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phemie," and thus it is 'sedition in Subjects, [illegible] may do in the height of his power."[13] Here was a King not restricted by any human law.

Neither the legal profession nor Parliament was willing to accept such a boundless royal prerogative. Having grown up in the civil law tradition of Scotland, James I was indifferent to the common law, but the English lawyers argued that, while the King had many privileges at common law, he was limited by and subordinate to it. When James I asserted that Parliament existed only by "the grace and permission of our ancestors and us,"[14] the House of Commons passed the famous Protestation of December 18, 1621, which asserted:

> That the Liberties, Franchises, Privileges and Jurisdictions of Parliament, are the ancient and undoubted birthright and inheritance of the subjects of England; and that the arduous and urgent affairs concerning the King, State and defence of the realm, and of the Church of England, and the making and maintenance of laws, and redress of michiefs and grievances, which daily happen within this realm, are proper subjects and matter of counsel and debate in Parliament: and that in the handling and proceeding of those businesses every member of the House hath, and of right ought to have, Freedom of Speech, to propound, treat, reason and bring to conclusion the same. . . .[15]

The King's response was to walk into the House of Commons and to tear from the Journal the page containing these words.

The leading legal theorist of the time was Sir Edward Coke, whose writings and leadership were to enhance the prestige of the common law, and bring it into alliance with Parliament against the monarchy. In response to an inquiry from James I, Coke and his colleagues declared:

> That the King by his proclamation cannot create any offence which was not an offence before, for then he may alter the law of the land by his proclamation in a high point; for if he may create an offence where none is, upon that ensues fine and imprisonment . . .; That the King hath no prerogative, but that which the law of the land allows him. . . .[16]

The common law courts asserted jurisdiction to inquire into the legality of acts of servants of the Crown, and thus began the doctrine of the rule of law.

In response to the wars waged by James I's improvident heir, Charles I, Parliament enacted the Petition of Right in 1628, inspired

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13. King James I, The Workes of the Most High and Mightie Prince James 529, 531 (1616).

14. 1 Parl. Hist. Eng. 1351 (1621).

15. *Id.* at 1361.

16. 7 The Reports of Sir Edward Coke, KNT 76 (G. Wilson trans. 1777).

and crafted largely by Coke. The petition was an assertion of the power of Parliament and the common law, and contained a long list of grievances. The abuses of the King's military power—billeting, martial law, imprisonment without trial, and forced loans—were particularly resented. Charles I had no choice but to sign the petition, since he needed revenues from Parliament, but he secretly consulted judges who assured him that his signature would not be binding. Soon afterward, in 1629, the King dissolved Parliament and began the long period of personal rule which was to end in the Great Rebellion.

Charles I was short of money, and revived an ancient tax; his judges upheld the legality of this action in the famous Ship Money case of 1635. The King also wished to strengthen the Church of England, the mainstay of the monarchy. The ecclesiastical canons of 1640 emphatically affirmed the theory of Divine Right of Kings and, in addition, promulgated the doctrine of nonresistance:

> For subjects to bear arms against their Kings, offensive or defensive, upon any pretence whatsoever, is at least to resist the powers which are ordained of God; and though they do not invade but only resist, St. Paul tells them plainly they shall receive to themselves damnation.[17]

This doctrine of "nonresistance" was to have an important role in religion and politics in both England and America, for the next century and a half.

Faced with a Scottish rebellion, Charles I was forced to summon the English Parliament in 1640 in order to obtain the resources necessary to put down the insurrection. After eleven years of personal royal government, Parliament trusted neither the King nor his leading minister, the Earl of Strafford. Parliament demanded a wide array of religious and political concessions, including the removal of Strafford as governor of Ireland and the disbanding of the strong army he had created there. When the King acceded to these demands, Ireland rebelled.

Charles I was now desperate. Scotland and Ireland were in open rebellion, and the Parliament of England was dominated by the King's enemies. The King had made numerous concessions, but to no avail. Strafford wanted to bring John Pym, the parliamentary leader, to trial for treasonable dealings with the Scottish army invading England, but Pym struck first with a bill of attainder against Strafford. The main charge was the creation of a powerful army in Ireland for the purpose of crushing opposition in England. The bill of attainder passed, and the King was forced to send his ablest servant to the scaffold in 1641.

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17. Constitutions and Cannons Ecclesiastical, Treated Upon by the Archbishops of Canterbury and York (1640), in 1 SYNODALIA 390-91 (E. Cardwell ed. 1842).

Still unsatisfied, Parliament presented its Nineteen Propositions as an ultimatum to the King in 1642. The Propositions, if acceded to, would have established a very limited monarchy with the King surrendering the power of the sword and Parliament obtaining complete control over the militia. Instead, the King raised the royal standard at Nottingham and proclaimed Parliament to be in rebellion. Thus began the Civil Wars, which resulted in the decapitation of Charles I and the proclamation of a republic in 1649.

Oliver Cromwell and the Puritans came to power by force of arms and the creation of a disciplined standing army. Cromwell soon quarreled with Parliament and assumed the role of a military dictator. The soldiers supported their leader because Parliament proposed to disband much of the army thus depriving them of their livelihood, and also because they feared that Parliament might once again come under the control of the Anglicans, who would revive persecution of the Puritan sects.

It was soon proposed that Cromwell be made king, but only because that office would have definite constitutional restrictions. Finally Cromwell assumed the title of Lord Protector in 1653, under a written constitution that gave him virtually royal power. Although Cromwell's government brought domestic peace and ruled efficiently, it did not gain in popularity. The Lord Protector's government was created and maintained by bayonets, and the people came to hate it. The end of the Protectorate and its legacy have been described by historian Eric Sheppard as follows:

> The great soldier's death in 1658, while the army he had made was still fighting victoriously in Flanders, marked the beginning of the end of that army's rule; its leaders soon had no choice but to accept the inevitable, and in May 1660 the red coats of the New Model were arrayed on Blackheath to do honor to the monarch whom nine years before it had hunted into exile. A few months later, setting an example which has since been followed by all the great armies of England, it . . . laid down its arms and passed silently and peacefully into the pursuits of peace, leaving behind it, in the minds of the governing class and the people, besides a deservedly high military reputation, a legacy of hatred and distrust of all standing armies which has endured to our own day.[18]

The mood of England at the restoration of Charles II, son of the martyred Charles I, was one of relief and enthusiasm. An act was swiftly passed which recited that "the people of this kingdom lie under a great burden and charge in the maintenance and payment of the present army," and provided that it should be disbanded with "all convenient speed."[19]

18. E. Sheppard, A Short History of the British Army (4th ed. 1959).

19. Disbanding Act, 12 Car. 2, c. 15 (1660).

Once again reliance for the country's security was placed in the militia system, which had fallen into disuse after two decades of professional armies, civil wars and military government. Statutes were passed in 1661 and 1662 declaring that the King had the sole right of command and disposition of the militia, and providing for its organization.[20] Winston Churchill makes this comment on the Cavalier Parliament, which had restored the monarchy:

> It rendered all honour to the King. It had no intention of being governed by him. The many landed gentry who had been impoverished in the royal cause were not blind monarchists. They did not mean to part with any of the Parliamentary rights which had been gained in the struggle. They were ready to make provision for the defence of the country by means of militia; but the militia must be controlled by the Lord-Lieutenants of the counties. They vehemently asserted the supremacy of the Crown over the armed forces; but they took care that the only troops in the country should be under the local control of their own class. Thus not only the King but Parliament was without an army. The repository of force had now become the county families and gentry.[21]

The revival of the militia did not mean that the King was forbidden to raise and maintain armies. He had no means of doing so, however, because Parliament held the purse strings, and the quartering of soldiers had been condemned since the days of the Petition of Right.

Foreign wars made the development of a standing army inevitable, and it reached 16,000 men by the end of the reign of Charles II. It was done with the consent of Parliament, and English country gentlemen were secure in their control of the domestic armed power—the militia. In addition, guns were taken out of the hands of the common people. Among the conditions of a 1670 statute was one that no person, other than heirs of the nobility, could have a gun unless he owned land with a yearly value of L100.[22] The protection of the people's liberties was thus committed entirely to Parliament and other legal institutions. The possibility of a citizen army, such as that created by Oliver Cromwell, was precluded.

In the reign of Charles II, religious controversy dominated politics. The Cavalier Parliament wished to maintain the established Anglican Church and persecute dissenters Catholic and Puritan alike. Parliament was also alarmed by the prospect that the King's Catholic brother, the Duke of York, would succeed to the throne. A parliamentary attempt to exclude the Duke failed, but in 1673 and 1678, two Test Acts

20. First Militia Act, 13 Car. 2, Stat. I, c. 6 (1661); Second Militia Act, 14 Car. 2. c. 3 (1662).

21. 2 W. Churchill, A History of the English-Speaking Peoples 336 (1956).

22. Game Preservation Act, 22 Car. 2, c. 25, § 3 (1670).

were passed [illegible]
and from both Houses of Parliament.

In 1685, the Catholic Duke of York ascended to the throne as James II. The new King quieted the fears of his subjects by proclaiming his intention to maintain church and state as they were by law established. The people were also comforted by the fact that the heirs to the throne were his Protestant daughters, Mary and Anne, and his Protestant nephew, William of Orange, stadholder of the Dutch Republic and Mary's husband. Because of the Test Acts, James II inherited an entirely Protestant government.

At the same time a rebellion, led by the Duke of Monmouth, broke out in the western counties. The King successfully crushed the uprising, but in the process succeeded in doubling his standing army to 30,000 men, granting commissions to catholic officers, and bringing in recruits from Catholic Ireland. In addition he quartered his new army in private homes. These arbitrary actions were in direct violation of previous parliamentary proclamations.

James II then asked Parliament to repeal the Test Acts and the Habeas Corpus Act, which Parliament refused to do. The King also asked the representatives of the nation to abandon their reliance on the militia, in favor of standing armies:

> My Lords and Gentlemen,
>
> After the storm that seemed to be coming upon us when we parted last, I am glad to meet you all again in so great Peace and Quietness. God Almighty be praised, by whose Blessing that Rebellion was suppressed: But when we reflect, what an inconsiderable Number of Men began it, and how long they carried [it] on without any Opposition, I hope every-body will be convinced, that the Militia, which hath hitherto been so much depended on, is not sufficient for such Occasions; and that there is nothing but a good Force of well disciplined Troops in constant Pay, that can defend us from such, as, either at Home or Abroad, are disposed to disturb us . . .[24]

John Dryden, the poet, shared the King's attitude toward the militia when he wrote these timeless words:

> The country rings around with loud alarms,
> And raw in fields the rude militia swarms;
> Mouths without hands; maintained at vast expense,
> In peace a charge, in war a weak defence;
> Stout once a month they march, a blustering band,
> And ever, but in times of need, at hand.

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23. Test Act, 25 Car. 2, c. 2. (1673); Parliamentary Test Act, 30 Car. 2, Stat. 2, c. 1 (1678) (an exemption allowed the Duke of York to retain his seat in the House of Lords).

24. 9 H.C. Jour. 756 (1685).

This was the morn when, issuing on the guard,
Drawn up in rank and file they stood prepared
Of seeming arms to make a short essay,
Then hasten to be drunk, the business of the day.[25]

Parliament adjourned in 1686 without resolving any of the basic issues. The King kept his army and pursued his policies through extra-parliamentary means.

To get rid of the Test Act, and to revive the royal prerogative at the same time, the King arranged a collusive lawsuit. A coachman in the service of a Roman Catholic officer brought suit under the Test Act to recover the statutory reward for discovering violators, and the officer pleaded a royal dispensation in defense. The King's judges in *Godden v. Hales*[26] upheld the validity of the dispensation and gave judgment for the defendant. Lord Chief Justice Herbert stated:

> We are satisfied in our judgments before, and having the concurrence of eleven out of twelve, we think we may very well declare an opinion of the court to be, that the King may dispense in this case: and the judges go upon these grounds;
>
> 1. That the kings of England are sovereign princes.
>
> 2. That the laws of England are the king's laws.
>
> 3. That therefore 'tis an inseparable prerogative in the kings of England, to dispense with penal laws in particular cases and upon particular necessary reasons.
>
> 4. That of those reasons and those necessities the king himself is sole judge: And then, which is consequent upon all,
>
> 5. That this is not a trust invested in or granted to the king by the people, but the ancient remains of the sovereign power and prerogative of the kings of England; which never yet has taken from them, nor can be.[27]

Thus armed with the law, the King proceeded to dispense with statutes as he saw fit. He replaced Protestants and Catholics at high posts in government, particularly at important military garrisons. The army was further enlarged and 13,000 men were stationed at Hounslew Heath, just outside London, in order to hold the city in subjection if necessary. How far James II planned to carry his religious and political program is unknown, but his powerful standing army made many Protestants fearful and uneasy about the future.

With the birth of a son, who would take precedence over the King's Protestant daughters in the succession, fear led to revolution.

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25. J. DRYDEN, CYMON AND IPHIGENIA, IN THE POETICAL WORKS OF JOHN DRYDEN 641 (W. Christie ed. 1893).

26. Godden v. Hales, 89 Eng. Rep. 1050 (Ex. 1686), *as reported in*, 11 STATE TRIALS 66 (T. Howell comp. 1811).

27. *Id.* at 1199.

Leading [illegible]
to England in defense of the liberties [illegible]
to the Crown. When William landed with a large Dutch army, the English army and government deserted James II who fled to France. Thus the Glorious Revolution of 1688 was accomplished. James II had believed that his enemies were paralyzed by the Anglican doctrine of nonresistance, but he had so alienated his subjects that he was deposed without being able to put up any resistance himself.

William and Mary were offered the Crown jointly after they accepted the Declaration of Rights on February 13, 1689. The Declaration was later enacted in the form of a statute, known as the Bill of Rights.[28] The document is divided into two main parts: 1) a list of allegedly illegal actions of James II, and 2) a declaration of the "ancient rights and liberties" of the realm.

The sections of the first part of the statute that are relevant to the right to bear arms are the allegations that James II

> did endeavor to subvert and extirpate the Protestant Religion and the Laws and Liberties of this Kingdom . . .
>
> 5. By raising and keeping a Standing army within this Kingdom in Time of Peace without Consent of Parliament and quartering Soldiers contrary to Law.
>
> 6. By causing several good Subjects, being Protestants, to be disarmed at the same Time when Papists were both armed and employed contrary to Law.[29]

It should be pointed out that the King did not disarm Protestants in any literal sense; the reference is to his desire to abandon the militia in favor of a standing army and his replacement of Protestants by Catholics at important military posts.

The parallel sections of the declaration of rights part of the statute are:

> 5. That the raising or keeping a Standing Army within the Kingdom in Time of Peace unless it be with the Consent of Parliament is against Law.
>
> 6. That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions, and as allowed by Law.[30]

The purpose, and meaning of, the right to have arms recognized by these provisions is clear from their historical context. Protestant members of the militia might keep and bear arms in accordance with

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28. Bill of Rights, 1 W. & M., sess. 2, c. 2 (1689).

