ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672
7480 SENATE JUDICIARY

MEMORANDUM STATE OF ALASKA

TO: The Honorable Rick Halford
Chairman
Senate Judiciary Committee

DATE: March 18, 1992

FAX NO: 789-6170

TELEPHONE NO: 789-6160

SUBJECT: Governor's SB 449

FROM: COMMERCIAL FISHERIES
ENTRY COMMISSION
Bruce Twomley, Chairman
Frank Homan, Commissioner
Rich Listowski,
Commissioner

As you know, Governor Walter J. Hickel has introduced SB 449 now referred to your Senate Judiciary Committee. The proposed Bill addresses the fact that two court decisions have declared that certain creditors may validly execute upon entry permits to enforce claims against the permit holders. The proposed legislation is the first attempt by the State to regulate transfers of entry permits due to these valid executions. The legislation does not discriminate between such creditors.

Section 3 of the proposed legislation will:

1. For the first time regulate transfers of entry permits due to valid execution;

2. Require such transfers to conform to state law;

3. Protect the revolving loan funds of the State Commercial Fishing Loan Program and the Commercial Fishing and Agricultural Bank (CFAB) by denying transfer of a permit which is security for a loan from either of these programs;

4. Attempt to protect fishers who most need their entry permits; and

5. Grant the State the right of first refusal with respect to the permit sold at a valid execution sale.

Please call, if you have any questions or comments.

cc: Lori Nottingham, Deputy Legislative Liaison, Office of the Governor
Deborah E. Behr, Esq., Assistant Attorney General
John T. Baker, Esq., Assistant Attorney General

Sectional Analysis

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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240 Main Street, Suite 500
Juneau, Alaska 99801-2101

MEMORANDUM March 26, 1992

SUBJECT: CS SB 449 (Judiciary)

TO: Senator Rick Halford, Chairman
Senate Judiciary Committee

FROM: George Utermohle GU
Legislative Counsel

Enclosed is the CS SB 449 (Judiciary) which had been requested by the Judiciary Committee. The CS contains the changes that the committee requested.

However, I should note that a question exists as to whether the references to AS 16.10.338 should be included on page 2, lines 6 and 20 of the CS. In both instances, the context of the bill relates to a certificate for a permit issued under AS 16.10.338. Unlike AS 16.10.333(b)(1)-(2) and AS 44.81.230(b)(1)-(2), AS 16.10.-338 does not provide for issuance of a certificate for a permit. There have been no regulations issued under AS 16.10.338. So there is no mention in either statute or regulation of a certificate issued under AS 16.10.338.

It may be the practice of the Department of Commerce and Economic Development to issue certificates for permits when the permits are used as collateral under AS 16.10.338, in which case it would be appropriate to reference AS 16.10.338 at these locations in SB 449. But, if the department does not issue certificates for permits used as collateral under AS 16.10.338, then some additional language may be necessary to properly bring AS 16.10.338 within the coverage of the bill.

If I may be of further assistance, please advise.

GU:pl
92-208.plm

Enclosure

3/20/92

7-GS2043.A

SENATE BILL NO. 449

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SESSION

BY THE SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

Introduced: 3/16/92
Referred: Judiciary

A BILL

FOR AN ACT ENTITLED

"An Act relating to the transfer of a limited entry permit, including a transfer due to an execution; and providing for an effective date."

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

* Section 1. AS 16.43.150(g) is amended to read:

(g) Except as provided in AS 16.10.333 - 16.10.338, AS 44.81.210, 44.81.225, and 44.81.230 - 44.81.250, an entry permit may not be

(1) pledged, mortgaged, leased, or encumbered in any way;

(2) transferred with any retained right of repossession or foreclosure, or on any condition requiring a subsequent transfer; or

(3) attached, distrained, or sold on execution of judgment or under any other process or order of any court, except as provided in AS 16.43.170(g) and (h).

* Sec. 2. AS 16.43.170(b) is amended to read:

(b) Except as provided in (c) and (e) of this section, the holder of an entry permit may transfer the permit to another person or to the commission upon 60 days notice of intent to

New Text Underlined [DELETED TEXT BRACKETED]

3/24/92 Corrected p. 2

transfer under regulations adopted by the commission. No sooner than 60 days nor later than 12 months from the date of notice to the commission, the holder of an entry permit may transfer the permit. If the proposed transferee, other than the commission, can demonstrate the present ability to participate actively in the fishery and the transfer [AGREEMENT] does not violate any provision of AS 16.43 or regulations adopted thereunder, and if a certificate for the permit under AS 16.10.333(b)(1) - (2) or AS 16.10.338 or AS 44.81.230(b)(1) - (2) is not in effect, the commission shall approve the transfer and reissue the entry permit to the transferee provided that neither party is prohibited by law from participating in the transfer.

* Sec. 3. AS 16.43.170 is amended by adding new subsections to read:

(g) A person may request the commission to transfer an entry permit due to an execution on the holder's interest in that permit. The request shall be made in the form and manner provided in AS 16.43 and regulations adopted thereunder. The commission may deny a request for transfer of an entry permit due to an execution of a holder's interest in that permit if

(1) the execution does not comply with legal requirements or otherwise is not valid;

(2) the transfer violates a provision of AS 16.43 or regulations adopted thereunder;

(3) the proposed transferee or other party to the transfer is prohibited by law from participating in the transaction;

(4) a certificate for the permit under AS 16.10.333(b)(1) - (2) or AS 16.10.338 or AS 44.81.230(b)(1) - (2) is in effect at the time of the proposed transfer;

(5) the proposed transferee of the entry permit, other than the commission, cannot demonstrate the present ability to actively participate in the fishery; or

(6) the holder of the entry permit as shown by the records of the commission demonstrates, under regulations adopted by the commission, that the entry permit is a necessary means of support for the holder and those dependent upon the holder.

(h) Notwithstanding (g) of this section, the commission may not approve a request for transfer of an entry permit after an execution sale unless the parties to the transfer offer the commission a right to purchase the permit at the same price and on the same terms as those of that execution sale. If the commission exercises its right to purchase the permit, the permit then shall be transferred to the commission.

SB 449: "Transfer of entry permit on execution."

Since enactment of AS 16.43.150(g), which protected limited entry permits from execution by creditors, the courts have nonetheless ruled in two cases that a permit holder's interest in a permit may be executed upon to satisfy a third party claim. Under Alaska law, only the Commercial Fisheries Entry Commission (CFEC) is authorized to transfer title to a permit. Currently, the CFEC's statutes do not provide for transfers in the case of execution by creditors. This bill is intended to address this deficiency.

Subsections 2 and 3 of the bill addresses the situation where a permit is collateral for a loan through the Department of Commerce and Economic Development or the Commercial Fishing and Agriculture Bank (CFAB). CFEC currently denies requests for the transfer of entry permits under this situation and this legislation incorporates the same requirement with respect to requests for the transfer of entry permits made in connection with a valid execution.

The department supports this legislation but recommends the following amendments:

Amend Section 1 of the bill as follows:

AS 16.43.150(g) should include a reference to AS 16.10.338. This section allows the department to use a limited entry permit as collateral for loans made under AS 16.10.310(a). AS 16.10.333 only relates to limited entry permits that were purchased with loan proceeds.

