ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672
7481 SENATE JUDICIARY

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

Redated 7/1/83 for printing purposes

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

Sincerely,

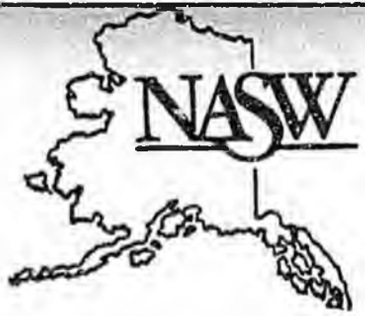
NORMAN C. GORSUCH
ATTORNEY GENERAL

By: Joseph W. Geldhof
Joseph W. Geldhof
Assistant Attorney General

JWG:vrb

cc: Norman C. Gorsuch
Attorney General

Ronald W. Lorensen
Deputy Attorney General



ALASKA CHAPTER
NATIONAL ASSOCIATION OF
SOCIAL WORKERS

8923 Tanis Drive
Juneau, Alaska 99801
(907) 789-7099

Executive Director
William Diebels, ACSW

January 31, 1989

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

Re: S.J.R. 4

Dear Senator Faiks:

The Alaska Chapter of the National Association of Social Workers is opposed to Senate Joint Resolution 4. We believe that to delete the provisions in the existing constitution that give the state the right to regulate the use and possession of firearms would create serious problems in a state that already has such high rates of violent deaths and accidents which are caused by firearms.

The National Association of Social Workers represents more than 300 professional social workers throughout the state. As a group working daily with a wide range of social problems, we urge you to consider the potential negative effects of this proposed Constitutional amendment.

Our organization is not opposed to the responsible use of firearms for hunting or sport. However, we believe that it is in the best interests of all the citizens of Alaska that the state retain the power to regulate the purchase and possession of weapons. If this amendment were to pass, the state could not prohibit convicted felons and mentally deranged individuals from purchasing and possessing weapons.

We do not believe there is a need to change the existing provision in the Consititution. However, if S. J. R. 4 is adopted, we strongly urge that you add a clause to the amendment that will allow the state to continue to regulate the use of firearms, such as "except that this right may be regulated by state law or municipal ordinance".

Sincerely,

William J. Diebels
by me.

Alaska Chapter
National Association of Social Workers

NATIONAL RIFLE ASSOCIATION OF AMERICA

Rupe Andrews
Field Representative
Alaska

9416 Longrun Drive
Juneau, AK 99801
(907) 789-7422
FAX (907) 789-5956

FACSIMILE TRANSMISSION

DATE January 18, 1990

3 PAGES INCLUDING THIS COVER PAGE.

DELIVER TO: Bob Dowlut, General Counsel's Office and ILA-State Affairs.

MESSAGE: Senator Pat Rodey, Alaska State Senate, has asked that I forward the attached version of the proposed Alaska Constitutional amendment marked, proposed by the Administration,for your immediate comment. The proposed amended version dated,November 21, 1989,has been approved by the attorney general's office and therefore removes any objection from the Department of Public Safety and the two, major law enforcement organizations,ie., this version can and most likely will ~~pass the Alaska Legislature this session without further amendment~~. Senator Rodey likes and prefers the original version (HJR-7 and SJR-4) In view of the Nebraska opinion Rodey's resolution should be acceptable to the Administration and law enforcement but most likely for reasons of ego they still oppose the original language. It appears that if we are ~~to have a constitutional amendment this session the proposed version~~ has the best chance of passage. By return FAX please advise.

------NEED IS IMMEDIATE------

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

Copy: Brian Judy, State Liason

DRAFT: November 21, 1989

IN THE HOUSE BY THE STATE AFFAIRS COMMITTEE

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

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SESSION

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

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

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

SECTION 19. RIGHT TO <u>KEEP AND</u> BEAR ARMS. <u>The individual</u> [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 <u>denied or</u> infringed <u>by the state or a political subdivision of the state except that the exercise of this right may be reasonably regulated by law. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms.</u>

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

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

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

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

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

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

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

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

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

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

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

Proposed by the Administration.

DRAFT: November 21, 1989

IN THE HOUSE . BY THE STATE AFFAIRS COMMITTEE

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

NATIONAL RIFLE ASSOCIATION OF AMERICA
INCORPORATED 1871

1600 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20036

RUPE ANDREWS
FIELD REPRESENTATIVE
ALASKA

9416 LONGRUN DRIVE
JUNEAU AK 99801
907/789-7422

Affix to file!

M E M O R A N D U M

TO: Senator Pat Rodey
Representative Dave Donley

DATE: November 28, 1989

SUBJECT: SJR-4, HJR-7 Amendments

FROM: Rupe Andrews
NRA Field Representative

Attached is a proposed amendment to SJR-4 and HJR-7. This amendment was discussed recently between Laurie Otto, Assistant AG, Criminal Division, and myself. As you are aware, Laurie Otto is de facto the liaison between the law enforcement groups, APOA and Alaska Chiefs of Police Association, and the administration. An agreement between yourselves and Laurie Otto is tantamount to non-objection from the administration and state law enforcement organizations re the constitutional amendment.

There are several points to consider in the amended proposal. First, the amendment provides a pre-emption of local firearm ordinances regarding individual ownership. Cities retain an exception as to discharge. Secondly, it provides a constitutional guarantee that the State will not impose any special registration, licensure or taxes. These are positive points to consider.

The amendment provides for "reasonable" regulation of firearm ownership, purchase, bearing and use under state statute. NRA has always supported reasonable regulation of firearms. NRA is just as concerned as every citizen should be that criminals, juveniles, alcoholics or those persons adjudged mentally incompetent not be able to purchase or possess firearms. The original position of NRA counsel is that reasonable regulation of firearms is understood in the introduced versions of SJR-4 and HJR-7. This was challenged by the Attorney General's office, the Department of Public Safety, and law enforcement organizations. Laurie Otto has advised that the proposed amendment will satisfy the concerns expressed by the foregoing.

If you agree to this amendment we can get the constitutional amendment on a fast track and through this session, providing no further problems arise. The amendment does take care of the major concerns expressed earlier by law enforcement while clearly protecting the right of the individual to own, possess and lawfully use firearms.

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

OFFICE OF THE
GENERAL COUNSEL

February 17, 1989

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

RE: Letter of January 29, 1989, from Laurie H. Otto, Assistant Attorney General

Dear Senator Faiks:

I have reviewed the above referenced letter. I shall cite but a few examples to demonstrate that its concerns are mistaken.

The letter argues that the Alaska Supreme Court takes a unique view of the state constitution, especially with the right to privacy. The issue of arms and privacy has already been addressed. In State v. Weaver, 736 P.2d 781 (Alaska App. 1987), the court upheld a statute which makes it a felony to possess a gravity knife in one's home despite an argument that such a statute is violative of the right to privacy under Article I, §22 of Alaska's Constitution. The decision in Ravin v. State, 537 P.2d 494 (Alaska 1975), was distinguished by the court in Weaver.

A West Virginia case is cited as proof that present Alaska law would be vulnerable if the proposed arms guarantee were adopted. West Virginia Code §61-7-1 makes it unlawful to carry openly or concealed a pistol, club, or knife unless a person has a license. West Virginia Code §61-7-2 establishes the plutocratic criteria for obtaining a license. A $5,000 bond has to be posted and a $50 fee must be paid. Moreover, the issuance of a license is discretionary because the statute uses the term "may". The court in State of West Virginia ex rel. City of Princeton v. Buckner, ___ S.E.2d ___ (West Virginia Sup. Ct. No. CC972, July 1, 1988), held that the statute is overbroad and violative of the right to bear arms guarantee. On page 16 of the slip opinion, the court cited numerous cases as examples of permissible regulation. These cases include laws forbidding convicted felons from having arms, carrying arms concealed, and carrying arms into a place where alcohol is sold. It was the opinion of the court that regulation is permissible so long as it does not broadly stifle the exercise of this right. The plutocratic approach to gun control has been voided in the past. See State v. Kerner, 181 N.C. 574, 107 S.E. 222 (1921). In Kerner the court struck down a law which required the posting

of a large bond before a person could obtain a gun carrying license. Kerner noted that it is common knowledge that such laws were enacted to disarm the common man.

The claim that West Virginia expanded its right to keep and bear arms is erroneous. Prior to the 1986 amendment, West Virginia had no specific guarantee to bear arms. It must also be remembered that Mr. McNeely was the chief opponent of the arms guarantee in West Virginia.

A claim is made that the Rhode Island guarantee to bear arms, which closely resembles the proposed guarantee in Alaska, has never been construed. State v. Storms, 112 R.I. 121, 308 A.2d 463 (1973), upheld a statute prohibiting carrying a pistol without a license except in one's home, place of business or upon land possessed by him. That case is cited in Dowlut & Knoop, State Constitutions and the Right to Keep and Bear Arms, 7 Okl. Univ. L. Rev. 177, 225 n.220 (1982).

The letter cites People v. Ford, 568 P.2d 26 (Colo. 1977), for the proposition that a statute forbidding felons to have guns has been declared unconstitutional. Ford raised the affirmative defense of self-protection, and his wife also testified "that the three pistols and one rifle in question were all kept by her and her husband in their bedroom for her protection." Ford simply recognizes that self-defense may be raised as an affirmative defense to such a charge. This is well-settled law. See United States v. Panter, 688 F.2d 268 (5th Cir. 1982). Federal law forbids convicted felons to possess any firearm or ammunition. 18 U.S.C.A. §922(g) (1988 Pocket Part). Nevertheless, Panter, like all other courts, has recognized self-defense as a narrow affirmative defense to such a charge. Other courts define such an affirmative defense as the defense of necessity. The exact scope of this defense has not been uniformily decided.

Colorado's felon with a gun statute has been found not to violate the right to bear arms under the state constitution. People v. Blue, 544 P.2d 385 (Colo. 1975); People v. Taylor, 544 P.2d 392 (Colo. 1975); People v. Bergstrom, 544 P.2d 396 (Colo. 1975) (there the sentence was life under a habitual offender statute). The statute has also survived equal protection challenges under the state and federal constitutions. People v. Trujillo, 497 P.2d 1 (Colo. 1972). It also survived an equal protection and second amendment challenge. People v. Marques, 498 P.2d 929 (Colo. 1972). Possessing a firearm while under the influence of alcohol or drugs may also be constitutionally prohibited. People v. Garcia, 595 P.2d 228 (Colo. 1979).

The Attorney General's letter claims that Alabama only forbids violent felons from having guns. On the surface, the Alabama statute forbids persons convicted of a crime of violence from possessing a gun. However, a review of the statutory definition reveals that the term "crime of violence" also includes "larceny". The courts have sustained the conviction of a person possessing a gun subsequent to a larceny conviction.

Article I, §32 of the Indiana Constitution guarantees a right to bear arms. It makes no mention of regulation. In Schubert v. DeBard, 73 Ind. Dec. 510, 398 N.E.2d 1339 (Ct. App. 1980), the court held that self-protection is constitutionally a proper reason for obtaining a license. A license must be issued to any suitable person. However, because of Schubert's odd behavior, the court reversed and remanded the case back to the trial court because "there was conflicting evidence on Schubert's suitability to be licensed and that those issues were not attempted to be resolved in the original determination." 398 N.E.2d at 1341. Therefore, while the right to bear arms guarantee mandates the issuance of a license, it does not prevent the denial of a license to a person who is found to be unsuitable by virtue of criminal convictions or mental problems.

A claim is made that the Anchorage ordinance would be struck down because of the proposed amendment. One of my law review articles is cited as authority for this claim. Reliance on that article to strike down a concealed carrying ordinance is misplaced because the passage reads as follows: "The specific boundaries of this right indicate that the open peaceful carrying in one's business place, vehicle, or on a public street in the ordinary course of one's travels cannot be prohibited. The concealed carrying of arms in the home should be protected, especially since the home is specifically mentioned in the guarantees. Obviously the ends to be served by the guarantee would not be defeated or called into question by a prohibition against carrying arms while drunk, or to a polling place, court, church, or public assembly, or in a manner calculated to inspire terror." Dowlut & Knoop, State Constitutions and the Right to Keep and Bear Arms, 7 Okl. City Univ. L. Rev. 177, 220-21 (1982) (emphasis added).

One of my law review articles is again cited for the proposition that felons charged with drug dealing and bootlegging, which are not "common law felonies", could legally carry weapons. Again, this is an erroneous reading. The quote in the law review article clearly covers drug offenses because they require some state of mind above strict liability and are inherently inimical to life. They are not offenses of strict

liability because the standard jury instruction for possessing drugs requires that the possession be a knowing possession. An act is done knowingly if done voluntarily and purposely and not because of mistake, inadvertence, or accident. It is well settled law that the due process clause places limits on which offenses may be classified as felonies. See United States v. Wulff, 758 F.2d 1121 (6th Cir. 1985).

A claim is made that Alaska's hunting laws could be violated. Courts from sister states have held to the contrary. State v. Barnhardt, 67 Or. App. 771, 680 P.2d 7 (1984); State v. Rathbone, 110 Mont. 225, 100 P.2d 86 (1940) (state has right to prohibit absolutely killing of game animals, but a game animal may be killed in self-defense).

In summation, it is worth remembering the following: "We stress again, as we have stressed before, that this decision does not mean individuals have an unfettered right to possess or use constitutionally protected arms in any way they please. The legislature may, if it chosses to do so, regulate possession and use." State v. Delgado, 692 P.2d 610, 614 (Or. 1984).

I trust that this response will clear up some of the claims in the letter from the Attorney General's Office. Hopefully, my letter will help enable the Senate to make its decision after a complete airing of all views on this issue. However, I am flattered that the Attorney General feels I should be promoted to General Counsel of the National Rifle Association.