29. *Id.*

30. *Id.* Securing the Peace in Scotland Act.

their militia duties for the defense of the realm. The right was recognized as a restriction on any future monarch who might wish to emulate James II and abandon the militia system in favor of a standing army without the consent of Parliament. There was obviously no recognition of any personal right to bear arms on the part of subjects generally, since existing law forbade ownership of firearms by anyone except heirs of the nobility and prosperous landowners.

In summary, the English Bill of Rights represents the culmination of the centuries old problem of the relationship of sovereignty and armed force. The king could have an army, but only with the express consent of Parliament. The king could not, however, dismantle and disarm the militia. There was no individual right to bear arms; the rights of subjects could be protected only by the political process and the fundamental laws of the land.

III. England and Her Colonies

The revolutionary settlement that followed the accession of William and Mary gave the English people permanent security. England, however, had become the center of an Empire, and the relationship between England and the outlying territories raised legal and political problems.

When William and Mary, and, later, Queen Anne, all died without heirs, the Crown passed to the distantly-related House of Hanover in Germany. Uprisings led by the son and grandson of James II were suppressed in 1715 and in 1745, and Parliament felt it necessary to deprive the people entirely of the right to bear arms in large parts of Scotland.[31]

The history of the English colonies in America was closely intertwined with that of the Mother Country. The New England colonies had been settled by Puritan refugees from the early Stuart kings. When Cromwell and the Puritans came to power in England, thousands of royalists fled to the southern colonies, swelling their populations.

The foundation of government in the colonies was the charter granted by the king. An important feature of a charter was the provision securing for the inhabitants of the colony the rights of Englishmen. For example, the 1606 Charter of Virginia contains this passage:

> Also we do . . . DECLARE . . . that all and every the Persons being our Subjects, which shall dwell and inhabit within every or any of the said several Colonies and Plantations, and every of their children, which shall happen to be born within any of the

31. 1 Geo. 1, Stat. 2, c. 54 (1715).

> Limits and Precincts of the said several Colonies and Plantations, shall HAVE and enjoy all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding and born, within this our Realm of *England*, or any other of our said Dominions.[32]

During the seventeenth century and the first half of the eighteenth century, the North American colonies were essentially self-governing republics following the political and legal model of England. In 1720, Richard West, counsel to the Board of Trade, gave this description of the state of law in the colonies:

> The Common Law of England is the Common Law of the Plantations, and all statutes in affirmance of the Common Law, passed in England antecedent to the settlement of a colony, are in force in that colony, unless there is some private Act to the contrary; though no statutes, made since those settlements, are there in force unless the colonies are particularly mentioned. Let an Englishman go where he will, he carries as much of law and liberty with him, as the nature of things will bear.[33]

The legal relationship of Britain and the colonies became more than an academic problem after the end of the Seven Years' War in 1763. That war, known in America as the French and Indian War, brought large British armies to colonies which had hitherto known no armed force but the colonial militia. The cost of the war was enormous, and the British government decided that the colonies should share it.

In his efforts to tax and govern the colonies, George III acted in two capacities: as King, armed with the prerogatives of his office, and as the agent of the British Parliament which at that time was under his personal control. The colonists acknowledged the authority of the King, but only in accordance with their charters and with the same restrictions that limited his power in Britain. Many of the colonists denied the authority of the British Parliament to regulate their internal affairs in any way.

Colonial resistance forced the British government to abandon the Stamp Tax, but Parliament passed the Declaratory Act in 1766 entitled "An Act for the better securing the Dependency of his majesty's dominions in *America* upon the Crown and parliament of *Great Britain*."

> Whereas several of the Houses of Representatives in his Majesty's Colonies and Plantations in *America*, have of late, against Law,

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32. VA. CHARTER (1606), in 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES 3788 (F. Thorpe ed. 1909) [hereinafter cited as CONSTITUTIONS].

33. 1 G. CHALMERS, OPINIONS OF EMINENT LAWYERS ON VARIOUS POINTS OF ENGLISH JURISPRUDENCE 194, 195 (1814).

claimed to themselves or to the General Assemblies of the same, the sole and exclusive Right of imposing Duties and Taxes upon his Majesty's Subjects in the said Colonies and Plantations; and have, in pursuance of such Claim, passed certain Votes, Resolutions and Orders, derogatory to the Legislative Authority of Parliament, and inconsistent with the Dependency of the said Colonies and Plantations upon the Crown of *Great Britain* be it declared . . . That the said Colonies and Plantations in *America* have been, are, and of Right ought to be, subordinate unto, and dependent upon, the Imperial Crown and Parliament of *Great Britain*; and that the King's Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons of *Great Britain* in Parliament assembled, had, hath, and of Right ought to have, full Power and Authority to make Laws and Statutes of sufficient Force and Validity to bind the Colonies and People of *America*, Subjects of the Crown of *Great Britain*, in all Cases whatsoever.[34]

The colonists were free-born Englishmen and they were not willing to accept inferior status. They could not admit the authority of Crown and Parliament to bind them "in all cases whatsoever." They fell back on the doctrine of fundamental law as expressed in 1764 by James Otis:

'Tis hoped it will not be considered as a new doctrine, that even the authority of the Parliament of *Great-Britain* is circumscribed by certain bounds, which if exceeded their acts become those of meer *power* without *right*, and consequently void. The judges of England have declared in favour of these sentiments, when they expressly declare; that *acts of Parliament against natural equity are void*. That *acts against the fundamental principles of the British constitution are void*. This doctrine is agreeable to the law of nature and nations, and to the divine dictates of natural and revealed religion.[35]

The concept of fundamental law was developed and grounded squarely on the English legal tradition. In 1772, Samuel Adams wrote in response to another writer in the *Gazette*:

Chromus talks of *Magna Charta* as though it were of no greater consequence that an act of Parliament for the establishment of a corporation of button-makers. Whatever low ideas he may entertain of the *Great Charter* . . . it is affirm'd by Lord Coke, to be declaratory of the principal grounds of the fundamental laws and liberties of England. "It is called *Charta Libertatum Regni, the Charter of the Liberties of the kingdom*, upon great reason . . . because *liberos facit, it makes and preserves the people free*." . . . But if it be declaratory of the principal grounds of the fundamental laws and liberties of England, it cannot be altered in any of its essential parts, without altering the constitution. . . . Vatel tells us plainly and without hesitation, that "the supreme legislative can-

34. Declaratory Act, 6 Geo. 3, c. 12 (1766).

35. J. Otis, The Rights of the British Colonies Asserted and Proved 72-73 (1764).

> not change the constitution." . . . If then according to Lord Coke, *Magna Charta* is declatory of the principal grounds of the *fundamental* laws and liberties of the people, and Vatel is right in his opinion, that the supreme legislative cannot change the constitution, I think it follows, whether Lord Coke has expressly asserted it or not, that an act of parliament made against Magna Charta in violation of its essential parts, is void.[36]

This statement of fundamental law later influenced the intellectual foundation of judicial review in the United States.

In order to sustain his claim of full and unrestricted sovereignty, George III sent large standing armies to the colonies. America was outraged. The colonists drew their arguments from Whig political theorists on both sides of the Atlantic who maintained that standing armies in time of peace were tools of oppression, and that the security of a free people was best preserved by a militia.

The American colonists, who had always relied on their own militia, hated and feared standing armies even more than their English brethren. In quartering his redcoats in private homes, suspending charters and laws, and eventually imposing martial law, George III was doing in America what he could not do in England. The royal prerogative had virtually ended in England with the Revolution of 1688, but the King was reviving it in America.

The Fairfax County Resolutions, drawn up under the leadership of George Washington and passed on July 18, 1774, reflect the colonial attitude in the year prior to the outbreak of war. Of particular interest is the following paragraph:

> *Resolved*, That it is our greatest wish and inclination, as well as interest, to continue our connection with, and dependence upon, the *British* Government; but though we are its subjects, we will use every means which Heaven hath given us to prevent our becoming its slaves.[37]

In October of the same year, the First Continental Congress assembled and stated the position of the colonies in these resolutions:

> *Resolved*, . . . 1. That they are entitled to life, liberty, & property, and they have never ceded to any sovereign power whatever, a right to dispose of either without their consent.
>
> *Resolved*, . . . 2. That our ancestors, who first settled these colonies, were at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England.

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36. S. ADAMS, *Candidus Letters* (1772), in 2 THE WRITINGS OF SAMUEL ADAMS 324-26 (H. Cushing ed. 1906).

37. Fairfax Co. Resolutions, (1774) in A. E. D. Howard, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 435 (1968).

> *Resolved*, . . .3. That by such emigration they by no means forfeited, surrendered, or lost any of those rights, but that they were, and their decendants now are, entitled to the exercise and enjoyment of all such of them, as their local and other circumstances enable them to exercise and enjoy.
>
> *Resolved*, . . . 4. That the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council: and as the English colonists are not represented, and from their local and other circumstances, cannot properly be represented in the British parliament, they are entitled to a free and exclusive power of legislation in their several provincial legislatures, where their right of representation can alone be preserved, in all cases of taxation and internal polity, subject only to the negative of their sovereign, in such manner as has been heretofore used and accustomed. . . .[38]

After stating these general principles, the Congress listed specific rights that had been violated by George III, including the following:

> *Resolved*, . . . 9. That the keeping a Standing army in these colonies, in times of peace, without the consent of the legislature of that colony, in which such army is kept, is against law.[39]

The colonists were asserting, in effect, that the restrictions on royal power that had been won by Parliament in its long struggle against the Stuart kings were binding against the sovereign, in favor of the colonial legislatures as well as Parliament. In order to make that claim good, the colonists were forced to take up arms.

IV. Popular Sovereignty and the New Nation

America's long war in defense of the rights of Englishmen began in 1775. Although many colonists still hoped for a reconciliation with the mother country, it was necessary to set up state governments in the interim. In Connecticut and Rhode Island, all that was necessary was to strike the King's name from the colonial charters, which continued to serve for many years as state constitutions.

In other states, written constitutions were drawn up. They generally had these features: 1) an assertion that political power derives from the people; 2) provision for the organization of the government with a three-fold separation of powers; 3) a powerful legislature with authority to pass all laws not forbidden by the Constitution; and 4) a specific bill of rights restricting governmental power in the same way that the English Bill of Rights restricted the King. It is important to emphasize that the concept of enumerated powers had not yet been

38. 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, 67-68 (Oct. 14, 1774) (W. C. Ford ed. 1904-1907).

39. *Id*. at 70.

developed, and that rights [illegible] in the nature of restrictions on power, not as individ[illegible].[40]

The Declaration of Independence substituted the sovereignty of the people for that of the King, and appealed to the "Laws of Nature and of Nature's God," but it did not proclaim a social or legal revolution. It listed the colonists' grievances, including the presence of standing armies, subordination of civil to military power, use of foreign mercenary soldiers, quartering of troops, and the use of the royal prerogative to suspend laws and charters. All of these legal actions resulted from reliance on standing armies in place of the militia.

Alth[illegible] America repudiated the British King, it did not repudiate British law. The Constitution of Maryland, for example, declared:

> That the inhabitants of Maryland are entitled to the common law of England, and the trial by jury according to the course of that law, and to the benefit of such of the English statutes as existed on the fourth day of July, seventeen hundred and seventy six, and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the courts of law or equity, . . .[41]

The War for Independence was fought by fourteen different military organization—the Continental Army under Washington, and the thirteen colonial militias. The debate over the relative merits of standing armies and the militia continued even during the fighting. A defender of standing armies, Washington wrote to the Continental Congress in September of 1776 as follows:

> To place any dependence upon Militia, is, assuredly, resting upon a broken staff. Men just dragged from the tender Scenes of domestick life; unaccustomed to the din of Arms; totally unac-

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40. For example, the Virginia Bill of Rights, adopted June 12, 1776, declared: "That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by the civil power." VA. CONST., Bill of Rights, § 13 (1776) in 7 CONSTITUTIONS 3814.

The comparable provision in Massachusetts was as follows: "The people have a right to keep and to bear arms for the common defence. And as, in time 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., Declaration of Rights, art. 17 (1780) in 3 CONSTITUTIONS 1892. (Considered in its context, the meaning of the "right to keep and bear arms" is clear. The words "for the common defence" makes it obvious that a collective right is intended. The people of Massachusetts did not want to risk a second British occupation.)

41. MD. CONST., Declaration of Rights, art. 3 (1851), in 3 CONSTITUTIONS 1713.

> quainted with every kind of military skill, which being followed by a want of confidence in themselves, when opposed to Troops regularly train'd, disciplined, and appointed, superior in knowledge and superior in Arms, makes them timid, and ready to fly from their own shadows. . . .
>
> The Jealousies of a standing Army, and the Evils to be apprehended from one, are remote; and, in my judgment, situated and circumstanced as we are, not at all to be dreaded; but the consequence of wanting one, according to my Ideas, formed from the present view of things, is certain, and inevitable Ruin; for if I was called upon to declare upon Oath, whether the Militia have been most serviceable or hurtful upon the whole; I should subscribe to the latter.[42]

To maintain the supremacy of civil power over that of the military Article II of the Articles of Confederation provided that each state would retain "its sovereignty, freedom, and independence."[43] A provision that "every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred" was included in Article VI.[44] In contrast, the military powers of the United States rested in Congress were strictly limited; Congress could not maintain standing armies without the consent of nine of the thirteen states.

The government of the United States under the Articles of Confederation was weak. Experience was to show that it needed to be strengthened in its military powers.

V. Forging a More Perfect Union

When the War for Independence ended, the government of the Confederation was faced with one gigantic, insoluble problem—money. As troublesome as foreign and domestic bondholders were, there was one stronger pressure group that simply could not be ignored: the former soldiers who had been promised back pay and large pensions. Organized under the name of the Society of Cincinnati, these veterans were viewed with suspicion by many Americans, who nurtured fears of standing armies.

The danger to civil authority from the military was not entirely imaginary. In the summer of 1783 there was a direct attempt to coerce the Confederation into paying what had been promised to the army. Originally intended as a peaceful protest march on the capitol in Philadelphia, the ex-soldiers were soon "mediating more violent measures,"

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42. Letter from George Washington to the President of Congress, Sept. 24, 1776, in 6 The Writings of George Washington 110, 112 (J. Fitzpatrick ed. 1931-1944).

43. *See generally* M. Jensen, The New Nation: A History of the United States During the Confederation, 1781-1789 (1950).

Including "seizure of the members of Congress."[44] [illegible] adjourned and fled to Trenton, New Jersey. The soldiers eventually gave up, and the officers who led them escaped.

Following the abortive demonstrations in Philadelphia in the summer of 1783, Madison and other leaders felt the need to reorder the nation's military structure.

The other important military event that precipitated demands for a stronger national government was Shays' Rebellion in Massachusetts in 1786. Oppressed by debt, farmers in the western part of the state seized military posts and supplies and defied the state government. Although the insurrection was suppressed fairly easily and Shays himself pardoned, exaggerated reports of the uprising circulated among the states, and conservatives were aghast. Madison, in writing the introduction to his notes on the Federal Convention, lists Shays' Rebellion as one of the "ripening incidents" that led to the Convention.[45]

Thomas Jefferson, in contrast, was not alarmed by the apparent dangers of anarchy, and he criticized the clamor of the Federalists. Just after receiving a copy of the proposed Constitution, he wrote from Paris:

> . . . We have had 13 states independent 11 years. There has been one rebellion. That comes to one rebellion in a century & a half for each state. What country before ever existed a century & a half without rebellion? & what country can preserve its liberties if their rulers are not warned from time to time that their people preserve the spirit of resistance? Let them take arms. The remedy is set them right as to facts, pardon & pacify them. What signify a few lives lost in a century or two? The tree of liberty must be refreshed from time to time with the blood of patriots & tyrants. It is natural manure. Our Convention has been too much impressed by the insurrection of Massachusetts: and in the spur of the moment they are setting up a kite to keep the hen-yard in order.[46]

Whatever the merits of Jefferson's beliefs, they were not shared by the majority of the Convention, which wished to prevent insurrections by strengthening the military powers of the general government.

