process* incorporation's first appearance in a Supreme Court case appears to be as a dictum in *Twining v. New Jersey*, 211 U.S. 78, 99 (1908). See note 211 *supra*.

213. *Presser* does, however, contain a far-reaching, but little noted, dictum suggesting that U.S. CONST. art. I, § 8, cl. 15 and 16 proscribes state or local wholesale arms prohibitions or confiscation. In the *Presser* court's view, cl. 15 envisions an armed citizenry which Congress is empowered to call forth whenever necessary to execute the laws, suppress rebellions or repel invasion. A state would directly infringe that congressional prerogative if it prohibits firearms possession by the constitutional militia, i.e., the military-age male populace. As the court stated:

It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well of the States, and, in view of this prerogative of the general government, as well as of its general powers, the States cannot, even laying the [second amendment] out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security and disable the people from performing their duty to the general government

116 U.S. at 265. Authorities indicating the continued importance of an armed citizenry for militia duty are reviewed at notes 283-84 *infra*. Militia considerations might not, however, preclude legislation against the possession, ownership, sale or manufacture of "Saturday Night Special"-type firearms that are unfit for military or police duty. See note 240 *infra* and accompanying text.

to the states is evident. In deciding whether a provision of the Bill of Rights is so fundamental as to justify incorporation, the Supreme Court has traditionally employed two criteria: The extent to which the right is rooted in our Anglo-American common law heritage, as well as its Greek and Roman antecedents;²¹⁴ and how highly the Founders themselves valued the right.²¹⁵ The great esteem in which the Founders held the right to arms has already been exhaustively detailed. Familiar to them in their own colonial law,²¹⁶ derived from the earliest known English legal codes,²¹⁷ the right to arms was in their day hailed as not only fundamental to their English legal and political heritage, but implicit in the (to them) premier and seminal natural law right of self-defense.²¹⁸ Likewise the right to keep personal arms was so fundamental a part of Graeco-Roman law that every commentator known to the Founders proclaimed it the basis of republican institutions and popular liberty.²¹⁹

Above and beyond the general criteria which normally govern incorporation is the question of specific legislative intent. There is ample evidence that the authors of the fourteenth amendment actually intended to protect the right to arms from state or local interference. The quantum of that evidence considerably exceeds the evidence that they intended to protect any of the rights which have heretofore received incorporation. The fourteenth amendment was enacted at a time when the Republicans were still utterly dominant in Congress by reason of their continuing exclusion of the delegations of the southern states. Section 1 goes virtually unmentioned in the debate on the fourteenth amendment — beyond the statement of Representative Thaddeus Stevens that it was intended to constitutionalize the underlying principles of the immediately preceding 1866 Civil Rights Act,²²⁰ thereby placing them beyond repeal upon

214. See, e.g., *Benton v. Maryland*, 395 U.S. 784, 795 (1969) (protection of double jeopardy held fundamental), *Duncan v. Louisiana*, 391 U.S. 145, 151-54 (1968) (right to jury trial fundamental); *Klopfer v. North Carolina*, 386 U.S. 213, 225-26 (1967) (right to speedy trial fundamental); *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963) (right to counsel fundamental).

215. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 152-53 (1968); *Klopfer v. North Carolina*, 386 U.S. 213, 225 (1967).

216. See notes 46-48, 156 *supra* and accompanying text.

217. Professor Whisker finds references to, or recognition of, the right in pre-Norman law, back to the period before the reign of Alfred the Great (871-899) when England was divided into various kingdoms. See J. WHISKER, *OUR VANISHING FREEDOM: THE RIGHT TO KEEP AND BEAR ARMS* 3 (1973) (citing the 602 Code of Ethelbert of Kent and a circa 650 law of Eadric of Kent). The Laws of Canute (reigned 1016-1035) imposed a fine on anyone who illegally disabled a subject.

218. See notes 109, 111 & 153 *supra* and accompanying text.

219. See text at notes 114-28 *supra*.

220. Act of Apr. 9, 1866, ch. 31, 14 Stat. 27.

the southern delegations' return.²²¹ It is therefore to the 1866 Act that we must turn to understand the purposes of section one of the fourteenth amendment.

The principle underlying the 1866 Civil Rights Act was nothing less than the repudiation of the whole juridical basis of southern slavery. Under the legal theory of slavery, blacks were not human beings, but intelligent livestock, incapable of possessing property or of having a right to defend it or themselves.²²² Pursuant to this theory, *Dred Scott* and various preceding southern court decisions had declared blacks incapable of citizenship and upheld legislation against their possessing arms.²²³ The 1866 Act in effect overruled

221. CONG. GLOBE, 39th Cong., 1st Sess., 2459 (1866). See generally Frank & Munro, *The Original Understanding of Equal Protection of the Laws*, 50 COLUM. L. REV. 131, 141 (1956). Although the drafting of the amendment was a joint effort by a number of Republicans, of whom Stevens was the most prominent, the assignment of its introduction to Rep. Bingham, (R-Ohio) further demonstrates its relationship to the 1866 Civil Rights Act, which had passed a few weeks earlier. Bingham had opposed that Act, not out of any fundamental disagreement with its provisions, but because he believed them to exceed federal constitutional authority under the thirteenth amendment. By constitutionalizing the basic principles of the 1866 Act, the fourteenth amendment removed the danger, of which the Republicans were highly cognizant after *Dred Scott v. Sandford*, 60 U.S. (19 How.) 690 (1856), that the Act might be overturned by the Supreme Court. Fairsman, *Doe: the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949). Indeed, in advocating the fourteenth amendment's enactment, one prominent Republican complained that southern courts were declaring the 1866 Act unconstitutional — and enforcing laws banning guns for freedmen. CONG. GLOBE, 39th Cong., 1st Sess. 3210 (1866) (statement of George W. Julian).

222. Kates, *Abolition, Deportation, Integration: Attitudes Toward Slavery in the Early Republic*, 53 J. NEGRO HIST. 33, 37 & n.25 (1968):

The majesty and consistency of [ante-bellum] American law uniformly regarded slaves as property, incapable of possessing a cognizable interest in personal security. Within this theory the rape or murder of a slave was no more than a crime against property—and no crime at all if committed by the master.

By constitutional, statutory, decisional, administrative and customary law the position of the slave was fixed. He could not possess arms or liquor, make contracts, own land or personality, travel freely, give testimony or serve as a juror or in any other public office, learn to read or write, act independently as a religious leader, intermarry with whites, compete in the free labor market—above all, he had no political rights. The prohibitions of arms, liquor and travel were enforced by a more or less well organized system of special and general searches and night patrols of the *posse comitatus*. Justice to the slave was, within the law or within its enforcement, summarily meted out by masters, possemen and judicial officials alike. As Mr. Chief Justice Taney succinctly expressed it: "[the Negro slave had] no rights which the white man was bound to respect." *Scott v. Sandford*, 60 U.S. (19 How.) 690, 701 (1856) (footnote omitted).

223. See notes 176-78 *supra* and accompanying text. Conversely, abolitionist legal treatises had offered as plain evidence of the unconstitutionality of slavery the fact that its legal theory abridged the second amendment right of blacks to keep arms. See, e.g., L. SPOONER, *THE UNCONSTITUTIONALITY OF SLAVERY* 98 (1860); J. TIFFANY, *TREATISE ON THE UNCONSTITUTIONALITY OF SLAVERY* 117-18 (1849) (reprinted 1969). Since these commentaries provided the legal underpinnings for the constitutional thought of the Radical (and moderate) Republicans of 1866, they are of particular significance for understanding the scope of the fourteenth amendment. See J. TEN BROEK, *EQUAL UNDER LAW* 125 (1965) (originally published as *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT*); Graham, *The Early Antislavery Background of the Fourteenth Amendment*, 1950 WIS. L. REV. 479.

*Dred Scott*²²⁴ as an adjunct to its general purpose of immutably conferring upon blacks legal standing as free citizens.²²⁵ In so doing it implicitly conferred upon them the right of arms under the second amendment. As we have seen, central to the idea of freedom and citizenship in Anglo-American law and philosophy were the rights to personal security and property, to self defense — and to the possession of arms for those purposes.²²⁶

Moreover, it appears that proscribing anti-gun laws was expressly contemplated by the authors of the 1866 Act and fourteenth amendment. The *betes noir* of the Congress of 1866 were the Black Codes that had immediately spewed from the all-white southern legislatures after Appomattox. These Codes sought to reduce the new freedman to peonage, perpetuating against him all the legal disabilities which had previously characterized his status as a slave. As the *Special Report of the Anti-Slavery Conference of 1867* noted, among the most obnoxious provisions of these Codes were those by which blacks were "forbidden to own or bear firearms," as they had been under slavery, "and thus were rendered defenseless against assaults" by their former masters or other whites.²²⁷ Congressman after congressman, including the Senate sponsors of both the 1866 Act and the fourteenth amendment, expressed their outrage at the denial of the freedman's right to arms.²²⁸ In summarizing what the 1866 Act would accomplish, its House and Senate sponsors cited Blackstone's classification of the "absolute rights of individuals", stating that these were the essential human rights being conveyed.²²⁹ Finally, myriad statements and an official committee report in relation to the anti-KKK legislation enacted in 1871²³⁰ shows an unchallenged as-

224. *Dred Scott* is overruled by § 1 of the 1866 Act, *supra* note 220, which declares "that all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are . . . citizens of the United States." This clause was adopted later as the first sentence of the fourteenth amendment.

225. Stating that its purpose was to guarantee the former slaves the rights inherent in their new status, both the House and the Senate sponsors of the 1866 Act quoted Chancellor Kent's listing of the rights of a free person: "the right of personal security, the right of personal liberty and the right to acquire and enjoy property." CONG. GLOBE, 39th Cong., 1st Sess. 1118 & 1757 (1866) (statements of Rep. Wilson and Sen. Trumbull) (quoting 2 J. KENT, COMMENTARIES 1 (New York 1827)).

226. See notes 109-11 & 117-18 *supra* and accompanying text.

227. Reprinted in H. HYMAN, THE RADICAL REPUBLICANS AND RECONSTRUCTION 217 (1967). See generally E. COULTER, THE SOUTH DURING RECONSTRUCTION 1865-1877, at 40 n 43 (1947); W. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 167, 172, 223 (1962).

228. See Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 GEO. MASON U. L. REV. 1, 21-25 (1981).

229. See CONG. GLOBE, *supra* note 225, at 1115-18; text accompanying note 153 *supra*.

230. Legislation designed to enforce the fourteenth amendment, and in particular to suppress the KKK was introduced in 1871. CONGRESSIONAL GLOBE, 42d Cong., 1st Sess. 174

sumption by a Congress largely identical in personnel to that of 1866 that the fourteenth amendment they had enacted five years earlier encompassed second amendment rights.²³¹

In sum, the only viable justification for denying incorporation of the second amendment against the states today is the exclusively state's right view that the amendment does not confer an individual right. If the amendment only guaranteed a right of the states it would be self contradictory to incorporate it into the fourteenth amendment.²³² But as this state's right interpretation of the amendment is itself not viable historically, it therefore follows that the second amendment should be held applicable to the states through the due process clause of the fourteenth.

IV. TOWARD A DEFINITION OF SECOND AMENDMENT RIGHTS AND THE PROPER SCOPE OF GUN CONTROL

Recognizing that the amendment guarantees an individual right applicable against both federal and state governments by no means forecloses all gun control options. Gun control advocates must, however, come to grips with the limitations imposed by the amendment — just as advocates of increasing police powers to deal with crime must come to grips with the limitations imposed by the fourth, fifth and sixth amendments. As with those amendments, determining what limitations the second imposes will require detailed examination of its colonial and common law antecedents.²³³ The phrase "the right of the people to keep and bear arms," so opaque to us, was apparently self-defining to the Founders, who used it baldly and

(1871) (Introduced as "an act to protect loyal and peaceable citizens in the South . . .", H.R. No. 189). Passed as the Enforcement Act, 17 Stat. 13 (1871). Section 1 of the legislation survives as 42 U.S.C. § 1983 (1976). See Halbrook, *supra* note 228, at 25 n.141, 27 n.146 and accompanying text.

231. See Halbrook, *supra* note 228, at 25-28. For the relationship between the two Acts and the personnel of the two Congresses which enacted them, see Kates, *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson v. Ray Reconsidered*, 65 NW. U. L. REV. 615, 621-23 (1970).

232. See, e.g., J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 455 (2d ed. 1983), *see also* note 171 *supra*.

233. Cf. *Payton v. New York*, 445 U.S. 573, 593-96 (1980) (interpreting fourth amendment by reference to a combination of materials including Coke's *Institutes*, pre-colonial case law, and American colonial commentary and practice); *Benton v. Maryland*, 358 U.S. 784, 795 (1969) (guarantee against double jeopardy construed by reference to Blackstone both as an authority on pre-colonial English practice and as the guide followed by the colonists in establishing American legal principles); *Duncan v. Louisiana*, 391 U.S. 145, 151-52 (1968) (right to jury trial defined by reference to Blackstone, as well as to independent evidence of American colonial and preceding English legal practice); *Klopfer v. North Carolina*, 386 U.S. 213, 223-25 (1967) (right to speedy trial defined by reference to Coke and English legal practice back to the Magna Carta).

... attempt to define it. Presumably they felt that clarification unnecessary because they were constitutionalizing a pre-existing right to arms whose parameters they knew under their colonial law and practice as it had developed out of the early English common law.²³⁴

The remainder of this Article is devoted to sketching out some of the amendment's implications in relation to a few of the more commonly encountered "gun control" proposals. The intention is not to resolve definitively the constitutionality of any of these, much less of the entire gamut of possible control options, but only to outline some relevant lines of inquiry.

A. *Limitations on the Right of the General Citizenry To "Keep" Weapons*

The preceding sections of this Article demonstrate that, in general, the second amendment guarantees individuals a right to "keep" weapons in the home for self defense.²³⁵ Several limitations on this

234. This is not to suggest that the meaning will be as readily understandable to us or as easily applied, particularly as to control proposals or options that bear little resemblance to those with which the Founders were familiar. Indeed, it will not be easy to determine even what control options were familiar to them outside of those commonly embraced by colonial law, see note 156 *supra*, the early common law principles set out by English commentators, see note 153 *supra*, and the absolute prohibition of the 1671 Game Act and the other Stuart arms confiscation devices, see notes 135-39 *supra* and accompanying text. It is difficult, if not impossible to determine precisely what knowledge the Founders had of English arms controls contemporary to their own time. In general, Americans seem to have believed the contemporary English law (or practice) far more restrictive than their colonial law or the original common law and Madison and Tucker found the exception-riddled English Bill of Rights guarantee insufficient. See notes 144 & 155 *supra*. In view of these real or perceived differences, the amendment cannot be slavishly construed with reference to contemporary English law. As with any constitutional guarantee whose "historic roots are in English history," it nevertheless "must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government rather than the English . . ." *United States v. Brewster*, 408 U.S. 501, 508 (1972). On the debate over the relevance of original intent in determining constitutional rights, see note 28 *supra*.

235. See notes 53-64 & 192-95 *supra* and accompanying text. G. NEWTON & F. ZIMRING, *supra* note 13, at 255, suggests that the 1671 Game Act's prohibition of firearms ownership to all but the high nobility demonstrates that the common law right to *arms* did not apply to *firearms*. By the same token, reference might be made to a series of statutes of Henry VIII which prohibited both gun and crossbow ownership by commoners. See REPORT OF THE SUBCOMMITTEE ON THE CONSTITUTION, *supra* note 19, at 12 nn.9-12. Incredible as it may seem, the primary rationale for these Henrician prohibitions (explicitly avowed in all five statutes) was that crossbow and gun possession was distracting Englishmen from their legally required ownership of, and arduous regular practice with, the long bow, which was still thought of as vitally necessary to English military defense. A secondary purpose (several times avowed) was that the "king's dere" were being "distrayd" by crossbow or gun-armed poachers. A tertiary concern (mentioned in only one of the five enactments) was to prevent the misuse of these weapons in crime. *Id.* at 1-2.

It is difficult to see any of this Henrician legislation playing an affirmative part in the colonial right-to-arms tradition upon which the amendment is based. In all probability the Founders were entirely ignorant that the Henrician legislation had ever existed. The anachronism of its principal purpose having become evident by the latter part of Henry's reign.

right have already been suggested, however. First and foremost are those implicit in *United States v. Miller*, suggesting that the amendment protects only such arms as are (1) "of the kind in common use" among law-abiding people and (2) provably "part of the ordinary military equipment" today.²³⁶ The analysis presented throughout this Article indicates that the "ordinary military equipment" criterion is infected by *Miller's* conceptually flawed concentration on the amendment's militia purpose, to the exclusion of its other objectives. Decisions recognizing that concerns for individual self-protection and for law enforcement also underlie right to arms guarantees involve at once greater historical fidelity and more rigorous limitation upon the kinds of arms protected. These decisions suggest that only such arms as have utility for *all three* purposes and are lineally descended from the kinds of arms the Founders knew fall within the amendment's guarantee.²³⁷ Reformulating *Miller's* dual test in this way produces a triple test that anyone claiming the amendment's protection must satisfy as to the particular weapon he owns. That weapon must provably be (1) "of the kind in common use" among law-abiding people today; (2) useful and appropriate not just for military purposes, but also for law enforcement and individual self-defense, and (3) lineally descended from the kinds of weaponry known to the Founders.

