THE COSTS OF USING GUN CONTROL TO REDUCE HOMICIDE

Alan A. Lizotte Ph.D.

This paper evaluates some of the costs of using gun control to reduce the homicide rate. However, gun control did not have to be the medium to carry the theme of the paper. Any social policy would have sufficed because any social policy to affect any behavior in society will have costs associated with it. I would like to discuss what some of those costs might be to pursue gun control as a social policy. I choose gun control as a policy to discuss for two reasons. First, I am familiar with the literature and research on gun control. But second and more important, gun control seems to be a sacred cow. For many it seems to be a policy with many benefits and few if any costs. Of course, gun control like any other policy, has its costs. It is just that until very recently we have not attempted to evaluate those costs and to examine this sacred cow. As suggested in other presentations at this conference, there is no quick fix in the policy realm. Policy initiatives take time, they have costs and they frequently fail. Because of this, a policy analyst must think through any policy, evaluate possible costs and outcomes regardless of how appealing the policy might seem at first glance. Once costs and possible outcomes have been evaluated, we can decide if we are willing to pay the costs necessary to pursue the policy. Or we may wish to abandon the policy because the possible outcomes, which were initially hidden, are unacceptable.

Loftin and McDowall provide a good example of a policy initia-tive that failed, but which at first blush seemed simple and effective.1 They evaluated the effects of a mandatory sentencing law in Detroit which requires a two year mandatory sentence for committing a crime with a gun. This is a relatively simple law. If a person committed a crime with a gun, that person was, without exception, to be sentenced to serve a two-year prison sentence. One would think that a law like this could be instituted rela- tively easily. After exhaustive research they concluded that the law simply was not used in Detroit. It had no effect whatsoever. Others have found the same sorts of relations for laws in Massa-- chusetts.2 And Majorie Zatz and I evaluated a similar law in California and found that the law was not used.3 I could not possibly discuss all aspects of the cost of gun control here. This discussion could fill volumes. In addition, it is not clear what gun control is. To some it means tough laws to deal with criminals who commit crimes with guns. To others it means handgun confiscation. To many it is a vague notion about controlling something that they know little about. Interestingly, if one knows little about something and wants to control it, that person probably knows little about how to, or the cost of, con- trol. This is, of course, part of the point of this discussion. Because space and specificity preclude full discussion of the Topic, I shall consider some possible costs of pursuing some types of gun control. These costs may or may not exist. They are just possible costs. Before any policy is pursued, however, these sorts of costs should be evaluated. If we ignore this warning for any proposed policy we could create a disaster.

SOME PUBLIC HEALTH COSTS OF HANDGUN ONLY CONTROL

Let us begin by considering the possible effects of gun control on the homicide rate. Many people assume or posit that gun control would reduce the homicide rate. In specific, many people argue that since handguns are the weapon of choice for those committing homicide, we should confiscate handguns. Kleck attempts to evaluate whether or not the death rate in crime would decrease if all handguns were confiscated.4 He uses existing research on ballistic tests and wounding patterns as they relate to firearm caliber. This research was conducted by the Federal Bureau of Investigation and the United States military. Kleck reports that the research suggests that as firearm caliber in-- creases, the lethality of the weapon increases. Interestingly, Zimring makes a similar argument for handgun caliber.5 On the basis of this, Kleck calculates that given the number of trigger pulls per criminal attack with a gun, if only 20% of handgun criminals shifted to either sawed off or unadulterated riffles and shotguns, the death rate in crime would double. That is, if 20% of handgun criminals shifted to clubs and knives, or something less deadly than a handgun, and no deaths occurred for that 80%, the death rate would still double because of the 20% shifting to more deadly weapons!

Let us assume that Kleck's findings are roughly correct. They may or may not be. However, right now they are our best guess. One might respond to Kleck by arguing that fewer than 20% of handgun criminals would shift to more deadly long guns. In research sponsored by the National Institute of Justice, James Wright and Peter Rossi surveyed prison inmates in order to deter- mine their patterns of gun use in crime.6 The people interviewed were gun criminals. Wright and Rossi asked these felons what they would do if they could not obtain a handgun to commit a crime. About 75% of them responded that they would saw off a rifle or shotgun in substitution for the handgun! One might respond to Wright and Rossi that these felons would not have the motivation or technical skill actually to saw off a long gun to make it as concealable as a handgun. However, they also asked these felons if they had ever done this when they could not obtain a handgun. Surprisingly, about 75% of those saying that they would saw off a long gun if they could not obtain a handgun also said that they had done this in the past! This means that if Kleck's 20% substi- tution leading to a doubling in death rates is correct and Wright and Rossi's felons are accurate, then we might expect a quintu-- pling in the death rate with handgun only control. To the ex- tent that their estimates are high we might only expect a four-- fold, or three-fold or maybe no increase in the death rate.

This implies that handgun only control is not a good idea. Kleck calls it "A policy disaster in the making."

Couple these findings with research by Philip Cook,7 who finds that injury rates in knife attacks are higher than in gun attacks. However, death rates in gun attacks are higher than in knife attacks. This means that some proportion of the criminals who shift from handguns would turn to knives, and this increase in knife usage would increase the injury rate. So if Kleck, Wright, Rossi and Cook are correct, handgun only control might result in the paradox of an increase in the death rate and an increase in the injury rate! This is not a good policy outcome to pursue.

This body of research suggests that handgun only control could result in costs which we are not willing to pay. If we are not willing to pay these costs we might wish to pursue a differ- ent form of gun control. Perhaps a bigger, more encompassing policy would be in order, or perhaps, a smaller more easily managed policy alternative. Whatever the choice, these alter- native policies would have costs and benefits associated with them. These new costs and benefits would have to be evaluated. And we would have to decide whether or not we would be willing to pay the price.

SOME RELATED PUBLIC HEALTH COSTS OF HANDGUN CONTROL

In an earlier presentation, Professor Zahn reported that young black urban women are not violence prone. Yet, young black urban men do tend to have high rates of violent crime. She suggested that we, as social scientists, investigate the reasons for these differences. Professor Bordua and I also noticed these differ- ences. In part, we addressed this issue with data from the state of Illinois.

In order legally to own guns in Illinois, one must have a Firearms Owners Identification Card. We obtained rates of card ownership for counties in Illinois.8 Using these data and inter- view data on a random sample of people in Illinois, we attempted to determine which social groups own guns and how this ownership is related to crime.

We found that the rate of male gun ownership is uncorrelated with the crime rate. However, the rate of female gun ownership is positively correlated with the rate of violent crime. In fact, the research suggests that young black urban women are the most likely group to own guns. Yet, Professor Zuhn reminds us that young black urban women are not likely to commit violent crimes. Women in general are not likely to commit violent crimes.

No serious criminologist would argue that significant num-- bers of black women buy guns to commit crimes. Therefore, we can only conclude that significant numbers of young black urban women do buy guns to protect themselves from crime.

In an earlier presentation Professor Loftin used a burning building analogy to make a point. He said that if

a building were on fire the crowd in the building could be thought as being ar- rayed in a queue. If there were no panic, people at the end of the line may or may not escape from the building. However, people at the end of the line might panic because they would realize that their probability of survival is the lowest: This panic could result in more death and injury, but it is a natural re- sponse to a dangerous situation. Young black urban women may see themselves at the back of the line in the burning building. They are the least likely to receive adequate protection from the criminal justice system and the most likely to be victimized. They may reason that a handgun puts them at the front of the line. The gun may or may not be effective for these women. More re- search needs to be done to determine the efficacy of using a gun for protection. The gun could increase the probability of injury to the victim. It could be used to thwart an attack. Or, more likely, if it is widely known that a certain social category of people on the street is armed, criminals may avoid that group. In fact, Wright and Rossi report that criminals are concerned about armed citizens.10 They would rather victimize unarmed citizens. If criminals are informed, all this suggests that handgun control or confiscation may increase the death and injury rates for these women. Again, more research needs to be done. The point is that policies can have unintended negative and posi- tive outcomes.

SOME OTHER COSTS OF SOCIAL POLICIES

To this point we have only considered the possible costs of handgun control in terms of death and suffering. There are other types of gun control. There are also other types of costs that in general, may accrue to social policies. Not all of these possible costs are related to public health. However, they would none-- theless influence our decision to pursue a certain policy. In this section, I shall briefly consider these other possible costs. I shall use various types of gun control to make the point. Again, these costs may or may not be real. They should, however, be considered.

Beyond human lives and suffering, there are at least five other types of costs. They include monetary costs, civil liber- ties costs, crime control costs, external security costs and emotional costs. Emotional or psychological costs do relate to the public health area. For example, the young black urban women discussed in the previous section provide an example of emotional costs to public policy. Presumably, these women buy guns because they fear crime. Whether or not the guns are effective in thwart- ing criminals or deterring crime, they probably have the effect of making the women feel more secure. It gives a feeling of psycho- logical well being. This feeling would be eliminated if the gun were removed.

There is another, probably more important, psychological cost. The government and the criminal justice system, in part, derive their ability to govern from the consent of the governed. That is, government can operate because the citizenry has confi- dence in it. Vietnam war protestors used this notion in their slogan: "what if you held a war and nobody came?" One might ask the same question about a social policy. That is, what would happen to the credibility of the criminal justice system if no one complied with the law? People might lose confidence in the ability of the system to function.

In the gun control area. Bordua, Kleck and I asked a random sample of people in Illinois if they would comply with gun confiscation.11 About 75% of gun owners said they would not. About half of the households in the United States possess a gun. If 75 % of those households refused to comply with the law. this would amount to massive civil disobedience which would be impos- sible to police. Obviously, noncompliance would not have to ap- proach 75% to make enforcement impossible. A much lower per-- centage would suffice. Again, this noncompliance might shake citizens' confidence in the system.

Monetary costs should be another concern to those interested in social policy. For example, there are about 200 million guns in the United States. Estimates vary plus or minus 40 million. About 60 million of these are handguns. The monetary costs of collecting or registering these guns is no trivial matter. Even if there were only 4 or 5% noncompliance, this would amount to from 800,000 to one million illegal guns. Also, in a confiscation scheme, reimbursement at fair market value may be necessary to ensure compliance. Given the large number of guns and their high cost, this could be a sizable amount of money.

A confiscation or registration law in the absence of suffi- cient authority to enforce the law would be costly and useless. However, there are certainly civil liberties costs to be paid. This is especially true if sizable numbers of people did not comply. Civil liberties problems arising from the United States Constitution's fourth amendment protections against illegal search and seizure could be substantial. In fact, the fourth amendment would probably bar any de facto application of a regis- tration or confiscation law for existing guns. That is, given the number of guns, the searches necessary to control even low percentages of noncompliance would be constitutionally prohibitive.

Any registration system which would check a person's mental or criminal history has interesting implications for civil liber-- ties. For example, Illinois' Firearm Owners Identification Card system does check the applicant's record, and cards are denied on the basis of prior criminal or mental health records. This means that employers in Illinois can, and do, get free and efficient background checks on employees by requiring them to obtain the card. This can be done without asking the employee or potential employee about past record. The employers simply argue that the employee in the course of his employment may need to be in a room in which a gun is located. Under Illinois law, being in a room with a gun puts the gun in the possession of everyone in the room. Some may not be willing to pay this cost of the license, others may.

There may be some interesting crime control costs of gun control. The obvious argument could be made. Armed citizens are capable of catching criminals. Or, as we have already discussed, armed citizens may deter criminals from victimizing groups known to be armed. But there may be a more tantalizing crime control cost. Kleck argues that disarmed criminals may be forced to change their modus operandi.11 Armed criminals have the luxury of being able to victimize somewhat "hardened" targets such as grocery stores. These targets are somewhat risky, but the payoff is large. Without the gun, criminals would be forced to pick less desirable, weak targets where the payoff is lower. This might result in an increase in the crime rate because the criminals would have to commit more crimes to generate the same amount of money. It might also have the effect of shifting victimization to those who can least afford it. So, with confiscation one might see decreases in commercial robbery and increases in robberies among the aged and the poor.

Finally, there are external security costs to some types of gun control. For example, there is reason to believe that the United States military uses recruits who are good shots in the infantry and those who are bad shots in other support areas.12 This means that we need not maintain a large standing army. That is, an army can be raised and trained very quickly and at less cost.

Another external security cost relates to the concept behind the Second Amendment to the Constitution. Recently, Cuban officials reported that military style rifles had been distributed to every household in Cuba. This news release was a not even thinly disguised attempt at warning that any attempt at invasion would be met with grueling urban and rural guerrilla warfare. An armed citizen is a force that despots either foreign or internal find very difficult to deal with. Obviously, invasion of the United States by a foreign country is all but impossible. This example, however, should make the point that policies internal to the Unites States can have the consequence of changing other countries' actions toward us.