With all kind wishes, I am,

Sincerely yours,

Robert Dowlut

Robert Dowlut
Deputy General Counsel

RD:sep

NATIONAL RIFLE ASSOCIATION OF AMERICA
INCORPORATED 1871

1600 RHODE ISLAND AVENUE, N.W.
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WHY DOES ALASKA NEED A FIREARMS PRE-EMPTION LAW?

The right to keep and bear arms is at the forefront of the various emotional issues that currently confront our society. Legislators, judges and bureaucrats at all levels of government — federal, state and local — are being called upon by citizens who wish to see this right expanded or restricted.

One underlying question is at what level should such legislation occur. The National Rifle Association has traditionally believed that the government most representative of the people is best. The explosion over the past few years of local ordinances that are more restrictive than current state law has, however, created the need for the states to pre-empt these local actions. Such legislation will prevent a hodgepodge of varying gun laws within a state, and thereby protect the law-abiding citizen not only from unwitting violation of the law, but also from arbitrary infringements of his or her rights. Indeed, in enacting pre-emption legislation, thereby expressly preventing local governments from infringing the rights of citizens and effectively eliminating the need for citizens to undertake costly litigation to protect their rights, state legislators fulfill their constitutional duty to protect the rights of citizens.

A state firearms pre-emption law will guarantee to the citizens of your state their right to own and use firearms for legitimate purposes based on state statutes and federal law.

Federal Law

Many people do not realize the full extent of federal law. Under the Gun Control Act of 1968 and as amended by the McClure-Volkmer Amendments (May 19, 1986), anyone convicted of a felony, adjudicated mentally defective, or addicted to drugs is prohibited from owning, purchasing or receiving or transporting any firearms or ammunition. The Gun Control Act also bans mail order sales of firearms by other than federally licensed dealers and requires that the sale of handguns is restricted to residents of the same state of the purchaser and seller.

Federal law also requires persons engaged in the business of dealing in firearms to be federally licensed. Dealers must

require from all firearms purchasers proof of identity and residence, and buyers must sign, under penalty of perjury, a statement certifying eligibility to purchase. Dealers are required to keep records of all firearms sales and are forbidden from selling handguns to persons under 21 or rifles and shotguns to persons under 18. Additionally, dealers are prohibited from making any sale of firearms or ammunition which would place the buyer in violation of state or local law.

The History of Firearms Pre-Emption Legislation

The first pre-emption firearms law was passed in the late 1960s, when, in response to the assassinations and urban rioting of that time, a number of localities passed "gun control" measures. Recognizing that these ordinances were based on emotional response rather than logical efforts to control crime, citizens of California and Pennsylvania led the way in enacting firearms pre-emption statutes. Today, some 15 states have firearms pre-emption either by statute or by legal precedent including: Alabama, Arizona, California, Indiana, Maryland, Massachusetts, Minnesota, New Jersey, New York, North Dakota, Pennsylvania, South Dakota, Virginia, Washington and West Virginia.

The Problem Behind Local Firearms Laws

The renewed popularity in passing local ordinances effecting gun ownership has triggered a great debate over the benefits of local rule on this issue. Clearly, all legislation — whether federal, state, or local — must be designed to ensure uniform and nondiscriminatory access to the rights and privileges of the citizenry as guaranteed by the U.S. and State Constitutions. Yet, a close look at the passage of the Morton Grove, Illinois, handgun ban, the most infamous of these local ordinances, proves beyond doubt that local firearms legislation does not guarantee this. In passing their ban, the Morton Grove Village Trustees were acting in defiance of a majority of the village citizenry as the opponents of the measure greatly outnumbered supporters at all public hearings on the ban. Morton Grove was acting not to control crime, which was minimal in the village, but rather to gain the attention of national media and to create a situation of harassment for individual firearms owners. Their gimmick worked! Today, Morton Grove is almost a household word and it is estimated that close to a thousand formerly law-abiding citizens are now technically "criminals" for exercising a right guaranteed by both the U.S. and the Illinois Constitutions.

The local intent to harass gun owners and sportsmen, rather than control crime, is even more apparent in the recent actions of the Friendship Heights (Maryland) Township. This tiny

community on the outskirts of Washington, D.C., originally attempted to ban possession of all handguns. The Montgomery County Council refused, however, to consider the proposal because it was a clear violation of the Maryland State Firearms Pre-Emption Statute. Friendship Heights then attempted to subvert state law by passing a complete ban on possession of all ammunition. Possession of ammunition for self-defense would have been outlawed, and anyone passing through Friendship Heights with a single bullet could have been subject to arrest and conviction — a $500 fine for the first offense and up to six months in jail for the second offense.

The attempted F.H. bullet ban was defeated by the county council; Montgomery County, nonetheless, ultimately passed an ordinance which will prohibit the purchase of ammunition unless a firearm registration certificate is produced, although registration is not required in Maryland. While Councilman David Scull claims it is a symbolic step toward gun control at the state and federal level, in reality, this ordinance "is an abysmal waste of governmental energy and corrodes the respect without which law is a husk." (*The Washington Times*, June 20, 1983)

In response to this ban and other similar restrictive ordinances, a number of local jurisdictions have gone in the opposite direction and required all individuals or household heads to own a firearm. The NRA does not condone these mandatory ownership ordinances because we believe it is an individual's choice whether or not to possess a firearm.

How Can Pre-Emption Help?

Local firearms legislation serves only to create a crazy quilt of laws, resulting in gun owners running the risk of arrest, prosecution and confiscation of personal property for unwitting violation of local law by transporting a gun for sporting or other legitimate purposes across city or county lines. Such legislation clearly interferes with the "uniform application of laws" as citizens from one city are treated differently from citizens of another. Such legislation also puts an undue burden on the nation's 28 million hunters and 7 million competitive shooters who would be required to know the firearms laws of each various city and county they may pass through on their way to hunting areas or shooting matches.

We are greatly concerned by this eruption of hostile camps of "pro-gun" and "anti-gun" localities in states who do not have firearms pre-emption legislation. A state firearms pre-emption law will curtail this movement and ensure that state law will be enforced uniformly through the state on an equal basis.

Charges Stand in Both Cases

2 Judges Disarm Felons' Gun Defense

By Jeff Gauger
World-Herald Staff Writer

Two more judges in Omaha have shot down convicted felons' attempts to fight gun charges by using the new right-to-bear-arms amendment to the Nebraska Constitution.

In decisions made public Friday, District Judges James Buckley and Stephen Davis rejected defense requests to throw out criminal charges against men charged with being felons in possession of guns. The Davis case involved a man who also was charged with possessing a sawed-off shotgun.

Buckley ruled in the case of Dwayne Hill, a convicted burglar, and Davis in the case of Charles Bunton, previously convicted in connection with a robbery and for possessing burglar tools.

Different in North Platte

Attorneys for Hill and Bunton had argued that Initiative 403, approved by Nebraska voters in November, took away the Legislature's authority to limit gun ownership through state law. The attorneys said their clients were being prosecuted for acts that could no longer be declared illegal.

Buckley and Davis joined Douglas County District Judge Robert Burkhard, who on Feb. 23 became the first judge in Omaha to rule on the legal questions arising from Initiative 403. All three judges ruled alike.

Two judges in North Platte, Neb., have ruled differently, saying the right-to-bear-arms amendment made some state gun laws unconstitutional.

Initiative 403 added language to the Nebraska Constitution that guarantees the right to keep and bear arms for security, defense, hunting, recreation and "all other lawful purposes." The amendment concludes with this phrase: "and such rights shall not be denied or infringed by the state or any subdivision thereof."

In an eight-page order rejecting the request by attorney Thomas Hickey to dismiss charges against Bunton, Buckley wrote, "The most fundamental, natural and inherent rights constitutionally recognized are not absolute or unlimited, but may be restricted by the State in the exercise of its police power for the good order of society and the protection of its citizens."

Similar Rulings

Buckley's ordered noted that state supreme courts in North Dakota, Colorado, Louisiana and Wyoming have ruled similarly.

He also wrote that the gun amendment carries the same weight as constitutional guarantees of life and liberty. Under the defense argument, Buckley said, the death penalty and imprisonment also would have to be declared unconstitutional.

Judge Davis rejected the defense request with four words — "motion to dismiss overruled" — scribbled in ink on a court document and followed by his initials. Attorney Scott Sladek had asked Davis to dismiss the charge against Hill.

Both judges entered their orders Thursday, but the orders were not released until a day later.

In North Platte, District Judges John P. Murphy and Don E. Rowlands II have sided with defendants who argued that they could not be prosecuted because of the right-to-bear-arms amendment.

NRA Criticism

Rowlands said felons can no longer be barred from having guns, while Murphy said people cannot be prosecuted for filing the serial number off a gun.

State and county prosecutors have asked the Nebraska Supreme Court to reverse the Rowlands and Murphy decisions, but the high court has not said whether it will take the case. It has discretion in these cases because both involve questions that arose before a trial.

Representatives of the National Rifle Association, which wrote and promoted Initiative 403, have criticized defense tactics that use the amendment to fight gun charges. Others, including State Sen. Brad Ashford of Omaha, have said the amendment should be repealed.

Meanwhile, different interpretations of the right-to-bear-arms amendment's impact on state gun laws remain in effect in different jurisdictions.

In North Platte and the eight counties of the 13th Judicial District, the Rowlands and Murphy interpretation reigns, and prosecutors are stymied. In Douglas County, three judges have sided with prosecutors.

Attorneys said similar defense requests are pending before three other judges in Douglas County: District Judges John Clark, Donald Hamilton and James Murphy. Douglas County has 12 district court judges.

STATE CONSTITUTIONAL GUARANTEES ON THE RIGHT TO KEEP AND BEAR ARMS

Forty-one (41) states have constitutional guarantees on the right to keep and bear arms.

Alabama: That every citizen has a right to bear arms in defense of himself and the state. Article I, Section 26.

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

Arizona: The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men. Article 2, Section 26.

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

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

Connecticut: Every citizen has a right to bear arms in defense of himself and the state. Article I, Section 15.

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

Georgia: The right of the people to keep and bear arms, shall not be infringed, but the General Assembly shall have the power to prescribe the manner in which arms may be borne. Article I, Section I, para. VIII.

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

Idaho: The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person, nor prevent passage of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent passage of legislation providing penalties for the possession of firearms by a convicted

felon, nor prevent the passage of legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition. Nor shall any law permit the confiscation of firearms, except those actually used in the commission of a felony. Article I, Section 11.

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

Indiana: The people shall have a right to bear arms, for the defense of themselves and the State. Article I, Section 32.

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

Kentucky: All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: *** 7. The right to bear arms in defense of themselves and of the state, subject to the power of the general assembly to enact laws to prevent persons from carrying concealed weapons. Kentucky Bill of Rights, Section I, para. 7.

Louisiana: The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person. Article I, Section 11.

Maine: Every citizen has a right to keep and bear arms for the common defense; and this right shall never be questioned. Article I, Section 16.

Massachusetts: The people have a right to keep and bear arms for the common defense. And as, in times of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it. Massachusetts Declaration of Rights, Part I, Article XVII.

Michigan: Every person has a right to keep and bear arms for the defense of himself and the state. Article I, Section 6.

Mississippi: The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power where thereto legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons. Article 3, Section 12.

Missouri: That the right of every citizen to keep and bear

arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed weapons. Article I, Section 23.

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

Nevada: Every citizen has the right to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes. Art. 1, Section II, para. 1.

New Hampshire: All persons have the right to keep and bear arms in defense of themselves, their families, their property, and the state. Part First, Art. 2-a.

New Mexico: No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons. No municipality or county shall regulate, in any way, an incident of the right to keep and bear arms. Article II, Section 6.

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

North Dakota: All individuals are by nature equally free and independent and have certain inalienable rights, among which are ... to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreatnal, and other lawful purposes, which shall not be infringed. Article I, Section 1.

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

Oklahoma: The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the

Legislature from regulating the carrying of weapons. Article 2, Section 26.

Oregon: The people shall have the right to bear arms for the defence of themselves, and the State, but the Military shall be kept in strict subordination to the civil power. Article I, Section 27.

Pennsylvania: The right of the citizens to bear arms in defence of themselves and the State shall not be questioned. Article I, Section 21.

Rhode Island: The right of the people to keep and bear arms shall not be infringed. Article I, Section 22.

South Carolina: A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed. As, in times of peace, armies are dangerous to liberty, they shall not be maintained without the consent of the General Assembly. The military power of the State shall always be held in subordination to the civil authority and be governed by it. No soldier shall in time of peace be quartered in any house without the consent of the owner nor in time of war but in the manner prescribed by law. Article I, Section 20.

South Dakota: The right of the citizens to bear arms in defense of themselves and the state shall not be denied. Article VI, Section 24.

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

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

Utah: The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the State, as well as for the other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms. Article I, Section 6.

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

Virginia: That a well regulated militia, composed of the

body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power. Article I, Section 13.

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

West Virginia: A person has the right to keep and bear arms for the defense of self, family, home, and state, and for lawful hunting and recreational use. Article III, Section 22.

Wyoming: The right of citizens to bear arms in defense of themselves and of the state shall not be denied. Article I, Section 24.

STATES WITHOUT CONSTITUTIONAL PROVISIONS:

Nine (9) states do not have a constitutional provision on arms: California, Delaware, Iowa, Maryland, Minnesota, Nebraska, New Jersey, New York, and Wisconsin.

§ 10. Right of assembly. — The people shall have the right to assemble in a peaceable manner, to consult for their common good; to instruct their representatives, and to petition the legislature for the redress of grievances.