This triple test resolves the *ad absurdum* and *ad horribilus* results (to which *Miller's* sketchy and flawed militia-centric discussion greatly contributed) sometimes viewed as flowing from an individual right interpretation of the amendment.²³⁸ Handguns, for example,

repealed the legislation by proclamation — more than 65 years before the settlement of the American colonies and over 200 before Madison's birth. *Id.* Doubtless the Founders were familiar with the 1671 Act since its repudiation had been one of the purposes of the arms guarantee in the English Bill of Rights. But the only relevance that execrated Act had to the Founders' thought was as a model of what the second amendment was intended to foreclose. See notes 137-51 *supra* and accompanying text. Moreover, legally speaking, neither the Henrician legislation nor the 1671 Game Act could have formed any part of the colonial law on arms. They were excluded by the inapplicability principle as they were clearly not suited to colonial conditions. See note 155 *supra*. Such legislation was wholly inconsistent with the arms policy upon which both Britain and the Colonies had operated from the colonies' inception. This policy, see notes 46-48 *supra* and accompanying text, called for the colonists to arm themselves for self defense rather than burdening or depending upon the remote military resources of the mother country. The weapons with which they were to be armed expressly included "pistols." Yet these would plainly have been forbidden had the Henrician legislation been considered applicable. See the colonial statutes cited at notes 46-48 *supra*.

236. See notes 188, 192-96 *supra* and accompanying text.

237. See *People v. Brown*, 253 Mich. 537, 541, 235 N.W. 245, 246-47 (1931); see also *State v. Kessler*, 289 Or. 359, 364-66, 614 P.2d 94, 98-100 (1980); *State v. Duke*, 42 Tex. 455, 458 (1875) (construing state constitutions).

238. See, e.g., *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942) (arguing that, since any and all weapons have proved useful in modern (particularly guerrilla) warfare, *Miller's*

clearly fall within the amendment's protection. That handguns are *per se* "in common use" among law-abiding people and combine utility for civilian, police and military activities is not only provable but judicially noticeable.²³⁹ On the other hand, such a factual demonstration would be difficult as to at least some of the weapons commonly denominated "Saturday Night Specials."²⁴⁰ Legislation selectively prohibiting them might, therefore, be consistent with the amendment. Gangster weapons like brass knuckles, blackjacks, sandbags, switchblade knives and sawed-off shotguns unquestionably can be prohibited since they fail to meet both the "common use" and tripartite appropriateness branches of the test. The possession of

militia-centric rationale provides no viable limit on the kinds of arms guaranteed by the amendment); Royko, *Machine Guns Don't Kill, People Kill*, Chi. Sun Times, Dec. 19, 1981, at 2, col. 1; cf. *United States v. Warin*, 530 F.2d 103 (6th Cir.) (reasoning that the amendment does not guarantee an individual right to possess machine guns because, if it did, there would be no limit to the kinds of weaponry embraced in the right), *cert. denied*, 426 U.S. 948 (1976); J. WHISKER, *supra* note 217, at 112-13 (arguing that since bazookas, cannon, and the like have never been used by criminals or terrorists in this country, and since such weapons are generally too heavy, bulky and expensive to operate for criminals or terrorists, government should not deny the law-abiding citizen's "right" to own, for instance, "a 20 mm. recoilless rifle simply for his own pleasure and perhaps to shoot ten times a year in a deserted part of the country").

239. As to the commonality of the handgun, exclusive of militarily-owned weapons, the American gun stock was estimated in 1981 as including not less than 54 million handguns. Kates, *supra* note 17, at n.2 and accompanying text (unpaginated manuscript). In general, a broad range of large-caliber, high-quality handguns combine suitability for military, law enforcement and civilian self-defense uses. Indeed, the vast majority of such weapons commonly sold to civilians in the United States for self-defense were specifically developed for the military and/or police market (or are the lineal descendants of models that were so developed). See, e.g., A. BRISTOW, *THE SEARCH FOR AN EFFECTIVE POLICE HANDGUN* (1971); M. JOSSERAND & J. STEVENSON, *PISTOLS, REVOLVERS AND AMMUNITION*, ch. 7 (1967); W. SMITH, *SMALL ARMS OF THE WORLD*, chs. 10-12 (J. Smith 9th ed. 1960). The military/police origin of these weapons is often evidenced by their current designations: Smith and Wesson model 10 ("Military and Police"), and models 36, 37 and 60 ("Chiefs Special" — regular, airweight and stainless), Colt "Government Model" (.45 ACP), "Lawman," and "Trooper" (.357 magnum), "Official Police," "Police Positive," "Detective Special," and "Agent" (.38 special). The origins and designations of imported handguns are similar: Walther PP and PPK (the initials stand for German police organizations), the standard weapon of the German Luftwaffe during World War II, Star "Guardia Civil", and Webley R.I.C. ("Royal Irish Constabulary"). Even those handguns which are not specifically designed with military and/or police use in mind are designed, manufactured and operate in manners closely analogous, or identical, to those used by the police or military forces of various nations. See, e.g., *id.* at 58-93, 159-92. Indeed, a substantial proportion of the civilian gun stock consists of former military weapons, captured in warfare or kept by veterans as souvenirs. The Comptroller General has estimated that 8.8 million "war trophies" returned from World War II alone. GOVERNMENT ACCOUNTING OFFICE, *HANDGUN CONTROL: EFFECTIVENESS AND COST* 17-18 (1978).

240. "Saturday Night Special" is the derisive name for a more or less distinct subspecies of handgun, identified primarily by inexpensiveness, small size and low quality of manufacture and metallurgy. See McClain, "Saturday Night Special" Gun Regulation: A Feasible Policy Option?, in *FIREARMS & VIOLENCE*, *supra* note 10. Twentieth-century countries have rarely if ever adopted as standard handguns for military and/or police purposes those of less than .32 caliber, the weapons they standardize tend to be relatively large and heavy and very well made. See A. BRISTOW, *supra* note 239; I. HOGG & J. WEEKS, *MILITARY SMALL ARMS OF THE 20TH CENTURY* (4th ed. 1981); J. OWEN, *BRASSEY'S INFANTRY WEAPONS OF THE WORLD, 1950-1975*, W. SMITH, *supra* note 239.

billy clubs is clearly protected, but mace or similar chemical spray weapons would not be unless they can be shown to be lineally descended from some form of weapon known to the Founders. Likewise, the amendment does not protect the possession of fully automatic weapons, grenades, rocket launchers, flame throwers, artillery pieces, tanks, nuclear devices, and so on. Although such sophisticated devices of modern warfare do have military utility, they are not also useful for law enforcement or for self-protection, nor are they commonly possessed by law-abiding individuals. Moreover, many of them may not be lineally descended from the kinds of weapons known to the Founders.

In addition to the tripartite test, two further limiting principles would tend to exclude the sophisticated military technology of mass destruction — or, indeed, anything beyond ordinary small arms — from the amendment's protection. First, since the text refers to arms that the individual can "keep *and* bear," weapons too heavy or bulky for the ordinary person to carry are apparently not contemplated. Second, according to Blackstone and Hawkins, the common-law right did not extend to "dangerous or unusual weapons" whose mere possession or exhibition "are apt to terrify the people."²⁴¹ Naturally, it would terrify the citizenry for unauthorized individuals to possess weapons that could not realistically be used even in self-defense without endangering innocent people in adjacent areas or buildings.

B. *Laws Prohibiting the Urban Possession of Rifles, Shotguns and Highly Penetrative Handgun Bullets*

This last limiting principle might also allow legislation against keeping rifles and shotguns loaded for defense, at least in urban areas. Although it appears that most people who keep firearms for self-defense today depend upon handguns, it is unfortunately the case that some urbanites continue to rely on long guns.²⁴² While a rifle or shotgun is clearly more effective than a handgun if the sole consideration is instantly killing a burglar,²⁴³ the various potential

241. 4 W. BLACKSTONE, COMMENTARIES *149; 1 W. HAWKINS, *supra* note 153, at 136. Blackstone was discussing a statute that properly made the carrying of such weapons a criminal breach of the peace. Similarly, Hawkins approved the criminalization of "affray," an offense that included the display of terrifying weapons.

242. See McClain, *Firearms Ownership, Gun Control Attitudes and Neighborhood Environment*, 5 LAW & POLICY Q. 299, 305-07 (1983).

243. The superior deadliness of long guns is touted by the field director of the National Coalition to Ban Handguns among others. Deriding the message behind NRA publicity of instances in which handgun-armed householders routed burglars, he recommends "a twelve gauge shotgun," for it will not only protect the householder better, but serve society as well by "permanently ending the intruder's crime career." — that is, a shotgun blast will kill him

side effects of firing such a weapon in an urban environment make it unacceptable.

Consider penetration: even the .44 magnum, the most powerful of all handguns, penetrates no more than thirteen inches in wood, while revolvers in the far more commonly owned .32 to .38 calibers range from two to seven inches in penetration.²⁴⁴ In contrast, the relatively underpowered military surplus carbine with which President Kennedy was killed penetrates forty-seven inches.²⁴⁵ So a householder or shopkeeper who uses a rifle against a robber is imposing on others a very considerable risk that the bullet will penetrate all the way through the intended target and successive wood or stucco walls, entering the street or a neighboring building with enough remaining velocity to kill an innocent third party. While a shotgun's discharge does not have equivalent penetration because its velocity is far less, that velocity still substantially exceeds all but the most powerful handguns.²⁴⁶ Moreover, a householder or shopkeeper who elects to defend his premises with a riot gun's promiscuous spray may end up hitting one or more of his own innocent children or customers, along with the robber. In contrast, a handgun fires one bullet at a time which, if accurately aimed, is unlikely to pass through the robber, or, if it does so, will bury itself harmlessly in the wall.

By the same token, accidental discharges with long guns (particularly rifles, which can penetrate horizontally through successive houses on a city block or vertically through the floors and ceilings of successive apartments in a high rise) are much more dangerous than with handguns. This danger is multiplied by the fact that a rifle or shotgun kept loaded for home or store defense is much more likely to suffer accidental discharge than is a handgun. A rifle or shotgun

instead of inflicting a nonfatal wound such as a handgun would be likely to do. Fields, *Handgun Prohibition and Social Necessity*, 23 ST. LOUIS U. L.J. 35, 41 (1979). A handgun wound will result in death 5-10% of the time, while a comparable 12-gauge shotgun wound will result in death 80% or more of the time. See Kleck, *Handgun-Only Gun Control: A Policy Disaster in the Making*, in FIREARMS & VIOLENCE, *supra* note 10.

244. D. GREENELL & M. WILLIAMS, LAW ENFORCEMENT HANDGUN DIGEST 194-95 (1972); Steindler, *Warning: Your Walls Are Not Bullet Proof*, in GUNS FOR HOME DEFENSE (G. James ed. 1975).

245. Lattimer & Lattimer, *The Kennedy-Connally Single Bullet Theory*, 50 INTL. SURGERY 524, 529 (1968).

246. The more powerful military-caliber rifles which Americans generally favor exhibit muzzle velocities in the range of 2500-3500 feet per second. A shotgun expels its projectiles at 1300-1350 feet per second, a velocity level reached only by handguns in the .44 magnum and .357 magnum calibers. Most handguns generate velocities of less than 1000 feet per second. See D. GREENELL & M. WILLIAMS, *supra* note 244, at 188; GUN DIGEST 257-68 (K. Warner ed. 1982).

ke, t ready to fire can discharge simply through impact if dropped on a floor; a modern revolver will not. A long gun is also much more difficult than a handgun to lock or hide away from inquisitive children. Finally, if an inquisitive three-year-old does locate a loaded rifle or shotgun, pushing the safety to "off" and pulling the trigger is literally "child's play"; he would not be strong enough to operate the trigger on a revolver or the slide on an automatic pistol.²⁴⁷

These technical factors are reflected in the concrete form of firearms accident statistics. Fifty years ago, long guns outnumbered handguns seven-to-one and were the principal weapons kept loaded in the home — handguns being possessed by less than one in thirteen Americans. In contrast, handguns today represent one-third of the total gunstock and one in every four American households contains them.²⁴⁸ Even though the handgun stock has grown to the point of displacing long guns in the home defense role, however, Americans continue to buy many more long guns (apparently for sport) each year than they do handguns.²⁴⁹ Yet this enormous increase in all kinds of firearms has been accompanied by the decline of per capita accidental firearms fatalities to the lowest point since the compilation of such statistics began.²⁵⁰ It is difficult not to attribute this decline to the general change-over to handguns for home defense. Indicative of the dangers presented by the practice of keeping loaded long guns is the fact that, although handguns undoubtedly represent 90% or more of the weapons kept loaded at any one time, today, only 15.5% of accidental firearms deaths appear to involve handguns.²⁵¹

Based on these statistics, an urban community (or a state legislature) might arguably rely on the "dangerous or unusual" weapon exclusion to prohibit the keeping of loaded long guns within densely populated municipal areas. By parity of reasoning, cognate restric-

247. The author has confirmed this by actual experiment with children of this age.

248. Compare Benenson, *supra* note 3, at 720 (quoting 1937 estimate by U.S. Attorney General Homer Cummings), with Kates, *supra* note 17, at n.2 (unpaginated manuscript), and WEAPONS, CRIME AND VIOLENCE IN AMERICA, *supra* note 3, at ch. 2.

249. The controversy surrounding the quadrupling of handgun sales over the past 20 years has tended to obscure the fact that long gun production has always exceeded that of handguns in the United States. For the seven years preceding 1980, for instance, long gun production outstripped handguns by 75%. Indicative of the phenomenal increase in long gun ownership is the fact that in that seven-year period more than one-third as many long guns were manufactured as in the entire preceding 70-year period. Compare G. NEWTON & F. ZIMRING, *supra* note 13, at 172 (giving 1899-1968 statistics), with *Production Figures of the American Firearms Industry 1973-1979*, AM. FIREARMS INDUS. MAG., Dec. 1980, at 32.

250. NATIONAL SAFETY COUNCIL, 1982 ACCIDENT FACTS 15 (indicating a 68% decline in the per capita rate of accidental firearms fatalities from 1913-1932, when it was 2.5 per hundred thousand population, to 1978-81, when it was 0.8 per hundred thousand population).

251. Private communication from National Safety Council (Mar. 28, 1983). This estimate is based on 1979 figures only, as no others are available.

tions might be placed on the kind of handguns which could be kept for self-defense or at least on kinds of ammunition. Such legislation might prohibit special high-penetration ammunition like the controversial KTW bullet, magnum ammunition for magnum revolvers, or full metal-jacketed ammunition for high-powered automatic pistols. Alternatively or cumulatively, the legislature might affirmatively limit those possessing high-velocity handguns to ammunition specially designed for low penetration, such as hollow point and semi-wadcutter.

C. *Licensing and Registration Requirements for Gun Ownership*

The terms "gun licensing" and "registration" are susceptible to multiple interpretations, although most people, including nonlegal scholars and opinion poll formulators, seem lamentably ignorant of this fact.²⁵² Under the form known as discretionary or "restrictive" licensing, the applicant has no right to have a gun or to be issued a permit by the police *even if* he meets all statutorily prescribed criteria. His application may be denied simply because enough permits have already been issued to others, or because his reason for desiring a firearm is not deemed important or compelling enough.²⁵³ Such a discretionary or restrictive licensing system, which is the form advocated by proponents of eliminating or radically reducing civilian gun ownership,²⁵⁴ is clearly inconsistent with the second amendment's guarantee of a personal right to possess arms.

In sharp contrast to restrictive licensing are both "permissive" licensing and registration. Under a permissive licensing system the applicant is entitled to licensure as of right unless he falls into certain proscribed categories - e.g., juveniles, convicted felons and the

252. See Kates, *Toward a History of Handgun Prohibition in the United States*, in *RESTRICTING HANDGUNS*, *supra* note 6, at 27-28.

253. See Kates, *supra* note 17, at n 1 and accompanying text (unpaginated manuscript). In one jurisdiction, informally established administrative criteria automatically deny handgun-purchase permits to homosexuals, nonvoters, women who lack their husband's permission, and anyone whom the sheriff personally dislikes. New York City permits have been denied on such bases as: post-nasal drip that caused the applicant to repeatedly clear his throat during the application interview demonstrated that he was "too nervous" to be trusted with a handgun; a son who "had been in trouble with the police," although the applicant himself had "a spotless record." Hardy & Chotiner, *supra* note 6, at 205, 209-11. In 1957, the New York City Police Department announced that henceforth applications would be entertained only from those desiring handguns to defend property. Reasons like target shooting or gun collecting, which did not contemplate the use of the gun against another human being, were not deemed important or compelling enough to warrant receiving an application for a. Kates, *supra* note 17, at n 1 and accompanying text (unpaginated manuscript).