Conclusion

In the preceding discussion I have tried to demonstrate that public policies can have unintended consequences. These consequences may or may not be acceptable costs to pay for the policy. It is also important to note that not all policies are feasible to pursue. There are social policies we may be willing to undertake, but which are not possible to achieve. The policy might be doomed to failure because of either the structural impossibility of the task or the political realities of the times. Whether it be feasibility of cost, we cannot afford to stumble blindly into policy initiatives without first having evaluated the consequences and subtleties of the plan. The costs discussed here may or may not be realistic. And the benefits of certain types of gun control may very well outweigh the costs. Be that as it may, the main point of this exercise should not be lost on the details of this example. Policy initiatives should not be treated as

sacred cows. Their myths should be debunked in order to avoid disaster.

Questions and Answers

Question: When talking about handgun control, the definition is not handguns versus rifles. I think it is the concealment of the weapon that is the key. An effective so-called handgun control law would be a law that would control those guns that are con- cealable, whether by sawing off a shotgun or rifle.

Dr. Lizotte: Any gun, with the exception of a howitzer, can be sawed off and made concealable. That is easy. One can do that with a hacksaw in the basement.

Mr. Mark Fleisher (Manhattan District Attorney's Office): You can perhaps not restrict the sale of rifles or shotguns but you can make it a crime to possess a sawed-off rifle or shotgun.

Dr. Lizotte: It is a crime to commit a homicide with a gun.

Mr. Fleisher: I understand your point with respect to 75% of those criminals who said they had already used sawed-off shotguns or rifles, that was their weapon of choice. It doesn't impress me to learn they would do so in the future, whether or not handguns were taken away.

Dr. Lizotte: This is 75 %, of the 75% who had committed gun crimes in the first place. That is a large number of people who are in jail for gun crimes--half of these people.

Mr. Fleisher: You are also talking about gun homicides, felony murders, which as we know, is a minority of homicides. The great cost to society of the availability of handguns lies largely in the situation where in the heat of passion somebody picks up an available handgun in the dresser drawer and shoots another person.

Dr. Lizotte: Those are included in the calculation. They included trigger pulls. They argue that if 20% of all crimes with handguns became crimes with long guns, the death rate would double, wheth-er or not they are domestic or felony.

Mr. Fleisher: But are we still talking about the availability of guns? I would also like to point out that I think at this point that no one is trying to confiscate guns. I think the goal of gun control organizations at this point is simply to treat guns like we treat cars. That one must register them, there is a waiting period and some kind of background check has to be made. To talk about confiscation is really a straw-man issue. I don't think anyone in this political climate is arguing they ought to be confiscated. Certainly Handgun Control Incorporated is not.

Dr. Lizotte: First, I favor gun control. I am not opposed to gun control. All l am saying is there are costs to registration too. We can talk about those. There are costs to these things and you have to decide whether or not you want to pay them. Confiscation is not a red herring. New York City has a de facto ban on guns. and Morton Grove in Illinois just passed one. Also, talking about a national law, there are political realities to be dealt with. That is, you are not going to get a national law in the foresee- able future. We can also use the prohibition analogy, if you like. We had a national law outlawing booze, and I suspect that the proportion saying they would violate the law and drink booze anyway during prohibition was something like 75%. It didn't work. To have a law doesn't guarantee that it will work. One unintended consequence of prohibition was the creation and nurturing of the American Mafia.

Dr. Franklin E. Zimring: Dr. Lizotte did not have a lot of time for his presentation. I would like to ask him to outline in some detail Professor Kleck's study.

Dr. Lizotte: I did not analyze the methods and statistical conclusions, so it is hard to be precise. Apparently ballistics tests have been done comparing the lethality of handguns and long guns. There is a problem because shotguns have entirely different problems. The military and FBI both fired bullets. The

F.B.I. fired bullets into masses of gelatin and looked at how the gelatin was displaced. On that basis the military and F.B.I. both came up with indices of stopping power--call it what you want--or lethality of different weapons. It does not work well for shotguns because they are so lethal and have so many little pellets it is very hard to measure. One cannot take human subjects and fire bullets at them and see if they die.

Mr. Howard Yagerman: (General Counsel for the New York City Department of Probation): I would like to follow-up some thing Dr. Lizotte said. He was quite correct when he said, paraphrasing him, that the statutes on the books are more honored than breached in terms of handgun control and so forth. New York City and New York State have perhaps the most strict statutes on the books. My department does about 36,000 to 38,000 presentence reports a year, a great number of them dealing with handguns. Very few of them, quite frankly, get the maximum penalty. There is always some mitigation or some other reason why the armed felon or the handgun possessor does not get the maximum penalty. Many of the people find their way to us on probation. I think we should take a look at what we really want to achieve before we make policy suggestions that, obviously, without much thoughtful- ness are going to delegitimize public policy.

Dr. Lizotte: I have data on California, which has a mandatory sentencing law for gun crimes. People who had committed up to five felonies in a three-year period and who had been convicted and sent to jail five times not only did not get the extra two years for committing the crime, but they actually got a shorter sentence because they were bargaining the gun charge away. Those who committed five or more felonies in a three-year period, con- victed five times and sent to prison got an extra two years. I think there were 65 of those in California in the three-year per- iod. It is safe to say that those mandatory sentencing laws are not being used. That might mean they are not effective and should not be used. I do not know. That is another form of gun control- that is not effective, at least currently, because it isn't used.

Mr. Yagerman: The point is well taken. I can't say it often enough. I have colleagues here. We did go in to every violation of probation because that is what we do--prosecute them. I can tell you that we see many returns, notwithstanding the fact that we have very strict laws on the books. They are not being enforced. It is as simple as that.

FOOTNOTES

1. D. McDowall, "Mandatory Sentencing and Firearms Violence: Evaluating an Alternative to Gun Control," Law Soc. Rev. 17:287, 318, 1983; C. Loftin and D. McDowall, "One with a Gun Gets You Two: Mandatory Sentencing and Firearms Violence in Detroit," Ann. Acad. Pol. Soc. Sci., 455:150, 1981; M. Heumann and C. Loftin, "Mandatory Sentencing and the Abolition of Plea Bargaining: The Michigan Felony Firearm Statute," Law Soc. Rev. 13:401-07, 1979.

2. P. Carlson, "Mandatory Sentencing: The Experience of Two States," Washington, D.C. National Institute of Justice, 1982.

3. A. Lizotte and M. Zatz, "The Use and Abuse of Sentence Enhancement for Firearms Offenses in California," Law Cont. Prob. In press.

4. G. Kleck, "Handgun Only Control: A Policy Disaster in the Making," Firearms and Violence: Issues of Public Policy, Kates, D.B. Jr., editor, San Francisco, Pacific Institute, 1982, pp. 167-99.

5. F. Zimring, "The Medium is the Message: Firearm Caliber as a Determinant of Death from Assault," J. Legal Studies, 1:97-123, 1972.

6. J.D. Wright and P. Rossi, "The Armed Criminal in America: A Survey of Incarcerated Felons," Washington, D.C., National Institute of Justice, 1985.

7. P. Cook, "Reducing Injury and Death Rates in Robbery," Pol. Anal. 6:21-45, 1980.

8. D. Bordua and A. Lizotte, "Patterns of Legal Firearm Ownership: A Cultural and Situational Analysis of Illinois Counties," Law Pol. Quart. 1:147-75, 1979.

9. J.D. Wright and P. Rossi, "The Armed Cranial in America: A Survey of incarcerated Felons," Washington, D.C., National Institute of Justice, 1985.

10. D.J. Bordua, A.J., and G. Kleck, with V. Cagle, "Patterns of Firearms Ownership, Use and Regulation in Illinois," Report to the Illinois Law Enforcement Commission, 1979, p. 253.

11. G. Kleck, "Policy Lessons from Recent Gun Control Research," Meeting of the American Society of Criminology, San Diego, 1985.

12. A. Lizotte and D.J. Bordua, "Military Socialization, Childhood Socialization and Current Situation: Veterans' Firearms Ownership," J. Pol. Milit. Sociol. 8:243-56, 1980.

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THE MISCONCEPTION OF THE AMERICAN CITIZEN'S RIGHT TO KEEP AND BEAR ARMS

By
Michael J. Palmiotto, Ph.D.

"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."

On the front of the National Rifle Association headquarters In Washington, D.C., emblazoned are the words, "the right of the people to keep and bear arms, shall not be infringed." A Time Magazine article of March 27, 1989 (p. 39) about assault rifles stated. "When the framers of the Constitution provided Americans with the right to bear arms, they could hardly have imagined the development of high powered semi-automatic weapons capable of firing more than 30 rounds in a clip." In a paid advertisement by the National Rifle Association that appeared in the U.S.A. Today, The Wall Street Journal and other print media sources in 1989 the NRA claimed "The students of Beijing did not have a Second Amendment right to defend themselves when the soldiers came."

All the quotes in the preceding paragraph pertaining to the Second Amendment of the United States Constitution are erroneous. The National Rifle Association, in its publicity fallaciously interprets the Second Amendment of the American Constitution. When national magazines lead people to believe that the framers of the U.S. Constitution "provided Americans with the right to bear arms" they contribute to widespread ignorance concerning the Second Amendment. This ignorance becomes further entrenched into the public's mind when celebrities like Johnny Cash, the Country singer, reinforce this belief by stating on cable televi- sion their "right to bear arms." (Mr. Cash made this statement while being interviewed by Ralph Emory on the Nashville Station in December 1989).

There exists a misconception by a vast number of American citizens that they have the inalienable right under the Second Amendment "to keep and bear arms." The Second Amendment of the U.S. Constitution does not guarantee to American citizens "the right to keep and bear arms." In every case since the mid 1800s where people cited the second Amendment as giving them the right to keep and bear arms," the Supreme Court has said "no." An American citizen does not have the right to keep and bear arms." In 1876 the Supreme Court in United States v. William J. Cruik- shank decided that the right to bear arms is not a right granted by the Constitution. The court interpreted the term "in- fringed" in the Second Amendment to mean that it shall not be infringed by Congress. Herman Presser on September 14, 1879, in Cook County, Illinois paraded as head of an unauthorized armed militia. Since Presser violated Illinois law by parading armed without a license he was found guilty and fined $10.00. The U.S. Supreme Court in Presser v. Illinois decided in 1886 that the right of the people to keep and bear arms "Is not a right under the Constitution." The Supreme Court further stated, "A State may pass laws to regulate the privileges and immunities of its own citizens, provided that in so doing it does not abridge their privileges and immunities as citizens of the United States." Herman Presser was not a member of the State of Illinois Militia or a member of the United States Military therefore the Court interpreted that a citizen did not have the right to disobey a State law and parade and drill with arms in cities and towns.

The National Firearms Act of 1934 regulated and taxed the transfer of certain types of firearms such as sawed-off shotguns and firearms. Jack Miller and Frank Layton, in violation of the National Firearms Act, transported a 12 gauge Stevens shotgun having a barrel of less than 18 inches across state lines. The weapon was transported from Oklahoma to Arkansas and not regis-- tered as required by the law. The National Firearms Act was con-- tested on the grounds that it was not a revenue measure but an attempt "to usurp police powers reserved to the states" making the law unconstitutional. The Supreme Court, in the United States of America v. Jack Miller and Frank Layton, reaffirmed earlier court decisions that the Second Amendment does not guarantee citizens the right to keep and bear arms. This 1939 Supreme Court decision interpreted the original intent of the Second Amendment by the framers. According to the Court,

the popular opinion of the day was against standing armies. The view of this period was that adequate defenses could be maintained by a militia-civil- ians who occasionally would serve as soldiers. These men were expected to bring their own arms. This concept could be traced to the Assay of Arms in England when all adult male inhabitants had the obligation to possess arms and to defend their community when called upon to do so.

In 1971, the Sixth Circuit Court of Appeals in Frank James Stevens v. United States affirmed that congress had the authority to prohibit possession of firearms by convicted felons under its commerce power. The circuit court examined the constitutional questions. Its remarks: "Since the Second Amendment right 'to keep and bear arms' applies only to the right of the state to maintain a militia and not to the individual's right to bear arms, there can be no serious claim to any express constitutional right of an individual to possess a firearm." Another Court of Appeals case decided by the Eighth Circuit in 1971. United States v. Audry Keith Decker. The constitutionality of the Gun Control Act of 1968 and that the record keeping requirements of the Act Do not infringe "upon the Second Amendment right to bear arms. The Circuit Court quoted the Supreme Court decision of the Miller case to substantiate its decision.

In Charles F. Eckert v. City of Philadelphia, a case decided in 1973, the Third Circuit Court of Appeals stated that Eckert was "completely wrong" in his claim that the Second Amendment entitled him to bear arms. In a case decided by the Sixth Circuit Court of Appeals in 1976, United States v. Glen Ray Birmley, the appellant contended that the statutes under which he was charged violated his Second Amendment right to bear arms. The Circuit Court agreed with the Supreme Court and the Ninth and Fifth Circuit Courts who have reviewed this question. The Court cited United States v. Miller decided in 1939, United States v. Tomlin decided by the Ninth Circuit in 1972, and United States v. Williams decid-ed the fifth Circuit in 1971.

