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The Honorable Wayne Metcalf
Chair, Judiciary Committee
Hawaii House of Representatives
State Tower, Room 803
Honolulu, Hawaii 96813

Dear Representative Metcalf:

I am writing this letter with regard to the constitutional questions that have been raised regarding S.B. No. 1843, Relating to Firearms. Major Boisse P. Correa of the Honolulu Police Department requested that I take an independent look at this question and pass on my views to you. Major Correa has provided me with some of the background material related to this issue, and I have also examined materials sent to me on this subject by Dr. Maxwell A. Cooper.

(I am sure you understand that this letter does not represent an institutional position of the University of Hawaii or its Law School, but is based on my professional experiences which include teaching Constitutional Law for the past 25 years here and at other universities.)

To understand the views that have been presented on S.B. No. 1843, I have examined a wide variety of materials, including in particular (1) the testimony of Hawaii's Attorney General, prepared by Warren Price III and Edwin L. (Ted) Baker and presented to the Senate Judiciary Committee on February 24, 1992, and (2) Standing Committee Report No. 1788, prepared by the Senate Judiciary Committee and dated February 14, 1992.

In my professional judgment, the passage by the Hawaii Legislature of S.B. No. 1843--either in its original version or as amended--would not violate Article I, section 17 of the Hawaii Constitution or the Second Amendment of the U.S. Constitution.

I found the February 24, 1992 Testimony of the Attorney General to be a careful and comprehensive analysis of this subject, and I agree with its conclusions.

There seems to be general agreement that the Second Amendment does not limit the power of a state to regulate guns, and no

federal case holds otherwise. See, e.g., United States v. Cruikshank, 92 U.S. 542 (1875); Presser v. Illinois, 116 U.S. 252 (1886); Miller v. Texas, 153 U.S. 535 (1894).

Hawaii's provision on guns in Article I, section 17 is explicitly modeled on the language of the Second Amendment, and so the meaning of Hawaii's provision should be determined by examining the meaning of the Second Amendment. The major issue of interpretation is whether this language protects a "collective" or an "individual" right to possess and use guns. The Second Amendment has historically been viewed as a protection only of our "collective" right to possess guns--the reference to a "well regulated militia" does make any sense if any other interpretation is given to this provision. See, e.g., Newton and Zimring, Firearms and Violence 258 (1970) ("This history supports the view that the second amendment was designed to protect the state militia, not to promote the individual's use of firearms"); United States v. Miller, 307 U.S. 174, 178 (1939) ("In the absence of any evidence tending to show that 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 cannot say that the Second Amendment guarantees the right to keep and bear such an instrument").

The delegates to the Hawaii's 1950 Constitutional Convention clearly understood this interpretation of the Second Amendment, as the excerpts in the Attorney General's Testimony indicate, and thus our present interpretation of Article I, section 17 should conform to the manner in which the Second Amendment was interpreted at that time. Further evidence of validity of this "collective right" interpretation can be found in the restrictive gun laws in existence in 1950, which the delegates explicitly wanted to retain.

A lot of attention in the current debate over the meaning of Article I, section 17 has been given to the Committee Report of June 15, 1950, reprinted in 1 Proceedings of the Constitutional Convention of Hawaii, 1950 at 303, which contains the following language:

This section incorporates the 2nd Amendment of the Federal Constitution. Your Committee wishes to make it clear that this section will not render invalid the existing laws of the Territory, which will be continued in effect by the State Constitution, relating to the registration, possession and carrying of firearms, nor will it prevent the legislature from passing other reasonable restrictions on the right to acquire, keep or bear firearms or other weapons, including the power of the legislature to entirely prohibit the possession of

such modern and excessively lethal weapons as machine guns, silencers, bombs, atomic weapons, etc.

The delegates thus wanted to make it clear that all existing laws would remain valid. As the Attorney General's Testimony states (at page 2), the existing laws as of 1950 prohibited possession of a wide variety of weapons including automatic rifles, machine guns, submachine guns, and silencers, and they also prohibited being armed with a pistol or "other deadly or dangerous weapon." Existing law as of 1950 also required registration of all firearms. The final phrase in the quote above reaffirmed this view by restating that the legislature would be permitted to prohibit completely weapons viewed to be unacceptably dangerous.

Some have viewed this final phrase as being a limiting phrase, and have said that the legislature should be permitted to prohibit only weapons that are "excessively lethal." This interpretation is not the natural way to read this sentence, because the "excessively lethal" phrase follows language that reaffirms the existing laws and the power the legislature to pass "other reasonable restrictions on the right to acquire, keep or bear firearms." The "excessively lethal" language is part of a clause that begins "including the power of the legislature to...." A prohibition of an "excessively lethal" weapon thus appears to be but one example of the type of restrictions or regulations that the legislature would be permitted to enact.

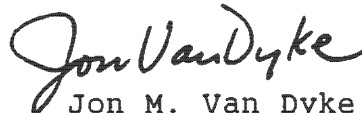
The Senate Judiciary Committee's Standing Committee Report No. 1788 (at page 5) differs with this analysis and argues that Article I, section 17 "created a qualified 'individual' right to bear arms." This conclusion is based on the awkward language of Article I, section 17 and the view that "[a] 'collective right' theory is logically inapplicable in the context of a state constitution." The language of Article I, section 17 is awkward, as is the language of the Second Amendment, on which it is based. The words themselves are ambiguous and can lead to alternative interpretations. What is not ambiguous, however, is the interpretation that had been given to the Second Amendment by the U.S. Supreme Court as of 1950, and the desire of the delegates to the 1950 Constitutional Convention to adopt that interpretation. They chose to copy the awkward language of the Second Amendment in order to ensure that the interpretation of that amendment would also apply to the language in the Hawaii Constitution. It is inappropriate, therefore, to focus on the awkward language of Article I, section 17; the historical interpretation of these words and the reason why they were chosen provide a much clearer guide their present meaning.

In conclusion, the words in Article I, section 17 were chosen to provide Hawaii's citizens (in relation to the state government) with the same right that U.S. citizens have (in relationship to the federal government)--namely the right to possess guns as part of a

militia formed for the collective defense. The records of the 1950 Constitutional Convention make it clear that this provision was not meant to limit the power of the State Legislature to regulate and prohibit personal possession of weapons deemed to by the Legislature to be unacceptably dangerous. For these reasons, it would not be inconsistent with Article I, section 17 for the Hawaii Legislature to enact S.B. No. 1843 either in its original or its amended version.

Please let me know if I can be of any further assistance on this question.

Sincerely yours,

A handwritten signature in cursive script that reads "Jon Van Dyke". The signature is written in black ink and is positioned above the printed name and title.

Jon M. Van Dyke
Professor of Law