Amend Section 2 of the bill as follows:

AS 16.43.170(b) should also include a reference to AS 16.10.338 for the same reasons as explained above.

Amend Section 3 of the bill as follows:

AS 16.43.170(g)(4) should also include a reference to AS 16.10.338 for the same reasons as explained above.

Glenn A. Olds, Commissioner

Date: 3-24-92

GAO/GW/dgl1693D-2
032392b

Already, IRS may be seizing fishing permits

by DABNEY VAN LIERE

Hundreds of rural Alaskan commercial fishermen and crewmembers could be in danger of losing their livelihoods. They could also face criminal charges if they don't file their taxes with the Internal Revenue Service.

Limited Entry Commission Chairman Bruce Twomley of Juneau and IRS spokeswoman Marilyn Steen are both hopeful that many rural fishermen can solve their current tax problems without jeopardizing their permits — now "tentatively" ruled personal property, subject to liens and seizure.

Anchorage tax lawyer Robert Brink is hopeful as well, but he says, in reality, a lot of rural fishermen are risking their permits and livelihoods, even though they may not be aware of the danger. "They're more 'sitting ducks' now than they used to be," says Brink. "If I were a fish captain or especially a self-employed crewmember, I would file this year, even if no taxes may be owed—due to low prices last year—and set up payments for any back taxes" on earnings from past profitable year."

Brink is chairman of the tax section for the Alaska Bar Association. He says many Rural Alaskan captains now have tax problems because they failed to report total profits from processors (possibly because they didn't have enough money left for taxes) or reported profits incorrectly. They also oftentimes neglected to give self-employed crewmembers IRS 1099 forms for their share of the catch. The self-employed crewmembers could have past tax problems if they failed to report their 1099 income. IRS regulations require self-employed crewmembers to file a return if they made over $400 on their 1099 share of the catch. Therefore they should get their 1099s and file this year, even though they may not have fished this year. If they don't file, the IRS will file for them, place liens on property, and require payments.

According to Brink, U.S. District Court Judge James Singleton's new permit ruling (*ACF*, January 24, 1992) could prompt the IRS to quickly seize the permits of rural Alaskan captains who have not reported past profits, without giving them a chance to set up a tax payment plan. "The ruling could also eventually make it easier for the IRS to bring felony charges against any fisherman who does not file, for willful tax violations."

However, Brink also says IRS permit seizures may not cause total catastrophe because Judge Singleton has also ruled that the IRS must work with the Alaska Limited Entry Commission to transfer any seized permits. "The IRS is not going to get any special considerations. The state allows only one permit to be held by a taxpayer for the same category of limited entry fishery," says Brink. He figures it could take some time for the IRS to find someone to whom they can transfer the permit. This could provide more time for fishermen to file for bankruptcy and set up payments.

Limited Entry Commission Chairman Twomley says there's still some time before the IRS can seize any permits. "The state has been fighting to keep the IRS from taking permits for over 10 years. We're not lying down now," says Twomley. "The ink's not dry on that ruling. The state is trying to get the best deal it can get and will be arguing the language to be included in the final ruling."

The Limited Entry Commission does not expect to see the written decision from the Federal District Court until late February or early March "Then there could be even more

(See: *Rural fishermen*, page 23)

(from page 22)

changes in wording and a possible decision to appeal," says Twomley. "That should give some people time to solve their tax problems."

Twomley thinks the IRS could be targeting Alaska's commercial fishermen, trying to get more fishermen to file accurate returns. "The IRS has added 22 new agents over the past couple of years. Many of them are probably working on this," says Twomley.

Twomley is also aware that the IRS has already slapped liens on the total assets of many rural Alaskans, possibly including some limited entry permits — even though the state and IRS are still in court negotiations. Twomley doesn't know exactly how many permits have liens on them, because the various IRS offices have not given the commission that information.

IRS Public Affairs Officer Marilyn Steen says "Yes, IRS agents are targeting on the Alaskan fishing industry because the industry as a whole has an extremely high percentage of fishermen who do not file returns and/or set up tax payment plans." However says Steen, the agents are trying to educate commercial fishermen to make it easier for them to comply with the tax laws, not cause more problems.

Steen explains that several years ago, Alaska District IRS officials decided that rural Alaskan fisherman might not be filing their tax returns because they might not know how to do so. They might not know what incomes they needed to report, what expenses they could deduct and what earned credits they could take. For instance, says Steen, "the earned credit low income taxpayers can take if a child lives with them. Over the years the rules have changed so that more taxpayers can claim the credit even though they now have a higher income than they had when they were not allowed to claim the credit." Also, the child no longer has to be a dependent.

IRS agents started one of their first workshops at the University of Alaska's Chukchi campus in Kotzebue, a couple of years ago. A local Kotzebue fish buyer says one day they held a seminar for small businesses, the next day they met with fishermen and the third day they talked with individuals. "When they first got here there were problems with with-holdings for boats and 1099s, but they showed permit holders how to keep records and do paperwork. They also allowed them to do 1099s, so now hardly any permit holders have trouble," says the fish buyer. "The workshop was really successful. Now the IRS sends people up to help every year."

According to the Kotzebue fish buyer, most of the problems started because some fishermen did not let "knowledgeable" people do their tax returns.

Another person reported that IRS agents also spent time in King Cove during that time. There were some problems but the IRS agents seem to be leaving King Cove alone now.

Steen says IRS agents opened an office in Kodiak this past summer and visited quite a few boats in Kodiak, Dutch Harbor and Bristol Bay to give workshops. She says the IRS realizes that fishermen often have a hard time filing their returns when they are onboard the boats most of the time. A January 9 IRS news release says District IRS Director Rob-

Related News Articles

Rural fishermen, contd.

ert Brock has directed Alaska IRS employees to increase opportunities for education and discussion, such as those offered by the Kodiak office.

Steen did not originally say that any liens were filed in Kodiak but the January 9 release mentioned that tax liens had been filed to secure delinquent taxes. The *Alaska Journal of Commerce* tax lien lists for August, 1991 show that the IRS filed eight liens over $10,000 each, totaling over $135,960 against Alaskans living in the Kodiak recording area. In September, the IRS filed 21 more liens over $10,000 each, totaling over $693,700 with the Kodiak recording office.

Steen says the IRS is placing liens on total assets including permits because money is owed to the government. According to Steen, a taxpayer can incur a lien with or without an audit of returns. In the case of those who do not file, the IRS is filing for them and placing liens on their total assets. Those liens will not be taken off until all delinquent taxes are paid," says Steen.

However, the IRS will work with fishermen to file accurate returns even if the IRS has already filed for them. In some cases the fisherman will incur a corrected lien with a lesser amount due for penalties.

A quick glance at the tax liens recorded at various recording offices around the state shows that quite a few Alaskans who received liens in 1991 now have corrected liens of a lesser amount or have been released from their liens all together.

Even if a permit is eventually seized and auctioned for transfer, any profit after payment of taxes and IRS expenses would be given to the taxpayer fisherman. "Some permit holders are asking us to go ahead and offer their permits for auction," says Steen. They want to be finished with IRS payments.

