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MAY 8 1979

The Vice President
United States Senate
Washington, D. C. 20510

Dear Mr. Vice President:

Pursuant to the Act of November 9, 1978, Pub. L. 95-624, 92 Stat. 3459, this is to advise you that the Department of Justice, after consultation with the Department of the Army, has determined to discontinue its defense of the constitutionality of the provision of 10 U.S.C. §4308 which is being challenged in the case of Geoffrey S. Gavett, et al. v. Clifford Alexander, et al. (USDC D.C.) Civil Action No. 78-2130.

In November of 1978, the plaintiffs Geoffrey Gavett and the National Coalition to Ban Handguns brought the present action against Clifford Alexander in his capacity as Secretary of the Army and Colonel Jack Rollinger in his capacity as Director of Civilian Marksmanship, National Board for the Promotion of Rifle Practice, Department of the Army. At issue in this litigation is a provision of 10 U.S.C. §4308(a)(5). This section constitutes the authorization for the Department of Army, as relevant to this litigation, to engage in the sale of surplus military arms. The particular provision of this section at issue in this litigation is the requirement that individuals seeking to purchase these weapons be members of the National Rifle Association. The individual plaintiff seeks by this litigation to participate as a purchaser in these sales despite his non-membership in the National Rifle Association. His challenge to this requirement is on two grounds. The first challenge is premised on his alleged First Amendment right to join or refuse to join political groups of his choosing, and his second challenge to the

membership requirement is premised on his alleged Fifth Amendment right to be treated in a non-discriminatory manner. The organizational plaintiff, National Coalition to Ban Handguns, challenges the NRA requirement on the basis of its alleged First and Fifth Amendment rights not to have the federal government aiding the activities of a group which often takes opposing positions on matters of public concern.

At a minimum, any defense of the statute would require a showing on behalf of the Department that the NRA membership requirement bears a rational relationship to a legitimate governmental interest. See, e.g., New Orleans v. Duke, 427 U.S. 297 (1976); Baldwin v. Montana Fish and Game Commission, U.S. _____, 56 L. Ed. 2d 354 (1978). It is the position of the Department of the Army that "... the requirement for membership in the National Rifle Association serves no valid purpose that is not served as well or better by the various regulatory criteria adopted by the Army." We therefore propose that the NRA membership provision of the statute not be defended against this constitutional challenge.

In an effort to avoid a direct challenge to the constitutionality of the statute, we previously sought from the Court expedited consideration of a motion to dismiss in which we argued the lack of standing on the part of plaintiff to present this challenge. Our effort to seek such expedited consideration was denied by the Court without consideration of the merits of the standing issue. As a result of our unsuccessful attempt to seek such early consideration, we are now faced with a briefing schedule pursuant to which our summary judgment motion is due on the 8th day of May, 1979. We will seek from the Court additional time in which to allow you to consider our position with respect to this litigation. Further, it may be relevant to your consideration of the position of the Executive Branch has taken on this issue to advise you that the National Rifle Association has intervened as a party defendant to this action, and based on our information, intends to defend the constitutionality of the statutory provision.

Accordingly, and pursuant to the Act of November 9, 1978, Pub. L. 95-624, 92 Stat. 3459, we propose to make known to the Court in which this litigation is pending that the

position of the Executive Branch is that the membership requirement contained in 10 U.S.C. §4303(a)(5) will not be defended against this constitutional challenge.

Very truly yours,

BARBARA ALLEN BABCOCK
Assistant Attorney General