254. See, e.g., G. NEWTON & F. ZISLINA, *supra* note 13, at 83 (coining the terms "restrictive" and "permissive" licensing, and favoring the former).

mentally unbalanced.²⁵⁵ Registration, though often confused with licensing, literally means only that owners must identify themselves and their firearms to the police or some other designated authority.²⁵⁶ Registration is generally tied to an overall control system, however, which, like permissive licensing, proscribes handgun ownership by classes of persons, such as felons and juveniles, with a high potential for misuse.²⁵⁷ Neither registration nor permissive licensing are *per se* violative of the amendment since they operate only to exclude gun ownership by those upon whom the amendment confers no right.²⁵⁸

Nevertheless, it has been argued that registration and permissive licensing cannot sustain scrutiny under the amendment, in that they undercut one of its most important purposes: deterring potential despots by the prospect that, in a country with perhaps 160 million civilian firearms, even an initially successful coup would result in internecine civil or guerilla warfare.²⁵⁹ By destroying the anonymity of gun ownership, licensing or registration laws would make it possible for a despot to follow up his coup by confiscating all firearms.

Whatever the abstract cogency of this argument, the concept of anonymity or privacy in gun ownership profoundly departs from the conditions under which the Founders envisioned the amendment operating. Under the militia laws (first colonial, then state and eventually federal), every household, and/or male reaching the age of majority, was required to maintain at least one firearm in good condition. To prove compliance these firearms had to be submitted for inspection periodically.²⁶⁰ While the firearms-maintenance provisions of state law and the First Militia Act have long since been repealed, federal law continues to classify the entire able-bodied male citizenry aged seventeen to forty-five as "the militia of the United States."²⁶¹ This being the country's ultimate military resource, men

255. See, e.g., CONN. GEN. STAT. §§ 29-33 (1983) (handgun may be purchased only upon application, which is deemed granted unless within two weeks licensing authority rejects, based on finding of felony conviction); MASS. ANN. LAWS, ch. 140, § 129B (Michie/Law. Co-op. 1981) (every applicant "shall be entitled to" issuance of a firearms identification card allowing purchase or possession of firearms unless he has been convicted of a felony within the last five years, is under treatment for drug addiction, or habitual drunkenness, has been an inmate of a psychiatric institution, or penitentiary, etc.).

256. See Bruce-Briggs, *supra* note 9, at 42; Kaplan, *supra* note 13, at 17-18.

257. See, e.g., CAL. PENAL CODE §§ 12072, 12073 (Deering 1980).

258. As to felons, see text accompanying notes 266-67 *infra*. As to juveniles, suffice it to say that the militia laws specifically excluded those below the age of majority. See notes 46-48, 54 *supra*.

259. See Kaplan, *supra* note 10, at 51; notes 281-82 *infra* and accompanying text.

260. See notes 46, 48-49 *supra* and accompanying text.

261. 10 U.S.C. § 311 (1982).

in this group remain liable for muster in dire military emergencies, *e.g.*, when necessary to keep order in the aftermath of an atomic attack or when both the Army and the National Guard have been deployed overseas.²⁶² Since one can scarcely argue that the First Militia Act violated the amendment,²⁶³ it is difficult to see that it would be unconstitutional for Congress even today to require every member of the present militia to possess a firearm and regularly present it for inspection to assure that it is being maintained in good working order. Alternatively, and fully consistent with these purposes, a national gun registration scheme could allow federal authorities to mobilize selectively those members of the unorganized militia who are already armed and presumably familiar with the handling of weapons.²⁶⁴ In sum, the historical background of the second amendment seems inconsistent with any notion of anonymity or privacy insofar as the mere fact of one's possessing a firearm is concerned.

D. *Laws Prohibiting Firearms to Felons*

Current federal, and many state, laws prohibit the possession of firearms by anyone who has been convicted of a felony.²⁶⁵ Since a substantial majority of murderers appear to have prior felony records, it has recently been suggested that strong enforcement of such laws could effectively reduce homicidal violence.²⁶⁶ The constitutionality of such legislation cannot seriously be questioned on a theory that felons are included within "the people" whose right to arms is guaranteed by the second amendment. Felons simply did not fall within the benefits of the common law right to possess arms. That law punished felons with automatic forfeiture of all goods, usually accompanied by death. We may presume that persons confined in gaols awaiting trial on criminal charges were also debarred from the possession of arms. Nor does it seem that the Founders considered felons within the common law right to arms or intended to confer any such right upon them. All the ratifying convention proposals which most explicitly detailed the recommended right-to-arms amendment excluded criminals and the violent.²⁶⁷

262. *See* Sprecher, *supra* note 10, at 667.

263. *See* note 49 *supra* and accompanying text.

264. *See* note 193 *supra* and accompanying text as to the militia value of allowing individual ownership and home possession of firearms.

265. *See, e.g.*, 18 U.S.C. § 922(g), (h) (1982) (all firearms); CAL. PENAL CODE § 12021 (Deering 1980 & Supp. 1983) (h; ndguns).

266. Kleck & Bordua, *The Factual Foundation for Certain Key Assumptions of Gun Control*, 5 LAW & POLY. Q. 271, 291-94 (1983).

267. *See* notes 70, 72 & 83 *supra* and accompanying text.

E. *Laws Restricting the Right To Carry Arms Outside of the Owner's Own Premises*

Largely as a result of gun-owner organizations' own legislative proposals, the laws of every state but Vermont prohibit at least the carrying of a concealed handgun off one's own premises.²⁶⁸ A common proposal; already the law in many jurisdictions, is to prohibit even the open carrying of handguns (or all firearms), with limited exceptions for target shooting and the like, without a permit.²⁶⁹ A further proposal would impose a mandatory minimum jail sentence for the unauthorized carrying of a handgun (or any firearm) off the owner's premises.²⁷⁰

The constitutionality of such legislation under the amendment can be established on the same basis as the unconstitutionality of a ban on possession. Smith's research in seventeenth and eighteenth-century colonial statutes indicates that, while the statutes used "keep" to refer to a person's having a gun in his home, they used "bear" only to refer to the bearing of arms while engaged in militia activities.²⁷¹ Thus the amendment's language was apparently intended to protect the possession of firearms for all legitimate purposes, but to guarantee the right to carry them outside the home only in the course of militia service. Outside that context the only carrying of firearms which the amendment appears to protect is such transportation as is implicit in the concept of a right to possess — e.g., transporting them between the purchaser or owner's premises and a shooting range, or a gun store or gunsmith and so on.

CONCLUSION

The second amendment's language and historical and philosophical background demonstrate that it was designed to guarantee indi-

268. See VT. STAT. ANN. tit. 13, § 4003 (1974) (prohibition limited to carrying with intent to commit crime, or within a state institution or upon its grounds). As to the NRA's sponsorship of the Uniform Revolver Act, from which such legislation largely derives, see note 23 *supra*.

269. See, e.g., TEX. PENAL CODE ANN. § 46.02(a) (Vernon 1974).

270. Scholars continue to debate whether this legislation has any significant impact on the crime rate. Compare Deutsch & Alt, *The Effect of Massachusetts' Gun Control Law on Gun-Related Crimes in the City of Boston*, 1 EVALUATION Q. 543 (1977), with Hay & McCleary, *Box-Tiao Time Series Models for Impact Assessment: A Comment on the Recent Work of Deutsch and Alt*, 3 EVALUATION Q. 277 (1979). For a general discussion of the strengths and weaknesses of the studies, see WEAPONS, CRIME AND VIOLENCE IN AMERICA, *supra* note 3, at 9-20. The latest and most negative assessment of the mandatory penalty device, a study done for the U.S. Department of Justice, is K. CARLSON, MANDATORY SENTENCING: THE EXPERIENCE OF TWO STATES (1982).

271. See notes 58-62 *supra* and accompanying text.

viduals the possession of certain kinds of arms for three purposes: (1) crime prevention, or what we would today describe as individual self-defense; (2) national defense; and (3) preservation of individual liberty and popular institutions against domestic despotism. It is often suggested that each of these purposes is obsolete and, therefore, that the amendment itself is obsolete. The national defense is fully provided for by our Armed Forces, supplemented by the National Guard, and a citizenry possessing only small arms could neither deter nor overthrow a domestic military despotism possessing tanks, aircraft and the other paraphernalia of modern war.²⁷² Likewise the possession of arms for self defense "is becoming anachronistic. As the policing of society becomes more efficient, the need for arms for personal self-defense becomes more irrelevant"²⁷³

Yet evidence can be offered to dispute each of these claims of obsolescence. As to the necessity of personal self-defense it is regretably the case that enormous increases in police budgets and personnel have not prevented, for instance, the per capita incidence of reported robbery, rape and aggravated assault from increasing by 300%, 400% and 300% respectively since 1960.²⁷⁴ Increasingly police are concluding, and even publicly proclaiming, that they cannot protect the law-abiding citizen, and that it is not only rational for him to choose to protect himself with firearms,²⁷⁵ but a socially beneficial deterrent to violent crime.²⁷⁶ This is, of course, a highly controver-

272. See Clark, *Reducing Firearms Availability: Constitutional Impediments to Effective Legislation and an Agenda for Research*, in *FIREARMS & VIOLENCE*, *supra* note 10.

273. Levin, *supra* note 13, at 166-67.

274. Compare FEDERAL BUREAU OF INVESTIGATION, U.S. DEPT. OF JUSTICE, *CRIME IN THE UNITED STATES - 1960*, at 33, with FEDERAL BUREAU OF INVESTIGATION, U.S. DEPT. OF JUSTICE, *CRIME IN THE UNITED STATES - 1980*. See generally *WEAPONS, CRIME AND VIOLENCE IN AMERICA*, *supra* note 3.

275. See, e.g., *Urban Merchants Find Guns Vital, And Most Police Units Now Agree*, N.Y. Times, July 20, 1974, § 1, at 39, col. 1; Kates, *supra* note 17, at n.14 and accompanying text (unpaginated manuscript) (collecting similar evidence).

Of over 5,000 officers who responded to a 1977 poll, 64% felt that an armed citizenry deters crime, and 86% stated that, if they were private citizens, they would keep a firearm for self defense. . . . These results may be subject to question since the poll was done for an organization which lobbies against handgun prohibition legislation. But in 1976 police chiefs and high ranking administrators were polled nationwide by the Research Division of the Boston Police Department which was then headed by Robert DiGrazia, an outspoken proponent of handgun prohibition. [The departmental survey reported]: "A substantial majority of the respondents looked favorably upon the general possession of handguns by the citizenry (excludes those with criminal records and a history of mental instability). Strong approval was also elicited from the police administrators concerning possession of handguns in the home or place of business." Indeed, by a bare majority, the respondents endorsed the idea that private citizens should be allowed to actually carry firearms with them at all times for self-protection. In answer to another question, the respondents opined that officers lower ranking than themselves would be even less favorably disposed toward "gun control."

276. Fundamental to systematic discussion of these issues is the distinction between an

sial matter,²⁷⁷ though the more recent scholarship has tended to vindicate the police point of view.²⁷⁸ For present purposes it is unnecessary to resolve this controversy. The mere fact of its exist-

self-defense value gun ownership may have and any potential crime deterrence value. For instance, G. NEWTON & F. ZIMRING, *supra* note 13, at 62-68, are unassailably correct in asserting that a gun owner rarely has the opportunity to *defend* his home or business against burglars because they generally take pains to strike only at unoccupied premises. But this fails to address two important issues of *deterrence*. First, Kleck and Bordua calculate that a burglar's small chance of being confronted by a gun-armed defender probably exceeds that of his being apprehended, tried, convicted and actually serving any time. One would then ask which is a greater deterrent: a slim chance of being punished or a slim chance of being shot? See Kleck & Bordua, *supra* note 266, at 282. Second, and even more important, fear of meeting a gun-armed defender may be one factor in the care most burglars take to strike at only unoccupied premises. In this connection, remember that it is precisely because burglary is generally a non-confrontation crime that victim injury or death is so very rarely associated with it — in contrast to robbery, where victim death is an all too frequent occurrence. If the deterrent effect of victim gun possession reduces victim death or injury by helping make burglary an overwhelmingly nonconfrontation crime, that *deterrent* benefits burglary victims and society in general, even though the *defense* value to the gun owners themselves is negligible.

Polls of convicted felons suggest that the average criminal has no more desire to meet an armed citizen than the average citizen has to meet an armed criminal:

Surveys among prison populations uniformly find felons stating that, whenever possible, they avoid victims who are thought to be armed, and that they know of planned crimes that were abandoned when it was discovered that the prospective victim was armed. Indeed, in these surveys prison denizens expressed support for handgun prohibition on [the grounds] . . . that it would make life safer and easier for the criminal by disarming his victims without affecting his own ability to attack them. Typical of prisoner comments, according to criminologist Ernest van den Haag of New York University, was: "Ilan guns, I'd love it. I'm an armed robber."

Silver & Kates, *Self-Defense, Handgun Ownership, and the Independence of Women in a Violent, Sexist Society*, in RESTRICTING HANDGUNS, *supra* note 6, at 139, 151 (footnote omitted). These conclusions are confirmed by the largest such survey yet conducted. The as-yet-unpublished results of this study in ten major prisons across the nation by the Social and Demographic Institute of the University of Massachusetts, are set out in its director's letter of May 10, 1983, to the author [hereinafter cited as Prison Survey].

277 See, e.g., G. NEWTON & F. ZIMRING, *supra* note 13, at 61-68; M. YEAGER, J. ALVIANI & N. LOVING, HOW WELL DOES THE HANDGUN PROTECT YOU AND YOUR FAMILY? (1976); Rushforth, Hirsch, Ford & Adelson, *Accidental Firearm Fatalities in a Metropolitan County (1958-1973)*, 100 AM. J. EPIDEMIOLOGY 499 (1975). The Rushforth study is the source of the well-known statistic that a handgun held by a homeowner is six times more likely accidentally to kill a relative or acquaintance of the homeowner than to kill a burglar. It and the Yeager study are assailed as partisan and unreliable by Wright, who concludes that the six-to-one figure is arrived at through statistical legerdemain. Wright, *The Ownership of Firearms for Reasons of Self-Defense*, (paper delivered to the 1981 annual meeting of the American Society of Criminology), reprinted in FIREARMS & VIOLENCE, *supra* note 10; see also Kleck & Bordua, *supra* note 266, at 281 (criticizes the Yeager study); Silver & Kates, *supra* note 276, at 152-56 (discusses the efficacy of citizens keeping guns for self-defense purposes).

278 G. NEWTON & F. ZIMRING, *supra* note 13, at 61-68, conclude from the fact that householders in Detroit and Los Angeles killed few burglars in the mid-1960's, that gun owners rarely have the opportunity to foil criminal misconduct. The opposite is suggested by later figures from broader geographic areas and encompassing a fuller range of violent and confrontational felonies. Nationwide, 1981 FBI statistics show that citizens justifiably kill 30% more criminals than do police. In California, 1981 statistics show citizens justifiably killing twice as many felons as do the police; in Chicago and Cleveland it is three times as many. See Kleck & Bordua, *supra* note 266, at 290; Rushforth, Ford, Hirsch, Rushforth & Adelson, *Violent Deaths in a Metropolitan County — Changing Patterns in Homicide (1958-1974)*, 297 NEW ENG. J. MED. 531 (1977); Silver & Kates, *supra* note 276, at 156; Kates, *Can We Deny Citizens Both Guns and Protection?*, Wall St. J., Aug. 17, 1983, at 22, col. 6. Similar statistics for Hous-

ence demonstrates that the asserted irrelevancy of self-defense today has not been so clearly proved as to justify the abandonment of an expressly guaranteed constitutional right.

The argument that an armed citizenry cannot hope to overthrow a modern military machine flies directly in the face of the history of partisan guerilla and civil wars in the twentieth century. To make this argument (which is invariably supported, if at all, by reference only to the *American* military experience in *non*-revolutionary struggles like the two World Wars²⁷⁹), one must indulge in the assumption that a handgun-armed citizenry will eschew guerrilla tactics in favor of throwing themselves headlong under the tracks of advancing tanks. Far from proving invincible, in the vast majority of cases in this century in which they have confronted popular insurgencies, modern armies have been unable to suppress the insurgents. This is why the British no longer rule in Israel and Ireland, the French in Indo-China, Algeria and Madagascar, the Portugese in Angola, the whites in Rhodesia, or General Somoza, General Battista, or the Shah in Nicaragua, Cuba and Iran respectively — not to mention the examples of the United States in Vietnam and the Soviet Union in Afghanistan.²⁸⁰ It is, of course, quite irrelevant for present purposes whether each of the struggles just mentioned is or was justified or whether the people benefited therefrom. However one may appraise those victories, the fact remains that they were achieved against regimes equipped with all the military technology which, it is asserted, inevitably dooms popular revolt.

Perhaps more important, in a free country like our own, the issue is not really *overthrowing* a tyranny but *detering* its institution in the first place. To persuade his officers and men to support a coup, a potential military despot must convince them that his rule will suc-

ton-Dallas are reported in *Citizens' Gun Use on Rise in Houston*, N.Y. Times, Nov. 21, 1982, § 1, at 27, col. 1.