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44. Debates of the Congress of the Confederation (June 2, 1783), in 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 93 (J. Elliot ed. 1836-1845) [hereinafter cited as STATE DEBATES].

45. DRAFTING THE FEDERAL CONSTITUTION: A REARRANGEMENT OF MADISON'S NOTES GIVING CONSECUTIVE DEVELOPMENTS OF PROVISIONS IN THE CONSTITUTION OF THE UNITED STATES 10 (A. Prescott ed. 1941) [hereinafter cited as MADISON REARRANGED].

46. Letter from Thomas Jefferson to William Stephen Smith, Nov. 13, 1787, in 4 THE WORKS OF THOMAS JEFFERSON 362 (P. Ford ed. 1892-1899).

The new military powers of Congress were listed in Article I, Section 8 of the proposed constitution, and include the following authority:

> . To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
>
> To provide and maintain a Navy;
>
> To make Rules for the Government and Regulation of the land and naval Forces;
>
> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
>
> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

The spirited debate over these provisions in the Federal Convention reflects the purposes and fears of the framers of the Constitution.

There was universal distrust of standing armies. For example, in June of 1787, Madison stated:

> . . . A standing military force, with an overgrown Executive will not long be safe companions to liberty. The means of defence agst. foreign danger, have been always the instruments of tyranny at home. Among the Romans it was a standing maxim to excite a war, whenever a revolt was apprehended. Throughout all Europe, the armies kept up under the pretext of defending, have enslaved the people. It is perhaps questionable, whether the best concerted system of absolute power in Europe cd. maintain itself, in a situation, where no alarms of external danger c. tame the people to the domestic yoke. The insular situation of G. Britain was the principal cause of her being an exception to the general fate of Europe. It has rendered less defence necessary, and admitted a kind of defence wch. c. not be used for the purpose of oppression.[47]

The defense "which could not be used for the purpose of oppression" was the militia, which was still revered on both sides of the Atlantic, even with its shortcomings.

Yet, despite the preference for the militia, it was generally agreed that Congress must have authority to raise and support standing armies in order to protect frontier settlements, the national government, and the nation when threatened by foreign powers. However, a few members were still fearful. Elbridge Gerry and Luther Martin, both of whom later opposed the Constitution, moved that a definite limit—two or three thousand men—be placed on the size of the national standing army. Voting by states, as always, the Convention unani

47. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 465 (M. Farrand ed. 1911).

mously rejected the motion. The judgment of Congress and the two year appropriation limitation were thought to be sufficient safeguards.[48]

The proper extent of federal authority over the militia was much more heatedly debated. The subject was introduced by George Mason, author of the Virginia Bill of Rights, who later opposed the Constitution, but who now maintained that uniformity of organization, training and weaponry was essential to make the state militias effective. His hope was that the need for a standing army would be minimized; perhaps only a few garrisons would be required. Mason's opinions were shared by Madison, who gave this analysis:

> The primary object is to secure an effectual discipline of the Militia. This will no more be done if left to the states separately than the requisitions have been hitherto paid by them. The states neglect their militia now, and the more they are consolidated into one nation, the less each will rely on its own interior provisions for its safety, and the less prepare its militia for that purpose; in like manner as the militia of a state would have been still more neglected than it has been, if each county had been independently charged with the care of its militia. The discipline of the militia is evidently a *national* concern, and ought to be provided for in the national Constitution.[49]

Despite such explanations, there were still opponents to the militia clauses. Gerry, for example, declared:

> This power in the United States, as explained, is making the states drill sergeants. He had as lief-let the citizens of Massachusetts be disarmed as to take the command from the states and subject them to the general legislature. It would be regarded as a system of despotism.[50]

Later, as the Convention moved toward resolution of the issue, Gerry marshalled his final arguments. One can sense his feeling of outrage, as he solemnly warned of the dangers of centralized military power: "Let us at once destroy the state governments, have an executive for life or hereditary, and a proper Senate; and then there would be some consistency in giving full powers to the general government. . . ."[51] But as the states are not to be abolished, he wondered at the attempts that were made to give powers inconsistent with their existence. He warned the Convention against pushing the experiment too far. Some people will support a plan of vigorous government at every risk. Others, of a more democratic cast, will oppose it with equal determination; and a civil war may be produced by the conflict.

48. MADISON REARRANGED 513-26.
49. *Id.* at 522.
50. *Id.* at 521.
51. *Id.* at 523-24.

Madison rose immediately and answered Gerry in these words:

> As the greatest danger is that of disunion of the states, it is necessary to guard against it by sufficient powers to the common government; and as the greatest danger to liberty is from large standing armies, it is best to prevent them by an effectual provision for a good militia.[52]

The last discussion of the militia clauses took place on September 14, 1787, just before the Convention finished its work. Mason moved to add a preface to the clause that allowed federal regulation of the militia, in order to define its purpose. His proposed addition was "that the liberties of the people may be better secured against the danger of standing armies in time of peace." The motion was opposed as "setting a dishonourable mark of distinction on the military class of citizens," and was rejected.[53]

Thus ended the Convention's debate over the relative merits and difficulties of standing armies and the militia. The debate was soon to be revived, however, as the new nation prepared to consider the proposed new form of government.

VI. The Ratification Controversy and the Bill of Rights

The new Constitution was signed on September 17, 1787 and the contest over its ratification soon began. The controversy was carried on mainly through the printed media. It was an unequal contest because the proponents of the new government, who now called themselves Federalists, controlled most of the newspapers. The Antifederalists resorted mainly to pamphlets and handbills.

Because the Antifederalist effort was decentralized and local in nature, it is difficult to generalize about the arguments used against the Constitution. The unifying theme, to the extent there was one, was that the new government would overreach its powers, destroy the states, deprive the people of their liberty, and create an aristrocratic or monarchical tyranny. In finding evidence of such dangers, the Antifederalists often made inconsistent interpretations of what the Constitution provided. In the case of the militia powers, for example, it was said that Congress would disarm the militia in order to remove opposition to its standing army; at the same time it was argued that Congress would ruthlessly discipline the militia and convert it into a tool of oppression.

52. *Id.* at 524.
53. *Id.* at 525.

Bearing in mind the inconsistency of [illegible], some of the pamphlets and articles will be examined in order to show how the fears of military power existed. One of the most scurrilous critics of the Constitution was "Philadelphiensis." His identity is uncertain, but he is believed to have been Benjamin Workman, a radical Irishman and a tutor at the University of Pennsylvania. His comments include the following:

> Who can deny but the *president general* will be a *king* to all intents and purposes, and one of the most dangerous kinds too; a king elected to command a standing army? Thus our laws are to be administered by this *tyrant*; for the whole, or at least the most important part of the executive department is put in his hands.
>
> The thoughts of a military officer possessing such powers, as the proposed constitution vests in the president general, are sufficient to excite in the mind of a freeman the most alarming apprehensions; and ought to rouse him to oppose it at *all events*. Every freeman of America ought to hold up this idea to himself, *that he has no superior but God and the laws*. But this tyrant will be so much his superior, that he can at any time he thinks proper, order him out in the militia to exercise, and to march when and where he pleases. His officers can wantonly inflict the most disgraceful punishment on a peaceable citizen, under pretense of disobedience, or the smallest neglect of militia duty.[54]

Another anonymous writer, Brutus, appealed to history as proof that standing armies in peacetime lead to tyranny:

> The same army, that in Britain, vindicated the liberties of that people from the encroachments and despotism of a tyrant king, assisted Cromwell, their General, in wresting from the people that liberty they had so dearly earned. . . .
>
> I firmly believe, no country in the world had ever a more patriotic army, than the one which so ably served this country in the late war. But had the General who commanded them been possessed of the spirit of a Julius Caesar or a Cromwell, the liberties of this country . . . [might have] in all probability terminated with the war.[55]

Still another unknown, styling himself "A Democratic Federalist," asserted that the Revolution had proved the superiority of the militia over standing armies:

> Had we a standing army when the British invaded our peaceful shores? Was it a standing army that gained the battles of Lexington and Bunker Hill, and took the ill-fated Burgoyne? Is not a well-regulated militia sufficient for every purpose of internal defense? And which of you, my fellow citizens, is afraid of any

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54. 'Philadelphiensis' *Letter*, Independent Gazetteer (Phila.), Feb 7, 1788.

55. 'Brutus' *Letter*, N. Y. Journal, Jan. 24, 1788.

invasion from foreign powers that our brave militia would not be able immediately to repel?[56]

Some writers, such as "Centinel," feared that national control over the militia would transform that bulwark of democracy into a tool of oppression:

> This section will subject the citizens of these states to the most arbitrary military discipline: even death may be inflicted on the disobedient; in the character of militia, you may be dragged from your families and homes to any part of the continent and for any length of time, at the discretion of the future Congress; and as militia you may be made the unwilling instrument of oppression, under the direction of government; there is no exemption upon account of conscientious scruples of bearing arms, no equivalent to be received in lieu of personal services. The militia of Pennsylvania may be marched to Georgia or New Hampshire, however incompatible with their interests or consciences; in short, they may be made as mere machines as Prussian soldiers.[57]

Other Antifederalist propagandists believed that the true motive for assertion of national control over the militia was not to use it, but to destroy it, and thus eliminate any opposition to the new standing army. The Bostonian who used the pseudonym "John De Witt" asked these questions about the militia clauses:

> Let us inquire why they have assumed this great power. Was it to strengthen the power which is now lodged in your hands, and relying upon you and *you solely* for aid and support to the civil power in the execution of all the laws of the new Congress? Is this probable? Does the complexion of this new plan countenance such a supposition? When they unprecedently claim the power of raising and supporting armies, do they tell you for what purposes they are to be raised? How they are to be employed? How many they are to consist of, and where stationed? Is this power fettered with any one of those restrictions, which will show they depend upon the militia, and not upon this infernal engine of oppression to execute their civil laws? The nature of the demand in itself contradicts such a supposition, and forces you to believe that it is for none of these causes—but rather for the purpose of consolidating and finally destroying your strength, as your respective governments are to be destroyed. They well know the impolicy of putting or keeping arms in the hands of a nervous people, at a distance from the seat of a government, upon whom they mean to exercise the powers granted in that government. . . .
>
> It is asserted by the most respectable writers upon government, that a well regulated militia, composed of the yeomanry of the country, have ever been considered as the bulwark of a free people. Tyrants have never placed any confidence on a militia composed of freemen.[58]

56. 'A Democratic Federalist' *Letter*, Pa. Packet (Phila.), Oct. 23, 1787.
57. 'Centinel' *Letter*, Independent Gazetteer (Phila.), Nov. 8, 1787.
58. 'John De Witt' *Letter*, Am. Herald (Boston), Dc. 3, 1787.

Anonymous pamphleteers and [illegible] persons concerned about standing armies and [illegible] Henry Lee, in a letter that was widely circulated in Virginia, [illegible] the contradictory arguments that the militia would be abandoned in favor of a standing army, and that the militia would be strengthened and forged into an instrument of tyranny. He foresaw that a small proportion of the total militia would be made into a select unit, much like a standing army, while the rest of the militia would be disarmed:

> Should one fifth, or one eighth part of the men capable of bearing arms, be made a select militia, as has been proposed, and those the young and ardent part of the community, possessed of but little or no property, and all the others put upon a plan that will render them of no importance, the former will answer all the purposes of any army, while the latter will be defenceless.[59]

A necessary premise underlying Antifederalist attack on the militia clauses of the Constitution was that these clauses operated to place exclusive jurisdiction over the militia in the hands of the general government. Though the Federalists denied this premise, it was affirmed even by Luther Martin and Elbridge Gerry, who had been members of the Federal Convention, but who now opposed the Constitution. Martin is particularly interesting because he advanced all of the contradictory arguments used by the antifederalists. Speaking on November 29, 1787 to the Maryland legislature, he said:

> . . . Engines of power are supplied by the standing Army—unlimited as to number or its duration, in addition to this Government has the entire Command of the Militia, and may call the whole Militia of any State into Action, a power, which it was vainly urged ought never to exceed a certain proportion. By organizing the Militia Congress have taken the whole power from the State Governments; and by neglecting to do it and encreasing the Standing Army, their power will increase by those very means that will be adopted and urged as an ease to the People.[60]

Martin later invoked the opposite approach, that the milita would be subject to ruthless discipline and martial law, and would be marched to the ends of the continent in the service of tyranny. In a letter published on January 18, 1788, Martin wrote that the new system for governing the militia was "giving the states the last coup de grace by taking from them the only means of self preservation."[61]

Elbridge Gerry, like many of the pamphleteers, viewed centralized military power as inseparable from monarchy:

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59. R. H. Lee, Observations Leading to a Fair Examination of the System of Government Proposed by the Late Convention 24-25 (1787).

60. 3 The Records of the Federal Convention of 1787, at 157 (M. Farrand ed. 1911).

61. Martin, *Letter*, Md. Journal, Jan. 18, 1788.

> By the edicts of auth[illegible]ity vested in the sovereign power by the proposed constitution, the militia of the country, the bulwark of defence, and the security of national liberty is no longer under the control of civil authority; but at the rescript of the Monarch, or the aristocracy, they may either be employed to extort the enormous sums that will be necessary to support the civil list—to maintain the regalia of power—and the splendour of the most useless part of the community, or they may be sent into foreign countries for the fulfilment of treaties, stipulated by the President and two thirds of the Senate.[62]

The supporters of the proposed constitution were well-prepared to meet these and similar arguments. They had the support of America's two national heroes, George Washington and Benjamin Franklin, and this helped make the Constitution respectable, as well as alleviating fears. Articles favoring the Constitution, such as the *Federalist Papers*, were often reprinted in distant states. Intelligent and well-educated, the proponents of the new government carefully and consistently answered the arguments of their rivals.

To the general argument that there were not sufficient restrictions on the power of the proposed general government, the federalists replied that no bill of rights was necessary. This was because the Constitution would establish a novel type of government, one of enumerated powers; restrictions were necessary only where full sovereignty was conferred. In Federalist Number 84, Alexander Hamilton made the argument in these words:

> It has been several times truly remarked that bills of rights are, in their origin, stipulations between kings and their subjects, abridgements of prerogative in favor of privilege, reservations of rights not surrendered to the prince. Such was MAGNA CHARTA, obtained by the barons, sword in hand from King John. Such were the subsequent confirmations of that charter by succeeding princes. Such was the Petition of Right assented to by Charles I, in the beginning of his reign. Such, also, was the Declaration of Right presented by the Lords and Commons to the Prince of Orange in 1688, and afterwards thrown into the form of an act of parliament called the Bill of Rights. It is evident, therefore, that, according to their primitive signification, they have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants.[63]

To particular criticism of the military clauses of the proposed Constitution, both Hamilton and Madison replied in detail in the Federalist Papers.

