Handgun Article

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MEMORANDUM

TO: Justice Powell
FROM: Rebecca
DATE: July 23, 1992
SUBJ: Handgun Article

Enclosed is the first rough draft of the handgun article. Much remains to be done, but Jeff and I hope you will find the basic structure of the article satisfactory. For my part, I have enjoyed working on the article as well as the opportunity to work with Jeff. He is simply a delight.

I look forward to your comments on the article, and trust that all is well in Richmond.

General comments:

1. Proposal section should focus narrowly on HADNOILS, and take stricter approach.

2. Must address severe penalties for violation of the regulatory rules proposed. Also severe penalties for unauthorized possession and sale.
Random firearm violence in this country, manifested most strikingly in our appalling murder rate, has reached crisis proportions. The statistics are stark, the trends discouraging. Last year was the most violent non-wartime year in American history. Over 25,000 murders were committed in 1991, a toll exceeding the record of 23,440 set the year before that. ¹ So it is that the sum of Americans killed by Americans in just the past two years approaches the number of Americans, 58,201, killed during the entire Vietnam War. ²

The violence, moreover, was not a function of geography; no


locality was immune from it. In recent years homicide records were set in major metropolitan cities like Washington, D.C. (489) and Dallas (501), as well as in cities on the scale of Anchorage (26) and San Antonio (211).\(^3\) Statistics and new research belie the myth that major cities are the only locales exposed to the day-to-day presence of firearm violence. Says one researcher who has documented the alarming increase in the number of students who carry guns in rural areas, "[A]ll the people who are taking their kids out of urban schools and moving to rural areas are living on false hope."\(^4\)

What is worse, the gravity of our national problem is unique among Western democracies. Consider these comparisons. In 1980, the murder rate in the United States was 10.5 per 100,000 persons, yet in Canada it was 2.1 — five times lower. In 1986, our murder rate was six times that of the homicide rate in England and Wales. While firearms account for approximately sixty percent of the

\(^3\)Id.

murders committed in this country, they account for only eight percent of the murders in England and Wales.\(^5\)

Perhaps the most alarming trend of all is the spread of violence to our schools. Headlines like these are no longer uncommon: "First Grader Uses Gun to Threaten Teacher," The New York Times, at -, March 6, 1992, and "Guns in Classes Are Newest Show and Tell," Washington Post, at 1, June 21, 1992. One in five students, studies indicate, now carries a weapon, and one in twenty reports having carried a gun.\(^6\)

Moreover, whether in school or out, today's youth witness more violence than past generations. Research confirms what intuition suggests: the steady diet of television violence consumed by American children alters their development, increasing levels of

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\(^5\) Powell, "Capital Punishment," 102 Harvard L. Rev. 1035, 1044 [see sources cited; try to update these statistics (perhaps from more recent editions of the citations noted in the Harvard article)].

aggressiveness and violence. Sadly, the violence children view on television programs often accurately reflects the violence they see in their own backyards. One recent survey showed that 43 percent of a sample of inner-city children between the ages of 7 and 19 say they have actually seen a homicide. It is disheartening to consider how such exposure to violence affects the development of children.

There is agreement, of course, that our schools, at a minimum, should be free from this endemic violence. But efforts to ensure school safety are not inexpensive. Scarce resources, once directed to books and the like, now must be diverted to costly metal detectors and other security measures. And not only are increasing portions of educational budgets siphoned away from intended uses, so also the time and talents of teachers and school administrators.

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8 "It’s Not Just New York ...," Time, at 29, March 9, 1992 (citing study by the University of Alabama at Birmingham) [Input full cite to study.]
best and brightest college graduates sought teaching positions, believing armed with the promise that the intangible rewards of teaching outweighed the low salaries of the profession. But because today's educators must fear for the safety of themselves and their students, many qualified and dedicated individuals who would otherwise consider teaching now choose other, less perilous professions. 9

Firearm violence is costly in another respect. It places heavy demands on our hospitals, at a time of dwindling health care resources. Injuries caused by firearms are expensive to treat. An average gunshot injury cost $16,700 per patient. That initial cost, plus post-discharge treatment costs, comes to more than $4 billion in annual expenditures, 86% of which the government pays. 10