The Sixth Circuit Court of Appeals in 1976 in United States v. Francis Narin supported the congressional right to regulate firearms. Narin argues that to tax firearms transactions "would be to sanction a tax on an activity which is Constitutionally guaranteed and protected" by the Second Amendment. The Court wrote that there exists an erroneous supposition that the Second Amendment is concerned with the rights of individuals rather than those of the States. The United States Supreme Court denied certiorari.

This paper will review four cases that were reviewed by the United States Court of Appeals during the 1980s. The first, Victor O. Quilici V. Village of Morton Grove, was decided the Seventh Circuit in 1982. The Village of Morton Grove adopted a gun control ordinance which was contested that it violated the Illinois Constitution and the Second Amendment of the U.S. Constitution. The Circuit Court upheld the Morton Grove ordinance and reaffirmed and indicated that the Second Amendment right to keep and bear arms is not a right that states cannot regulate. The Court reiterated that the Second Amendment does not apply to the states. A 1984 case of Jerome Sklar v. Jane M. Byrne dealt with a challenge to the constitutionality of a Chicago City ordinance prohibiting registration of handguns after a specific date. The Seventh Circuit Court of Appeals held that the Chicago firearms ordinance does not infringe upon any federal constitutional right to bear arms. The last case decided by the Eighth Circuit, United States v. Douglas John Nelsen, the appellant contested that Congress did not have a right to pass the Switchblade Knife Act. The law was designed to stop their use by young gang members. In the court's opinion the Act did not violate the Second Amendment. Although Nelsen claimed he had a right to keep and bear arms the court responded that his right did not exist for at least 100 years. This can be traced back to the Supreme Court case of 1876 in United States v. Cruikshank.

For over 100 years, Federal Courts have rendered the legal opinion that the Second Amendment did not give citizens the right to bear and keep arms. Yet in the 1990's, there still exists the misconception of the American citizens' right to keep and bear arms. Under America's judicial process, legal precedents are important. They should not be overlooked nor responded to as if they never existed. In 1971, Supreme Court Justice William D. Douglas wrote, "A powerful lobby dins into the ears of our citi- zenry that these gun purchases are constitutional rights protect-- ed by the Second Amendment. . . ." Yet, why do so many American citizens hold the misconception of the belief of their right to gun ownership? Is it due to the

excellent publicity of the National Rifle Association? Is it due to the news media's unwillingness to provide correct information about this issue? Or perhaps the legal profession, law enforcement or educators have been remiss in making Americans aware of the appropriate legality concerning this controversial issue. Most assuredly the aforementioned cases and Justice Douglas' remarks clearly serve to dispel the image that the Second Amendment is the constitutional fountain from which springs the so-called illusion of the "right to bear arms." Legal opponents on both sides acknowledge that the Second Amendment did not serve to "grant" any right to keep and bear arms, but rather served to form the rights which pre-existed the Constitution to prevent government infringement.

That of course, effectively opens the door to the pro-gunners' arguments that the Fourth and Fourteenth Amendment guarantees against unreasonable seizure of property and the right to due process serve collectively to bolster their position. This area is particularly sensitive in light of the literal proliferation of claims brought under U.S. Code 42-1983. Any action by a government official performed "under the color of law" which serves to violate the Constitutional Rights of the individual gives rise to a plaintiff cause of action. Without a doubt the Fourth and Fourteenth Amendment clauses are by far the most common. A recent case in point, United States v. Verdugo-Urquidez (58 U.S. Law Week 4263, Feb. 28, 1990) focused on the issue of denial of the Fourth Amendment "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures". Specifically the legal issue on point addressed the Constitutional framers' intent in the terms "people" and "persons" as contained in the Constitution and its numbered Amendments. The majority opinion concluded that specific reference in the Second Amendment to "the people" meant essentially "enfranchised persons" rights as opposed to the concept of "we the people as a government or body." The court went on the suggestion that if the Second Amendment were framed with the intent of preserving governmental rights (the right of the states to keep a well trained militia), why did the authors immediately follow with the Fourth Amendment which clearly seems to limit governmental rights to prevent infringement on individual rights. This new interpretation indicates a possible new change in direction for the courts.

THE RIGHT TO POSSESS ARMS: THE INTENT OF THE FRAMERS OF THE SECOND AMENDMENT

By Bernard J. Bordenet

Bernard J. Bordenet was a Military Law Attorney with the United States General Accounting Office. He retired from Federal Service in 1972. Reprinted with permission from the University of West Los Angeles Law Review, Volume 21, 1990.

I. Introduction

The Constitution and Bill of Rights contain no superfluous language.

> The Constitution was ratified in the belief, and only because of the belief, encouraged by Its leading advocates, that, immediately upon the organization of the Government of the Union, articles of amendment would be submitted to the people, recognizing those essential rights of life, liberty, and property which inhered in Anglo-Saxon freedom, and which our ancestors brought with them from the mother country.1

The Framers recognized that they could not enumerate or even contemplate all the specific rights they enjoyed and wished to protect.2 Thus, The guarantees of the Bill of Rights were to be broadly and liberally construed.3

One may or may not agree on the wisdom of the Framers, but they believed that the right to possess arms was so necessary that they included it in the Bill of Rights. The Second Amendment reads: "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.4

The historical meaning and intent of this guarantee should not be ignored. The provision is not an outmoded relic of past fears about what could not possibly happen here.5

History has a way of repeating itself. In 1775 British General Gage seized the arms of the inhabitants of Boston in a futile effort to suppress a revolution. Bostonians surrendered 1,778 muskets, 634 pistols, 973 bayonets, and 38 blunderbusses.6 One purpose behind the Second Amendment, which was adopted in 1791, was to prevent a reoccurrence of such confiscatory efforts.7 In 1981 the Illinois Village of Morton Grove passed an ordinance to disarm the people of their pistols.8 Armed with the Second and Fourteenth Amendments, several citizens mounted a court challenge to the ordinance. A divided court upheld the ordinance in *Quilici v. Village of Morton* Grove,9 with the comment that the debates surrounding the adoption of the Second and Fourteenth Amendments were irrelevant to the court's determination, and further, that the possession of a pistol, even in the home, was not constitutionally protected.10

Justice Hugo Black criticized courts who "abate whenever and however possible" by such "judicial techniques" as "narrow construction" any right which "[s]ome people are hostile to" and view as "a constitutional nuisance."11

This article will demonstrate that some courts exhibit a profound misunderstanding of the purposes or intent behind the Second Amendment, or demonstrate a disturbing willingness to simply ignore history and any favorable case law or writings in a concerted effort to turn the Second Amendment into a hollow shell, lacking any force and effect.

II. Historical Background of the Second Amendment

During the Revolutionary War the colonies established a confederation of states under Articles of Confederation without conferring real power on the United States Congress to solve national problems. Under the Articles each state retained "its sovereignty, freedom and independence, and every power, jurisdiction and right" which was not therein "expressly delegated to United States."12 The United States were wholly dependent upon the response of the states for requests for troops and funds, 13 which frequently were ignored. Lack of independent power in Congress to raise revenue, to control interstate and foreign commerce, to establish effective international relations, and to provide effective internal and external defense were among its chief deficiencies in meeting national needs.

The Constitution was drafted by representatives of the states in the 1787 Constitutional Convention to provide a national government adequate to meet those needs. It preserved all the powers of the states except those that were exclusively delegated to the United States, while limiting those of the new national government to the powers delegated to it.14 This framework later was guaranteed by the Tenth Amendment.15

The experience of the Revolutionary War, the hostility Of the Indians on the western frontier and of the English and Spanish on the northern and southern borders, and the possibility of foreign invasions a some future time, convinced the framers of the Constitution of the necessity for a navy and a small standing army in the time of peace.16 Hence, the Constitution conferred on Congress the power "to raise and support Armies"17 and "to provide and maintain a Navy."18

There was no popular opposition to the navy provision, but memories of standing armies maintained by James II in England without the consent of Parliament and of British troops maintained in the colonies without their consent were fresh in the representative' minds. Mindful of the hostility of the people to standing armies the Founding Fathers provided safeguards against large standing armies. The power to raise armies and appropriate money therefor was vested in the Congress whose representatives are elected by the people every two years;19 command of the armies was conferred on the elected civilian President of the United States,20 who appoints the officers with the advise and consent of the Senate,21 and appropriations for armies were limited to a term no longer than two years.22 Neither the English Bill of Rights nor those of the states prohibited standing armies established with the consent of the legislature itself,23 but the Constitution vested the power of raising armies in the national legislature itself.24 The main reliance apparently was to be placed in a federal militia to execute the laws of the Union, suppress insurrections, and repel invasions.25 This federal militia was to consist of such part of the state militia as may be called into the active service of the United States, having been organized and trained by the states under standards prescribed by Congress, with the officers appointed by the states.26 Thus the Constitution established civilian control over the military and left practically unaffected the right of the states to maintain and use state militia for state purposes.27

The Founding Fathers believed that these safeguards were sufficient to overcome all reasonable popular opposition to the military provisions of the Constitution.28 Furthermore, federal military power would be available to protect the citizens Of each state against usurpations and tyranny of the state government and its officials,29 and against foreign invasions and against domestic violence (a provision lacking under the Articles of Confederation).30 It was believed that a standing army necessarily would be so small that it would be no match for the greater power of the armed citizens of the militia.31 Compare the thirteenth article in the Virginia Declaration of

Rights of 1776 drafted by George Mason:

> That a well-regulated Militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State; that Standing Armies, in time of peace, should be avoided as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power.32

The Constitution fully met the spirit of that provision.

There was widespread and powerful opposition to the Constitution, which was to become effective only if ratified by at least nine state conventions elected by the people. Among the stated objections were the absence of a national Bill of Rights and the alleged destruction of the power of the states over their militia. One of the strategies of opponents of ratification was to condition ratification upon the adoption of previous amendments, thereby delaying ratification until after a new convention could make desired amendments and add a Bill of Rights. The proponents of ratification regarded such course of action as probably fatal to the Constitution, and in order to obtain unconditional ratification promised to propose appropriate amendments and a Bill of Rights once the Constitution was adopted. That strategy was successful.

Some of the ratifying conventions and the minorities of Pennsylvania, Massachusetts, and Maryland recommended Bills of Rights and amendments to the Constitution. The main battle over the militia was fought in the Virginia convention with James Madison, the principal author of the first ten amendments, one of the chief proponents of the Constitution. The Virginia proposals were the most comprehensive and included two separate and distinct recommendations relating to the militia. The wording of the Second Amendment proposed by Madison and slightly rephrased by the First Congress is in substance practically identical to one of the Virginia recommendations. The Second and Third Amendment provide:

> II: 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.33
>
> III: 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 a manner to be prescribed by law.34

III. State Militia Powers Were Retained Under the Constitution

Some courts and commentators contend that the Second Amendment was designed to prevent federal interference with the power of the states to organize, arm, maintain, and use state militia for state purposes.35 This contention is flatly contradicted by its legislative history. That history indicates, as hereinafter conclusively demonstrated, that under the Constitution the states retained their powers over state militia subject only to the paramount power of Congress to provide for organizing, arming, and disciplining the militia and to call them into federal service in only three situations.36

James Madison and other federalists in the Virginia Constitution Ratifying Convention repeatedly rejected the alleged need for a guarantee of the right of the individual states to organize, arm, and use state militia to enforce state laws and to suppress riots and insurrections. The Virginia opponents of ratification, led by George Mason and Patrick Henry, did indeed argue the need for such a guarantee, but James Madison, John Marshall, George Nicholas, Edmund Pendleton, and Governor Edmond Randolph were adamant in their assertion that the states retained their

preexisting powers over their militia and needed no such guarantee.