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62. E. GERRY, OBSERVATIONS ON THE NEW CONSTITUTION AND ON THE FEDERAL AND STATE CONVENTIONS 10 ([illegible]).

63. THE FEDERALIST No. [illegible] at 536 (H. Lodge ed. 1888) (A. Hamilton).

Hamilton denied that a standing army was unnecessary, citing recent experience:

> Here I expect we shall be told that the militia of the country is its natural bulwark, and would be at all times equal to the national defence. This doctrine, in substance, had like to have lost us our independence. It cost millions to the United States that might have been saved. . . .
>
> The American militia, in the course of the late war, have, by their valor on numerous occasions, erected eternal monuments to their fame; but the bravest of them feel and know that the liberty of their country could not have been established by their efforts alone, however great and valuable they were. War, like most other things, is a science to be acquired and perfected by diligence, by perseverance, by time, and by practice.[64]

Hamilton did not, however, go so far as to say that standing armies were a good thing. Instead, he argued that a strong militia would minimize the need for them.[65]

Madison also addressed himself to the fear that the new national government would disarm the militia and destroy state government. He first argued that the states would still have concurrent power over the militia, thus denying that the proposed Constitution gave exclusive jurisdiction over the militia to the general government. He also pointed out that the militia, comprised of half a million men, was a force that could not be overcome by any tyrant.[66]

The arguments of the federalists appear to have quieted the fears of their countrymen, since the early state conventions were all easy victories for the new Constitution. Between December 7, 1787 and January 9, 1788, Delaware, Pennsylvania, New Jersey, Georgia and Connecticut all ratified unconditionally and overwhelmingly; the vote was unanimous in three of these states. In Massachusetts, the contest was close. On February 6, 1787, the state convention ratified the new Constitution by a narrow margin.

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64. *Id.* No. 25 at 150 (A. Hamilton).

65. Hamilton explained: "If a well-regulated militia be the most natural defence of a free country, it ought certainly to be under the regulation and at the disposal of that body which is constituted the guardian of the national security. If standing armies are dangerous to liberty, an efficacious power over the militia, in the body to whose care the protection of the state is committed ought, as far as possible, to take away the inducement and the pretext to such unfriendly institutions. If the federal government can command the aid of the militia in those emergencies which call for the military arm in support of the civil magistrate, it can the better dispense with the employment of a different kind of force. If it cannot avail itself of the former, it will be obliged to recur to the latter. To render an army unnecessary will be a more certain method of preventing its existence than a thousand prohibitions upon paper." *Id.* No. 29, at 169 (A. Hamilton).

66. *Id.* No. 46, at 297-99 (J. Madison).

On the other hand, Maryland overwhelmingly approved the Constitution on April 28, 1787. South Carolina was next, on May 23, 1787. Eight states had now ratified the document and only one more was needed. All of the ratifications, except Massachusetts, had been by majorities of two-thirds or more. The remaining states were to see close contests, and all of them would suggest that a Bill of Rights be added to the Constitution.

New Hampshire, on June 21, 1787, became the ninth state to approve the new form of government, thus assuring that the proposed Constitution would go into effect. The New Hampshire convention proposed some amendments in its ratifying resolution. Among the proposals were a three-fourths vote requirement for keeping standing armies, a flat prohibition on quartering troops, and a prohibition against Congressional disarmament of the militia. Although no records were kept of the debates, it seems likely that the delegates feared that New England's experiences with General Gage's redcoats would be repeated.

As yet undecided, Virginia was vital to the Union as the largest, richest, and most populous state. The Virginia convention was also important because it was the only one in which the military clauses of the Constitution were extensively discussed.

The main protagonist of the Virginia debates was Patrick Henry, backwoods lawyer, ardent republican, and incomparable orator. By means of the rhetorical question, Henry was able to capture the fears and emotions which led to the adoption of the Second Amendment:

> A standing army we shall have, also, to execute the execrable commands of tyranny; and how are you to punish them? Will you order them to be punished? Who shall obey these orders? Will your mace-bearer be a match for a disciplined regiment? In what situation are we to be? . . .
>
> Your militia is given up to Congress, also, in another part of this plan: they will therefore act as they think proper: all power will be in their own possession. You cannot force them to receive their punishment: of what service would militia be to you when, most probably, you will not have a single musket in the state? for, as arms are to be provided by Congress, they may or may not furnish them. . . .
>
> By this, sir, you see that their control over our last and best defence is unlimited. If they neglect or refuse to discipline or arm our militia, they will be useless: the states can do neither—this power being exclusively given to Congress. . . .
>
> . . . If we make a king, we may prescribe the rules by which he shall rule his people, and interpose such checks as shall prevent him from infringing them; but the President, in the field, at the head of his army, can prescribe the terms on which he shall reign master,

> so far that it [illegible]
> under the galling yoke. . . .[67]

While other critics lacked Henry's oratorical talents, they also feared disarmament of the militia by the new national government. George Mason, for example, spoke as follows:

> . . . There are various ways of destroying the militia. A standing army may be perpetually established in their stead. I abominate and detest the idea of government, where there is a standing army. The militia may be here destroyed by that method which has been practised in other parts of the world before; that is, by rendering them useless—by disarming them. Under various pretences, Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has an exclusive right to arm them . . .[68]

Mason then went on to cite the case of a former British governor of Pennsylvania who had allegedly advised disarmament of the militia as part of the British government's scheme for "enslaving America." The suggested method was not to act openly, but "totally disusing and neglecting the militia."[69] Mason said:

> . . . This was a most iniquitous project. Why should we not provide against the danger of having our militia, our real and natural strength, destroyed? The general government ought, at the same time, to have some such power. But we need not give them power to abolish our militia . . .[70]

In these words lie the origin of the Second Amendment. The new government should be allowed to keep its broad general military powers, but it should be forbidden to disarm the militia.

Madison, leader of the Federalist forces, still argued that the militia clauses were adequate as written. He said the states and national government would have concurrent power over the militia. In response to a question, he explained why the general government was to have power to call out the militia in order to execute the laws of the union:

> . . . If resistance should be made to the execution of the laws, he said, it ought to be overcome. This could be done only in two ways—either by regular forces or by the people. If insurrections should arise, or invasions should take place, the people ought unquestionably to be employed, to suppress and repel them, rather than a standing army. The best way to do these things was to put the militia on a good and sure footing, and enable the government to make use of their services when necessary.[71]

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67. Spoken at the Virginia Convention 3 STATE DEBATES 51-59.
68. *Id.* at 379.
69. *Id.* at 380.
70. *Id.*
71. *Id.* at 378.

it is interesting to note that Madison uses the words "people" and "militia" as synonymous, as does the Second Amendment, which he was later to draft.

The Federalists still maintained that a bill of rights was unnecessary where there was a government of enumerated powers. Governor Randolph, who had attended the Philadelphia Convention and had refused to sign the Constitution, but who was now supporting its adoption, spoke as follows:

> On the subject of a bill of rights, the want of which has been complained of, I will observe that it has been sanctified by such reverend authority, that I feel some difficulty in going against it. I shall not, however, be deterred from giving my opinion on this occasion, let the consequence be what it may. At the beginning of the war, he had no certain bill of rights; for our charter cannot be considered as a bill of rights; it is nothing more than an investiture, in the hands of the Virginia citizens, of those rights which belonged to British subjects. When the British thought proper to infringe our rights, was it not necessary to mention, in our Constitution, those rights which ought to be paramount to the power of the legislature? Why is the bill of rights distinct from the Constitution? I consider bills of rights in this view—that the government should use them, where there is a departure from its fundamental principles, in order to restore them.[72]

This statement is very important, because it clearly explains how men in the eighteenth century conceived of a right. A right was a restriction on governmental power, necessitated by a particular abuse of that power.

The Virginia convention, however, decided that it would be wise to impose restrictions on the power of the general government before abuses occurred. So the delegates appended to their ratification resolution a long document recommended to the consideration of the Congress. This document is divided into two distinct parts: a declaration of principles and specified suggested amendments to the Constitution designed to secure these principles.

The declaration of principles tells much about the social and political philosophy of eighteenth century Americans. The theory of government as a social compact is affirmed. There are five provisions that relate directly to the background of the Second Amendment.

The third principle condemns the Anglican doctrine of nonresistance as "absurd, slavish, and destructive of the good and happiness of mankind."[73] This is not surprising, since Virginia had recently dis-

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72. *Id.* at 466.

73. J. MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 660 (G. Hunt & J.B. Scott ed. 1920).

established the Anglican church [illegible]
authority of the head of that church.

The seventh principle is "that all power of suspending laws or the execution of laws by any authority, without the consent of the representatives of the people in the legislature is injurious to their rights, and ought not to be exercised."[74] The attempt to assert such power had cost James II his throne and George III his American colonies, even though both Kings had been backed by powerful standing armies.

The seventeenth, eighteenth and nineteenth principles are as follows:

> Seventeenth, That the people have a right to keep and bear arms; that a well regulated Militia composed of the body of the people trained to arms is the proper, natural and safe defence of a free State. That standing armies in time of peace are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the Community will admit; and that in all cases the military should be under strict subordination to and governed by the Civil power.
>
> Eighteenth, That no Soldier in time of peace ought to be quartered in any house without the consent of the owner, and in the time of war in such manner only as the laws direct.
>
> Nineteenth, That any person religiously scrupulous of bearing arms ought to be exempted upon payment of an equivalent to employ another to bear arms in his stead.[75]

These words encapsulate the Whig point of view in the long debate over the relative merits of standing armies and the militia. The specific amendments that were proposed to protect these principles were:

> Ninth, That no standing army or regular troops shall be raised or kept up in time of peace, without the consent of two thirds of the members present in both houses.
>
> Tenth, That no soldier shall be inlisted for any longer term than four years, except in time of war, and then for no longer term than the continuance of the war.
>
> Eleventh, That each State respectively shall have the power to provide for organizing, arming and disciplining it's own Militia, whensoever Congress shall omit or neglect to provide for the same. That the Militia shall not be subject to Martial law, except when in actual service in time of war, invasion, or rebellion; and when not in the actual service of the United States, shall be subject only to such fines, penalties and punishments as shall be directed or inflicted by the laws of its own State.[76]

It is important for our purposes to note that there is no mention here of any individual right.

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74. *Id.* at 661.
75. *Id.* at 662.
76. *Id.* at 663.

The Purpose of the Second Amendment

There might never have been a federal Bill of Rights had it not been for one alarming event that is almost forgotten today. As part of the price of ratification in New York, it was agreed unanimously that a second federal convention should be called by the states, in accordance with Article V of the Constitution, to revise the document. Governor Clinton wrote a circular letter making this proposal to the governors of all the states.

Madison feared that a new convention would reconsider the whole structure of government and undo what had been achieved. Professor Merrill Jensen, in *The Making of the American Constitution*, analyzes the situation as follows:

> The Bill of Rights was thus born of Madison's concern to prevent a second convention which might undo the work of the Philadelphia Convention, and also of his concern to save his political future in Virginia. On the other side such men as Patrick Henry understood perfectly the political motives involved. He looked upon the passage of the Bill of Rights as a political defeat which would make it impossible to block the centralization of all power in the national government.[77]

Madison had outmanuevered the antifederalists by drafting the Bill of Rights very soon after the First Congress met.

Madison's original draft of the provision that eventually became the Second Amendment read:

> The right of the people to keep and bear arms shall not be infringed; a well armed but well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.[78]

There was debate in Congress over the religious exemption, and it was removed. Otherwise, there was general discussion of standing armies and the militia, and widespread support for the proposal. It became part of the Constitution with the rest of the Bill of Rights on December 15, 1791.

Considering the immediate political context of the Second Amendment, as well as its long historical background, there can be no doubt about its intended meaning. There had been a long standing fear of military power in the hands of the executive, and, rightly or wrongly, many people believed that the militia was an effective military force which minimized the need for such executive military power. The pro-

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77. M. JENSEN, THE MAKING OF THE AMERICAN CONSTITUTION 149 (1964).
78. 1 ANNALS OF CONG. 434 (1789).

posed Constitution authorized standing [illegible]
Congressional power over the militia. Some even feared [illegible] of the militia. The Second Amendment was clearly and simply an effort to relieve that fear.

Neither in the Philadelphia Convention, in the writings of the pamphleteers, in the newspapers, in the convention debates, nor in Congress was there any reference to hunting, target shooting, duelling, personal self-defense, or any other subject that would indicate an individual right to have guns. Every reference to the right to bear arms was in connection with military service.

Thus the inevitable conclusion is that the "collectivist" view of the Second Amendment rather than the "individualist" interpretation is supported by history. It thus becomes necessary to examine the decisions of the Supreme Court in order to determine whether that body has expanded the right to bear arms beyond what was intended in 1789.

VII. Supreme Court Interpretation of the Second Amendment

The Second Amendment has been directly considered by the Supreme Court in only four cases: *United States v. Cruikshank*,[79] *Presser v. Illinois*,[80] *Miller v. Texas*[81] and *United States v. Miller*.[82]

In *Cruikshank*, the defendants had been convicted of conspiracy to deprive negro citizens of the rights and privileges secured to them by the Constitution and laws of the United States, in violation of the criminal provisions of the Civil Rights Act of 1870. Among the rights violated were the right to peaceably assemble and the right to keep and bear arms for a lawful purpose.

Chief Justice Waite, speaking for the majority, held that the rights violated by the defendants were not secured by the Constitution or laws of the United States, and thus the judgment of conviction was affirmed. The chief justice began with a long discussion of the nature of the federal system in general, and the attributes of state and national citizenship in particular. The only rights protected by the national government were those necessary for participation in that government. The right to petition Congress would be such a right, but a person must look

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79. 92 U.S. 542 (1875).
80. 116 U.S. 252 (1886).
81. 153 U.S. 535 (1894).
82. 307 U.S. 174 (1939).

to his state government for protection of similar rights in other situations.

In particular reference to the Second Amendment, the opinion states:

> The second and tenth counts are equally defective. The right there specified is that of "bearing arms for a lawful purpose." This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes, to what is called, in *The City of New York v. Miln*, 11 Pet. 139, the "powers which relate to merely municipal legislation, or what was, perhaps, more properly called internal police," "not surrendered or restrained" by the Constitution of the United States.[83]

The only dissenter in *Cruikshank* was Justice Clifford, who found the indictment vague on its face. He thus concurred in the result reached by the majority without discussing any constitutional issues.

The next, and undoubtedly the most important Second Amendment case was *Presser v. Illinois*[84] decided in 1886. Herman Presser, a German-American, was the leader of *Lehr und Wehr Verein*, a fraternal, athletic and paramilitary association incorporated under Illinois law. He was convicted for parading and drilling with men under arms, in violation of an Illinois statute, and was fined ten dollars.

On appeal to the United States Supreme Court, it was contended that the Illinois statute conflicted with the military powers given to Congress by the Constitution, with federal statutes passed in pursuance of those powers, and with various other parts of the Constitution, including the Second Amendment. The Supreme Court unanimously rejected all of these claims and affirmed the conviction.