Moreover, justifiable homicide statistics provide an inherently distorted, under-representative picture of the value of civilian gun ownership. By analogy, the value of the police is not measured simply by how many criminals they kill, but rather by the entire universe of criminal activity deterred, as well as those criminals they wound, apprehend or scare off. Considering evidence on the entire universe of defensive handgun uses, Wright concludes that they are used at least as frequently in defense against criminals as they are by criminals in attacking citizens. See Wright, *supra* note 277. This conclusion is buttressed in Prison Survey, *supra* note 276, which reports that about 50% of the felons questioned (and a much higher proportion of the violent felons) stated that they had been interrupted, wounded, arrested or scared off by an armed citizen.

279. See, e.g., DeZee, *National Rifle Association and Gun Control*, in BUSINESS LOBBYING AND SOCIAL GOALS 212 (1979).

280. See Marina, *Weapons, Technology and Legitimacy: The Second Amendment in Global Perspective*, in FIREARMS & VIOLENCE, *supra* note 10; Kessler, *Gun Control and Political Power*, 5 LAW & POLY. Q. 381 (1983).

ceed where our current civilian leadership and policies are failing. In a country whose widely divergent citizenry possesses upwards of 160 million firearms, however, the most likely outcome of usurpation (no matter how initially successful) is not benevolent dictatorship, but prolonged, internecine civil war:

A general may have pipe dreams of a sudden and peaceful take-over and a nation moving confidently forward, united under his direction. But the realistic general will remember the actual fruits of civil war — shattered cities like Hue, Beirut, and Belfast, devastated countryside like the Mekong Delta, Cyprus, and southern Lebanon.²⁸¹

Even if the general's ambition does not recoil from the prospect of victory at such cost, will his officers and men accept it? Additionally, he and they must evaluate the effect of civil war in leaving the country vulnerable to the very foreign enemies their coup is designed to unite it against:

Because it leads any prospective dictator to think through such questions, the individual, anonymous ownership of firearms is still a deterrent today to the despotism it was originally intended to obviate.

Implicit in the Bill of Rights, as in the entire structure of our Constitution, are the twin hallmarks of traditional liberal thought: trust in the people, and distrust in government, particularly the military and the police. We are apt to forget these constant principles in light of our government's generally quite good record of exerting power without abusing it. But the deterrent effect of an armed citizenry is one little-recognized factor that may have contributed to this. In the words of the late Senator Hubert Humphrey, "[t]he right of citizens to bear arms is just one more guarantee against arbitrary government, one more safeguard against the tyranny which now appears remote in America, but which historically has proved to be always possible."²⁸²

Moving to the argument that a militia is not necessary to the national defense, for constitutional purposes the issue appears to have been resolved by Congress. For Congress has determined that it remains necessary to classify the entire able-bodied male population aged seventeen to forty-five as the militia of the United States, subject to a potential call to arms in the case of dire military emergency.²⁸³ Moreover, the recent military history of the United States

281. Hardy, *The Second Amendment as a Restraint on State and Federal Firearm Restrictions*, in *RESTRICTING HANDGUNS*, *supra* note 6, at 171, 184.

282. *Id.* at 184-85.

283. 10 U.S.C. § 311 (1982). Sprecher, *supra* note 10, at 667, notes that the unorganized militia constitutes the only available substitute for national defense purposes in circumstances, like those of World War II, in which both the Army and the federalized National Guard have been deployed overseas. Recognizing that the unorganized militia can "not prevent an atomic attack," its mobilization may nevertheless be necessary to "preserve internal order after one." "Thus militias (by whatever name) are as important as ever, and perhaps more so in the atom-and-missile age . . ."

shows that such militia units are still being called upon in time of military emergency.²⁸⁴

Finally, arguments as to whether the amendment is obsolete are of at most tangential import to its proper interpretation by the courts. After all, the second amendment is not the only provision of the Bill of Rights which is assertedly obsolete (or with the idea of which some Americans may today just happen to disagree). For instance, a judge may be absolutely convinced by scientific argument that the premise of free will which underlies freedom of religion has been invalidated by the modern psychological concept of brainwashing. He may believe a mother's anguished claims that only by such insidious techniques could her son have been induced by a "cult" to drop out of college and abandon the beliefs and lifestyle to which she raised him. Nevertheless, so long as the first amendment stands, no judge is free to disregard as obsolete the rights it confers on that young man and commit him to the custody of a "deprogrammer."²⁸⁵ The seventh amendment, to take another example, clearly is obsolete, at least insofar as it requires jury trials in civil cases exceeding twenty dollars in controversy. Nevertheless, the courts continue faithfully to apply that amendment's dictate in all cases fairly covered by its literal wording and original spirit.²⁸⁶ Though courts sometimes give constitutional rights *additional* scope in order to effectuate what is deemed to be their original intent, courts have no authority to reduce or eliminate the plain terms of a constitutional guarantee because they disagree with that intent or view it as obsolete.²⁸⁷ The duty of the courts is to enforce the Constitution, not to

284. As late as Pearl Harbor, a military emergency was deemed to require mustering individually armed citizens. Because available military personnel were insufficient to repel the Japanese invasion that seemed imminent, the Governor of Hawaii called upon citizens to use their personal arms in manning checkpoints and remote beach areas. (Ironically, many of those who responded were Japanese-Americans whose colleagues in California were soon to be imprisoned without benefit of trial or habeas corpus.) Across the country the unorganized militia proved a successful substitute for the National Guard, which was federalized and activated for overseas duty. OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE, U.S. DEPT. OF DEFENSE, U.S. HOME DEFENSE FORCES STUDY, 32, 34 (1981). Members of the unorganized militia, many of whom belonged to gun clubs and whose ages ranged from 16 to 65, served without pay and provided their own arms. *Id.* at 58, 62-63. The U.S. government, however, not only could not supply sufficient arms to the militia but "turned out to be an Indian giver" by recalling rifles. M. SCHLEGEL, VIRGINIA ON GUARD 131 (1949).

285. *See, e.g.*, Rankin v. Howard, 633 F.2d 844 (9th Cir. 1980), *cert. denied*, 451 U.S. 39 (1981).

286. *See, e.g.*, Curtis v. Loether, 415 U.S. 189 (1974) (applying seventh amendment to damage actions for housing discrimination under the 1968 Civil Rights Act); Pernell v. Southall Realty, 416 U.S. 363 (1974) (applying seventh amendment to actions under special District of Columbia statute).

287. *See, e.g.*, State v. Kessler, 289 Or. 359, 360, 614 P.2d 94, 95 (1980):

We are not unmindful that there is current controversy over the wisdom of a right to hear

arrogate to themselves the power to delete its provisions.²⁸⁸ Generally speaking, the power to withdraw a right explicitly guaranteed to the people is reserved exclusively to their state and federal legislatures in a process which is ornately hedged with safeguards, not the least of which is its protracted length.²⁸⁹ As Mr. Justice Frankfurter noted in reference to criticism of the privilege against self-incrimination as an obstacle to the needs of law enforcement in an era of rampant crime: "If it be thought that the privilege is outmoded in the conditions of this modern age, then the thing to do is to take it out of the Constitution, not to whittle it down by the subtle encroachments of judicial opinion."²⁹⁰

Unmistakably the Founders intended the second amendment to guarantee an individual right to possess certain kinds of weapons in the home certain kinds of circumstances. The precise details and parameters of that guarantee remain significantly unclear. In part this is because neither federal, state nor local governments have generally moved beyond gun control to the extreme of confiscation. In even larger part the delay in defining its parameters is attributable to the diversion and monopolization of legal analysis by the false dichotomy between the exclusively state's right and the unrestricted individual right interpretations. In fact, the arms of the state's militias were and are the personally owned arms of the general citizenry, so that the amendment's dual intention to protect both was achieved by guaranteeing to the citizenry a right to possess arms individually. Having dispelled the ahistorical exclusively state's right notion, it will become possible to move forward to analyzing how rational, effective gun-control strategies can be reconciled with the constitutional scheme.

arms, and that the original motivations for such a provision might not seem compelling if debated as a new issue. Our task, however, in construing a constitutional provision is to respect the principles given the status of constitutional guarantees and limitations by the drafters; it is not to abandon these principles when this fits the needs of the moment.

Cf. note 28 *supra* (discussing the proper role of original intent in constitutional adjudication).

288. Hamilton's explanation of the judicial function in THE FEDERALIST NO. 78 remains as true today as it was when he penned it:

[T]he right of the courts to pronounce legislative acts void . . . [does not] by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former.

THE FEDERALIST NO. 78, at 577-78 (A. Hamilton) (J. Hamilton ed. 1864).

289. We are reminded by Mr. Justice Douglas of Mr. Chief Justice Marshall's dictum that "it would be dangerous in the extreme to infer from extrinsic circumstances, that a case for which the words of [the Constitution] expressly provide, shall be exempted from its operation." *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 77 (1946).

290. *Ullmann v. United States*, 350 U.S. 422, 427-28 (1956) (quoting *Maffie v. United States*, 209 F.2d 225, 227 (1st Cir. 1954)).

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

BILL SHEFFIELD, GOVERNOR

POUCH K - STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

April 13, 1983

The Honorable Pat Rodey
Senator
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

The Honorable Charlie Bussell
Representative
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Re: Handgun Ban

Dear Senator Rodey and Representative Bussell:

You have asked this office whether a landlord, through a leasehold agreement, may prohibit a tenant from possessing handguns. We conclude that in certain circumstances a landlord may restrict or prohibit the use and/or possession of handguns on property which is leased to another individual.

Our initial inquiry regarding this matter commenced with a review of relevant Alaskan Constitutional provisions. The Alaska Constitution directly addresses a citizens ability to bear arms at Article I, Section 19 which states:

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.

The language embodied in Alaska's Constitution pertaining to arms is virtually identical, save for two changes in punctuation, to language found in Article II of the United States Constitution. Article II of the United States Constitution was proposed by the Congress on September 25, 1789 and became the law of the United States on December 15, 1791. During the one hundred and ninety two years since adoption of the Second Amendment to the United States Constitution and the twenty-four years since the Alaska Constitution has been in effect, numerous court cases have interpreted the constitutional language which establishes the right to bear arms.

We note the period since the adoption of the Second Amendment has witnessed an ever increasing issuance of opinions from the judiciary of the various states and the federal courts which place limits on an individual's ability to bear arms. Some commentators have theorized that the legislative and judicial limitations increased significantly with the availability of inexpensive surplus weapons following the American Civil War. ^{1/} According to this theory, the increase in restrictive gun control measures and corresponding judicial interpretations was associated with increasing acquisition of firearms by recently emancipated Black Americans and immigrants coupled with the increased availability of firearms in the post Civil War industrial America. The right of 'bearing arms' is not a right granted by the Constitution nor is it in any manner dependant upon that instrument for its existence. U.S. v. Cruikshank, 92 U.S. 553 (D.C.La. 1875).

While offering no judgment on the propriety or effectiveness of the restrictive legislative and judicial measures, we observe that the current state of the law pertaining to the constitutional language holds that:

[The] purpose of this amendment, guaranteeing that the right of the people to keep and bear arms, was to preserve the effectiveness and assure the continuation of the state militia. U.S. v. Oakes, 564 F.2d, cert. denied 98 S.Ct. 1493 (C.A. Kan. 1977).

The modern judicial view has increasingly found that the guaranteed right to keep and bear arms is not an individually protected right, but rather a collective right which allows the people of the various states to serve in a militia. The contemporary judicial view in the great majority of states interprets the constitutional language as posing no limitations on the legislature's power to regulate the ownership or control of firearms. Whatever the scope of any common-law or constitutional right to bear arms, it is not absolute and does not guarantee to individuals the right to carry weapons abroad at all times and in all circumstances. Application of Atkinson, 291 N.W.2d 396 (Minn. 1980). By analogy then, a landlord, too, could restrict

^{1/} Kates, Don B. Restricting Handguns, North River Press, pages 7-30 (1979)

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Hon. Charlie Bussell, Representative

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the possession of handguns on property he or she owns and leases. If the State can restrict arms without running afoul of constitutional provisions, an individual almost certainly has similar abilities.

It is conceivable that a landlord's ban on handgun ownership could be challenged under constitutional doctrines which afford a right of privacy. The United States Constitution, while not containing an express provision guaranteeing privacy has been interpreted to afford an individual certain protections, Cf. Griswold v. Connecticut, 381 U.S. 479 (1965). "The Constitution extends special safeguards to the privacy of the home, including activities which might be prohibited in other contexts." Cf. U.S. v. Orito, 413 U.S. 137, 142 (1973).

While it is unlikely that a court would find that an individual's right to possess arms (for example a gun collection) is protected by the privacy shield of the U.S. Constitution, the argument could be maintained. We are unaware of this argument being successfully asserted in any anglo-american jurisdiction.

A more likely source of protection under the right to privacy doctrine may be afforded by the Alaska Constitution at Article I, Section 22 which states that:

The right of the people to privacy shall not be infringed. The legislature shall implement this section.

The Alaska Supreme Court has explicitly stated that the right of privacy guaranteed to Alaskans is broader in scope than that guaranteed by the federal constitution. Woods & Rohde, Inc., v. State, 565 P.2d 138 (1977). Even so, the meaning of privacy of necessity must vary depending on the factual context and the often compelling interests of society and the individual. State v. Glass, 583 P.2d 879 (1978). The test for what interests are protected under Alaska's constitutional right to privacy are, first, whether a person has exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable". Hilbers v. Municipality of Anchorage, 611 P.2d 31 (1980).

The question of handgun ownership in Alaska and whether such ownership is "reasonable" in the context of a landlord tenant relationship is open ended. Probably the "expectation" and reasonableness of gun ownership in Alaska is different than the reasonableness of gun ownership in many other jurisdictions where actual firearm ownership and use is reduced. In any event,

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absent specific language under the Alaska Uniform Residential Landlord and Tenant Act, AS 34.03.010 et seq., or other relevant Alaska law, prohibiting inclusion of provisions in a leasehold agreement, we believe a landlord can properly restrict the terms of the tenancy. 2/ In all probability, under existing Alaska law, a landlord can restrict possession of handguns for tenants in a manner not unlike a landlord's ability to prohibit tenants from possessing dogs, operating businesses in a residential leasehold or operating obnoxious stereo equipment.

While a landlord will probably be able to impose a restriction prohibiting future tenants from possessing handguns, an across-the-board ban applicable to tenants with existing leasehold agreements may be invalid. Under classic contract principles, neither party to an agreement may superimpose an additional term on a valid contract without the consent of each party to the contract. Consequently, a landlord may not prohibit handgun possession among tenants during the pendency of an existing lease. Conversely, where a landlord and tenant agree to a lease agreement which contains a restriction banning handguns, remedial legislative action interpreting Alaska's right to privacy law to permit such possession probably would not invalidate existing prohibitions.

Finally, concern was expressed regarding the state's liability with respect to landlord/tenant agreements which prohibit handgun ownership in buildings located on property owned by the State. This last point is conceivably problematic if the land on which the Panoramic View Apartments are located is conveyed to the state as a result of the current Alaska Railroad transfer negotiations. Attached is a copy of a memorandum by Assistant Attorney General Jack McGee which deals with this subject.

2/ In passing, we note that a landlord concerned with unjustified gun play need not necessarily prohibit gun ownership. Other remedies exist for controlling individual tenants with a propensity to abuse gun ownership. Cf. Osness v. Dimond Estates, Inc., 615 P.2d 605 (1980), where the landlord obtained a Forcible Entry and Detainer (F.E.D.) thereby removing a tenant that proved incapable of properly handling firearms.

Hon. Pat Rodey, Senator
Hon. Charlie Bussell, Representative

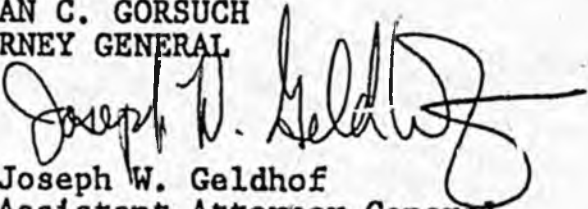
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We trust this response answers your inquiry. If you have any additional questions, please let me know.

Sincerely,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By:


Joseph W. Geldhof
Assistant Attorney General

JWG:vrb

cc: Norman C. Gorsuch
Attorney General

Ronald W. Lorensen
Deputy Attorney General

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

Bill Sheffield, Governor

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June 27, 1983

The Honorable Rick Halford
Senator
Alaska State Legislature
Pouch V
Juneau, AK 99811

Re: SJR-28
A. G. #366-444-83

Dear Senator Halford:

The Department of Law has completed a preliminary analysis of Senate Joint Resolution 28 regarding the proposed amendment to the Alaska Constitution pertaining to the right of a person to keep and bear arms.

You may wish to consider inserting the word "lawful" after the term "for" and before the word "defense". With this insertion, the new constitutional clause would read as follows:

The right of a person to keep and bear arms for lawful defense of self, home and property, or for lawful hunting and recreational use, or for other lawful purposes shall not be infringed.