Comp. provisions: Cal. Art. 1, § 3.
Mont. Art. 2, § 26.
Ore. Art. 1, § 26.
Wyo. Art. 1, § 21.

ANALYSIS

Deprivation of right.
Newspaper report of assembly.

Deprivation of Right.

Labor union was not deprived of right of assembly, contrary to this section, where it was enjoined from picketing and displaying sign which announced that plaintiff's store was unfair to labor union where the employees of the store did not belong to the union, did not participate in picket line, and were not involved in any labor dispute with the plaintiff. J. J. Newberry Co. v. Retail Clerks Int'l Ass'n, 78 Idaho 85, 298 P.2d 375 (1956), rev'd, 352 U.S. 987, 77 S. Ct. 386, 1 L. Ed. 2d 367 (1957).

The assembly of defendants for the purpose of threatening other persons with assault and battery after an automobile chase of such persons by defendants across a state line and through the city streets was not an assembly in a peaceable manner within the protection of this section. Lowiston v. Frary, 91 Idaho 322, 420 P.2d 805 (1966).

Newspaper Report of Assembly.

Newspapers had a conditional privilege to publish with accuracy the proceedings of a public gathering called for the purpose of inducing a district judge to call a grand jury. Borg v. Boas, 231 F.2d 788 (9th Cir. 1956).

Collateral References. Discussion of this section in constitutional convention. Constitutional Convention Proceedings, Vol. I, p. 281; Vol. II, p. 1695.

16A Am. Jur. 2d, Constitutional Law, §§ 526-532.

16 C.J.S. Constitutional Law, § 214.

Constitutional questions involved in conviction based on failure or refusal to obey police officer's order to move on, on street. 65 A.L.R.2d 1152.

Participation of student in demonstration on or near campus as warranting imposition of criminal liability for breach of peace, disorderly conduct, trespass, unlawful assembly, or similar offense. 32 A.L.R.3d 551.

Peaceful picketing of private residence. 42 A.L.R.3d 1353.

§ 11. Right to keep and bear arms. — The ~~people have the~~ right to keep and bear arms, ~~which right~~ shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage of any legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition. Nor shall any law permit the confiscation of firearms, except those actually used in the commission of a ~~felony~~ crime.

Compiler's notes. As originally adopted, this section read as follows:

"§ 11. Right to bear arms. — 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." This section was amended as proposed by S.J.R. No. 116 (S.L. 1978, p. 1031) and ratified at the general election on November 7, 1978, to read as it now appears.

Cross ref. Fish and game law, restrictions on carrying uncased shotguns and rifles, § 36-401.

Comp. provisions: Mont. Art. 2, § 12.
Ore. Art. 1, § 27.
Utah. Art. 1, § 6.
Wyo. Art. 1, § 24.

Cited in: Fall Creek Sheep Co. v. Walton, 24 Idaho 760, 136 P. 438, 1915C Ann. Cas., 1252 (1913).

ANALYSIS

Legislative regulation.
Municipal regulations.

West Virginia Opinion

COPY

NO. CC972

FILED

JUL 1 1988

STATE OF WEST VIRGINIA
EX REL. CITY OF PRINCETON

V.

HAROLD L. BUCKNER, MAGISTRATE
OF MERCER COUNTY

Mercer County

Certified questions answered.

McHugh, Chief Justice

1. "Where a provision of a constitution is clear in its terms and of plain interpretation to any ordinary and reasonable mind, it should be applied and not construed." Syl. pt. 3, State ex rel. Smith v. Gore, 150 W. Va. 71, 143 S.E.2d 791 (1965).

2. W. Va. Code, 61-7-1 [1975], the statutory proscription against carrying a dangerous or deadly weapon, is overbroad and violative of article III, section 22 of the West Virginia Constitution, known as the "Right to Keep and Bear Arms Amendment." It infringes upon the right of a person to bear arms for defensive purposes, specifically, defense of self, family, home and state, insofar as it prohibits the carrying of a dangerous or deadly weapon for any purpose without a license or other statutory authorization.

3. "The police power is the power of the state, inherent in every sovereignty, to enact laws, within constitutional limits, to promote the welfare of its citizens. The police power is difficult to define precisely, because it is extensive, elastic and constantly evolving to meet new and increasing demands for its exercise for the benefit of society and to promote the general welfare. It embraces the power of the state to preserve and to promote the general welfare and it is concerned with whatever affects the peace, security, safety, morals, health and general welfare of the community. It cannot be circumscribed within narrow limits nor can it be confined to precedents resting alone on conditions of the past. As society becomes increasingly complex and as advancements are made, the police power must of necessity evolve, develop and expand, in the public interest, to meet such conditions." Syl. pt. 5, State ex rel. Appalachian Power Co. v. Gainer, 149 W. Va. 740, 143 S.E.2d 351 (1965).

4. The West Virginia 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 article III, section 22 of the West Virginia Constitution, known as the "Right to Keep and Bear Arms Amendment."

McHugh, Chief Justice:

This action is before this Court upon two certified questions from the Circuit Court of Mercer County. This action concerns the constitutionality of W. Va. Code, 61-7-1 [1975], relating to the carrying of certain types of dangerous or deadly weapons without a license, in light of the adoption of article III, section 22 of the West Virginia Constitution, commonly referred to as "The Right to Keep And Bear Arms Amendment," and whether the legislature may reasonably regulate the right of a person to keep and bear arms in West Virginia. This Court has before it the petition for appeal, all matters of record and the briefs and argument of counsel.[1]

I

The facts in this case are uncontroverted. On March 10, 1987, a municipal police officer in the City of Princeton, in Mercer County, stopped a vehicle and arrested the driver for driving under the influence of alcohol. After searching the driver, the policeman discovered a .22 caliber automatic pistol inside the driver's jacket pocket. The driver was then asked to produce a license allowing him to carry such a weapon, and he subsequently advised the police officer that he did not have such a license.

The police officer presented these facts to a duly elected magistrate of Mercer County, and sought a warrant for the driver's arrest for the DUI offense. The respondent

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[1]This Court also has before it the brief of amicus curiae filed by the National Rifle Association of America.

advised the officer that he would not issue a warrant for carrying a dangerous and deadly weapon against the driver, based upon the magistrate's conclusion that W. Va. Code, 61-7-1 [1975] violated article III, section 22 of the West Virginia Constitution.

The prosecuting attorney then filed a writ of mandamus in the Circuit Court of Mercer County requesting the court to compel the magistrate to issue a warrant against the driver for carrying a dangerous or deadly weapon without a license in violation of W. Va. Code, 61-7-1 [1975].

After a hearing on the matter, the circuit court concluded that when comparing W. Va. Code, 61-7-1 [1975] and W. Va. Const. art. III, § 22, the statute was in conflict with the subsequently adopted constitutional provision. The court further concluded that article III, section 22 of the State Constitution voided that part of W. Va. Code, 61-7-1 [1975] dealing with the carrying of firearms without a license. The court concluded that the legislature may, in some fashion, regulate the right to keep and bear arms so as not to conflict with W. Va. Const. art. III, § 22.

The court then certified the matter to this Court. The following questions were certified:

> 1. Is W. Va. Code Chapter 61, Article 7, Section 1 constitutional in light of the subsequent adoption of Article 3, Section 22 of the Constitution of West Virginia?
>
> 2. May the Legislature of the State of West Virginia by proper legislation regulate the right of a person to keep and bear arms in the State of West Virginia?

II

This case involves the interpretation of article III, section 22 of the West Virginia Constitution and its effect on the constitutionality of the state's weapons statute, W. Va. Code, 61-7-1 [1975], which prohibits the carrying of a dangerous or deadly weapon without a license.[2] Because both of the questions certified to this Court are so closely associated, we choose to discuss them together.

Article III, section 22 of the West Virginia Constitution was approved by the voters of this State on November 4, 1986, and succinctly states: "A person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use."

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[2]W. Va. Code, 61-7-1 [1975] provides in pertinent part:

> If any person, without a state license therefor or except as provided elsewhere in this article and other provisions of this Code, carry about his person any revolver or pistol, dirk, bowie knife, slung shot, razor, billy, metallic or other false knuckles, or other dangerous or deadly weapon of like kind or character, he shall be guilty of a misdemeanor, and, upon conviction thereof, shall be imprisoned in the county jail not less than six nor more than twelve months for the first offense; but upon the conviction of the same person for the second offense in this State, he shall be guilty of a felony, and, upon conviction thereof, shall be imprisoned in the penitentiary not less than one nor more than five years, and, in either case, shall be fined not less than fifty dollars nor more than two hundred dollars[.]

The State of West Virginia has had a long history or statutory provisions regulating the use of weapons. See generally McNeely, The Right of Who to Bear What, When, and Where-- West Virginia Firearms Law v. The Right-to-Bear-Arms Amendment, 89 W. Va. L. Rev. 1125, 1127-41 (1987).[3] An 1882 statute is actually the first statutory provision which is similar to the statute now before us, W. Va. Code, 61-7-1 [1975]. 1882 W. Va. Acts ch. 135, § 7.[4]

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[3]A comprehensive discussion of the statutory, common law and general historic backdrop surrounding this amendment, as well as its possible impact on existing weapons statutes is detailed in this law review article.

[4]The 1882 statute, found in chapter 135, section 7 of the acts of the West Virginia Legislature provided as follows:

> If a person carry about his person any revolver or other pistol, dirk, bowie knife, razor, slung shot, billy, metalic or other false knuckles, or any other dangerous or deadly weapon of like kind or character, he shall be guilty of a misdemeanor, and fined not less than twenty-five nor more than two hundred dollars, and may, at the discretion of the court, be confined in jail not less than one, nor more than twelve months; and if any person shall sell or furnish any such weapon as is hereinbefore mentioned to a person whom he knows, or has reason, from his appearance or otherwise, to believe to be under the age of twenty-one years, he shall be punished as hereinbefore provided; but nothing herein contained shall be so construed as to prevent any person from keeping or carrying about his dwelling house or premises any such revolver or other pistol, or from carrying the same from the place of purchase to his dwelling house, or from his dwelling house to any place where repairing is done, to have it repaired, and back again. And if upon the trial of an indictment for carrying any such pistol, dirk, razor or bowie knife, the

(Footnote Continued)

The 1882 statutory provision was interpreted by this Court in State v. Workman, 35 W. Va. 367, 14 S.E. 9 (1891). The Court in Workman considered several issues regarding the right to bear arms, including the constitutional right to self-defense, the constitutionality, under the due process clause, of the weapons statute in effect in West Virginia at that time and the definition of the term "arms" in the context of the second amendment to the United States Constitution.[5]

(Footnote Continued)

> defendant shall prove to the satisfaction of the jury that he is a quiet and peaceable citizen, of good character and standing in the community in which he lives, and at the time he was found with such pistol, dirk, razor or bowie knife, as charged in the indictment, he had good cause to believe and did believe that he was in danger of death or great bodily harm at the hands of another person, and that he was, in good faith, carrying such weapon for self defense and for no other purpose, the jury shall find him not guilty. But nothing in this section contained shall be so construed as to prevent any officer charged with the execution of the laws of the state from carrying a revolver or other pistol, dirk or bowie knife.

(emphasis added) We need not address the implications of the impermissible burden shifting to the defendant regarding the possession of arms for self-defense purposes. See syl. pt. 4, State v. Kirtley, 162 W. Va. 249, 252 S.E.2d 374 (1978) (once there is sufficient evidence to create a reasonable doubt that the killing resulted from the defendant acting in self-defense, the prosecution must prove beyond a reasonable doubt that the defendant did not act in self-defense); see also Bowman v. Leverette, 169 W. Va. 589, 595, 289 S.E.2d 435, 439 (1982).

[5]The second amendment to the United States Constitution provides: "A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

Despite language embodied in § 7 of the 1882 weapons statute which on its face appeared to grant the right of self-defense only to persons of "good character," see note 4, supra, the Court in Workman found that there was a constitutional right to self-defense guaranteed to all persons under both the due process clause of the fourteenth amendment to the United States Constitution and article III, section 1 of the West Virginia Constitution. 35 W. Va. at 370-71, 14 S.E. at 10-11.

After recognizing a constitutional right to self-defense, the Court addressed the general intent of the second amendment to the United States Constitution and determined that it involved the protection of keeping and bearing arms as a popular or collective right.[6] 35 W. Va. at 372-73, 14 S.E. at 11. The Court concluded that "to regulate a conceded [constitutional] right is not necessarily to infringe the same." Id at 372, 14 S.E. at 11. In so holding, the Court compared a state's regulation of the right to keep and bear arms to the regulation of the freedoms guaranteed under the first amendment to the United States Constitution. Thus, the Court implied that a

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[6]We note that the Court in Workman interpreted the second amendment as though it was a restriction upon state as well as federal legislation. Id. at 372, 14 S.E. at 11. Of course, since our Court's holding in Workman, the Supreme Court of the United States has determined that the second amendment operates as a restraint solely upon the power of the national government and does not restrict the power of the states to regulate firearms. Miller v. Texas, 153 U.S. 535, 538, 14 S. Ct. 874, 875, 38 L. Ed. 812, 813 (1894). "Workman does not stand for the proposition that the second amendment extends to the states, but is rather a decision assuming, but not holding, that the second amendment did apply to the states." McNeely, supra at 1130 n. 29.

constitutional guarantee or right to keep and bear arms would subject laws regulating protected arms to the same standard of scrutiny given laws regulating first amendment freedoms. McNeely, supra at 1130.

Significantly, the Court in Workman defined the term "arms" in a second amendment context as follows:

> [I]n regard to the kind of arms referred to in the [second] amendment, it must be held to refer to the weapons of warfare to be used by the militia, such as swords, guns, rifles, and muskets--arms to be used in defending the State and civil liberty--and not to pistols, bowie-knives, brass knuckles, billies, and other weapons as are usually employed in brawls, street fights, duels and affrays, and are only habitually carried by bullies, blackguards, and desperadoes, to the terror of the community and the injury of the State.