The basic premise of Mason and Henry was that the Constitution established a sovereign national government and that a sovereign government possesses all powers not specifically denied to it, particularly since the Constitution contained no express provision indicating that the national government was to possess only delegated powers and failed specifically to reserve to the states their powers, such as those contained in the Articles of Confederation. 37

Mason and Henry rejected the view that all powers not given to the federal government were reserved to the states, and argued that the states "have no power at all over the militia"38 and could not use their militia even to protect themselves against domestic violence.39 Henry said: "My great objection to this government is, that it does not leave us the means of defending our rights, or of waging war against tyrants ... Have we the means of resisting disciplined armies, when our only defense, the militia, is put into the hands of Congress?40 They feared that the federal government had exclusive power to arm the militia and suppress insurrections and rebellions and that the states could not, and that by neglect and harassment of the militia the federal government would make militia duty so onerous and odious that the people would demand a standing army. The federal government would then erect a standing army on their ruin and billet federal solders "on the people at pleasure."41

Madison pointed out that under the Constitution "delegation alone warrants the exercise of any power."42 He noted:

> The state governments might do what they thought proper with the militia, when they were not in the actual service of the United States. They might make use of them to suppress insurrections, quell riots, etc., and call on the general government for the militia of any other state, to aid them if necessary.43

He stated further:

> The state governments are to govern the militia when not called forth for general purposes; and Congress is to govern such part only as may be in the actual service of the union. Nothing can be more certain and positive than this. It expressly empowers Congress to govern them when in the service of the United States. It is, then, clear that the states govern them when they are not.44

Earlier Madison had stated that he considered the militia provisions of the Constitution "to be an additional security to our liberty, without diminishing the power of the states in any considerable degree."45

John Marshall, later Chief Justice of the United States, stated:

> The state governments did not derive their powers from the general government; but each government derived its powers from the people, and each was to act according to the powers given it... . Could any man say this power was not retained by the states, as they had not given it away? ... The state legislatures had power to command and govern their militia before, and have it still, undeniably, unless there be something in this Constitution that takes it away... . But the power given to the states by the people is not taken away; for the Constitution does not say so ... To me it

> appears, then, unquestionable that the state governments can call forth the militia, in case the Constitution should be adopted, in the same manner as they could have before its adoption ... If Congress neglect our militia, we can arm them ourselves ... the power of governing the militia was not vested in states by implication, because, being possessed of it antecedent to the adoption of the government, and not being divested of it by any grant of restriction in the Constitution, they must necessarily be as fully possessed of it as ever they had been. And it could not be said that the states derived any power from that system, but retained them, though not acknowledged in any part of it.46

Nicholas argued that the national and state governments had concurrent power of arming the militia, and that such power given to the national government is not exclusive,"... for, in every instance where the Constitution intends that the general government shall exercise any power exclusively of the state governments, words of exclusion are particularly inserted. Consequently ... Virginia may arm the militia should Congress neglect to arm them."47 And since Congress can call forth the militia only to execute the laws of the Union, suppress insurrections, and repel invasions, the federal government "can only govern such part of them as may be in the actual service of the United States."48

Pendleton put the federal and state powers of the militia in perspective:

> They say that the state governments have no power at all over the militia. The power of the general government to provide for arming and organizing the militia is to introduce a uniform system of discipline to pervade the United States of America. But the power of governing the militia, so far as it is in Congress, extends only to such parts of them as may be employed in the service of the United States. When not in their service, Congress has no power to govern them. The states then have the sole government of them; and though Congress may provide for arming them, and prescribe the mode of discipline, yet the states have the authority of training them, according to the uniform discipline prescribed by Congress. But there is nothing to preclude them from arming and disciplining them should Congress neglect to do it. As to calling the militia to execute the laws of the Union, I think the fair construction is directly opposite to what the honorable member says. The 4th section of the 4th article [which guarantees federal government protection of each state against invasion and domestic violence] contains nothing to warrant the supposition that the states cannot call them forth to suppress domestic insurrections ... All the restraint here contained is, that Congress may, at their pleasure, on application of the state... protect each of the states against domestic violence. This is a restraint on the general government not to interpose. The state is in full possession of the power of using its own militia to protect itself against domestic violence; and the power in the general government cannot be exercised, or interposed, without the application of the state itself. This appears to me to be the obvious and fair construction.49

Governor Randolph said:

> Another construction ... is, that it is exclusively in the power of Congress to arm the militia, and that the states could not do it if Congress thought

> proper to neglect it ... Should Congress neglect to arm or discipline the militia, the states are fully possessed of the power of doing it; for they are restrained in no part of the Constitution.50

Near the close of the debate he said that the Mason-Henry "amendment respecting the militia is unnecessary. The same powers rest in the states by the Constitution. Gentlemen were repeatedly called upon to show where the power of the states over the militia was taken away, but they could not point it out. "51

Unconvinced that the Constitution conferred only delegated power on the federal government or that the states retained all other powers not specifically prohibited therein, Mason stated:

> I wish a clause in the Constitution, with respect to all powers which are not granted, that they are retained by the States ... We wish this amendment to be introduced to remove our apprehensions. There was a clause in the Confederation reserving to the states respectively every power, jurisdiction, and right, not expressly delegated to the United States.52

Mason thought that, "... there ought to be some express declaration in the Constitution, asserting that rights not given to the general government were retained by the states. He apprehended that, unless this was done, many valuable and important rights would be concluded to be given up by implication."53

Henry said that the Articles of Confederation declared that "every right was retained by the states, respectively, which was not given up to the government of the United States."54 He "declared a Bill of Rights indispensably necessary; that a general positive provision should be inserted in the new system, securing to the states and the people every right which was not conceded to the general government; and that every implication should be done away."55 Henry thought that "[a) bill of rights may be summed up in a few words. What do they tell us? That our rights are reserved. Why not say so?"56 Madison obliged, in what are now the Ninth and Tenth Amendments.57

The notion that the Second Amendment was adopted to guarantee to the states the right to maintain and govern their own militia is particularly difficult to understand, not only because it fails to so state, but also because the right to bear arms provision was a separate Virginia proposal, and because Madison and the First Congress rejected the Virginia recommendation that would expressly so provide in submitting the Bill of Rights to the states for ratification.

The Virginia convention recommended a separate specific amendment for that purpose: "That each State respectively shall have power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same."58 That was the Mason-Henry Constitutional amendment that Madison, Marshall, Nicholas, Pendleton, and Randolph all had declared to be unnecessary. Not only did Madison fail to include it in his proposed amendments, but both the House of Representatives and the Senate of the First Congress refused to recommend it to the states for ratification. It should be noted that recommendation sought such guarantee of state power over their militia only if Congress should neglect the militia. The Pennsylvania minority, however, sought a guaranteed absolute and independent right of the states to maintain their militia. Its recommendation read: "That the power of organizing, arming and disciplining the militia, (the manner of disciplining the militia to be prescribed by Congress) remain with the individual states... "59

The U.S. Supreme Court has been in full agreement with the views of Madison, Marshall,

Pendleton, Nicholas, and Randolph. In 1820 in *Houston v.* Moore,60 it observed that the power of the states to maintain their militia existed prior to the adoption of the Constitution, but under the Constitution such state power is subordinate to the paramount power of the federal government to call the militia to execute the laws of the Union, suppress insurrections, and repel invasions. As to state militia the Court said: "The power of the state government to legislate on the same subjects, having existed prior to the formation of the Constitution, and not having been prohibited by that instrument, it remains with the states."61

Unlike the Articles of Confederation which provided that "every state shall always keep up a well regulated and disciplined militia,"62 the Constitution contains no such specifically articulated mandate. However, as the Supreme Court observed in 1939 in *United States v. Miller,* "the states were expected to maintain and train" the militia.63 Without state militia the Constitution's organization plan for the federal militia would lack its ordained foundation, since the states appoint the officers and the federal militia is composed of state militia called into active federal service. No command in the Constitution was considered necessary.

The claim that the purpose of the Second Amendment was to guarantee the right of the states to maintain armed militia, [That is the right to bear arms belongs only to the militia itself] is not only contrary to historical fact, but demonstrates flawed reasoning or theory. The constitutional function of the federal militia is to suppress insurrections and repel invasions, which necessitate an armed response. Said the Supreme Court of the Second Amendment in Miller "With the obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee [of "the right of the people to keep and bear arms"] were made."64 The contention that the second Amendment guarantees the right of the states to maintain militia, which the Constitution presupposed and expected that they would maintain for the benefit of the United States and of the states themselves, is patently erroneous and reveals how dismal the intellectual discourse is on this topic.

An absolute right of the states to maintain militia would mean that the states have a right to maintain at least two militia: that called into active federal service and the militia retained, and therefore is contrary to the Constitutional prohibition against keeping troops without the consent of Congress65 (since the right to keep an armed militia riot subject to federal requisition would be independent of the consent of Congress). Nothing in the Second Amendment or its history warrants such a theory. Under current federal law the "organized" militia (the National Guard, a recent institution) is part of the federal militia and a reserve component of the Army of the United States.66 If a state militia guarantee rather than an individual right of citizens to keep and bear arms were the purpose of the Second Amendment, it would have been totally unnecessary and irrelevant to include any guarantee of "the right of the people to keep and bear arms," since by its very nature a militia is necessarily an armed force and without arms it would be impossible to carry out its constitutional functions of suppressing insurrections and repelling invasions. Both Virginia and the Pennsylvania minority67 suggested a specific provision for that purpose, without a right of the people to bear arms provision, but both suggestions were rejected by Madison and the First Congress. Note that Virginia in article XIII of its 1776 Declaration of Rights contained no right of the people to bear arms provision, but like the U.S. Constitution clearly implied that the state should maintain a state militia.

Since the states retained their powers over their militia, the right of the states to maintain and govern their militia, which the Constitution presupposed they would do, is guaranteed by the Constitution as originally adopted and by the Tenth Amendment.

The above-quoted statement of the Supreme Court in *Miller* may have given rise to the state militia protection theory. However, immediately following that statement is a lengthy reference to

the history of colonial and early state laws requiring all able-bodied free male citizens to perform militia duty and provide their own arms and ammunition. That discussion would have been irrelevant if the purpose of the Second Amendment was viewed merely as protection of the right of the states to maintain militia without federal interference. Had that been the purpose of the framers, in order to render possible the effectiveness of federal militia it would have been more appropriate to protect federal militiamen against state and federal infringement, otherwise the states could frustrate federal use of militia by failing to maintain state militia or by prohibiting their citizens to keep arms. The Supreme Court recognized this in Presser v. lllinois,68 stating that aside from the Second Amendment "the states cannot ... prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the General Government."69

The Framers of the Second Amendment believed that there was no necessity to guarantee state militia powers against federal interference, since under the Constitution the federal government was dependent upon state militia for its organized manpower "which the States were expected to maintain and train"70 for mutual benefit. Furthermore the state retained their rights over their militia.

To determine the framers' intent, we should be mindful of the following: (1) having emphasized the inherent right of the states to maintain and use state militia for state purposes, (2) doubtless being aware of complete federal dependence on state militia for its own militia, (3) leaving a want of federal power to interfere with state militia, (4) having rejected state and minority recommendations for protecting state militia powers, (5) and stating preference by Madison and the framers for militia over large standing armies, and (6) having guaranteed state militia powers by the Tenth Amendment, (7) plus including in the Constitution's plan reliance on federal militia for suppressing insurrections and repelling invasions; Madison and the framers perceived no necessity to guarantee state militia powers by the Second Amendment, which by its terms does not preserve them, but instead guarantees the right of the people to keep and bear arms against federal infringement in order to protect the federal militia. The history of the Second Amendment militates against state militia protection theory. Furthermore, the Court's statement in United States v. Miller, regarding the purpose of the Second Amendment was not addressed to state militia, but to the federal militia.

Neither Madison nor the First Congress in proposing the Bill of Rights recommended that any change be made with respect to the powers of either Congress or of the states over militia, or to the organization, functions, training, or use of federal or state militia, although stele recommendation included time and territorial limitations on federal use of state militia, as well as a requirement of state consent in some circumstances. Likewise state recommendations that no standing army be kept up in time of peace unless with the consent of two-thirds or three-fourths of the Congress were rejected, but state proposals against quartering troops in private homes is now the Third Amendment. Hence it is clear that the purpose of the Second Amendment was not to guarantee to the states the right to organize, arm, maintain, and use state militia for state purposes, since they had retained that right.

IV. The Purpose of the Second Amendment Was To Prevent Large Standing Armies

What then was the purpose of the Second Amendment? It was to prevent the establishment of large standing armies by the federal government by guaranteeing the right of the people to keep and bear arms so as to provide the foundation for a national militia as the preferred armed service of the federal government to suppress insurrections and repel invasions. This view is supported by Virginia's Seventeenth Bill of Rights Recommendation:

> That the people have a right to keep and bear arms; that a well regulated militia composed of the body of the people trained to arms is the proper, natural and safe defense of a free state. That standing armies in time of peace are dangerous to liberty, and therefore ought to be avoided, as far as circumstances and protection of the community will admit ... 71

Madison's draft of the Second Amendment adopted the substance of the first sentence of that Virginia recommendation. Virginia followed that up immediately with Its Eighteenth Bill of Rights Recommendation: "That no Soldier in time of peace ought to be quartered in any house without the consent of the owner, and in time of war in such manner only as the laws direct."72

The adoption of that recommendation in the Third Amendment lends support to the view that one purpose of the Second Amendment was to promote the militia as the principal military arm of the federal government rather than large standing armies. This view is also supported by the remarks of Alexander Hamilton and Madison in THE FEDERALIST.73

There was strong universal objection to large standing armies as dangerous to liberty at the time of adoption to the Constitution. Madison stated:

> If insurrections should arise, or invasions take place, the people ought unquestionably to be employed, to suppress and repel them, rather than a standing army. The best way to do these things was to put the militia on a good and sure footing, and enable the (federal) government to make use of their service when necessary.74

Although convinced of the necessity of maintaining a standing army,75 Madison stated that, "the only possible way to provide against standing armies is to make them unnecessary. The way to do this is to organize and discipline our militia, so as to render them capable of defending the country against external invasions and internal insurrections."76 In the Constitutional Convention of 1787 Madison had stated that "as the greatest danger to liberty is from large standing armies, it is best to prevent them, by an effectual provision for a good militia."77

There should not be overlooked the state recommendations against standing armies in time of peace nor their recommendations that the people have a right to keep and bear arms .78 These clearly indicated a preference for a national militia rather than the maintenance Of regular troops as the military arm of the national government.