I believe it would be wise to make explicit that the Constitution provides for lawful activities, which of course are established by the legislature. In the absence of the term "lawful", I can envision a situation where persons attempt to use the constitutional language as a defense to behavior which ordinarily would constitute a violation of the Alaska criminal statutes. Also, I'm not sure the explicit mention of lawful hunting, recreational use and other specific activities is necessary to insure that individuals have a guaranteed right to keep and bear arms, however, I realize this language may be reassuring to certain groups within our state.

You may wish to review the language in other state Constitutions which relates directly to the right to keep and bear arms. In many instances this right is explicitly characterized as an individual right without mentioning specifically what constitutes appropriate use by an individual citizen. The

constitutional clauses relating to arms from the thirty-seven states which have such constitutional language are as follows:

Alabama: That every citizen has a right to bear arms in defense of himself and the state. ALA. CONST. art I, §26.

Alaska: 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. ALASKA CONST. art. I, § 19.

Arizona: The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men. ARIZ. CONST. art. II, § 26.

Arkansas: The citizens of this State shall have the right to keep and bear arms for their common defense. ARK. CONST. art. II, § 5.

Colorado: The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons. COLO. CONST. art. II, § 13.

Connecticut: Every citizen has a right to bear arms in defense of himself and the state. CONN. CONST. art. I, § 15.

Florida: 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. FLA. CONST. art. I, § 8.

Georgia: 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. GA. CONST. art I, § 1.

Hawaii: 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. HAWAII CONST. art I, § 15.

Idaho: The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage of legislation

providing minimum sentences for crimes committed while in possession of a firearm, nor prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage of any legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms, except those actually used in the commission of a felony. IDAHO CONST. art. I, § 11.

Illinois: Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed. ILL. CONST. art. I, § 22.

Indiana: The people shall have a right to bear arms, for the defense of themselves and the State. IND. CONST. art I, § 32.

Kansas: The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power. KAN. CONST., Bill of Rights, § 4.

Kentucky: All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: ...The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons. KY. CONST. § 1.

Louisiana: The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person. LA. CONST. art. I, § 4.

Maine: Every citizen has the right to keep and bear arms for the common defense; and this right shall never be questioned. ME. CONST. art I, § 16.

Massachusetts: The people have a right to keep and bear arms for the common defence. And as, in times of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it. MASS. CONST. pt. 1, art. 17.

Michigan: Every person has a right to keep and bear arms for the defense of himself and the state. MICH. CONST. art I, § 6.

Mississippi: The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power where thereto legally summoned, shall not be called question, but the legislature may regulate or forbid carrying concealed weapons. MISS. CONST. art. III, § 12.

Missouri: That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed weapons. MO. CONST. art I, § 23.

Montana: The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons. MONT. CONST. art II, § 12.

New Mexico: No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreation use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons. N.M. CONST. art. II, § 6.

North Carolina: 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; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice. N.C. CONST. art. I, § 30.

Ohio: The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power. OHIO CONST. art I, § 4.

Oklahoma: The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons. OKLA. CONST. art. II, § 26.

Oregon: The people shall have the right to bear arms for the defense of themselves, and the State, but the Military shall be kept in strict subordination to the civil power. OR. CONST. art. I, § 27.

Pennsylvania: The right of the citizens to bear arms in defence of themselves and the State shall not be questioned. PA. CONST. art. I, § 22.

South Carolina: 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. As, in times of peace, armies are dangerous to liberty, they shall not be maintained without the consent of the General Assembly. The military power of the State shall always be held in subordination to the civil authority and be governed by it. No soldier shall in time of peace be quartered in any house without the consent of the owner not in time of war but in the manner prescribed by law. S.C. CONST. art I, § 20.

South Dakota: The right of the citizens to bear arms in defense of themselves and the state shall not be denied. S.D. CONST. art. VI, § 24.

Tennessee: That the citizens of this State have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime. TENN. CONST. art. I, § 26.

Texas: Every citizen shall have the right to keep and bear arms in the lawful defence of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime. TEX. CONST. art. I, § 23.

Utah: The people have the right to bear arms for their security and defense, but the Legislature may regulate the exercise of this right by law. UTAH CONST. art. I, § 6.

Vermont: That the people have a right to bear arms for the defence of themselves and the State-and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to and governed by the civil power. VT. CONST. ch. 1, art. 16.

Virginia: That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the

people to keep and bear arms shall not be infringed; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that all cases the military should be under strict subordination to, and governed by, the civil power. VA. CONST. art. I, § 13.

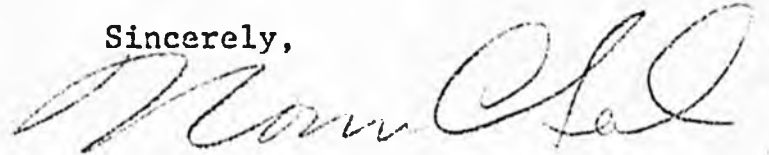
Washington: The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men. WASH. CONST. art. I, § 24.

Wyoming: The right of citizens to bear arms in defense of themselves and of the state shall not be denied. WYO. CONST. art I, § 24.

In addition, thirteen states do not have express constitutional provisions related to the right to keep and bear arms.

I would be happy to discuss this matter with you in more detail.

Sincerely,



Norman C. Gorsuch
Attorney General

NCG:ml

Distribution of
identical letter: The Honorable Jalmar M. Kerttula
Alaska State Senate

The Honorable Don Bennett
Alaska State Senate

The Honorable Patrick M. Rodey
Alaska State Senate

Wayne
Anthony
Ross & Associates

ATTORNEYS AT LAW

WAYNE ANTHONY ROSS
ROBERT D. FRENZ
THOMAS S. GINGRAS
WILLIAM D. COOK

OF COUNSEL:
DONALD J. MILLER

MAIN BRANCH
1007 W. THIRD AVENUE, SUITE 304
ANCHORAGE, ALASKA 99501
AREA 907/276-3307 • 277-6775

CORDOVA BRANCH
POST OFFICE BOX 207
CORDOVA, ALASKA 99574
AREA 907/424-7229

April 29, 1983

Tom Fink
1035 W. Fireweed Lane
Anchorage, Alaska 99503

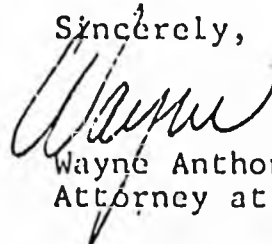
Dear Tom:

Enclosed please find a copy of a recent Attorney General's opinion issued by a Joe Geldhof, Assistant Attorney General, State of Alaska regarding the Panoramic View Apartments situation. To say I am extremely disappointed with the opinion is an understatement.

The present Attorney General, Mr. Norman Gorsuch, was appointed by Governor Bill Sheffield and has not been confirmed by the state legislature. I think this would be a good case for you to send a letter to each of the members of the Alaska State Legislature advising them that since the candidate for attorney general Mr. Norman Gorsuch does not interpret Alaska's Constitution Article I, Section 19, and by implication, the Second Amendment of the United States Constitution which reads the same, as supporting the individual's right to keep and bear arms, you oppose his confirmation. Please let me know if such assistance will be forthcoming.

Best regards. I remain,

Sincerely,



Wayne Anthony Ross
Attorney at Law

WAR/jm

cc: Don Kates
Ken Fanning
Joe Nava
The Honorable Pat Rodey
The Honorable Charlie Bussell
Bob Parkerson

May 10, 1983

Wayne Anthony Ross, Esq.
Attorney at Law
1007 W. Third Ave., Suite 304
Anchorage, Alaska 99501

Dear Mr. Ross:

I understand that you are extremely disappointed with a recent Department of Law opinion regarding the gun prohibition problem in the Panoramic View Apartments.

As you know, I am not against individual gun ownership. As a long time resident of our state, I believe ownership of guns is both necessary and desirable. At the same time, there are certain circumstances where private parties can limit the possession of firearms. The Panoramic View Apartment situation is probably such a situation under current law.

I trust that you understand the recent Department of Law opinion is supported by case law in the great majority of American jurisdictions. Under the circumstances, it would be reckless for me or my attorneys to issue an opinion which is contrary to contemporary thinking throughout the federal and state judiciary.

Our opinion respecting a challenge to the gun prohibition comports with the advice you received from Benson, Kates and Hardy, Attorneys at Law. Recall that you requested an opinion from Benson, Kates and Hardy who outlined four theories challenging the landlords prohibition. Your counsel stated "I emphatically do not entertain great hopes for any of these theories." Enclosed is a copy of your attorneys letter for convenient reference.

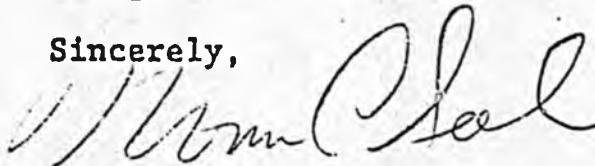
While I understand your concerns, I strongly believe the immediate problem with the Panoramic View Apartment landlord can be remedied by a simple amendment to Alaska's Landlord-Tenant Act. It is my hope that you and the members of the National Rifle Association will seek relief through appropriate legisla-

Wayne Anthony Ross, Esq.
Attorney at Law

May 10, 1983
Page 2

tive channels to remedy problems you have with the Panoramic View situation. I look forward to your thoughts on this matter.

Sincerely,



Norman C. Gorsuch
Attorney General

NCG:vrh

Enclosure

cc: The Honorable Pat Rodey
Senator
Alaska State Legislature
w/enclosure

The Honorable Charlie Bussell
Representative
Alaska State Legislature
w/enclosure

Tom Fink
1035 W. Fireweed Lane
Anchorage, AK 99503
w/enclosure

BENENSON, KATES AND HARDY
ATTORNEYS AT LAW

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NEW YORK, NY 10017
(212) 759-2822

DON B. KATES, JR.
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SAN FRANCISCO, CA 94111
(415) 433-5300

DAVID T. HARDY
100 N. STONE, SUITE 201
TUCSON, AZ 85701
(602) 822-7424

January 19, 1983

Wayne A. Ross, Esq.
P.O. Box 1522
Anchorage, Alaska 99510

Dear Wayne:

In response to your letter, and pursuant to our phone conversation, I would offer the following four legal theories as to your no-handgun lease problem [note: I emphatically do not entertain great hopes for any of these theories]:

1. In accordance with Alaska law forbidding leasehold requirements which are contrary to public policy, argue that this provision (a) violates the right of self defense which is a fundamental principle in every legal system and philosophy (Bob Dowlut of NRA-ILA and Steve Halbrook can give you a host of citations from legal philosophers ancient and modern; in addition, see H. Wechsler, A Rationale of The Law of Homicide 27 COLUM. L. REV. 701, 736 (1937). "the universal judgment that there is no social interest in preserving the lives of the aggressors at the cost of those of their victims."); (b) violates the fundamental constitutional, criminal and civil law privilege of the "castle doctrine" (see enclosed portion of my petition for rehearing in the Morton Grove case); (c) violates the public policy inherent in Alaska's constitutional protection of the right to keep in bare arms. See Williams v. International Brotherhood, etc. 165 P.2d 903, 905 (S. Ct. Cal 1946) applying constitutional anti-discrimination imperative to private employers:

...where persons are subjected to certain conduct by others which is deemed unfair and contrary to public policy, the courts have full power to afford the necessary protection. James v. Marinship Corp., 155 P.2d 329 (1944).

2. That this is a "contract of adhesion" which forces tenants into a Hopson's Choice between giving up the only available place for their families to live and giving up the only viable defense for their families in a violent society.

3. For declaratory judgment that, by interfering with and diminishing tenants' opportunity to protect themselves and their families, the landlord assumes the

Wayne A. Ross, Esq.
January 19, 1983
Page Two.

responsibility of a guarantor of their safety and is absolutely liable for any criminal misconduct which they could have prevented if they had possessed handguns.

4. That, by forbidding handguns, the management is encouraging tenants to possess loaded long guns for the protection of their families, thereby greatly increasing the danger of accidental discharge and or of injury through the use of and over-penetrating long gun against burglars or other attackers in the home. See discussion in footnote 10 to my petition for rehearing in the Morton Grove case, enclosed.

With reference to your concern about possible removal to Federal Court on diversity of citizenship grounds, one possibility would be to limit your suit to one tenant and to injunct and declaratory relief. You might therefore be able to argue that the requisite amount in controversy has not been met. But this is something you should research and think out very thoroughly before trying. I am not certain either that it would work or that it wouldn't involve a host of side effects more disagreeable than the possibility of removal.

If I can be of any further assistance, please do not hesitate to contact me.

Cordially,


Don B. Kates, Jr.

DBK:clh

Enclosure

cc: Mr. Greg McDonald
Michael McCabe, Esq.

Anthony

Ross & Associates

ATTORNEYS AT LAW

ROBERT J. FRENZ
THOMAS S. GINGRAS
WILLIAM E. COOK

OF COUNSEL:
DONALD J. MILLER

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CORDOVA BRANCH
POST OFFICE BOX 207
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AREA 907/424-7229

April 29, 1983

The Honorable Charlie Bussell
Representative
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Representative Bussell:

I am in receipt of a copy of the Attorney General's opinion dated April 13, 1983 entitled "Re: Handgun Ban" addressed to Senator Rodey and Representative Bussell. From that Attorney General's opinion written by one Joseph W. Geldhof, Assistant Attorney General under the signature of Norman Gorsuch, Attorney General, it appears that the attorney general's office as presently constituted does not believe that the Second Amendment to the Constitution of the United States and Article 1, Section 19 of the Alaska Constitution provides for the individual's right to keep and bear arms.

Such a position is in my opinion contrary to law, contrary to the desires of most Alaskans, and contrary to the report of the Subcommittee on the Constitution of the Committee of the Judiciary United States Senate 97th Congress, rendered in February 1982. That subcommittee report concludes with the following:

The following represents a list of twelve scholarly articles which have dealt with the subject of the right to keep and bears arms as reflected in the Second Amendment to the Constitution of the United States. The scholars who are undertaking this research range from professors of law, history and philosophy to a United States senator. All have concluded that the Second Amendment is an individual right protecting American citizens in their peaceful use of firearms. (Subcommittee Report page 18). Hays, The Right to Bear Arms, A Study in Judicial Misinterpretation, 2 Wm. & Mary L. R. 381 (1960); Sprecher, The Lost Amendment, 51 Am. Bar Assn. J. 554 & 664 (2 parts) (1965);

Anthony

Floss & Associates

ATTORNEYS AT LAW

The Honorable Charlie Bussell

April 29, 1983

Page 2

Comment, The Right to Keep and Bear Arms; A Necessary Constitutional Guarantee or an Outmoded Provision of the Bill of Rights? 31 Albany L. R. 74 (1967); Levine & Saxe, The Second Amendment: The Right to Bear Arms, 7 Houston L. R. 1 (1969); McClure, Firearms and Federalism, 7 Idaho L. R. 197 (1970); Hardy & Stompoly, Of Arms and the Law, 51 Chi.-Kent L. R. 62 (1974); Weiss, A Reply to Advocates of Gun Control Law, 54 Jour. Urban Law 577 (1974); Whisker, Historical Development and Subsequent Erosion of The Right to Keep and Bear Arms, 78 W.Va. L. R. 171 (1976); Caplan, Restoring The Balance: The Second Amendment Revisited, 5 Fordham Urban L. J. 31 (1976); Caplan, Handgun Control: Constitutional or Unconstitutional?, 10 N.C. Central L. J. 53 (1979); Cantrell, The Right to Bear Arms, 53 Wis. Bar Bull, 21 (Oct. 1980); and Halbrook, The Jurisprudence of the Second and Fourteenth Amendments, 4 Geo. Mason L. Rev. 1 (1981).

This attorney general's opinion, coming out as it did under Mr. Gorsuch's name, must be construed as coming out with the knowledge and consent of Mr. Gorsuch. An attorney general, being one of the highest law enforcement officers of the state, is sworn to uphold the Constitution of the United States of America.

For Mr. Gorsuch to come to a conclusion that "the modern judicial view has increasingly found that the guaranteed right to keep and bear arms is not an individually protected right, but rather a collective right which allows the people of the various states to serve in a militia" demonstrates a total lack of knowledge of the history and intent of the very constitution which he is sworn to uphold. Such a lack of legal reasoning ability, which leads to a derogation of the rights of the individual residents of this state to keep and bear arms pursuant to their own constitution, justifies you and other members of the legislature in voting not to confirm Mr. Gorsuch's appointment. You may use this letter as you see fit. I urge you and

Anthony

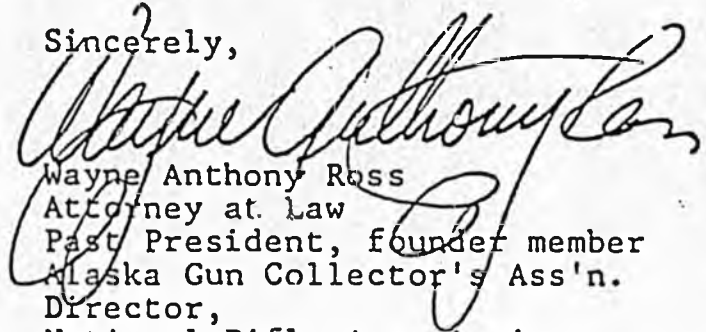
Ross & Associates

ATTORNEYS AT LAW

The Honorable Charlie Bussell
April 29, 1983
Page 3

your fellow legislators to not confirm Mr. Gorsuch. I remain,

Sincerely,



Wayne Anthony Ross
Attorney at Law
Past President, founder member
Alaska Gun Collector's Ass'n.
Director,
National Rifle Association
Member, Ohio Gun Collector's Association
Member, Smith & Wesson Gun
Collector's Association
Member, Colt Collector's Ass'n.
Director, National Firearms Museum,
Inc.
Vice Chairman, NRA Gun Collector's
Committee
Member and Legislative Liaison
Officer, Alaska Rifle & Pistol
Association
Member, Alaska Rifle Association
Member, McKinley Mountainmen
Member, Alaska Peace Officers Association
Member, Alaska Professional
Hunter's Association

WAR/jm

Vic.