It should be emphasized that *Presser* was argued and decided as a case presenting broad issues of the relationship of state and federal military power, and that the Second Amendment was only one aspect of that question. In reference to the Illinois statute, the Court observed:

> We think it clear that the sections under consideration, which only forbid bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law, do not infringe the right of the people to keep

83. 92 U.S. at 553 (1875).
84. 116 U.S. 252 (1886).

> and bear arms. But a conclusi[illegible] answer to the [illegible] this amendment prohibits the legislation in question lies in the fact that the amendment is a limitation only upon the power of Congress and the National government, and not upon that of the States.[85]

The Court cited *Cruikshank* in support of this proposition. The inapplicability of the Second Amendment to the states was a sufficient ground for rejecting Presser's Second Amendment contentions, but the Court did not stop there. It preferred to discuss the problem further and make clear the nature of the right protected by the Second Amendment.

> 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 as 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 constitutional provision in question 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.[86]

One view of the Second Amendment suggests that this dicta constitutes the first step toward incorporating the right to bear arms into the Fourteenth Amendment,[87] apparently forgetting that the Court was laying the Second Amendment "out of view." The Court had stated that the Illinois law does not have the effect of depriving the federal government of its military capacity.

To further clarify its view that the Second Amendment is concerned only with military matters, the opinion focuses on *Presser*:

> The plaintiff in error was not a member of the organized volunteer militia of the State of Illinois, nor did he belong to the troops of the United States or to any organization under the militia law of the United States. On the contrary, the fact that he did not belong to the organized militia or the troops of the United States was an ingredient in the offence for which he was convicted and sentenced. The question is, therefore, had he a right as a citizen of the United States, in disobedience of the State law, to associate with others as a military company, and to drill and parade with arms in the towns and cities of the State? If the plaintiff in error has any such privilege he must be able to point to the provision of the Constitution or statutes of the United States by which it is conferred.[88]

The obvious implication here is that any right to bear arms by virtue of the Second Amendment, even if asserted against the national gov-

85. *Id.* at 264-65.
86. *Id.* at 265.
87. *See generally* H. Black, *The Bill of Rights*, 35 N.Y.U.L. Rev. 865 (1960).
88. *Id.* at 266.

ernment, is contingent upon military service in accordance with statutory law. This implication is confirmed later in the opinion, as the Court declared:

> The right to voluntarily associate together as a military company or organization, or to drill or parade with arms, without, and independent of, an act of Congress or law of the State authorizing the same, is not an attribute of national citizenship. Military organization and military drill and parade under arms are subjects especially under the control of the government of every country. They cannot be claimed as a right independent of law.[89]

Thus the *Presser* case clearly affirms the meaning of the Second Amendment that was intended by its framers. It protects only members of a state militia, and it protects them only against being disarmed by the federal government. There is no individual right that can be claimed independent of state militia law. Furthermore, the dicta relating to preservation of the nation's military capacity could not be used as the basis for questioning any regulation of private firearms, unless such a regulation violated an act of Congress; Congress is obviously the best judge of the proper means of preserving the nation's military capacity.

The third, and least important, of the Second Amendment cases was *Miller v. Texas.*[90] A convicted murderer asserted that the state had violated his Second and Fourth Amendment rights. The Supreme Court unanimously dismissed the claim in one sentence, relying on the inapplicability of these provisions to the states, and citing *Cruikshank* and other cases.

The fourth and last time that the Supreme Court considered the Second Amendment was in *United States v. Miller.*[91] The result reached by Justice McReynolds for a unanimous Court was obviously correct, but the opinion is so brief and sketchy that it has undoubtedly caused much of the uncertainty that exists today about the meaning of the Second Amendment.

Defendants Miller and Layton were indicted for violation of the National Firearms Act of 1934,[92] which was designed to help control gangsters, and which infringed the right to keep and bear sawed off shotguns, among other arms. The District Court of the United States for the Western District of Arkansas sustained a demurrer and quashed the indictment, holding the 1934 Act unconstitutional on Second

89. *Id.* at 267.
90. 153 U.S. 535 (1894).
91. 307 U.S. 174 (1939).
92. National Firearms Act *as amended* 26 U.S.C. §§ 5801-5872 (1972).

Amendment grounds. The go[illegible]
Court, which reversed and remanded.

When *Miller* was argued before the High Court, there was no appearance for the defendants. With only one side presenting a case, it is easy to understand why the Court viewed the issues as rather simple, and not needing very much analysis.

The Court began by observing that the National Firearms Act was a valid revenue measure, and not a usurpation of the police powers of the states. The opinion then addresses itself to the Second Amendment issue:

> In the absence of any evidence tending to show that possession or use of a "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.[93]

It is this paragraph that is the source of the uncertainty and confusion arising from the *Miller* case. The Court was merely correcting the error of the district judge, but it made the mistake of looking at the weapon, rather than the person, in determining that the Second Amendment is not applicable.

Fortunately, however, Justice McReynolds went on and partially clarified the ambiguity in the above paragraph. He cited the militia clauses of the Constitution and said:

> With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.[94]

These words alone undercut any individual right interpretation of the Second Amendment.

Justice McReynolds then proceeded to give a brief history of the militia, stressing its function as a military force. He then considered the relevance of state interpretations of the right to bear arms, and noted:

> Most if not all of the States have adopted provisions touching the right to keep and bear arms. Differences in the language employed in these have naturally led to somewhat variant conclusions concerning the scope of the right guaranteed.[95]

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93. 307 U.S. at 178.
94. *Id.*
95. *Id.* at 182.

...concluded that such decisions did not support the trial judge's ruling. He then referred the reader to "some of the more important opinions" concerning the militia. First among these opinions was *Presser v. Illinois*.[96]

Thus, in spite of some ambiguity in the Court's opinion in *Miller*, there is no reason to suppose that there was any change in the established view that the Second Amendment defines and protects a collective right that is vested only in the members of the state militia.

VIII. Conclusion

In the last angry decades of the twentieth century, members of rifle clubs, paramilitary groups and other misguided patriots continue to oppose legislative control of handguns and rifles. These ideological heirs of the vigilantes of the bygone western frontier era still maintain that the Second Amendment guarantees them a personal right to "keep and bear arms."[97] But the annals of the Second Amendment attest to the fact that its adoption was the result of a political struggle to restrict the power of the national government and to prevent the disarmament of state militias.[98] Not unlike their English forbears, the American revolutionaries had a deep fear of centralized executive power, particularly when standing armies were at its disposal. The Second Amendment was adopted to prevent the arbitrary use of force by the national government against the states and the individual.

Delegates to the Constitutional Convention had no intention of establishing any personal right to keep and bear arms. Therefore the "individualist" view of the Second Amendment must be rejected in favor of the "collectivist" interpretation, which is supported by history and a handful of Supreme Court decisions on the issue.

As pointed out previously, the nature of the Second Amendment does not provide a right that could be interpreted as being incorporated into the Fourteenth Amendment. It was designed solely to protect the states against the general government, not to create a personal right which either state or federal authorities are bound to respect.

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96. 116 U.S. 252 (1886).

97. A recent call to action was made by an organization which calls itself the *Sheriff's Posse Comitatus*. This group, dismayed over claimed violations of the Second Amendment promises to "come together and do something about it." Its propaganda concludes rather ominously, "The PEOPLE are the rightful masters to both congress and courts, not to over throw (sic) the Constitution, but to over throw (sic) the men who pervert the Constitution." *Flyer, Sheriff's Posse Comitatus*, Petaluma, California, 1975.

98. See notes 60-66 and accompanying text.

The contemporary meaning of the Second Amendment is the same as it was at the time of its adoption. The federal government may regulate the National Guard, but may not disarm it against the will of state legislatures. Nothing in the Second Amendment, however, precludes Congress or the states from requiring licensing and registration of firearms; in fact, there is nothing to stop an outright congressional ban on private ownership of all handguns and all rifles.

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THE ASSOCIATION OF THE BAR
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Gun Control Legislation

By THE COMMITTEE ON FEDERAL LEGISLATION

INTRODUCTION

Since the enactment of the Gun Control Act of 1968 there has been a substantial increase in the incidence of gun-related crimes and it has become evident that the existing system of law is inadequate. Efforts have been underway in both Houses of Congress to enact further gun control legislation and the Executive Branch has indicated support for stronger gun control. Both the Subcommittee on Crime of the House Committee on the Judiciary and the Subcommittee on Crime and Juvenile Delinquency of the Senate Committee on the Judiciary have accumulated a substantial factual record on which to base legislation.

We believe that the contribution of handguns to the current increase in homicide and other violent crimes requires immediate and comprehensive action. In our opinion, the continued existence of an unwarranted supply of handguns is an underlying factor in the decline of our major urban centers. This Committee does not find any substantial justification for the continued widespread public possession of handguns, and, accordingly, we strongly endorse the legislative proposals calling for a prohibition on the manufacture, importation, sale, and private possession of handguns.[1] Whether or not our recommendations are politically feasible at this moment in time, we are of the firmly held conviction that a complete ban on handguns should be the ultimate objective of any new federal gun control legislation.

This report is divided into four parts. Part I describes the current federal law and the congressional proposals for change. Part II examines the constitutional bases for Congress legislating a prohibition on the manufacture, importation, sale, and private possession of handguns. Part III discusses the need for adopting far-reaching gun control legislation. Our recommendations are contained in Part IV.

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II. *GUN CONTROL AND THE CONSTITUTION*

To determine whether a federal statute restricting handguns would be constitutional, two questions must be answered: (A) Is there a constitutional right to possession of handguns which cannot be infringed by legislation, and (B) does regulation of handguns fall within the scope of any of the subjects on which Congress is empowered by the Constitution to legislate? A review of the relevant decisions demonstrates that Congress may constitutionally enact legislation restricting and prohibiting the possession of handguns by private citizens.[10]

A. *Is There a Constitutional Right to Possess Handguns?*

Debates on the merits of gun control legislation are regularly punctuated by claims of a constitutional right to possess firearms. The source of these claims is the Second Amendment to the Constitution, which provides:

> "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

Although spirited controversy as to the meaning of the Second Amendment continues unabated among commentators,[11] courts over a long period of time have consistently given the amendment a very narrow construction. The Second Amendment as so interpreted places no restrictions on Congress' ability to regulate handguns.

A constitutional provision concerning the right to "bear Arms" is directed at checking power. The question is what the framers of the Constitution intended. There are basically three relationships which could have been intended to be affected: (1) the individual against the world; (2) the populace against the government, whether state or federal; and (3) the state government against the federal government. The first possibility, that the framers were concerned with the right of individuals to protect their homes and their persons from whatever depredations might confront them, appears to be without historical support.[12] The amendment itself speaks of the "security of a free State." The disputes have centered around the second and third possibilities.

The initial question is the proper interpretation of the term "Militia." The practice in Europe of maintaining large standing armies while prohibiting the general populace from having guns led to a preference in colonial America for the militia as the primary military force. This force would be drawn from the people and would be active only in time of military need.[13]

Some have argued that the militia was regarded as the populace at large—or at least those members of the populace capable of bearing arms.[14] To these commentators, militia meant the "unorganized militia," so that the Second Amendment must be read as permitting the populace to maintain arms as a check against excesses of any or all government. This position is sometimes characterized as more extreme than it really is. The framers of the

Constitution need not have created a "right to revolution" or a license to band together in paramilitary organizations to have established a check on the government by permitting the populace to keep and bear arms.[15] Whatever the merits of the "unorganized militia" analysis may be, however, it has never found judicial favor.

The federal courts have long regarded the Second Amendment as concerned only with the "organized militia" maintained by the states. In 1875, the Supreme Court ruled in *United States* v. *Cruickshank* [16] that the Second Amendment restricted Congress alone and not state governments. More recently, in *United States* v. *Miller*,[17] the Supreme Court held that Congress could regulate firearms so long as there was no evidence of a relationship between the regulation and the preservation or efficiency of the state militia. The Court said that Miller could not attack his indictment for interstate shipment of a sawed-off shotgun under the Second Amendment:

> "In the absence of any evidence tending to show that possession or use of a '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." [18]

Some have argued that the *Miller* case should be read narrowly, since evidence of a military use can be shown as a matter of fact for most kinds of weapons.[19] However, federal courts after *Miller* have read the decision as requiring a showing that the challenged legislation actually interfered with the state militia. Under this standard, Second Amendment challenges to federal gun control legislation uniformly have been rejected.[20]

Further, even if the Second Amendment were to be interpreted to refer to an "unorganized militia," it would not follow that Congress would be barred from regulating the ownership of handguns. Such regulation would still be constitutional unless handguns were regarded as "Arms" within the meaning of the Second Amendment. It appears instead that the "Arms" of the militia were understood to consist of rifles and muskets.

In addition to the constitutional provisions and old state statutes quoted in *United States* v. *Miller*[21] and other secondary sources,[22] there are a number of early cases considering whether handguns are "Arms" within the meaning of the Second Amendment. While the decisions are not uniform, the weight of authority is that handguns do not constitute such "Arms."[23]

This position is most effectively expressed in *State* v. *Workman*,[24] where the Supreme Court of Appeals of West Virginia wrote:

> ". . . in regard to the kind of arms referred to in the amendment, it must be held to refer to the weapons of warfare to be used by the militia, such as swords, guns, rifles, and muskets,—arms to be used in defending the state and civil liberty,—and not to pistols, bowie-knives

> brass knuckles, billies, and such other weapons as are usually employed in brawls, street fights, duels, and affrays, and are only habitually carried by bullies, blackguards, and desperadoes, to the terror of the community and the injury of the state."[25]

Thus, in our view, the Second Amendment poses no barrier to congressional efforts to reduce "the terror of the community and the injury of the state" by prohibiting the private possession of handguns.

B. *Does Congress Have Power to Regulate the Manufacture, Possession and Sale of All Handguns?*

While several congressional powers could be invoked in support of gun control legislation,[26] justification is ordinarily found under Congress' power to regulate interstate and foreign commerce.[27] There can be no serious dispute that certain kinds of gun-related activities—for example, interstate sales of firearms—can be regulated under the commerce clause. The disagreements arise over how far Congress may go in regulating local gun activity under its power to regulate matters "affecting" commerce.

In *United States* v. *Bass*,[28] the Supreme Court recently avoided a constitutional issue concerning 18 U.S.C. § 1202, which prohibits the transportation, receipt or possession of guns by felons, by holding that proof that the prohibited conduct in each case was in commerce or affected commerce was required by the statute. Prior courts of appeals decisions had differed as to whether that statute was a constitutional exercise of the commerce power without such proof.[29]

However, in *Perez* v. *United States*,[30] a case decided shortly before the *Bass* case, the Supreme Court had laid the groundwork for the power to create a federal criminal law under the commerce clause. The *Perez* case concerned the constitutionality of a provision in Title II of the Consumer Credit Protection Act, 18 U.S.C. §§ 891 *et seq.*, making loansharking a federal crime. In holding that Perez had been lawfully convicted despite the absence of proof of the effect of his conduct on commerce, the Court cited a variety of reports and statistical studies providing evidentiary support for the congressional finding that, in the aggregate, loansharking had an effect on commerce. It concluded, therefore, that Congress could prohibit the practice regardless of the extent to which the activities of each particular loanshark may have affected commerce.