Steen urges fishermen to contact the IRS even though they think they can't pay, to set up payment plans. That way they may save their permits, if and when the time comes for seizure.

Steen also says "Certainly, some Rural Alaskan fishermen are at risk of facing criminal charges for tax evasion. "They know who they are," says Steen.

Any taxpayer can receive a $125,000 fine and/or one year in jail for minor failure to file without overt acts of tax evasion or a fine of $250,000 and/or five years in jail if they willfully do not file and overtly evade paying their taxes.

"But they don't have to go to jail or pay those taxes," says Steen. They just need to contact the IRS before it's too late. "Even then the IRS might be able to work things out with taxpayers who do not file tax returns."

BRISTOL BAY NEWS

VOL. V Ed. 7

February 14, 1992 Page 7

IRS catches bingo winners

by DABNEY VAN LIERE

U.S. Attorney Wevley Shea says Alaska has a high incidence of failures to file tax returns, failures to make tax payments. "The tax problems are at all levels, in both urban and rural Alaska, says Shea.

A team of special Internal Revenue Service agents from the Criminal Investigation Division in Anchorage are investigating and working with U.S. Attorney Shea and Department of Justice attorneys in Washington D.C. to prosecute tax fraud of all types including social security abuse, failure to properly account for income from pull tabs and everything else, including self-employed income.

"If we didn't perceive a problem, we would not be proceeding. There will be more indictments," says Shea.

No targets

But "we're not out to get anyone," says Shea. "We're not targeting rural Alaskans, as was possibly implied in a previous report by the *Anchorage Times*.

According to Shea, "there are just some people here in Alaska who are independent. They think they don't have to pay taxes on income from any source, like everyone else. They think they can hide. Well, not anymore. We'll find them." Shea says he hopes "this sends a message to Anchorage, Juneau, Fairbanks, Barrow, Kodiak and everywhere else in Alaska, that they simply cannot ignore tax obligations and tax fraud ... fraud of any nature. No matter how remote they are, we'll find them."

Bingo problems

One of the areas where there are problems is with people incorrectly or inacurately reporting income from bingo and pull tabs.

Bingo and pull tabs are tremendously popular in Alaska in both urban and rural areas alike. Non-profit organizations and communities (through local taxes) use proceeds from bingo and pull tabs to raise funds. Many individual Alaskans in both rural and urban Alaska also use bingo and pull tab winnings to augment low monthly income from wage and seasonal jobs.

Kotzebue bingo

Late last month, several tax consultants who wish not to be identified, voiced concern that the IRS was possibly targeting rural Alaska because quite a few Kotzebue clients reported that IRS agents were questioning their reported bingo winnings from 1987.

One of the consultants wondered if the IRS agents were possibly doing something illegal. IRS statutes say an agent needs to get an uncoerced signed waiver from the taxpayer in order to continue audits for additional taxes after three years have passed, since the return was filed. However, if an IRS agent suspects that a taxpayer has failed to report an item of gross income which is more than 25 percent of the gross income on the return, the IRS agent can audit and assess additional taxes for up to six years past the return's filing date.

In Kotzebue's case, a tax preparer sent reports to the IRS from non-profit bingo and pull tab concerns totaling the winnings of individual people on a dollar for dollar basis instead of only reporting them when they won a game or games totaling over $1200 for bingo, $600 for pull tabs.

IRS statutes require individual taxpayers to report the full amount of their winnings on standard IRS form 1040 (the long version). They may deduct their losses up to the amount of their winnings on Itemized Deduction Schedule A and include them in their total itemized deductions on IRS Form 1040, line 34.

More taxes assessed

When IRS agents compared the winners tax returns with reports from the bingo and pull tabs concerns in Kotzebue, they found discrepancies. Therefore they asked the winners to file amended returns and pay additional taxes or show full accurate documentation on their losses. The IRS also placed liens on their total assets until the additional taxes are paid.

According to the tax consultants, some people filed amended returns with adequate documentation so they did not have to pay additional taxes. Some paid the additional taxes. Some residents have asked the IRS Problem Resolutions office to help them.

The tax consultants don't know whether there are any commercial fishermen who might now have liens on their limited entry permits (along with total assets) because of bingo problems. But Anchorage tax lawyer Robert Brink says he has heard of at least one elderly Eskimo permit holder from another community, who might have jeopardized her permit because of bingo problems.

Keep accurate records

Bingo players everywhere should keep accurate records of winnings and losses, warns Brink. He suggests that bingo and pull tab players should keep a daily journal of all monies won or lost. If possible, says Brink, players should also pay for cards and tabs by check or an automatic teller card, ask for receipts and keep receipts and/or pull tab stubs in order to document their winnings and losses. IRS agents generally want to see documentation to support the daily journal.

SCR

5

SEVENTEENTH LEGISLATURE
SENATE JUDICIARY COMMITTEE BILL FILE

BILL NUMBER: SCR 5
ABBREVIATED TITLE:

SPONSER: Kerttula ORIGINAL RECEIVED: 1-23?
WRITTEN REQUEST TO SCHEDULE REC'D: _____ FROM: _____
SPONSER'S STATEMENT REC'D: _____ FROM: _____
SECTIONAL ANALYSIS RQST'D: _____ FROM: _____
SECTIONAL ANALYSIS RECEIVED: _____
FISCAL NOTE (ORIGINAL)
RQST'D OF: _____ REC'D FROM: _____ DATE: _____
RQST'D OF: _____ REC'D FROM: _____ DATE: _____
RQST'D OF: _____ REC'D FROM: _____ DATE: _____
FISCAL NOTE (C.S.)
RQST'D OF: _____ REC'D FROM: _____ DATE: _____
RQST'D OF: _____ REC'D FROM: _____ DATE: _____
RQST'D OF: _____ REC'D FROM: _____ DATE: _____
FIVE DAY NOTICE GIVEN: _____ NOTICE OF HEARINGS GIVEN: _____
COMMITTEES OF REFERRAL: FIRST: Jud SECOND: ~ THIRD: ~

COMMITTEE ACTION

DATE:	
March 26, 91	Adopted Kerttula Amendment -
	Added Dept of H&SS on page 2 line 5 & 8 -
	Request final CS from AA.
3-28-91	Fiscal Note by OMB Transmitted to Sen Sec.

PERSONS TO BE NOTIFIED OF HEARING

1. SPONSOR Kerttula
2. AGENCY
3. _____
4. _____
5. _____
6. _____
7. _____
8. _____
9. _____
10. _____

Sen. Halford

Alaska State Legislature

Official Business

P.O. Box V
State Capitol
Juneau, Alaska 99811

MEMORANDUM

TO: Senator Rick Halford, Chairman
Senate Judiciary Committee

FROM: Senator Jay Kerttula

SUBJ: Senate Concurrent Resolution 5 --
Youth Courts

DATE: February 1, 1991

I would appreciate it if you would schedule Senate Concurrent Resolution 5.

Senate Concurrent Resolution 5 would request that the Alaska Bar Association and the Alaska Court System assist in expansion of the Anchorage Youth Court to other communities in the state. The Anchorage Youth Court has been a successful project, and I believe such a court could also be useful in other communities.

