ALASKA LEGISLATURE COMMITTEE FILES 1985-1986 8672

4129 SJUD SJR 39 - SJR 44

1005?

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

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

Alaska: A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed. ALASKA CONST. art. I, § 19.

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

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

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

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

Florida: The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law. FLA. CONST. art. I, § 8.

Georgia: The right of the people to keep and bear arms, shall not be infringed, but the General Assembly shall have power to prescribe the manner in which arms may be borne. GA. CONST. art I, § 1.

Hawaii: A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed. HAWAII CONST. art I, § 15.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

North Carolina: A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice. N.C. CONST. art. I, § 30.

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

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

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

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

South Carolina: A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed. As, in times of peace, armies are dangerous to liberty, they shall not be maintained without the consent of the General Assembly. The military power of the State shall always be held in subordination to the civil authority and be governed by it. No soldier shall in time of peace be quartered in any house without the consent of the owner not in time of war but in the manner prescribed by law. S.C. CONST. art I, § 20.

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

Norman C. Gorsuch
Attorney General

NCG:ml

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

The Honorable Rick Halford
Alaska State Senate

The Honorable Don Bennett
Alaska State Senate

Municipality of Anchorage

POUCH 6-650
ANCHORAGE, ALASKA 99502-0650
(907) 264-4545

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
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M April 14, 1983

SUBJECT: The right to bear arms
(Work Order No. 13-1175)

TO: Senator Patrick M. Rodey

FROM: Tamara Brandt Cook
Legislative Counsel TBC

You have asked whether the state constitution protects the right of private individuals to own firearms. Article I, section 19 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.

This section has never been considered by the Alaska Supreme Court. The wording is identical to that in the Second Amendment of the United States Constitution, so court decisions regarding that amendment would be helpful in judging the nature of the right conferred under the state constitution. However, since it was adopted the Second Amendment has received little attention from the federal courts, so questions regarding the nature and scope of the right to bear arms remain largely unsettled. (For a historical analysis of the adoption of the Second Amendment, see, Feller and Gotting, The Second Amendment: A Second Look, 61 N.W.U.L.R. 46 (1966).)

It is argued by legal scholars that the sole concern of the framers of the Second Amendment was to prevent federal interferences with state militias and the consequent destruction of local autonomy. Under this reasoning, the amendment guarantees only the right of the people collectively to bear arms as part of a militia, but provides no guarantee of the right of the individual to bear arms for other lawful purposes. Tribe, American Constitutional Law, page 226, note 6; Feller and Gotting, supra; United States v. Cruikshank, 92 U.S. 542, 23 L.Ed. 588 (1876). It has been held that a state may

prohibit groups of people other than organized militia from drilling with arms. Presser v. Illinois, 116 U.S. 252 (1886). Congress may also regulate the possession of firearms if the regulation is not shown to interfere with the preservation of state militia. U.S. v. Miller, 307 U.S. 174 (1939). However, the Supreme Court has never directly considered whether the Second Amendment provides any protection to the private ownership of arms for lawful purposes.

It is clear that the Second Amendment itself is a limit on the power of the federal government and does not apply to the states or their subdivisions. Eckert v. City of Philadelphia, 329 F.Supp. 845, affirmed 477 F.2d 610, cert. denied 94 S.Ct. 89, 414 U.S. 839, 38 L.Ed.2d 74 (1973) and 94 S.Ct. 104, 414 U.S. 843, 38 L.Ed.2d 81 (1973). Most state constitutions do contain a guarantee similar to the federal guarantee. State court decisions construing the guarantee represent widely divergent points of view about the nature of the right to bear arms. Some states have taken the position that the right to bear arms is a collective right to function as a state militia, but not a right to individually own firearms. U.S. v. Warin, 530 F.2d 103 (CA Ohio), cert. denied 96 S.Ct. 3168, 426 U.S. 948, 49 L.Ed.2d 1185 (1976); Commonwealth v. Davis, 343 N.E.2d 845 (Mass 1976); Salina v. Blaksley, 83 P. 619 (Kansas 1905); People ex rel. Leo v. Hill, 27 N.E. 789 (New York 1891); Aymette v. State, 21 Tenn 154 (1840). On the other hand, the right has been construed to allow the private ownership of arms customarily kept by law abiding citizens. State v. Hart, 157 P.2d 72 (Idaho 1945); People v. Brown, 235 N.W. 245 (Michigan 1931); Kerner v. State, 107 S.E. 222 (North Carolina 1921).

While it is undoubtedly true that the particular language of a state's constitution will affect the construction of the right to bear arms, it must be noted that even language that closely follows the federal wording of the Second Amendment and contains references to the need for a militia has been construed in some states as a guarantee of the right of individuals to own firearms for lawful purposes. For your information I have included a copy of State v. Dawson, 159 S.E.2d 1 (North Carolina 1968) which construes a constitutional provision to include a guarantee of the right of an individual to own firearms for lawful purposes, even though the provision appears to be narrower than that contained in the Alaska Constitution. It may be that, should the question be presented, the court will construe the Alaska guarantee in the same way. I cannot find, however, an indication that

the framers of the state constitution contemplated the right to bear arms as being any greater than that right as it exists under the federal constitution. One commentator notes generally that ". . . efforts . . . to strengthen guarantees of individual freedoms were not successful". Fischer, Alaska's Constitutional Convention, 1975, page 70.

The letter that you attached with your request refers to a new amendment to the Constitution of New Hampshire which guarantees the right of private ownership of guns. I have included a copy of that amendment for your consideration. It is interesting to note that Senator Conley in moving that amendment believed it to be a ". . . similar provision to that of the federal Constitution." (Senate Journal 21, April, 1981). If the federal Constitution does not in fact guarantee a private right to bear arms, one wonders what is being accomplished with the language added to the Constitution of New Hampshire. It does, however, appear more clearly applicable to the question of individual ownership of arms than the Second Amendment of the federal constitution.

In concluding I must stress that until the Supreme Court of Alaska construes Article I, section 19 of the state constitution, it cannot be determined whether it is necessary to amend the Alaska Constitution to insure that an individual has the right to keep and bear arms for lawful purposes. An amendment might make this interpretation of the right to bear arms more likely to be applied in Alaska.

TBC:ljb

Enclosure
14/023

SB 142, relative to the enforcement powers of agents of the liquor commission. Inexpedient to legislate. Sen. Brown for the committee.

SEN. BROWN: SB 142 is written by the liquor inspectors. They want the same powers that the county sheriff would have. They want to be authorized to carry firearms. It was testified that the main purpose was that they wanted to get into Group II which is considered a hazardous group which gives them more protection. The Liquor Commission testified that the Commission now has the right to provide them a firearm if necessary. It was also testified by numerous people that they are not supposed to get involved in violence but to see that the licenses are posted correctly, that the dues are paid and he doesn't need a gun to do that sort of thing. The committee found it inexpedient to legislate.

Adopted.

CACR 6, relative to the right to bear arms. Ought to pass. Sen. Conley for the committee.

Senator Conley moved a floor amendment.

SEN. CONLEY: The amendment which is put on the table this morning is the result of perusal of this bill just before coming to the floor today. We found that Legislative Services has again made an error in the bill and this corrects the error in it so that the wording is appropriate for the change in the Constitution. This Constitutional amendment reaffirms that all persons have the right to keep and bear arms in defense of themselves, their family, their property, and the state. It simply spells out that we believe that the New Hampshire Constitution should have a similar provision to that of the federal Constitution. The federal courts, on several occasions, have interpreted the Second Amendment as imposing a limititation on the national government only and therefore does not speak to the States' rights. Thirty-seven states have Constitutional provisions guaranteeing the right to bear arms. Thirteen states have no Constitutional provisions and in the New England states only the state of New Hampshire has no such provision. This subject matter appeared on a ballot in the year 1978 and narrowly missed passage. 160,628 people believe that we should amend the Constitution and 87,807 voted no. In other words, we had a 65% vote where we needed a 66-2/3% vote. When that many people favor a proposition I believe we ought to give them the right once again to support the inclusion of the right to bear arms in our State Constitution. I would hope that the Senate goes on record as supporting this amendment to our state Constitution as amended here in this constitutional amendment.

Amendment to CACR 6

Amend article 2-a, part first, as inserted by paragraph I of the resolution by striking out same and inserting in place thereof the following:

[Art.] 2-a. [The Bearing of Arms.] All persons have the right to keep and bear arms in defense of themselves, their families, their property and the state.

Amendment adopted.

Roll Call.

The following Senators voted yes: Lamontagne, Conley, Freese, Hough, Bergeron, Chandler, Wiggins, Monier, Blaisdell, Stabile, Boyer, Kelly, Podles, Sanborn, Stephen, Brown, Champagne, Lessard, Roy, and Preston.

The following Senators voted no: Rice, and Splaine.

20 yeas 2 nays

Ordered to third reading by necessary 2/3 vote.

SB 246, relative to the use of force in defense of premises. Ought to pass. Sen. Conley for the committee.

SEN. CONLEY: SB 246 was heard in committee and the vote of ought to pass was unanimous. This bill clarifies existing law and broadens the right to use deadly force in defense of a person's home. Our clear intent in filing this bill is to provide a protective statute for homeowners attacked in

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 relating..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)

GENERAL FUND		0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL		0	0	0	0	0

POSITIONS :

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 : _____ — Date : 3/27/86
Agency : Public Safety

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

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

DISTRIBUTED BY SEN. VIC FISCHER

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

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

Harold M. Brown
Attorney General

HMB:GAH:gb-13

DISTRIB. BY V. FISCHER

M E M O R A N D U M

MUNICIPALITY OF ANCHORAGE

To: Members of the Senate
From: Chip Dennerlein
Re: SJR 39

The Municipality has been asked to comment on the present form of SJR 39, including any potential effects the resolution might have on existing municipal ordinances concerning the possession and use of firearms. First, it is our understanding that the intent of SJR 39 is to clarify the constitutional right to keep and bear arms as an "individual" right in Alaska, and to give Alaskans the opportunity to vote on this proposition. We support this intent and approach.

However, the language of SJR 39 raises a serious question beyond the basic intent. That is, does SJR 39 override existing municipal code regarding the prohibition against carrying concealed weapons? Based on careful review by legal counsel, the answer is yes. I will explain.

The language provides specifically for the "lawful defense of self, etc." This insures that the "use" of arms which is protected by SJR 39 is "lawful" use. However, the actual keeping and bearing of arms (their "posession") has no such qualifier. In other words, while "use" must be "lawful", "possession" is an absolute constitutional "right". As long as a person uses or intends to use a firearm in a lawful manner, that person can carry it in any manner he or she chooses. As currently written SJR 39 would authorize the carrying of concealed weapons, overriding municipal code.

The Municipality has previously suggested language to correct this problem. Please refer to the attached letter from the Anchorage Municipal Attorney.

Municipality of Anchorage

POUCH 6-650
ANCHORAGE, ALASKA 99502-0650
(907) 264-4545

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

COMMENTARY ON PROPOSED AMENDMENT TO ALASKA RIGHT TO BEAR ARMS GUARANTEE

Article I, Section 19 of the Constitution of Alaska would be amended to read as follows:

> The right of each citizen of the state to keep and bear arms for personal defense and for the defense of family, property, and the state and for lawful hunting, recreation, and other lawful purposes shall not be infringed by the state or by a borough or city of the state.

This proposal guarantees a broad individual right and explicitly protects the traditional rights that gun owners in Alaska always assumed were guaranteed. The Alaska proposal is a blending of the New Mexico, Nevada, New Hampshire, North Dakota, Colorado, Mississippi, Missouri, Montana, Oklahoma, and Utah guarantees.

I. TO WHOM THE RIGHT BELONGS

This guarantee would belong to the citizen of the state. Citizenship includes the full enjoyment of all rights and privileges. The full enjoyment of all rights and privileges is obviously not enjoyed by certain groups, including the following: convicted felons, lunatics, and illegal aliens. This principle of law is so well established that commentators only mention it briefly in passing. See Dowlut & Knoop, State Constitutions and the Right to Keep and Bear Arms, 7 Okl. City Univ. L.Rev. 177, 191 (1982). See also State v. Kessler, 289 Or. 359, 614 P.2d 94, 99 (1980).

II.
WHAT CONSTITUTES ARMS

Constitutionally protected arms are those arms that are commonly kept by the people. The people of Alaska commonly keep and bear rifles, shotguns, pistols, revolvers, edged weapons, hatchets, and clubs. They do not possess weapons that are exclusively used by the military or weapons of mass destruction. Therefore, bombs, poison gas, or cannons do not come under the umbrella of the constitutional guarantee.

III.
THE RIGHT TO KEEP AND BEAR ARMS

Arms may be kept or borne for defensive, recreational, and other traditional lawful purposes. Alaska's frontier tradition is to carry arms openly. See Nunn v. State. 1 Ga. (1 Kel.) 243 (1846); State v. Kerner, 181 N.C. 574, 107 S.E. 222 (1921); Glasscock v. City of Chattanooga, 157 Tenn. 518, 11 S.W.2d 678 (1928); City of Las Vegas v. Moberg, 485 P.2d 737 (N.M. App. 1971); City of Lakewood v. Pillow, 180 Colo. 29, 501 P.2d 744 (1972). The concealed carrying of arms may be prohibited in a public place. The state may require the obtaining of a license to carry an arm concealed. However, a concealed carrying license statute would have to be equitably administered. See Schubert v. DeBard, 73 Ind. Dec. 510, 398 N.E.2d 1339 (Ind. App. 1980).

The constitutional purpose for bearing arms would not be frustrated by a prohibition on carrying arms while drunk, to a polling place, court, public assembly, or in a manner calculated to inspire terror. The keeping or bearing of arms in the home or

place of business may be either open or concealed, keeping the castle doctrine in mind and the purpose of protecting a place of business.

IV.
THE RIGHT SHALL NOT BE INFRINGED BY THE STATE OR ANY SUBDIVISION THEREOF

Neither the State nor any subdivision of the state could prevent the people from keeping or bearing constitutionally protected arms within the perimeters of the constitutional guarantee. Laws forbidding the sale of arms or ammunition, or preventing the repair, bearing, or keeping of constitutionally protected arms, laws requiring a license to possess or acquire arms, or the payment of special taxes, or requiring registration would be an infringement on the right to keep and bear arms. The guarantee would also provide for uniformity throughout the state. This would be a form of preemption. Units of local government could only enact legislation which was absolutely necessary and uniquely necessary for a unit of local government. Therefore, a city or village could regulate the discharge of firearms within its boundaries without infringing the right to keep and bear arms.

V.
CONCLUSION

The proposal guarantees the fundamental right of a citizen to keep and bear arms for traditional purposes. This right may not be infringed. The misuse of arms falls outside the boundaries of the constitutional guarantee. The types of

misconduct that the legislature may forbid and punish are well-known and self-evident; examples include using arms to rob, harass, intimidate, or recklessly endanger someone, shooting in an unsafe place or manner, and poaching. Therefore, this proposal will not hinder the legislature in performing its duty to punish the misuse of arms.

298 Or. 395

STATE of Oregon, Petitioner on Review,

v.

Joseph Luna DELGADO, Respondent on Review.

TC CR83-946, CA A30962, SC S31059

Supreme Court of Oregon, In Banc.

Argued and Submitted Nov. 6, 1984.

Decided Dec. 28, 1984.

Defendant was convicted in the District Court, Polk County, Walter W. Foster, J., of unlawful possession of a stabbing weapon, and he appealed. The Court of Appeals, 69 Or.App. 254, 684 P.2d 630, reversed, and appeal was taken. The Supreme Court, Lent, J., held that defendant's constitutional right to bear arms was violated by prohibition of mere possession and mere carrying of a switchblade knife.

Decision of the Court of Appeals affirmed.

Weapons ⇐1

Defendant's constitutional right to bear arms was violated by prohibition of mere possession and mere carrying of a switchblade knife. Const. Art. 1, § 27; ORS 166.510, 166.510(1).

Robert W. Muir, Asst. Atty. Gen., Salem, argued the cause for petitioner on review. With him on the briefs were Dave Frohnmayer, Atty. Gen., James E. Mountain, Jr., Sol. Gen., and Lynn Torno, Certified Law Student.

Susan M. Garrett, Salem, argued the cause and filed briefs for respondent on review.

Robert Dowlut, Washington, D.C., and Steven L. Krasik, Salem, filed a brief amicus curiae for Nat. Rifle Ass'n.

LENT, Justice.

The issue is whether ORS 166.510(1), insofar as it prohibits the mere possession and mere carrying of a switchblade knife, violates defendant's right to bear arms under Article I, section 27, of the Oregon Constitution. We hold that in that respect the statute does violate defendant's constitutional right.

ORS 166.510(1) provides, in relevant part:

"* * * [*A*]*ny person who* manufactures, causes to be manufactured, sells, keeps for sale, offers, gives, loans, *carries or possesses an instrument or weapon having a blade which projects or swings into position by force of a spring or other device and commonly known as a switch-blade knife* or an instrument or weapon commonly known as a blackjack, slung shot, sandclub, sandbag, sap glove or metal knuckles, or who carries a dirk, dagger or stiletto commits a Class A misdemeanor." (Emphasis added)

Article I, section 27, of the Oregon Constitution provides:

"The people shall have the right to bear arms for the defence of themselves, and the State * * * [.]"

The accusatory instrument charged that defendant "did unlawfully possess and carry" a weapon commonly known as a switch-blade knife in violation of ORS 166.510. Defendant demurred to the accusatory instrument on the ground that the statute was overbroad as impinging on the right guaranteed to him under Article I, section 27, of the Oregon Constitution. The trial court overruled the demurrer.[1]

Trial then proceeded on the basis of facts stipulated to be the same as those found by the trial court in the hearing on the motion

1. The defendant had also filed a motion to suppress the knife as evidence on the basis that it was obtained as a result of an unlawful search and seizure. The trial court's denial of that motion was not assigned as error.

to suppress mentioned in footnote 1, *supra*. Those facts are as follows.