It has been estimated that the lifetime costs for firearm injuries

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9 A good cite here would be the New York Times article that discusses teachers leaving the profession as a result of violence in their schools. (I will locate this)

that occurred in 1985 alone will be $14.4 billion.\textsuperscript{11} The numbers don't lie. As the public relations director at a Chicago Hospital has stated, "A cheap handgun can end up costing millions." \textsuperscript{12}

Perhaps the most portentous development is the recent declaration by the Journal of the American Medical Association that gun violence is a public health emergency, to be ranked with cancer and AIDS as primary killers.\textsuperscript{13} The authors of the article, former surgeon general Dr. C. Everett Koop, JAMA Editor Dr. George Lundberg, observed "If the violence report being published this month in the Journal of the American Medical Association were due to a virus, the American people and their leaders would be shouting for a cure."\textsuperscript{14}


\textsuperscript{13}The Washington Post, "Finding a Cure of Gunfire," editorial, June 14, 1992. [Mention caveat: this is not necessarily the AMA's view, just the view of its journal, and of Dr. Koop. Find out the AMA's reaction to the article.]

\textsuperscript{14} C. Everett Koop & George D. Lundberg, Violence in America: A Public Health Emergency, 267 JAMA 3075-3076 (June 10, 1992).
The Role of Handguns

With no end in sight to these alarming trends, I too think it is time to demand a cure for the internecine scourge that afflicts our Nation. Of course, attacking the problem is not easy; hitting a moving target never is. The violence stems from the ready availability of all sorts of weapons, old and new, and from all sorts of societal ills, many unrelated to the accessibility of guns. Poverty, drugs, urban decline, family breakdown, racial and class tensions all contribute to the problem. Breaking the cycle of random violence therefore is no simple task. Like a jigsaw puzzle whose image periodically takes new form, the problem seems intractable and impervious to incremental solutions. Nonetheless, in my view, one piece of the puzzle is -- and will continue to be -- handguns. While deceptively innocuous when compared to assault and semiautomatic weapons which have captured the attention of the press and many legislatures, handguns are undeniably deadly. Concealable, lethal, and all too easy to obtain, they are a fertile source of violence. Death by handgun, in short, is no longer an aberrational threat to life in this country, and the time has come for legislative action.
Statistics substantiate the view that handguns have contributed to the violence epidemic. In the 1950's, handguns represented about one-fifth of new gun sales. But by the early 1970's, handgun sales had jumped to two million a year, a four-fold increase. At present, nearly one in two guns sold is a handgun.\textsuperscript{15} And of the estimated 200 million firearms that now exist in this country, approximately one-third are handguns.\textsuperscript{16}

The proliferation of handguns has produced deadly results. From 1960 to 1980 the population of the United States increased by \textsuperscript{26}\%; the homicide rate due to guns increased \textsuperscript{160}\%.\textsuperscript{17} One study indicates that handguns are now used in 75 percent of the firearm-related homicides in this country and more than 80 percent of the firearm-related robberies.\textsuperscript{18} America's teenage boys are now more


\textsuperscript{17}C. Everett Koop & George D. Lundberg, Violence in America: A Public Health Emergency, 267 JAMA 3075-3076 (June 10, 1992).


\textsuperscript{8}Is there a better cite? Does Chafee's office have original sources?
likely to die from a gunshot wound than from any other cause.\textsuperscript{19}

The probable weapon in these teenage homicides: a handgun.

Particularly revealing -- and embarrassing -- is the contrast between the murder-by-handgun statistics of this country and those of other countries. In 1985, the \textit{most recent year} for which such statistics are available, handguns were used to murder 46 people in Japan, 8 in Great Britain, 31 in Switzerland, 5 in Canada, 18 in Israel, 5 in Australia, and 8,092 in the United States.\textsuperscript{20} To be sure, demographics, culture, and tradition partially explain these disparities. But surely at least one explanation for the appalling contrast is that handguns are regulated more strictly in those countries than they are in the United States.\textsuperscript{21}

\textsuperscript{19}C. Everett Koop & George D. Lundberg, \textit{Violence in America: A Public Health Emergency}, 267 JAMA 3075-3076 (June 10, 1992).

\textsuperscript{20}The League of Women Voters, "The Sale, Use, and Possession of Firearms in Minnesota," January 1990 (citing "You Can Do Something About Handgun Violence," (Handgun Control, Inc.))