Patrick Henry agreed when he argued that a "most fatal omission" of the Constitution "is with respect to standing armies. In our Bill of Rights of Virginia, they are said to be dangerous to liberty, and it tells you that the proper defense of a free state consists in militia..."79

George Mason was of like mind. In the 1787 Constitutional Convention, fearful that an absolute prohibition against standing armies would be unsafe, he had sponsored the militia clause of the Constitution providing for federal regulation of the militia as to arms, organization, and training in order to make the militia an effective military arm of the federal government in suppressing insurrections and repelling invasions. He unsuccessfully proposed that the militia clause be prefaced with the words, "And that the liberties of the people may be better secured against the danger of standing armies in time of peace."80 In 1775 Mason had drafted a plan for a Fairfax County, Virginia militia composed of all able-bodied freemen 18 to 5O years of age, being convinced that such militia would relieve the mother country from any expense in their protection and defense, "and render it unnecessary to keep any standing army (ever dangerous to liberty) in

this colony."81

Another leading opponent of ratification of the Constitution, Elbridge Gerry of Massachusetts, said: "What, Sir, is the use of militia? It is to prevent the establishment of a standing army, the bane of liberty."82 Thus there appears to have been general agreement between the proponents and opponents of ratification of the Constitution that one purpose of a militia is to prevent standing armies. The expression "a free state" in the Second Amendment "is obviously here used in the generic sense, and refers to the United States as a whole rather than to the several states."83

Madison stated:

> The states are to have the authority of training the militia according to the Congressional discipline: and of governing them at all times when not in the service of the Union. Congress is to govern such part of them as maybe employed in the actual service of the United States ... If you limit their [United States'] power over the militia, you give them [the United States] a pretext for substitution a standing army.84

The Supreme Court has echoed this view: "The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of the country and laws could be secured through the Militia - civilians primarily, soldiers on occasion."85 The Court further agree that "the Militia comprised all males physically capable of acting in concert for the common defense."86 Clearly this did not refer to a select militia such as the National Guard. Federal law provides that the militia includes all able-bodied male citizens of the United States between the ages of 17 and 45.87 The National Guard is a relatively recent organization and is part of the Organized Militia, it constitutes a "select militia," which colonial Americans opposed as the equivalent of the universally hated "standing armies." Obviously the framers of the Second Amendment did not have a "select militia" such as the National Guard in mind.88

In view of George Mason's 1775 explanation that the purpose of organizing the Fairfax County militia was to make a standing army unnecessary, it is apparent that such was the purpose of his 1776 Virginia Bill of Rights militia as well as Virginia's 1788 seventeenth Bill of Rights recommendation for a national Bill of Rights, which Mason and Patrick Henry presented to the 1788 Virginia Convention. That purpose is also self-evident from that seventeenth Bill of Rights recommendation itself. Since Madison's Second Amendment recommendation was based thereon, as well as his views and those of both proponents and opponents of ratification of the constitution that the way to prevent standing armies is to have an effective militia, it is proper to conclude that one purpose of the Second Amendment was to prevent large standing armies, even though Madison believed that a standing federal army was necessary. The debates in the Virginia Convention set forth above of Madison, Marshall, Nicholas, Pendleton, and Randolph with Mason and Henry clearly support this view of the Second and Tenth Amendments, of the militia controversy, by all of the states that made any recommendations for amendments.

It seems clear, therefore, that what is now the Second Amendment, considered together with proposals of the states for a Bill of Rights and amendments to the Constitution, was proposed by Madison and the First Congress, not to guarantee to the states the right to maintain state militia, but to prevent large standing armies by guaranteeing to the people, all of them potential militia, the right to keep and bear arms.

V. Possession of Arms an Individual Right

Madison's Second Amendment proposal was based on recommendations originating in the State conventions.89 Three of these specifically involved an individual right to possess arms for other than militia purposes.90 The Pennsylvania Minority would protect the peoples "right to bear arms for the defense of themselves and their own State, or the United States, or for the purpose of killing game," and no individual should be disarmed "unless for crimes committed" or threat of "real danger of public injury."91 The Massachusetts minority urged that "the said Constitution be never construed ... to prevent the people of the United States, who are peaceable citizens, from keeping their own arms."92. New Hampshire urged that "Congress should never disarm any Citizen, unless such as are or have been in actual rebellion."93 While the exact wording of such recommendation is not found in the Second Amendment, the command that "the right of the people to keep and bear arms shall not be infringed" is entirely consistent with them. It captures the essence of the various proposals through consolidation and merger.94

It was in the era when militiamen were still required by state law to possess and furnish their own arms that the Second Amendment was adopted (1789-1791).95 Presumably the framers of the amendment considered that tradition when they wrote the guarantee of "the right of the people to keep and bear arms." They apparently assumed that for the immediate future, at least, considering the primitive arms production technology of the time and the limited financial resources of the new government encumbered with large Revolutionary War debts, individual citizen militiamen would have to furnish their own arms (which would hardly be a hardship, since private ownership of arms was general).

This is amply illustrated by the fact that the first federal militia law, enacted immediately after the adoption of the Second Amendment by many of the same men who had framed that amendment, required every militiaman to furnish his own arms and ammunition.96 That law required "each and every" resident free able-bodied male citizen 18 to 45 to enroll in the militia and report for training and militia duty with arms and ammunition furnished by himself, and exempted the same from seizure for debts and taxes.

There was riot imposed an ambiguous impersonal "collective" duty upon citizens, but a duty upon "each and every" such individual citizen, to furnish his own arms and ammunition and perform militia duty, just as it is still the duty in modern time of each able bodied male citizen of military age to serve in the armed forces when called in time of war, and even in time of peace when universal military service is mandates. Even today all able-bodied male citizens 17-45 are members of the unorganized militia.97

Since the existence of a duty implies the right to perform the duty, and since it was the duty of every such individual citizen was to have the corresponding right to keep and bear arms. It is apparent, then, that the right to keep and bear arms was a right of each and every such citizen, and not an exclusively "collective" right, whatever that may mean.98 Certainly the Militia Act of 1792 enacted by many of the same men who framed the Second Amendment throws definitive illumination upon the meaning of that Amendment, particularly since it was enacted to carry into effect the militia clause of the Constitution immediately after Second Amendment was adopted.

In *United States v. Miller,* the U.S. Supreme Court said that

> [T]he history and legislation of the Colonies and States, and the writings of approved commentators ... show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense. "A body of citizens enrolled for military discipline." And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the

> time.99

It noted Blackstone's Commentaries pointing out "that King Alfred First settled a national militia in his kingdom" and quoted historian Osgood:

> In all the colonies, as in England, the militia system was based on the principle of the assize of arms. This implied the general obligation of all adult male inhabitants to possess arms, and with certain exceptions, to cooperate in the work of defense ... Clauses intended to insure the possession of arms and ammunition by all who were subject to military service appear in all the important enactments concerning military affairs. Fines were the penalty for delinquency, whether of towns or individuals.100

The Court then cited specific laws: A 1784 Massachusetts law required that every militiaman "shall equip himself, and be constantly proved with a good fire arm."101 A 1786 New York law directed that every able-bodied resident male citizen 16 to 45 enroll in the militia and "provide himself, at his own expense, a good Musket or Firelock" and ammunition.102 A 1785 Virginia law required every free male citizen 18 to 50 to appear at his respective muster-field "with a good, clean musket" or rifle and ammunition.103 It was with this historical background that the Court made this pronouncement:

> In the absence of any evidence tending to show that the possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we can riot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.104

If the Supreme Court considered that the purpose of the Second Amendment was to prevent federal interference with state militia, or that the right of the people to keep and bear arms was limited to the militia itself or to militiamen on militia duty, it certainly would not have maintained a complete silence with respect to such matters, nor would it have instead emphasized and discussed in such detail the history of the obligation of all able-bodied male citizens of military age to enroll in the citizen militia and provided their own arms and ammunition at their own expense. If state militia protection had been considered the purpose of the Second Amendment, it certainly would have ruled on that basis and remanded the case for determination of the militia status of the defendants at the time of their alleged crime, and if the requisite status existed, whether a sawed-off shotgun was a recognized militia weapon. The Court was completely silent concerning the militia status of defendants: Whether they had active, inactive, organized or unorganized militia status, if any. Instead of disposing of the case on such a basis, it followed what must be regarded as a most strange course if it considered that the Second Amendment does not protect the right of individual citizens to keep and bear arms against federal infringement. It engaged in a lengthy discussion of the universal traditional obligation of individual citizens to perform militia duty with arms furnished by themselves at their own expense, and it focused its conclusion on the relationship of the weapon to accepted militia arms. It clearly indicated that the sole factual issue in the case was that relationship, completely ignoring any possible militia status of defendants. Its holding was the Second Amendment does riot prevent Congressional prohibition of a weapon not commonly possessed by the people and unrelated to militia armament for use by individual militiamen, particularly gangster and criminal types, of weapons regulated by the National Firearms Act. 105 The Supreme Court clearly implied that the Second Amendment protects the right of individual citizens to possess arms.106

At least one federal appellate court has agreed that the Second Amendment guarantees an individual right. *Cases v. United States,* interpreted *Miller* as meaning that "Congress would be prevented by the Second Amendment from regulating the possession or use by private persons not present or prospective members of any military unit, of distinctively military arms."107 It said that the federal government could not "prohibit the possession or use of any weapon which has any reasonable relationship to the preservation or efficiency of a well-regulated militia."108

Justice Hugo Black, a member of the *Miller* Court, wrote that "Although the Supreme Court held this amendment to include only arms necessary to a well-regulated militia, as so construed, its prohibition is absolute."109 Even Chief Justice Taney indicated that citizens had a constitutionally protected right "to keep and carry arms wherever they went. "110

Justice Story wrote:

> The right of the citizens to keep and bear arms has justly been considered the palladium of the liberties of a republic; since it offers a strong moral check against usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.111

Recently the Supreme Court indicated that specific liberty guarantees in the Bill of Rights included "freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on."112

Conclusion

The History of Militia laws requiring almost universal militia membership with militiamen furnishing their own arms and ammunition and the opinion, relevant until very recent times, that the Second Amendment protects the right of individual citizens to possess arms against federal infringement.113 If it had been the purpose of Madison and the First Congress to preserve state militia rights against federal interference (an unneeded protection) it is inconceivable that they would have rejected the clear and unambiguous proposals of the Virginia convention and the Pennsylvania minority, which were designed specifically to establish just such a guarantee without a "right of the people to keep and bear arms" provision. Instead, they not only flatly rejected those proposals, but adopted the guarantee of "the right of the people to keep and bear arms," which considered in the light of the long historical tradition of individual militiamen being required to furnish their own arms at their own expense not only before but immediately after the adoption of the Second Amendment, clearly establishes that a guarantee of the right of the individual citizen to possess arms was intended, and would include a least side and shoulder arms commonly possessed by the people and appropriate for militia use.

The undoubted right of citizens to protect their lives and those of their families deserves the protection of the right to possess the means for self-defense, the right to possess arms. The core element of the right to arms is to keep them in one's home for self-defense, for possible militia use, and to deter governmental oppression.

The only proper and logical approach is to interpret the Constitution as its drafters and adopters intended. The Constitution contains provisions for amending it.114 Amendment through judicial fiat is both unconstitutional and illegal. If federal, state, and local authorities can stomp out the right to arms with impunity, which has been enjoyed since the founding of this country, then each

of us should tremble at our own vulnerability in face of a reign of judicially sanctioned tyranny in which governmental ends justify any means.

Footnotes

1. O'Neil v. Vermont, 144 U.S. 323, 370 (1982) (Harlan, J., dissenting). See also id. at 361 (Fields, J., dissenting). For a historical analysis of the common law tradition of possessing arms see Malcolm, The Fight of the People to Keep and Bear Arms: The Common Law Tradition, 10 HASTINGS CONST. L.Q. 285 (1983); Caplan, The Right of the individual to Bear Arms: A recent Judicial Trend, 1982 DET. C.L. REV. 789 (1982).