Attached is a copy of research on this topic. Thank you for your consideration of this request.

JK:kh

SCR 5 – Youth Courts –
Adams – What is statutory authority.
Could IRA use the same things?

Count suggesting adding HSS to language –

Rodeymoore Kerttula amendment –
Next to last whereas – Adopted w/o objection –

Count is asking for Grant to increase these.

Adams asks – Could Tribal Courts do this?

Moved CS for SCR 5 Indentical Rec.
2 Amendments –

AMENDMENT

OFFERED IN THE SENATE: BY: Kerttula

TO: _____ SENATE BILL No. SCR 5

HOUSE BILL No. _____

PAGE: 1 LINE: 16

On page 1, line 16, DELETE "WHEREAS the Anchorage Youth Court has been funded by the Anchorage Bar Association and the Young Lawyers Section of the Anchorage Bar Association; and"

INSERT "WHEREAS the Anchorage Youth Court has been funded by the Anchorage Bar Association, the Young Lawyers Section of the Anchorage Bar Association, and the Interest on Lawyers Trust Accounts (IOLTA) Fund of the Alaska Bar Association; and".

Kertl

AYC

Anchorage Youth Court
P.O. Box 102735
Anchorage, Alaska 99510 (907) 274-5986

JAN 31 1990

January 28, 1991

Senator Jay Kertula
PO Box V
Juneau, AK 99811
(Interdepartment Mail Stop 3100)

Dear Senator Kertula

The members of Anchorage Youth Court thank you for your interest in expanding youth courts throughout the state, as noted in your Senate Concurrent Resolution No. 5, introduced on January 22, 1991. The students and adults, who have created Anchorage Youth Court, stand ready to assist in this development of more youth courts in Alaska. Of the thirty three cases that we have thus far accepted, there has been only one case of recidivism, so we feel it is definitely a viable alternative within the juvenile justice system.

We appreciate and applaud your very carefully researched and written resolution. You might like to note, however, that line 16 on page 1 and line 1 on page 2 need to read;

"Whereas the Anchorage Youth Court has been funded by the Anchorage Bar Association, the Young Lawyers Section of the Anchorage Bar Association, and the Interest on Lawyers Trust Accounts (IOLTA) Fund of the Alaska Bar Association; and"

Each of the three organizations has contributed substantially to Anchorage Youth Court's survival.

On January 31 the Anchorage Youth Court president and chief judge will testify before the Governor's Commission on Youth. Among other concerns, they will state that helping in the expansion of youth courts to other Alaskan villages and towns is one of the long term goals of Anchorage Youth Court. Undoubtedly your resolution will help tremendously in the achievement of this goal.

Again, thank you for your support. If we can be of any help, please call or write.

Sincerely,

Sharon A. Leon
Coordinator

cc: Mary Hughes
Michael D. White

Alaska State Legislature

Legislative Research Agency

P.O. Box Y
Juneau, AK 99811-3100
Phone: (907) 465-3991
Fax: (907) 465-3551

October 25, 1990

MEMORANDUM

TO: Senator Jay Kerttula

FROM: Maureen Weeks MW
Legislative Analyst

RE: Teen Courts in Alaska and Other States
Research Request 90.364

You asked for information about teen courts (courts in which young defendants charged with minor offenses appear before juries of their contemporaries). This memorandum begins with information about teen courts in general and continues with brief descriptions of teen courts in Anchorage, Alaska; Hillsborough County, Florida; Denver, Colorado; Odessa, Texas; and Pasco County, Florida. For comparison, selected characteristics of the five model courts are presented in the attached table.

Background

Most youthful, first-time offenders who commit misdemeanors do not go to court, do not appear before a jury and are not sentenced by a judge. Instead, they receive a letter warning them not to offend again and they may be ordered to attend several hours of class for shoplifters or substance abusers. Teen courts are an effort to change this. They replace the "slap on the wrist" of a letter with the intimidating formality of a court appearance. Furthermore, they ask young people to appear before juries composed of other young people--tribunals which juvenile justice experts say tend to be harder on young offenders than adult jurors would be. By giving young, first-time offenders a glimpse of "real life" before judge and jury, these courts function as juvenile diversion, early intervention programs. Their purpose is to stop the progress from misdemeanor to felony by asking young offenders to take responsibility for their acts and accept sanctions determined by their peers.

Teen courts are composed of student volunteers who act as jurors and sometimes lawyers, clerks and bailiffs. Most are conducted by volunteer adult judges. Cases are generally screened. Defendants may be referred by the police, school officials, judges and, sometimes, private businesses. Most cases involve petty crimes. Teen courts are not recognized as courts of original or appellate jurisdiction.

Although the five courts we have chosen as models for discussion in this memorandum differ in many ways, all offer teen-age defendants the right to trial by their peers--defined in these courts as trial by one's contemporaries. Three carry this principle further by also using young people as prosecutors, defense lawyers, clerks and bailiffs. One (the Anchorage Youth Court) expands the concept to its fullest by allowing students to preside as judges.

All five teen courts hold their proceedings in local courtrooms to impress upon defendants that the session is "real." How court is conducted varies, however. For example, while the East Pasco Juvenile Court stresses the authenticity of the hearing by seating teens as jurors in regular juvenile court proceedings (presided over by a sitting judge and argued by actual prosecutors and public defenders), the Anchorage Youth Court asks teen-age defendants to accept verdicts and fulfill sentences determined solely by what many young people consider the most formidable of forums--other teen-agers.

The role of the jury also varies with the court. Three of the five courts we studied accept only defendants who are willing to admit guilt. In these courts, the teen-age jury hears arguments before determining an appropriate sentence. Two teen courts, however, allow not-guilty pleas. In one (East Pasco County Juvenile Court), young jurors recommend a verdict and, where appropriate, a sentence to the sitting juvenile court judge. In another (Anchorage Youth Court), young people are allowed much more authority. Here, after listening to arguments by youthful prosecutors and defense lawyers, teen juries determine a verdict and teen judges pronounce sentence.

Teen courts differ from each other in other ways. The Odessa Teen Court, begun in 1983 and the oldest of the courts we studied, emphasizes family responsibility by requiring parents of teen-age defendants to attend parent training workshops. The Denver Teen Court, which opens next month, is designed to replace school suspension and expulsion (which many students perceive as rewards) with community service and restitution. The Hillsborough County Teen Court stresses a variety of sentencing options by allowing student jurors to impose modified house arrest and restrict a defendant's driving privileges.

The advantages of teen courts are several. First, they place young, first-time misdemeanants before a court, a forum they take seriously. Second, they allow young people to be tried and sentenced by juries of their peers. Third, they allow defendants to pay their debts to society without incurring criminal records. Fourth, sentences by youth courts encourage a sense of responsibility by stressing redress to the community. Fifth, teen courts allow young people--defendants and court officials--to learn court proceedings first hand. And sixth, teen courts reduce the volume of cases brought before regular juvenile courts.