← Oregon & ILLINOIS BOTH have language in their constitutions that refer to the "right of the people" as a collective unit. Their courts have ruled that that language includes the rights of people as individuals,

~~Patty Macklin~~ constitutional
The Washington language ^{is} ~~is~~ ^{virtually} identical to the Alaska language. The Washington courts have decided that the individual has the right to bear arms subject to reasonable regulation by the police.

There is virtually no Alaska case-law on the right to bear arms.

Discussion will come up on The Panoramic View apartments. The issue in ~~that~~ the opinion written by AG's office was NOT on whether or not the state legislature may prohibit or control the possession of firearms; The issue was whether or not a private citizen could ~~propose~~ impose a firearms prohibition in a lease term for tenants of his apt. building.

(over)

The opinion dealt w/ a dispute
between private citizens. ~~The~~
~~An amendment~~
~~to~~ Handgun opinion does not
address the states' ability to limit
hand-guns ~~or~~.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

BILL SHEFFIELD, GOVERNOR

REPLY TO:

1031 W 4th AVENUE
SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 276-3550

1st NATIONAL CENTER
100 CUSHMAN ST.
SUITE 400
FAIRBANKS, ALASKA 99701
PHONE: (907) 452-1568

POUCH K - STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

April 11, 1984

The Honorable John J. Liska
Alaska State House of Representatives
Pouch V
Juneau, AK 99811

Re: Opinion on Article I, Section
19, Alaska Constitution

Dear Representative Liska:

The Attorney General has requested that I respond to your March 23, 1984, letter making inquiry about constitutional provisions addressing the right to bear arms. Specifically, you requested our opinion comparing the Alaska language pertaining to the right to bear arms with constitutional language found in the Washington State Constitution. Additionally, you wondered whether the provision in the United States Constitution protecting the right to bear arms conveys identical rights to the people as the provision in the Alaska Constitution.

The relevant provisions found in each constitution are as follows:

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.

Alaska Const. art. I, § 19.

The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men.

Wash. Const. Art. I, § 24.

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.

U.S. Const. amend. II.

The language embodied in Alaska's constitution pertaining to arms is virtually identical, save for two changes in punctuation, to language found in amendment II to the U.S. Constitution. Amendment II to the U.S. Constitution was proposed by the congress on September 25, 1789, and became the law of the United States on December 15, 1791. The Washington constitutional provision was adopted in 1889 and the Alaska provision became operative with the formal proclamation of statehood on January 3, 1959.

During the intervening years since adoption of the United States, Washington, and Alaska constitutional arms provisions, numerous court cases have interpreted the constitutional language which establishes the right to bear arms. The Alaska Supreme Court has not had occasion to pass judgment on the exact nature of the rights contained in the Alaska Constitution, however the Washington Supreme Court has opined that the "constitutional guarantee of certain rights to certain individual citizens does not place such rights entirely beyond the police power of the state." State v. Gohl, 90 P. 259 (Wash. 1907). More specifically, the Washington Supreme Court found that the provision pertaining to the right to bear arms was "subject to reasonable regulation by the state under its police power." State v. Krantz, 164 P.2d 453 (Wash. 1945).

The contemporary judicial view in many jurisdictions does not regard amendment II to the United States Constitution as prohibiting or limiting the legislature's power to regulate the ownership or control of firearms. Whatever the scope of any common law or constitutional right to bear arms, it is not absolute and does not guarantee to individuals the right to carry weapons abroad at all times and in all circumstances. Application of Atkinson, 291 N.W. 2d 396 (Minn. 1980).

Because of the lack of case law in Alaska, we are unable to ascertain with any great certainty how the Alaska Supreme Court would construe article I, section 19, of the Alaska Constitution. It is possible that the Alaska courts would follow case law from other jurisdictions, which has held that the right to bear arms is subject to reasonable regulation under the state's police power.

The Honorable John J. Liska
Alaska State House of Representative

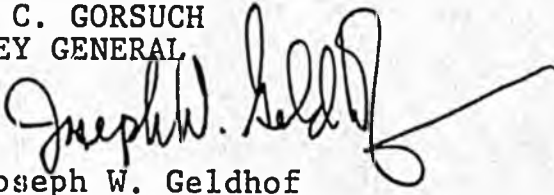
April 11, 1984
Page #3

Please contact us at your earliest convenience if we
can answer additional questions.

Sincerely,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By:


Joseph W. Geldhof
Assistant Attorney General

JWG:eer

October 19, 1983

The Honorable Mike Szymanski
Representative
Alaska State Legislature
SR-A 1304B
Anchorage, Alaska 99502

Dear Mike:

Thank you very much for the kind words in your recent letter. I certainly appreciate the discussion you had with Mr. Brune.

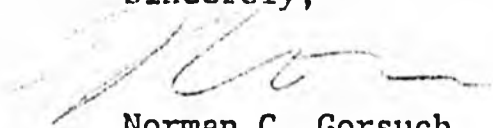
I am gratified to know that the NRA has decided that it made a mistake.

I think I will keep a copy of his letter in my file. I never know when I might need to pull it out.

Thanks again for your support during the past Legislative session.

I hope that we can continue to work together in the coming years.

Sincerely,



Norman C. Gorsuch
Attorney General

NCG:vrb



NATIONAL RIFLE ASSOCIATION OF AMERICA
INSTITUTE FOR LEGISLATIVE ACTION
1600 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D. C. 20036

September 20, 1983

001-3 1983
AM 7,8,9,10,11,12,13,14,15,16 PA

The Honorable Mike Szymanski
Alaska State Legislature
SR-A-Box 1304B
Anchorage, AK 99502

Dear Mike:

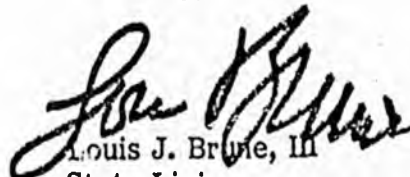
I enjoyed meeting you at the recent National Conference of State Legislatures in San Antonio. I appreciate your candor in conveying your comments concerning our opposition to Norman Gorsuch as Attorney General. All of us are human and at some time subject to mistakes. Gorsuch has proved to be a friend of the sportsman and law abiding gun owners of Alaska. The Attorney General recently signed a brief to the Supreme Court to hear the Morton Grove handgun ban.

I wanted to thank you for your invitation to attend the Western Conference of Legislators in Fairbanks in September, but due to budget constraints I will not be able to make that trip.

I was sorry to hear that the Governor vetoed money for the Range Development Program in Alaska. Although there are greater priorities in terms of funding monies for the development of sewerages in some of the cutlying bush areas of Alaska and to maintain wildlife habitat, at the same time a range development program, such as the one in Alaska, is a pioneer effort and has been the model for similar programs throughout the United States. I appreciate the strong support that both you and Pat Rodey have given on these issues.

Please give my best to Pat, and if I can be of any further assistance, please do not hesitate to call upon me.

Sincerely,


Louis J. Brune, III
State Liaison

sms



Official Business

Alaska State Legislature

House of Representatives

Representative Mike Szymanski

SR-A-Box 1304B
Anchorage, Alaska 99502
Phone (907) 349-3373

While in Session:
Pouch V
State Capitol
Juneau, Alaska 99811

October 3, 1983

Mr. Norman Gorsuch
Attorney General
State of Alaska
Pouch "K"
Juneau, Alaska 99811

AM 7 10 11 12 13 14 15 16
OCT 5 1983
PER

Dear Norm:

Just a short note to say "hi" and pass on a letter I received from the National Rifle Association of America concerning their position on your confirmation.

During the recent national conference, I basically indicated to the NRA that they were way off base in attacking you and, at least from my perspective, they lost a lot of credibility in doing so.

Keep up the good work and if there is anything I can do for you, just give me a holler.

Best regards,

A handwritten signature in cursive script that reads "Mike Szymanski".

Mike Szymanski
Representative



Matanuska Valley
Sportsmen

Palmer, Alaska 99645



VF
ST

P. O. Box 1875
Palmer, Alaska 99645
March 17, 1984

The Honorable Vic Fischer, Chairman
Senate State Affairs Committee
Alaska State Senate
Pouch "V"
Juneau, Alaska 99811

Dear Senator Fischer:

It is my understanding that SJR-28, which pertains to a constitutional amendment which will guarantee the right of Alaskans to keep and bear arms for legitimate purposes, is before the State Affairs Committee, and will be acted upon shortly.

During their monthly meetings, the Matanuska Valley Sportsmen have discussed SJR-28 on several occasions, and have unanimously supported it.

An important aspects of this resolution is that it will allow the electorate of the State of Alaska to voice an opinion on this issue which is so hotly debated elsewhere in our country. Furthermore, the right to keep and bear arms is extremely important to the maintenance of the Alaskans lifestyle, especially when that lifestyle is based upon the use of arms for subsistence. It is, therefore, one issue which is important to both residents of bush areas and urbanites.

I, personally and as a representative of the Matanuska Valley Sportsmen, urge you and your committee to vote in favor of SJR-28.

Sincerely,

Robert H. Parkerson
Vice President
Matanuska Valley Sportsmen

Ltr / Matanuska Valley Sportsmen 3/17/84



UNITED
Lumber Co., Inc.

WHOLESALE
P.O. BOX 1318
KENT, WA 98301
(206) 872-7788

UNITED LUMBER COMPANY, INC.
Building Supply & Home Center

CORPORATE HEADQUARTERS
P.O. BOX 6809 • ANCHORAGE, AK 99502
TELEPHONE (907) 243-4545

ANCHORAGE
5011 JEWEL LAKE RD.
ANCHORAGE, AK 99502
243-4545

EAGLE RIVER
P.O. BOX 458
EAGLE RIVER, AK 99645
894-2784

PALMER
P.O. BOX 1270
PALMER, AK 99645
745-2410

SOLDOTNA
P.O. BOX 29
SOLDOTNA, AK 99689
282-9081

BETHEL
P.O. BOX 1888
BETHEL, AK 99559
543-2034

HOME CENTER
501 W. RASPBERRY RD.
ANCHORAGE, AK 99502
349-7518

April 27, 1984

The Honorable Patrick Rodey
Alaska State Legislature
Pouch V
Juneau, AK 99811

Dear Senator Rodey,

The attached list of signatures is a result of our company employees becoming aware of Joint Resolution No.28. We believe this list represents a good cross section of voters and it indicates that if this ammendment is placed on the ballot it is very likly to be passed.

Please feel free to use this list as necessary to get this ammendment on the ballot.

We would be pleased to hear from you if we can be of assistance.



O. Holmstrom
Secretary / Treasurer

ff

MILLWORK & TRUSS
180 W. 68TH
ANCHORAGE, AK 99502
243-4545

MANUFACTURING PLANT
MILE 7 1/2 OLD SEWARD HWY.
ANCHORAGE, AK 99502
344-7812

UNITED COMPONENT & BUILDING SYSTEMS PLANT
PALMER INDUSTRIAL PARK
PALMER, AK 99645
745-3052

SAWMILL
147 1/2 STERLING HWY.
STARISKY, AK 99639

Letter / United Lumber Co. 4/27/84

Philip A. Robinson
 Shaun Young
 Tim Pitts
 Lucia Jordan
 Lotie K. Hammell
 Kathy Casselas
 P. Clem. Sander
 David P. Hill
 Patricia S. Jackson
 David R. Valiga
 Patricia M. Miller
 Hal Kowalski
 Richard Smith
 Les W. Edwards
 John Andrew Stember
 Dan Casey
 Alfred R. Calounek
 Peggy S. Kijarski
 Frank S. S. J.
 Selma Stone
 Louis Turbice
 Edward A. Westwood
 Nancy Favros
 John P. McConnell
 Jim D. Jant
 Off. [unclear]
 Michael [unclear]
 George [unclear]

Victor H. Johnson
 P. Brock E. H.
 Clair M. [unclear]
 Clint Kaylock
 Rick Gull
 Jim S. [unclear]
 Charles J. Mills
 Suzanne M. Trotter
 Thomas J. Mayer
 Maurice L. Hawks
 Edgar W. Knott
 [unclear]
 Dan L. Hansen
 Bobbie L. Hauser
 [unclear]
 [unclear]
 W. W. Jones
 W. D. [unclear]
 [unclear]
 David Connor
 Larry A. P. [unclear]
 Anna Brodie
 John E. Salt
 Richard Bush
 [unclear]
 Robert A. Larson
 [unclear]

Harold Gray
Vernon Stille

Jul Johnson
A. B. B. J.
Ralph J. Schuch

Carl J. Jatta
Rabbie. Clodfelter

Marilyn Cooper
L. J. Taylor

Paul Shuman
Tom McMillin

W. J. Samuel AMOCT

Darrell Atchley

Alonzo H. Habley

Norman W. Baker

J. L. Weir

Reuben F. Smith

Ron Johnson

Thomas P. Riegrister

Frank Farnsworth

George M. Sorenson

Robert E. Smith

Thomas L. Johnson

Will W. W. W.

Ben Moore

Tom English

Edward C. Egan

Tom Schreyer

Butler J. J.

Wayne V. Sweeney

Lee Franklin

Gene Byrnes

Alvin E. Poirer

Allen B. Turner

SJR

31

SENATE STATE AFFAIRS COMMITTEE

Date received 3/12

Bill Number SJR 31 Title Capture of orcas in Alaska waters

Fiscal Note	Position Paper	Date requested	From	Amount	Date Rec'd Note	Rec'd Paper
0						

CONTACTS

Backup list

P. 2, line 15
"respectfully"

HEARING INFORMATION

NOTES:

FINAL ACTION _____

DATE _____

Original sponsors: V.Fischer, Rodey,
Halford, et al

1 IN THE SENATE BY THE STATE AFFAIRS COMMITTEE
2 S FOR SENATE JOINT RESOLUTION No. 31 (State Affairs)
3 IN THE LEGISLATURE OF THE STATE OF ALASKA
4 THIRTEENTH LEGISLATURE - SECOND SESSION

5 Relating to the capture of orcas in
6 Alaska waters.

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

8 WHEREAS the State of Alaska and its people have an abiding interest in
9 the wildlife of the state; and

10 WHEREAS the National Marine Fisheries Service has issued to Sea World,
11 Inc., a permit to capture 100 orcas (killer whales) in Alaska waters and to
12 retain 10 of the orcas for breeding and public display; and

13 WHEREAS the granting of a permit for the capture of orcas in Alaska is
14 a major federal action resulting in a significant environmental impact on
15 the State of Alaska; and

16 WHEREAS the State of Alaska has been engaged in discussions with Sea
17 World, Inc., concerning the issuance of a state permit that would condition
18 the capture of orcas on (1) performance of certain investigations prior to
19 capture, (2) compliance with conditions regulating the locations, methods,
20 times and other aspects of capture, (3) providing for observers to be
21 stationed aboard vessels used for captures, and (4) providing for the
22 reimbursement of certain costs that may be incurred by the state as a
23 result of capture activities; and

24 WHEREAS, during testimony given before the Alaska Legislature and in
25 negotiations with the Alaska Department of Fish and Game, Sea World, Inc.,
26 agreed to abide by state decisions with respect to the taking of orcas, but
27 subsequently has denied making such commitments and has stated its inten-
28 tion to ignore the wishes of the State of Alaska and its people; and

29 WHEREAS Alaskans have testified overwhelmingly against the capture and

1 removal of orcas from Alaska waters;

2 BE IT RESOLVED by the Alaska State legislature that the Congress of
3 the United States is requested to (1) prohibit the taking of orcas in
4 Alaska waters; or (2) require that the capture of orcas in Alaska waters be
5 carried out only after public hearings and an environmental impact state-
6 ment are conducted in Alaska by the National Marine Fisheries Service and
7 only in accordance with conditions of capture established by the State of
8 Alaska; and be it

9 FURTHER RESOLVED that the National Marine Fisheries Service is re-
10 quested to (1) suspend the permit issued to Sea World, Inc., for the cap-
11 ture of orcas in Alaska waters until an environmental impact statement is
12 completed; or (2) require that Sea World, Inc., abide by conditions of
13 capture to be established by the Alaska Department of Fish and Game; and be
14 it

15 FURTHER RESOLVED that the governor of Alaska is ^{respectfully} requested to (1)
16 vigorously pursue implementation of this resolution; and (2) act firmly to
17 prevent illegal or unauthorized interference with or harassment of orcas in
18 Alaska waters.