An examination of *Perez* and its progeny, and of other federal criminal legislation regulating local activity, points out what may have led the Supreme Court to take a very narrow position in the *Bass* case, namely the lack of any substantial legislative findings. In *Perez*, the Court put great emphasis on the findings made by Congress of the impact of loan sharking on interstate commerce, even as a local activity, and on the very substantial evidence which was available to Congress to support those findings. In *Bass*, in contrast, there was virtually no legislative history to guide the Court in its interpretation of congressional intentions.

The implication of the limitation on Congress' attempted exercise of

power in the *Bass* case is that if gun control legislation is supported by substantial documentation and carefully drawn congressional findings concerning the effects of the proscribed activity on interstate commerce generally, the Supreme Court would sustain the exercise of power under the commerce clause even if the activity of specific individuals were purely local in nature.

In a number of cases involving federal gun control legislation arising after *Bass*, courts have followed *Perez* to uphold the power of Congress to regulate firearms felonies without a showing in each case of a nexus with interstate commerce.[31] In *United States* v. *Nelson*,[32] the Fifth Circuit affirmed a conviction under 18 U.S.C. § 922(a)(6), which prohibits the making of false statements in connection with the acquisition of a firearm, in spite of a failure to show a nexus between the defendant's false statements to the gun dealer and interstate commerce. Although the individual activity was clearly local, the court found that under *Perez* the Congress does have the power to regulate an intrastate activity, an isolated instance of which may have no direct connection with interstate commerce, because that intrastate activity in the aggregate does impose a burden on interstate commerce.[33]

The decision in *Nelson* leaves open the question whether Congress has the power under the *Perez* theory to regulate possession of a firearm. It could be argued that the manufacture and sale of firearms presents a stronger case for federal regulation since a potential impact on interstate commerce is discernible, while possession of a firearm could be an entirely and perpetually local activity in a given instance. Such an argument ignores the aggregate effect on commerce of a substantial number of people possessing firearms. In an analogous situation, regulation of the possession of narcotics and other controlled substances under 21 U.S.C. §§ 811 and 844, and predecessor statutes, courts have upheld the regulation without a showing in each case of a nexus with interstate commerce.

In *Deyo* v. *United States*,[34] for example, the Ninth Circuit affirmed a conviction for possession and sale of a drug against the contention of the defendant that the conviction was invalid because there had been no proof of a connection between the defendant's activities and interstate commerce. The court described at length the congressional findings supporting federal control of the possession of these drugs. The court concluded that effective interstate regulation was not possible if intrastate transactions were not also regulated.[35]

The conclusion to be drawn from the narcotics possession cases is that if it can be shown through proper congressional findings that possession of handguns as a class of activity has an effect on interstate commerce, then individual possession could be legitimately proscribed without any showing in each case of a nexus with interstate commerce, notwithstanding that a particular weapon had never been in interstate commerce. Indeed it is the possession of handguns that can be viewed as being responsible for their manufacture, importation and sale. Thus, if undertaken after congressional findings of effect on interstate commerce based on substantial investigation, federal legislation banning the manufacture, sale and possession of handguns would in our view be authorized by the commerce clause.

Municipality of Anchorage

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TONY KNOWLES,
MAYOR

OFFICE OF THE MUNICIPAL ATTORNEY

May 6, 1986

Members of the House Judiciary Committee

Re: SJR 39

The Municipality does not oppose a constitutional amendment that redefines the "right to bear arms" as a personal right vested in each citizen of the state. We are very concerned however with the way in which the measure is now drafted. Our concerns are based on the fact that the present language, quite arguably, would not permit the state or a municipality to regulate either the type of arms possessed or the manner and circumstances of possession.

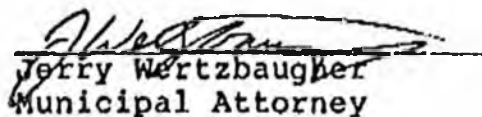
While the version passed by the Senate clearly allows regulation of the use of arms, many existing laws do not relate to the simple use of a weapon, but rather to its function and to the manner and circumstances in which it is possessed. Public safety concerns demand that the state legislature and local assemblies be permitted to ban certain types of arms such as bombs, hand grenades, machine guns, silencers, sawed-off shotguns and bullets designed to pierce protective devices worn by law enforcement officials. We believe likewise that the constitution should permit the Legislature to bar the possession of arms by certain classes of convicted criminals, intoxicated or mentally disturbed persons. Finally we feel it is essential to control the circumstances in which otherwise lawful weapons are possessed by limiting the carrying of concealed weapons, the possession of loaded firearms on licensed premises, the possession of a firearm by a minor without parental consent, et cetera. We reiterate the position taken by Attorney General Harold Brown in his March 26, 1986 letter regarding SJR 39:

> These statutes [that would be invalidated by SJR 39] serve an important public safety function by carefully regulating the possession of especially dangerous weapons or weapons

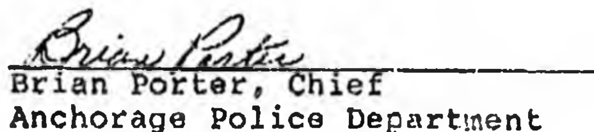
> carried in an especially dangerous manner or place. If the legislature does not intend to render these statutes unenforceable, nor to foreclose a future legislature from adopting similar provisions (prohibiting possession of loaded firearms in a church or on school grounds for example), then the legislatures intent to continue to allow a reasonable regulation by law should be made clear.

The clarity of intent referred to by the Attorney General must be embodied in the measure itself. Otherwise both State and Municipal prosecutors will face a flurry of legal challenges by those charged with weapons-related offenses.

In conclusion, we urge that if the committee does not intend to invalidate existing statutes and ordinances regulating the type of arms that may be possessed, and the circumstances of possession, then it must embody this intent clearly within the amendment that is offered to the voters for ratification.



Jerry Wertzbaugher
Municipal Attorney



Brian Porter, Chief
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TONY KNOWLES, MAYOR

OFFICE OF THE MUNICIPAL ATTORNEY

February 25, 1986

TO: Members of the Senate Judiciary Committee

Re: Senate Joint Resolution No. 39

The proposed amendment to Article I, Section 19 of the State Constitution set forth in Senate Joint Resolution No. 39 could, in its original form, preclude the regulation of conduct which has traditionally been considered to be criminal. Of particular concern is the clause beginning on line 15 which specifies "...personal defense and for the defense of family, property...". This provision could be read to invalidate all existing state and municipal laws governing the use of firearms for self-defense and the defense of property. Historically, the right to use firearms to protect self, family, and property has been curtailed. The amendment in its present form would cast doubt on the viability of continued regulation of such items.

The amendment, in its present form, would also have the likely affect of nullifying state and municipalities laws regulating the possession of firearms. This is because of the deletion of provisions referencing a "well regulated militia." Historically, the courts have interpreted that phrase as creating not a personal right to bear arms, but rather a right of the state to maintain a militia. The deletion of that phrase would cast doubt on the validity of all previous court decisions pertaining to the interpretation of section 19, and a similar provision of the Federal Constitution. With the deletion of that body of law, the phrase "shall not be infringed" would take on a whole new meaning. Thus, the state and local governments could lose the ability to regulate such activities as the carrying of concealed weapons and the obliteration of serial numbers on firearms.

The provision could easily be amended so as to affirm the right of the individual to own and possess firearms (as opposed to the right of the state to maintain a militia) without precluding the Legislature's ability to prescribe certain conduct with respect

to the use and possession of deadly weapons. First, I would propose a change to line 15 whereby the term "personal" would be replaced by "lawful" and the phrase "and for the defense" be replaced by the phrase "of self". In addition, line 17 should be changed by adding language after the term "city" which would read "...except that the manner in which arms are possessed may be subject to reasonable regulations designed to protect the public safety".

In addition, if the Committee's intent is merely to establish a personal right to the ownership and possession of firearms and not to overturn existing laws governing the use of firearms, then such intent should be plainly set forth in a permanent report that will serve in the future to guide the courts. Furthermore, if the additional language I have suggested is added to the amendment, the Committee report should clarify the Committee's intent by specifying that the ability of state and local government to impose reasonable regulations on the possession of firearms would include laws curtailing the possession of concealed weapons or weapons that have altered identification marks, but would not include the right of the state or local government to enact an outright ban on the ownership or possession of arms.

Very truly yours,

DEPARTMENT OF LAW

Jerry Wertzbaugher
Municipal Attorney

JW:gml

STATE OF ALASKA

Bill Sheffield, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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

RECEIVED
MAR 26 1986
Dept. of Law
Administration

March 26, 1986

The Honorable Vic Fischer
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Re: S.J.R. 39

Dear Senator Fischer:

You have asked for the Department of Law's comments upon the current language of S.J.R. 39, a resolution proposing an amendment to Article I, sec. 19 of the state constitution, relating to a citizen's right to keep and bear arms. As I understand it, S.J.R. 39, as amended on the Senate floor yesterday, provides that art. I, sec. 19 of the Alaska Constitution will be amended to read:

> SECTION 19. RIGHT TO KEEP AND BEAR ARMS. The [A WELL-REGULATED MILITIA BEING NECESSARY TO THE SECURITY OF A FREE STATE, THE] right of each citizen of the state [THE PEOPLE] to keep and bear arms for lawful defense of self, family, property, and the state and for lawful hunting, recreation, and other lawful purposes, shall not be infringed by a state or by a borough or city of the state.

We are concerned that the language presently contained in S.J.R 39 might allow later constitutional challenge to some existing state statutes. Present law, for example, prohibits a convicted felon from possessing a concealable firearm, prohibits possession of certain weapons such as bombs, hand grenades, silencers, and sawed-off shot guns, prohibits possession of a firearm while intoxicated, or the discharge of a firearm from, on, or across a highway, the carrying of a concealed weapon, possession of a loaded firearm on licensed premises, or possession of a firearm by a minor without parental consent. (See AS 11.61.200-.220.)

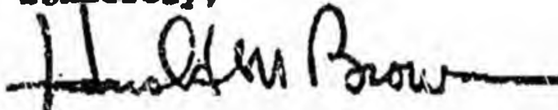
These statutes serve an important public safety function by carefully regulating the possession of especially dangerous weapons or weapons carried in an especially dangerous manner or place. If the legislature does not intend to render

these statutes unenforceable, nor to foreclose a future legislature from adopting similar provisions (prohibiting possession of loaded firearms in a church or on school grounds, for example), then the legislature's intent to continue to allow reasonable regulation by law should be made clear. The possibility that the language proposed in S.J.R. 39 could be interpreted as invalidating some portions of Alaska's present criminal code is a real one. See, for example, State v. Kessler, 614 P.2d 94 (Ore. 1980), and State v. Delgado, 692 P.2d 610 (Ore. 1984).

We believe that any possible ambiguity could be eliminated by the addition, at the end of the current language, of the phrase "except that the manner of keeping and bearing arms may be regulated by law." This suggested language is based upon similar provisions in the constitutions of several other states, including Florida (art. I, sec. 8), Georgia (art. I, sec. 1), and Utah (art. I, sec. 6). The addition of this clause would make it clear that, although a citizen's basic right to keep and bear arms may not be infringed, reasonable and appropriate regulation of the manner in which arms are kept or borne (i.e., possession by felons, by minors, in a bar, while intoxicated, etc.) is not an infringement on an individual's constitutional right. Mr. Rupe Andrews, Alaska Field Representative for the National Rifle Association, has indicated that his organization would not object to the inclusion of this additional language in S.J.R. 39. I also suggest that you consider retaining the language in the present constitutional provision "the people," rather than change it to "each citizen of the state." State constitutional provisions have traditionally recognized the equal rights of all residents of the state, regardless of the resident's national origin.

A carefully drafted amendment would minimize the possibility that, should the proposed constitutional amendment be adopted, a criminal defendant would later be able to argue that a criminal weapons misconduct statute is unconstitutional because it violates his right to keep and bear arms under art. I, sec. 19 of the state constitution.

Sincerely,



Harold M. Brown
Attorney General

HMB:GAH:gb-13

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

May 8, 1986

The Honorable M. Mike Miller
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Dear Representative Miller:

You have asked this office to comment upon the effect of "legislative intent" language currently contained in a resolution now under consideration by the House Judiciary Committee: CS SJR 39 (Jud) am. This resolution, if passed, would place a proposed constitutional amendment before the voters at the next general election. The resolution contains an amendment to art. I, sec. 19 of the state constitution, relating to a citizen's right to keep and bear arms. The stated purpose of the proposed amendment is to establish that the right to keep and bear arms under the state constitution is an individual right, rather than a collective one.

The proposed constitutional amendment now states that a citizen's right to keep and bear arms "shall not be infringed by the state or by a borough or city of the state." During consideration of CS SJR 39 (Jud) am on the Senate floor Senator Vic Fischer proposed an amendment which would have added the phrase "except that the manner of keeping and bearing arms may be regulated by law." This proposed amendment was rejected by the Senate on a vote of 16 to 2. See Senate Journal, March 26, 1986, at pp. 2166-2167. The Judiciary Committee version of the resolution, adopted with amendment by the Senate, contains a section entitled "legislative intent." Section 2 of CS SJR 39 (Jud) am now provides, in part, that the proposed constitutional amendment "should not be construed to preclude the regulation of the manner in which arms may be borne, carried, or used."

We are concerned that the language presently contained in CS SJR 39 (Jud) am might allow later constitutional challenge to some existing state statutes. Present law, for example, prohibits a convicted felon from possessing a concealable firearm, prohibits possession of certain weapons such as bombs, hand grenades, silencers, and sawed-off shot guns, prohibits possession of a firearm while intoxicated, the discharge of a firearm from, on, or across a highway, the carrying of a concealed weapon, possession of a loaded firearm

on licensed premises, or possession of a firearm by a minor without parental consent. (See AS 11.61.200-11.61.220.)

These statutes serve an important public safety function by restricting the possession of especially dangerous weapons or weapons carried in an especially dangerous manner or place. If the legislature does not intend that the proposed amendment of art. I, sec. 19 would render these statutes unenforceable, nor foreclose a future legislature from adopting similar provisions (prohibiting possession of loaded firearms in a church or on school grounds, for example), then the legislature's intent to continue to allow reasonable regulation by law should be made clear.

It may be that the Senate, in rejecting the amendment proposed by Senator Fischer but adopting section 2 of CS SJR 39 (Jud) am, believed that it was not necessary to explicitly state in the proposed constitutional provision that regulation of firearms by law is allowed, as this point is included in their "legislative intent" language. As a general rule, however, a measure will be enforced according to the plain meaning of the language on its face. 2A C. Sands, Sutherland Statutory Construction § 45.02 at 4 (4th ed. 1984); Wilson v. Municipality of Anchorage, 669 P.2d 569, 571 (Alaska 1983). It is a "fundamental principle of statutory interpretation ... that a statute means what its language reasonably conveys to others..." North Slope Borough v. Sohio Petroleum Corp. 585 P.2d 534, 540 (Alaska 1978); Souch Central Health Planning v. Commissioner, Dept. of Administration, 628 P.2d 551, 553 (Alaska 1981). 1/

While the courts in Alaska may consider a measure's legislative history to the extent it may assist the court in correctly interpreting the measure, a legislative committee report or formal statement of legislative intent may not be used to give the statute a meaning not fairly contained within its words. Chicago, M., St. P. & P. R. Co. v. Acme Fast Freight, 336 U.S. 465, 93 L.Ed.2d 817, 69 S.Ct. 692 (1949); North Slope Borough, 585 P.2d at 540.