Teen Courts

Anchorage Youth Court

Contact: Blythe Marston
Chair, Youth Court Advisory Committee
Bogle & Gates
907-276-4557 or

Sharon Leon, Coordinator
Anchorage Youth Court
274-5986 (between 1 p.m. and 5 p.m.)

The court is composed of middle school and high school students (ages 12 to 18) who volunteer as judges, jurors, bailiffs, clerks, prosecutors and defense attorneys. To be eligible to sit on the court, students must attend an eight-to-ten week class and pass a Youth Court Bar Examination. About 100 students are members of the bar, with another 200 in preparation classes where they are taught constitutional law, criminal law and procedure, ethics and advocacy. Legal advisors prepare student prosecutors and defense lawyers before their cases go to trial.

Judges are elected by members of the Youth Bar Association. They must have argued twice as prosecutors and twice as defense attorneys. The chief judge and assistant chief judge must have served at least once as associate judge.

Defendants, who are also between the ages of 12 and 18, are usually first offenders charged with petty crimes. They have been referred through the juvenile probation department, but they may be referred by other organizations, such as a store alleging shoplifting. Defendants and their parents must agree to allow the Youth Court to hear the case. Court proceedings insure them the right to be represented by a lawyer, the right to trial by jury, the right to cross-examine witnesses, the right against self-incrimination and the right to appeal.

At arraignment, defendants may plead guilty or not guilty. Student jurors and judges hear arguments before they determine the verdict and set the sentence.

Offenses include petty crimes, but the Youth Court has also heard felonies and civil suits.

Sentences include community service and restitution. A defendant who wishes to appeal a verdict or sentence must submit the appeal within three days of the sentence. Once a sentence is served satisfactorily, the record is expunged.

Miscellaneous: This court is the most developed of teen courts we studied. It is the only court in which students serve as judges, the only court in which student lawyers argue cases for defendants who have pleaded not guilty, and the

only court which requires students to pass a bar examination before qualifying to sit on the court.

The court has heard between 30 and 40 cases in the three years it has existed. (Juvenile probation officers have begun to refer cases increasingly frequently, according to Ms. Marston.) Trials are conducted at the Anchorage Courthouse in the evening.

The court is administered by two groups. A 16-member administrative board of lawyers, judges, police officers and students meets quarterly to oversee funding. This board is composed equally of adults and students. In addition, the Anchorage Youth Court Bar Association, composed of students who have passed the bar examination, meets weekly. The court was originally funded solely by the Anchorage Bar Association. Recently, funds have been appropriated from the Interest On Lawyers' Trust Association (IOLTA) funds. Private individuals also contribute to the court.

We will send under seperate cover an Anchorage Youth Court video tape of the case of *State v. Pat O'Shea*, in which the defendant is accused of "minor assault" the night of March 23, 1989, after an evening of dancing at the Flaming Turban. The tape shows a three-judge panel presiding with youthful lawyers arguing before an attentive jury in procedures modeled after state court proceedings.

Hillsborough County, Florida

Contact: Bob Sleczkowski,
Director, Juvenile Services,
Thirteenth Judicial Circuit, Florida
813-272-5110

The court is composed of students from area high schools who volunteer to serve as prosecutors and defense attorneys, as well as bailiffs, court clerks and jurors. They must complete a three-hour orientation and training before they are allowed to participate on the court.

The judge is a volunteer from the Young Lawyers Association.

Defendants, who are between 13 and 17 years old, participate voluntarily in teen court. No defendant appears before court officials from his or her own high school. Defendants are referred by the police through the state's attorney. First-time misdemeanants who do not qualify for teen court hearings may go to juvenile arbitration.

Defendants are required by statute to plead guilty. Jurors hear arguments and decide the sentence.

Offenses heard in teen court include school offenses (e.g. battery, trespassing) and alcohol offenses.

Sentences last for five weeks. The include community service, modified house arrest, driver's license restriction, attendance at Alcoholics Anonymous meetings, written apologies, essays and jury duty. Sentences must be served exactly as determined by the teen court. After five weeks, the director of juvenile services rehears the case and, if the sentence is completed satisfactorily, the record is expunged.

Miscellaneous: The Hillsborough County teen court was established in March 1990. It meets Tuesday and Thursday nights in a county courtroom. Four cases are heard each night. Nineteen area high schools participate in teen court on a rotating basis (each school sends a teen court once every six weeks). Adult staff includes the teen court coordinator, counselor, a secretary and director of juvenile services for the Thirteenth Judicial Circuit.

Denver, Colorado

Contact: Jan Church
Chair, Teen Court Advisory Board
1700 Lincoln, Suite 4100
Denver, Colorado 80203
303-861-7000

The court is composed of students who volunteer to serve as jurors and prosecutors and defense attorneys.

The judge is a volunteer retired judge.

Defendants are students in trouble in middle school and high school who have committed acts for which they would be suspended or expelled from school (but not serious enough to warrant a criminal charge). They participate in teen court voluntarily, although court organizers ask school principals to "strongly encourage" young people to choose teen court over traditional punishments which keep them out of school.

To appear in court, a teen must sign a contract admitting guilt. Jurors hear arguments and set the sentence.

Offenses heard by teen court include stealing, fighting, trespassing and possessing alcohol on campus.

Sentences include community service, apology to the victim and restitution. Those who do not comply with the teen court sanction are referred to the school or the police department.

Miscellaneous: The purpose of this program is to replace traditional negative school punishment, such as suspension and expulsion, with sanctions which keep the student in school and encourage him or her to serve the community. It is an attempt to intervene before students commit more serious offenses for which

they will be charged. Teen court, sponsored by the Denver Bar Association, holds its first hearing in November 1990. This court replaces a teen court begun in the 1970s and disbanded in the mid-1980s.

Odessa, Texas

Contact: Natalie Rothstein
201 N. Grant
Odessa, Texas 79761
415-333-3641

The court is composed of teen-agers who volunteer to act as jurors, bailiffs, clerks, prosecutors and defense lawyers. A master jury trained in interview and assessment skills hears traffic cases; other juries hear miscellaneous cases. Student court officials are trained during pre-trial and post-trial meetings with the judge and the teen court director.

The judge is a volunteer retired district court judge.

Defendants are referred by police, local courts, the justice of the peace courts and the schools. They participate in teen court voluntarily. No defendant may go through the teen court twice.

To qualify for teen court, defendants must plead guilty. Jurors hear arguments before determining the sentence.

Offenses heard in teen court include traffic offenses and Class C and B misdemeanors, including some drug possession cases.

Sentences include community service and jury duty. Alcohol or drug offenders must take a chemical abuse workshop. The parents of all offenders must take a parenting workshop. If the sentence is satisfactorily completed, the record is labeled "dismissed through Teen Court."

Miscellaneous: The Odessa Teen Court was established in November 1983. It meets every Tuesday night in the county courthouse, with seven juries hearing 21 trials. One "master jury" hears 15 traffic cases each night, while six other juries hear other cases. Parent participation is mandatory. Parents must be present at the initial interview with the teen court director, as well as at the trial. In addition, parents must attend three-hour parenting workshops, taught by the court director and by her husband, a professor at the University of Texas. The director says this parent training is vital to the program's success. The program is sponsored by the Junior League of Odessa. Two-thirds of the program's funding is from the city council and one-third is from the schools.