35 W. Va. at 373, 14 S.E. at 11. Clearly, with this definition, the Court refused to include pistols as a constitutionally protected weapon pursuant to its second amendment analysis.

However, it is important to note that the definition of "arms" presented in Workman focuses on the "well regulated militia" language of the second amendment. No parallel language appears in our state constitutional amendment. Because the second amendment does not operate as a restraint upon the power of states to regulate firearms, supra note 6, the definition of "arms" set forth in Workman is not particularly helpful in the case now before us. Moreover, the broad language embodied in our current Right to Keep and Bear Arms Amendment makes any further reexamination of the Workman definition unnecessary.

In several cases where courts have considered the constitutionality of statutes and ordinances in light of constitutional provisions guaranteeing a right to bear arms for defensive purposes, proscriptive laws infringing on that constitutionally protected right have been voided. See, e.g., City of Lakewood v. Pillow, 180 Colo. 20, 23, 501 P.2d 744, 745-46 (1972) (ordinance prohibiting possession of dangerous or deadly weapon unconstitutionally overbroad where it prohibited activities which under police power could not be reasonably classified as unlawful); In Re Brickey, 8 Idaho 597, 599, 70 P. 609, 609 (1902) (statute prohibiting carrying of weapons in any manner in cities, towns or villages was unconstitutional); People v. Zerillo, 219 Mich. 635, 642, 189 N.W. 927, 929 (1922) (statute prohibiting possession of pistol by unnaturalized foreign born resident unconstitutional because of broad term "person" in the constitutional provision); State v. Delgado, 298 Or. 395, 403-04, 692 P.2d 610, 614 (1984) (constitutional right to bear arms violated by statute prohibiting mere possession and mere carrying of a switchblade knife); State v. Blocker, 291 Or. 255, 261-62, 630 P.2d 824, 827 (1981) (statute prohibiting possession of billy club in public unconstitutional infringement of right to bear arms); State v. Kessler, 289 Or. 359, 372, 614 P.2d 94, 100 (1980) (statute prohibiting possession of billy club in home unconstitutional infringement of right to bear arms); State v. Rosenthal, 75 Vt. 295, 299, 55 A. 610, 611 (1903) (ordinance prohibiting carrying dangerous concealed weapon without written permission of mayor or police chief unconstitutional).

INTENT

The language embodied in art. III, § 22 of our State Constitution is sweeping, and we look to the well established rules of constitutional construction in order to ascertain its meaning.

At the outset we note that "[t]he fundamental principle in constitutional construction is that effect must be given to the intent of the framers of [the constitutional amendment] and of the people who ratified and adopted it." State ex rel. Brotherton v. Blankenship, 157 W. Va. 100, 108, 207 S.E.2d 421, 427 (1973); see also syl. pt. 4, State ex rel. Smith v. Kelly, 149 W. Va. 381, 141 S.E.2d 142 (1965); syl. pt. 4, State ex rel. Morgan v. O'Brien, 134 W. Va. 1, 60 S.E.2d 722 (1948). Unfortunately, no real statement of legislative intent is before us.

Questions of constitutional construction are governed by the same general rules as those applied in statutory construction. State ex rel. Brotherton v. Blankenship, 157 W. Va. 100, 108, 207 S.E.2d 421, 427 (1973). It is a well established principle of constitutional construction that "[w]here a provision of a constitution is clear in its terms and of plain interpretation to any ordinary and reasonable mind, it should be applied and not construed." Syl. pt. 3, State ex rel. Smith v. Gore, 150 W. Va. 71, 143 S.E.2d 791 (1965). See also Rav v. McCoy, ___ W. Va. ___, ___, 321 S.E.2d 90, 92 (1984).

Moreover, a cardinal rule of statutory construction, which of course applies to the construction of constitutional provisions as well, is that a statute, or in this case a constitutional amendment, must be considered in its entirety, with effect given, if possible, to every word

or phrase within the provision. Diamond v. Parkersburg-Aetna Corp., 146 W. Va. 543, 553-54, 122 S.E.2d 436, 443 (1961). A constitutional amendment will supersede any inconsistent portions of antecedent constitutional or statutory provisions, as "'the latest expression of the will of the people.'" State ex rel. Kanawha County Building Commission v. Paterno, 160 W. Va. 195, 203, 233 S.E.2d 332, 337 (1977). (citation omitted)

Because the constitutional provision in the case before us is clear and unambiguous, this Court must apply the amendment rather than construe it. See discussion supra. Thus, the meaning of a phrase or terms would generally be sought in the plain and ordinary meaning of the words themselves. State ex rel. Dunbar v. Stone, 159 W. Va. 331, 334-35, 221 S.E.2d 791, 793 (1976) (and cases cited therein).

W. Va. Code, 61-7-1 [1975] is written as a total proscription of the carrying of a dangerous or deadly weapon without a license or other authorization. W. Va. Code, 61-7-1 [1975] thus prohibits the carrying of weapons for defense of self, family, home and state without a license or statutory authorization. Article III, section 22 of the West Virginia Constitution, however, guarantees that a person has the right to bear arms for those defensive purposes. Thus, the statute operates to impermissibly infringe upon this constitutionally protected right to bear arms for defensive purposes. See City of Lakewood v. Pillow, 180 Colo. at 23, 501 P.2d at 745. We discuss infra the legislature's power to reasonably regulate the exercise of the right to bear arms; however, W. Va. Code, 61-7-1

[1975] prohibits the exercise of this right by infringing upon the constitutional right to bear arms for the defensive purposes guaranteed in the amendment. See In Re Brickey, 8 Idaho at 599, 70 P. at 609.

In considering the constitutionality of a particular statutory proscription against the possession of a certain weapon in public in light of the right to bear arms amendment of the state, the Supreme Court of Oregon determined that the statute was overbroad and therefore unconstitutional. State v. Blocker, 291 Or. 255, 261, 630 P.2d 824, 827 (1981). The court's insightful discussion of the overbreadth doctrine is applicable in this case:

> An 'overbroad' law, as that term has been developed by the United States Supreme Court, is not vague, or need not be. Its vice is not failure to communicate. Its vice may be clarity. For a law is overbroad to the extent that it announces a prohibition that reaches conduct which may not be prohibited. A legislature can make a law as 'broad' and inclusive as it chooses unless it reaches into constitutionally protected ground. The clearer an 'overbroad' statute is, the harder it is to confine it by interpretation within its constitutionally permissible reach.

Id.

Based upon the foregoing, we conclude that the language embodied in W. Va. Code, 61-7-1 [1975] sweeps so broadly as to infringe a right that it cannot permissibly reach, in this case, the constitutional right of a person to keep and bear arms in defense of self, family, home and state, guaranteed by art. III, § 22. Accordingly, W. Va. Code, 61-7-1 [1975], the statutory proscription against carrying a dangerous or deadly weapon, is overbroad and violative of article III, section 22 of the West Virginia

Constitution, known as the "Right to Keep and Bear Arms Amendment." It infringes upon the right of a person to bear arms for defensive purposes, specifically, defense of self, family, home and state, insofar as it prohibits the carrying of a dangerous or deadly weapon for any purpose without a license or other statutory authorization.

The question remains whether the State may reasonably regulate the right of a person to keep and bear arms in this State.[7]

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[7]The principal statute involved in this portion of our discussion is W. Va. Code, 61-7-2 [1988], which delineates the procedures to obtain a license. W. Va. Code, 61-7-2 [1988] provides in pertinent part:

> (a) Any person desiring to obtain a state license to carry any such weapon as is mentioned in the first section of this article, within one or more counties in this state, shall first publish a notice setting forth his name, residence and occupation, and that on a certain day he will apply to the circuit court of his county for such state license. Such notice shall be published as a Class I legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this code, and the publication area for such publication shall be the county in which such person resides. Such notice shall be published at least ten days before such application is made. After the publication of such notice and at the time stated in such notice, upon application to such court, it may grant such license to such person, in the following manner, to wit:
>
> (b) The applicant shall file with such court his application in writing, duly verified, which application shall show, as basic qualifications, as follows:
>
> (1) That such applicant is a

(Footnote Continued)

We stress that our holding above in no way means

(Footnote Continued)
citizen of the United States of America;

(2) That the applicant has been a bona fide resident of this state for at least one year next prior to the date of such application, and of the county sixty days next prior thereto;

(3) That the applicant is over eighteen years of age; that he is a person of good moral character, of temperate habits, not addicted to intoxication, not addicted to the use of any controlled substance, and has not been convicted of a felony or of any offense involving the use on his part of such weapon in an unlawful manner, and shall prove to the satisfaction of the court that he is gainfully employed in a lawful occupation and has been so engaged for a period of five years next preceding the date of his application;

(4) The purpose or purposes for which the applicant desires to carry such weapon, the necessity therefor, and the county or counties in which such license is desired to be effective; and

(5) That the applicant has qualified under minimum requirements for handling and firing such firearms. These minimum requirements are those promulgated by the department of natural resources and attained under the auspices of the department of natural resources: Provided, That the court may waive this requirement in the case of a renewal applicant who has previously qualified.

(c) Upon the hearing of such application the court shall hear evidence upon all matters stated in such application and upon any other matter deemed pertinent by the court, and if such court be satisfied from the proof that there is good reason and cause for such person to carry such weapon, and all of the other conditions of this article be complied with, the court, or

(Footnote Continued)

OREGON

that the right of a person to bear arms is absolute. See cases cited infra at pp. 15-16. Other jurisdictions concluding that state statutes or municipal ordinances have violated constitutional provisions guaranteeing a right to bear arms for defensive purposes, though not specific in what ways this is to be done, have recognized that a government may regulate the exercise of the right, provided the regulations or restrictions do not frustrate the guarantees of the constitutional provision. See, e.g., In Re Brickey, 8 Idaho 597, 599, 70 P. 609, 609 (1902); City of Las Vegas v. Moberg, 82 N.M. 626, 627, 485 P.2d 737, 738 (Ct. App. 1971). Particularly, on three occasions, the Supreme Court of Oregon, in striking statutes as violative of the state's constitutional right to bear arms, has repeatedly stressed

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(Footnote Continued)

> the judge thereof in vacation, may grant such license for such purposes, and no other, as such court, or the judge in vacation, may set out in the license (and the word 'court' as used in this article shall include the circuit judge thereof, acting either in term or vacation); but, before such license shall be effective such person shall pay to the sheriff, and the court shall so certify in its order granting the license, the sum of fifty dollars, and shall also file a bond with the clerk of such court, in the penalty of five thousand dollars, with good security, signed by a responsible person or persons, or by some surety company, authorized to do business in this state, conditioned that such applicant will not carry such weapon except in accordance with his application and as authorized by the court, and that he will pay all costs and damages accruing to any person by the accidental discharge or improper, negligent or illegal use of such weapon or weapons.

that the court's holdings should not be construed to mean that an individual has an "unfettered right" to possess or use constitutionally protected arms in any way they choose. The Oregon court has consistently emphasized that the legislature may regulate such possession and use. State v. Delgado, 298 Or. at 403, 692 P.2d at 614; State v. Blocker, 291 Or. at 259, 630 P.2d at 826; State v. Kessler, 289 Or. at 370; 614 P.2d at 99.

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. See generally State ex rel. Appalachian Power Co. v. Gainer, 149 W. Va. 740, 143 S.E.2d 351 (1965); syl. pt. 5, Farley v. Graney, 146 W. Va. 22, 119 S.E.2d 833 (1960). In syllabus point 5 of Gainer, this Court defines the State's police power as follows:

> The police power is the power of the state, inherent in every sovereignty, to enact laws, within constitutional limits, to promote the welfare of its citizens. The police power is difficult to define precisely, because it is extensive, elastic and constantly evolving to meet new and increasing demands for its exercise for the benefit of society and to promote the general welfare. It embraces the power of the state to preserve and to promote the general welfare and it is concerned with whatever affects the peace, security, morals, health and general welfare of the community. It cannot be circumscribed within narrow limits nor can it be confined to precedents resting alone on conditions of the past. As civilization becomes increasingly complex and as advancements are made, the police power must of necessity evolve, develop and expand, in the public interest, to meet such conditions.

OTHER COURTS

See also Security National Bank & Trust Co. v. First W. Va. Bancorp., Inc., 166 W. Va. 775, 780, 277 S.E.2d 613, 616 (1981).

Our research has revealed that courts throughout the country have recognized that the constitutional right to keep and bear arms is not absolute, and these courts have uniformly upheld the police power of the state through its legislature to impose reasonable regulatory control over the state constitutional right to bear arms in order to promote the safety and welfare of its citizens. See, e.g., Bristow v. State, 418 So. 2d 927, 930 (Ala. Crim. App.), cert. denied (Ala. 1982); People v. Blue, 190 Colo. 95, 102-03, 544 P.2d 385, 390-91 (1975); State v. Rupp, 282 N.W.2d 125, 130 (Iowa 1979); In re Atkinson, 291 N.W.2d 396, 399 (Minn. 1980); State v. Angelo, 3 N.J. Misc. 1014, 1015, 130 A. 458, 459 (1925); State v. Dees, 100 N.M. 252, 254-55, 669 P.2d 261, 263-64 (Ct. App. 1983); Commonwealth v. Ray, 218 Pa. Super. 72, ___, 272 A.2d 275, 279 (1970); Carfield v. State, 649 P.2d 865, 871 (Wyo. 1982). We stress, however, that the legitimate governmental purpose in regulating the right to bear arms cannot be pursued by means that broadly stifle the exercise of this right where the governmental purpose can be more narrowly achieved. City of Lakewood, supra.