1/ Although general rules of legal interpretation are most often expressed in the context of statutory interpretation, the same rules apply to the interpretation of legislative resolutions and constitutional amendments. 1A C. Sands, Sutherland Statutory Construction § 29.08 at 500 (4th ed. 1985).

When a reviewing court decides that it must consider the legislature's intent in order to construe a provision, the text of the measure itself is still considered the best evidence of legislative intent. See 2A C. Sands, Sutherland Statutory Construction § 46.03 at 82 (4th ed. 1984) and the cases cited there. Where the terms of a provision are clear and straightforward, the intent of the legislature will be based on those terms, even if the apparent intent conflicts with a statement of legislative intent or a committee report. See Caminetti v. United States, 242 U.S. 470, 61 L.Ed. 442, 37 S.Ct. 192 (1917) and 2A C. Sands, Sutherland Statutory Construction § 48.06 at 308 (4th ed. 1984).

In Commercial Fisheries Entry Commission v. Apokedak, 680 P.2d 486 (Alaska 1984) Apokedak, relying upon legislative intent language contained in the "preamble" to the Limited Entry Act, urged the state supreme court not to adopt a literal construction of the act. The court refused to adopt the interpretation suggested by Apokedak, stating: "a statutory preamble ... can neither restrain nor extend the meaning of an unambiguous statute; nor can it be used to create doubt or uncertainty which does not otherwise exist." 680 P.2d at 488, n.3. Thus, to the extent that language contained in the "legislative intent" section of CS SJR 39 (Jud) am conflicts with the plain meaning of the terms of the constitutional provision, it is the constitutional language which will control.

The courts may also consider the history of legislative action taken on a given measure when determining legislative intent. Generally, the rejection of a proposed amendment indicates that the legislature did not intend the bill to include the provisions embodied in the rejected amendment. Lapina v. Williams, 232 U.S. 78, 58 L.Ed. 515, 34 S.Ct. 196 (1914); United States v. Great Northern Railway Co., 287 U.S. 144, 155, 77 L.Ed. 223, 53 S.Ct. 28 (1932); 2A C. Sands, Sutherland Statutory Construction § 48.04 at 302, § 48.18 at 341 (4th ed. 1984). Thus, a reviewing court may well conclude that if the legislature had intended to allow the continued regulation by law of some aspects of a person's right to possess arms it would have adopted the language proposed by Senator Fischer during the Senate's consideration of the resolution. See, e.g., North Slope Borough, 585 P.2d at 541; Wilson, 669 P.2d at 571.

Perhaps the most important consideration here is that in the case of a measure (such as this one) which is to be decided by a vote of the electorate, descriptive statements accompanying the proposition are an important source of

guidance for interpretation. 2A C. Sands, Sutherland Statutory Construction § 48.04 at 301, § 48.19 at 345 (4th ed. 1984); State v. Lewis, 559 P.2d 630, 637-638 (Alaska 1977), cert. denied, 97 S.Ct. 2943, 432 U.S. 901, 53 L.Ed.2d 1073.

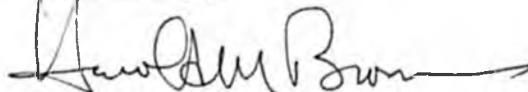
Under art. XIII, sec. 1 of the Alaska Constitution, the lieutenant governor is required to prepare a ballot title and a summary of the proposed constitutional amendment. The election pamphlet prepared pursuant to AS 15.58.010 must contain: 1) the text of the proposed constitutional amendment, 2) the ballot title and summary prepared by the lieutenant governor, 3) "a neutral summary" of the proposition prepared by the Legislative Affairs Agency, and 4) advocatory statements for and against the proposed amendment. AS 15.58.020(6). Thus, although the resolution directs the Legislative Affairs Agency to "consider" the statement contained in section 2 of CS SJR 39 (Jud) am when preparing its neutral summary for the ballot, this language will not appear on the ballot, and may well not appear in the elections pamphlet. Since, in the final instance, a reviewing court will look to the intent in the minds of the voters who voted to adopt the constitutional amendment, the legislature's statement of its intent when placing the measure on the ballot has limited significance. Lewis, 559 P.2d at 637-638.

One of the main purposes of a constitution is to limit legislative power. Ordinary acts of the legislature (i.e., statutes), whether adopted before or after a given constitutional provision, cannot be given effect if the statute conflicts with a substantive provision in the constitution. Thus, an amendment to the constitution may expressly, or by implication, repeal existing legislative enactments. Rhode Island v. Palmer, 253 U.S. 350, 64 L.Ed. 946, 40 S.Ct. 486 (1919); 1A C. Sands, Sutherland Statutory Construction § 23.20 at 387 (4th ed. 1985). The possibility that the language proposed in SJR 39 could be interpreted as invalidating some portions of Alaska's present criminal code is a real one, as this has occurred in similar circumstances in other states. See, for example, State v. Kessler, 289 Or. 359, 614 P.2d 94 (1980) and State v. Delgado, 298 Or. 395, 692 P.2d 610 (1984).

Principals of both common sense and responsible draftsmanship dictate that a well-drafted statute or constitutional provision should reduce the need for disputes about interpretation. 2A C. Sands, Sutherland Statutory Construction § 45.02 at 5 (4th ed. 1984). Statements of "legislative intent" are not an adequate substitute for clear, unambiguous language in the proposed constitutional amendment. A more precisely drafted amendment would minimize the

possibility that, should the proposed constitutional amendment be adopted, a criminal defendant would later be able to argue that a criminal weapons misconduct statute is unconstitutional because it violates his right to keep and bear arms under art. I, sec. 19 of the state constitution.

Sincerely,



Harold M. Brown
Attorney General

Original sponsors: Rodey, Abood,
Bennett, et al

IN THE SENATE BY THE JUDICIARY COMMITTEE

HOUSE CS FOR CS FOR SENATE JOINT RESOLUTION NO. 39 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

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

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

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

SECTION 19. RIGHT TO KEEP AND BEAR ARMS. The [A WELL-REGULATED MILITIA BEING NECESSARY TO THE SECURITY OF A FREE STATE, THE] right of a person [THE PEOPLE] to keep and bear arms for lawful purposes shall not be infringed.

* Sec. 2. LEGISLATIVE INTENT. The legislature intends that the amendment clarify the Alaska Constitution by providing that the right to keep and bear arms is an individual right rather than a collective right. This amendment does not repeal or render unconstitutional statutes such as assault with a dangerous weapon or being a felon in possession of a firearm or similar laws, ordinances, or regulations of municipalities or instrumentalities of the state.

* Sec. 3. In the preparation of its neutral summary under AS 15.58.020 (6)(C), the Legislative Affairs Agency shall include sec. 2 of this resolution.

* Sec. 4. The amendment proposed by this resolution and sec. 2 of this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

Bradley
5/5/86

Original sponsors: Rodey, Abood,
Bennett, et al

1 IN THE SENATE BY THE JUDICIARY COMMITTEE

2 HOUSE CS FOR CS FOR SENATE JOINT RESOLUTION NO. 39 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - SECOND SESSION

5 Proposing an amendment to the Constitu-
6 tion of the State of Alaska relating to
7 the right of a citizen to keep and bear
8 arms.

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

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

12 SECTION 19. RIGHT TO KEEP AND BEAR FIREARMS [ARMS]. The [A
13 WELL-REGULATED MILITIA BEING NECESSARY TO THE SECURITY OF A FREE
14 STATE, THE] right of a citizen of the state [THE PEOPLE] to keep and
15 bear firearms for lawful purposes [ARMS] shall not be infringed except
16 that the keeping, bearing, or use of firearms may be regulated by law.

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

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THIS [X] BILL [ ] RESOLUTION

has been prepared by the staff of the Legal Services Division of the Legislative Affairs Agency in response to the request and at the direction of the sponsor. The staff has attempted to place it in proper legal and clerical form subject to any special limitations or instructions of the sponsor. Requests for bills and resolutions are kept confidential by the staff and any announcement of intent to have a document drafted or introduced is the prerogative and responsibility of the sponsoring member. The agency or its staff may not endorse or comment on policy matters involved in a bill or resolution. The substance and merits of a bill or resolution are the responsibility of the sponsor.

Delivered to sponsor: 5-9-86

4 FOURTEENTH LEGISLATURE

5 Proposing an amendment to the Constitu-
6 tion of the State of Alaska relating to
7 the right of a citizen to keep and bear
8 arms.

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

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

12 SECTION 19. RIGHT TO KEEP AND BEAR ARMS. The [A WELL-REGULATED
13 MILITIA BEING NECESSARY TO THE SECURITY OF A FREE STATE, THE] right of
14 a person [THE PEOPLE] to keep and bear arms for lawful purposes shall
15 not be infringed.

16 * Sec. 2. LEGISLATIVE INTENT. (a) In proposing the amendment to art.
17 I, sec. 19, Constitution of the State of Alaska, in sec. 1 of this resolu-
18 tion, the legislature intends only that the amendment proposed clarify the
19 Alaska Constitution by providing that the right to keep and bear arms is an
20 individual right rather than a collective right. The adoption of this
21 amendment should not be construed to repeal or to render unconstitutional
22 statutes such as AS 11.41.200 or AS 11.61.200 or municipal ordinances.

23 (b) In the preparation of its neutral summary under AS 15.58.020
24 (6)(C), the Legislative Affairs Agency shall include the statement of
25 legislative intent contained in (a) of this section.

26 * Sec. 3. The amendment proposed by this resolution and the legislative
27 history shall be placed before the voters of the state at the next general
28 election in conformity with art. XIII, sec. 1, Constitution of the State of
29 Alaska, and the election laws of the state.

#

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

LEGISLATIVE REFERENCE LIBRARY

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JUNEAU, ALASKA 99811
907-465-3800

May, 1986

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS date base CM 14. In order to save space copies of minutes have not been left in the files.

Jeanie Henry

House Judiciary	5-9-86	8:00 AM
" "	5-9-86	1:30 pm
" "	5-10-86	8:00 AM

HOUSE

COMMITTEE REPORT

(7)
Date referred: 4/1/86

FURTHER REFERRALS:

DATE: ______________

The JUDICIARY Committee has considered CSSJR 39(Jud)am

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

and recommends:

[ ] do pass

[ ] do not pass

[ ] do pass with attached amendment(s)

[ ] no recommendation

[ ] replace with ______________ [ ] same title

[ ] new title

and recommends ______________

[ ] further referr l to the ______________ Committee

and attaches:
[ ] letter of intent
[ ] first fiscal note
[ ] new fiscal note
[ ] zero fiscal note

SIGNING DO PASS:

[signature]
Robin L. Taylor
[signature]
[signature]
[signature]

SIGNING OTHER RECOMMENDATIONS:

[signature] - NO REC
[signature] - NO REC

[signature]
Chairman

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date : ________

REQUEST

Bill/Resolution No. : CSSJR 39 (JUd)am
Title : "Proposing an amendment to the Constitution of the State of Alaska relatin.. right... to keep and bear arms."
Sponsor : Rodey
Requestor : House Judiciary
Date of Request : ________

FISCAL DETAIL

Agency Affected : Public Safety
BRU : DPS Administration
Components : ________

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING : (Thousands of Dollars)

	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
GENERAL FUND		0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL		0	0	0	0	0

POSITIONS :

	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

Prepared by : Kathy Niles, Admin Assistant
Phone : 465-4336
Division : Commissioner's Office
Date : 3/24/86

Approved by Commissioner : [signature]
Date : 4/2/86
Agency : Public Safety

Distribution (by Agency preparing fiscal note) :
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

page ____ of ____

10/25/85

DEPARTMENT OF PUBLIC SAFETY

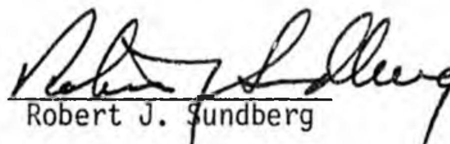
POSITION PAPER - CSSJR 39 (Jud) am

Support

March 27, 1986

CSSJR 39(Jud) am - "Proposing an amendment to the Constitution of the State of Alaska relating to the right of a citizen to keep and bear arms."

The Department supports the concept of this resolution as the intent does not abrogate existing laws related to firearms control and use, as well as possible future weapon laws needed for the protection and safety of the state populace.



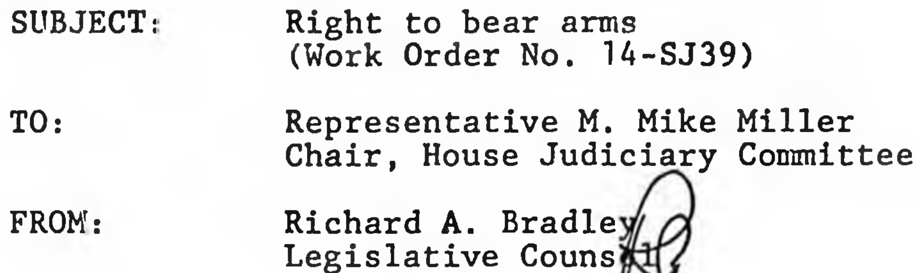
Robert J. Sundberg

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M   May 9, 1986



SUBJECT: Right to bear arms
(Work Order No. 14-SJ39)

TO: Representative M. Mike Miller
Chair, House Judiciary Committee

FROM: Richard A. Bradley
Legislative Counsel

Hayden Kaden has requested a CS for SJR 39. It is enclosed as requested.

The amendment is changed in the second house. I believe we may have provided you with a concurrent resolution to address the question.

The resolution continues the "legislative intent" language in sec. 2. As my April 30 memorandum to your committee on the Senate version of this resolution suggested, we do not believe that "legislative history" is placed before the voters and therefore will not be considered before them.

Thus, the language of sec. 3 that directs the lieutenant governor to place the "legislative history" before the voters may be ineffective. Article XXX, sec. 1 of the Alaska Constitution tells the lieutenant governor what to place before the voters; it provides, in pertinent part:

> SECTION 1. AMENDMENTS. * * * The lieutenant governor shall prepare a ballot title and proposition summarizing each proposed amendment, and shall place them on the ballot for the next general election. * * *

Thus, as you see, the amendment itself is not placed before the voters but only "a ballot title and proposition summarizing each proposed amendment". If the lieutenant governor follows the constitution, which seems to offer mandatory

language, the lieutenant governor may not follow the instructions added in sec. 3 of the resolution.

And I also believe that the amendment to sec. 2(b) of the resolution is also ineffective in its instruction to the Legislative Affairs Agency to "include" the statement of legislative intent in the neutral summary.