On October 3, 1983, defendant was walking with a companion on a public street. The two appeared disorderly to an officer nearby, and when defendant reached up as he passed a street sign and tapped or struck it with his hand, the officer confronted both individuals and conducted a patdown search. Defendant was found with a switch-blade knife in his back pocket. Defendant told the arresting officer that he carried the knife "for protection" (defendant evidently feared attack by a jealous rival for his present girl friend).[2]

Defendant moved for judgment of acquittal, which was denied. The trial court then found defendant guilty and eventually sentenced defendant to jail "suspended on the condition" that defendant meet certain terms of probation.

Defendant appealed, assigning as error the trial court's overruling of his demurrer and denial of his motion for judgment of acquittal. The Court of Appeals, 69 Or. App. 254, 684 P.2d 630, per curiam, reversed on the basis of our decisions in *State v. Blocker*, 291 Or. 255, 630 P.2d 824 (1981), and *State v. Kessler*, 289 Or. 359, 614 P.2d 94 (1980). We allowed review to determine whether a switch-blade knife is within the constitutional guarantee. 298 Or. 37, 688 P.2d 845 (1984).

In *State v. Kessler*, *supra*, this court for the first time considered the scope of Article I, section 27. There, following the discovery by police officers of two billy clubs in his apartment, defendant was charged with the possession of billy clubs in violation of ORS 166.510(1), the same statute at issue in the case at bar. On appeal defendant argued that the statute violated Article I, section 27, of the Oregon Constitution. The Court of Appeals held that ORS 166.510(1) was within the reasonable exercise of what the court called the state's "police power" to control crime. 43 Or.App. 303, 307, 602 P.2d 1096, 1097 (1979). We reversed.

In *Kessler*, we examined the historical roots of Article I, section 27. We concluded that the drafters of Oregon's constitution did not wish to limit the right to bear arms to a citizen militia, but rather intended that the private citizen also have the right to "possess certain arms for the defense of person and property." 289 Or. at 371, 614 P.2d at 98.

Our analysis in *Kessler* of the meaning of the term "arms" is central to the case at bar and so merits a further discussion. We reasoned that because settlers during the revolutionary era used many of the same weapons for both personal and military defense, the term "arms," as contemplated by the constitutional framers, was not limited to firearms but included those hand-carried weapons commonly used for personal defense. 289 Or. at 368, 614 P.2d at 98. Thus, the term "arms" "includes weapons commonly used for either purpose, even if a particular weapon is unlikely to be used as a militia weapon." 289 Or. at 369, 614 P.2d at 98. On the basis of this historical examination, we held that the possession of a billy club was constitutionally protected:

> "Our historical analysis of Article I, section 27, indicates that the drafters intended 'arms' to include the hand-carried weapons commonly used by individuals for personal defense. The club is an effective, hand-carried weapon which cannot logically be excluded from this term."

2. We have in mind that defendant's principal argument is that, insofar as this charge of criminal conduct is concerned, the statute is overbroad in proscribing conduct in which he has a state constitutional right to engage. Ordinarily, we would have no reason to go beyond the facts described in the accusatory instrument to resolve whether error was committed in overruling defendant's demurrer. In this case, however, a factual record was developed, and the defendant also assigned as error the denial of his motion for judgment of acquittal. The facts are recounted to show that there is no evidence to support any possible charge of an illegal intent to use the weapon or an illegal use of the weapon.

289 Or. at 372, 614 P.2d at 100.[3]

The state argues that a switch-blade is not a weapon "commonly used for personal defense," and is therefore not an "arm" within the meaning of the Oregon Constitution. It insists that the switch-blade is an offensive weapon used primarily by criminals. In support of this argument we are referred to various authorities, especially the Federal Anti-Switchblade Act, 15 USC §§ 1241–44 (Supp. IV, 1980), which is aimed at prohibiting the introduction of switch-blade knives into interstate commerce because they are "almost exclusively the weapon of the thug and the delinquent." S.Rep. No. 1980, 85th Cong., 2d Sess., reprinted in 1958 U.S.Code Cong. & Ad.News 3435, 3437.

We note, first, that that material offers no more than impressionistic observations on the criminal use of switch-blades. More importantly, however, we are unpersuaded by this distinction which the state urges of "offensive" and "defensive" weapons. All hand-held weapons necessarily share both characteristics. A kitchen knife can as easily be raised in attack as in defense. The spring mechanism does not, instantly and irrevocably, convert the jackknife into an "offensive" weapon.[4] Similarly, the clasp feature of the common jackknife does not mean that it is incapable of aggressive and violent purposes. It is not the design of the knife but the use to which it is put that determines its "offensive" or "defensive" character.

There are statutes now on the books that concern the manner in which weapons are carried, the intent with which they are carried, the use to which they may not be put and the status of a person that results in forbidding his possessing a weapon.

> "This state has several such regulatory statutes, with which we are not concerned in this case: ORS 166.220(1) prohibiting possession of a dangerous weapon with intent to use such weapon unlawfully against another; ORS 166.240, prohibiting carrying certain weapons concealed about one's person; ORS 166.250, prohibiting carrying any firearm concealed upon the person or within any vehicle without a license to do so." (Footnote omitted.)

State v. Blocker, *supra*, 291 Or. at 259–260, 630 P.2d at 826. *See, also*, ORS 166.270, which prohibits an exconvict from possessing a firearm concealable on the person, which this court held not to offend Article I, section 27, of the Oregon Constitution in *State v. Robinson*, 217 Or. 612, 619, 343 P.2d 886 (1959).

The appropriate inquiry in the case at bar is whether a kind of weapon, as modified by its modern design and function, is of the sort commonly used by individuals for personal defense during either the revolutionary and post-revolutionary era,[5] or in 1859 when Oregon's constitution was adopted. In particular, it must be determined whether the drafters would have intended the word "arms" to include the switch-blade knife as a weapon commonly used by individuals for self defense. To answer that question we must journey briefly into the history of knives. We have resorted primarily to three books by H. Peterson for that history: Arms and Armour in Colonial America, 1526–1783 (1956); American Knives (1958); Daggers and Fighting Knives of the Western World (1968). What we have to say generally in

3. One year later, in *State v. Blocker*, 291 Or. 255, 259, 630 P.2d 824, 826 (1981), we held that the possession of a billy club outside as well as inside the home is constitutionally protected.

4. At one time the single-action, single-shot handgun was carried by many men for defense. Did the development of the double-action feature of the handgun or the addition of the revolving cylinder which enabled one to fire the gun several times without pausing to reload, as a matter of law, transform the handgun from a defensive weapon to an offensive weapon? Obviously, the gun, both before and after such changes, could be used for either defense or offense.

5. Article I, section 27, of the Oregon Constitution was taken verbatim from sections 32 and 33 of the Indiana Constitution of 1851. Indiana's bill of rights liberally drew upon the state constitutions of Kentucky, Ohio, Tennessee, and Pennsylvania, which were drafted between 1776 and 1802. *See State v. Kessler*, 289 Or. 359, 365, 614 P.2d 94, 95 (1980).

the next few paragraphs is drawn from those works.

The popularity of the fighting knife has had an uneven history, even to today. During the Roman civilization and for several centuries thereafter, for example, the knife was little appreciated as a tool of combat, but during the Viking Period of the 9th and 10th centuries large knives (scramasax), used for general purposes as well as for war, were popular among the Northmen, Germans, Franks and Anglo-Saxons. It was during the Middle Ages that the real flowering of the fighting knife and dagger occurred. New shapes appeared and the knife became part of the standard dress for all classes: from the knights and their men-at-arms as an adjunct to the sword, to the laborer and peasant for protection and convenience. During the 16th century the dagger came to be used by the aristocracy, mainly in conjunction with the sword, and was used primarily for combat; indeed, during the early part of that century the technique of fighting with sword and dagger developed, thus giving rise to the modern school of knife fighting. Through the 16th and 17th centuries knives and daggers declined in importance and were no longer an important part of the daily civilian costume.

In early colonial America the sword and dagger were the most commonly used edged weapons. During the American colonial era every colonist had a knife. As long as a man was required to defend his life, to obtain or produce his own food or to fashion articles from raw materials, a knife was a constant necessity. Around 1650 one form of dagger popular in the colonies was the "plug bayonet," so called because it fit into the muzzle of a musket. It was used both as a dagger or as a general utility knife. Other knives became popular during the 17th and 18th centuries. The American frontiersman used a large knife to ward off danger from Indian attacks and to hunt and trap; along with that he carried a smaller knife, the blade being three to four inches long, in his rifle bag.

In the 19th century, daggers remained popular, but in the west, the renowned Bowie knife became the weapon favored by the lawless and law-abiding alike. These were violent times, particularly from the 1820s through the Civil War, when a weapon might be needed at a moment's notice. In response, "the well-equipped gentleman carried a pistol in his pocket and a knife beneath his coattails."

Of the many varieties of knives, none has been a more constant or enduring companion to man than the pocket knife. Specimens of folding pocket knives have been discovered in Roman archeological sites, indicating that such knives were popular at least from the first century A.D. They have been manufactured for their utility as both instruments of labor and combat. One of the most common of the specific named knives is the jackknife, a word of uncertain origin, which was a large single-bladed folding knife, ranging in size from four to seven inches when closed. By the early 1700s, when the eastern seaboard had become a highly settled area with large towns and cities and relatively good roads, men normally carried a folding pocket knife. Even when they joined the American army during the revolution, the knife they carried was the jackknife, which was mentioned frequently in colonial records. During the American Revolution at least two states, New Hampshire and New York, required their militiamen to carry a jackknife. Even during the mid-18th century, some of these "jackknives" were rather more lethal than their name suggests, measuring two feet long with the blade extended, and designed solely for fighting. G. Neumann, Swords and Blades of the American Revolution 247 (1973). Some others had blades over 16 inches long, extending well beyond the hilt even when folded, and were designed to be used open or closed. "Gentlemen" and officers during this same era often carried canes with slender daggers mounted inside which could be drawn with a quick tug and were used for personal defense. Neumann, Swords and Blades of the American Revolution, *supra*, at 239. In the early 19th century a special form of

dagger also developed, the pocket or folding dagger, with blades ranging in size from four to sixteen inches; they were intended to be carried in the pocket or in special sheathes.

It is clear, then, that knives have played an important role in American life, both as tools and as weapons. The folding pocketknife, in particular, since the early 18th century has been commonly carried by men in America and used primarily for work, but also for fighting.

This brings us to the switch-blade knife. A switch-blade is defined as a "pocketknife having the blade spring-operated so that pressure on a release catch causes it to fly open." Webster's Third International Dictionary 2314 (1971). If ORS 166.510(1) proscribed the possession of mere pocketknives, there can be no question but that the statute would be held to conflict directly with Article I, section 27. The only difference is the presence of the spring-operated mechanism that opens the knife. We are unconvinced by the state's argument that the switch-blade is so "substantially different from its historical antecedent" (the jackknife) that it could not have been within the contemplation of the constitutional drafters. They must have been aware that technological changes were occurring in weaponry as in tools generally. The format and efficiency of weaponry was proceeding apace. This was the period of development of the Gatling gun, breach loading rifles, metallic cartridges and repeating rifles. The addition of a spring to open the blade of a jackknife is hardly a more astonishing innovation than those just mentioned.[6]

We stress again, as we have stressed before, that this decision does not mean individuals have an unfettered right to possess or use constitutionally protected arms in any way they please. The legislature may, if it chooses to do so, regulate possession and use. *See State v. Blocker, supra,* 291 Or. at 259, 630 P.2d at 826; *State v. Kessler, supra,* 289 Or. at 370, 614 P.2d at 100. This court recognizes the seriousness with which the legislature views the possession of certain weapons, especially switch-blades.[7] The problem here is that ORS 166.510(1) absolutely proscribes the mere possession or carrying of such arms. This the constitution does not permit.[8]

The decision of the Court of Appeals is affirmed.

6. Charles Dickens, in his novel Martin Chuzzlewit, published in 1842 shortly after his return from America, referred to a certain Scadder, who "picked his teeth with a sort of young bayonet that flew out of his knife when he touched a spring." This suggests that America could have been the origin of the switch-blade. *See* A. Popkess, *Flick Knives,* [1959] Crim.L.R. 640.

7. ORS 166.510(1) was amended in 1957 to include, for the first time, proscription against the possession of switch-blades. Or.Laws 1957, ch. 290, § 1.

8. The analysis we have employed in *State v. Kessler* and *State v. Blocker, supra,* at footnotes 3 and 5, concerning clubs and in the case at bar concerning a knife may not be the same analysis that would be appropriate to the application of Article I, section 27, of the Oregon Constitution to a weapon such as a can of mace, not having a pre-twentieth century form or counterpart. It has been suggested that it is incongruous to believe that a woman today to defend herself from a rapist would have constitutional sanction for carrying a switch-blade knife but not for the can of mace because the latter was unknown to the mid-nineteenth century. Such a case is not before us. The time to deal with that case is when it is presented.

71 Or.App. 356

Gerald Lee ALBERS, Appellant,

v.

Hoyt C. CUPP, Superintendent, Oregon State Penitentiary, Respondent.

137975; CA A31762.

Court of Appeals of Oregon.

Argued and Submitted Nov. 28, 1984.

Decided Dec. 12, 1984.

Reconsideration Denied Jan. 25, 1985.

Review Denied Feb. 12, 1985.

Appeal from Circuit Court, Marion County, Clarke C. Brown, Judge.

(b) It is an affirmative defense to a prosecution under (a)(1) of this section that

(1) the defendant took reasonable steps to remove the substance from the highway; and

(2) no person suffered physical injury as a result of the presence of the substance on the highway.

(c) Obstruction of highways is a class B misdemeanor. (§ 7 ch 166 SLA 1978)

Collateral references. — 39 Am. Jur. 2d, Highways, Streets and Bridges, §§ 281-310.
39A C.J.S., Highways, §§ 217-231.

Article 2. Weapons and Explosives.

Collateral references. — Validity and construction of gun control laws, 28 ALR3d 845.

Sec. 11.61.200. Misconduct involving weapons in the first degree. (a) A person commits the crime of misconduct involving weapons in the first degree if the person

(1) knowingly possesses a firearm capable of being concealed on one's person after having been convicted of a felony by a court of this state, a court of the United States, or a court of another state or territory;

(2) knowingly sells or transfers a firearm capable of being concealed on one's person to a person who has been convicted of a felony by a court of this state, a court of the United States, or a court of another state or territory;

(3) manufactures, possesses, transports, sells, or transfers a prohibited weapon;

(4) knowingly sells or transfers a firearm to another whose physical or mental condition is substantially impaired as a result of the introduction of an intoxicating liquor or drug into that other person's body;

(5) removes, covers, alters, or destroys the manufacturer's serial number on a firearm with intent to render the firearm untraceable; or

(6) possesses a firearm on which the manufacturer's serial number has been removed, covered, altered, or destroyed, knowing that the serial number has been removed, covered, altered, or destroyed with the intent of rendering the firearm untraceable.

(b) It is an affirmative defense to a prosecution under (a)(1) or (2) of this section that

(1) the person convicted of the prior offense on which the action is based received a pardon for that conviction;

(2) the underlying conviction upon which the action is based has been set aside under AS 12.55.085 or as a result of post-conviction proceedings; or

(3) a period of five years or more has elapsed between the date of the person's unconditional discharge on the prior offense and the date of the possession, sale, or transfer of the firearm.

(c) It is an affirmative defense to a prosecution under (a)(3) of this section that the manufacture, possession, transportation, sale, or transfer of the prohibited weapon was in accordance with registration under 26 U.S.C. 5801-5872 (National Firearms Act).

(d) The provisions of (a)(3) of this section do not apply to a peace officer acting within the scope and authority of the officer's employment.

(e) As used in this section,

(1) "prohibited weapon" means any

(A) explosive, incendiary, or noxious gas

(i) mine or device that is designed, made, or adapted for the purpose of inflicting serious physical injury or death;

(ii) rocket, other than an emergency flare, having a propellant charge of more than four ounces;

(iii) bomb;

(iv) grenade;

(B) device designed, made, or adapted to muffle the report of a firearm;

(C) metal knuckles;

(D) switchblade or gravity knife;

(E) firearm that is capable of shooting more than one shot automatically, without manual reloading, by a single function of the trigger; or

(F) rifle with a barrel length of less than 16 inches, shotgun with a barrel length of less than 18 inches, or firearm made from a rifle or shotgun which, as modified, has an overall length of less than 26 inches;

(2) "unconditional discharge" has the meaning ascribed to it in AS 12.55.185.

(f) Misconduct involving weapons in the first degree is a class C felony. (§ 7 ch 166 SLA 1978)

The portion of the judgment entered below awarding appellees $13,000 for personalty taken, plus interest and attorney's fees thereon, is vacated and the case remanded for a new trial on the issues as limited by this opinion.

James F. BUSH, Appellant,
v.
James REID and Clarence Reid, Appellees.
No. 1841.

Supreme Court of Alaska.
Dec. 14, 1973.

Parolee brought action for injuries sustained in automobile accident and defendants filed motion to dismiss. The Superior Court, Third Judicial District, Anchorage, Ralph E. Moody, J., granted defendants' motion and the parolee appealed. The Supreme Court, Boochever, J., held that statutes suspending parolee's civil rights during time he was in custody of parole board denied parolee due process and equal protection to extent that they denied him the right to institut civil suit.

Reversed and remanded.

Connor, Erwin and Fitzgerald, JJ., did not participate.

1. Constitutional Law ⇐250.3(2), 272
Pardon and Parole ⇐2

Statutes suspending parolee's civil rights during time he was in custody of parole board denied parolee his right to initiate a civil suit but, to that extent, statutes denied parolee due process and equal protection. AS 11.05.070, 33.15.190; Const. art. 1, §§ 7, 12; U.S.C.A.Const. Amend. 14.

