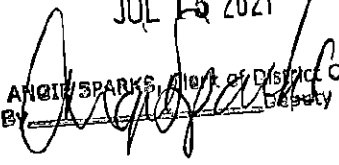


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FILED

JUL 15 2021
ANGIE SPARKS, Clerk of District Court
By  Deputy Clerk

**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS & CLARK COUNTY**

**BOARD OF REGENTS OF
HIGHER EDUCATION OF THE
STATE OF MONTANA,**

Petitioner,

v.

**THE STATE OF MONTANA, by
and through Austin Knudsen,
Attorney General of the State of
Montana in his official capacity,**

Respondents.

Cause No.: BDV-2021-598

***MONTANA SHOOTING SPORTS
ASSOCIATION'S
REPLY BRIEF IN SUPPORT OF
MOTION TO INTERVENE***

Intervenor Montana Shooting Sports Association (MSSA), through
counsel, and in further support of its Motion to Intervene, hereby
respectfully submits the following:

REPLY BRIEF

INTRODUCTION

In this action to have HB102 declared unconstitutional, MSSA filed a motion to intervene, arguing, on behalf of its members, that as a key proponent of getting HB102 passed in the legislature over the course of decades, it is in the best position to vigorously defend the rights of its members. The argument is grounded on the controlling authority of *Sportsmen for I-143 v. Montana Fifteenth Judicial Dist. Court, Sheridan Cnty.*, 2002 MT 18, ¶ 7, 308 Mont. 189, 40 P.3d 400, which holds Montana's intervention rule "is interpreted liberally." In *Sportsmen for I-143*, the Montana Supreme Court overruled a district court which refused intervention by two advocacy groups who had been heavily involved in promoting passage of I-143. In doing so, the Court recognized the advocacy groups "may be in the best position to defend their interpretation of the resulting legislation." *Sportsmen for I-143*, ¶ 17.

Plaintiff Board of Regents of Higher Education for the State of Montana (BoR) filed an answer brief urging the Court to take a narrow, crabbed interpretation of *Sportsmen for I-143*. They argue unpersuasively

that, on the standard promulgated in *Sportsmen for I-143*, MSSA has no interest in the outcome of this action, and it played little role in the passage of HB102. This characterization, however, is simply false, and it offers no principled analysis upon which to distinguish this case from the controlling authority of *Sportsmen for I-143*. Defendant State of Montana, meanwhile, filed a response recognizing and arguing trenchantly for the need and appropriateness of MSSA's (and the other intervenor's) intervention. For the reasons stated herein, BoR's opposition to intervention is without merit, the State's support for intervention is well-founded, and the motion to intervene should be allowed.

ARGUMENT

- 1. MSSA's constitutional standing to bring an action against BoR concerning HB102 satisfies the "interest in the property" requirements of intervention.**
- A. MSSA's interest as a beneficiary of a public trust over which BoR serves as mere steward establishes MSSA member interest for purposes of intervention.**

BoR does not dispute the motion to intervene is timely and fully satisfies the first element of the intervention test. It argues instead that MSSA members have no demonstrable interest in BoR's "property," so-

called, at issue here. Thus, BoR seeks to distinguish the interest of the successful associational interveners in *Sportsmen for I-143* from MSSA in this case. The distinction BoR attempts to draw, however, is too fine to withstand scrutiny.

BoR points out, accurately, the plaintiffs in *Sportsmen for I-143* were “beneficiaries” of a public trust, the *res* of which is the wildlife of Montana. (Pl. Br. at 10.) Thus, BoRs’ major premise is true. But, its minor premise is simply false. It does not own the property, which consists of the Montana University System (MUS), at issue in this case. In other words, the MUS is not, despite BoR’s contentions, the property of BoR. As § 9, Art. X, Mont. Const. states: “The government and control of the Montana university system is vested in a board of regents of higher education . . .” Rather, the MUS is property intended to benefit the public to which MSSA members belong. The MUS is the *res* and MSSA members, along with the rest of the public, are its beneficiaries. This is especially true for MSSA members who go to college, live and work at MUS facilities. These MSSA members are, like the members of the associational intervenors in *Sportsmen for I-143*, intended to benefit from the MUS *res*. Thus, the BoR is a mere steward, whose duty it is to manage the *res* in the best interest of the public,

including MSSA members. Indeed, BoR's inability to recognize the true nature of its role as mere steward makes a compelling argument for MSSA intervention. As the associational representative of beneficiaries of the *res* at issue here, MSSA has sufficient interest to satisfy the requirements of intervention. *Sportsmen for I-143*, ¶¶ 11-13.

B. MSSA has constitutional standing, which is also sufficient to satisfy the “interest” element of standing.

BoR also fails to recognize, however, that MSSA members are not on the sidelines of this controversy, merely rooting, as for an athletic team, for the outcome they prefer. MSSA members include both employees and students whose are granted rights under HB102, which rights rise or fall on whether HB102 is constitutional. (See Second Declaration of Marbut, attached hereto as Ex. 3.) In other words, it represents individuals with Constitutional standing to file their own declaratory judgment action against BoR with respect to its present refusal to abide by HB102 and to enjoin it, for example, from interfering with the rights conveyed to them under HB102. As BoR acknowledges, such standing is sufficient to sustain

intervention. (BoR Br. at 4, fn. 5, citing cases.)¹

To establish case-or-controversy standing, a party must “clearly allege past, present, **or** threatened injury to a property **or** civil right.” *Brown v. Gianforte*, 2021 MT 149, ¶ 10, ____ Mont. ____, ____ P.3d ____ (quoting precedent, emphasis added). “The question is not whether the issue itself is justiciable, but whether the Petitioners are the proper party to seek redress in this controversy.” *Id.* A party must allege a “concrete, meaning actual or imminent, and not abstract, conjectural, or hypothetical; redressable; and distinguishable from injury to the public generally.” *Id.* The future “threatened injury” here is BoR’s intention to strip MSSA members who live, work, and seek an education on MUS facilities of the rights conferred upon them by HB102. BoR’s effort to deprive MSSA members of this right confers upon them standing to challenge, in a civil action, BoR’s plan.