At least forty-two jurisdictions have constitutional provisions guaranteeing a right to bear arms; however, most are distinguishable from art. III, § 22 either in their failure to specifically recognize the right to self-defense, or in their express recognition that the constitutional provision is subject to legislative regulation. 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). The State, in the appendix to its brief, cites thirteen states which, like art. III, § 22, grant a rather broad, unrestrictive right to bear arms for the defense of self and the state.[8] With the exception of

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[8]The following is a list of the jurisdictions with constitutional provisions, quoted below, guaranteeing a right to bear arms, which are worded similarly to West Virginia's amendment. Of particular note is the Delaware constitutional provision which is nearly identical to West Virginia's constitutional guarantee, except for the insertion of the word "lawful" before the word "hunting" in the West Virginia amendment.

> Alabama: "That every citizen has a right to bear arms in defense of himself and the state." Ala. Const. art. I, § 26.
>
> Arizona: "The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men." Ariz. Const. art. II, § 26.
>
> Connecticut: "Every citizen has a right to bear arms in defense of himself and the state." Conn. Const. art. I, § 15.
>
> Delaware: "A person has the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use." Del. Const. art. I, § 20.
>
> Indiana: "The people shall have a right to bear arms, for the defense of themselves and the State." Ind. Const. art. I, § 32.
>
> Michigan: "Every person has a right to keep and bear arms for the defense of himself and the state." Mich. Const. art. I, § 6.

(Footnote Continued)

Vermont, which imposes no significant regulation, the

(Footnote Continued)

> New Hampshire: "All persons have the right to keep and bear arms in defense of themselves, their families, their property and the state." N.H. Const. pt. 1, art. 2-a.
>
> Oregon: "The people shall have the right to bear arms for the defence [sic] of themselves, and the State, but the Military shall be kept in strict subordination to the civil power[.]" Or. Const. art. I, § 27.
>
> Pennsylvania: "The right of the citizens to bear arms in defence [sic] of themselves and the State shall not be questioned." Pa. Const. art. I, § 21.
>
> South Dakota: "The right of the citizens to bear arms in defense of themselves and the state shall not be denied." S.D. Const. art. VI, § 24.
>
> Utah: "The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; nothing herein shall prevent the legislature from defining the lawful use of arms." Utah Const. art. I, § 6.
>
> Vermont: "That the people have a right to bear arms for the defence [sic] of themselves and the State--and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to and governed by the civil power." Vt. Const. ch. 1, art. 16.
>
> Washington: "The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed

(Footnote Continued)

remaining jurisdictions regulate the ownership and use of arms in general, particularly handguns.[9]

Again excluding Vermont, certain statutory regulations are common to most of the jurisdictions having constitutional provisions comparable to West Virginia's. For instance, the prohibition against the possession or ownership of handguns by persons previously convicted of a felony or other specified crime is widely accepted.[10] Four states prohibit the open or concealed carrying of handguns without a license or permit; several others specifically prohibit carrying a concealed handgun without a license, while at least one of these jurisdictions, namely, Arizona, further prohibits carrying a handgun in public establishments or certain specified public places.[11]

(Footnote Continued)
body of men." Wash. Const. art. I, § 24.

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

[9]Although Vermont imposes no significant restriction on the carrying of handguns, it nevertheless has regulations prohibiting the possession or carrying of handguns and other deadly weapons with intent to injure another person. Vt. Stat. Ann. tit. 13, § 4003 (1974).

[10]Ala. Code § 13A-11-72 (1982); Conn. Gen. Stat. Ann. § 29-29 (West 1975); Ind. Code Ann. § 35-47-2-3 (Burns 1985); Mich. Comp. Laws Ann. § 28.422 (West Supp. 1988); N.H. Rev. Stat. Ann. § 159:3 (1981); Or. Rev. Stat. § 166.270 (1987); Pa. Stat. Ann. tit. 18, § 6105 (Purdon 1983); S.D. Codified Laws Ann. § 23-7-7.1 (Supp. 1987); Utah Code Ann. § 76-10-513 (Supp. 1987); Wash. Rev. Code Ann. § 9.41.040 (West 1988); Wyo. Stat. § 6-8-104 (1977, 1986).

[11]See, e.g., Ala. Code § 13A-11-52, 13A-11-73 (1982); Ariz. Rev. Stat. Ann. § 13-3102 (Supp. 1987); Conn.
(Footnote Continued)

West Virginia does not regulate the carrying of a weapon on one's own premises nor prohibit the carrying of such weapon to and from places where they may be lawfully used, i.e., target-shooting clubs and hunting grounds. W. Va. Code, 61-7-3 [1987].[12] Pursuant to W. Va. Code,

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(Footnote Continued)
Gen. Stat. Ann. § 29-35 (West Supp. 1988); Ind. Code Ann. § 35-47-2-1 (Burns Supp. 1988); Mich. Comp. Laws Ann. § 28.422, § 750.227 (West Supp. 1988); N.H. Rev. Stat. Ann. § 159:4 (1977); Or. Rev. Stat. § 166.250 (1987); Pa. Stat. Ann. tit. 18, § 6106 (Purdon 1983 and Supp. 1988); S.D. Codified Laws Ann. § 22-14-9 (Supp. 1987); Utah Code Ann. § 76-10-513 (Supp. 1987); Wash. Rev. Code Ann. § 9.41.050 (1988); Wyo. Stat. § 6-8-104 (1977, 1986).

Alabama, Connecticut, Indiana and Michigan are the four jurisdictions which prohibit the unconcealed (or open) or concealed carrying of handguns without a license or permit.

[12] W. Va. Code, 61-7-3 [1987] provides in pertinent part:

> Nothing in this article shall prevent any person from carrying any such weapon as is mentioned in the first section of this article, in good faith and not having felonious purposes, upon his own premises; nor shall anything herein prevent a person from carrying any such weapon, unloaded, from the place of purchase to his home or residence, or to a place of repair and back to his home or residence; . . . nor shall anything herein prevent any member of a properly organized target-shooting club authorized by law to obtain firearms by purchase or requisition from this state, or from the United States for the purpose of target practice, from carrying any revolver or pistol mentioned in this article, unloaded, from his home or place of residence to a place of target practice, and from any such place of target practice back to his home or residence, for using any such weapon at such place of target practice in training and improving his skill in the use of such weapons[.]

61-7-2 [1988], any person desiring to obtain a license to carry a weapon must meet the following requirements: (1) is a citizen of the United States: (2) has been a resident of West Virginia for at least one year next prior to the date of application; (3) is an adult of good moral character and temperate habits; (4) has not been convicted of any felony or handgun offense; (5) has been employed for five years; (6) is qualified to handle handguns; (7) has "good reason and cause" to carry such weapon, and (8) must post a $5000 surety bond.

The regulatory requirements, embodied in W. Va. Code, 61-7-2 [1988], rather than being unique, are for the most part found in the fourteen states with similar constitutional provisions.[13] Of the three states whose constitutional provisions most closely resemble our own, Connecticut, Indiana, and Michigan, two require the licenses to be a United States citizen and resident of the state;[14] all three require that the licensee be of good character or a "suitable person;"[15] two require that the licensee be an

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[13] See, e.g., Ala. Code §§ 13A-11-72 to -75, as amended; Conn. Gen. Stat. Ann. §§ 29-28,-29,-33, as amended; Ind. Code Ann. §§ 35-47-2-3, 35-47-1-7, as amended; Mich. Comp. Laws Ann. §§ 28.422,-.426, as amended; N.H. Rev. Stat. Ann. §§ 159:3,-:6, as amended, Or. Rev. Stat. §§ 166.270,-290, as amended; Pa. Stat. Ann. tit. 18, §§ 6105, 6109, as amended; S.D. Codified Laws Ann. § 23-7-7.1 (Supp. 1987); Utah Code Ann. § 76-10-513 (Supp. 1987); Wash. Rev. Code Ann. § 9.41.070 (1988); Wyo. Stat. § 6-8-104 (1977, 1986).

[14] See Conn. Gen. Stat. Ann. §§ 29-33 and -28, as amended, respectively, and Mich. Comp. Laws Ann. § 28.422 (West Supp. 1988).

[15] Conn. Gen. Stat. Ann. § 29-28 (West 1975); Ind. (Footnote Continued)

adult;[16] all three prohibit possession by persons convicted of a felony;[17] two require that the licensee demonstrate good cause or proper reason to carry a weapon;[18] and one requires that a licensee not be addicted to drugs or alcohol.[19]

It is important to note that the state of Delaware recently adopted a constitutional amendment strikingly similar to our West Virginia provision, see Del. Const. art. I, § 20, quoted in note 8, supra. The Delaware weapons statute, Del. Code Ann. tit. 11, § 1441 (1987) is analogous to our weapons regulations in that it requires an applicant to obtain a license in order to carry a concealed weapon. Similar to W. Va. Code, 61-7-2 [1988], the statute further provides that an applicant be of "full age, sobriety and good moral character" as well as demonstrate that the carrying of such a weapon is necessary for the protection of the applicant himself, his property or both in order to be so licensed.

(Footnote Continued)
Code Ann. § 35-47-2-3 (Burns 1985); Mich. Comp. Laws Ann. § 28.426 (West Supp. 1988).

[16] Ind. Code Ann. § 35-47-2-3 (Burns 1985); Mich. Comp. Laws Ann. 28.422 (West Supp. 1988).

[17] See note 10, supra.

[18] Ind. Code Ann. § 35-47-2-3 (Burns 1985); Mich. Comp. Laws Ann. § 28.426 (West Supp. 1988).

[19] Ind. Code Ann. § 35-47-1-7 (Burns 1985).

We further note that Utah, like West Virginia, requires applicants for a weapon license to have an employment history. Utah Code Ann. § 76-10-513 (Supp. 1987).

Thus, our research reveals that the only requirement unique to West Virginia is that the licensee post a $5000 surety bond.

Based upon the foregoing, we conclude that the right to keep and bear arms guaranteed by W. Va. Const. art. III, § 22 is not unlimited. The individual's right to keep and bear arms and the State's duty, under it police power, to make reasonable regulations for the purpose of protecting the health, safety and welfare of its citizens must be balanced. See People v. Blue, 190 Colo. 95, 102-03, 544 P.2d 385, 390-91 (1975). Accordingly, the West Virginia 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 article III, section 22 of the West Virginia Constitution, known as the "Right to Keep and Bear Arms Amendment." However, 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 in our State Constitution. See City of Lakewood v. Pillow, 180 Colo. 20, 23, 501 P.2d 744, 745 (1972).

For the foregoing reasons, we answer the first certified question in the negative and the second in the affirmative and remand this action to the Circuit Court of Mercer County for further proceedings consistent with this opinion.

Having answered the certified questions, this case is dismissed from the docket of this Court.

Certified questions answered.

SJR

2

SEVENTEENTH LEGISLATURE
SENATE JUDICIARY COMMITTEE BILL FILE

BILL NUMBER: SJR 2 ~~Fisher~~, Amend Const.,
ABBREVIATED TITLE: Repeal of Regulations by Legislature

SPONSER: ~~Fisher~~; Pearce ORIGINAL RECEIVED: 1-22?
WRITTEN REQUEST TO SCHEDULE REC'D: 1-30 FROM: ~~Sen Fischer~~ —
SPONSER'S STATEMENT REC'D: _____ FROM: _____
SECTIONAL ANALYSIS RQST'D: _____ FROM: _____
SECTIONAL ANALYSIS RECEIVED: _____
FISCAL NOTE (ORIGINAL)
RQST'D OF: _____ REC'D FROM: Election DATE: 1-29-91 KB
RQST'D OF: _____ REC'D FROM: Law DATE: 2-5-91 CB
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: Judiciary SECOND: — THIRD: —

COMMITTEE ACTION

DATE:	
Feb 7	Heard - Held over -
April 23	Amended - Moved Do Pass as Amended - Frank, Perley, Holland, Collins yes - Adams absent - 7,
_____	Sent to LHA for final C.S.
April 25 91	Sent to Sen. V Toll
_____	
_____	
_____	
_____	
_____	
_____	
_____	
_____	
_____	
_____	

PERSONS TO BE NOTIFIED OF HEARING

3791

1. SPONSOR ~~Fisher~~/ Sandy Rowsbourn
2. AGENCY Lt Gov.
3. Law
4. Art Peterson -
5. _____
6. _____
7. _____
8. _____
9. _____
10. _____

1980 Rec was Similar - Required a Majority of Each House -
See Proposed Amendment -

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. SJR2

Revision Date: 01/29/91 Department Affected: Office of the Governor - Elections
Title: Amendment to Constitution BRU: Elections
Repeal Regulations by Legislature Component: II - Primary and General Elections
Sponsor: Senator Fischer
Requestor: Judiciary COMPONENT SERIAL NO. 0 0 2 2

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL		2.2*				
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		2.2*				
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		2.2*				
FEDERAL FUNDS						
OTHER						
TOTAL		2.2*				

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: -0-

ANALYSIS: (Attach a separate page if necessary.) * This figure covers cost of inclusion of information about this issue in the Official Election Pamphlet as required by AS 15.58, and programming for DataVote counting of votes cast on this measure. However, only 4 measures can be printed on a single ballot card. Should this measure require printing an additional ballot card, the fiscal impact would be: 53.4.