2. Constitutional Law ⇐277(1)

A chose in action is a form of "property" within due process protection. U.S.C.A.Const. Amend. 14.

See publication Words and Phrases for other judicial constructions and definitions.

Barry Donnellan, Anchorage, Stephen C. Cooper, Fairbanks, Edgar Paul Boyko, Edgar Paul Boyko & Associates, Anchorage, for appellant.

No appearance for appellees.

Robert Wagstaff as amicus curiae, for American Civil Liberties Union.

Before RABINOWITZ, Chief Justice, BOOCHEVER, Justice, and EBEN H. LEWIS, Superior Court Judge.

OPINION

BOOCHEVER, Justice.

James F. Bush originally filed this lawsuit in superior court to recover damages for injuries received in an automobile accident. At the time of the accident and the filing of the suit, appellant Bush was a felon on parole. The Reids, as defendants below, filed, and the superior court subsequently granted, a motion to dismiss the complaint on the ground that AS 11.05.070[1] suspends the civil rights of a person sentenced to imprisonment in the penitentiary for a term less than life. Bush here appeals on the grounds that the superior court erred in interpreting the statute, or, alternatively, that the statute if interpreted to bar appellant from access to the courts, violates the Alaska and United States constitutions.

AS 11.05.070 and AS 33.15.190[2] when read together clearly indicate that a parol-

1. AS 11.05.070 provides:
A judgment of imprisonment in the penitentiary for a term less than for life suspends the civil rights of the person sentenced, and forfeits all public offices and all private trusts, authority, or power during the term or duration of imprisonment.

2. AS 33.15.190 provides:
The board may permit a parolee to return to his home if it is in the state, or to go elsewhere in the state, upon such terms and conditions, including personal reports from the paroled person as the board prescribes. The board may permit the parolee

ee's civil rights, similarly to those of a prisoner, remain suspended during the time he is in the custody of the parole board. The first question presented to this court is whether the right to bring and maintain a civil suit is among the civil rights suspended by AS 11.05.070.

[1] The general rule has been that in a jurisdiction where a convict loses his civil rights, he cannot sue while under such disability.[3] This rule has recently been applied and upheld in Kansas and Oregon.[4] New York courts consistently have held that Penal Code Sec. 510, which suspends all rights of a prisoner while incarcerated comprises the right to file a civil lawsuit.[5] Cases which allow convicts the right to initiate civil actions have been decided in the absence of statutes suspending civil rights such as the one in point here.[6]

Rush argues, however, that this court should consider the use of "*the* civil rights" instead of "*all* civil rights" in AS 11.05.070 (Kansas, Oregon, and New York provisions use "all civil rights"), and liberally construe the provision so as not to ex-

to go into another state upon terms and conditions as the board prescribes, and subject to the provisions of any compact executed under the authority of ch. 10 of this title and amendments to it. A prisoner released on parole remains in the legal custody of the board until the expiration of the maximum term or terms to which he was sentenced, less good time allowances provided by law. While in the custody of the board, a person is subject to the disabilities imposed by AS 11.05.070.

3. Quick v. Western Ry. of Alabama, 207 Ala. 376, 92 So. 608, 609 (1922); Sullivan v. Prudential Ins. Co. of America, 131 Me. 22[illegible] 160 A. 777, 779 (1932); McLaughlin v. M Laughlin, 228 Mo. 635, 129 S.W. 21, 23 (1910); Avery v. Everett, 110 N.Y. 317, 18 N.E. 148, 154 (1888); Miller v. Turner, 64 N.D. 463, 253 N.W. 437, 439 (1934).
The supporting rationale for this suspension of civil rights of prisoners is explained in Tabor v. Hardwick, 224 F.2d 526, 529 (5th Cir. 1955), cert. denied, 350 U.S. 971, 76 S.Ct. 445, 100 L.Ed. 843 (1956):

> We do not question the wisdom of the rule recognized by such decisions as Ex parte Hull [, 312 U.S. 546, 61 S.Ct. 640, 85 L.Ed. 1034] and White v. Ragen [, 324 U.S. 760, 65 S.Ct. 978, 89 L.Ed. 1348], supra, that penitentiary inmates ought to have their right to inquire into the validity of their restraint of personal liberty and freedom zealously safeguarded by the courts, but we think that the principle of the cases so holding should not be extended to give them an absolute and unrestricted right to file any civil action they might desire. Otherwise, penitentiary wardens and the courts might be swamped with an endless number of unnecessary and even spurious law suits filed by inmates in remote jurisdictions in the hope of obtaining leave to appear at the hearing of any such case, with the consequent disruption of prison routine and concomitant hazard of escape from custody. As a matter of necessity, however regrettable the rule may be, it is well settled that, "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." [citations omitted].

4. Hammett v. San Ore Construction Co., 195 Kan. 822, 402 P.2d 820 (1965); Chinn v. State, 6 Or.App. 350, 488 P.2d 293 (1971). In *Hammett*, 402 P.2d at 822, the Kansas court said:

> Under well-established authorities it is recognized (1) that the use of court process is a "civil right" within a statute providing that sentence of imprisonment in state prison for a term less than life suspends all civil rights during the term of sentence and (2) that the right to sue is a right which is suspended under a statute providing that sentence of imprisonment in state prison for a term less than life suspends all civil rights during term of sentence. See Nastasi v. State, 186 Misc. 1051, 61 N.Y.S.2d 438; Lipschultz v. State, 192 Misc. 70, 78 N.Y.S.2d 731; Application of White, 166 Misc. 481, 2 N.Y.S.2d 582.

5. Lynch v. Quinlan, 65 Misc.2d 236, 317 N.Y.S.2d 216 (1970); In re Cirello's Estate, 50 Misc.2d 1007, 271 N.Y.S.2d 841 (1966); Glenn v. State, 207 Misc. 776, 138 N.Y.S.2d 857 (1955); Lipschultz v. State, 192 Misc. 70, 78 N.Y.S.2d 731 (1948); Grant v. State, 192 Misc. 45, 77 N.Y.S.2d 756 (1948). These cases are inapplicable to an action commenced before incarceration because so applied, they would violate § 79-b of the New York Civil Rights Law, McKinney's Consol.Laws, c. 6, a statutory due process clause. Thomas v. Grupposo, 73 Misc.2d 427, 341 N.Y.S.2d 819, 822 (1973). The statute does not deprive *parolees* of civil process. *See* Glenn v. State, 138 N.Y.S.2d at 858; Grant v. State, 77 N.Y.S.2d at 758.

6. *See* Panko v. Endicott Johnson Corp., 24 F.Supp. 678 (N.D.N.Y.1938); Bosteder v. Duling, 115 Neb. 557, 213 N.W. 809 (1927).

tend denial of civil access to the courts. The substitution of "the" for "all", while seemingly minor, does allow the possibility that certain civil rights might not be denied. We have been given no authority for such distinction however, and find no indication that this was the intent of the legislature. In light of this absence of indications of such legislative intent, and the strong common-law authority holding that convicts are denied civil access to the courts,[7] we hold that AS 11.05.070 and AS 33.15.190 combine to deny parolees the right to initiate civil suit.

Such finding, however, does not conclude our inquiry. We must also consider Bush's contention that these statutes, if read to bar him from access to the courts, are contrary to the Alaska and United States constitutions. Bush argues that AS 11.05.070 provides for "cruel and unusual punishment"[8] and violates the due process clauses of the Alaska and United States constitutions.[9] While we do not find the punishment provided to be so severe as to constitute "cruel and unusual punishment",[10] nor the statute void for vagueness, we do hold that AS 33.15.190 violates the due process and equal protection clauses of the Alaska and United States constitutions insofar as it prohibits parolees from having access to the civil courts.

Both art. I, sec. 7 of the Alaska Constitution and sec. 1 of the fourteenth amendment of the United States Constitution prohibit the state from depriving any person of "life, liberty, or property, without due process of law." Bush contends that the right to bring a civil action for damages is property, and that therefore the suspension of such right is a deprivation of property without due process of law.

Any suggestion that a parolee was deprived by his custodial status of standing to assert a denial of due process was dissolved by the United States Supreme Court in Morrissey v. Brewer.[11] The nature of protection due "depends on the extent to which an individual will be 'condemned to suffer grievous loss.'"[12] The loss suffered must have some relationship to a "liberty or property" interest within the ambit of the fourteenth amendment.[13]

Because Bush seeks to overcome a statutory denial of access to the courts as a

7. There is no Alaska case involving the right of an imprisoned convict to have access to the courts. We do not here reach that issue.

8. Art. I, sec. 12 of the Alaska Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Penal administration shall be based on the principle of reformation and upon the need for protecting the public.

The eighth amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

9. Art. I, sec. 7 of the Alaska Constitution provides:

> No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.

Sec. 1 of the fourteenth amendment to the United States Constitution provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . .

10. This court in Lanier v. State, 486 P.2d 981, 990 (Alaska 1971), defined "cruel and unusual punishment" to be that punishment which is:

> inhuman and barbarous, or so disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice. [citing Green v. State, 390 P.2d 433, 435 (Alaska 1964)].

11. 408 U.S. 471, 481–482, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484, 494–495 (1972). This does not mean that the due process rights of ordinary citizens may not be somewhat modified by the necessities of the criminal correction process. Sostre v. McGinnis, 442 F.2d 178, 188–189 (2nd Cir. 1971), cert. denied sub nom. Sostre v. Oswald, 404 U.S. 1049, 92 S.Ct. 719, 30 L.Ed.2d 740 (1972), cert. denied sub nom. Oswald v. Sostre, 405 U.S. 978, 92 S.Ct. 1190, 31 L.Ed.2d 254 (1972).

12. Morrissey v. Brewer, 408 U.S. at 481, 92 S.Ct. at 2600, 33 L.Ed.2d at 494.

13. *Id.*

plaintiff, the starting point of our analysis must be Boddie v. Connecticut,[14] in which the United States Supreme Court held that a state could not deprive indigents of access to divorce tribunals by imposing a prohibitive filing fee.

Justice Harlan, writing for the Court in *Boddie*, recognized the centrality of the concept of due process in maintaining both order and justice in the resolution of the disputes which inevitably arise from human interaction. Upon that jurisprudential foundation he built the holding that where the state commands a monopoly over the only available legitimate means of dispute settlement and the relationship underlying the dispute is warp and woof of the fabric of society, the state may not deny access to the forum of settlement on account of poverty.[15]

We note superficial distinctions between the social context of the instant dispute and that in *Boddie*, but upon reflection we conclude that the denial of access to the civil courts rends the fabric of justice as surely here as in *Boddie*.

Although the collision of automobiles results in a dispute at first subject to private resolution, often the reconciliation of competing interests may be accomplished only by resort to the formal judicial process. The state exercises a monopoly over that paramount process where the "private structuring of individual relationships and repair of their breach" has failed.[16] Unlike the overburdened debtor, who was held in United States v. Kras[17] to have such adequate redress outside the Bankruptcy Act[18] that his right of access to bankruptcy adjudication could be denied by the imposition of a substantial filing fee, the injured citizen has no recourse but to the courts when those who caused his injuries refuse to enter a consensual resolution of the conflict, whether out of recalcitrance or in the assertion of a good faith defense. We further distinguish *Kras* because the prospective bankrupt could pay the required filing fee in unburdensome $2.00 per week installments;[19] here the bar is absolute and no ameliorative device exists. No "recognized, effective alternatives for the adjustment of differences remain."[20] Thus the initial element of the *Boddie* analysis exists here.

The second aspect of *Boddie* dealt with the importance of the marital relationship. Based on the hierarchy of social values the resolution of personal injury lawsuits might not be considered of such grave importance so as to justify invalidating this statute, although in the instance of a gravely-injured plaintiff, the very quality of his future existence may be dependent upon the outcome. In *Boddie* Justice Harlan sought the fundamental human relationship doctrine to satisfy the due process clause only because denial of access to a divorce court does not impair a simpler "liberty or property" interest. United States v. Kras instructs that one must search for a fundamental interest justifying access to the particular dispute resolution process in order to actuate the *Boddie*

14. 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971).

15. *Id.* at 374–376, 383, 91 S.Ct. at 781–785, 28 L.Ed.2d at 117, 122.

16. *Id.* at 375–376, 91 S.Ct. at 785, 28 L.Ed.2d at 117.

17. 409 U.S. 434, 443–444, 93 S.Ct. 631, 637, 34 L.Ed.2d 626, 635–636 (1973).

18. Because the actual disposition of payment remains in the debtor's control, consensual settlement was a viable option in *Kras*; mere non-action could settle the controversy forcibly to the debtor through the passage of the statutory limitations period; a state-law composition of creditors could be effected. Further, discharge in bankruptcy would effect no change in the debtor's ability to obtain and hold sufficient funds for life's necessities because of statutory protection of wages and welfare payments from assignment or civil process. United States v. Kras, 409 U.S. at 445, 93 S.Ct. at 638, 34 L.Ed.2d at 636.

19. United States v. Kras, 409 U.S. at 445, 93 S.Ct. at 638, 34 L.Ed.2d at 636.

20. Boddie v. Connecticut, 401 U.S. at 376, 91 S.Ct. at 785, 28 L.Ed.2d at 117.

doctrine.[21] The Court in *Kras* held that debtors do not have a fundamental right to an adjudication of bankruptcy. But here we must apply the test of *Morrissey*: whether the individual is "condemned to suffer grievous loss" in conjunction with an interest "within the contemplation of the 'liberty or property' language of the Fourteenth Amendment."[22]

[2] We begin with the understanding that a chose in action, such as Bush's claim for personal injuries, is a form of property.[23] The judicial process exists to reduce inchoate claims to money judgment where private settlement is unavailing (or to extinguish them as non-meritorious). Judgments may be executed or assigned for substantially their face value, presuming solvency of the debtor. Unlitigated claims for personal injury have slight market value. Deprivation of access to the courts thus denies both the ability to reduce the claim to a money judgment and the ability to collect the claim or otherwise convert it into property of an appreciable value and liquid nature during the parole status. Because the only reasonable use of the "property" represented by an unlitigated claim is reduction to judgment followed by collection or assignment, deprivation of that use deprives the claimant of the whole value of his property so long as he remains *non sui juris*.[24] The deprivation is no less severe than the taking of disputed wages or property during the pendency of litigation.[25] Additionally, the denial of access to the courts creates an unfair leverage in the potential defendant who may avoid or reduce a meritorious claim because the ordinarily penurious state of the parolee dictates an early settlement on whatever terms are available.[26] Finally, the risk of loss of the entire property due to staleness of evidence, loss of witnesses and similar complications constitutes an unreasonable burden. We note that the tolling of the statute of limitations[27] during disability prevents the baldest of takings; nevertheless, the disability robs the parolee of the opportunity to be heard "at a meaningful time and in a meaningful manner."[28]

We conclude that a parolee denied access to the judicial process by reason of his custodial status is thereby condemned to suffer a grievous loss of property rights protected by the due process clause of the fourteenth amendment of the United States Constitution. We further declare that we would reach an identical result in interpreting the due process provisions of the Alaska Constitution alone, finding as we do that Justice Harlan's insightful analysis of the social compact applies with equal force to our constitution. We have several times held that "we are free, and we are under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution." Finding as we do that "civil death" of parolees violates the

21. United States v. Kras, 409 U.S. at 445-447, 93 S.Ct. at 638-639, 34 L.Ed.2d at 636-637.

22. Morrissey v. Brewer, 408 U.S. at 481, 92 S.Ct. at 2600, 33 L.Ed.2d at 494.

23. Sanner v. Trustees of Sheppard and Enoch Pratt Hospital, 278 F.Supp. 138, 142 (D.Md. 1968); Martinez v. Fox Valley Bus Lines, Inc., 17 F.Supp. 570, 577 (N.D.Ill.1936); City of Phoenix v. Dickson, 40 Ariz. 403, 12 P.2d 618, 619 (1932); Rosane v. Senger, 112 Colo. 363, 149 P.2d 372, 375 (1944).

24. Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337, 342, 89 S.Ct. 1820, 1823, 23 L.Ed.2d 349, 354 (1969) (concurring opinion of Harlan, J.). *See* Fuentes v. Shevin, 407 U.S. 67, 84-85, 92 S.Ct. 1983, 1996, 32 L.Ed.2d 556, 572-573 (1972).

25. *See* Fuentes v. Shevin, 407 U.S. 67, 84-85, 92 S.Ct. 1983, 1996, 32 L.Ed.2d 556, 572-573 (1972); Sniadach v. Family Finance Corp. of Bay View, 395 U.S. at 342, 89 S.Ct. at 1823, 23 L.Ed.2d at 354.

26. *See* Sniadach v. Family Finance Corp. of Bay View, 395 U.S. at 339-341, 89 S.Ct. at 1821-1822, 23 L.Ed.2d at 352-353.

27. AS 09.10.140.

28. Boddie v. Connecticut, 401 U.S. 371, 378, 91 S.Ct. 780, 786, 28 L.Ed.2d 113, 119 (1971), quoting from Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62, 66 (1965) and Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865, 873 (1950).

spirit and intention of the Alaska Constitution, we would not be impeded in our constitutional progress by a narrower holding of the United States Supreme Court.[29]

The finding of a deprivation of a property right does not conclude a due process analysis; the assessment of what process is due requires a balancing of the individual's interest against the state's justification for its enactment.[30] Denial of incarcerated felons' access to the civil judicial process has been justified by fears of disruption of prison routine, spurious litigation commenced in the hope of spending a few hours beyond the bars of prison and increased risks of escape by prisoners en route to hearings.[31] Where the litigant is a parolee, to state these arguments is to reveal their absurdity.[32] No argument has been pressed that engaging in civil litigation will encourage recidivism or otherwise interfere with the rehabilitation of an offender. If one may anticipate any effect, it is that active participation in the system of justice will develop added respect for the system and a sense of belonging in the mainstream of society.