Pasco County, Florida

Contact: Judge Lynn Tepper
East Pasco Juvenile Court
813-996-7341

The court is composed of students from the local high school (Zephryhills High School). Jurors, selected from the school's law studies class, sit as the jury in actual cases heard by the East Pasco Juvenile Court. Jurors are trained by the law studies teacher, who discusses jury instructions in class, and by the sitting judge, who appears before the class once each semester to discuss the state's juvenile justice system. The judge also asks the state's attorney, the public defender and a pre-trial case worker to speak to the class. During court, jurors sit in the jury box. The trial proceeds as with a non-jury trial, except that all objections by lawyers must be made and argued on the floor where the jurors can hear them. Bench conferences, voir dire and objection to particular jurors are not allowed.

The judge is Circuit Court Judge Lynn Tepper (replacing Judge Maynard F. Swanson, Jr., who began the program).

Defendants are juveniles whose cases are on the regular docket; cases are not screened.

Defendants may plead guilty or not guilty. Jurors recommend the verdict by majority vote and, if the verdict is guilty, jurors also recommend sentencing. (Judge Swanson says his verdict differed from the jury's only once; he attributes that anomaly to his mistake in not properly instructing the jury.)

Offenses include any offense on the juvenile court docket.

Miscellaneous: This is the only court we studied in which jurors serve under a sitting judge. It has received national publicity on both the NBC Today Show and NBC Nightly News.

We attach an article describing the Pasco County Teen Court ("Pasco Juvenile Justice Program Wins National Fame," *Florida Bar News*, May 15, 1990); a description of the Hillsborough County Teen Court ("Teen Court," provided by Bob Sleczkowski, director of juvenile services in Tampa, Florida); and an article describing the Odessa Teen Court (Robert Rothstein, "Teen Court: A Way to Combat Teen-age Crime and Chemical Abuse," *Juvenile & Family Court Journal*, 1987, p. 1-4). In addition, we attach several documents from the Anchorage Youth Court. The documents include step-by-step instructions in how to set up similar courts in other areas ("Anchorage Youth Court: Trial by Peers") and the Anchorage Youth Court Constitution.

I hope this information is useful. If you have any questions, or want additional information, please contact this agency.

SJR

1

SEVENTEENTH LEGISLATURE
SENATE JUDICIARY COMMITTEE BILL FILE

BILL NUMBER: S.J.R 1
ABBREVIATED TITLE: Amend Constitution: Individual Right To Bear Arms -

SPONSER: Roden - Halford Etc. ORIGINAL RECEIVED: 1-22-91? DB
Verbal ~~WRITTEN~~ REQUEST TO SCHEDULE REC'D: 1-23 FROM: Sen Ruley DB
SPONSER'S STATEMENT REC'D: _____ FROM: _____
SECTIONAL ANALYSIS RQST'D: _____ FROM: _____
SECTIONAL ANALYSIS RECEIVED: _____
FISCAL NOTE (ORIGINAL)
RQST'D OF: Lt Gov Linda Edgeworth 1-24 REC'D FROM: Election DATE: 1-29-91 DB
3672 – RQST'D OF: Law - Peeves - 1-24 REC'D FROM: Law DATE: 2-5 DB
RQST'D OF: _____ REC'D FROM: _____ DATE: _____
FISCAL NOTE (C.S.)
RQST'D OF: _____ REC'D FROM: _____ DATE: _____
RQST'D OF: _____ REC'D FROM: _____ DATE: _____
RQST'D OF: _____ REC'D FROM: _____ DATE: _____
FIVE DAY NOTICE GIVEN: 1-23 2300 1-28-91 DB NOTICE OF HEARINGS GIVEN: _____
COMMITTEES OF REFERRAL: FIRST: Jud SECOND: Fin. THIRD: _____

COMMITTEE ACTION Teleconf #91-01-173

DATE:

1-31 Telecon's Discussion - Held over for later action. Frank absent.
3-5 Adams - amendment to preserve reasonable regulation failed 3-2 (Adams - Collins)
Bills Passed out 4-1 over Adams objection.

PERSONS TO BE NOTIFIED OF HEARING

1. SPONSOR Sen Rodey
4322 – 2. AGENCY Public Safty - Bottm
3. Chief of Police Assn - Mtland 786 8500
4. WARoss 276 - 5307
5. AK Peace officers
6. Russel Andrews / NRA / 789-7422
7. _____
8. _____
9. _____
10. _____

See - Klenhalla LIO 822 - 5588

T Fiscus SJR 4 - 16th Legis.

ALASKA STATE LEGISLATURE

Anchorage Office:
3111 C St., Suite 530
Anchorage, AK 99503
907-561-7616

While in Juneau:
P.O. Box V
Juneau, AK 99811
907-465-4958

Senator Rick Halford

MEMORANDUM

TO: Senate Judiciary Committee Members
Senator Adams
Senator Frank
Senator Collins
Senator Rodey

FROM: Senator Halford, Chair

DATE: January 30, 1991

RE: SJR 1 Committee file

Attached is the committee file supplement for SJR 1 -- "The Right to Keep and Bear Arms."

RH:rst

Residence: P.O. Box 190 • Chugiak, AK 99567 • 907-694-4958

Alaska State Legislature

Al Adams
District L

WHILE IN SESSION
P.O. Box V
State Capitol
Juneau, Alaska 99811
(907) 465-3707

OUT OF SESSION
P.O. Box 333
Kotzebue, Alaska 99752
(907) 442-3245

3111 C Street
Anchorage, Alaska 99503
(907) 561-7622

Official Business

TO: Senator Rick Halford, Chair and members of the Senate Judiciary committee

FROM: Senator Al Adams AA

RE: SJR 1, "Proposing an amendment to the Constitution of the State of Alaska relating to the individual right to keep and bear arms."

DATE: January 30, 1991

I would like to offer the following amendment to the aforementioned legislation for consideration in committee on January 31, 1991:

Page 1, line 8 after the word "state" add, "except that the exercise of this right may be regulated by law."

BILL NO: SJR 1

DATE: January 31, 1991

TITLE: Proposing an Amendment to the Constitution...Relating to the Individual Right to Keep and Bear Arms

CONTACT: Gayle A. Horetski
Deputy Commissioner

DEPARTMENT OF PUBLIC SAFETY

Senate Joint Resolution No. 1 proposes an amendment to the Constitution of the State of Alaska relating to the individual right to keep and bear arms. If approved by a two-thirds vote of each house, this proposed constitutional amendment would be placed on the ballot at the next general election. If a majority of the voters adopt the amendment, the language of the State Constitution will be changed.

This amendment apparently is intended to establish that the right to keep and bear arms under the state constitution is an individual right, rather than a collective (militia-related) one. In Alaska, however, the right of the people to bear arms for legitimate purposes is widely recognized, and has never been infringed. Indeed, Alaska and Vermont are the states with the least restrictive firearms laws in the entire United States.

