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## THE RIGHT TO BAR ARMS

*"A messenger from Henry, our dread liege, to know the reason of these arms in peace."<sup>2</sup>*

In his crime message to the first session of the Ninetieth Congress, President Johnson requested the enactment of a federal gun control law. That bill,<sup>1</sup> designated the State Firearms Control Assistance Act of 1967<sup>2</sup> and commonly referred to as the Mail Order Gun Control Law or as the Dodd Bill, was introduced by Senator Dodd on February 9, 1967. The Dodd Bill is apparently the final product of several years of committee work and extensive hearings.<sup>3</sup> The consideration of this measure and several others preliminary to it<sup>4</sup> focused attention upon the second amendment to the Constitution, the so-called "lost" amendment.<sup>5</sup> The tremendous controversy precipitated by these efforts has pressed home the question of the reason, scope, and limitation on the legislative power of the constitutional guaranty of a right to keep and bear arms.

It shall be the thesis of this article that the second amendment does not confer any individual right to bear arms except when such conduct is necessary to the militia. Indeed, the better constitutional issue is whether the state and federal government have the right to bar arms entirely. Finally, a review of existing federal and state firearms regulations will be offered. Policy arguments touching the necessity and desirability of various firearm regulation schemes will be left to those presently engaging in an extensive dialogue.

### I. THE COMMON LAW

There was no individual right to keep or bear arms in the common law. The Statute of Northampton, promulgated in

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\* SHAKESPEARE, KING HENRY THE SIXTH, Part 2, Act V, Scene 1, Line 17.

1. S. 1, 90th Cong., 1st Sess. (1967).

2. *Id.* at 1.

3. The hearings were held by the Subcommittee To Investigate Juvenile Delinquency of the Committee On the Judiciary, United States Senate. Senator Dodd is chairman; Subcommittee members are Philip Hart of Michigan, Birch Bayh of Indiana, Quentin Burdick of North Dakota, Joseph Tydings of Maryland, Roman Hruska of Nebraska, Hiram Fong of Hawaii and Jacob Javits of New York. The inclusive dates of the last hearings were May 19 through July 27, 1965, during the first session of the 89th Congress.

4. S. 14, S. 1180, S. 1592, and S. 1965, 89th Cong., 1st Sess. (1965).

5. *E.g.*, Spreacher, *The Lost Amendment*, 51 A.B.A.J. 554 (1965).

1328, provided that no man should "go nor ride armed by night or by day in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere. . . ."<sup>6</sup> A later statute provided that no person who had not lands of the yearly value of £100, other than the son and heir of an esquire or other person of higher degree, should be allowed even to keep a gun.<sup>7</sup> These offenses, indictable under the common law of England, became the common law of the American colonies.<sup>8</sup>

Parallel to this development was one of longer gestation, the birth of citizen-soldier militias. Plato, counseling about 350 B. C. that cities, like individuals, are often not secure against wrong, concluded that "all men must train for war, not in war-time but while they are living in peace."<sup>9</sup> Contemporaneously, Aristotle made the connection between citizen soldiers and democracy, noting that in topography allowing the use of cavalry and heavy infantry oligarchies thrived since horses and cannon were incidents of wealth, while democracies prevailed in countries whose terrain restricted wars to the light arms owned by most citizens.<sup>10</sup>

In England, the great pressure for a people's right to organize a militia arose in response to the attempts of Charles II (1660-1685) to maintain a standing army of 5,000.<sup>11</sup> His successor, James II (1685-1688) increased the troop strength to 30,000,<sup>12</sup> used them to suppress Monmouth's Rebellion and as a consequence of the rebellion, deprived many Protestant militiamen of arms. The Declaration of Rights by the Convention Parliament after the flight of James II condemned these acts as subversive to liberty and contrary to law. The subsequent statutory Eng-

6. 2 Edw. III., c. 3 (1328).

7. 22 Car. II, c. 25, § 3.

8. BISHOP, STATUTORY CRIMES, § 784 (3rd ed. 1901).

9. PLATO, LAWS viii, 127 (Bury transl. 1917). Plato, continuing, alluded to the fact that an armed citizenry acts as a check on oppression by the ruler, suggesting that "the ruler through fear of the subject, will never allow him to become . . . in any way warlike." *Id.* at 139.