Given this utter vacancy of rationale for the continued deprivation of access to the judicial process, we hold that AS 33.15.190, insofar as it suspends, in conjunction with AS 11.05.070, the access of parolees to civil courts, violates the due process clauses of the Alaska and United States constitutions.

Additionally, we find that AS 33.15.190 denies parolees "the equal protection of the laws", in violation of the fourteenth amendment to the United States Constitution,[33] and art. I, sec. 1 of the Alaska Constitution.[34] The state, by AS 33.15.190 and 11.05.070, denies parolees the right of access to the civil courts possessed by other persons. We find that the state interest in denying parolees this right satisfies neither the "compelling state interest" test applied when a "fundamental right" is at stake,[35] nor the traditional,

29. Baker v. City of Fairbanks, 471 P.2d 386, 401–402 (Alaska 1970); R. L. R. v. State, 487 P.2d 27 (Alaska 1971); *see* Roberts v. State, 458 P.2d 340, 342 (Alaska 1969).

30. Morrissey v. Brewer, 408 U.S. at 483, 92 S.Ct. at 2594, 33 L.Ed.2d at 495–496; Bell v. Burson, 402 U.S. 535, 540–541, 91 S.Ct. 1586, 1590, 29 L.Ed.2d 90, 95 (1971); Boddie v. Connecticut, 401 U.S. at 381–383, 91 S.Ct. at 783, 28 L.Ed.2d at 121; Sniadach v. Family Finance Corp. of Bay View, 395 U.S. at 339, 89 S.Ct. at 1821, 23 L.Ed.2d at 352.

31. Tabor v. Hardwick, 224 F.2d 526, 529 (5th Cir. 1955), cert. denied, 350 U.S. 971, 76 S.Ct. 445, 100 L.Ed. 843 (1956).

32. *See* Morrissey v. Brewer, 408 U.S. at 478, 92 S.Ct. at 2598, 33 L.Ed.2d at 492–493 and our discussion *infra* notes 37 to 39 and accompanying text.

33. The fourteenth amendment provides in relevant part:

> No State shall . . . . deny to any person within its jurisdiction the equal protection of the laws.

34. Art. I, sec. 1 provides:

> This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

In Lerge v. Martin, 379 P.2d 447, 451–452 (Alaska 1963), this court explained:

> The statutory denial of a stay is also without legal effect because it deprives appellees of "equal rights, opportunities, and protection under the law", to which they are entitled under art. I, § 1 of the state constitution. This constitutional guarantee of equal treatment, like the equal protection clause of the federal constitution, is the embodiment of the fundamental principle that all men are equal before the law. It is a prohibition against laws which, in their application, make unjust distinctions between persons. As to this case, the guarantee of equality of treatment prohibits legislation which denies to one group of persons the enjoyment of certain rights which are afforded to another group, when considering the purpose of the legislation, there is no reasonable basis for not treating both groups the same. [footnote omitted].

See Alex v. State, 484 P.2d 677, 684 (Alaska 1971).

35. *See* Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1966). In Ramirez v. Brown, 9 Cal.3d 199, 107 Cal.Rptr. 137, 507 P.2d 1345, 1355–1357 (Cal.1973), the California Supreme Court held that the disenfranchisement of ex-felons was not necessary

more lenient "rational basis" test[36] otherwise applicable.

The state may have a reasonable basis for denying convicts while imprisoned access to civil courts for the reasons expressed in Tabor v. Hardwick[37] already discussed in this opinion. But the administration of a parole system differs so substantially from the administration of a prison that these reasons cannot logically support the "civil death" of parolees.[38] The conditions and purposes of parole were recently described by the United States Supreme Court in Morrissey v. Brewer:

> To accomplish the purpose of parole, those who are allowed to leave prison early are subjected to specified conditions for the duration of their terms. These conditions restrict their activities substantially beyond the ordinary restrictions imposed by law on an individual citizen. Typically parolees are forbidden to use liquor or to have associations or correspondence with certain categories of undesirable persons. Typically also they must seek permission from their parole officers before engaging in specified activities, such as changing employment or living quarters, marrying, acquiring or operating a motor vehicle, traveling outside the community and incurring substantial indebtedness. . . .
>
> The parole officers are part of the administrative system designed to assist parolees and to offer them guidance. The conditions of parole serve a dual purpose; they prohibit, either absolutely or conditionally, behavior which is deemed dangerous to the restoration of the individual into normal society. And through the requirement of reporting to the parole officer and seeking guidance and permission before doing many things, the officer is provided with information about the parolee and an opportunity to advise him. The combination puts the parole officer into the position in which he can try to guide the parolee into constructive development. [footnote omitted].[39]

Thus, although the state has a legitimate interest in restricting some activities of parolees, prohibiting a parolee from initiating civil actions has no logical connection with such an interest. The only interest here pertinent is preventing behavior which is detrimental to the restoration of a parolee into normal society. Since the parolee is no longer incarcerated, there is no justification based on the furthering of smooth penal administration. The parolee's ability to avail himself of the civil judicial process in order to vindicate his rights and protect his property interests in fact furthers, rather than restricts, the parolee's constructive development and restoration into normal society.

Failing to find either a "compelling state interest" or a "rational basis" for the state's denial to parolees of the right to initiate civil actions, we therefore hold that AS 33.15.190 denies parolees the "equal protection of the laws", in violation of the Alaska and United States constitutions.

For the reasons expressed above, we reverse the judgment of the superior court and remand the case for proceedings in accordance with this opinion.

Reversed and remanded.

CONNOR, ERWIN and FITZGERALD, JJ., not participating.

to the compelling interest of preserving the purity of elections.

36. *See* Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970).

37. 224 F.2d 526 (5th Cir. 1955), cert. denied 350 U.S. 971, 76 S.Ct. 445, 100 L.Ed. 842 (1956). *See* Chinn v. State, 6 Or.App. 350, 488 P.2d 293 (1971); Harrell v. State, 17 Misc.2d 950, 188 N.Y.S.2d 683 (1959). We do not, however, express an opinion now as to the state's interest in denying prisoners access to civil courts. We instead confine our holding here to the rights of parolees.

38. *Cf.* Price v. Johnston, 334 U.S. 266, 285, 68 S.Ct. 1049, 1060, 92 L.Ed. 1356, 1369 (1948).

39. 408 U.S. at 478, 92 S.Ct. at 2598, 33 L.Ed.2d at 492-493.

to reinstate a defaulted interest in an entirely separate mining property where Jackson and Eustler were co-investors. Jackson said he did not know why the source of this money was B.R. Goodwin rather than Eustler himself. However, he stated that this fact had not concerned him.

[6] Upon this evidence the jury well could have inferred the existence of a fraud and conspiracy embracing Wulfenstein and Jackson. In doing so the jury would have chosen to disbelieve protestations by these defendants that they were unaware of any fraudulent scheme. But the jury did not make this choice. The jury, having heard and observed the witnesses, elected instead to find that the alleged conspiracy had not been proven. We decline to disturb this finding. The circumstantial evidence, though highly suggestive, was not so conclusive as to put the matter beyond disagreement among reasonable minds. Therefore, the jury verdict must be upheld.

III

[7, 8] On cross appeal the defendants have argued that the trial judge should have granted their request for attorney fees under I.C. § 12-121. The trial judge found that the plaintiffs' cause "was not brought and pursued frivolously, unreasonably, or without foundation." Therefore, under I.C. § 12-121 and I.R.C.P. 54(e)(1), the court denied an award of attorney fees. The decision to grant or to deny attorney fees under section 12-121 is committed to the sound discretion of the trial court. We will not overturn that determination unless an abuse of discretion is shown. *Viehweg v. Thompson*, 103 Idaho 265, 647 P.2d 311 (Ct.App.1982). In this case, genuine issues were presented at trial. Consequently, we find no abuse of discretion in denying attorney fees.

The judgment of the district court is affirmed. Costs to respondents, Wulfenstein and Jackson. No attorney fees on appeal.

WALTERS, C.J., and SWANSTROM, J., concur.

107 Idaho 496

STATE of Idaho, Plaintiff-Respondent,

v.

Bruce L. GROB, Defendant-Appellant.

No. 14412.

Court of Appeals of Idaho.

Oct. 31, 1984.

Defendant was convicted in the First Judicial District Court, Kootenai County, James G. Towles, J., of first-degree kidnapping with intent to rape, second-degree kidnapping, aggravated battery, and using a firearm during the commission of a felony, and the defendant appealed as to sentence. The Court of Appeals, Burnett, J., held that: (1) the Court of Appeals could consider defendant's contention, raised for first time on appeal, that his additional sentence for use of a firearm impermissibly infringed upon his constitutional right to bear arms; (2) the statute does not infringe the right to bear arms; (3) the trial judge did not act beyond his authority in imposing additional sentence for the use of the firearm; and (4) the trial did not abuse his sentencing discretion since the length of the defendant's confinement as computed for purposes of sentencing review could reasonably be viewed if not exceeding the period necessary to achieve the goals of protecting society, retribution and deterrence.

Affirmed.

1. Criminal Law ⇨1028

In criminal appeal, Court of Appeals will not consider issues raised for first time on appeal unless they relate to fundamental error.

2. Criminal Law ⇨1030(2)

Constitutional question may be considered for first time on appeal if such

15. Criminal Law ⇐1205

Deterrence of others is sufficient ground for imposing substantial prison sentence.

16. Assault and Battery ⇐100
Criminal Law ⇐1208.6(2)
Kidnapping ⇐6

Trial judge did not abuse his discretion in sentencing defendant to indeterminate life sentence for first-degree kidnapping of adult woman with intent to rape her, concurrent and indeterminate 15-year sentence for second-degree kidnapping of her companion, consecutive and fixed ten-year sentence for aggravated battery, and another consecutive fixed ten-year sentence for use of firearm during commission of a felony, as facts of case could reasonably be viewed to indicate that length of defendant's confinement would not exceed period necessary to achieve goals of protecting society, retribution and deterrence.

Eric T. Nordlof, Seattle, Wash. (formerly of Coeur d'Alene), for defendant-appellant.

Jim Jones, Atty. Gen. by Lynn E. Thomas, Sol. Gen., and Myrna A.I. Stahman (argued), Deputy Atty. Gen., Boise, for plaintiff-respondent.

BURNETT, Judge.

This is a sentence review case. Appellant Grob has challenged a four-part series of sentences imposed for violent crimes committed against two female victims. After pleading guilty to each of the crimes, Grob received (1) an indeterminate life sentence for the first degree kidnapping of an adult woman with intent to rape her; (2) a concurrent and indeterminate fifteen-year sentence for the second degree kidnapping of her companion; (3) a consecutive and fixed ten-year sentence for an aggravated battery committed by shooting one of the victims; and (4) another consecutive, fixed ten-year sentence for using a firearm during commission of a felony. We affirm the sentences.

Grob's attack upon the sentences is two-pronged. First, he contends that the firearm sentence is unconstitutional. Second, he argues that the sentences, taken as a whole, were unduly harsh. We will consider these points in turn.

I

[1-3] The first issue is whether the additional sentence for use of a firearm impermissibly infringes upon the right to bear arms as provided in the Idaho Constitution. We deem it clear that this sentence represented an enhancement of the sentence for aggravated battery—the only offense which the prosecutor charged as having been committed by use of a firearm. Prefatorily, we note that the constitutional issue has been raised for the first time on appeal. In a criminal appeal, we will not consider such issues unless they relate to fundamental error. E.g., *State v. Wells*, 103 Idaho 137, 645 P.2d 371 (Ct.App.1982). Here, Grob contends that the district judge lacked authority to impose the firearm sentence. Moreover, a constitutional question may be considered for the first time on appeal if such consideration is necessary for subsequent proceedings in a case. *Messmer v. Ker*, 96 Idaho 75, 524 P.2d 536 (1974). Grob's contention, were it not addressed on appeal, could be embodied in a subsequent motion under I.C.R. 35 to correct an allegedly illegal sentence. Accordingly, we deem it appropriate to consider the issue now.

[4] Idaho Code § 19-2520, enacted in 1977, provides in pertinent part that a person convicted of using a firearm while engaged in kidnapping or aggravated battery, "shall, in addition to the sentence imposed for the commission of the crime, be imprisoned in the state prison for not less than three (3) nor more than fifteen (15) years." The right to bear arms is set forth at Article 1, § 11, of the Idaho Constitution. When I.C. § 19-2520 was enacted, the constitutional provision read as follows: "The people have the right to bear arms for their security and defense; but the legislature shall regulate the exercise of this right by law." In 1978, Article 1, § 11, was amend-

ed to narrow the scope of such regulation. However, the Legislature was authorized, *inter alia*, to prescribe "minimum sentences for crimes committed while in possession of a firearm" and to punish the unlawful "use of a firearm." Thus, whether examined against the 1978 or pre-1978 versions of Article 1, § 11, we believe I.C. § 19-2520 passes constitutional muster.

[5] In a related line of argument, Grob contends that prior to the 1978 amendment of Article 1, § 11, a mandatory sentencing law—such as I.C. § 19-2520—impermissibly infringed upon the constitutional separation of legislative and judicial functions. Grob further argues that the infirm statute could not be saved by a subsequent constitutional amendment. Grob's argument is based upon the pre-1978 decision of our Supreme Court in *State v. McCoy*, 94 Idaho 236, 486 P.2d 247 (1971). In that case the Court struck down a statute imposing a mandatory minimum sentence for driving while intoxicated. However, we need not ponder the implications of *McCoy* in this appeal. In *State v. Cardona*, 102 Idaho 668, 637 P.2d 1164 (1981), the Supreme Court held the rule of *McCoy* inapposite to I.C. § 19-2520. The statute was upheld against a separation-of-powers attack. Consequently, the statute does not depend for its validity upon the 1978 amendment to Article 1, § 11. We hold that the district judge in this case did not act beyond his authority by imposing an additional sentence for use of a firearm as provided by section 19-2520.

II

Grob next contends that his sentences were unduly harsh. Grob could have been sentenced to death or life imprisonment for first degree kidnapping, twenty-five years for second degree kidnapping, fifteen years for aggravated battery and fifteen additional years for use of a firearm. *See* I.C. §§ 18-4504(1), 18-4504(2), 18-908 and 19-2520. Therefore, the sentences imposed were within the maximum statutory limits. Aside from the general issue of undue harshness, the propriety of imposing a fixed sentence under section 19-2520 has not been placed at issue in this appeal.

[6-8] A sentence within statutory limits will not be disturbed unless a clear abuse of discretion is shown. *State v. Bartholomew*, 102 Idaho 106, 625 P.2d 1109 (1981). Such an abuse of discretion may be found if the sentence imposed is shown to be unreasonable upon the facts of the case. *State v. Nice*, 103 Idaho 89, 645 P.2d 323 (1982). A sentence is reasonable to the extent it appears necessary, at the time of sentencing, to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution applicable to a given case. *State v. Toohill*, 103 Idaho 565, 650 P.2d 707 (Ct.App.1982).

[9] Sentencing determinations cannot be made with precision. In deference to the discretionary authority vested in Idaho's trial courts, an appellate court will not substitute its view for that of a sentencing judge where reasonable minds might differ. The appellant must show that, under any reasonable view of the facts, his sentence was excessive in light of the criteria of protection of society, retribution, deterrence and rehabilitation. *State v. Toohill*, *supra*.

[10-12] In applying the *Toohill* standard, we first must determine the actual measure of confinement for sentencing review purposes. With respect to the indeterminate life sentence, ten years is the measure of confinement. *State v. Wilde*, 104 Idaho 461, 660 P.2d 73 (Ct.App.1983). For the fifteen-year indeterminate sentence, one-third (or five years) is the appropriate measure under *Toohill*. That period is concurrent with the ten-year period on the indeterminate life sentence. With regard to the fixed sentences, the duration of confinement is deemed to be the term of the sentence less the statutory formula reduction available as a matter of right for good conduct. *State v. Miller*, 105 Idaho 838, 673 P.2d 438 (Ct.App.1983). Where, as here, the fixed sentence is ten years or more, an inmate may receive a reduction of

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STATE of Oregon, Respondent,

v.

Randy KESSLER, Petitioner.

TC DA 160004-7811; CA 14296 and SC 26705.

Supreme Court of Oregon.

Argued and Submitted March 4, 1980.

Decided July 15, 1980.

Defendant was convicted in the District Court, Multnomah County, Philip T. Abraham, J., of disorderly conduct and possession of two billy clubs and he appealed. The Court of Appeals, 43 Or.App. 303, 602 P.2d 1096, affirmed and review was allowed. The Supreme Court, Lent, J., held that: (1) defendant's contention that his act did not constitute the crime of disorderly conduct did not present the exceptional circumstance or manifest error which would justify consideration of such claim on appeal, where it was not raised at trial, and (2) defendant's possession of a billy club in his home was protected by right to bear arms provision of Oregon Constitution.

Defendant's conviction for disorderly conduct affirmed; defendant's conviction for possession of a slugging weapon reversed.

1. Weapons ⇐1

Term "arms" in right to bear arms provision of Oregon Constitution does not include modern weapons used exclusively by the military. Const. Art. 1, § 27.

See publication Words and Phrases for other judicial constructions and definitions.

2. Weapons ⇐1

Term "arms" in right to bear arms provision of Oregon Constitution includes modern day equivalents of weapons used by colonial militiamen and weapons used for personal defense. Const. Art. 1, § 27.

3. Weapons ⇐1

Oregon constitutional guarantee that persons have right to "bear arms" does not mean that all individuals have an unrestricted right to carry or use personal weapons in all circumstances. Const. Art. 1, § 27.