19 COPIES of this resolution shall be sent to the Honorable George Bush,
20 Vice-President of the United States and President of the U.S. Senate; the
21 Honorable Thomas P. O'Neill, Jr., Speaker of the House of Representatives;
22 and to the Honorable Ted Stevens and the Honorable Frank Murkowski, U.S.
23 Senators, and the Honorable Don Young, U.S. Representative, members of the
24 Alaska delegation in Congress; William G. Gordon, assistant administrator
25 for fisheries, National Marine Fisheries Service; and the Honorable Bill
26 Sheffield, Governor of Alaska.
27
28
29



Official Business

Alaska State Legislature

Senate Committee on State Affairs

Vic Fischer, Chair • Pouch V
Juneau, Alaska 99811
(907) 465-4954

M E M O R A N D U M

Date: March 20, 1984
To: Senate State Affairs Committee
From: Senator Vic Fischer
Re: Brief history of SJR31

In November 1983, the National Marine Fisheries Service issued a permit to Sea World, Inc. to capture up to 100 killer whales in Alaska waters for public display and research purposes. Subsequently, major concerns have been raised by Alaskans. Among them are:

- Issuing the permit presented a federal action that could result in a significant environmental impact on Alaska and its people.
- There had been no public hearings held in Alaska. The single hearing on the federal permit was held in Seattle, Washington.
- No one representing the state of Alaska was present during the Seattle hearing and since our citizens are, by and large, ignorant of the federal permitting process, they were unable to respond within the public comment period.
- The Alaska Department of Fish and Game had supported the permit under the condition that they be granted authority to monitor compliance with the permit and establish times and places for the captures. That request was ignored and by NMFS.
- The Alaska Native Brotherhood passed a resolution asking for a ban on the capture of killer whales for any purpose. The cultural and religious significance of killer whales to some Southeast Alaskan natives was not considered during the federal permitting process.
- The opportunity to view killer whales in the wild is a major tourist attraction in Alaska and tour boat operators, primarily in Prince William Sound, have testified that they fear the captures will reduce the overall population and drive the orcas away from areas where they have been viewed in the past.

SJR 31 was introduced by Senator Vic Fischer, along with eight co-sponsors, in order to address Alaska's interest in killer whales within state waters, the effects of the proposed captures on that population, and Alaska's marine ecology as a whole.

The proposed State Affairs Committee substitute before you asks that the state's request to monitor the captures be granted or, failing that, that NMFS withdraw the permit until public hearings are held in Alaska and an environmental impact statement is completed.

While Alaska's role in the permitted capture of marine mammals under federal control may be extremely limited, other states faced with a similar situation have been successful in banning captures within their three mile limit. Further, federal legislation is currently pending that would amend the marine mammal act to prohibit capturing for public display purposes in the future.

The wishes of the Alaska legislature as presented through this resolution, therefore, has significance on both a state and national level. Testimony received during two teleconferences on the House resolution (HJR58) and two hearings on SJR 31 was near unanimous in its opposition to any captures for any purpose. Every person or agency who offered testimony agreed that the state should have a lead role in monitoring compliance with the permit conditions, should the captures actually take place.

BACK-UP INFORMATION:

- * 1/18/84 letter from Ralph Monro, Secretary of the state of Washington, and a copy of Washington state resolution banning captures.
- * ANB resolution
- * HR4457 (federal legislation banning future captures)
- * Testimony from Greenpeace International
- * 1/9/84 letter from Sea World, Inc. to ADF&G outlining scope of proposed captures and research project.
- * NMFS permit authorizing captures in Alaska

/gb



Grand Camp
Alaska Native Brotherhood

71ST, ANNUAL ANB-ANS GRAND CAMP CONVENTION
JUNEAU, ALASKA
NOVEMBER 14-19, 1983

RESOLUTION NO. 92

- WHEREAS, Sea World of San Diego, California has been issued a permit by the Federal government to capture 100 killer whales in a period of five years, and
- WHEREAS, The state of Washington and the government of Canada have both opposed and stopped the capture of killer whales within their water boundaries in the past, and
- WHEREAS, Sea World has promised safe capture of these mammals, but has caused many deaths in past captures because of their use of seal bombs, high speed boats, sea planes, and methods of capture, and
- WHEREAS, These offenses during the capture of killer whales influenced the state of Washington to file a law suit against Sea World in 1976, putting an end to their operations and cancelling their permit, and
- WHEREAS, The state of Alaska has no mammal protection laws to protect killer whales, or to prevent this type of operation within the water boundaries of Alaska, NOW

THEREFORE BE IT RESOLVED that the 71st Annual Grand Camp Convention of the Alaska Native Brotherhood and Sisterhood assembled in Juneau, Alaska strongly urge the State of Alaska to enact legislation banning the capture of killer whales within the boundaries of Alaska waters, and

BE IT FURTHER RESOLVED that an intense investigation be conducted by the Dept. of Fish and Game on the methods used by Sea World in their capturing methods in Puget Sound. Copies of this resolution to be sent to the Assistant Administrator for Fisheries, Washington, D.C., to Alaska Legislature, and the U. S. Delegation from Alaska.

ATTEST:

I certify that this resolution was adopted by the ANB ANS Grand Camp in Convention at Juneau during the week of Nov. 14-19, 1983.

Ronald Williams

Ronald Williams, Grand President

Albert Kookesh

Albert Kookesh, Grand Secretary

Past ANB Grand P...ents
Re...
A...
C...

Frank Peratrovich
Patrick J. Paul
Thompson Jackson

ANB RESOLUTION

Frank See
Walter Sebottell
Richard Selt
D...

Nelson D. Frank
Frank O. Williams
Herbert Hara
B...

SECRETARY
of STATE



Ralph Munro

January 17, 1984

Olympia, Washington 98504
(206) 753-7121

Representative Mike Szymanski
Pouch V
State Capitol
Juneau, AK 99811

Dear Representative Szmanski:

I write to commend you for your intention to sponsor legislation to ban the capture of Orcas in Alaskan waters.


In 1976, my wife and I had the unfortunate experience of watching a whale capture here in Southern Puget Sound. It was both cruel and inhumane, as well as in violation of the federal permits issued for that incident.

Just a short time after we witnessed the capture attempt, the Washington State Senate passed Senate Resolution 222, which stated Washington's policy of prohibition of further captures in our waters. Senate Resolution 222, which I have enclosed for your reference, calls for a "moratorium on the intimidation, harrassment, hunting and capturing of killer whales in Puget Sound and adjacent salt waters." The resolution still stands as a statement of legislative policy. In addition, the Washington Game Commission adopted a set of policies to guide the Department of Game in the management of the state's wildlife resources. This policy states that "commercial exploitation of wildlife . . . will be opposed unless specifically authorized by the Commission as not being harmful to the resource." We feel that this policy is particularly relevant when applied to a situation where orcas would be captured in Washington, then transported out-of-state for commerical purposes, such as amusement parks in Southern California.

Should you or your staff need any materials, please call on me directly. I should note that Governor Spellman, the Washington State Game Department, our Lands Commissioner, and many other elected officials from both sides of the political aisle have been strongly opposed to these catures and will continue to fight for stronger national legislation to ban the capture of orcas.

Again, I commend you for sponsoring this important legislation.

Sincerely,


RALPH MUNRO
Secretary of State

RM:tu

Enclosure

1/17/84 letter From State of Washington

IN THE LEGISLATURE
of the
STATE OF WASHINGTON



SENATE RESOLUTION 1976-222

By Senators, Cunningham, Bailey, Lewis (Harry), McDermott, Wilson and vonReichbauer:

WHEREAS, Certain species of marine mammals are, or may be, in danger of extinction or depletion as a result of man's activities and such species should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part; and

WHEREAS, There presently exists within Puget Sound and the salt waters contiguous thereto a species of mammal commonly known as the "killer whale;" and

WHEREAS, There is inadequate knowledge of the ecological and population dynamics of such mammals and of the factors which bear upon their ability to reproduce and survive in an atmosphere of continuing encroachment by man; and

WHEREAS, It is the sense of the Washington Legislature that the killer whales should be protected and encouraged to develop in a natural state and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem; and

WHEREAS, Present methods and techniques of pursuing and capturing the killer whales present substantial and serious questions as to their efficiency, humaneness and effect on marine life in this delicate ecosystem;

NOW, THEREFORE, BE IT RESOLVED, By the Senate of the State of Washington, that the United State Congress be requested to declare an immediate moratorium on the intimidation, harassment, hunting and capturing of killer whales in Puget Sound and adjacent salt waters;

BE IT FURTHER RESOLVED, That the United States Congress be requested to direct the appropriate federal agencies to cease issuing permits to hunt and/or capture this mammal and revoke all such existent permits;

AND BE IT FURTHER RESOLVED, That copies of this resolution be sent to the United States Department of Commerce, the National Marine Fisheries Service, members of the Congressional delegation from this state, the Marine Mammal Commission, and the Scientific Advisors on Marine Mammals.

Adopted March 9, 1976



98TH CONGRESS
1ST SESSION

H. R. 4457

To prohibit the taking and importation of killer whales for public display purposes.

IN THE HOUSE OF REPRESENTATIVES

NOVEMBER 17, 1983

Mr. CHANDLER (for himself, Mr. FOLEY, Mr. DICKS, Mr. MORRISON of Washington, Mr. LOWRY of Washington, and Mr. SWIFT) introduced the following bill; which was referred to the Committee on Merchant Marine and Fisheries

A BILL

To prohibit the taking and importation of killer whales for public display purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That section 101(a)(1) of the Marine Mammal Protection Act
4 of 1972 (16 U.S.C. 1371(a)(1)) is amended by adding at the
5 end thereof the following new sentence: "After the effective
6 date of this sentence, no permit may be issued for the taking
7 and importation of killer whales (*Orcinus orca*) for public dis-
8 play purposes."

9 SEC. 2. The amendment made by the first section of this
10 Act shall take effect on the date of the enactment of this Act

FEDERAL LEGISLATION BANNING CAPTURES



SUBMISSION TO
THE U.S. NATIONAL MARINE FISHERIES SERVICE

COMMENTS CONCERNING SEA WORLD, INC'S
ORCA CAPTURE PERMIT APPLICATION UNDER

THE GUIDELINES OF THE U.S. MARINE

MAMMAL PROTECTION ACT

GREENPEACE,
SEATTLE

GOOD SHEPHERD
CENTER
4649 SUNNYSIDE
AVENUE NORTH
SEATTLE, WA
98103

TELEPHONE
206/632-4326

Greenpeace Northwest

Alan Reichman, Wildlife
Campaign Coordinator

June 6, 1983

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TAX-EXEMPT
ORGANIZATION

TESTIMONY BY GREENPEACE

ERIES SERVICE

CAPTURE PERMIT

1. MARINE MAMMAL

of Greenpeace—with ap-
granting Sea World, Inc. a
orca) from Alaska and Cal-
s of the U.S. Marine Mammal

Sea World orca capture op-
t of our location. Therefore,
those submitted by Greenpeace
Sea World as well as other con-

on opposing a potential Sea

ans of capturing orcinus orca

cation for Sea World's proposed
a orcinus orca populations; as
entific justification for the
conduct.

source of display animals for
operations—as well as potential
Sea World's proposed research appears
justify its desire to provide its

ons in the State of Washington.
: have experienced the negligence
the State of Washington success-
ure operation was subsequently

1
2
3
4



SUBMISSION TO THE U.S. NATIONAL MARINE FISHERIES SERVICE

COMMENTS CONCERNING SEA WORLD, INC.'S ORCA CAPTURE PERMIT

APPLICATION UNDER THE GUIDELINES OF THE U.S. MARINE MAMMAL

PROTECTION ACT

The Pacific Northwest regional office of Greenpeace—with approximately 20,000 members—is opposed to granting Sea World, Inc. a permit to capture killer whales (orcinus orca) from Alaska and California coastal waters under the guidelines of the U.S. Marine Mammal Protection Act.

GREENPEACE,
SEATTLE

GOOD SHEPHERD
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4649 SUNNYSIDE
AVENUE NORTH
SEATTLE, WA
98103

TELEPHONE
206/632-4326

Greenpeace Northwest has experienced Sea World orca capture operations firsthand in the past as a result of our location. Therefore, we are submitting comments in addition to those submitted by Greenpeace U.S.A., emphasizing our experience with Sea World as well as other concerns.

There are four facets of our position opposing a potential Sea World orca capture permit:

1. The biological and ethical implications of capturing orcinus orca and holding them in captivity.
2. The clear lack of scientific justification for Sea World's proposed exploitation of Alaska and California orcinus orca populations; as well as an equally clear lack of scientific justification for the scientific research they propose to conduct.
3. Sea World's interest in procuring a source of display animals for its highly profitable marine circus operations—as well as potential sale to other aquaria worldwide. Sea World's proposed research appears to possibly represent an attempt to justify its desire to provide its facilities with a resource.
4. Sea World's pitiful capture operations in the State of Washington. As citizens of Washington State, we have experienced the negligence of Sea World firsthand. In 1976, the State of Washington successfully sued Sea World and their capture operation was subsequently shut down.

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I. BIOLOGICAL AND ETHICAL IMPLICATIONS

The risks of mortality to orcas during capture operations, transport, and captivity are manifold. There is a bonafide risk of death for non-target as well as target animals during capture, and an exceptionally high risk of mortality to captive animals during transport as well as the first few months of captivity. Furthermore, the longevity of captive orcas is far below that of orcas in the wild (please see the attached table provided by Washington Secretary of State Ralph Munro concerning orcas captured in Washington State and British Columbia waters from 1961-1976). Also, no orcas have ever successfully bred in aquaria facilities anywhere in the world. Thus, captive orcas are denied an opportunity to contribute to the survival of their particular pod or the population as a whole.

GREENPEACE,
SEATTLE

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Ethical considerations must also be scrutinized. For instance, we must consider the importance of the pod as the intricate social unit which orcas live within. During capture operations, entire pods are harassed: often by "California seal devices" (which are better known as seal bombs), high speed boats, and sea planes. As a result, non-target animals are adversely affected by such operations. All orcas within an affected pod are disrupted and disturbed by the removal of individual members. A trauma factor for all the whales must be considered. Furthermore, the conditions of confinement in aquaria enclosures are not acceptable by modern zoo-keeping standards. Orcas can range up to one hundred miles per day in the wild. Enclosures which are not realistically much larger than backyard swimming pools simply are not adequate. Orcas have sophisticated sonar systems for communication, hunting and navigation and live in perpetual distress in a captive environment wherein their communications reverberate off concrete walls.

II. LACK OF SCIENTIFIC JUSTIFICATION FOR PERMIT

Sea World does not provide ample evidence supporting their estimate of a world orca population of 200,000 animals. Furthermore, Sea World does not provide sufficient information concerning the stocks in Alaska and California they wish to exploit. Greenpeace Northwest supports the reasons given by the Moclips Cetological Society of Friday Harbor, WA. in its opposition of a potential Sea World permit for these reasons as well as the others they cite.

We agree with Moclips' critique of Sea World's plan to develop a "sustained captive breeding population." Orcas have never successfully bred in captivity. Greenpeace Northwest recommends that Sea World demonstrate that it can provide a captive environment wherein orcas that are currently in captivity can successfully breed before they are permitted to capture more orcas for the explicit purpose of breeding orcas. Until Sea World can successfully demonstrate that captive orca breeding is possible, a permit should not be granted.

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Also, Sea World does not provide sufficient justification for the research that it wishes to conduct. They do not establish that such research could not be successfully conducted from orcas that are currently in captivity. There, especially is no justification for Sea World to transport orcas away from the capture site if they are going to be released. Sea World needs to clarify its intentions concerning the duration of time they intend to experiment on whales. They are requesting up to three weeks to conduct experimentation yet Lanny Cornell claims the whales will be held only twenty minutes to two hours in a Seattle Post-Intelligencer article of June 2, 1983 (which is enclosed). Sea World only concedes that it will "attempt" to release orcas near other orcas. Furthermore, they could never insure that orcas would be released at locations where they could reintegrate themselves into their pods. Given the intricacy and dynamacy of the relationship between an individual orca and its pod this could cause an inhumane level of pain and suffering.

GREENPEACE,
SEATTLE

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In summation, Greenpeace Northwest is in agreement with the Moclips Cetological Society's comments concerning Sea World's lack of evidence regarding orca population sizes; the lack of credibility for their proposed "sustained breeding population"; and the lack of justification for the validity as well as methodology of the research they propose to conduct.

III. SEA WORLD'S OVERRIDING INTEREST IN PROCURING DISPLAY ANIMALS

When one traces the history of the orca capture industry, one realizes that Sea World may be more interested in procuring a source of display animals for its highly profitable marine circuses than it hopes to increase scientific knowledge of orcinus orca.