\textsuperscript{21}Id.
Medicine discussed an even more telling comparison. Entitled "A Tale of Two Cities," the study compared crime and homicide rates in Seattle with those in Vancouver, Canada. The cities were chosen because of their similar population and socioeconomic composition, and indeed statistics revealed that Seattle and Vancouver suffered from comparable rates of burglary, robbery, and assault. Notably, the risk of assault involving a firearm was seven times higher in Seattle than in Vancouver. Perhaps most alarming, residents of Seattle are almost five times as likely to be murdered by a handgun than Canadian citizens across the border.

Such statistics cannot be ignored. The inescapable conclusion is that Vancouver's restrictive handgun laws reduce the number of handgun related homicides. The only remaining question is whether our society is equipped to impose similar gun restrictions and, perhaps more the issue, whether Americans are willing to bear the admitted burdens of such regulation.

The authors of the Bill of Rights addressed the right of the people to keep and bear arms in the Second Amendment. It reads: "A well regulated Militia, being necessary to the security of a free State, the right of people to keep and bear Arms, shall not be infringed." Gun advocacy groups contend that the Second Amendment prohibits all federal and state regulations of guns. Gun control proponents counter that the Amendment is no bar to government regulation of firearms as the amendment was intended only to prohibit federal government suppression of state militias.

Supreme Court interpretations of the Second Amendment have been episodic and laconic. The Supreme Court has discussed the Second Amendment in only a handful of cases. Some have postulated that the Supreme Court has refused to take cases that would force the Court to recognize the right of an individual to bear arms under the Second Amendment. See N.Lund, "The Second Amendment, Political Liberty, and the Right to Self-
defendant charged with transporting a shotgun in interstate commerce in violation of requirements under the Act, did not violate the Second Amendment. The Court had this to say about whether the shotgun in question fell within the ambit of the Second Amendment: "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." Absent evidence indicating that the shotgun at issue had some "reasonable


24 In three late nineteenth-century opinions, the Court held that the Second Amendment operates as a limitation only on the actions of the federal government, not on the actions of private individuals or states. See United States v. Cruikshank, 92 U.S. 542, 553 (1875); Miller v. Texas, 153 U.S. 535, 536 (1894); Presser v. Illinois, 116 U.S. 252, 264 (1886). The Court held that the Amendment did not restrict state regulation of firearms on the grounds that the Bill of Rights did not apply to the states. While the continuing validity of these decisions may be questioned in light of subsequent Court decisions incorporating selective portions of the Bill of Rights into the Fourteenth Amendment, Presser and Miller v. Texas are still the Court's last pronouncements on the subject. In any event, these cases did not discuss the scope of the right guaranteed under the Second Amendment, but rather to whom or to which governmental entities the restrictions under the Amendment applied.

See 60 USLW 2759 for an interesting but indefensible

CA9 decision.

25 Id.

This, when we consider the nature of the weapon, the different implications for criminal rather than mass-marketed objects, that we play and in fact. The Miller Court was indeed probably wrong about shotguns, given their wide use in WWII as trench weapons.
relationship to the preservation or efficiency of a well regulated militia," the Court refused to "say that the Second Amendment guarantees the right to keep and bear such an instrument." 26 In arriving at that conclusion, the court stated that the amendment must be interpreted in view of its "obvious purpose," which was to "assure the continuation and render possible the effectiveness of such [militia] forces." 27

Central to the Miller Court's analysis, then, was the purpose for which the weapon was to be used, not the nature of the weapon itself. 28 Interestingly, nothing in Miller directly supports the argument that the Second Amendment should be read to guarantee an individual's right to bear arms for purposes of self-defense or for

26 Miller, 307 U.S. at 178.
27 Id.
28 Some have maintained that Miller can be read to grant Second Amendment protection to all weapons which have a military use. The absurdity of this argument is captured by the observation that such a reading would "accord constitutional protection to machine guns, bazookas, hand grenades, and other military hardware of staggering destructive potential." Keith A. Ehrman & Dennis A. Henigan, The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?, 15 U. Dayton L.Rev. 5, 42 (1989). Moreover, the focus of the Miller Court's analysis was whether a particular weapon would further the "preservation or efficiency of a well regulated militia," not whether a weapon is suitable for military uses.

but should we deal in fact that a militia was understood to include all able-bodied males of certain ages?
hunting, in other words for purposes unrelated to participation in a "well regulated militia." Faced with Second Amendment challenges to federal firearms statutes, lower courts have held unanimously that federal statutes regulating firearms do not offend the Second Amendment unless the statutes interfere with the maintenance of an organized state militia. In short, no federal court has ever read the Second Amendment to provide for an individual right to bear arms for purposes unrelated to militia service.