4. Appeal and Error ⇐169, 181
Criminal Law ⇐1028, 1030(1)

Generally, in both civil and criminal cases, a question not raised and preserved in the trial court will not be considered on appeal; however, failure to raise an objection at trial court does not automatically preclude appellate review.

5. Criminal Law ⇐1030(3)

Defendant's contention that his acts did not constitute crime of disorderly conduct did not present exceptional circumstance or manifest error which would justify consideration of the claim on appeal, where it was not raised at trial. ORS 166.025.

6. Weapons ⇐1

Right to bear arms provision of Oregon Constitution includes a right to possess certain arms for defense of person and property. Const. Art. 1, § 27.

7. Weapons ⇐1

Defendant's possession of a billy club in his home was protected by right to bear arms provision of Oregon Constitution and therefore he could not be prosecuted under statute prohibiting mere possession of a club. ORS 166.510; Const. Art. 1, § 27.

David L. Slader, Portland, argued the cause and filed the brief, for petitioner.

W. Benny Won, Asst. Atty. Gen., Salem, argued the cause, for respondent. With him on the brief was James A. Redden, Atty. Gen., and Walter L. Barrie, Sol. Gen., Salem.

Before DENECKE, C. J., and TONGUE, HOWELL, LENT and PETERSON, JJ.

LENT, Justice.

The defendant in this case was convicted of "possession of a slugging weapon," ORS 166.510(1).[1] We allowed review to consider his claim that the legislative prohibition of the possession of a "billy"[2] in ORS 166.510(1) violates Article I, section 27, of the Oregon Constitution. That provision states:

> "The people shall have the right to bear arms for the defence [sic] of themselves, and the State, but the Military shall be kept in strict subordination to the civil power."

The language of this provision raises several questions in this case, including:

(a) To whom does the right belong?

(b) What is the meaning of "defense of themselves"?

(c) What is the meaning of "arms," and what, if any, weapons of current usage are included in this term?

The scope of Article I, section 27, has not previously been analyzed by Oregon courts.[3] The decisions construing the second amendment to the United States Constitution are not particularly helpful because the wording of the second amendment differs substantially from our state provision. The second amendment has not yet been held to apply to state limitations on the bearing of arms.[4] The wording of Oregon's right to bear arms provision also differs from many other state constitutional provisions.[5]

Despite the many variations in wording, the states' constitutional provisions guaranteeing the right to bear arms share a common historical background. We begin first with an examination of this historical background and then with an examination of the meaning and purpose of the particular words chosen by the Oregon drafters. We are not unmindful that there is current controversy over the wisdom of a right to bear arms, and that the original motivations for such a provision might not seem compelling if debated as a new issue. Our task, however, in construing a constitutional provision is to respect the principles given the status of constitutional guarantees and limitations by the drafters; it is not to abandon these principles when this fits the needs of the moment.

I. *The historical background*

The first article of Oregon's constitution of 1859 contains the state's bill of rights.

1. ORS 166.510(1) provides:

> "(1) Except as provided in ORS 166.515 or 166.529, any person who manufactures, causes to be manufactured, sells, keeps for sale, offers, gives, loans, carries or possesses an instrument or weapon having a blade which projects or swings into position by force of a spring or other device and commonly known as a switch-blade knife or an instrument or weapon commonly known as a blackjack, slung shot, billy, sandclub, sandbag, sap glove or metal knuckles or who carries a dirk, dagger or stiletto commits a Class A misdemeanor."

Although the words "slugging weapon" are not used in ORS 166.510, this term was used in the complaint filed in this case.

2. Webster's Third International Dictionary defines a "billy" as "a heavy usually wooden weapon for delivering blows; club, especially a policeman's club."

3. In *State v. Robinson*, 217 Or. 612, 619, 343 P.2d 886 (1959) this court held that ORS 166.270 which prohibits ex-convicts from possessing concealed weapons did not violate Article I, section 27, of the Oregon Constitution. Accord, *State v. Cartwright*, 246 Or. 120, 134-137, 418 P.2d 822 (1967).

4. The second amendment to the United States Constitution 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."

In early cases the United States Supreme Court held that the second amendment proscription applies only to Congress. *Presser v. Illinois*, 116 U.S. 252, 6 S.Ct. 580, 29 L.Ed. 615 (1886); *United States v. Cruikshank*, 92 U.S. 542, 23 L.Ed. 588 (1876). The second amendment has not yet been held applicable to the states, either directly or through selective incorporation in the fourteenth amendment. *See* Rohner, *The Right to Bear Arms: A Phenomenon of Constitutional History*, 16 Catholic U.L.Rev. 53 (1966).

5. For a helpful categorization of various state constitutional right to bear arms provisions see Note, *The Impact of State Constitutional Right to Bear Arms Provisions on State Gun Control Legislation*, 38 U.Chi.L.Rev. 185 (1970).

Article I, section 27, regarding the right to bear arms was taken verbatim from sections 32 and 33 of the Indiana Constitution of 1851. C. Carey, *A History of the Oregon Constitution* 469 (1926); Palmer, *The Sources of the Oregon Constitution*, 5 Or.L. Rev. 200, 202 (1926).

The original Indiana constitution was adopted in 1816 at Indiana's first statehood convention. Indiana's constitution was revised in 1851, but the 1816 version of the right to bear arms provision remained unchanged. *See* W. Swindler, *Sources and Documents of U.S. Constitutions*, Vol. 3, p. 345–400 (1974).

The drafters of Indiana's bill of rights of 1816 borrowed freely from the wording of other state constitutions, most notably the constitutions of Kentucky, Ohio, Tennessee, and Pennsylvania. Twomley, *The Indiana Bill of Rights*, 20 Ind.L.J. 211, 212-213 (1945). These state constitutions were drafted between 1776 and 1802. Oregon's right to bear arms provision therefore can be traced to state provisions drafted in the revolutionary and post-revolutionary war era.

The constitutions adopted by the original colonies generally included a bill or declaration of rights. Many of the declarations of rights were patterned largely upon the English Bill of Rights of 1689.[6] The background of the English Bill of Rights sheds some light upon the meaning of the right to bear arms provisions in the colonial constitutions.

James II, a Catholic king, ascended the English throne in 1685 amidst domestic religious controversy between the Catholics and Protestants. James II established a strong standing army which he quartered in private homes. He sought to repeal certain laws of Parliament which barred Catholics from public offices. The Protestants revolted in the "Glorious Revolution" of 1688 and succeeded in deposing James II and bringing to power the king's Protestant daughter, Mary, and her husband, William of Orange. William and Mary were offered the crown in 1689 on condition that they sign the Declaration of Rights. The Declaration was later enacted as a statute, which was divided into two parts, first listing the allegedly illegal actions of James II, then declaring the rights of the people. The first part stated 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."

The parallel provisions of the declaration of rights provided:

> "* * * 5. That the raising or keeping a Standing Army within the Kingdom 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."[7]

Historians have noted that the early colonial legislatures perceived themselves as descendants of the House of Commons who shared many of the same political experiences of their 17th century English counterparts. See B. Schwartz, *The Great Rights of Mankind* 15, 31-32 (1977). The French and Indian War ending in 1763 brought large numbers of British soldiers to the colonies. King George III maintained and increased these standing armies following that war, and ordered the troops to be quartered in private homes. The colonists who were accustomed to relying on their

6. *See generally*, B. Schwartz, *The Great Rights of Mankind* 1-36 (1977); Feller and Gotting, *The Second Amendment: A Second Look*, 61 Northwestern U.L.Rev. 46, 47-56 (1966).

7. Bill of Rights, 1 W. & M., sess. 2, c. 2 (1689), *reprinted in* Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 Hastings Const.L.Q. 961, 973 (1975).

own citizen militias viewed the standing armies as an unlawful instrument of oppression. *See* Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 Hastings Const.L.Q. 961, 975-978 (1975). The state constitutions drafted in the revolutionary war era therefore included provisions guaranteeing the right to bear arms and prohibiting standing armies in time of peace. The relevant provisions of the English Bill of Rights of 1689 provided a useful model for the colonial drafters.

II. *The Oregon right to bear arms*

A. *"Defense of themselves and the state"*

We have noted that Oregon's constitutional right to bear arms provision, Or. Const. Art. I, § 27, was taken verbatim from the Indiana constitutional provision drafted in 1816. The phrase "for defense of themselves and the state" in Indiana's provision was most likely taken from the Kentucky provision in its 1799 constitution, or the Ohio provision in its 1802 constitution.[8] The phrase "for defense of themselves and the state" appears in the present day constitutions of Oregon, Indiana, and six other states.[9] The language is subject to varying interpretations. It has been suggested that the language includes three separate justifications for a state constitutional right to bear arms: (a) The preference for a militia over a standing army; (b) the deterrence of governmental oppression; and (c) the right of personal defense.[10]

The language "the right to bear arms * * * for defense of * * * the state" more likely refers to the historical preference for a citizen militia rather than a standing army as outlined above.[11] *See People v. Brown*, 253 Mich. 537, 235 N.W. 245, 246 (1931):

> "It is generally recognized that * * * the right to bear arms had its origin in the fear of the American colonists of a standing army and its use to oppress the people, and in their attachment to a militia composed of all able-bodied men. Probably the necessity of self protection in a frontier society also was a factor."

The phrase "the right to bear arms in defense of themselves" has a suggested purpose which is closely related to the prefer-

8. Art. X, §§ 23 and 24, of the 1799 Kentucky constitution provided:

> "Sec. 23. That the rights of the citizens to bear arms in defence of themselves and the State shall not be questioned.
>
> "Sec. 24. That no standing army shall, in time of peace, be kept up, without the consent of the legislature; and the military shall, in all cases and at all times, be in strict subordination to the civil power."

W. Swindler, *Sources and Documents of U.S. Constitutions*, Vol. 4, p. 163 (1975).

Art. VIII, § 20, of the 1802 Ohio constitution provided:

> "Sec. 20. That the people have a right to bear arms for the defence of themselves and the State, and as standing armies, in time of peace, are dangerous to liberty, they shall not be kept up, and that the military shall be kept under strict subordination to the civil power."

W. Swindler, *Sources and Documents of U.S. Constitutions*, Vol. 7, p. 555 (1978). Ohio's constitutional provision was most likely taken from Art. XIII of Pennsylvania's constitutional Bill of Rights of 1776 which provided:

> "That the people have a right to bear arms for the defence of themselves and the state, and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power."

W. Swindler, *Sources and Documents of U.S. Constitutions*, Vol. 8, p. 279 (1979).

9. The phrase "for defense of themselves and the state" appears in the constitutions of Florida, Declaration of Rights § 20; Kentucky Bill of Rights § 1; Pennsylvania, art. I, § 21; South Dakota, art. VI, § 24; Vermont, ch. I, art. 16; and Wyoming, art. I, § 24.

10. *See* Note, *The Impact of State Constitutional Right to Bear Arms Provisions on State Gun Control Legislation*, 38 U.Chi.L.Rev. 185, 190-198 (1970).

11. Despite the early Americans' objection to standing armies and their preference for citizen militias, our society today apparently prefers the maintenance of federally controlled standing armies. The federal government has assumed total responsibility for training and supplying the "state militias," i. e., the National Guard. *See, e. g.*, 32 U.S.C., §§ 101, 102, 501, 502, 701 (1976). Rohner, *The Right to Bear Arms: A Phenomenon of Constitutional History*, 16 Cath.U.L.Rev. 53, 72 (1966).

ence for citizen militias. That suggested purpose is the deterrence of government from oppressing unarmed segments of the population. For example, King James II attempted to disarm the Protestants while allowing Catholics to bear arms, thus prompting the guarantee in the 1689 Bill of Rights that Protestants could have "arms for their defense." [12] Joseph Story wrote that,

> "The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them."

J. Story, *Commentaries on the Constitution*, Vol. 3, p. 746 (1833). *Cf., Carlton v. State*, 63 Fla. 1, 58 So. 486, 488 (1912) (state provision was "intended to give the people the means of protecting themselves against oppression and public outrage").

"Defense of themselves' has also been said to include an individual's right to bear arms to protect his person and home. *Schubert v. DeBard*, Ind.App., 398 N.E.2d 1339, 1341 (1980) (Indiana constitution provides citizenry the right to bear arms for their personal self-defense). Self-defense has been recognized as a privilege in both civil and criminal law since about 1400 in England and at all times in the United States.[13] Although the right to bear arms for self protection does not appear to have been an important development in England, the justification for a right to bear arms in defense of person and home probably reflects the exigencies of the rural American experience. *See People v. Brown, supra. Cf., Matthews v. State*, 237 Ind. 677, 689-692, 148 N.E.2d 334, 339-341 (1958) (Emmert, C. J., dissenting) (constitutional guarantee based on historical necessity for personal defense.) [14]

B *The meaning of the term "arms"*

The term "arms" is also subject to several interpretations. In the colonial and revolutionary war era, weapons used by militiamen and weapons used in defense of person and home were one and the same. A colonist usually had only one gun which was used for hunting, protection, and militia duty, plus a hatchet, sword, and knife. G. Neumann, *Swords and Blades of the American Revolution* 6-15, 252-254 (1973). When the revolutionary war began, the colonists came equipped with their hunting muskets or rifles, hatchets, swords, and knives. The colonists suffered a severe shortage of firearms in the early years of the war, so many soldiers had to rely primarily on swords, hatchets, knives, and pikes (long staffs with a spear head). W. Moore, *Weapons of the American Revolution* 8 (1967).

Therefore, the term "arms" as used by the drafters of the constitutions probably was intended to include those weapons used by settlers for both personal and military defense. The term "arms" was not limited to firearms, but included several handcarried weapons commonly used for defense. The term "arms" would not have included cannon or other heavy ordnance not kept by militiamen or private citizens.

12. *See* text accompanying note 7 *supra*.

13. "The privilege of self-defense rests upon the necessity of permitting a man who is attacked to take reasonable steps to prevent harm to himself, where there is no time to resort to the law. The early English law, with its views of strict liability, did not recognize such a privilege; * * *. But since about 1400 the privilege has been recognized, and it is now undisputed, in the law of torts as well as in the criminal law." (citations omitted) W. Prosser, *Law of Torts* 108 (4th ed. 1971).

14. *Compare* the provisions in several state constitutions which guarantee that a person has the right to bear arms "in defense of his home, person and property." Colo.Const., Art. II, § 13; Miss.Const., Art. III, § 12; Mo.Const., Art. I, § 23; Mont.Const., Art. III, § 13; Okla. Const., Art. II, § 26; *State v. Nickerson*, 126 Mont. 157, 247 P.2d 188 (1952) (defendant cannot be convicted of assault if he pointed a loaded gun at a trespasser in his home); *accord, State v. Plassard*, 355 Mo. 90, 195 S.W.2d 495 (1946).

The revolutionary war era ended at a time when the rapid social and economic changes of the so-called Industrial Revolution began. The technology of weapons and warfare entered an unprecedented era of change. P. Cleator, *Weapons of War* 143-152 (1967). Firearms and other hand-carried weapons remained the weapons of personal defense, but the arrival of steam power, mechanization, and chemical discoveries completely changed the weapons of military warfare. The development of powerful explosives in the mid-nineteenth century, combined with the development of mass-produced metal parts, made possible the automatic weapons, explosives, and chemicals of modern warfare. P. Cleator, *Weapons of War* 153-177 (1967).

[1] These advanced weapons of modern warfare have never been intended for personal possession and protection. When the constitutional drafters referred to an individual's "right to bear arms," the arms used by the militia and for personal protection were basically the same weapons. Modern weapons used exclusively by the military are not "arms" which are commonly possessed by individuals for defense, therefore, the term "arms" in the constitution does not include such weapons.

[2] If the text and purpose of the constitutional guarantee relied exclusively on the preference for a militia "for defense of the State," then the term "arms" most likely would include only the modern day equivalents of the weapons used by colonial militiamen. The Oregon provision, however, guarantees a right to bear arms "for defense of *themselves*, and the State." The term "arms" in our constitution therefore would include weapons commonly used for either purpose, even if a particular weapon is unlikely to be used as a militia weapon.

[3] The constitutional guarantee that persons have the right to "bear arms" does not mean that all individuals have an unrestricted right to carry or use personal weapons in all circumstances. For example, the danger of firearms was recognized shortly after the development of gunpowder. The English Statute of Northampton in 1327 forbade persons to ride at night carrying a firearm for the purpose of terrifying the the people.[15] A 1678 Massachusetts law forbade shooting near any house, barn, garden, or highway in any town where a person may be "killed, wounded, or otherwise damaged."[16] The courts of many states have upheld statutes which restrict the possession or manner of carrying personal weapons. The reasoning of the courts is generally that a regulation is valid if the aim of public safety does not frustrate the guarantees of the state constitution. For example many courts have upheld statutes prohibiting the carrying of concealed weapons, *see, e. g., State v. Hart*, 66 Idaho 217, 157 P.2d 72 (1945); and statutes prohibiting possession of firearms by felons, *see, e. g., State v. Cartwright*, 246 Or. 120, 418 P.2d 922 (1966).

III. *The present case*

We now turn to the facts of the present case. The defendant was involved in an off and on verbal argument with his apartment manager in the course of the day on November 13, 1978. The dispute escalated into name calling, colorful words, and object throwing. At one point the defendant kicked the elevator door in the apartment building. The police were called and arrested the defendant. The defendant asked the police to get his coat from his apartment. The officers found two "billy clubs" in the defendant's apartment.

The defendant was charged with disorderly conduct, ORS 166.025, and possession of a slugging weapon, ORS 166.510. The matter went to trial without a jury. The defendant at trial demurred to and moved to dismiss the second charge on the grounds that it failed to state a crime. The motion was denied and the defendant was found guilty as charged on both counts.

15. 2 Edward III, ch. 3 (1328), reprinted in J. Bishop, *Statutory Crimes*, § 783 (3d ed. 1901).