Prepared By: Linda Edgeworth, Information Officer Phone: 465-4611
Division: Division of Elections Date: 01/29/91
Approved by Commissioner: Cheryl E. Mucksten
Agency: Division of Elections Date: 1-29-90

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Rev 10/90

Alaska State Legislature

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

State Senate

While in Juneau
P.O. Box V
Juneau, Alaska 99811
(907) 465-3791

MEMORANDUM

TO: Senator Rick Halford, Chairman
Senate Judiciary Committee
Senate Judiciary Committee members

FROM: Senator Paul Fischer

SUBJECT: Senate Joint Resolution 2
(repeal of regulations by the legislature)

DATE: February 1, 1991

Background

This proposal for an amendment to the Constitution of the State of Alaska to repeal regulations by the Legislature has been placed on the ballot on three previous occasions. Each time it failed to be approved by the voters. The following chart and past proposition materials are attached for your files.

1980	1984	1986	
58,808	91,174	65,176	Yea's
82,010	98,856	94,299	Nay's
140,818	190,030	159,475	Total Proposition Votes
16%	4%	18%	Failure Percentage
162,653	213,173	182,526	Total Votes Cast
258,742	305,262	292,274	Total Registered Voters
63%	70%	62%	Voter Turnout

PAF/sgn
Attachments

BALLOT PROPOSITION NO. 1

LEGISLATIVE ANNULMENT OF REGULATIONS

Constitutional Amendment

(Committee Substitute for House Joint Resolution No. 82 Amended)

SUMMARY

(As it will appear on the November 4, 1980 General Election Ballot)

This proposal would permit the legislature to annul, by adopting a resolution, regulations adopted by state agencies. Annulment of regulations by resolution was authorized by the First State Legislature in 1959; however, in 1980 the Alaska Supreme Court held that the constitution permits the legislature to annul a regulation only by passing a bill, which requires three readings of the bill and a roll call vote which is recorded. The procedures for adopting resolutions are governed by legislative rules and require only the approval of the resolution by voice vote of a majority of both houses. A bill passed by the legislature annulling a regulation could be vetoed by the governor or repealed by referendum. A resolution annulling a regulation could not.

BALLOT FORM:

A vote "FOR" adopts the amendment.
A vote "AGAINST" rejects the amendment.

FOR ☐
AGAINST ☐

VOTE CAST BY MEMBERS OF 11TH STATE LEGISLATURE ON FINAL PASSAGE

Senate	(20 members):	Yeas 18	Nays 0	Absent or Not Voting 2
House	(40 members):	Yeas 36	Nays 0	Absent or Not Voting 4

LEGISLATIVE AFFAIRS AGENCY SUMMARY

(As required by law)

This proposal would add a new section, section 22, to Article II of the state constitution. If adopted, the proposal would authorize the legislature to annul or set aside a regulation which has been adopted by a state department or agency. In order to annul a regulation, the legislature could adopt a concurrent resolution by approval of the resolution by majority vote of the membership of each house of the legislature. The resolution specifies the date on which the annulment of a regulation would take effect.

FULL TEXT OF PROPOSED CONSTITUTIONAL AMENDMENT

SECTION 22. **ANNULMENT OF REGULATIONS.** The legislature by a concurrent resolution approved by a majority vote of the membership of each house may annul a regulation adopted by a state department or agency. The annulment of the regulation is effective on the date the concurrent resolution is approved by both houses unless the concurrent resolution specifies a different date.

STATEMENT IN FAVOR OF BALLOT PROPOSITION NO. 1

The legislature, when it writes a law, cannot foresee all of the possible details involved in carrying it out. The appropriate administrative agency is therefore allowed to write regulations which spell out who does what, when, where, and how. If the agency does no more than this no problem is created.

Unfortunately agency regulations are not always consistent with the intent the legislature had in passing the law. Sometimes an agency will get carried away and put out regulations that cause an unnecessary burden for the citizens. The First State Legislature realized this and provided a simple solution. The legislature could, by a concurrent resolution passed by a majority of each house, annul an administrative regulation. Such a resolution is not subject to the governor's veto.

The Alaska Supreme Court recently held, in a 3-2 decision, that the legislature must use a bill rather than a resolution to annul administrative regulations. But a bill is subject to the governor's veto. The governor can hardly be expected to approve a bill overruling his subordinates, who put out the regulation in the first place. The present governor has already vetoed one such bill.

The court ruling gives agency regulations equal standing with laws, *even though no single person elected by the voters has approved them.*

Our government is wisely based on dividing power among the three branches: legislative, executive and judicial. The current situation gives entirely too much power to the executive branch. Your approval of this constitutional amendment will restore the better balance under which the state operated from 1961 to 1980.

— **Charles H. Parr**
Chairman, House Judiciary Committee
Alaska State Legislature

STATEMENT AGAINST BALLOT PROPOSITION NO. 1

This is still another proposal by the legislature to free itself from the checks and balances of our constitution. Under the constitution, the legislature has all the power it needs to make laws and annul administrative regulations. This proposal does not aid the public in any way. What it does is allow the legislature to exercise its power to annul regulations in disregard of the constitutional requirements that each bill have a single subject, that each bill have three readings in each house, and that there be a recorded vote of the ayes and nays on final passage. It would also free the legislature from the executive veto and it would allow it to ignore the prohibition against special and local legislation.

The Alaska Supreme Court has recently ruled that the legislature must abide by the constitution's checks and balances on its power whenever it exercises that power, including when it acts to annul regulations. This amendment is intended to overrule the court's decision and erode the constitution's safeguards. It aids legislators, not the public, and it should be rejected.

— **Katherine D. Nordale**
Delegate to the Alaska
Constitutional Convention,
1955-1956

Arguments printed on this page are the opinions of the authors and have not been checked for accuracy by any official agency.

MEASURE NO. 1

Constitutional Amendment

LEGISLATIVE ANNULMENT OF ADMINISTRATIVE REGULATIONS

(1983 Legislative Resolve No. 15 (SCS HJR 5[Jud]))

SUMMARY

(As it will appear on the November 6, 1984 General Election Ballot)

This amendment of the Alaska Constitution would permit the legislature to annul executive-branch regulations by passing a resolution. The annulment would become effective 30 days after passage by the legislature, unless the resolution sets a different date. The resolution must have three readings in each house on separate days, except that it may be advanced from second to third reading on the same day by a three-fourths vote of the house considering it. The resolution must receive approval of a majority of the membership of each house. The yeas and nays on final passage must be entered in the legislative journals. The resolution is not subject to veto by the governor, and it is not subject to repeal by referendum.

BALLOT FORM:

A vote "FOR" adopts the amendment.
A vote "AGAINST" rejects the amendment.

FOR ☐
AGAINST ☐

VOTES CAST BY MEMBERS OF THE 13TH STATE LEGISLATURE ON FINAL PASSAGE

Senate	(20 members):	Yeas **19**	Nays **0**	Absent or Not Voting **1**
House	(40 members):	Yeas **34**	Nays **2**	Absent or Not Voting **4**

LEGISLATIVE AFFAIRS AGENCY SUMMARY

(As required by law)

This proposal for a constitutional amendment would allow the legislature to annul a regulation adopted by a state department or agency by concurrent resolution. The annulment is effective thirty days after the date the concurrent resolution is approved by both houses unless the resolution specifies a different date. Adoption requires three readings in each house on three separate days except it may be advanced from second to third reading on the same day by concurrence of three fourths of the membership of the house considering it. Adoption requires approval by a majority vote of the membership of each house. The vote on final passage must be entered into the journal.

FULL TEXT OF PROPOSED CONSTITUTIONAL AMENDMENT

(This amendment would add the following section to article II of the Alaska Constitution.)

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

STATEMENT IN FAVOR OF BALLOT MEASURE NO. 1

Voters who have ever experienced irritation or anger as a result of a problem they have had with state regulations should vote in favor of Ballot Measure No. 1. While many regulations do conform to and support state laws, there are occasionally regulations which are imposed that go beyond the intent of the law and cause undue hardship on our citizens. These regulations often make no sense at all, state agency people are often at a loss to explain the meaning or sense of the regulations, and yet the state agencies involved continue to enforce them, and voters are powerless to change them.

The Alaska Constitution, patterned essentially upon the Constitution of the United States and the experience of the other states, provides a system of checks and balances among the three branches of government, and further entitles the people to their own checks and balances through the voting booth, the initiative process, and final authority over amendments to the constitution. The one major area of government that is currently **not** directly accessible to the people's checks and balances is the very considerable volume of administrative regulations which are written by the state agencies in the executive branch of government.

These regulations deal with every aspect of government and our lives: fish and game, education, health and social services, traffic, land development, utilities, taxes; the list is endless. And once the regulations go into effect, they have all the force of law.

The problem is, that unlike the situation that occurs with laws, the agency people who make and enforce regulations are not subject to voter approval at election time; they are either appointed by the governor or by his commissioners.

While the legislature is often made aware of foolish bureaucratic requirements by unhappy constituents, it is almost powerless to do anything about them. Currently, to annul a regulation, the legislature must pass a new bill which is then subject to veto by the governor. This puts the governor in the powerful position of being able to stop a bill that would overturn a regulation made by his own subordinates.

It was never intended by the framers of our State Constitution that any governmental body except the legislature have the power to make laws. Yet, bad regulations have been written, on occasion by state agencies, which go beyond the letter and intent of the law as passed by the legislature and in effect create law on their own.

This measure would provide a reasonable avenue for annulment of bad regulations. It would allow your elected representatives in the legislature, through a majority vote of both houses, to annul regulations in the same way they pass any legislative bill, except it would **not** be subject to veto by the governor, who clearly has a biased position in the matter.

The House Joint Resolution which created the ballot measure had bi-partisan sponsorship during the last legislative session, and was passed with near-unanimous support by both houses of the legislature.

—Mike Szymanski,
State Representative

STATEMENT OPPOSING BALLOT MEASURE NO. 1

This proposed amendment to the Alaska Constitution is very similar to the one proposed in 1980 and rejected by the voters 82,010 to 58,808. Although the present version includes some improvements over the 1980 version, it is another attempt by the legislature to concentrate governmental power in its own hands.

Under the current constitution and statutes, the legislature has all the power it needs to make laws and to limit or guide the adoption of administrative regulations. The regulations are adopted to implement statutes. This proposal would enable legislators to use a law-making procedure that is not subject to veto by the governor or repeal by referendum, and that could be used to ignore the prohibition against special and local legislation.

The constitution now provides for a balance of power among the legislative, executive, and judicial branches of the government. This balance requires a blending or sharing, as well as a dividing, of governmental responsibilities. If this constitutional amendment were to be approved by the voters, it would enable the legislature not only to write the laws, as has traditionally been the legislature's function, but it would also enable the legislature to act in place of the courts in deciding whether the executive has lawfully executed the laws when adopting a regulation; and it would empower the legislature to act in place of the executive by nullifying a specific executive-branch decision.

The annulment is like a repeal. In using this expedited procedure to annul a regulation, the legislature would act only in a negative way. It would not be providing the sort of policy guidance and direction that is appropriate to its law-making function. And it would not be providing the thoughtful analysis necessary to solve a problem. The legislature would be saying to the agency "your decision to adopt that regulation is wrong". But it would not be telling the agency what would be right. This is especially troublesome when dealing with a complex subject. Without any guidance beyond the statute that the executive branch agency was trying to implement in the first place, the agency is left with only the option to guess again. That is neither an efficient nor an appropriate way to run the government.

The Alaska Supreme Court has ruled that the legislature must abide by the Constitution's checks and balances on its power when it exercises that power, including when it acts to annul regulations. The present proposal is intended to overrule the court's decision. As argued four years ago, when the voters rejected the 1980 proposal, this amendment would aid legislators, not the public, and it should be rejected.

—Katherine D. Nordale,
Delegate to the Alaska Constitutional Convention, 1955-1956

BALLOT MEASURE NO. 2

Constitutional Amendment
Legislative Annulment of Administrative Regulations
(1986 Legislative Resolve No. 60 HCS SJR 40 [Jud] am H)

BALLOT LANGUAGE
(As it will appear on the November 4, 1986, General Election Ballot)

This amendment of the Alaska Constitution would permit the legislature to annul executive branch regulations by passing a resolution that is not subject to veto by the governor or repeal by referendum. The annulment would become effective 30 days after passage by the legislature, unless the resolution sets a different date. The resolution must have three readings in each house on separate days, except that it may be advanced from second to third reading on the same day by a three-fourths vote of the house considering it. The resolution must receive approval of a majority of the membership of each house. The yeas and nays on final passage must be entered in the legislative journals.

A vote "FOR" adopts the amendment. FOR ☐

A vote "AGAINST" rejects the amendment. AGAINST ☐

VOTES CAST BY MEMBERS OF THE 14TH ALASKA LEGISLATURE ON FINAL PASSAGE

House:	Yeas	31
	Nays	4
	Absent or Not Voting	5
Senate:	Yeas	17
	Nays	0
	Absent or Not Voting	3

LEGISLATIVE AFFAIRS AGENCY SUMMARY
(HCS SJR 40 (Jud) am H)

This proposal for a constitutional amendment would allow the legislature to annul a regulation adopted by a state department or agency by its adoption of a concurrent resolution. Under the present provisions of the constitution, the legislature may annul a regulation only by the enactment of a bill that is subject to the veto of the governor; if the governor vetoes the bill, the constitution now requires a two-thirds affirmative vote of the legislature assembled in joint session to override the veto.

If the legislature adopts a concurrent resolution to annul a regulation under the authority proposed here, the annulment would be effective thirty days after the date the concurrent resolution is approved by both houses unless the resolution specified a different date. The concurrent resolution would not be subject to the veto of the governor. Adoption would require three readings in each house on three separate days except that it may be advanced from second to third reading on the same day by the concurrence of three-fourths of the membership of the house considering it. Adoption would require approval by a majority vote of each membership of each house. The vote on final passage must be entered into the journal.

FULL TEXT OF PROPOSED CONSTITUTIONAL AMENDMENT

(This amendment would add the following section to article II of the Alaska Constitution.)