Since the language in sec. 2 of the resolution is not law and has not (and cannot) amend the instructions to the Agency, the Agency will continue to be bound by the requirements of AS 15.58.020(6)(C). Those provisions now provide:

> Sec. 15.58.020. CONTENTS OF PAMPHLET. Each election pamphlet shall contain
>
> * * *
>
> (6) for each ballot proposition submitted to the voters by initiative or referendum petition or by the legislature,
>
> * * *
>
> (C) a neutral summary of the proposition prepared by the Legislative Affairs Agency:
>
> * * *

It seems that the obligation of the Agency is to prepare a summary (rather than simply accept a summary not prepared in the Agency). The Agency is also obligated to ensure that the summary is neutral (not weighted by any external considerations beyond the language of the actual proposed amendment itself).

I believe, therefore, that the Agency may consider the legislative history but cannot "include" as its own the legislative history suggested in sec. 2(a).

If I may be of further assistance, please advise.

RAB:ml
095/m5

Patrick M. Rodey
Senator

Alaska State Legislature

1024 W. 6th Avenue, Suite 305
Anchorage, Alaska 99501
(907) 276-6731

During Session
Pouch V
Juneau, Alaska 99811
(907) 465-3717

Senate

MEMORANDUM

TO: Representative Don Clocksin
Representative Max Gruenberg
Representative John Sund
Representative Robin Taylor
Representative Randy Phillips
Representative Fritz Pettyjohn

FROM: Senator Pat Rodey Pat

DATE: April 17, 1986

RE: SJR 39; Right to Keep and Bear Arms

This is to request your favorable consideration of SJR 39, currently before the House Judiciary Committee.

Nearly 70% of the households in Alaska possess at least one firearm, and 22,000 Alaskans are members of the National Rifle Association. It would seem quite clear that the right to keep and bear arms is highly guarded by a majority of Alaskans.

By adopting the clarifying language contained within SJR39, we will ensure that Alaskans remain unfettered by restrictive gun legislation and that individual liberties will be enhanced and safeguarded.

If you have any questions regarding this proposal, please don't hesitate to contact me.

M E M O R A N D U M

TO: All Members of the House of Representatives

FROM: Wayne Anthony Ross
Attorney at Law
Director, National Rifle Association
Chairman, District 8 Republican Party

DATE: March 4, 1986

RE: Senate Joint Resolution 39

Senate Joint Resolution 39 is one of the most important resolutions to be considered by the Legislature this session. Please support it. My family came to Alaska to enjoy hunting and the personal freedoms available here. SR 39 protects those freedoms. That is why SR 39 passed the Senate unanimously.

Vote YES on SR 39.

Wayne Anthony Ross
WAYNE ANTHONY ROSS /lee

JIM MISKO
Empire North, Inc.
3820 Lake Otis Pky.
Anchorage, Alaska
99508-5225
(907) 562-2520

JIM MISKO
5226 Shorecrest
Anchorage, Alaska,
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(907) 243-5523

JIM MISKO
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Pahoa, Hawaii
96778
(808) 965-8961

4/14/86

Goodmorning Jan

Thank you for your letter of April 4th about SJR 39...also for your support in that effort. I am a member of many groups that seek to push back the controls on gun ownership and bearing. I am not a "gun nut" but do own and shoot many different weapons and calibers for fun and for hunting and for defense. I greatly appreciate the American fundamental attitude on arms and generaly like Alaska's attitude but we need SJR for clarification and for peace of mind and for freedom.

I appreciate your thoughtfulness in writing. Appreciate your vote.

Sincerely yours

James Misko

Representative Mike Miller
State House
Juneau

Goodmorning Sir

Wanted you to know how I feel about SJR 39. I hope your committee will get it's work done quickly and neatly and submit the final bill to the house for approval. Can you believe that Alaska has more restrictive laws than Vermont? Anything I can do to help you in that aspect please let me know.

Sincerely yours

James A. Misko

RECORDS CERTIFICATION

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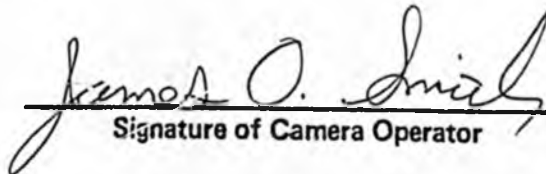
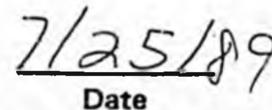


Signature of Camera Operator



Date

02-519 (REV 8/78)

SJR

40

STATE OF ALASKA
THE LEGISLATURE

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907-465-3800

May, 1986

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS date base CM 14. In order to save space copies of minutes have not been left in the files.

Jeanie Henry

House Judiciary	5-9-86	8:00 AM
" "	5-9-86	1:30 pm

Original sponsors: P.Fischer, Fahrenkamp,
Coghill and DeVries

IN THE SENATE BY THE JUDICIARY COMMITTEE

HOUSE CS FOR SENATE JOINT RESOLUTION NO. 40 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

Proposing an amendment to the Constitution of the State of Alaska relating to annulment of regulations by the legislature.

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

* Section 1. Article II, Constitution of the State of Alaska, is amended by adding a new section to read:

SECTION 22. ANNULMENT OF REGULATIONS. The legislature by concurrent resolution may annul a regulation adopted by a state department or agency. The annulment of the regulation is effective thirty days after the date the concurrent resolution is approved by both houses unless the concurrent resolution specifies a different date. The concurrent resolution requires three readings in each house on three separate days, except that it may be advanced from second to third reading on the same day by concurrence of three-fourths of the house considering it, and approval by a majority vote of the membership of each house. The yeas and nays on final passage shall be entered into the journal.

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

STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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

May 8, 1986

Honorable M. Mike Miller
Chairman
House Judiciary Committee
Alaska State Legislature
P. O. Box V
Juneau, Alaska 99811

Re: SJR 40 (constitutional amendment on annulment of regulations)
Our file: 66-3-86-0493

Dear Representative Miller:

I understand that Senate Joint Resolution No. 40, proposing an amendment to the Alaska Constitution, is on your committee's agenda for tomorrow. This letter is to express the Department of Law's opposition to that resolution. If the resolution is passed, that proposed amendment would hit the voters for the third time in six years.

BRIEF STATEMENT

Essentially, the Department of Law's position is that:

1. In 1980, the voters rejected a virtually identical constitutional amendment by a substantial margin -- 82,010 to 58,808. In 1984, they even rejected an improved version (improved in terms of accountability to the public). We should assume that the voters knew what they were doing.

2. The legislature does not need this shortcut method to perform its proper oversight function.

(A) The Alaska Administrative Procedure Act includes provisions giving multiple notice to the legislature and enabling legislators to participate in the regulations-adoption process.

(B) If an executive-branch agency, in adopting a regulation, goes in a direction that is not supported by the current legislature, the legislature may legislate further -- enact guidelines,

limitations, prohibitions.

3. A concurrent resolution, the vehicle proposed by this resolution to annul administrative regulations, is not covered by the constitutional and other provisions applicable to bills, which provisions tend to assure protection of and accountability to the public.

4. An annulment resolution's bare negative statement does not afford the executive-branch agency responsible for executing the law any guidance in performing its constitutionally mandated duties.

DISCUSSION

The amendment proposed by SJR 40 is virtually identical to the Eleventh Legislature's CSHJR 82 am (1980 Legislative Resolve No. 5). That amendment was rejected by the voters on November 4, 1980 by a vote of 82,010 to 58,808. That is a substantial margin, and we should assume that the voters knew what they were doing. They again rejected the amendment in 1984 -- in the form of the Thirteenth Legislature's SCS HJR 5(Jud) (1983 Legislative Resolve No. 15) -- even though it contained provisions for a deferred effective date, three readings on separate days, and recording in the journal the yeas and nays on final passage. The voters should not be repeatedly subjected to the same ballot issue.

As you know, these proposals for constitutional amendments are intended to reverse the effect of the Alaska Supreme Court's decision in State of Alaska v. A.L.I.V.E. Voluntary, 606 P.2d 769 (1980). The essence of that court decision, which held invalid the statute (AS 44.62.320(a)) that provided for legislative annulment of administrative regulations by concurrent resolution, is that (1) procedurally and substantively valid regulations have the force of law, (2) an "annulment" of a regulation has the effect of changing the law, and (3) when the legislature changes the law, it must do so by following the constitutional procedures for law-making. Since AS 44.62.320(a)'s concurrent resolutions did not follow the procedures for law-making, the court held that that statute was invalid.

As the court pointed out in Plumley v. Hale, 594 P.2d 497, 500 (Alaska 1979), the various constitutional provisions specifying the mechanics of legislating are "designed to engender a responsible legislative process worthy of the public trust." Those provisions are "to ensure deliberation prior to passage, to ensure that the requisite majority of each house affirmatively

votes to enact a bill into law, and to provide a public record of the vote cast by each legislator." Id. Those procedures include, for example

- -- the single subject rule of art. II, sec. 13;
- -- the descriptive title rule of art. II, sec. 13;
- -- the requirement of separate readings on separate days, under art. II, sec. 14;
- -- the requirement that the ayes and nays on final passage be recorded in the legislative journal, under art. II, sec. 14;
- -- the provisions on gubernatorial veto, under art. II, secs. 15 and 16; and
- -- the deferred effective date, under art. II, sec. 18.

Those provisions provide for public accountability, public notice, and an opportunity for the public to prepare for the application of new law. Regulations adopted under the Alaska Administrative Procedure Act take effect only after the required public notice, opportunity for public comment, legal review by the Department of Law, and a deferred effective date. Curiously, the current version of this proposed constitutional amendment omits the improvements contained in 1983 LR 15. Neither the constitutional protections nor the corresp ding Administrative Procedure Act protections would be applicable to a concurrent resolution's annulment of an administrative regulation.

The proposed constitutional amendment before you is not a "mere adjustment" or technical correction of the constitution. It proposes a substantial realignment of the constitutionally specified powers. Although the adoption of administrative regulations by an administrative agency is considered a "quasi-legislative function," it is an essential part of the executive branch's execution or implementation of a statute. The proposed amendment, by providing for legislative annulment by means of a concurrent resolution, provides for the legislature to make what can be considered executive-branch decisions -- executing a program created by statute. This concentration of power in the legislative branch -- both enacting the program statute and then participating in executing it -- does not reflect a sound policy in the face of the separation-of-powers doctrine as expressed in the Federalist Papers and other writings. That doctrine, of

course, involves a blending or sharing of powers. The purpose is to avoid an inappropriate concentration of power.

In addition, when the legislature makes a simple negative statement by merely annulling a regulation, it interferes with the executive-branch's execution of the statute and offers nothing in its place. For example, the regulation involved in the A.L.I.V.E. Voluntary case was a Department of Revenue regulation dealing with permits for such things as lotteries. It contained several elements: a dollar limitation, a time limitation, and a provision for the cumulative effect of the value of individual prizes in reaching the dollar limitation. When the legislature annuls a provision such as that, is the agency to interpret the annulment as meaning that the dollar limitation is not appropriate, or that the time period is not appropriate, or that the cumulative effect is not appropriate? If the agency concluded that the legislature must have been primarily concerned about the dollar limitation, and adopted a new regulation specifying a different dollar amount, would it be guessing right?

I do not believe that anyone questions the legislature's right to review the executive-branch's execution of the statutes. Nor does anyone question the legislature's right to enact statutes setting guidelines and imposing limitations or prohibitions. We may disagree as to the merit of a particular guideline or prohibition, but not as to the right of the legislature to enact it (subject, in some circumstances, to the applicability of other constitutional provisions).

The Alaska Administrative Procedure Act (AS 44.62) provides a carefully structured system with many opportunities for legislator involvement in the adoption of administrative regulations. If one of those opportunities was missed, or proved otherwise unavailing in some circumstance, further legislation might be appropriate. Such legislation would, of course, supersede the offending regulation.

In Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 77 L.Ed.2d 317, 103 S.Ct. 2764 (1983), affirming Chadha v. Immigration and Naturalization Service, 634 F.2d 408 (9th Cir. 1980), the United States Supreme Court held invalid what has become known as the "legislative veto." The U.S. Supreme Court's decision is consistent with our state supreme court's decision in A.L.I.V.E. Voluntary. Your committee might also find helpful the discussion in the official commentary to the 1981 Revised Model State Administrative Procedure Act, promulgated by the National Conference of Commissioners on Uniform State laws; see, especially, the art. III introductory comments

which discuss the legislative/executive/public interrelationship regarding administrative regulations.

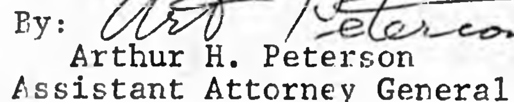
In a nutshell, the problem is that once the legislature passes a statute creating a program or function it is then up to the executive to execute that statute and up to the court system to determine whether the executive has exceeded its authority or otherwise violated the law. This proposed amendment would alter that balance by injecting the legislature into the execution stage of the system.

As the voters have done twice before, your committee should reject this proposed constitutional amendment.

Thank you for this opportunity to comment. I would be happy to discuss the matter further with you at your convenience.

Yours truly,

HAROLD M. BROWN
ATTORNEY GENERAL

By: 
Arthur H. Peterson
Assistant Attorney General

AHP:md

cc: Hon. Paul Fischer
Alaska State Senate

Jim Ayers, Director
Legislative Relations
Governor's Office

STATE OF ALASKA

THE LEGISLATURE

1983

Source

SCS HJR 5(Jud)

Legislative Resolve No.

15

Proposing an amendment to the Constitution of the State of Alaska relating to annulment of regulations by the legislature.

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

* Section 1. Article II, Constitution of the State of Alaska, is amended by adding a new section to read:

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

Rejected by voters
98,856 to 91,174.
/
52.02%

Alaska State Legislature

State Senate

Senator Paul A. Fischer
Senate District D
Box 784
Soldotna, Alaska 99669
(907) 262-9420 W
262-9269 H

While in Juneau
Pouch V
Juneau, Alaska 99811
(907) 465-3791

To: Representative Mike Miller, Chairman
House Judiciary Committee

From: Senator Paul Fischer

Date: April 25, 1986

Subject: Senate Joint Resolution 40

I urge that you promptly schedule hearings on SJR 40. As you are aware, the legislature lost its power to exercise a veto over agency promulgated regulations in the courts.

This has placed the legislature in the awkward position of passing laws and having an agency write regulations that supersede the law.

An example of this is Senate Bill 51 which was passed into law last year. In Senate Bill 51, the legislature mandated that interest earned on bond proceeds be used for the project for which the bonds were passed. The regulations that were passed far exceed the authority granted by the legislature.

The legislature cannot repeal these regulations without the governors concurrence, even though they supersede the legislature's intent. Under current law, the legislature cannot be guaranteed the laws it passes will be interpreted in the manner in which they were intended.

I realize that this proposed constitutional amendment has been before the voters two times and has failed. In the first vote, in 1980, it failed miserably when placed before the voters, 82,010, (58%) voted against, 58,808 (42%) voted in favor. But in the second vote, in 1984, the numbers changed substantially, 98,855 (52%) voted against, 91,171 (48%) voted in favor.

I believe that the voters were not fully informed of the consequences of current law. There are a myriad of issues that demonstrate the need for this legislative power. I urge your action on this legislation so that the voters will have the opportunity to speak on this issue. I believe if they are properly informed they will grant their elected representatives this power.

I appreciate your consideration of my request.