16. Council held in Boston, March 28, 1678; referred to in Levin, *The Right to Bear Arms: The Development of the American Experience*, 48 Chi.-Kent.L.Rev. 148, 150, n. 18 (1971).

[4, 5] The defendant appealed to the Court of Appeals, contending first that his acts did not amount to the crime of disorderly conduct, and second that the statute prohibiting possession of billy clubs, ORS 166.510(1), violates Article I, section 27, of the Oregon Constitution. The Court of Appeals did not consider defendant's first contention because it was not raised at trial.[17] The Court of Appeals held that ORS 166.510(1) was within the reasonable exercise of the "police power" of the state to curb crime. 43 Or.App. 303, 307, 602 P.2d 1096 (1979).

[6] The defendant contends that his conviction for possession of a billy club violates his right to possess arms in his home for personal defense. Pursuant to our previous discussion regarding the purpose and scope of the right to bear arms provision, we hold that Article I, section 27, of the Oregon Constitution includes a right to possess certain arms for defense of person and property. The remaining question is whether the defendant's possession of a billy club in this case is protected by Article I, section 27.

The club is considered the first personal weapon fashioned by humans. O. Hogg, *Clubs to Cannon* 19 (1968). The club is still used today as a personal weapon, commonly carried by the police. ORS 166.510 prohibits possession of a "billy;" however, ORS 166.520 states that peace officers are not prohibited from carrying or possessing a weapon commonly known as a "blackjack"[18] or "billy."

The statute in this case, ORS 166.510, prohibits the mere possession of a club. The defendant concedes that the legislature could prohibit carrying a club in a public place in a concealed manner, but the defendant maintains that the legislature cannot prohibit all persons from possessing a club in the home. The defendant argued that a person may prefer to keep in his home a billy club rather than a firearm to defend against intruders.

[7] Our historical analysis of Article I, section 27, indicates that the drafters intended "arms" to include the hand-carried weapons commonly used by individuals for personal defense. The club is an effective, hand-carried weapon which cannot logically be excluded from this term. We hold that the defendant's possession of a billy club in his home is protected by Article I, section 27, of the Oregon Constitution.

The defendant's conviction for disorderly conduct is affirmed, and his conviction for possession of a slugging weapon is reversed.

17. The general rule in both civil and criminal cases is that a question not raised and preserved in the trial court will not be considered on appeal. *State v. Abel*, 241 Or. 465, 467, 406 P.2d 902 (1965). Failure to raise an objection in trial court does not automatically preclude appellate review. The defendant's contention that his acts did not constitute the crime of disorderly conduct, however, does not present the exceptional circumstance or manifest error which justifies this court's consideration of such a claim. It follows that defendant's conviction of disorderly conduct is affirmed. Note that this case is not concerned with that aspect of the statute prohibiting disorderly conduct which we held to be unconstitutional in *State v. Spencer*, 289 Or. 225, 611 P.2d 1147 (1980).

18. Webster's Third International Dictionary defines a "blackjack" as "* * * 4. a small striking weapon typically consisting at the striking end of a leather enclosed piece of lead or other heavy metal and at the handle end of a strap or springy shaft that increases the force of impact."

289 Or. 511

DEPARTMENT OF REVENUE, State of Oregon, Respondent,

v.

Donald W. GREAVES and Norma P. Greaves, Appellants.

TC 1373; SC 26873.

Supreme Court of Oregon, In Banc.

Argued and Submitted June 24, 1980.

Decided July 23, 1980.

Department of Revenue petitioned for statutory writ of mandamus commanding

RECORDS CERTIFICATION

I, the undersigned, an employee of the State of Alaska, do hereby certify that the microfilm images on this microform are accurate reproductions of the original records of the State of Alaska as accumulated during the regular course of business, and that it is the established policy and practice of this State to microfilm its records and to dispose of the original records after microfilm reproductions have been made.

James O. Smith
Signature of Camera Operator

11/7/89
Date

02-519 (REV 8/78)

SJR

40

BILL CONTACT/ACTION

DATE	CONTACT/ACTION
3/26	PAUL FISCHER (3791)

Alaska State Legislature
Senate

Official Business

SENATOR PAUL FISCHER

Pouch V
State Capitol
Juneau, Alaska 99811

To: All Senate Judiciary Members

From: Senator Paul Fischer PF

Date: March 24, 1986

Subject: SJR 40, Proposing an amendment to the Constitution of the State of Alaska relating to annulment of regulations by the legislature.

I have introduced this legislation in response to the conflicts that continue to arise when an agency develops regulations from law.

The Department of Education, for example, passed regulations to comply with a new law which mandates that municipalities may only use interest on bond proceeds for the projects which were bonded. DOE wrote regulations which exceeded the intent of the new law. Yet even if the legislature agrees that the regulations exceed the law and passes a bill negating the regulation, the Governor will have the opportunity to veto legislative intent.

The First Alaska Legislature provided that the Legislature could, by a concurrent resolution passed by a majority of each house, annul an administrative regulation. This provision, in effect from 1961 to 1980, provided a legislative check on regulatory agencies which might override legislative intent by writing regulations which would exceed the original law.

In 1980, the law which had provided for a reasonable oversight of agencies by the legislature for 19 years was ruled unconstitutional by the Alaska Supreme Court in a 3-2 decision.

I believe that now is the time to ask the voters to reenact this legislative power. Our government is based upon the division of powers among the three branches: legislative, executive and judicial. The current situation gives too much power to the executive branch. The legislature should have the check that they had previously exercised with restraint, returned.

Similar legislation was introduced in 1980 and 1983, both passed the legislature and were on the 1980 and 1984 general election ballots. Each time the propositions were turned down by the voters. However, the votes favoring the constitutional amendment increased substantially in the 1984 general election. I believe the proposition failed due to a poorly informed electorate, we have the momentum with us to pass this amendment this time.

To do this we must inform the public that this power was used in a responsible manner for 19 years by the legislature. The status quo will only allow state agencies to continue to proliferate new "laws", without regard to the legislature's intent. I urge your support.

Alaska State Legislature
Senate

Official Business

SENATOR PAUL FISCHER

Pouch V
State Capitol
Juneau, Alaska 99811

To: Senator Pat Rodey, Chairman
Senate Judiciary Committee

From: Senator Paul Fischer

Date: February 22, 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 previously and that it failed. I think the voters were not fully informed of the consequences of current law. There are more issues that can demonstrate the need for this legislative power.

I appreciate your thoughtful consideration of my request.

RECORDS CERTIFICATION

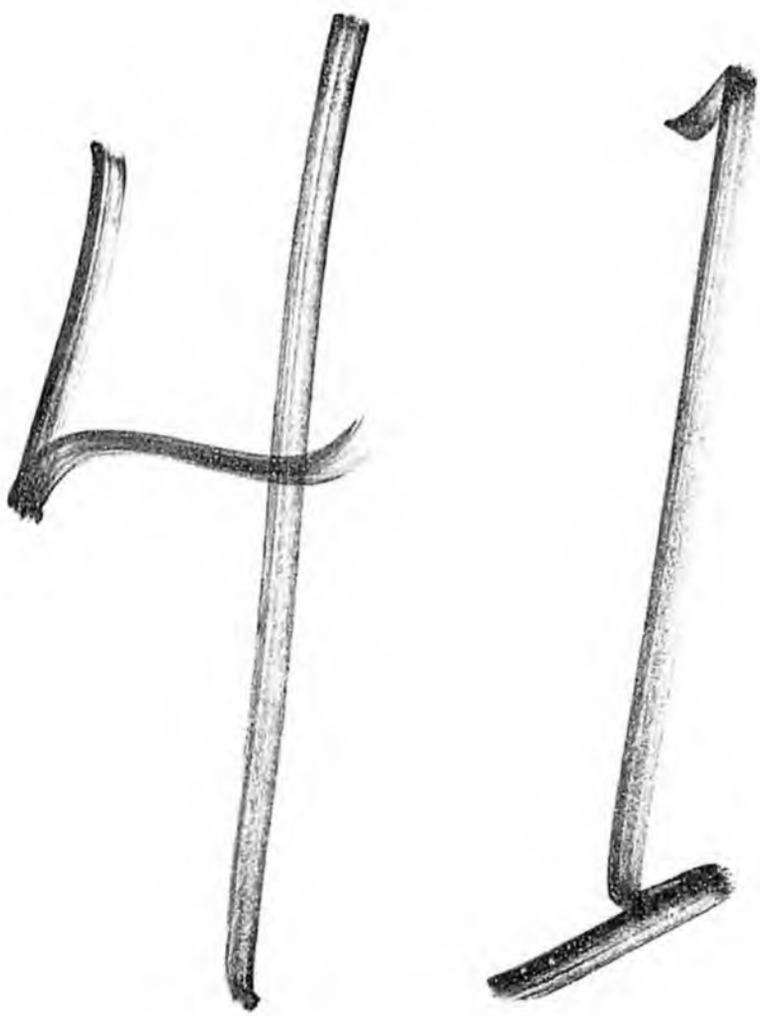
I, the undersigned, an employee of the State of Alaska, do hereby certify that the microfilm images on this microform are accurate reproductions of the original records of the State of Alaska as accumulated during the regular course of business, and that it is the established policy and practice of this State to microfilm its records and to dispose of the original records after microfilm reproductions have been made.

James O. Smith
Signature of Camera Operator

11/7/89
Date

02-519 (REV 8/78)

SJR



BILL CONTACT/ACTION

DATE	CONTACT/ACTION
3/14	notified of 3/18 meeting
	Flaks
	Dept of Revenue (2300) Bruce Weller
3/18	notified Flaks' office

COMMONWEALTH
NORTH

March 13, 1986

Senator Patrick Rodey
Alaska State Legislature
P. O. Box V
Juneau, Alaska 99911

Dear Senator Pat Rodey:

The Commonwealth North Board has reviewed SJR-41 and has voted to recommend its approval by the Legislature. This action is based on our Compass North report which recommended that an amended version of the current constitutional spending limit be presented to the voters on the 1986 ballot.

SJR-41 recognized three significant fiscal policy issues facing Alaska.

(1) The continued long-term decline in Alaska's unrestricted revenue.

(2) The need to bring State spending trends into conformance with unrestricted revenue trends.

(3) The need to control future spending when revenues increase.

The primary features of SJR-41 are as follows:

(1) CHANGES THE BASIS FOR CALCULATION

The basis for calculating the Appropriation Limit in any year would have both a spending and revenue component. The revenue component would tie the Appropriation Limit to the unrestricted revenue forecast plus a population and inflation adjustment factor. The spending component would tie the Appropriation Limit to the previous years appropriation plus a population and inflation adjustment factor. The lesser of the two components becomes the Appropriation Limit.

935 West Third Avenue / Anchorage, Alaska 99501 / 907-276-1414

(2) RETAINS THE AMOUNT RESERVED FOR CAPITAL PROJECTS AND LOANS
One-third of the annual appropriation would continue to be reserved for capital projects and loans.

(3) RETAINS CURRENT EXCLUSIONS
Permanent fund dividends, revenue bond proceeds, debt service and no-State restricted revenues would continue to be excluded from the Appropriation Limit.

(4) SAFETY VALVE PROVISION EXPANDED
The Appropriation Limit could be exceeded for either operation or capital appropriations as long as it received voter approval.

(5) SUNSET CLAUSE RETAINED
The revised Appropriation Limit would be resubmitted to the voters at the 1990 election.

(6) EFFECTIVE DATE
The effective date of the Appropriation Limit, if approved this year, would be for the FY 88 budget.

The primary benefits of approval of the revised Appropriation Limit would be:

(1) Stretching out the period for dissipation of current windfalls and surpluses. At the present time revenue surplus of nearly $1 billion exist outside of the Permanent Fund. At the same time spending and unrestricted revenue was now about equal. By keeping spending and revenue in close proximity, current surpluses will last longer. Should it become necessary to dip into the surpluses for special needs, in the future, the appropriation will require voter approval.

(2) Adding discipline to the State fiscal policy process. The budget process will be much more predictable resulting in much needed reform of the current process.

(3) Restraining future spending growth if revenues begin to increase. Whenever revenues increase from one year, spending growth will be limited by the previous year spending not the current year revenue surplus. Voter approval would be required to expand spending beyond the limit should revenue "windfalls" be forthcoming.

Commonwealth North has pledged its strong support for controlling State spending and we sincerely believe that this amendment to the Appropriation Limit is essential for the long-term health of Alaska's state and local governments. We welcome the opportunity to work with you and other members of the legislature on the successful passage of this measure as well as the public information campaign required to inform the voters about this issue and bring about its approval at the general election.

Sincerely,

Max Hodel

Max Hodel
President

RECORDS CERTIFICATION

I, the undersigned, an employee of the State of Alaska, do hereby certify that the microfilm images on this microform are accurate reproductions of the original records of the State of Alaska as accumulated during the regular course of business, and that it is the established policy and practice of this State to microfilm its records and to dispose of the original records after microfilm reproductions have been made.

James O. Smith
Signature of Camera Operator

11/7/89
Date

02-519 (REV 8/78)


SJR
44

*** FOR IMMEDIATE RELEASE *** March 12, 1986

The Alaska State Senate today passed a resolution which would request the U.S. House of Representatives to approve the McClure-Volkmer Bill (S.49), the Firearm Owners Protection Act.

Sponsored by the Senate Judiciary Committee, chaired by Senator Patrick Rodey, SJR 44 would urge the U.S. House of Representatives to follow the U.S. Senate's lead in passing this proposal. S. 49 passed the U.S. Senate by a vote of 79 to 15 in July 1985, and it has managed to garner the support of 170 House Members to bypass the House Judiciary Committee to move the bill to the House Floor. The legislation requires a majority vote of 218 to pass the House.

Senator Patrick Rodey, a strong proponent for the bill, said, "I feel this legislation goes a long way to correct provisions of the 1968 Gun Control Act that limit the individual rights of honest gun owners, dealers and collectors. The Firearm Owners Protection Act is backed by the National Rifle Association and would prevent some of the existing abuses allowed under the 1968 Gun Control Act." Changes brought about by the Firearm Owners Protection Act include:

*Eliminating the requirement for records on ammunition purchases.

*Prohibits government from imposing any gun registration scheme.

*Allows an individual to transport firearms through restrictive firearm jurisdictions.

*Requires for the first time that the government prove criminal intent before you can be convicted of an offense.

*Allows an individual to purchase a firearm in another state provided the legal requirements of both states are met.

*Provides a mechanism for return of seized firearms should the government fail to prosecute or the owner is acquitted of charges.

Senator Rodey continued, "There are a number of improvements which would be brought about as a result of passage of S. 49. This Act strengthens federal mandatory penalty provisions by applying a five year mandatory jail term to first offenses and ten years for second offenses. These penalties would be extended to drug traffickers as well.

"Another area of concern addresses the pre-emption of state laws regarding transporting guns through a state. This Act does not pre-empt state laws that apply to criminals using or possessing guns. It simply allows honest law-abiding citizens to travel from one state to another on the condition that their firearms are inaccessible and unloaded. The Act would bar illegal gun traffickers from interstate travel," he concluded.

The proposal has received the unanimous support of Alaska's congressionl delegation and received a record vote of 19 yeas to pass it through the State Senate.

Patrick M. Rodey
Senator

Alaska State Legislature

1024 W. 6th Avenue, Suite 308
Anchorage, Alaska 99501
(907) 276-6731

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

Senate

March 11, 1986

TO : All Senators

FROM: Senator Patrick M. Rodey

RE : SJR 44 - Requesting the U.S. House of Representatives to approve the McClure-Volkmer Bill

Attached is a copy of a sectional analysis on the McClure-Volkmer Bill which I believe will be helpful to you.

Attachment

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

Volkmer/McClure

THE FIREARM OWNERS PROTECTION ACT

The Firearm Owners Protection Act has now passed the Senate. Peter Rodino, Chairman of the House Judiciary Committee has declared the bill "Dead on arrival in the House." We need your help to show Peter Rodino he is dead wrong.

The Firearm Owners Protection Act will prevent abuses under the 1968 Gun Control Act by:

★ Requiring for the first time that government prove criminal intent before you can be convicted of an offense.

★ Allowing you to transport your firearms through restrictive firearm jurisdictions.

★ Allowing you to purchase a firearm in another state so long as the legal requirements of both your state of residence and the state of purchase are met.

★ Eliminating the requirement for records on your ammunition purchases.

★ Providing a mechanism for the return of seized firearms in the event the government fails to prosecute or the owner is acquitted of charges.

★ Prohibiting the government from imposing any gun registration scheme.

Support of the Firearms Owners Protection Act by the nation's firearm owners is needed to get the bill to the House floor. ***You can help by letting your Congressman know of your strong support.*** Ask your Congressman to sign Congressman Volkmer's discharge petition to let the House vote on the Firearm Owners Protection Act.

You can write your Congressman at the following address:

The Honorable _____
U.S. House of Representatives
Washington, D.C. 20515

or call his or her office (202) 224-3121. Your Congressman needs to hear of your support for the Firearm Owners Protection Act. Together we can make it law.

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

Dear Activist:

The Firearms Owners Protection Act introduced by Representative Harold Volkmer and Senator James McClure has been referred to the House Judiciary Committee that is chaired by anti-gun Representative Peter Rodino.

Rodino plans to kill this important bill, and he has stated that it is "dead on arrival." To defeat Rodino, Representative Volkmer, Tommy Robinson, Trent Lott and Larry Craig have filed a discharge petition to release the Firearms Owners Protection Act from committee, the discharge petition needs 218 Congressional signatures to bring the bill to the floor.

The enclosed list of major provisions of the Firearms Owners Protection Act detail many of the reforms entailed in this important bill. I cannot over emphasize the importance of this fight. For years, the NRA has been perceived as a strong lobby with active members. Our many legislative and electoral successes have reinforced this truth. However, our political strength is being called into question by Judiciary Committee Chairman Rodino. It is critical that gun owners win this battle, or else the door may be opened for efforts currently underway to ban every semiautomatic firearm in the nation.