2. *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316,407 (1819) (Constitution cannot take on the "prolixity of a legal code ... only its great outlines should be marked

3. Boyd v. *United States,* 116 U.S. 616, 635 (1886).

4. U.S. CONST. amend.II.

5. The purposes of a right to arms are to deter governmental oppression, to enable the people to perform militia duties if the occasion should arise, and to protect the right of personal defense. *State v. Kessler,* 289 Or. 359,614 P.2d 94 (1980). These purposes are still vital today.

In response to fears of opponents of the Constitution that the power of the federal government would endanger state governments, Madison suspected that, in case of federal encroachments over the authority of state governments, plans of resistance would be concerted and "a militia amounting to near half a million of citizens with arms in their hands" would overwhelm the standing armies, which could not amount to more than 25,000 or 30,000 men. THE FEDERALIST No. 46, at 325-27 (J. Madison). That shows that he believed that the militia should consist of all able-bodied men capable of bearing arms: The 1790 census indicated that the population of the United States was 4,000,000, of whom 700,000 were slaves. In THE FEDERALIST No. 29, at 190 (A. Hamilton), Alexander Hamilton, after suggesting that "the people at large" be properly armed, stated that the "army can never be formidable to the liberties of the people while there is a large body of citizens, little, if at all, inferior to them in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow-citizens." Patrick Henry asserted that "The great object is, that every man be armed ... Every one who is able may have a gun." 3 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 386 (J. Elliot ed. 1836).

The militia is more than the National Guard. It is the people capable of bearing arms. State ex rel. *McGaughey v. Grayton,* 349 Mo. 700, 163 S.W.2d 335,337 (en banc 1943); *People ex rel Leo v. Hill,* 126 N.Y 497, 27 N.E. 789,790 (1891); *Dunne v. People,* 94 III.120, 34 Am. Rep. 213 (1879); Ex parte McCants, 39 Ala. 107,113 (1863). During WWII the people capable of bearing arms served in the militia when the National Guard was federalized and sent overseas. "State Guard Reserve units operated only in their own towns or rural localities. Members served without pay and provided their own uniforms, arms, and ammunition. Many of them belonged to gun clubs... " U.S. Home Defense Forces Study 58 (Office of Sec. of Defense, Mar. 1981).

"[T]here is no constitutional right to be protected by the state against being murdered by criminals or madmen." *Bowers v. DeVito,* 686 F.2d 616,618 (7th Cir. 1982). The police have no duty to protect the individual citizen. *Warren v. District of Columbia,* 444 A.2d I (D.C. App. 1981).

6. R. FROTHINGHAM, HISTORY OF THE SIEGE OF BOSTON, AND OF LEXINGTON,

CONCORD, AND BUNKER HILL, 95 (6th ed. 1903).

7. Documents Illustrative of the Formation of the Union of the American States, H.R. Doe. No. 398, 69th Cong., 1st Sess., 14-15 (1927) (The confiscation effort in Boston was listed in the "Declaration of the Causes and Necessity of Taking Up Arms" delivered on July 6, 1775, at the Continental Congress); *Nunn v. State, 1* Ga. 243 (1846) (neither federal nor state government may disarm the individual); *State v. Dawson,* 272 N.C. 535,159 S.E. 2d 1, 9 (1968).

"Remarks on the first part of the Amendments to the Federal Constitution, moved on the 8th instant In the House of Representatives," The Federal Gazette and Philadelphia Evening Post, June 18, 1789, at 2, col. 1, described the Second Amendment:

> As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed by the next article in their right to keep and bear their private arms.

"Great weight has always been attached, and very rightly attached, to contemporaneous exposition." *Cohens v. Virginia,* 19 U.S. 264, 418 (1821). For contemporaneous exposition on the right to possess arms, as enunciated in writings of the post-Revolutionary War era; see Halbrook, To Keep and Bear Their Private Arms: The Adoption of the Second Amendment, 1787-1791, 10 N. KY. L. REV. 13 (1982).

8. Morton Grove, Ill., Ordinance 81 -11 (June 8, 1981).

9. Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982).

10. For a textual analysis of the 39 state guarantees on arms and criticism of Quilici's interpretation of the state guarantee, see Dowlut & Knoop, State Constitutions and the Right to Keep and Bear Arms, 7 OKLA. CITY U.L. REV. 177 (1983).

11. *Rogers v.* United States, 340 U.S. 367, 375-76 (1951) (Black, J., dissenting). Outright nullification is another technique. When the Prohibition Amendment was still in force a federal commission, which included Harvard Law Dean Roscoe Pound, extolled prohibition, rejected suggestions for the amendment's repeal, and declared "The open saloon in this country is dead beyond any resurrection." WICKERSHAM COMMISSION 71, 83,127 (1931). Commission member William S. Kenyon opined that an alternative to repeal of the Eighteenth Amendment was nullification. "Nullification is an odious word in this republic and yet the Fifteenth and parts of the Fourteenth Amendment to the constitution have been nullified and such nullification accepted by the people." Id. at 133.

However, studies reveal that most people believe they have a constitutional right to own a gun, and that the majority would disobey gun prohibition. Wright, Public Opinion and Gun Control, 455 ANNALS 24 (May 1981); RESTRICTING HANDGUNS-THE LIBERAL SKEPTICS SPEAK OUT 201 (D. Kates, Jr. ad. 1979). Labeling conduct, which was lawful since the founding of this country, as criminal would make certain "that a sizable portion of the gun-owning population would simply ignore any law interfering with the possession of weapons ... Laws which turn a high percentage of the citizenry into criminals impose serious costs on society over and above those incurred in attempted enforcement." Kaplan, Controlling Firearms, 28 CLEV. ST. L. REV. 1, 10 (1979). The willingness of some judges to ignore constitutional rights where a gun is involved is exemplified in People v. Warren, 89 A.D.2d 501, 452 N.Y.S.2d 50 (1982), where the appellate

division reversed on first amendment grounds a trial judge's order that defendant contribute $2,500 to an organization politically advocating gun control. See also Hagan, Gun Law Violators Told to Join Anti-Arms Unit, Cleveland Plain Dealer, Oct. 9, 1982, at 1 (defendant ordered to join National Coalition to Ban Handguns as condition of probation).

12. ARTICLES OF CONFEDERATION art. II.

13. ARTICLES OF CONFEDERATION arts. VI, VIll, IX.

14. THE FEDERALIST NO. 32, at 210 (A. Hamilton).

15. The Amendment Provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. While the Tenth Amendment has been generally stripped of its vitality, it has been occasionally employed to strike down a statute. *National League of Cities v. Usery,* 426 U.S. 833 (1976).

16. THE FEDERALIST NO. 24, at 161-63 (A. Hamilton); No. 25, at 164-69 (A. Hamilton); No. 41, at 276-81 (A. Hamilton).

17. U.S. CONST. art. 1, * 8, cl. 12.

18. U.S. CONST. art. 1, * 8, cl. 13.

19. U.S. CONST. art. I * 2, cl. 1.

20. U.S. CONST. art. II, * 2, cl. 1.

21. U.S. CONST. art. II, * 2, cl. 2. Of. U.S. CONST. art. I, * 8 cl. 16 (for appointment

of militia officers).

22. U.S. CONST. art. I, * 8, cl. 12.

23. As in THE DECLARATION OF INDEPENDENCE 1776, e.g., wherein the colonists complained: "He has kept among us, in times of peace, Standing Armies without the Consent of our Legislature," (Emphasis added),

24. Supra, notes 17, 18. Neither the Articles of Confederation nor any state constitution prohibited standing armies. THE FEDERALIST Nos. 24, 26, 29 addressed the standing army and militia. Only two state constitutions "contained an interdiction of standing armies in time of peace," and they merely stated that "standing armies OUGHT NOT to be kept up, in time of peace ... The other eleven either observed a profound silence on the subject, or had in express terms admitted the right of the Legislature to authorize their existence," as had the English Bill of Rights of 1689. "A good militia would render an army unnecessary, [and] will be a more certain method of preventing its existence than a thousand prohibitions upon paper." [The early state constitutions are found in the multi-volume SOURCES AND DOCUMENTS OF U.S. CONSTITUTIONS (Wm. Swindler ed. 1973)]. The 1775 responses of armed citizens at Lexington, Concord, and Boston illustrate the colonial concept of individually armed militiamen and armed citizen opposition to government tyranny.

25. U.S. CONST. art. 1, * 8, cl. 15.

26. U.S. CONST. art. 1, * 8, cl. 16.

27. *Luther v. Borden,* 48 U.S. 1, 45 (1849); *Houston v. Moore,* 18 U.S. 1, 16-17 (1820).

"The power to control and organize the militia resided in the several states at the time

of the adoption of the Constitution of the United States and was not taken away by that

instrument 	People ex rel. *Leo v. Hill,* 126 N.Y. 497, 27 N.E. 789,790 (1891).

28. THE FEDERALIST No. 8, at 5O-51 (A. Hamilton); No. 24, at 158-60 (A. Hamilton); No. 25, at 164-68 (A. Hamilton); No. 26, at 172-74 (A. Hamilton); No. 28, at 180 (A, Hamilton); No. 29, at 184 (A. Hamilton); No. 32, at 187-90 (A. Hamilton); No. 41, at 275-80 (J. Madison); No. 46, at 325 (J. Madison).

29. THE FEDERALIST NO. 28, AT 183-85 (A. Hamilton). 30. THE FEDERALIST No. 43, at 297-301 (J. Madison).

31. THE FEDERALIST No. 8, at 53 (A. Hamilton); No. 46, at 325-27 (J. Madison).

32. B. Schwartz, 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY, 235 (1971).

33. U.S. CONST. amend. II.

34. U.S. CONST. amend. III.

35. Stevens v. United States, 440 F.2d 144, 149 (6th Cir. 1971); L. TRIBE. AMERICAN CONSTITUTIONAL LAW 226 n.6 (1978).

36. *Hamilton v. Regents of* University of *California,* 293 U.S. 245, 260 (1934).

37. 3 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 52,169, 206, 417, 423, 444-46, 461 (J. Elliot ed. 1836) [hereinafter cited as ELLIOT'S DEBATES].

38. Id. at 440.

39. Id. at 441.

40. Id. at 47-48.

41. Id. at 410-11. See also id. at 52,169, 206, 379-81, 416, 423, 441, 445-46.

42. Id. at 620.

43. Id. at 416.

44. Id. at 424 (emphasis added).

45. Id. at 90.

46. Id. at 419-21.

47. Id. at 391.

48. Id.

49. Id. at 440-41.

50. Id. at 206.

51. Id. at 602.

52. Id. at 442. Cf., id. at 380, 444, 446.

53. Id. at 444.

54. Id. at 446.

55. Id. at 150. This also reveals that the Framers recognized the distinction between the terms "the states and the people."

56. Id. at 448.

57. U.S. CONST. amend, IX provides: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage other retained by the people." U.S. CONST. amend. X; supra note 15.

58. ELLIOT'S DEBATES, supra note 37, at 660, proposal "11th."

59. E. DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 174 (1957). ELLIOT'S DEBATES do not contain the Pennsylvania and Massachusetts mini proposals for a bill of rights.

60. *Houston v. Moore,* 18 U.S. (5 Wheat.) 1, 16-17 (1820). See also, supra notes 27 & 36.

61. Id.

62. ARTICLES OF CONFEDERATION art. VI

63. *United States v. Miller,* 307 U.S. 174,178 (1939).

64. Id.

65. U.S. CONST. art 1, - 10, cl. 3.

66. 10 U.S.C. ** 311, 3062 (1977).

67. ELLICT'S DEBATES, supra not 37, at 660 (Va.). DUMBAULD, supra note 59, at 13 (Penn).

68. Presser v. Illinois, 116 U.S. 252 (1886).

69. Id. at 265. The Court was referring to the militia clauses of U.S. CONST. art. 1, 8.

70. Miller, 307 U.S. at 178.

71. ELLICTS DEBATES, supra note 37, at 659.

72. Id.

73. THE FEDERALIST No. 29, at 188-90 (A. Hamilton); No. 46, at 325-28 (J. Madison).

74. ELLIOT'S DEBATES, supra note 37, at 378.

75. Id. at 91.

76. Id. at 413. See also Id. at 381.

77. Documents Illustrative Of The Formation Of The Union Of The American States, supra note 7, at 602. See also THE FEDERALIST No. 46 (Madison).

78. Dumbauld, supra note 59, at 174, 179, 182, 185, 187, 190, 194, 201, 203. Several ideologies on arms existed in American thought when the Second Amendment was framed. While the emphasis for arms in the Second Amendment is for a militia purpose, self-defense and defense of state and country existed side by side. This view is supported by the various proposals which surfaced in the state conventions.

On Dec. 12, 1787, a minority faction in the Pennsylvania convention was the first to propose a Bill of Rights, making 15 proposals. Number 7 reads:

> That the people have a right to bear arms for the defense of themselves and their own State, or the United States, or for the purpose of killing games; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to and be governed by the civil power.

PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788, at 422 (J. McMaster & F. Stone eds. 1888). This proposal reveals that the common understanding of the term "to bear arms" was not restricted to a militia purpose. The right to bear arms for lawful hunting is presently found in the constitutions of New Mexico and Nevada. NEV. CONST. art. I,*11; N.M. CONST. art. ll, *6. It stems partly from fears that games laws could be used to disarm the people. "For prevention of popular insurrections and resistance to the government, by disarming the bulk of the people, which last is a reason oftener meant, then avowed, by the makers of forest or game laws. " 2 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 412 (1771).

On February 6, 1788, a minority faction in the Massachusetts convention made a number of proposals for a Bill of Rights:

> And that the said Constitution be never construed to authorize Congress to infringe the just liberty of the press, or the rights of conscience; or to prevent the people of the United states, who are peaceable citizens, from keeping their own arms; or to raise standing armies, unless when necessary for the defense of the United States, or of some one or more of them; or to prevent the people from petitioning, in a peaceable and orderly manner, the federal legislature, for redress of grievances; or to subject the people to unreasonable searches and seizures of their persons, papers or possessions.

DEBATES AND PROCEEDINGS IN THE MASSACHUSETTS CONVENTION 86-67 (B. Pierce & C. Hale eds. 1856).

The majority in the New Hampshire convention proposed twelve Amendments. The tenth

proposal addressed standing armies and the eleventh freedom of religion and conscience. The twelfth simply stated: "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion." 1 ELLIOT'S DEBATES at 326.

The proposal on arms surfacing in the North Carolina convention copied that of Virginia:

> That the people have a right to keep and bear arms; is the proper, natural, and safe defence of a free states; that standing armies, in time of peace, are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the community will admit; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power.

4 ELLIOT'S DEBATES at 244. See ELLIOT'S DEBATES, supra note 37, at 659 the Virginia proposal. The proposals surfacing in Now York and Mode Island similar to those of Virginia and North Carolina, but provided that the militia include "the body of the people capable of bearing arms." 1 ELLIOT'S DEBATES at 327 (N.Y.); id. at 335 (R.I.)

"In framing his propositions [for a Bill of Rights] Madison went over amendments asked for by the conventions of Massachusetts, South Carolina, New Hampshire, Virginia, New York and North Carolina, and by minorities in Pennsylvania and Maryland." 1. BRANT, JAMES MADISON: FATHER OF THE CONSTITUTION 264 (1950).

Keeping the various proposals in mind, the language of the Second Amendment, listing a militia purpose on the one hand and a right to keep and bear arms which may not be infringed on the other hand, is broad enough to satisfy the needs concerns on arms expressed in the Virginia, New York, New Hampshire, North Carolina, Rhode Island, Massachusetts, and Pennsylvania convention.

79. ELLIOT'S DEBATES, supra note 37, at 588. Henry also said: "The object is, every man be armed ... Every one who is able may have a gun." Id. at 386. Zachairiah Johnson (Va.) said: "The people are not to be disarmed of their weapons. They left in full possession of them." Id. at 646. Johnson unlike Henry, considered a bill of rights unnecessary.

80. Documents Illustrative of the Formation of the Union, supra not 7, at 725.

81. 1 PAPERS OF GEO. MASON 215 (1970).

82. 1 ANNALS OF CONG. 749-50 (1789).

83, E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 299 (19

84. ELLICTS DEBATES, supra note 37, at 383.

85. Miller, 307 U.S. at 179 (emphasis added).

86. Id. This broad definition of militia comports with George Mason's definition of the militia. He said:

> Mr. Chairman, a worthy member has asked who are the militia, if they be not the people of this country, and if we are not to be protected from the fate of the Germans, Prussians, & c. by our representation? I ask, Who are the militia? They consist now of the whole people, except a few public

officers.

ELLIOT'S DEBATES, supra note 37, at 425.

87. 10 U.S.C. * 311 (1977).

88. "A militia, when properly formed, are in fact the people themselves... . [T]he constitution ought to secure a genuine and guard against a select militia..." The militia should include "all men capable of bearing arms ..." 2 THE COMPLETE AN FEDERALIST 341 (H. J. Storing ed. 1981).

89. DUMBAULD, supra note 59, at 36.

90. Supra note 78.

91. Id.

92. Id.

93. Id.

94. American ideological, constitutional, and philosophical thought was shaped by writings praising the virtues *of* a militia, as opposed to a standing army, and self defense. Shalhope, The Ideological Origins of the Second Amendment, 69 J. AM. HIST. 599 (1982). An English writer *of* the period noted that "possession of arms" In itself "Is the distinction between a freeman and a slave." A freeman "ought to have arms to defend himself, and what he possesses, else he lives precariously ... awed into submission to every arbitrary command." J. BURGH, II POLITICS DISQUISITIONS: OR AN INQUIRY INTO PUBLIC ERRORS, DEFECTS, ABUSES 390 (1774). Aristotle noted: "Those who possess arms are the persons who enjoy constitutional rights." THE POLITICS OF ARISTOTLE 114 (Baker, Jr., ed 1962). Furthermore, the people *of* the Revolutionary War era were faced by a hostile environment and surrounded by Indians, Spaniards, and Frenchmen who resented English intrusion in America. In construing a state constitution which tracks the language of the Second Amendment, it has been recognized that the framers assumed the right to self-defense was protected. State v. Dawson, 272 N.C. 535,159 S.E.2d 1, 9 (1968). The Supreme Court has acknowledged that protected rights are "not confined to the specific terms of the Bill *of* Rights ... This court, however, has never held that the Bill of Rights or the Fourteenth Amendment protects only those rights that the Constitution specifically mentions by name." Griswold v. Connecticut, 381 U.S. 479,486, 486 n.1 (1965) (Goldberg, J., concurring).

The majority in Quilici, 695 F.2d at 270, rejected the claim that "[t]he fact that the right to keep and bear arms is joined with language expressing one of its purposes in no way permits a construction which limits or confines the exercise *of* that right." The evidence presented here, when coupled with various proposals on arms made in the state conventions, demonstrates the penchant for inaccuracy of the Quilici majority. Supra note 78.

95. What constitutes constitutionally protected arms can be gleaned from some decisions cited in Miller, 307 U.S. at 182 n.3: Fife v. State, 31 Ark. 455,25 Am. Rep. 556 (1876) ("the rifle, of all descriptions, the shot gun, the musket and ... such [pistol] as is in ordinary use, and effective as a weapon of war"); People v. Brown. 253 Mich. 537, 235 N.W. 245 (1931) ("ordinary guns, swords, revolvers, or other weapons usually relied upon by good citizens for defense or pleasure"); State v. *Duke, 42* Tex. 455 (1875) ("shot-gun, the huntsman's rifle, and such pistols at least as are not adapted to being carded concealed').

The Oregon Supreme Court defined what constitutes arms in a constitutional sense in State v. Kessler, 289 Or. 359, 614 P.2d 94, 98-99 (1980):

> [T]he term "arms" as used by the drafters of the constitutions probably was intended to include those weapons used by settlers for both personal and military defense. The term "arms" was not limited to firearms, but included several hand carried weapons commonly used for defense. The term "arms" would not have included cannon or other heavy ordinance not kept by militiamen or private citizens. [A]dvanced weapons of modem warfare have never been intended for personal possession and protection. When the constitutional drafters referred to an individual's "right to bear arms, " the arms used by the militia and for personal protection were basically the same weapons. Modem weapons used exclusively by the military are not "arms" which are commonly possessed by individuals for defense, therefore, the term "arms" in the constitution does not include such weapons, If the text and purpose of the constitutional guarantee relied exclusively on the preference for a militia "for defense *of* the State," then the term "arms most likely would include only the modem day equivalents *of* the weapons used by colonial militiamen.

Militia statutes are another source for determining what the frame considered to be constitutionally protected arms. Such statutes typically referred weapons such as a "musket or fusee ... pike ... Sword ... Lance.... pistol ... case good pistols ... rapier... carbine ... powder ... bullets..." I THE COLONIAL LAWS 0 NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 232 (1894).

Colonial militia statutes considered the pistol a legitimate arm. A 1 Connecticut law referred to "a case of pistols and holsters." 3 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 12,295 (C. Hoadly ed. 1968). 1744 New Jersey law referred to "a Case of Pistols." 6 DOCUMENTS RELATING COLONIAL HISTORY OF NEW JERSEY 193 (W. Whithead ed. 1882). A 1701 Rhode Island law referred to "pistol." 3 RECORDS OF THE COLONY OF RHODE ISLAND 433 (J. Bartlett ed. 1856). A New York law referred to "case of good pistols." 1 THE COLONIAL LAWS OF NEW York FROM THE YEAR 1664 TO THE REVOLUTION 232 (1894). A Virginia law referred to "case of pistols well fixed." 3 LAW OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1691338 Hening ed. 1823). Even the first federal militia statue referred to pistols. I Stat. 271 272 (1792). One court has simply stated that the "historical use of pistols as 'arms' offense and defense is beyond controversy ... " and included the pistol in the term "arms." State v. Kerner, 181 N.C. 574,107 S.E. 222,224 (1921). Thus the claim I Quilici 695 F.2d at 270, that "the right to keep and bear handguns is not guaranteed by the Second Amendment" is contrary to history and case law. Under the Illinois constitution the right to keep arms is subject only to the police power. While the Quill majority conceded that possession of handguns is there protected, so long as a firearms are not outlawed it viewed the banning of handguns as a permissible police regulation based on a city council's finding their possession to be inimical to public safety. There was no credible evidence showing the such possession by the residents of that peaceful community is a threat to public safety. Surely no legislative finding based on non-existent evidence should survive constitutional scrutiny. Gun possession in itself obviously constitutes no such threat, nor is crime caused peaceful law-abiding citizens. Can a city's legislative finding not based on relevant local evidence nullity a constitutional right?

96. Militia Act of 1792, 1 Stat. 271 (1792).

97. 10 U.S.C. - 311 (1977).

98. The term "people" is used in the First, Second, Fourth, Ninth, and Tent Amendments. A word repeatedly used in a constitution will bear the same meaning through the instrument. *Kirkpatrick v. King,* 228 Ind. 236,91 N.E.2d 785,789 (1950 The term "people" as used in the constitution is broad and comprehensive, an comprises generally all of the individual inhabitants of the state. *State v. Kofines, 3* R.I. 211, 80 A. 432,437 (1911). Also since the Tenth Amendment recognizes a clear distinction between the people and the state, the term "people" in the Second Amendment was meant to guarantee an individual right rather than solely a collective right. George Mason, as quoted in *FERC v. Mississippi,* 456 U.S. 742 (1982) (O'Connor, J., dissenting), contrasted the states with the people or individuals. People of the states equal individualism the state, not the state itself: "Under the existing Confederacy, Congress represents the States not the people of the States their acts operate on the States not on the individuals. The case will be changed in the new plan of Government." Id. at 791. Lastly, logic dictates that even a claimed collective right can only be assertible by individuals, for Its individuals who make up a collective body.

The individual right to keep and bear arms, however, does not extend to those convicted of violent felonies, the mentally incompetent, and infants. The proposals on arms surfacing in the state conventions, especially that of the Pennsylvania minority, support this view; supra note 78. Person not failing within these high-risk categories enjoy a right guaranteed by the command language: "the right of the people to keep and bear arms shall not be infringed."

99. Miller, 307 U.S. at 179.

100. Id. at 179-80.

101. Id. at 180-181. England had suffered successive Invasions by foreign peoples, many of whom remained there. Alfred sought to end such invasions by establishing sufficient sea and land forces composed of citizens to prevent and repel future invasions. After the Norman Conquest in 1066 William the Conqueror established a system of land tenure involving the duty of certain citizens periodically to perform military service. By the Assize of Arms in 1181 Henry II required all free laymen to possess arms according to their property status. When England was experiencing a major crime wave of murder, robbery, arson, etc., Edward by the Statute of Winchester in 1285 in order to control and prevent crime required "that every man shall have in his house arms for keeping the peace according to the ancient assize" and hold himself ready for service when summoned; his arms were to be inspected by government agents twice a year; upon death his arms were to remain to his heirs. Other measures were instituted for the prevention of crime and apprehension of criminals, such as keeping of watch and ward, and performing posse and militia duties. See Malcolm,, The Right of the People to Keep and Bear Arms: The Common Law Tradition, 10 HASTINGS CONST. L.Q. 285 (1983); Caplan, The Right of the Individual to Bear Arms: A Recent Judicial Trend, 1982 DET. C.L. Rev. 789,794 (1982). (Contrast that statute with the modem day clamor to disarm American citizens and the criminalization of self-defense and possession of the means therefor.)

102. Id. at 180.

103. Id. at 181.

104. Id. at 178. For a list of constitutionally protected arms see supra note 95.

105. 48 Stat. 1237 (1934); presently 26 U.S.C. ** 5801-5872 (1977).