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

BALLOT MEASURE NO. 2

STATEMENT IN SUPPORT OF BALLOT MEASURE NO. 2

The issue is basically simple: should bureaucrats or the Legislature be the ultimate lawmaking authority?

All 60 members of the Legislature (40 House and 20 Senate) are elected by the people. They are all voted into, and out of, office by individual voters. The Alaska Constitution says, "The legislative (i.e., lawmaking) power of the State is vested in a Legislature consisting of a Senate...and a House of Representatives..." The Legislature proposes, considers, and enacts laws, known collectively as the Alaska Statutes (if general and permanent) or as the Session Laws of Alaska (if specific and temporary).

All bureaucrats who promulgate (i.e., enact and enforce) regulations (theoretically, to put laws into effect) are in the Executive Branch, headed by the Governor. Bureaucrats are not voted into office and thus cannot be removed by the people. Instead, bureaucrats are hired by the Governor or by his/her appointees, and thus can only be removed from office by the Governor or by somebody answerable to him/her. However, the regulations promulgated by the bureaucrats, known collectively as the Alaska Administrative Code, have the force of law and affect all of us, sometimes adversely.

What can be done about a law that's bad? It can be repealed by the Legislature or, in some cases, by the people directly via an initiative petition.

What about a regulation that's bad? It can only be repealed by the bureaucrats who promulgated it, up to and including the Governor. If the Legislature tries to repeal a regulation by passing a bill, the Governor will almost certainly (and always has, in the past) veto the bill so that the bad regulation stays in full force and effect.

Now, if the Legislature had the power to repeal regulations by passing a concurrent resolution (instead of a bill), then the resolution could not be vetoed by the Governor. Thus, the Legislature would be able to get rid of bad regulations, which in effect it cannot do now.

Would this give the Legislature too much power? Not hardly. Since the Legislature already has full power to enact laws, why shouldn't it have full power to repeal all laws, including regulations?

Why do Governors and bureaucrats oppose giving the Legislature such regulatory repeal power? Because Governors and their handpicked bureaucrats, which are answerable **only** to the Governor (and cannot be removed by the people, which can remove Legislators), don't want to lose the power they now have to promulgate and enforce any regulation they want. It's that simple.

If you feel that the Legislature should have the power to repeal regulations via concurrent resolution (not vetoable by the Governor), vote FOR the ballot measure. If you feel that bureaucrats should be the ultimate lawmaking authority, vote otherwise.

I recommend that you vote FOR. Only in this way will we realistically be able to get rid of bad regulations.

Andre Marrou
State Representative

STATEMENT OPPOSING BALLOT MEASURE NO. 2

For the third time in six years, the legislature insists on confronting the voters with a proposed constitutional amendment giving the legislature a short-cut to law-making—another attempt by the legislature to concentrate governmental power in its own hands. The voters rejected a similar proposal in 1980 and the **identical** proposal in 1984. It should be rejected again.

Under the current constitution and statutes, the legislature has all the power it needs to make laws and to limit or guide the adoption of administrative regulations. Regulations are adopted to implement statutes. They have the force of law. Annulling them changes the law. This proposal would enable legislators to use a law-making procedure that is not subject to veto by the governor or repeal by referendum, and that would be used to ignore the prohibition against special and local legislation.

The constitution now provides for a balance of power between the legislative, executive, and judicial branches of the government. This balance requires a blending or sharing, as well as a dividing, of governmental responsibilities. If this constitutional amendment were to be approved by the voters, it would enable the legislature not only to write the laws, as has traditionally been the legislature's function, but it would also enable the legislature to act in place of the courts in deciding whether the executive has lawfully executed the laws when adopting a regulation, and it would empower the legislature to act in place of the executive by reversing a specific executive-branch decision.

In its intent statement accompanying this proposal, the legislature admitted that the "difficulty in achieving [the two-thirds] majority [to override a veto] in opposition to the governor and the governor's administration has led the legislature to propose this amendment." In other words, the fear that the governor might veto a bill and that not enough legislators would agree to override that veto prompted this short-cut approach to law-making. That fear overlooks the governor's accountability to the voters throughout the state.

The annulment is like a repeal. The legislature would act only in a negative way. It would not be providing the sort of policy guidance and direction that is appropriate to its law-making function. The legislature would be saying to the agency "your decision to adopt that regulation is wrong." But it would not be telling the agency what would be right. This is especially troublesome when dealing with a complex subject. Without any guidance beyond the statute that the executive-branch agency was trying to implement in the first place, the agency is left with only the option to guess again. That is neither an efficient nor appropriate way to run the government.

The Alaska Supreme Court has ruled that the legislature must abide by the constitution's checks and balances on its power, including when it acts to annul regulations. The present proposal is intended to overrule the court's decision. As mentioned when the voters rejected the 1980 and 1984 proposals, this amendment would aid legislators, not the public, and it should be rejected.

Katherine D. Nordale
Delegate to the Alaska
Constitutional Convention, 1955—1956

Alaska State Legislature

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

State Senate

While in Juneau
P.O. Box V
Juneau, Alaska 99811
(907) 465-3791

MEMORANDUM

TO: Senator Rick Halford, Chairman
Senate Judiciary Committee

FROM: Senator Paul Fischer PF

SUBJECT: Senate Joint Resolution 2
(repeal of regulations by the legislature)

DATE: January 23, 1991

I would appreciate your scheduling the above referenced resolution for a hearing before the Senate Judiciary Committee at your earliest possible convenience.

As a you are aware, this subject has been before us before and has even appeared on the ballot a couple of times. Last session it passed the Senate with only 1 descending vote.

It would be my desire to give the voters a chance to decide on this issue again, hopefully with a much better campaign promotion.

Your consideration would be greatly appreciated.

PAF/sgn

DRAFT AMENDMENT TO SENATE JOINT RESOLUTION NO. 2
(repeal of regulations by the legislature)
PROPOSED BY: Senator Fischer

Page 1, line 10: Add new Sec. 2 to read:

*Sec. 2. INTENT. (a) The legislature in proposing this constitutional amendment, is seeking the ability to annul regulations adopted by a state department or agency when a majority of the legislature believes the regulation may have an adverse effect on the public or the regulation does not reflect the intent of the laws passed by the legislature.

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

(c) In the preparation of the true and impartial summary of the amendment under AS 15.50.020, the lieutenant governor shall consider inclusion of the statement of legislative intent contained in (a) of this section.

Renumber remaining Section accordingly.

22

If legs finds that a reg is inconsistent with the authorizing ~~legisla~~ statute the legs may repeal a reg . . .

SJR

4

SENATE COMMITTEE REPORT
FIRST COMMITTEE OF REFERRAL

DATE: 1/21/91 FURTHER: Finance

Date of 5-Day Notice: 3/19/92
(in accordance with Uniform Rule 23)

DATE TURNED INTO OFFICE: 4/1/92

Judiciary Committee considered SENATE JOINT RESOLUTION NO. 4

Proposing an amendment to the Constitution of the State of Alaska requiring legislative confirmation for members of the governing boards of the Alaska Permanent Fund Corporation and the Alaska Railroad Corporation.

and recommended:

[✓] **replace with** ✓ **CS** SJR 4 (JUD) [ ] same title [✓] new title

[ ] **attached amendment(s)**

[ ] _____ **letter of intent adopted**

[ ] **do pass**

[ ] **do not pass**

[ ] **no recommendation**

[ ] **individual recommendations**

[ ] **further referral to** _____

ATTACHES NEW FISCAL NOTE(S):

Department(s)/Date:	Department(s)/Date:
[ ] fiscal note(s) _____	[ ] zero fiscal note(s) _____
Elections 1/13/92	
[ ] appropriation-no fiscal note	[ ] Governor's bill w/fiscal note

SIGNING DO PASS:

OTHER RECOMMENDATIONS:

Rick Halford do pass
Chair: Signature and Recommendation

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. SJR 4

Revision Date: 01/13/92
Title: Amendment to the Constitution RE: Legislature to Confirm Railroad and Permanent Fund Boards
Sponsor: Senator Kerttula
Requestor: Senate Judiciary

Department Affected: Office of the Governor-Elections
BRU: Division of Elections
Component: II-Primary and General Elections

COMPONENT SERIAL NO. 0 0 2 2

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	2.2*	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	2.2*	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE FUND SOURCE:	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	2.2*	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER FUND SOURCE:	0	0	0	0	0	0
TOTAL	2.2*	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year impact: 0

ANALYSIS: (Attach a separate page if necessary.) * This figure covers cost of inclusion of information about this issue in the Official Elections Pamphlet as required by AS 15.58, and programming for DataVote counting of votes cast on this measure. However, only 4 measures can be printed on a single ballot card. Should this measure require printing an additional ballot card, the fiscal impact would be: 53.4.

Prepared by: Elizabeth Ziegler, Deputy Director
Division: Elections
Phone: 465-4611
Date: 01/13/92

Approved by Commissioner: Charlotte E. Thickstun
Agency: Office of the Governor
Date: 01-13-92

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

Rev 10/07/91
SJR4.FN2

Fiscal Notes

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. SJR 4

Revision Date: _____ **Department Affected:** AK Permanent Fund Corporation

Title: Amending the Constitution requiring legislative confirmation for Permanent Fund Corporation board members **BRU:** Alaska Permanent Fund Corporation

Component: AK Permanent Fund Corporation

Sponsor: Kertulla

Requestor: Judiciary Committee **COMPONENT SERIAL NO.** 0109

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY	-0-	-0-	-0-	-0-	-0-	-0-

Estimate of current year impact: -0-

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: _____ **Phone:** (907) 465-2047

Division: David A. Rose, Executive Director Alaska Permanent Fund Corporation **Date:** 2/3/92

Approved by Commissioner: _____

Agency: Alaska Permanent Fund Corporation **Date:** 2/3/92

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

Rev 10/7/91

Alaska State Legislature

SENATE

Official Business

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

MEMORANDUM

TO: Senator Rick Halford
Chairman, Senate Judiciary Committee

FROM: Senator Jay Kerttula

SUBJECT: SJR 4 - Legislative Confirmation of Permanent Fund and Railroad Boards

DATE: February 19, 1992

I would appreciate it if you would reschedule SJR 4, proposing a constitutional amendment to require legislative confirmation of the members of the boards of the Permanent Fund Corporation and Railroad Corporation.

Thank you for your attention to this request.

JK:pt

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

SUBJECT: SJR 4 - Legislative Confirmation of Permanent Fund and Railroad Boards

DATE: January 15, 1992

I would appreciate it if you would schedule SJR 4, proposing a constitutional amendment to require legislative confirmation of the members of the boards of the Permanent Fund Corporation and Railroad Corporation.

I am attaching my previous request of February I, 1991, together with some additional back-up and hope you will give favorable consideration to this request.

JK:pt

Alaska State Legislature

SENATE

Official Business

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

MEMORANDUM

TO: Senator Rick Halford
Chairman, Senate Judiciary Committee

FROM: Senator Jay Kerttula

SUBJECT: SJR 4 - Legislative Confirmation of Permanent Fund and Railroad Boards

DATE: January 14, 1992

I would appreciate it if you would schedule SJR 4, proposing a constitutional amendment to require legislative confirmation of the members of the boards of the Permanent Fund Corporation and Railroad Corporation.

I am attaching my previous request of February 1, 1991, together with some additional back-up and hope you will give favorable consideration to this request.

JK:pt

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: SJR 4 -- Legislative Confirmation of Permanent Fund and Railroad Boards

DATE: February 1, 1991

I would appreciate it if you would schedule SJR 4, proposing a constitutional amendment to require legislative confirmation of the members of the boards of the Permanent Fund Corporation and Railroad Corporation.

The Alaska Constitution requires legislative confirmation of the members of any board or commission which is the head of a principal department or a regulatory or quasi-judicial agency. Legislative Counsel issued an opinion this interim that only those officers expressly mentioned in the Constitution are subject to legislative confirmation. Citing Bradner v. Hammond, counsel concluded that the legislature is not free to add to the list of boards of commissions subject to confirmation.

The Permanent Fund Corporation invests extremely large amounts of state funds, and the corporation's decisions have a tremendous impact on the Alaska economy, as well as on individual Alaskans. As of January 31, 1990, the permanent fund corporation was managing over $11 billion in state funds. The Alaska Railroad Corporation, which is a vital link in our statewide transportation system, is an agency which is virtually independent of any state

control. Legislative oversight regarding the Alaska Railroad Corporation is limited to budget determinations. I believe it is a telling point that the most recent information available to Legislative Finance is an annual report from December 31, 1989. At that time, the railroad's total assets were $83.6 million.

While I do not favor many revisions to our Constitution, I believe that the amendment proposed in SJR 4 is a necessary addition. It is clear that the drafters of Alaska's Constitution intended that the boards of principal state functions be subject to legislative confirmation. Both the Permanent Fund Corporation and the Railroad Corporation are vitally important to Alaska, and their board members should be confirmed by the legislature.

SPONSOR STATEMENT

Senator Jay Kerttula

SJR 4 - Legislative Confirmation of Railroad and Permanent Fund Boards

The Alaska Constitution currently provides for legislative confirmation of any board or commission which is the head of a principal department or a regulatory or quasi-judicial agency.

Legislative counsel has provided an opinion that only those officers whom the constitution expressly mentions are subject to legislative confirmation; the legislature is not free to add to the list of boards and commissions which is it required to confirm. Our counsel cited Bradner v. Hammond as authority for this conclusion.

The Permanent Fund corporation invests extremely large sums of state funds and their activities have a tremendous impact on all Alaskans and on our state economy. As of January 1, 1992, the Permanent Fund was managing $11.9 billion in state funds.