10. 6 ARISTOTLE, POLITICS ch. 7, 271 (Jowett transl. 1908). "When the country is adapted for cavalry, then a strong oligarchy is likely to be established. For . . . only rich men can afford horses. The second form of oligarchy prevails when the country is adapted to heavy infantry; for this service is better suited to the rich than the poor. But the light armed . . . element is wholly democratic . . ."

11. THE FEDERALIST No. 26 (Hamilton). See also 1 BLACKSTONE, COMMENTARIES 414 (Wendell ed. 1847).

12. *Id.*

lish Bill of Rights, based on the Declaration, prohibited standing armies without the consent of Parliament and provided that Protestant subjects might keep arms suitable to their conditions and as allowed by law. These two rights, the control of standing armies and the consequent arming of the citizen militia as a means of securing that control, were conceived to have pre-existed the Bill of Rights. They survived the decline of the religious factionalism that was their impetus, reappearing when Blackstone in 1765, listing the means of assuring the absolute rights of man, the so-called "auxiliary rights," included the bearing of such arms for defense as are "suitable to their condition and degree, and such as are allowed by law; which is also declared by the same statute, 1 W. & M., st. 2, c. 2 . . ."<sup>13</sup> That great legal scholar thereafter continued, "Nothing . . . ought to be more guarded against . . . than making the military . . . too distinct from the people . . . it should be wholly composed of natural subjects . . . [who] enlisted for a short and limited time . . . live intermixed with the people . . ."<sup>14</sup> Adam Smith, in his classic *Wealth of Nations*, echoed the cry that "Men of republican principles have been jealous of a standing army as injurious to liberty."<sup>15</sup> And Baron Montesquieu, a great influence on early American political theory, defined as a requisite of liberty that armies should consist of citizen soldiers to avoid military tyranny such as Marius established in Rome by enlisting the rabble, and giving the army an identity separate from that of the people. Thus, by the time of the American Revolution the right of the people to bear arms for a militia as a substitute for and check on standing armies was firmly established in the common law and other elements of the political mainstream from which flowed our American institutions.

## II. THE CONSTITUTIONAL ORIGINS

In its original form, the second amendment, introduced by James Madison in the House in the first session of the First Congress, read:

The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the

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13. 1 BLACKSTONE, COMMENTARIES 143 (Wendell ed. 1847).

14. *Id.* at 414.

15. 5 A. SMITH, WEALTH OF NATIONS ch. 1 (Bullock ed. 1909).

best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.<sup>16</sup>

As reported out of committee, the amendment read:

A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms.<sup>17</sup>

It is important to note that in both versions the concept of conscientious objection is phrased in individual terms, i.e., "no person," while the concept of a right to bear arms is phrased in the collective terms "the people" and "the body of the people." This contrast is consistent with the conclusion that while the protection of religious scruples was viewed as an individual right, the right to bear arms was seen as a collective one, obtaining for the body of the people through a militia rather than for the benefit of any single citizen.

Attention should also be directed to the fact that the amendment employs the word "arms," traditionally a military term, rather than the description "weapons" or "firearms." A number of courts have held that to extend the right beyond the militia would pervert the meaning of "arms."<sup>18</sup>

The debates, chiefly concerned with the retention of the conscientious objector provision (which was dropped), contain no mention whatever of any individual right to own or use arms. Elbridge Gerry of Massachusetts did state that the purpose of providing for a militia was to discourage standing armies which he described as "the bane of liberty."<sup>19</sup>

State constitutions in effect in 1789 further bear out the conclusion that no individual right to bear arms existed in the

16. 1 ANNALS OF CONG. 434 (1789).

17. *Id.* at 749.

18. See, *e.g.*, *Strickland v. State*, 137 Ga. 1, 72 S.E. 260 (1911); *Hill v. State*, 53 Ga. 472 (1874); *English v. State*, 35 Tex. 473 (1872). Most writers agree. See, *e.g.*, 2 BISHOP, CRIMINAL LAW § 124: "[T]he provision protects only the right to 'keep' such 'arms' as are used for purposes of war, in distinction from those which are employed in quarrels and broils, . . . since only the former are properly known by the name 'arms' and such only are adapted to promote 'the security of a free state'."