The Department of Public Safety and many other law enforcement agencies in the state are very concerned that if this language appears on the ballot and is approved by the voters, some existing state statutes may be subject to constitutional challenge. 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 shotguns; and prohibits possession of a firearm while intoxicated, the carrying of a concealed weapon, possession of a loaded firearm on licensed premises, and possession of a firearm by a minor without parental consent. (See AS 11.61.200 - 11.61.220).

These statutes serve a critical public safety function by restricting the possession of especially dangerous weapons or weapons carried in an especially dangerous manner or place. In order to make sure that the proposed amendment does not render these statutes unenforceable, nor foreclose a future legislature from adopting similar provisions (prohibiting possession of loaded firearms in a church or on school grounds, for example), it is essential that the language of any proposed amendment continues to allow reasonable regulation of firearms by law.

As presently drafted, SJR 1 would also present municipalities or other political subdivisions of the state from regulating the use or possession of firearms. This authority currently exists, and is used. Last October, for example, the Anchorage Municipal Assembly unanimously adopted an ordinance making it illegal for school students to carry deadly weapons onto school grounds in Anchorage. This action was taken after two separate incidents in which students had brought loaded handguns onto school grounds. At this time, there is no comparable law statewide.

There is no good reason why Art. I, §19 of the Alaska Constitution should be amended. Since adoption in it's present form could seriously endanger the public safety of the state's citizens and visitors, the Department of Public Safety opposes SJR 1.

Richard L. Burton

Richard L. Burton
Commissioner

BILL NO: SJR 4

DATE: January 30, 1989

TITLE: "Proposing an amendment... relating to the right to keep and bear arms."

CONTACT: Gayle A. Horetski
Deputy Commissioner
465-4322

DEPARTMENT OF PUBLIC SAFETY

If passed by the legislature, SJR 4 would place a proposed constitutional amendment before the voters at the next general election. The resolution contains an amendment to article I, section 19 of the state constitution, relating to a citizen's right to keep and bear arms.

The stated purpose of the proposed amendment is twofold:

1) to establish that the right to keep and bear arms under the state constitution is an individual right, rather than a collective one; and

2) to preclude local regulation of the possession or use of firearms. (At present, local regulations regarding firearms may differ from state law.)

I am concerned that the present language of the amendment, if adopted by the voters at the next election, 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 shotguns, prohibits possession of a firearm while intoxicated, the discharge of a firearm from, on, or across a highway, the carrying of a concealed weapon, possession of a loaded firearm on licensed premises, or possession of a firearm by a minor without parental consent. (See AS 11.61.200-11.61.220.)

These statutes promote public safety by restricting the possession of especially dangerous weapons or weapons carried in an especially dangerous manner or place. If any of these laws were to be struck down by the courts as violative of the amended language of article I, section 19 of the constitution, the ability of the state to regulate the possession of deadly weapons could be seriously impaired. This, in turn, could present a serious threat to the safety of innocent persons.

The Department of Public Safety sees no compelling need to change the existing language in Alaska's Constitution. The Department of Public Safety therefore opposes SJR 4.

Arthur English
Commissioner

STEVE COWPER, GOVERNOR

DEPARTMENT OF PUBLIC SAFETY

COUNCIL ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT

P.O. BOX N
JUNEAU, ALASKA 99811-1200
PHONE: (907) 465-4356

OFFICE ADDRESS: 450 WHITTIER STREET

January 31, 1989

The Honorable Jan Faiks, Chair
Senate Judiciary Committee
P. O. Box V
Juneau, AK 99811

Re: Senate Joint Resolution 4

Dear Senator Faiks:

I am writing on behalf of the Council on Domestic Violence and Sexual Assault. The Council opposes Senate Joint Resolution 4. Of particular concern is the lack of any language in S.J.R. 4 which explicitly preserves the state's right to regulate firearms. We strongly believe the state must retain the right to regulate firearms. Recent incidents in Alaska and in other states demonstrate that unlimited access to firearms by everyone, including the mentally unstable and convicted felons, can lead to tragedies like the death last April of the woman in an insurance office in Anchorage, and the more recent shootings of children on a school playground in Stockton, California.

The mission of the Council is to provide for planning and coordination of services to victims of domestic violence. We believe this proposed resolution directly affects victims of domestic violence. In 1987, 51 murders occurred in Alaska. 36% of the victims in these murders were either family members or in a boyfriend/girlfriend relationship. Furthermore, firearms were used in 61% of the murders.

If this proposed amendment is approved, we urge that it be amended to add a phrase preserving the state's ability to reasonably regulate the possession and use of firearms.

Sincerely,

Barbara Miklos

Barbara Miklos
Executive Director

12 L16LH

STATE OF ALASKA

DEPARTMENT OF LAW

CRIMINAL DIVISION

WALTER J. HICKEL, GOVERNOR

REPLY TO

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

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

January 31, 1991

The Honorable Rick Halford
Alaska State Senator
P.O. Box V
Juneau, Alaska 99811

Re: SJR 1, Right to Bear Arms

Dear Senator Halford:

The position of the Department of Law on the resolution to amend the Alaska Constitution to recognize an "individual" right to bear arms (Senate Joint Resolution 1) remains the same as it has been over the past several years during which similar resolutions have been introduced. The department has opposed, and currently opposes, such a change to the constitution, not because it opposes the "individual" right to bear arms, but because the resolution as introduced could invalidate existing laws regulating firearms. This conclusion has been reached after careful and extensive review, over a number of years, of the law in Alaska and other states.

A summary of the Department of Law's prior and current analysis follows:

1. In a wide variety of contexts, the Alaska Supreme Court has interpreted the state constitution as providing broader protection for individual rights than does the federal constitution. We believe that the court would interpret the existing right-to-bear arms provision in the state constitution in a similarly broad manner. Amendments satisfy the proponents' concerns about the potential for [illegible] regulation, without the need for the amendment.

2. According to federal authority, Alaska already shares with Vermont the distinction of having the least restrictive firearms laws in the United States.[1] It is common for firearms to be carried openly in all areas of the state, and they may be

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

carried concealed in and around one's home or for protection while engaged in outdoor activity. AS 11.61.220(b). At the same time, dangerous weapons (such as switchblades, machine guns, bombs, and "sawed-off shotguns") are prohibited. Also, felons are prohibited from carrying concealable firearms. AS 11.61.200. In the department's view, there is no compelling reason that has been put forward to change this status quo.

3. No one can predict the full legal effect of the proposed constitutional amendment with any degree of certainty. The one effect of the amendment that can be stated with certainty, however, is that it transfers the power to regulate firearms use, currently held by the legislature, to the judiciary. A similar and well-known example of such a power transfer occurred when the constitution was amended to specifically guarantee the right of privacy; it was followed shortly thereafter by a supreme court opinion, with which the state is still struggling, that protected the right to use marijuana.