The Railroad Corporation is an agency which is virtually independent of any state control, while being vital to our statewide transportation system and which receives state capital and operating funds. As of November 30, 1991, the total assets of the Railroad Corporation were $98.6 million; while not as large as the Permanent Fund Corporation, this is still a substantial holding.

I am not generally in favor of revisions to our state constitution. I believe that the drafters of the constitution put a great deal of thought into the document and the citizens of Alaska had a large voice in its drafting. However, it is clear that the drafters of the constitution intended that boards of principal functions of the state be subject to legislative confirmation. Both the Permanent Fund Corporation and the Railroad Corporation are too important to the state to be exempted from legislative confirmation.

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

Paul sent to Rio 3.19

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

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

MEMORANDUM March 17, 1992 MAR 17 1992

SUBJECT: Confirmation of Governing Boards of Public Corporations (Work Order No. 17-LS0038\D)

TO: Senator Jay Kerttula

FROM: Jerry Luckhaupt JEL
Legislative Counsel

You have requested a new version of SJR 4, a resolution proposing an amendment to the constitution requiring the confirmation of the governing bodies of the Alaska Railroad and the Permanent Fund Corporation. In this new version you asked that I attempt to provide for the confirmation of certain public corporations in a more generic manner, such as, by requiring confirmation of the boards of public corporations that operate outside of the normal legislative appropriations process. The reason for this approach was to sort the big public corporations, for which confirmation was desired, from the little public corporations, for which confirmation was not desired, and to ensure that public corporations created after the constitutional amendment would be included.

I did not use that specific approach in this draft as I was unsure that it would apply to any public corporations, including the railroad and the permanent fund. The reason that a distinction based upon certain public corporations operating outside the legislative appropriations process would not apply to the railroad and the permanent fund and would not work is that it is the opinion of this office that the Alaska Railroad Corp., and the Alaska Permanent Fund Corp., are subject to the legislative appropriations process and they only operate outside the normal process because the legislature, intentionally or by oversight, permits these corporations to do so.

This opinion is based upon the superior court decision in Kelley v. Hammond, No. 77-4, First Judicial District Court, decided May 30, 1978. In that case the superior court held that art. IX, § 13 of the Alaska Constitution, requires an appropriation for any expenditure of public funds even from trust or custodial funds received from the federal government or for special purposes. The decision of the court would seem to be broad enough to include and therefore require an appropriation for any expenditure of funds from dedicated funds of the Alaska Railroad Corporation and

the Alaska Permanent Fund Corporation. Therefore, an attempt to distinguish on this basis may result in our not catching any fish (public corporations) in our net (the constitutional amendment).

As a result, after talking with Senator Halford as you requested, I drafted a new version to distinguish between big and small public corporations on the basis of whether they manage significant state assets, a term which may be defined by the legislature generally.

GPL:pl
92-185.plm

Enclosure

cc: Senator Rick Halford

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

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

FEB 03 1992

MEMORANDUM February 3, 1992

SUBJECT: Alaska Public Corporations (Work Order No. 17-LS1927)

TO: Senator Jay Kerttula
Attn: Paula

FROM: Jerry Luckhaupt JER
Legislative Counsel

You have requested a compilation of the public corporations and corporate authorities of the state of Alaska. In my review of the statutes I have found the following corporations and authorities:

(1) Alaska Aerospace Development Corporation (AS 14.40.821)
(2) Alaska Amateur Sports Authority (AS 05.40.010);
(3) Alaska Energy Authority (AS 44.83.020);
(4) Alaska Gas Pipeline Finance Authority (AS 44.82.010);
(5) Alaska Housing Finance Corporation (AS 18.56.020);
(6) Alaska Industrial Development and Export Authority (AS 44.88.020);
(7) Alaska Medical Facility Authority (AS 18.26.010);
(8) Alaska Municipal Bond Bank Authority (AS 44.85.020);
(9) Alaska Permanent Fund Corporation (AS 37.13.040);
(10) Alaska Railroad Corporation (AS 42 40.010);
(11) Alaska Resources Corporation (AS 37.12.010);
(12) Alaska Science and Technology Foundation (AS 37.17.010)
(13) Alaska Seafood Marketing Institute (AS 16.51.010)
(14) Alaska State Housing Authority (AS 18.55.020);
(15) Alaska Tourism Marketing Council (AS 44.33.700);

In addition, the Commercial Fishing and Agriculture Bank (AS 44.81.010), appears to have some of the attributes of a public corporation in that the exercise of its powers "is considered to be for a public purpose." AS 44.81.010(a). Further, a cursory review of legislation that has been introduced during the 17th Legislature shows these additional public corporations have been proposed:

(a) HB 10 - Alaska Marine Highway Authority;
(b) HB 59 - Alaska Mental Health Trust Corporation;
(c) HB 71 - Alaska State Health Resources Authority;
(d) HB 358 - Alaska State Salmon Marketing Association;
(e) SB 18 - Alaska State Pension Corporation;
(f) SB 73 - Health Insurance Authority.

Gubernatorial appointees to the boards of public corporations are apparently not subject to confirmation by the legislature as the public corporations are not "at the head of a principal department or a regulatory or quasi-judicial agency" as provided in art. III, § 26 of the Alaska Constitution. See also, Bradner v. Hammond, 553 P.2d 1 (Alaska 1976)(only section 26 boards subject to confirmation); Walker v. Alaska State Mortgage Authority, 416 P.2d 245 (Alaska 1966)(ASMA not a section 26 board).

GPL:pl
92-064.plm

7-LS0038\D
Luckhaupt
3/17/92

CS FOR SENATE JOINT RESOLUTION NO. 4 ( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATORS KERTTULA, Sturgulewski

A RESOLUTION

Proposing an amendment to the Constitution of the State of Alaska relating to appointment, confirmation, and removal of members of the governing entities of public corporations that manage significant state assets.

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

* Section 1. Article III, sec. 26, Constitution of the State of Alaska, is amended to read:

SECTION 26. BOARDS AND COMMISSIONS. When a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, <u>or is the governing entity of a public corporation established by law that manages significant state assets as defined by law,</u> its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and may be removed as provided by law. They shall be citizens of the United States. The board or commission may appoint a principal executive officer when authorized by law, but the appointment shall be subject to the approval of the governor.

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

M E M O R A N D U M June 22, 1990

SUBJECT: Confirmation of the members of boards and commissions (Work Order No. 7-0029)

TO: Senator Jay Kerttula

FROM: Richard A. Bradley
Legislative Counsel

Kathy Hathaway has asked that we comment on an opinion of the attorney general regarding the power of the legislature to confirm members of boards and commissions. The only opinion that we could find on that subject goes back to 1975; it addresses the "Constitutionality of CSSB 98 (Legislative Confirmation Bill)".

I have checked with Ron Lorensen and Jim Baldwin in the attorney general's office on the question whether anything more recent has been issued; neither could recall any more recent opinions. The index of opinions published by the Department of Law contains no such opinion.

Jim Baldwin suggested that the Bradner case represents the authoritative statement on the question; we agree that Bradner v. Hammond, 553 P.2d 1 (Alaska 1976) represents a more informed statement of the law than the attorney general's opinion, particularly as the Bradner decision is a year later than the opinion.

We have enclosed a copy of the 1975 attorney general's opinion as well as the Bradner decision.

I. Discussion of the Attorney General's opinion.

The opinion concludes that it would be beyond the power of the legislature to require the confirmation of the members of boards and commissions except for that confirmation

Legal Analysis

contemplated by art. III, sec. 26 of the Alaska Constitution. The provision states, in pertinent part:

> SECTION 26. BOARDS AND COMMISSIONS. When a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and may be removed as provided by law. . . .

While the opinion also addresses the authority of the legislature to require the confirmation of sub-cabinet officers--and finds the power to require their confirmation also lacking-- the essential point of the opinion regarding confirmation is that the "power to confirm [executive] appointments is an executive function." The logic of concluding that the power to confirm constitutes an executive function leads to the corollary of that conclusion: that legislative incursions into executive functions are construed against the legislature. The result is that only those officers whom the Constitution has required the legislature to confirm are subject to confirmation; the legislature is not free to add to (or subtract from) the list of executive officers serving as members of boards or commissions whom it is required to confirm-- or not.

While I have not sought to review our opinions from this era, my assumption is that we may have disagreed with the attorney general's opinion at that time. I note that Billy Berrier, director of the division of legal services at that time was counsel for the legislative officers and members in the Bradner litigation. But because of the Bradner decision, discussed below, we now agree that the conclusion reached by the attorney general represents the law of the state.

II. Discussion of Bradner.

The court starts out by noting that the members of the constitutional convention that drafted the Alaskan Constitution intended that the state have a "strong executive." The court quoted the chairman of the executive committee at the convention, Victor Rivers: "We are all strongly agreed on the principle of the strong executive." Bradner, supra, at 3.

The court then stated that the sole question before the court is whether secs. 25 and 26 of art. III describe the outer limits of the legislature's confirmation authority or whether the legislature may, by statute, require the confirmation of other high-level, policy-making officials within the executive branch. The legislative officers had argued that no provision of the constitution prohibited the legislature from requiring confirmation of other executive officers.

The governor had argued, on the other hand, that the power of confirmation is an executive function that may be exercised by the legislature only to the extent that the Constitution grants the power to the legislature.

> Viewed in this manner, appellee [Hammond] analyzes the power to confirm executive officers as part of the appointment process, incapable of existence independent of the power of appointment, and characterizes this confirmation authority as a power "super-added" to the legislature's general legislative powers. Thus, appellee would find that Sections 25 and 26 set the maximum rather than the minimum parameters of the legislature's power to confirm appointments of executive officers. This follows, according to appellee, from the fact that legislative confirmation is a delegated function taken from executive function, and thus the breadth of this delegated authority must be strictly construed. Bradner, at 4.

The court affirmed the superior court's judgment that the law requiring legislative confirmation of certain sub-cabinet officers was in excess of legislative power.

In its decision, the court agreed with decisions of the U.S. Supreme Court concluding that confirmation is a power "super added" to those possessed by the legislature. Myers v. United States, 272 U.S. 56 (1926). Confirmation is not a distinct legislative power but is a part of the executive power of appointment, some part of which in specific instances was delegated to the legislative branch.

Moreover, the court stated, "[t]he lack of ambiguity in Sections 25 and 26 of Article III of the Alaska Constitution mandate that this court interpret these express provisions as embodying not only the maximum parameters of the delegation of the executive appointment authority through the

legislative confirmation function but, further, that they delineate the full extent of the constitution's express grant to the legislative branch of checks on the governor's power to appoint subordinate executive officers. In our view, the separation of powers doctrine requires that the blending of governmental powers will not be inferred in the absence of an express constitutional provision."

III. Comments.

The Bradner decision did not explicitly discuss the application of sec. 26 to members of boards and commissions the Bradner decision construed AS 39.05.020, as enacted in 1975, required the confirmation only of deputy commissioners and certain division directors. The logic of the decision makes clear, however, that the court believes that only those members of the boards and commissions described in sec. 26 would be subject to legislative confirmation. Sec. 26 states that legislative confirmation is required for members of a board or commission when the board or commission is "at the head of a principal department or a regulatory or quasi-judicial agency". I believe that the phrase describes most state boards or commissions-- but not all. For example, advisory commissions are not among those described in sec. 26. The board recently established in the Forest Practices Act, ch. 34, SLA 1990, appears only to have advisory functions and its members are not subject to legislative confirmation under that Act; in my view, they are similarly not subject to confirmation under Sec. 26. See AS 41.17.041 as enacted in Sec. 3 of ch. 34.

Other boards or commissions that seem not to fall under sec. 26 include the Alaska Women's Commission [AS 44.19.165], the Alaska Public Broadcasting Commission [AS 44.21.256], and the Older Alaskans Commission [AS 44.21.200]. Others probably exist.

If I may be of further assistance, please advise.

RAB:gc
G15/002

SJR

6

SEVENTEENTH LEGISLATURE
SENATE JUDICIARY COMMITTEE BILL FILE

BILL NUMBER: SJR 6 Amend Const.
ABBREVIATED TITLE: Desecration of Flag -

SPONSER: ZHavoff; Menard; Rodey ORIGINAL RECEIVED: 1-22
WRITTEN REQUEST TO SCHEDULE REC'D: 2-5 FROM: ZHavoff -
SPONSER'S STATEMENT REC'D: _____ FROM: _____
SECTIONAL ANALYSIS RQST'D: _____ FROM: _____
SECTIONAL. ANALYSIS RECEIVED: _____
FISCAL NOTE (ORIGINAL)
RQST'D OF: Law-Pegues 1-24 REC'D FROM: Law DATE: 2-5
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: _____ SECOND: _____ THIRD: _____

COMMITTEE ACTION

DATE:
2-11-91 Individual Recommendation: Fernandez, Halford & Rodey, Do Pass
Cullen - Cordova - No Rec.

PERSONS TO BE NOTIFIED OF HEARING

1. SPONSOR ZHavoff
2. AGENCY Law -
3. Wagstaff
4. Warren Calver
5. _____
6. _____
7. _____
8. _____
9. _____
10. _____

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. SJR 6

Revision Date: _____ Department Affected: Department of Law

Title: "...Constitution of the United States prohibiting desecration of the flag..." BRU: Prosecution

Component: Criminal Justice Litigation

Sponsor: Senator Zharoff

Requestor: Senate Judiciary COMPONENT SERIAL NO. | | | 8 | 9 |

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

Prepared By: Richard I. Pegues, Director Phone: 465-3672

Division: Administrative Services Date: February 4, 1991

Approved by Commissioner: Richard I. Pegues /FOR Charles E. Cole, Attorney General

Agency: Department of Law Date: February 4, 1991

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).