19. 1 ANNALS OF CONG. 750 (1789).

American law when the Bill of Rights was formulated. The Rhode Island Charter of 1663 and the 1776 constitutions of Connecticut, Delaware, and New Jersey were silent on the matters of both militias and bearing arms. Five state constitutions mentioned militias but contained no mention of any right to bear arms.<sup>20</sup>

Three state constitutions granted a right to bear arms that is expressly construed as a means of defending the state.<sup>21</sup> All three were phrased in terms of "the people" as were other collective rights in all of them, while the terms "individually," "persons," "citizens," etc. were used where individual rights were guaranteed.

The remaining two state constitutions might be construed as having recognized an individual right to bear arms for self defense. Both the Vermont Constitution of 1777 and the Pennsylvania Constitution of 1776 contained the guaranty "[t]hat the people have a right to bear arms for the defense of themselves and the State. . . ."<sup>22</sup> The remainders of both articles contained prohibitions against standing armies and guarantees of civilian control of the militia. Again, in both these documents the term "people" was used throughout to denote collective rather than individual rights. Thus it seems more reasonable to construe the phrase "defense of themselves" as referring to collective rather than individual self-defense.

The conclusion is inescapable that at the time of the origin of the second amendment neither the Congress nor the states contemplated any individual right to keep and bear arms but were, instead, preoccupied with the distrust of standing armies and

20. The Georgia Constitution of 1777, arts. XXXIV and XXXV, provided for the structure of a militia; the Maryland Constitution of 1776, art. XXV, underscored its importance ("a well regulated militia is the proper and natural defense of a free government") as did the New Hampshire Constitution of 1774, art. XXIV, providing that "[a] well regulated militia is the proper, natural, and sure defense of a state"; the New York Constitution of 1777, art. XL, provided for the state (rather than the militiamen) to provide the arms; and the South Carolina Constitution of 1778, art. XLII, ensured civilian control of the militia.

21. MASS. CONST. art. XVII (1780) "The people have a right to keep and to bear arms for the common defense . . ."; N.C. CONST. art. XVII (1776) "The people have a right to bear arms, for the defense of the state . . ."; VA. BILL OF RIGHTS 13 (1776) "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 . . ."

22. VT. CONST. art. XV (1777); PA. CONST. art. XIII (1776).

the importance of providing for militias. In this context, then, an individual was endowed with the right to bear arms expressly and only for the purpose of serving in the state militias. It is in this context that the courts have subsequently construed the amendment.

### III. JUDICIAL FATE OF THE AMENDMENT

#### A. State Regulations in the Courts

Although a few early cases arising from state controls on fire-arms went so far as to hold that there was an inalienable individual right to bear arms for self protection,<sup>23</sup> that interpretation has not survived. The overwhelming majority of state cases take the position of *Commonwealth v. Murphy*<sup>24</sup> that "it has been almost universally held that the legislature may regulate and limit the mode of carrying arms."<sup>25</sup> Thus an act making illegal the carrying of certain deadly weapons does no violence to the second amendment,<sup>26</sup> nor does an act requiring a license to carry revolvers,<sup>27</sup> neither does a state law forbidding the carrying of concealed weapons.<sup>28</sup> Numerous state decisions contain express language to the effect that no body of citizens, other than members of the militia, has a constitutional right to bear arms.<sup>29</sup>

23. See, e.g., *Bliss v. Commonwealth*, 2 Litt. 90, 13 Am. Dec. 251 (Ky. 1822). *Bliss* is probably the leading case cited by the proponents of an individual right; however, its result has been expressly repudiated by a number of courts: "This ruling [*Bliss*] has not been followed, but severely criticized. The decisions are practically unanimous to the contrary." *Strickland v. State*, 137 Ga. 1, 2, 72 S.E. 260, 261 (1911). "[T]his decision [*Bliss*] has never been followed." *City of Salina v. Blaksley*, 72 Kan. 230, 231, 83 Pac. 619, 620 (1905). "The early decision to the contrary . . . [*Bliss*] has not been generally approved." *Commonwealth v. Murphy*, 166 Mass. 171, 44 N.E. 138 (1896).