As I will further explain in section IV of these comments, Sea World conducted its capture operations in Washington State waters until it was successfully sued by the State of Washington in 1976. As a result, Sea World's "orca capture expert" Donald Goldsberry travelled to Iceland where he helped start a similar capture operation based at the Saedryasafned Zoo (see accompanying portion of Erich Hoyt's The Whale Called Killer, New York, E.P. Dutton, 1981). Iceland has been Sea World's source of orcas since 1977.

Since the National Marine Fisheries Service has temporarily stopped issuing permits allowing the importation of orcas from Iceland, Sea World is wondering where its display animals will be obtained from. The National Marine Fisheries Service should consider the possibility that Sea World is submitting this application because its Icelandic source has dried up.



IV. SEA WORLD'S RECORD IN WASHINGTON STATE

Until March of 1976, Sea World regularly attempted—many times successfully—to capture orcas in Washington State coastal waters. Their capture operations raised considerable public concern. One such occasion is described by Sheldon Campbell in his Lifeboats to Ararat (New York: Times Books, 1978):

"A year before this time (Campbell has described a confrontation between Goldsberry and Don McGaffin, a columnist with Seattle's KING-TV which is an NBC affiliate, in the preceding paragraph) a tragedy had occurred which stirred many of the residents around Penn Cove to anger, for by 1970 killer whales were a welcome addition to the local scenery, coming as they did around the same time every year, generally in August, remaining awhile, and then departing on what happened to be an annual migration. In 1970 some of the visiting whales had been left behind dead, their corpses washing up along the shore. Several had their bellies slit and rocks, concrete, and old chunks of iron placed inside. Because whale collectors had been in the vicinity before the deaths, some residents blamed them. (Footnote at bottom of page: "Nothing was proved but accidents do occur in animal collecting, particularly in the earlier stages of developing capture techniques.")"

GREENPEACE,
SEATTLE

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While it has never been proven that Sea World's orca capture operation under the direction of Donald Goldsberry killed the orcas, it has never been proven otherwise.

In early March of 1976, Sea World attempted its last ever capture attempt in Puget Sound waters. Sea World utilized seal bombs, high speed boats, and sea planes to herd whales from north of the Tacoma-Narrows Bridge to Budd Inlet, just outside of Olympia. A heated public outcry ensued. On Wednesday, March 10, Governor Dan Evans asked Attorney General Slade Gorton to file suit in District Court at Seattle to block the removal of orcas that were trapped at Budd Inlet.

The lawsuit questioned whether Sea World was authorized to use the seal bombs, etc. within the terms of the permit that had been issued by the U.S. National Marine Fisheries Service. I have enclosed some of the transcripts of Sea World's appeal that was dismissed by the U.S. District Court. Many of the transcripts from the successful suit are not included in the file that is held in archives in Seattle, WA.

Judge Morell Sharpe's verdict ruled that the defendants illegally pursued orcas in a prohibited zone north of the Tacoma-Narrows Bridge. Moreover, Sea World's permit stipulated that the allowed method of capture would be as follows:

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"Methods of capture will be allowing the animals to enter a bay or harbor and then closing off the mouth or entrance with a specially designed mesh net which keeps the animals inside the bay but allows the passage of fish back and forth. From this point another net is placed inside the original net to herd the animal into a working area and from there the animals are divided into smaller groups and put in floating pens large enough to accommodate two or three animals as necessary. Some animals which are to be taken are then separated, placed in floating pens, and the remaining animals are freed. The size of the pens would be adjusted so that individual animals accommodated would have at least twice their body length in depth within the pen. This method allows the collector to evaluate the animals and pick out the most likely specimens, while not placing undue stress on the animals."

GREENPEACE,
SEATTLE

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206/632-4326

Clearly, these terms do not permit the usage of explosives, high speed boats, and sea planes for herding. Sea World broke the terms of its agreement.

While Sea World is not asking for authority to capture orcas from Puget Sound waters in this application, we must consider that they have not followed National Marine Fisheries Service regulations in the past. I have enclosed a copy of the 1976 Washington State Senate Resolution that bans capture and harassment of orcas in Washington State coastal waters.

Interestingly enough, the text that Sea World cites as its description of the techniques it plans to utilize in proposed capture operations is co-authored by none other than Donald Goldsberry.

V. SUMMATION

Greenpeace Northwest agrees with the recommendations of the Moclips Cetological Society of Friday Harbor, WA. and further recommends that:

- 1) Sea World, Inc. conducts any scientific research it deems necessary on orcas that are currently in captivity at its facilities in San Diego, CA., Aurora, OH., and Orlando, FL., as well as other aquaria worldwide.
- 2) Sea World, Inc. demonstrate that it can successfully develop a captive environment where orcas that are currently in captivity can breed successfully. Orcas that are currently in captivity at their facilities as well as other aquaria could be transferred to the new enclosure system.
- 3) Public hearings be conducted to further scrutinize Sea World, Inc.'s application. Citizens should be invited to voice their opinions con-

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cerning this proposal. A hearing should be held in the Puget Sound region of Washington State as the citizens of Washington State have had experience with Sea World, Inc.'s capture operations in the past and should be allowed to participate in the decision-making process.

Yours Sincerely,

Alan Reichman

Alan Reichman
Wildlife Campaign Coordinator
Greenpeace Northwest

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A Scientific Review of the SeaWorld Permit Application
of March 7, 1983 for Public Display and Scientific Research
Under the Marine Mammal Protection Act

16 - August - 1983

by Richard Ferraro and Dr. Merrill Spencer

Seattle, Washington

abstract:

On March 7, 1983 SeaWorld requested a five year permit to confine and capture Orca Orcinus (killer whale) for the reasons of public display and scientific experimentation.

This review addresses all scientific aspects of this permit request and is presented by two concerned research scientists. The SeaWorld permit request should not be approved. We request that this written review be entered into the record.

authors:

Richard Ferraro is a research scientist specializing in computer applications of medical electronics. He has a masters degree in Electrical Engineering, and acts as a consultant to electronics corporations, hospitals, Universities and the National Institutes of Health. He has focused his attention, in the past 18 months, to the Orca of the Puget Sound.

Dr. Merrill Spencer is a physiologist specializing in the field of Cardiovascular research. He has published over 160 scientific papers including comparative Physiology subjects, and 7 papers on Orca and Grey Whale physiology. He has served on many National panels reviewing scientific research proposals. He has participated in the capture of wild Orca in the San Juan Islands as well as Grey Whales of Laguna Ojo De Lebríe Baja California and thus has first hand experience with the logistical and stress related problems involved in the capture and confinement process.

review and risk assessment:

The general criticisms we have of the SeaWorld permit request are that it is poorly organized, omits important information, and lacks consideration for scientific hypothesis and protocol. The consultants listed have no defined roles nor is the five year plan clearly outlined.

The risks to Orcus Orcinus, both individuals and pods, are not clearly identified in either the capture and handling techniques nor in the medical procedures. Subsequently the methods for minimizing obvious risks are missing.

For example the risk of infection due to the tooth extraction process is not dealt with. No mention is made to the use of antibiotics in minimizing this infection potential. Nor is it suggested that the Orca whose teeth are to be extracted could be the animals that SeaWorld currently holds or plans to keep. Their standard animal husbandry program would further minimize the risk of infection.

The specific criticisms of the SeaWorld permit application follow. We have reorganized each of the experiments and procedures into the following five categories:

1. Breeding

There is no hypothesis stated as to how SeaWorld plans to successfully breed Orca when they have been unsuccessful in the past. The procedural changes such as larger pools, hormone levels, Karyotyping, vaginal swabs, and increased numbers of whales proposed could be tested on the 8 existing captive SeaWorld Orca. If a larger population of captive whales or a larger tank are believed to be the solutions to the unsuccessful breeding problem then the 8 current captive Orca owned by SeaWorld could be put into one of SeaWorlds larger tanks to prove the hypothesis. It is also not proposed that the freshly captured animals will be held in the larger tanks.

No where is it mentioned in this proposal whether any or all of the proposed Orca to be kept by SeaWorld for breeding purposes will be required to perform and how this performance schedule would effect the whales ability to breed.

2. Animal Husbandry

Tests involving the health care of the captured Orca including blood chemistry, liver biopsy, hematology, and nasal swabs are important for animal husbandry to protect the dollar investment. This is health care of captured animals and therefore provide no scientific justification for this proposal any more than these procedures are considered scientific research projects when applied to human health care.

3. Gastric Lavage

The reviewers believe that the gastric lavage has scientific merit in the analysis of the stomach contents of free ranging Orca. Gastric lavage could provide valuable information comparing stomachs contents of the free ranging Orca with the sacrificed Orca data from Rice. The only comparisons discussed however relate to adult male/non adult males however, and no mention is made regarding stress related changes caused by the capture process preceding the stomach lavage.

4. Population Dynamics, Vocalizations, Body Dimension, and Growth Rates

Census data obtained in the population dynamics studies could be of scientific merit yet we feel the success others are having with visual and photographic techniques merit further consideration.

Certain data from vocalizations, radio telemetry, spaghetti streamers cryogenic marking, and tagging desired could be acquired using less invasive techniques currently being successfully employed with free ranging Orca. The highly invasive techniques proposed could damage the very data they are trying to obtain by capturing, tagging with various markers, releasing and recapturing the Orca.

The mensural data made available through the original capture could be of scientific value however the plan to recapture the same whales up to 3 times involves serious risk to the individual Orc and to the pod. It is unclear as to how SeaWorld plans on using this mensural data. Again we feel that more extensive use of less invasive techniques should be explored before resorting to the proposed invasive techniques.

5. Respiratory Gas Analysis, Hearing and Aging

Certain data related to respiratory gas analysis, hearing thresholds and tooth extraction desired in this experiment could be obtained using already existing captive Orca. No justification is given for performing the hearing threshold tests or the respiratory gas analysis on Orca under captive conditions, what information is being looked for with these tests, or why they couldn't be performed on existing captive Orca.

conclusion:

In conclusion this 5 year massive invasion of Orca environment in the Alaskan waters is not justified on the basis of the scientific aspects of this proposal. The benefits proposed in this permit application are far outweighed by the risks of such an aggressive invasive disturbance of the free ranging Orca of the Alaskan and California waters.

Hon. W. H. F. ...

Sea World



Lanny H. Cornell, D.V.M.
Senior Vice President/
Zoological Director

January 9, 1984

Don W. Collinsworth
Commissioner
Alaska Department of Fish and Game
Support Building
Juneau, Alaska 99811

Dear Mr. Collinsworth:

As you will recall, several of us from Sea World have visited over the last several years with you and your staff to explore the possibility of our obtaining permits from the State of Alaska and from the federal government (National Marine Fisheries Service) to collect killer whales in Alaskan waters for public educational display and captive propagation here at Sea World and to conduct benign nonharmful research on wild killer whales in Alaskan waters. As you probably already know, we have obtained from National Marine Fisheries Service permits to collect an average of two killer whales per year over a five-year period - a total of 10 whales.

We therefore would like to follow through now with our original inquiry to collect an average of two killer whales per year from Alaskan waters (Kodiak, Shelikof Straits, Prince William Sound, Southeast) over a five-year period for the purposes of public educational display at our three Sea World parks in San Diego, California; Aurora, Ohio; and Orlando, Florida, and to conduct benign, nonharmful research on an unspecified number of killer whales which would be encircled coincidental to the collecting activities. These whales would be studied at the site of encirclement and released. The studies would include such things as morphometrics, blood

Sea World's to ADFAG OUTLINING SCOPE OF CAPTURE

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sampling for genetic determination, photography, some animals would be cryogenically marked (painless freeze branding) and approximately six animals over the five-year period would have small radio-packs attached so their movements could be monitored by satellite. All of these activities, of course, and others as your Department recommends, will be conducted in concert with your scientists as well as those from the University of Alaska. As you know, we have worked closely in the past with such eminent scientists as Dr. Robert Elsner and Dr. John Burns, among others. Previous studies in concert with the Alaska Department of Fish and Game have included work on seals, sea lions and walrus. (We have, over the last few years, rescued and returned to good health an average of six or so walrus pups per year in cooperation with your Department and various Alaskan native corporations as well as Fish and Wildlife Service.)

These proposed studies on killer whales and other marine mammals in Alaska will provide data that are currently unavailable on the natural history, physiology, population dynamics, etc. as we have discussed. In addition, locations of groups of killer whales and other cetaceans will be more exactly pinpointed to allow tourist vessels and scientists to observe them in the wild.

Although we have had reports over the last few years of large numbers of killer whales ranging from several hundred to several thousand in Alaskan waters, the literature currently indicates there are approximately 250 to 300 animals minimum in the areas we suggest. We are currently in the process of conducting field research which will give us a more concise idea of minimum population numbers. Some of these early data will be available later this year and should boost the minimum numbers.

There have been some misconceptions about this project. Some would imply it is too extensive or is

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in conflict with the U.S./IWC position. This is not the case, however. Neither the United States' position on whaling nor the IWC moratorium are threatened. Both the Russians and the Japanese are envious of the United States' capabilities with public-display. These they do not now have, but they will, in time, develop them. Further, the IWC position presently allows for the aboriginal taking of whales and, as you know, the United States' position on this issue immeasurably exceeds any position on live capture for public display. We believe these "problems" are intended to divert attention from the truth.

Our only intent at the outset was and still is to follow the IWC requests which outline coordination of science with capture for public display so as to accumulate as much knowledge as possible about marine mammals.

As you are already aware, the IWC charter currently extends only to the great whales taken for slaughter on the high seas. It was once previously extended to include bottlenosed whales, following six years of debate - a move still protested by some of the members. The IWC has not extended the charter to cover other whales and has ~~certainly~~ never studied live capture for public display as an obligation.

Some IWC killer whale management recommendations have been made: 1) The IWC asked the Soviets not to kill any more killer whales in the Antarctic after they killed over 900 killer whales in 1979-80. This request is valid, however, only until the Soviets provide more data on population and provide information on those already killed. The Soviet reply has been that they intend to slaughter no more killer whales and thus they foresee no need to supply the data requested. 2) Norway has been allowed to kill 52 killer whales each year ad infinitum, based on a minimum population of 1,115 killer whales in their waters. This quota is voluntary, but the Norwegians are complying.

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Many countries which are signators to the IWC charter also are in favor of the moratorium and also currently exhibit killer whales for public display. They are not likely to abstain from or vote against the moratorium unless it conflicts with their display of cetaceans.

There is no move at present to include live capture in the IWC charter as this almost exclusively occurs in sovereign waters, not on the high seas. And, the total numbers taken for public display are so minute as to be nonexistent compared to those in fisheries, commercial slaughter and for scientific research alone. There are in all of North America a total of approximately 1400 seals, sea lions, dolphins and whales to educate 110-120 million visitors each year to zoological parks and aquaria.

We have on several occasions attended meetings to discuss the project. In May 1983 we suggested to National Marine Fisheries Service that the appropriate site for a public hearing would be in Alaska. We have met with representatives of the University of Alaska, the Alaska Department of Fish and Game, National Marine Fisheries Service, Alaska, the Alaska Congressional delegation representatives, as well as representatives from Governor Sheffield's office. In addition we have met with Alaska charter and tourist interests and look forward to more cooperation with these groups to enhance their knowledge of wild marine mammals.

The field studies and the research alongside or aboard our collecting vessels is to be accomplished in concert with scientists from Sea World, the Hubbs-Sea World Research Institute, the University of Alaska Institute of Marine Science and the Alaska Department of Fish and Game, as well as other scientists you may designate. Several of us will be in Juneau on or about February 8, 1984 and would like to continue our discussions on this matter

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with you at that time at your convenience. We will be visiting earlier in that week with some of the people already indicated at the University of Alaska in Fairbanks.

Sea World currently maintains three killer whales in our Orlando, Florida park, three in San Diego, California and two for our Aurora, Ohio facility. Our goal would be to double these numbers for the creation of small breeding groups which would also serve to enhance our public educational displays.

Our oldest male killer whale is approximately 25 years old and has been with us for over 15 years. Other killer whales in our care have been with us for approximately 7 years and are 10-12 years old. All are doing well and are approaching sexual maturity. Thus we believe we have an opportunity which has never before been available - the captive propagation of killer whales.

To accommodate the success of our propagation program, we have designed and begun construction on huge new killer whale facilities in our Orlando park. This 5 million gallon "ocean" will be 4-5 times larger than our current facilities which are the world's largest. We also plan similar facilities in our San Diego park to be completed in 1987. We have also just finished remodeling the Ohio whale pools.

The research project, which is currently budgeted at \$250,000 per year for the five year period, a total of \$1.25 million, will be administered by the nonprofit Hubbs-Sea World Research Institute. Almost all of these funds will be spent in Alaska, as that is where the majority of the work will take place. This means an added \$5-7 million to the Alaska economy if you include a dollar multiplier of 5-7.

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We have successfully conducted many projects in Alaska without incident in the past with the cooperation of the Alaska Department of Fish and Game, and we look forward to the onset of this particularly important project with your approval and cooperation.

Sincerely,

Lanny H. Cornell, D.V.M.

LHC/lā

cc: Robert A. Hinman