106. The narrow holding in Miller can be imputed in part to the defendant's failure to file a brief

before the Supreme Court. The Court thus did not benefit from the traditional adversary process. A full briefing would have shed light on the personal defense aspects of the second amendment guarantee. A historian recently noted: "But advocates of the control of firearms should not argue that the Second Amendment did not intend for Americans of the late eighteenth century to possess arms for their own personal defense, for the defense of their states and their nation, and for the purpose of keeping their rulers sensitive to the rights of the people." Shalhope, supra note 91 at 614. "The instrument [the constitution] was not intended to proved merely for the exigencies of a few years, but was to endure through a long lapse of ages..." *Martin v. Hunter's Lessee,* 14 U.S. (I Wheat.) 304, 326 (1816).

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

108, The court agreed that "the weapon [a .38 caliber Colt type revolver] may be capable of military use, or while at least familiarity with it might be regarded as of value in training a person to use a comparable weapon of military type and caliber," but the conviction was upheld because the defendant was previously convicted of a violent felony and used the revolver for shooting up a night club. "We are of view that, as applied to the appellant, the Federal Firearms Act does not conflict with the Second Amendment to the Constitution of the United States." Cases, 131 F.2d at 922-23 (emphasis added). See also *United States v. Bowdach,* 414 F. Supp, 1346,1353 N.11 (S.D. Fla. 1976).

109. Black, The Bill of Rights, 35 N.Y.U.L. REV. 865,873 (1960).

110. *Scott v. Sandford,* 60 U.S. (19 How.) 393, 417 (1856) (Dred Scott). Congress cannot disarm the people. Id. at 450.

111. 3 J. STORY, COMMENTARIES ON THE CONSTITUTION 746 (1833)

(emphasis added).

112. *Moore v. East* Cleveland, 431 U.S. 494, 502 (1977).

113. The Second Amendment would *apply* to the states through incorporation under the Fourteenth Amendment. THE RIGHT TO KEEP AND BEAR ARMS, REPORT OF Sen. Judiciary Subcom. on the Constitution, 97th Cong., 2d Sess., 68 (Feb. 1982). That the Second Amendment should apply to the states is also supported in 1. BRANT, THE BILL OF RIGHTS: ITS ORIGIN AND MEANING 319, 336 (1965). The fundamental nature of a constitutional guarantee can be gauged by examining state constitutional guarantees. *Benton v. Maryland, 395* U.S. 784,794-96 (1969). The right to arms is guaranteed in the constitutions of 39 states. Dowlut & Knoop, supra note 10. State courts have struck down weapons laws on at least 17 reported occasions: *State v.* Blocker, 291, Or. 255,630 P.2d 824 (1980); *State v.* Kessler, 289 Or. 359,614 P.2d 94 (1980): *City of Lakewood v. Pillow,* 180 Colo. 20,23,501 P.2d 744, 745 (en banc 1972); *City of Las Vegas v. Moberg, 82* N.M. 626,485 P.2d 737 (N.M. App. 1971); People v. *Nakamura,* 99 Colo.. 262, 62 P.2d 246 (en banc, 1936); *Glasscock v. City of Chattanooga,* 157 Tenn. 518, 11 S.W.2d 678 (1928); People v. Zerillo, 219 Mich. 635,189 N.W. 927 (1922); *State v.* Kerner, 181 N.C. 574,107 S.E. 222 (1921); In re Reilly, 31 Oh. Dec. 364 (C.P. 1919); *State v. Rosenthal, 75* Vt. 295,55 A. 610 (1903); In re Brickey, 8 Idaho 597,70 P.609 (1920); Wilson v. *State,* 33 Ark. 557,34 Am. Rep. 52 (1878); *Jennings v. State,* 5 Tex. Crim. App. 298 (1878); *Andrews v. State,* 50Tenn. 165, 8Am. Rep. 8 (1871); *Smith v. Ishenhour,* 43 Tenn. 214,217 (1866); *Nunn v. State,* I Ga. (I Kelly) 243 (1846); Bliss v. *Commonwealth,* 12 Ky. (2 Litt.) 90,13 Am. Dec. 251 (1922).

Prior to adoption of the Fourteenth Amendment, in Nunn, I Ga. 243, the court applied the Second

Amendment directly to the state:

> It is true, that these adjudications are all made on clauses in the State Constitutions: but these instruments confer no new rights on the people which did not belong to them before. When, I would ask, did any legislative body in the Union have the right to deny to its citizens the privilege of keeping and bearing arms in defence of themselves and their country?
>
> We do not believe that, because the people withheld this arbitrary power of disfranchisement from Congress, they ever intended to confer it on the local legislatures.
>
> The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear arms of every description, and not such merely as are used by the militia, shall not be infringed, curtailed, or broken upon, in the smallest degree; and all this for the important end to be attained; the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State.

In summation, the rationale of Nunn, the presence of an arms guarantee in 39 state constitutions, and the history surrounding the Second Amendment applies to the states.

114. The Constitution provides for amending ft. U.S. CONST. art. V.

THE TEXT OF THE SECOND AMENDMENT

By J. Neil Schulman

J. Neil Schulman is the founder and president of SoftServ Publishing.

If you wanted to know all about the Big Bang, you'd ring up Carl Sagan, right? And if you wanted to know about desert warfare, the man to call would be Norman Schwartzkopf, no question about it. But who would you call if you wanted the top expert on American usage to tell you the meaning of the Second Amendment to the United States Constitution?

That was the question I asked A.C. Brocki, editorial coordinator of the Los Angeles Unified School District and formerly senior editor at Houghton Mifflin Publishers -- who himself had been recommended to me as the foremost expert on English usage in the Los Angeles school system. Mr. Brocki told me to get in touch with Roy Copperud, a retired professor of journalism at the University of Southern California and the author of *American Usage and Style. The Consensus.*

A little research lent support to Brocki's opinion of Professor Copperud's expertise.

Roy Copperud was a newspaper writer on major dailies for over three decades before embarking on a distinguished seventeen-year career teaching journalism at USC. Since 1952, Copperud has been writing a column dealing with the professional aspects of journalism for *Editor and Publisher,* a weekly magazine focusing on the journalism field.

He's on the usage panel of the *American Heritage Dictionary,* and *Merriam Webster's Usage Dictionary* frequently cites him as an expert. Copperud's fifth book on usage, *American Usage and Style: The Consensus,* has been in continuous print since 1981, and is the winner of the Association of American Publisher's Humanities Award.

That sounds like an expert to me.

After a brief telephone call to Professor Copperud in which I introduced myself but did not give him any indication of why I was interested, I sent the following letter:

"I am writing you to ask you for your professional opinion as an expert in English usage, to analyze the text of the Second Amendment to the United States Constitution, and extract the intent from the text.

"The text of the Second Amendment is, 'A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.'

"The debate over this amendment has been whether the first part of the sentence, 'A well-regulated Militia, being necessary to the security of a free State,' is a restrictive clause or a subordinate clause, with respect to the independent clause containing the subject of the sentence, 'the right of the people to keep and bear Arms, shall not be infringed.'

"I would request that your analysis of this sentence not take into consideration issues of political impact or public policy, but be restricted entirely to a linguistic analysis of its meaning and intent. Further, since your professional analysis will likely become part of litigation regarding the consequences of the Second Amendment, I ask that whatever analysis you make be a professional opinion that you would be willing to stand behind with your reputation, and even be willing to testify under oath to support, if necessary."

My letter framed several questions about the text of the Second Amendment, then concluded:

"I realize that I am asking you to take on a major responsibility and task with this letter. I am doing so because, as a citizen, I believe it is vitally important to extract the actual meaning of the Second Amendment. While I ask that your analysis not be affected by the political importance of its results, I ask that you do this because of that importance."

Questions and Answers

After several more letters and phone calls, in which we discussed terms for his doing such an analysis, but in which we never discussed either of our opinions regarding the Second Amendment, gun control, or any other political subject, Professor Copperud sent me the following analysis (into which I have it italicized my questions for the sake of clarity):

The words "A well-regulated militia, being necessary to the security of a free state," contrary to the interpretation cited in your letter of July 26, 1991, constitutes a present participle, rather than a clause. It is used as an adjective, modifying "militia," which is followed by the main clause of the sentence (subject "the right," verb "shall"). The right to keep and bear arms is asserted as essential for maintaining a militia.

In reply to your numbered questions:

(1) Can the sentence be interpreted to grant the right to keep and bear arms solely to "a well-regulated militia"?

The sentence does not restrict the right to keep and bear arms, nor does it state or imply possession of the right elsewhere or by others than the people; it simply makes a positive statement with respect to a right of the people.

(2) Is "the right of the people to keep and bear arms" granted by the words of the Second Amendment, or does the Second Amendment assume a pre-existing right of the people to keep and bear arms, and merely state that such right "shall not be infringed"?

The right is not granted by the amendment; its existence is assumed. The thrust of the sentence is that the right shall be preserved inviolate for the sake of ensuring a militia.

(3) Is the right of the people to keep and bear arms conditioned upon whether or not a well-regulated militia, is, in fact, necessary to the security of a free State, and if that condition is not existing, is the statement "the right of the people to keep and bear Arms, shall not be infringed" null and void?

No such condition is expressed or implied. The right to keep and bear arms is not said by the amendment to depend on the existence of a militia. No condition is stated or implied as to the relation of the right to keep and bear arms and to the necessity of a well-regulated militia as a requisite to the security of a free state. The right to keep and bear arms is deemed unconditional by the entire sentence.

(4) Does the clause 'A well-regulated Militia, being necessary to the security of a free State, "

grant a right to the government to place conditions on the "right of the people to keep and bear arms, " or is such right deemed unconditional by the meaning of the entire sentence?

The right is assumed to exist and to be unconditional, as previously stated. It is invoked here specifically for the sake of the militia.

*(5) Which of the following does the phrase "well-regulated militia" mean: "well-equipped, " "well-organized, " "well-drilled, " "well-educated, " or "subject to regulations of a superior authority"? 	*

The phrase means "subject to regulations of a superior authority;" this accords with the desire of the writers for civilian control over the military.

(6) If at all possible, I would ask you to take into account the changed meanings of words, or usage, since that sentence was written two-hundred years ago, but not take into account historical interpretations of the intents of the authors, unless those issues cannot be clearly separated.

To the best of my knowledge, there has been no change in the meaning of words or in usage that would affect the meaning of the amendment. If it were written today, it might be put: "Since a well-regulated militia is necessary to the security of a free state, the right of the people to keep and bear arms shall not be abridged."

(7) As a "scientific control" on this analysis, I would also appreciate it if you could compare your analysis of the text of the Second Amendment to the following sentence:

"A well-schooled electorate, being necessary to the security of a free State, the right of the people to keep and read Books, shall not be infringed."

My questions for the usage analysis of this sentence would be,

(A) Is the grammatical structure and usage of this sentence and the way the words modify each other identical to the Second Amendment's sentence?; and

(B) Could this sentence be interpreted to restrict "the right of the people to keep and read Books" only to *"a well-educated electorate" -- for example, registered voters with a high-school diploma?*

(A) Your "scientific control" sentence precisely parallels the amendment in grammatical structure.

(B) There is nothing in your sentence that either indicates or implies the possibility of a restricted interpretation.

Concluding Comment

Professor Copperud had only one additional comment, which he placed in his cover letter: "With well-known human curiosity, I made some speculative efforts to decide how the material might be used, but was unable to reach any conclusion."

So now we have been told by one of the top experts on American usage what many knew all

along: the Constitution of the United States unconditionally protects the people's right to keep and bear arms, forbidding all governments formed under the Constitution from abridging that right.

As I write this, the attempted coup against constitutional government in the Soviet Union has failed, apparently because the *will* of the people in that part of the world to be free from capricious tyranny is stronger than the old guard's desire to maintain a monopoly on dictatorial power.

And here in the United States, elected lawmakers, judges, and appointed officials who are pledged to defend the Constitution of the United States ignore, marginalize, or prevaricate about the Second Amendment routinely. American citizens are put in American prisons for carrying arms, owning arms of forbidden sorts, or failing to satisfy bureaucratic requirements regarding the owning and carrying of firearms -- all of which is an abridgement of the unconditional right of the people to keep and bear arms, guaranteed by the Constitution. Even the American Civil Liberties Union (ACLU), staunch defender of the rest of the Bill of Rights, stands by and does nothing.

It seems it is up to those who believe in the right to keep and bear arms to preserve that right. No one else will. No one else can. Will we beg our elected representatives not to take away our rights, and continue regarding them as representing us if they do? Will we continue obeying judges who decide that the Second Amendment doesn't mean what it says it means but means whatever they say it means in their Orwellian doublespeak?

Or will we simply keep and bear the arms of our choice, as the Constitution of the United States promises us we can, and pledge that we will defend that promise with our lives, our fortunes, and our sacred honor?