24. 166 Mass. 191, 44 N.E. 138 (1896).

25. *Id.* Concurring results from eight other state courts are listed.

26. *English v. State*, 35 Tex. 473 (1872). The decision is based on the distinction drawn between those arms useful and proper to a state militia and those primarily useful in individual strife.

27. *Strickland v. State*, 137 Ga. 1, 72 S.E. 260 (1911). This beautifully documented opinion also stresses the general police power.

28. *Haile v. State*, 38 Ark. 564 (1882). The court sees the constitutional provision as springing from the "former tyrannical practice of disarming the subjects so as to render them powerless against oppression. It is not intended to afford citizens the means of prosecuting their private broils in a free government." *Id.* at 566.

29. See, e.g., *City of Salina v. Blaksley*, 72 Kan. 230, 83 Pac. 619 (1905). "The second amendment refers to the people as a collective body. It deals exclusively with the military. Individual rights are not considered . . ."

The Supreme Court has twice directly and once by dictum had occasion to examine the constitutionality of state laws governing firearms. In 1886 the Court upheld an Illinois statute which forbade drilling or parading with arms in cities and towns unless authorized by law.<sup>30</sup> Eight years later the Court upheld a Texas statute prohibiting the carrying of deadly weapons since the restraints of the second amendment "operate only upon the Federal power, and have no reference whatever to proceedings in State courts."<sup>31</sup> Finally in 1897, the Court, in dictum, held it axiomatic that the second amendment "is not infringed by laws prohibiting the carrying of concealed weapons. . . ."<sup>32</sup> There is no constitutional bar to state regulation of arms.

### B. Federal Regulations in the Courts

Defendants charged with violations of the National Firearms Act of 1934<sup>33</sup> or the Federal Firearms Act of 1938<sup>34</sup> have raised the constitutional issue of the right to bear arms, all unsuccessfully. In *United States v. Adams*<sup>35</sup> a federal district court disposed of defendant's demurrer on constitutional grounds by holding that the second amendment "refers to the militia . . . to the collective body and not individual rights."<sup>36</sup> In a 1939 case<sup>37</sup> involving the transportation of a sawed-off shotgun in interstate commerce (in violation of the National Firearms Act) the Supreme Court had its best opportunity in 150 years to pass

30. *Presser v. Illinois*, 116 U.S. 252 (1886). The Court reached the expected result by means of incorrect reasoning. It apparently construed the right to a militia as accruing to the federal government rather than to the states.

It is undoubtedly true that all citizens capable of bearing arms constitute the reserve military force or reserve militia of the United States as well as of the States; and in view of this prerogative of the General Government as well as of its general powers, the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the General Government.

*Id.* at 265.

This view antedated the absorption of the state militias into the National Guard, so that not even this possible justification applies. The reasoning in the quoted passage has been ignored in subsequent decisions; it is dictum anyway.

31. *Miller v. Texas*, 153 U.S. 535, 538 (1894).

32. *Robertson v. Baldwin*, 165 U.S. 275, 282 (1897).

33. 26 U.S.C. §§ 5801-5862 (1934).

34. 15 U.S.C. §§ 901-909 (1938).

35. 11 F. Supp. 216 (S.D. Fla. 1935).

36. *Id.* at 219.

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

directly on the constitutional issue. It held that in the absence of proof that the shotgun bore some

reasonable relationship to the preservation or efficiency of a well regulated militia we cannot say 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.<sup>38</sup>

Here was a clear holding that the right to bear arms is collective and dependent on the use of those arms for militia purposes. However, this decision implied that the more suitable a weapon might be for militia purposes, the less it would be subject to Congressional control. This implication was quickly negated in two circuit court holdings which the Supreme Court did not disturb. In *United States v. Tot*<sup>39</sup> the third circuit examined the common law, constitutional convention and learned writers to conclude that, unlike the first amendment, the second amendment "was not adopted with individual rights in mind, but as a protection for the states in the maintenance of their militia organizations against possible encroachments by the Federal power."<sup>40</sup> In *Cases v. United States*<sup>41</sup> the first circuit concluded that the amendment did not give private individuals a right to possess deadly weapons of any character, whether or not they were of the kind that would be useful to a well regulated militia.