A signature on the Volkmer discharge petition is the single test of your Congressman's support for your rights.

Rest assured, the Washington Post, New York Times and CBS News have already lined up against you. Some national police union leaders have grabbed the limelight by allowing themselves to be manipulated by Judiciary Committee Chairman Rodino in opposition to the bill.

Only you can help turn the tide in favor of the rights of law abiding citizens.

A key to our success is to extend a message beyond the NRA membership to all law-abiding gun owners. Toward this end, I am enclosing petitions for signature supporting the Firearms Owners Protection Act. Please make copies of these petitions, and get the signatures of all your fellow gun owners.

Also, if you have any friends in law enforcement, please designate a petition as "A SPECIAL LAW ENFORCEMENT PETITION" and urge him or her to get their fellow officers signatures.

Please make certain that your local gun shops, ranges and locations where hunting licenses are sold have fact sheets and petitions available for signature. Take the enclosed cards to these locations, and encourage them to order a store display.

The defense of the 2nd Amendment is everyone's business. With your help, we will be able to get many non-NRA members involved in the fight.

Sincerely,

Wayne LaPierre

Wayne LaPierre
Director
Governmental Affairs

enclosure

Major Provisions of S. 49

1. S. 49 defines the term "engaging in the business", in terms of livelihood and profit motive and activity considered to be in the regular course of trade or business. Specifically exempted are individuals who make only occasional sales or purchases to enhance a personal collection or those who liquidate all or part of their personal collection.

Current law contains no such definition.

2. S. 49 eliminates the record keeping requirements for the sale of ammunition. The retention of these records serve no useful purpose.

Current law requires that records for the sale of ammunition, except .22 caliber rimfire, be maintained.

3. S. 49 clearly establishes who is prohibited from receiving or possessing a firearm. In addition, it creates a felony of any person knowingly selling a firearm to a prohibited person.

Current law contains duplicative categories of prohibited persons which are found in different code sections. S. 49 consolidates them. In addition, currently it is not a violation of current law for a non-licensee to sell to a prohibited person. S. 49 closes this loophole.

4. S. 49 allows a licensed dealer to sell firearms to a resident of another state, if the legal requirements of both the state of residence and state of purchase are met in regard to sale, receipt, and delivery. Because the Bureau of Alcohol, Tobacco and Firearms supplies each licensed firearms dealer with a booklet of all state firearms laws and ordinances, the licensed dealer is presumed to know the law of the purchaser's residence. An illegal sale subjects the dealer to a federal felony charge. The prohibition on "mail order sales" is maintained.

Current law prohibits such transactions except for "contiguous state" transactions involving rifles and shotguns.

5. S. 49 expressly recognizes that a Federal Firearms licensee may maintain a private collection of firearms separate and distinct from that persons business inventory. It provides that business records need not reflect transactions from the private collection regarding firearms acquired from the inventory if the firearm remains in the collection for one year.

Some courts have interpreted current law to prohibit a Federal licensee from maintaining such a private collection and requires all transactions from the private collection be reflected in the licensee's business records.

6. S. 49 expressly requires that intent (willful) to violate the provisions of Federal law be shown before a licensee may have his license revoked. It also provides for a "de novo" judicial review of such a determination. In addition, S. 49 prohibits revocation or denial of a license where the denial or revocation is based upon charges upon which the licensee was acquitted.

Current law does not expressly require that intent be shown to revoke a license and allows only normal judicial reviews of administrative decisions. Licenses can be revoked on the basis of charges of which the licensee was acquitted.

7. S. 49 generally requires a search warrant to inspect the records of a Federal licensee. The exceptions to the warrant requirement are (a) during the course of a criminal investigation, (b) to "trace" a specifically identified firearm or (c) one courtesy inspection per year upon reasonable notice.

Current law allows unlimited inspection during business hours.

8. S. 49 provides that out of business dealer records be stored by the Archivist of the United States for twenty years. It provides that the Secretary of Treasury may, in writing, require a licensee to provide business record information. S. 49 also requires the reporting of multiple handgun sales.

Current law is formally silent on these matters, but they are covered by Treasury regulation. The legislation formalizes these regulations.

9. S. 49 allows Federal licensees to conduct business at sanctioned gun shows provided that all records required are kept.

This is currently allowed by Treasury regulation and the legislation formalizes the regulatory standard.

10. S. 49 requires the showing of criminal intent before a person can be convicted of an offense under the Gun Control Act.

Current law requires no proof of intent.

11. S. 49 designates certain technical, record-keeping violations as misdemeanors.

Under current law, all violations are felonies.

12. S. 49 makes the use or carrying of a firearm in a crime of violence subject to a mandatory five years for a first offense and a mandatory ten years for a second offense. No parole, probation, or suspension of sentence is allowed and the sentence cannot run concurrently with the sentence for the underlying offense.

Current law does not require mandatory sentence for a first offense. Otherwise, these are only technical changes from the legislation as it appeared in the President's crime package.

13. S. 49 establishes rules and a type of statute of limitations for seizure and forfeiture actions. Actions for forfeiture must be commensed within 120 days of seizure. Seized firearms must be returned in the event of acquittal or failure to prosecute. It also provides for the award of attorney fees in the event the owner must sue to have his firearms returned.

Current law has no such provisions, and the general statutory provisions dealing with seizure and forfeiture govern. Currently property may be seized and held without instituting forfeiture, with the threat of criminal charges being brought if a person tried to recover his property.

14. S. 49 establishes a judicial review for those individuals whose petition for relief from disabilities is denied by the Secretary.

Current law has no such provision.

15. S. 49 prohibits the importation of frames, barrels, or receivers of firearms which if assembled could not be imported under the sporting purpose test.

Current law prohibits only the importation of such frames and receivers.

16. S. 49 prohibits the establishment of any firearms registration system.

This provision formalizes a restriction contained in the Treasury Appropriation ever since 1979, and would make it part of permanent law.

17. S. 49 allows the transportation in interstate commerce of firearms which are unloaded and not readily accessible, not withstanding any state or local law or ordinance.

Current law does not permit such transport where local law prohibits.

What S. 49 Does Not Do

1. S. 49 does not allow mail order sales. S. 49 maintains the current prohibition on transmitting a firearm through the mails to a non federal licensee and the current requirement that a buyer appears at a dealer's premises.

2. S. 49 does not allow felons, drug addicts, or mental incompetants to possess firearms. In fact, S. 49 would result in a clear concise listing of such prohibited persons by consolidating the catagories of current law.

3. S. 49 will not allow firearms to be sold out of the trunks of cars. S. 49 tracks current regulations by allowing licensed dealer sales off premise only at properly sanctioned gun shows, and subject to all record keeping requirement.

4. S. 49 will not allow an individual to evade local firearm ownership restrictions simply by crossing a state line. For an interstate sale to be legal, the purchaser would be required to meet both the requirements of his own state of residence and the state of purchase.

When the 1968 Gun Control Act was signed into law, its preamble contained a solemn sounding promise. In part, it read that nothing in the Federal gun law was intended or would be used to "place any undue restrictions or burdens on law-abiding citizens . . ." or "discourage or eliminate the private ownership of firearms. . . ."

The history of enforcement of the Gun Control Act of 1968 has shown that pledge not to have been kept. S. 49, the Firearm Owners Protection Act, is a clear response to the abuses of citizens' rights documented under the '68 Act. The reform legislation passed the U.S. Senate by a vote of 79 to 15 on July 9, 1985.

Many utterly false allegations have been made—by the media and by groups that support the prohibition of firearms—about the legislation and what it will accomplish.

Please learn the truth about S. 49, the Volkmer-McClure Firearm Owners Protection Act.

CLAIM:

The nation's law enforcement community is against Volkmer-McClure, the Firearm Owners Protection Act. They say it endangers police and aids criminals. How can NRA oppose law enforcement?

FACTS:

NRA does not oppose law enforcement. In fact, over one million police have been trained by NRA-trained police and security firearms instructors. The Protection Act is an effort to change unjust provisions in the federal gun law. The federal law enforcement agencies charged with enforcing this law—the Treasury Department and the Justice Department—support this bill. They helped write the bill to ensure that it meets the needs of law enforcement and protects the rights of honest citizens.

The leadership of the Fraternal Order of Police, International Association of Chiefs of Police and some others that claim to speak for their memberships in opposing the Protection Act have relied on distortions of the bill provided by anti-gun ownership groups, such as the National Coalition to Ban Handguns and Handgun Control Inc. The propaganda they hand out opposing the bill was written and printed by Handgun Control Inc. It is totally wrong and intended to mislead the public.

State and local law enforcement are charged with enforcing state and local laws, not federal law. The Protection Act is federal law and has the support of federal law enforcement. If federal law enforcement lobbied state legislatures on state matters, state law enforcement would object mightily. The obvious political nature of the alleged law enforcement objections and the mixing of jurisdictional authority casts grave suspicion on that so-called opposition.

CLAIM:

Criminals will evade restrictive state laws by purchasing guns in other states.

FACTS:

Nonsense. Criminals will still be prohibited by federal law from purchasing any gun in any state. The interstate sales provision applies only to the law-abiding citizen—for example a collector or hunter or competitor. No sale would be permitted without verifiable proof that the purchaser is in compliance with all the laws of the buyer's state of residence and the state of purchase.

The Protection Act directs the Treasury Department to publish and distribute to all licensed dealers a booklet of state and local gun laws and the Act directs Treasury to keep dealers informed of changes. (Note: passage of state pre-emption laws in all states would reduce the hodge podge of state and local laws to 50. At present, more than 30 states have pre-emption.)

Mail order sales are prohibited. All sales must be made in person.

CLAIM:

Criminals will be allowed to carry guns across state lines.

FACTS:

Felons, drug abusers and the mentally incompetent are barred from possession of guns, period. Only the law-abiding would be allowed to transport personal, legally-owned firearms across state lines if the guns are *unloaded* and *inaccessible* to the owners.

CLAIM:

The ability to trace guns used by criminals would be eliminated.

FACTS:

Absolutely false. Current regulations governing tracing would be written into federal statute by the Protection Act. Dealers evading federal record-keeping provisions would be subject to a federal felony charge. Dealers would not be able to circumvent record-keeping restrictions by "placing firearms in inventory into their private "collections." Dealers would be allowed to sell themselves guns. These transactions would be recorded exactly as any other sale. For dealers, however, even those guns would be considered as part of their inventory for a full 12 months after the transaction.

Criminal investigators would have complete access to a dealer's records at any time. Only the annual compliance bookkeeping check requires "prior notice."

The "advance notice" provision was included in the Act to eliminate the use of the compliance inspection as a harassment technique by a government hostile to the private ownership of guns.

CLAIM:

No criminal charges can result from compliance inspections. "Carelessness" can be used as an excuse by crooked dealers.

FACTS:

Criminal charges can be brought against dealers for selling firearms to prohibited persons if such sales are uncovered in the course of a compliance inspection. Minor technical bookkeeping errors, those which are obviously non-criminal in nature, would be excused. Current law does not distinguish between minor or inadvertent infractions and criminal violations. Every violation, regardless of its nature, is a federal felony under current law.

CLAIM:

Elimination of centerfire ammunition record-keeping cripples law enforcement efforts.

FACTS:

Federal law enforcement authorities urged that ammunition record-keeping provisions be dropped. Nearly two decades have proven this a useless crime-fighting tool. Centerfire rifle and shotgun ammunition was exempted in 1969. Record-keeping for .22 ammunition was eliminated in 1983. Even Ted Kennedy voted in favor of that ex-

emption. Today, virtually all handgun cartridges—.357 magnum, .44, 9mm and 45 ACP—have become rifle cartridges with carbines and rifles chambered to accept them.

CLAIM:

Current mandatory penalty provisions of federal law would be "gutted" by the Protection Act's use of the term "in furtherance of" a crime phrase.

FACTS:

False. The Protection Act strengthens federal mandatory penalty provisions. The Protection Act applies a five-year mandatory jail term to first offenses, 10 years for second offenses. The Protection Act extends the mandatory penalties to drug traffickers.

The term "in furtherance" was inserted to protect individuals such as police officers, required by law to carry guns at all times, from facing a five-year mandatory felony charge should they find themselves guilty of a minor infraction, such as being involved in a scuffle, during which a gun was present but not used.

The legislative history of the Protection Act as described in the Senate Judiciary Committee's report on the bill specifically states that criminals would not be exempted from the enhanced penalty.

CLAIM:

A plea of self-defense to avoid the mandatory penalty provision could be used to justify the killing of police by criminals.

FACTS:

False. Self-defense claims would apply only when a "severe and substantial miscarriage of justice" regarding the application of the mandatory penalty provision was proved to the court. The bill as well as the Senate Judiciary Committee report notes specifically that criminals engaged in criminal activity would not be eligible to claim "self-defense."

CLAIM:

"Waiting period" provisions are needed in federal law to keep guns out of the hands of criminals.

FACTS:

"Waiting period" statutes have been considered and rejected by 34 states. Because they did not believe that Congress should overrule more than half of all the states by imposing a national waiting period, 79 U.S. Senators voted against that scheme.

There is no proof that waiting periods deter criminals from obtaining firearms. Justice Department studies show that most criminals obtain firearms from the black market and not from dealers. Current federal gun law leaves individual traffickers untouched. The Protection Act makes it a federal felony for dealers and individuals to channel guns to criminals.

CLAIM:

Congress seems perfectly willing to pre-empt state laws regarding transporting guns through a state.

FACTS:

The Protection Act does not pre-empt state laws dealing with criminals using or possessing guns. It only allows honest citizens to travel across the United States on the condition that their firearms are unloaded and inaccessible. Illegal gun traffickers would be barred from interstate travel.

CLAIM:

The NRA doesn't want any testimony or debate on the Protection Act; that's why they are attempting to secure a discharge petition and avoid the committee process.

FACTS:

For six years the Protection Act worked its way through the committee process. Two sets of Senate hearings were held. Numerous meetings with federal enforcement agencies—the U.S. Treasury Department and the U.S. Justice Department—were held to ensure the bill met federal law enforcement needs. The House Judiciary Committee under Representative Peter Rodino refused to hold hearings. Rodino declared the bill "dead on arrival in the House." His current strategy is to hold rigged "hearings" in an effort to "hear" the bill to death. That's why a bipartisan coalition of congressmen have chosen to obtain a floor vote on the Protection Act by using a technique called a discharge petition. Under the current discharge petition, six hours of debate would be allowed. Amendments from the floor during that time would also be allowed. Democracy will be allowed to prevail over Rodino's dictatorial rule.

Please write your Senators and Congressmen. Without your support, without your letters, the Firearm Owners Protection Act will not be enacted. With your message, enactment of that long-awaited relief from the oppressive anti-gun law will truly be within reach. And if your lawmakers are cosponsors of the Firearm Owners Protection Act, by all means thank them. It's important.

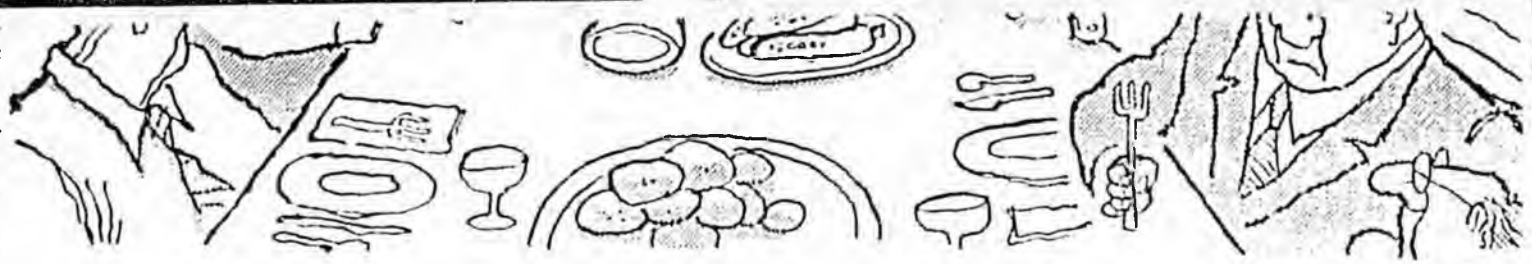
ILA 10026 12/85 20M

for the coalition lobbying on the issue, says he has spoken or written to every member of the Finance Committee and the House Ways and Means Committee about it. So have dozens of college presidents, many of whom descended on Senate offices during a convention here three weeks ago.

"Very few senators come from a state without a university," says Sen. Daniel Patrick Moynihan, a New York Democrat, who strongly favors retaining the deduction.

The coalition, called the Alliance for Philanthropy, was the brainchild of Washington lobbyist Dan Flanagan, whose clients include Sloan-Kettering. After the House bill passed, Flanagan says, alarmed proponents of the deduction realized their strategy had been flawed: "We were making our case to staff and by the time the opportunity presented itself, it was part of the minimum tax," he says.

This time around, coalition members decided, they would seek to persuade senators themselves. At weekly meetings, they allocate their resources among Senate Finance members, so that each one will be contacted by influential charitable groups from his state.



BY ROGERS FOR THE PITTSBURGH PRESS

At one recent pow-wow, for example, two Oregon colleges, a foundation, the Oregon Symphony Orchestra and a public-land trust agreed to talk to Finance Committee Chairman Bob Packwood, a Republican from their state. Republican Sen. John Heinz would hear from the University of Pennsylvania, the local United Way, a community foundation and an area museum group. The University of Minnesota was to call Sen. David F. Durenberger. Sen. William L. Armstrong would hear from the Colorado Open Lands Foundation, and ranking committee Democrat Russell B. Long from the president of Tulane University and the New Orleans Symphony. And so on.