\[\text{Potential Solutions}\]

Supposing that the Constitution does not prohibit firearms regulation by the federal government, as distinct from the separate more difficult question of the Constitution's application to a firearms bar, it must be determined what amount of federal involvement is desirable. Reactions to the recent Los Angeles riots are characteristic of the chasm separating the opposing perspectives on this issue. Those supporting aggressive federal gun control, even to the point of eliminating certain weapons, say

\[\text{See e.g. United States v. Johnson, 497 F.2d 548 (4th Cir. 1974); Stevens v. United States, 440 F.2d 144 (6th Cir. 1971); United States v. Tot, 131 F.2d 261 (3d Cir. 1942);}\]
that the availability of guns fueled the riots. Those opposing firearm regulation claim that the riots illustrate the citizenry's need to have ready access to guns for self-protection. For instance, a representative of Handgun Control, Inc. commented: "The lesson we learned is that everybody with a gun is not the answer"; while a spokesman for the National Rifle Association said: "This proves that law-abiding people ought to have the means of defending themselves." 30

What should be done? Here I speak not as a Retired Associate Justice of the United States Supreme Court, but as a concerned citizen, husband, father, grandfather, and gun owner convinced that the devastating consequences of firearm violence must end. In short, it is my view that further federal regulation of handguns is needed.

I find persuasive the analogy suggested by Drs. Koop and Lundberg between regulation of automobiles and regulation

of guns. Owners of firearms, they suggest, should be licensed just as operators of automobiles are. Only those consumers of a certain age, physical and mental fitness, and level of training should be allowed to purchase firearms in the first place. Subsequent to purchase, firearm use should be monitored, and licenses lifted if gun owners fail to comply with certain rules. Likewise, I see no reason why registration of the instrumentality itself, the firearm, need be any less comprehensive than registration of automobiles, nor the requirements under law for safe firearms. Remarkably, while the Gun Control Act of 1968 establishes safety requirements for some imported firearms, no similar requirements exist for domestically-made guns. I see no justification for failing to ensure that such hazardous products meet certain standards, some no more demanding than the assurance that a loaded model does not discharge when dropped to the floor. As Koop and Lundberg point


\[\text{See id.}\]
out, "[d]efining motor vehicle casualties as a public health issue and initiating intervention activity succeeded in reversing the upward trend of such fatalities, without banning or confiscating automobiles." Such has been the experience in Texas. The Texas Department of Health indicates that in 1990 firearm deaths exceeded automobile deaths, a result attributed primarily to automobile deaths falling than to firearm deaths rising.\[33\]

Although our federal system provides opportunities for local and national initiatives, I am of the view that even strict state regulatory efforts will be rendered meaningless absent some federal controls. One principal benefit of establishing a national regulatory floor in this area is that such measures frustrate smuggling from States with lax restrictions to States with strong ones.

The ideal gun-control measure would reduce the use of firearms for violent and illegal means without impairing their use for


\[34\]Id.
legitimate purposes by law-abiding citizens. A point-of-purchase computer check for the possible criminal background of a purchaser is one such proposal. While a feasibility study undertaken by the U.S. Department of Justice estimates that the establishment of a national data base will take time and several billion dollars, the price tag does not seem prohibitive when the extensive societal costs that result from firearm violence are considered.35

There also is merit to extending regulation beyond the point of sale. Each year, several million used hands guns are transferred, although it is difficult to be sure about that since most private exchanges are exempt from record-requirements established by the Federal government.36 It being fair to assume that many of these transfers end up in the hands of persons otherwise unqualified to own a gun we may want to subject even private transfers to registration requirements. Legislation in this area, if initiated, should not include "grandfather clauses" that immunize domestic

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owners of the 200 million guns now in circulation from registration requirements.

The focus, moreover, need not be confined to weaponry.omen its sale.

one, find frustrating the inattention to ammunition sales: Felons, to use one example, are prohibited by law from buying ammunition. But, according to one report, ammunition retailers are under no requirement to make any special effort to determine if purchasers have a criminal record, and they rarely do.37

Screening systems and ownership prohibitions are only helpful to the extent that they keep firearms out of the hands of minors and convicted felons. Homicides are committed most often, however, not by convicted felons, but by individuals who can purchase a gun legally.38 The homicide rate for one particular class of these homicides—firearm related deaths in the home—might best be reduced through education.