Thus, apparently the only restraint on the federal power to control arms is that the Congress not regulate them in such a way as to impair the efficiency of state militias. However, it is submitted that this restraint is meaningless when one considers that state militias have passed out of existence.

#### IV. THE PRESENT DAY "WELL REGULATED MILITIA"

In a memorandum to the Dodd Committee,<sup>42</sup> Attorney General Katzenbach concluded that the "well regulated militia" is

38. *Id.* at 178.

39. 131 F.2d 261 (3d Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943).

40. *Id.* at 266.

41. 131 F.2d 916 (1st Cir. 1942), *cert. denied*, 319 U.S. 770 (1943).

42. *Hearings Before the Subcommittee To Investigate Juvenile Delinquency of the Senate Committee on the Judiciary*, 89th Cong., 1st Sess. at 43.

today the National Guard. If this conclusion obtains, it is quite arguable that any state rights under the second amendment are extinguished, dying with the state's interest (the militia). A review of the history of the militias bears out the Attorney General's conclusion. Two developments are germane: the arming of the militias by the federal government and the passage of those bodies from state to federal authority.

In 1808, Congress provided 200,000 dollars annually to purchase arms for the whole of the enrolled militia, title to the arms passing to the states.<sup>43</sup> In 1887, Congress doubled the appropriation, imposed restrictions on it and provided that the arms remained the property of the United States.<sup>44</sup> From that date, the federal government has supplied arms to the militia under strict controls and continuing federal ownership.<sup>45</sup> The 1903 Act,<sup>46</sup> procured by Secretary of War Elihu Root, is the most significant in this area, for there Congress provided for the organizing, training, and *equipping* of all militias that met its criteria. Today the National Guard is a part of the army of the United States, subject at all times to federal call.

For the last half-century, since Congress has provided the arms for the former state militias, it has no longer been necessary for any man to bear his own arms for use in that militia; further, under existing regulations only federal government issue weapons may be used. Additionally, it is clear that the present day "well regulated militia" is a federal entity, the National Guard (and since 1914, the Naval Militia<sup>47</sup>). It could be argued that the state militia still exists in the form of standby home guard units formed for emergencies when the National Guard is called away. Material here would be the policy question of how these citizens should be armed; no opinion is ventured.

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43. Act of Apr. 23, 1808, ch. 55, 2 Stat. 490.

44. Act of Feb. 12, 1887, ch. 129, 24 Stat. 401.

45. See Act of Feb. 24, 1897, ch. 310, 29 Stat. 592; Act of Jan. 21, 1903, ch. 196, § 13, 32 Stat. 775, 777; Act of May 27, 1908, ch. 204, § 8, 35 Stat. 399, 401-402; Act of June 23, 1916, ch. 134, §§ 67, 83-87, 39 Stat. 166, 199-200, 203-205; Act of Aug. 10, 1956, ch. 1041, 32 U.S.C. § 710 (1964).

46. Act of Jan. 21, 1903, ch. 196, § 13, 32 Stat. 775, 777.

47. Created in 1914; see Act of Feb. 16, 1914, ch. 14, 38 Stat. 283.

## V. FEDERAL LEGISLATION

The National Firearms Act of 1934<sup>48</sup> imposes a tax on the manufacture or transfer of enumerated firearms (those commonly thought of as "gangster weapons"), requiring that they be registered with the Treasury Department. The act is administered by the Alcohol and Tobacco Tax Division of the Internal Revenue Service. It covers machine guns, submachine guns, and all other fully automatic weapons, all cut-down or sawed-off shotguns and rifles, mufflers, and silencers. The act does not encompass pistols, revolvers, sporting and target rifles and shotguns, flintlock and percussion weapons, and ammunition.

The Federal Firearms Act of 1938<sup>49</sup> is also administered by the Alcohol and Tobacco Tax Division of the Internal Revenue Service, not because it is a taxing measure, but simply because by 1938 this Division had built up an expertise in firearm regulations after four years of administering the National Firearms Act. It regulates the interstate and foreign commerce in all types of firearms and pistol and revolver ammunition by requiring the licensing of manufacturers, dealers, and importers of said items or components thereof. It is enervated by its loose criteria for granting licenses. Experts estimate that more than two-thirds of the licensees are not legitimate dealers but are either buying for their own use or reselling to those, who, as an excluded class under state or federal statutes, cannot buy from a bona-fide dealer. The heart of the act is its prohibition of sales to anyone under indictment or convicted of a crime punishable by a term of more than one year, or any fugitive from justice. This section (902d) is utterly vitiated by its limitation that the dealer selling the firearm must *know* or have reasonable cause to know that the buyer is under indictment, etc.