No such lobbying is taking place on the other side of the issue. The only support for the provision comes from tax-policy experts who point out that the appreciated-property provision is like almost no other section of the tax code in that it gives taxpayers a double benefit: Not only can they avoid taxation on the property's increase in value, but they can use that higher value to shelter income from other sources.

The deduction "conflicts with basic principles governing the measurement of income, produces an artificial incentive to donate appreciated property rather than cash and also leads to abuse and administrative problems for the Internal Revenue Service when taxpayers overvalue donated property," according to the Treasury Department's original tax plan.

"Here is someone giving something worth $30,000. They get a $100,000 donation and the Treasury does not get the tax revenue, and that's not the way it's supposed to work," says Democratic Sen. Bill Bradley of New Jersey, a Finance member.

Proponents of the deduction marshal a host of arguments against such objections, contending that most appreciated gifts are stock or real estate, which are fairly easy to price.

Those arguments and others seem to be making headway with the Finance Committee. At a hearing on the minimum tax, several senators made a point of objecting to including appreciated property. And there is little sign the House-passed provision will be in the draft tax-overhaul legislation Packwood is preparing to offer to the committee. □

ISSUES

(S.49) SJR 44

Has the Move to Shoot Holes in Gun Control Run Out of Ammo?

Meese objects to parts of an NRA-backed bill

By Howard Kurtz
Washington Post Staff Writer

Senior officials at the Justice and Treasury departments have privately expressed strong reservations about legislation—officially backed by the Reagan administration—that would weaken the 1968 Gun Control Act, according to administration sources and documents.

Attorney General Edwin Meese III told a conservative group that he has serious reservations about parts of the bill and these concerns were repeated by Justice Department officials in a January meeting with lobbyists for the National Rifle Association, according to the documents.

The Treasury Department's Bureau of Alcohol, Tobacco and Firearms (BATF) detailed 13 objections in an internal memo two weeks ago, saying the bill would make it harder to prosecute gun-wielding criminals.

The split within the administration is over the McClure-Volkmer bill, which is backed by the NRA but opposed by most law enforcement groups.

The internal divisions became clear last week at a hearing of the House Judiciary subcommittee on crime, where Chairman William J. Hughes of New Jersey released some of the documents.

Deputy Assistant Treasury Secretary Edward T. Stevenson denied any change in position, saying, "Justice, Treasury and the White House are still consistent in support of" the bill. Stevenson said the measure strikes "a balance between the rights of law-abiding gun owners on the one hand and the requirements of law enforcement on the other."

Under questioning from Hughes, however, Stephen E. Higgins, director of Treasury's firearms bureau, acknowledged that his agency objects to key provisions.

At the Justice Department, spokesman Patrick Korten says: "We fully support the bill, and Ed Meese wants to see it passed. No amendments are needed. Whatever concerns we and Ed Meese may have, we believe they can be fully resolved through a colloquy on the House floor to establish a legislative history."

Meese declined to send a representative to the hearing, saying he would defer to the Treasury Department. An administration official says this was meant to signal that the Justice Department finds "several things wrong with the bill." Hughes says he thinks that the attorney general "has very serious reservations" about some provisions.

The bill, sponsored by Republican Sen. James A. McClure of Idaho and Democratic Rep. Harold L. Volkmer of Missouri, proposes the first major change in gun control laws in 17 years. It passed the Senate 79 to 15 in July, and 170 House members have signed a discharge petition to bypass the Judiciary Committee and move the bill to the House floor. A majority of 218 is needed.

In a Feb. 10 memo, Higgins listed six positive

aspects of the bill and 13 criticisms, such as its ban on surprise inspections of gun dealers.

"The prohibition against unannounced inspections would enable unscrupulous licensees to conceal violations of the law," he wrote.

He also criticized its weakening of mandatory penalties for using a gun in a violent crime.

"The bill may be interpreted to allow a fleeing felon to avoid the penalties where he used a firearm to make his escape," he wrote.

Higgins also took issue with the easing of record-keeping rules for dealers and owners, saying this "would hamper law enforcement's ability to trace firearms." And he said a provision to legalize the interstate transportation of unloaded, inaccessible firearms "would impede the efforts of state and local law enforcement officials" to enforce the law.

Another BATF memo said Meese told the conservative 721 Group "that he had problems with the bill; that the bill was no longer necessary since the administration had solved the problems that gave rise to the bill . . . and that he was particularly concerned about the provision of the bill on mandatory penalties."

NRA spokesman John Aquilino says BATF's concerns are "nonsense" and "sound like a serious disinformation campaign." He says the issues were dealt with in the Senate bill. "There's no wavering by the administration as far as we're concerned," he says.

Higgins conceded at the hearing that he receives few complaints about record-keeping, a target of the bill, and that each year only 4 percent of the nation's 225,000 gun dealers are inspected.

"We cannot break publicly with the administration," a BATF official says. "But we went in there and told the truth." ◻

CONGRESS

Well, They Dealt These Cards...

Capitol Hill budgets have to shrink, too

By Sandra Sugawara
Washington Post Staff Writer

Rep. Stan Parris, a Virginia Republican, recently laid off two employes, including one recently recruited from a federal agency, and is planning to dismiss a third worker.

The House Foreign Affairs Committee sharply cut or eliminated everything from salaries to long distance phone calls to expense money for out-of-town witnesses.

The House Merchant Marine and Fisheries Committee is struggling with a 10 percent cut in its staff budget. "The rumor mill is working overtime," says Sue Waldron, committee press assistant.

The Gramm-Rudman-Hollings budget-balancing law has hit home on Capitol Hill. The creators of the law are now learning, like other recipients of federal money, what it is like to live with across-the-board cuts.

More complicated. Each congressman was originally given $296,010 to pay for up to 18 staff members from January through September. Gramm-Rudman-Hollings reduced that amount by 10.5 percent, to $265,000 for each office.

In addition, each office has a fund that pays for such things as office supplies, telephones and rent on district offices. The amount varies from $100,000 to $370,000, depending on such factors as distances and regional costs. Those accounts are to be cut by 4.3 percent.

In the Senate, administrative officials hav been asked to prepare lists of people wh might be let go. Members have been told to reduce their office and staff budgets by 4.3 percent, according to Peter Loomis, an aide to Republican John Warner of Virginia. He says that Warner will not replace two people who recently left, and will not have paid col-

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PRESIDENTIAL ACTION

Antitrust Law Revision

The Reagan administration issued its detailed legislative proposal for a major revision of merger laws, including limited antitrust immunity for companies in industries that have been severely injured by import competition. The proposals' fate is uncertain, particularly in the House, where Rep. Peter W. Rodino Jr., chairman of the House Judiciary Committee, has already expressed skepticism. The proposal would change several long-standing antitrust and merger policies in the name of eliminating unneeded government regulation of business. (Feb. 19)

Aid to the Contras

President Reagan asked Congress for $100 million in economic and military aid for the rebels fighting to overthrow Nicaragua's Sandinista government. Reagan asked Congress to provide the contras with $30 million in nonlethal aid, such as clothing and medical supplies, and $70 million in covert military assistance. In 1984 Congress barred military aid to the contras, but last year approved $27 million in nonlethal aid, which expires March 31. (Feb. 18)

Ex-Im Bank Nominee

President Reagan announced that he will nominate John A. Bohn Jr. to be president of the Export-Import Bank of the United States. Bohn, who is vice president of the bank, would replace William H. Draper III, who resigned last month to become head of the United Nations Development Program. The Ex-Im Bank provides low-cost financing to help American exporters sell their products overseas. (Feb. 18)

Aid to Savimbi

The Reagan administration told Congress that it has decided to provide Angolan rebel leader Jonas Savimbi with covert military assistance in his war with the Marxist

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When the 1968 Gun Control Act was signed into law, its preamble contained a solemn sounding promise. In part, it read that nothing in the Federal gun law was intended or would be used to "place any undue restrictions or burdens on law-abiding citizens . . ." or "discourage or eliminate the private ownership of firearms. . . ."

The history of enforcement of the Gun Control Act of 1968 has shown that pledge not to have been kept. S. 49, the Firearm Owners Protection Act, is a clear response to the abuses of citizens' rights documented under the '68 Act. The reform legislation passed the U.S. Senate by a vote of 79 to 15 on July 9, 1985.

Many utterly false allegations have been made—by the media and by groups that support the prohibition of firearms—about the legislation and what it will accomplish.

Please learn the truth about S. 49, the Volkmer-McClure Firearm Owners Protection Act.

CLAIM:

The nation's law enforcement community is against Volkmer-McClure, the Firearm Owners Protection Act. They say it endangers police and aids criminals. How can NRA oppose law enforcement?

FACTS:

NRA does not oppose law enforcement. In fact, over one million police have been trained by NRA-trained police and security firearms instructors. The Protection Act is an effort to change unjust provisions in the federal gun law. The federal law enforcement agencies charged with enforcing this law—the Treasury Department and the Justice Department—support this bill. They helped write the bill to ensure that it meets the needs of law enforcement and protects the rights of honest citizens.

The leadership of the Fraternal Order of Police, International Association of Chiefs of Police and some others that claim to speak for their memberships in opposing the Protection Act have relied on distortions of the bill provided by anti-gun ownership groups, such as the National Coalition to Ban Handguns and Handgun Control Inc. The propaganda they hand out opposing the bill was written and printed by Handgun Control Inc. It is totally wrong and intended to mislead the public.

State and local law enforcement are charged with enforcing state and local laws, not federal law. The Protection Act is federal law and has the support of federal law enforcement. If federal law enforcement lobbied state legislatures on state matters, state law enforcement would object mightily. The obvious political nature of the alleged law enforcement objections and the mixing of jurisdictional authority casts grave suspicion on that so-called opposition.

CLAIM:

Criminals will evade restrictive state laws by purchasing guns in other states.

FACTS:

Nonsense. Criminals will still be prohibited by federal law from purchasing any gun in any state. The interstate sales provision applies only to the law-abiding citizen—for example a collector or hunter or competitor. No sale would be permitted without verifiable proof that the purchaser is in compliance with all the laws of the buyer's state of residence and the state of purchase.

The Protection Act directs the Treasury Department to publish and distribute to all licensed dealers a booklet of state and local gun laws and the Act directs Treasury to keep dealers informed of changes. (Note: passage of state pre-emption laws in all states would reduce the hodge podge of state and local laws to 50. At present, more than 30 states have pre-emption.)

Mail order sales are prohibited. All sales must be made in person.

CLAIM:

Criminals will be allowed to carry guns across state lines.

FACTS:

Felons, drug abusers and the mentally incompetent are barred from possession of guns, period. Only the law-abiding would be allowed to transport personal, legally-owned firearms across state lines if the guns are *unloaded* and *inaccessible* to the owners.

CLAIM:

The ability to trace guns used by criminals would be eliminated.

FACTS:

Absolutely false. Current regulations governing tracing would be written into federal statute by the Protection Act. Dealers evading federal record-keeping provisions would be subject to a federal felony charge. Dealers would not be able to circumvent record-keeping restrictions by "placing firearms in inventory into their private "collections." Dealers would be allowed to sell themselves guns. These transactions would be recorded exactly as any other sale. For dealers, however, even those guns would be considered as part of their inventory for a full 12 months after the transaction.

Criminal investigators would have complete access to a dealer's records at any time. Only the annual compliance bookkeeping check requires "prior notice."

The "advance notice" provision was included in the Act to eliminate the use of the compliance inspection as a harassment technique by a government hostile to the private ownership of guns.

CLAIM:

No criminal charges can result from compliance inspections. "Carelessness" can be used as an excuse by crooked dealers.

FACTS:

Criminal charges can be brought against dealers for selling firearms to prohibited persons if such sales are uncovered in the course of a compliance inspection. Minor technical bookkeeping errors, those which are obviously non-criminal in nature, would be excused. Current law does not distinguish between minor or inadvertent infractions and criminal violations. Every violation, regardless of its nature, is a federal felony under current law.

CLAIM:

Elimination of centerfire ammunition record-keeping cripples law enforcement efforts.

FACTS:

Federal law enforcement authorities urged that ammunition record-keeping provisions be dropped. Nearly two decades have proven this a useless crime-fighting tool. Centerfire rifle and shotgun ammunition was exempted [illegible]. Record-keeping for .22 ammunition was eliminated in 1983. Even Ted Kennedy voted in favor of that ex-

emption. Today, virtually all handgun cartridges—.357 magnum, .44, 9mm and 45 ACP—have become rifle cartridges with carbines and rifles chambered to accept them.

CLAIM:

Current mandatory penalty provisions of federal law would be "gutted" by the Protection Act's use of the term "in furtherance of" a crime phrase.

FACTS:

False. The Protection Act strengthens federal mandatory penalty provisions. The Protection Act applies a five-year mandatory jail term to first offenses, 10 years for second offenses. The Protection Act extends the mandatory penalties to drug traffickers.

The term "in furtherance" was inserted to protect individuals such as police officers, required by law to carry guns at all times, from facing a five-year mandatory felony charge should they find themselves guilty of a minor infraction, such as being involved in a scuffle, during which a gun was present but not used.

The legislative history of the Protection Act as described in the Senate Judiciary Committee's report on the bill specifically states that criminals would not be exempted from the enhanced penalty.

CLAIM:

A plea of self-defense to avoid the mandatory penalty provision could be used to justify the killing of police by criminals.

FACTS:

False. Self-defense claims would apply only when a "severe and substantial miscarriage of justice" regarding the application of the mandatory penalty provision was proved to the court. The bill as well as the Senate Judiciary Committee report notes specifically that criminals engaged in criminal activity would not be eligible to claim "self-defense."

CLAIM:

"Waiting period" provisions are needed in federal law to keep guns out of the hands of criminals.

FACTS:

"Waiting period" statutes have been considered and rejected by 34 states. Because they did not believe that Congress should overrule more than half of all the states by imposing a national waiting period, 79 U.S. Senators voted against that scheme.

There is no proof that waiting periods deter criminals from obtaining firearms. Justice Department studies show that most criminals obtain firearms from the black market and not from dealers. Current federal gun law leaves individual traffickers untouched. The Protection Act makes it a federal felony for dealers and individuals to channel guns to criminals.

CLAIM:

Congress seems perfectly willing to pre-empt state laws regarding transporting guns through a state.

FACTS:

The Protection Act does not preempt state laws dealing with criminals using or possessing guns. It only allows honest citizens to travel across the United States on the condition that their firearms are unloaded and inaccessible. Illegal gun traffickers would be barred from interstate travel.

CLAIM:

The NRA doesn't want any testimony or debate on the Protection Act; that's why they are attempting to secure a discharge petition and avoid the committee process.

FACTS:

For six years the Protection Act worked its way through the committee process. Two sets of Senate hearings were held. Numerous meetings with federal enforcement agencies—the U.S. Treasury Department and the U.S. Justice Department—were held to ensure the bill met federal law enforcement needs. The House Judiciary Committee under Representative Peter Rodino refused to hold hearings. Rodino declared the bill "dead on arrival in the House." His current strategy is to hold rigged "hearings" in an effort to "hear" the bill to death. That's why a bipartisan coalition of congressmen have chosen to obtain a floor vote on the Protection Act by using a technique called a discharge petition. Under the current discharge petition, six hours of debate would be allowed. Amendments from the floor during that time would also be allowed. Democracy will be allowed to prevail over Rodino's dictatorial rule.

Please write your Senators and Congressmen. Without your support, without your letters, the Firearm Owners Protection Act will not be enacted. With your message, enactment of that long-awaited relief from the oppressive anti-gun law will truly be within reach. And if your lawmakers are cosponsors of the Firearm Owners Protection Act, by all means thank them. It's important.

NRA Institute for Legislative Action
1600 Rhode Island Avenue, N.W.
Washington, D.C. 20036

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the truth about S.49:

THE FIREARM OWNERS PROTECTION ACT

NATIONAL RIFLE ASSOCIATION OF AMERICA ORGANIZED 1871

99TH CONGRESS
1ST SESSION

S. 49

IN THE HOUSE OF REPRESENTATIVES

JULY 11, 1985

Referred to the Committee on the Judiciary

AN ACT

To protect firearms owners' constitutional rights, civil liberties, and rights to privacy.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress finds that the rights to keep and bear arms under the second amendment to the United States Constitution; their rights to security against illegal and unreasonable searches and seizures under the fourth amendment; the protections against uncompensated taking of property, double jeopardy, and assurance of due process of law under the fifth amendment; and the rights against unconstitutional exercise of authority under the ninth and tenth amendments; require

additional legislation to correct existing firearms statutes and enforcement policies. The Congress further finds that additional legislation is required to reaffirm its intent, as expressed in section 101 of title I of the Gun Control Act of 1968, that "it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap-shooting, target shooting, personal protection, or any other lawful activity, . . ." or "to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes.".

TITLE I—AMENDMENTS TO TITLE 18, UNITED STATES CODE (18 U.S.C. 921–928)

AMENDMENTS TO SECTION 921

SEC. 101. Section 921 of title 18, United States Code, is amended—

(1) in subsection (a)(10) by deleting the words "manufacture of" and inserting in lieu thereof the words "business of manufacturing";

(2) in subsection (a)(11)(A) by deleting the words "or ammunition";

(3) in subsection (a)(12) by deleting the words "or ammunition";

(4) in subsection (a)(13) by deleting the words "or ammunition";

(5) by amending subsection (a)(20) to read as follows:

"(20) The term 'crime punishable by imprisonment for a term exceeding one year' shall not include (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or (B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less: *Provided, however,* That what constitutes a conviction shall be determined in accordance with the law of the jurisdiction in which the proceedings were held: *Provided further,* That any conviction which has been expunged, or set aside or for which a person has been pardoned or has had his or her civil rights restored shall not be considered a conviction under the provisions of this Act, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms."; and

(6) in subsection (a) by inserting new paragraphs (21) and (22) after paragraph (20), to read as follows:

"(21) The term 'engaged in the business' means—