Note: Requiring a mandatory education certificate for handgun ownership would both increase safety and provide a disincentive to purchase for marginal buyers.
The risks associated with keeping firearms in the home include accidental gunshot wounds, wounds inflicted during domestic altercations, and the availability of a highly efficient means of suicide. Concerned only with having a ready method of self-protection, many gun owners remain ignorant as to the potential hazards. Gun manufacturers and the gun lobby itself, it seems to me, have a role to play here as well. Whether "[r]evered as a bulwark of American freedom, [or] reviled as accomplices in murder, gun makers [and the gun lobby]," bear some responsibility for the hazardous uses of the products they create or endorse. They can, for example, do a better job in educating gun owners about elementary safety precautions. The recently-released study by the Journal of the American suggests safety is no small matter. The study revealed that out of 605 gun owners surveyed, one-third kept

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their guns loaded, and more than one-half kept them unlocked. 41

[Justice Powell: Jeff and I have several ideas of other regulations you could mention or endorse in this section assuming you are comfortable with the general approach of the article. These suggestions include:

1. A waiting period for the purchase of firearms (similar to the various versions of the Brady Bill which have been under Congressional consideration).

2. A call for leadership from the NRA and other advocacy groups to support moderate gun control efforts so that more draconian legislation might be avoided.

3. Establishment of a reliable and comprehensive national reporting system to isolate and identify the causes of firearm violence—such a system would facilitate the enactment of appropriate remedies and no such national reporting system now

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exists.

4. Discussion, without endorsement, of Senator Chafee's proposal to ban all handguns.

Conclusion

I am perhaps an unlikely advocate for the stringent regulation of firearms. My mother gave me my first gun, a shotgun, when I was eight years old. After teaching me how to operate it safely, she taught me how to hunt. Duck and pheasant hunting became one of my favorite pastimes, sustaining many a weekend trip with family and friends. During World War II, my experience with guns took a more serious turn. I was issued several weapons, including a handgun and a rifle, and I was taught how to fire a machine gun. The handgun, which I kept as a memento of the war, was recently passed on to my son. Like me, he learned to appreciate hunting from his parents. Together we have enjoyed many hunting trips, including a safari to Kenya. Guns, in short, whether as instruments of my favorite hobby, as antiques, or as tools of war, have played a significant part in my life and in most respects have given me
great pleasure.

But much as my own experience with guns has been a positive one, I have come to be persuaded by those who argue that something must be done about their ready availability and irresponsible use. One consequence of these developments -- an alarming murder rate -- has reached crisis proportions. As Americans kill more and more Americans each year, it becomes apparent that this problem like so many others plaguing us today -- drugs, family, poverty, race, the economy, education, AIDS -- threatens us from within.

Something must be done. As someone who values the privilege of law-abiding Americans to own firearms, I think it preferable to avoid an outright ban on handguns. While perhaps constitutionally permissible, a ban would strike at the core of our culture. Guns occupy a revered place in our national history. Once necessary to combat the perils of frontier life and for protection against the forces of tyranny from which the colonists had fled, guns became to many a symbol of the pioneering spirit and individualism that contributed to this country's greatness. Our culture is different from those of other Western democracies with long traditions of gun control. In those countries, first there was law, then guns. Here guns had an established place before law arrived.
Those on both sides of the gun control issue must recognize the fears and the legitimate concerns of the other. The now famous slogan "guns don't kill people, people do" is a correct, yet incomplete assessment of the issue. True, regulation of handguns cannot alleviate firearm violence without a corresponding effort to identify and address the underlying causes of societal violence. Yet gun advocacy groups would do well to admit what the statistics show: people with guns kill more people than people without guns.

There are essentially three possibilities for the regulation of handguns: balanced legislation which reflects the competing interests at stake, drastic legislation, or continued legislative inaction and deadlock. The refusal to concede to reasonable regulation which strikes a compromise between the interests of citizens to use firearms legitimately and the interest of society in limiting the destructive capacity of firearms will thus produce one of two disastrous results. One result, Drastic legislation banning handguns and other weapons, a development that, as gun would be regrettable. But we simply cannot live with the other alternative owner, I would regret. The alternative, however, is untenable.