These two statutes comprise the direct federal firearm controls. In addition there are postal regulations governing the shipment of concealable weapons, Department of State regulations governing international traffic in arms, tariff regulations and federal sales taxes on guns, and prohibitions of loaded firearms on commercial air carriers and of the use or display of firearms in national parks.

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48. 26 U.S.C. §§ 5801-5862 (1934).

49. 15 U.S.C. §§ 901-909 (1938).

The Dodd Bill (S. 1) would vastly increase the dealer license fees to rout out the purchasers posing as retailers, forbid sales of any gun to anyone under eighteen years of age and of handguns to anyone under twenty-one. Additionally, it would forbid sales to a non-resident of the dealer's state, effectively ending interstate mail order purchases. Finally, it would require police approval to buy certain types of weapons and require that records of purchasers be kept (name, age, address). Essentially, this bill is designed to govern interstate purchases, leaving state laws to control intrastate dealings. Even if the second amendment were construed as guaranteeing an individual right, it would not apply to this bill. The proposed legislation does not infringe on the right to keep and bear arms; it merely makes purchase a little more inconvenient.

## VI. STATE LEGISLATION

Today, all fifty states and the District of Columbia have statutes regulating firearms.<sup>50</sup> The two most striking characteristics of these state laws are their diversity and their impotency.

Seven states require a permit to purchase a handgun,<sup>51</sup> nineteen report such sales to the police,<sup>52</sup> four have no minimum age requirement for such a purchase.<sup>53</sup> Twenty-three states require dealers in guns to be licensed.<sup>54</sup> Eighteen states require a license for carrying a pistol in a car.<sup>55</sup> This complete lack of uniformity is compounded by diversity within states as well, where, often, municipalities have restrictions more severe than those embodied in the state statute.

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50. For a listing of the states and their statutes see Note, *Firearms Legislation*, 18 VAND. L. REV. 1362 (1965).

51. Hawaii, Massachusetts, Michigan, Missouri, New Jersey, New York, North Carolina.

52. Alabama, California, Connecticut, Delaware, Hawaii, Iowa, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New York, North Dakota, Oregon, Pennsylvania, Rhode Island, Tennessee, Washington, West Virginia.

53. Alaska, Arkansas, Colorado, New Mexico.

54. Alabama, California, Connecticut, Delaware, Georgia, Hawaii, Idaho, Indiana, Iowa, Massachusetts, Michigan, New Hampshire, New Jersey, New York, North Dakota (some counties), Oregon (some counties), Pennsylvania, Rhode Island, South Dakota, Texas, Virginia (some counties), Washington, West Virginia.

55. Alabama, California, Connecticut, Hawaii, Idaho, Indiana, Iowa, Massachusetts, Michigan, New Hampshire, New Jersey, New York, North Dakota, Oregon, Pennsylvania, Rhode Island, South Dakota, Washington.

State laws regulating purchase and recordation are exercises in futility in the present absence of similar federal control of mail order guns. A prospective buyer, unable to purchase within the state because of disability under the state statute may simply order the desired weapon from an out-of-state company. Thus, law enforcement divisions from virtually every state have lent support to the efforts of the Dodd Committee.

## VII. CONCLUSION

It is posited that the dominant feature of the second amendment is the guaranty of a militia and that any right to bear arms is conditioned on its relationship to this guaranty. The amendment is declarative of a collective right. The state governments may regulate arms in any way and to any extent they choose without infringing on second amendment rights of their polity. Federal control of arms is violative of the second amendment only when it impairs the functioning of a state militia, a legal conclusion rendered nugatory by the fact of federal absorption of the national guard. Assuredly, the "right" of federal and state governments to *bar* arms, whatever its fate on other constitutional grounds, is not confined by the "lost" amendment.

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