4. Because the Alaska courts construe the provisions of our constitution broadly, and because the language of the proposed amendment gives either no or exceedingly little authority to the legislature to regulate firearm use, it is very likely that portions of Alaska's statutes regulating firearms will be declared unconstitutional. Examples of conduct prohibited by existing laws that could be declared unconstitutional under the proposed amendment include the possession of weapons by felons, the possession by anyone of "prohibited weapons" such as machine guns, switchblades or "sawed-off shotguns", the possession of firearms in bars or by intoxicated persons, and the removal of serial numbers. Indeed, the courts of several states have struck down similar firearms laws based on amendments to their state constitutions. Furthermore, the proposed amendment could preclude future Alaska legislatures from adopting additional laws in this area, such as laws prohibiting the possession of firearms on school grounds, in government buildings, or in proximity to oil and gas facilities.

5. The department does not believe that statements of "legislative intent", indicating that the constitutional amendment should not be construed to preclude the reasonable regulation of weapons, are sufficient to avoid current state laws from being struck down. As a general rule, a statute or constitutional provision will be interpreted according to the plain meaning of the language on its face. If the intent behind the adoption of the amendment becomes an issue, it is the intent of the voters who adopted the measure, rather than the intent of the legislators who drafted it, that will be relevant.

If the legislature believes it is necessary to explicitly recognize the "individual" right to bear arms, the amendment should be drafted to also explicitly recognize the legislature's authority

to reasonably regulate firearms, that is, to maintain the status quo concerning firearms laws. As alternatives to the proposed joint resolutions, the Department of Law has previously suggested the following language:

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

or

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

or

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

A more detailed analysis of this issue, and of the points raised above, which was submitted to the legislature in 1989, is attached to this letter.

Very truly yours,

CHARLES E. COLE
ATTORNEY GENERAL

By: Dean J. Guaneli
Dean J. Guaneli
Assistant Attorney General

DJG:me--004

STATE OF ALASKA

DEPARTMENT OF LAW

CRIMINAL DIVISION

STEVE COWPER, GOVERNOR

REPLY TO

CRIMINAL DIVISION CENTRAL OFFICE
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OFFICE OF SPECIAL PROSECUTIONS AND APPEALS
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PHONE: (907) 279-7424

January 29, 1989

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

Dear Senator Faiks:

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

In summary, our analysis is:

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

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

03-C31LH

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

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

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

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

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

1. The Right to Keep and Bear Arms in Alaska

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

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

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

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

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

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

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

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

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

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

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

2. Constitutional Interpretation in Alaska

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. The West Virginia Experience

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

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[14]651 P.2d at 5.

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

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

a. Legislative History

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

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

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

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

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

[16]McNeely at 1152.

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

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

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

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

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

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

b. Princeton v. Buckner

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

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

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[18]McNeely at 1162.

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

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

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

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

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

> The basis of the argument of the State is that the proponents took the position that the right to bear arms amendment did not change existing laws. The fact of the matter is that the opponents of the amendment took the position that it would, in fact, change existing law and the Legislature refused, although given opportunity to do so, to word the amendment in such a fashion so as to deal with that question. (emphasis added) Brief of Respondent Buckner at 5.

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

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

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

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

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

c. Current Status of West Virginia Gun Law

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

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

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

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

4. The Proposed Alaska Amendment

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

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

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

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

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

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

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

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

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

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

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

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

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

5. The Risk to Specific Alaska Statutes

a. Constitutionality of Concealed Weapons Statutes

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

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

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

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

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

[30]Id. at 220.

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

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

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

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

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

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

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

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

b. Constitutionality of Felon in Possession Statutes

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

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

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

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

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

[32]Dowlut & Knoop at 192.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

c. Constitutionality of Prohibited Weapons Statutes

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

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

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[37]AS 11.61.200(e).

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

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

d. Constitutionality of Game Regulations

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

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

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[39] Delgado at 611.

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

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

6. The Legislature Should Affirmatively State Its Intent

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

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

[42]Id.

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

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

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

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

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

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

Conclusion

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

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

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

As alternatives to SJR4, we suggest language such as:

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

or

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

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

Respectfully submitted,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By: _____
Laurie H. Otto
Assistant Attorney General

cc: The Honorable Pat Rodey
The Honorable Peter Goll
The Honorable Max Gruenberg
The Honorable Dave Donley
Grace Berg Schaible
Bob Evans

STATE OF ALASKA

DEPARTMENT OF LAW

CRIMINAL DIVISION

STEVE COWPER, GOVERNOR

REPLY TO

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February 23, 1989

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

Dear Senator Faiks:

As I'm sure you remember, I recently testified before the Senate Judiciary Committee and explained the Department of Law's concerns about the proposed right to bear arms amendment, SJR 4. The type of problems we identified have started to arise in Nebraska as a result of an amendment to the Nebraska constitution that passed last November. Attached for your information are two opinions issued by Nebraska trial courts that declared unconstitutional both the Nebraska felon in possession law, and the Nebraska law making it a crime to possess a firearm with the serial numbers obliterated. I have also included two newspaper editorials from the Omaha World-Herald.

Based on the reasons we explained in both our written and oral testimony, as well as the new developments in Nebraska, we once again urge you to take a second look at the need to amend the Alaska constitution. If you decide a constitutional amendment is necessary, we implore you to add language to the proposed amendment that reserves the right of the legislature to reasonably regulate arms. A list of eight possible ways to reserve this right is attached to this letter.

If you have any questions about this issue, or if I can provide you with any additional information, please let me know and I will be glad to meet with you at your convenience.

Very truly yours,

DOUGLAS B. BAILY
ATTORNEY GENERAL

By: _____
Laurie H. Otto
Assistant Attorney General

03-C31LH

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

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

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

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

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

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

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

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

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

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

NRA

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

Nebraskans Were Warned

Ironic Use of Gun Law Shouldn't Be Surprise

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

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

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

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

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

Recent news stories magnify the concerns. Among them:

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

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

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

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

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

Another Nebraska Vote Needed

Rulings on Gun Laws Show NRA Was Wrong

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

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

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

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

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

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

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

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

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

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

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

FILED
1996 FEB -2 PM 3:13
ANITA R. GUILGESTON
CLERK DISTRICT COURT

IN THE DISTRICT COURT OF LINCOLN COUNTY, NEBRASKA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The explanatory language contained on the ballot stated:

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

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

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

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

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

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

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

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

SO ORDERED.

John P. Murphy
District Judge

FILED
1989 FEB -6 AM 10:38
ANITA R. CHILDERSTON
CLERK DISTRICT COURT

IN THE DISTRICT COURT OF LINCOLN COUNTY, NEBRASKA

THE STATE OF NEBRASKA,	)	
	)	
Plaintiff,	)	CASE NO. 97-26
	)	
v.	)	ORDER
	)	
LARRY L. RUSH,	)	
	)	
Defendant.	)	

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

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

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

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

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

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

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

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

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

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

The explanatory language contained on the ballots stated:

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

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

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

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

inches in length.

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

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

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

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

Supreme Court in the Spire decision:

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

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

SO ORDERED.

BY THE COURT:

DONALD E. ROWLANDS II
District Judge

Supplement file -

STATE OF ALASKA

Bill Sheffield, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K – STATE CAPITOL
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PHONE: (907) 465-3600

April 13, 1983
Redated 7/1/83 for printing purposes

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

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

Re: Handgun Ban
Our file No.: 366-444-83

Dear Senator Rodey and Representative Bussell:

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

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

> A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

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