¹ BoR argues in a footnote that MSSA’s privacy commitment deprives its members of their right to intervene. Non-profit privacy, as has been recently recognized, is protected under the First Amendment. Just a few days ago, the U.S. Supreme Court struck down California’s law requiring nonprofits to file a list of their large donors with the state. The court said the law subjected donors to potential harassment, chilling their speech in violation of the First Amendment. *Americans for Prosperity Found. v. Bonta*, No. 19-251, 2021 WL 2690268, at *12 (U.S. July 1, 2021).

The Montana Supreme Court has previously interpreted the Uniform Declaratory Judgment Act (UDJA) as granting Montana courts the power to issue declaratory judgments when an employee, such as MUS members, suffers a threatened injury. *McKamey v. State*, 268 Mont. 137, 885 P.2d 515 (1994) (overruled on other grounds by *Trs. of Ind. Univ. v. Buxbaum*, 2003 MT 97, 315 Mont. 210, 69 P.3d 663). In *McKamey*, a firefighter who worked for the state of Montana filed an action seeking declaratory, injunctive, and equitable relief from the State's requirement that the firefighter must be a member of the Montana Air National Guard as a condition of employment. *McKamey*, 268 Mont. at 141, 885 P.2d at 518. The firefighter wanted to retire from the Montana Air National Guard and remain employed by the State. The State argued that a declaratory judgment would constitute an improper advisory opinion based on a possible future occurrence because the firefighter had not yet retired or resigned from the Montana Air National Guard. *McKamey*, 268 Mont. at 141, 885 P.2d at 518. The firefighter felt his right to retire from the Montana Air National Guard was threatened, and that if the State fired him, his family would have no income, insurance, or other benefits and his pension would be reduced. *McKamey*, 268 Mont. at 142, 885 P.2d at 519. The Court

held that the firefighter met the requirement of alleging a “threatened injury” and the case was therefore justiciable. *McKamey*, 268 Mont. at 142, 885 P.2d at 519. BoR threatens future harm here, just as the State did in *McKamey*. The future threat confers standing on MSSA members who live, work, and go to college on MUS campuses just as it did in *McKamey*.

Other decisions similarly support a plaintiff’s standing to sue when faced with a threatened injury. In *Gryczan*, six homosexual Montanans brought a declaratory judgment action against the State seeking a determination as to whether a criminal statute proscribing deviate sexual conduct was unconstitutional. *Gryczan v. State*, 283 Mont. 433, 441-446, 942 P.2d 112, 117-120 (1997). The State challenged the standing of the petitioners on the grounds that they had suffered no “injury in fact” because they had never been arrested or prosecuted for violating the statute and there was no evidence of a credible threat of prosecution. *Gryczan*, 283 Mont. at 441, 942 P.2d at 117. The Court determined that the petitioners suffered legitimate and realistic fears of prosecution along with other psychological harms. *Gryczan*, 283 Mont. at 446, 942 P.2d at 120. The Court held that petitioners had standing to challenge the statute, and it was not necessary to wait until one of them was prosecuted before an action

could be maintained. *Gryczan*, 283 Mont. at 446, 942 P.2d at 120. The same goes here for MUS students and personnel who may wish to arm themselves against sexual predators or other vicious attackers on campus. They would do so, if BoR is successful, at the risk of arrest and prosecution. This threat of future harm confers on them constitutional standing.

Finally, Associations have standing to assert the rights of their members: “when (a) at least one of its members would have standing to sue in his or her own right, (b) the interests the association seeks to protect are germane to its purpose, and (c) neither the claim asserted, nor the relief requested requires the individual participation of each allegedly injured party in the lawsuit.” *Mont. Immigrant Justice All. v. Bullock*, 2016 MT 104, ¶ 19, 383 Mont. 318, 371 P.3d 430. “Associational standing ‘recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others.’” *Cnty. Ass’n for N. Shore Conservation, Inc. v. Flathead Cty.*, 2019 MT 147, ¶ 20, 396 Mont. 194, 207, 445 P.3d 1195, 1203, reh’g denied (Aug. 20, 2019) (quoting *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 44, 360 Mont. 207, 255 P.3d 80). Here, MSSA easily meets all criteria for associational standing on the claim’s plead in BoR’s action.

MSSA has alleged a specific injury to both its members civil rights and to their rights as a citizen of this state. Thus, its claim to standing is similar that asserted in *Mont. Envtl. Information Centr. v. Dept. of Envtl. Qual.*, 1999 MT 248, 296 Mont. 207, 988 P.2d 1236 (*MEIC*). In *MEIC*, a group of plaintiffs sought to challenge the constitutionality of a statute which allowed certain discharges of water from watering or monitoring well tests, contending that the discharge was degrading the water quality in the Blackfoot River. The standing of the plaintiffs was challenged. The Montana Supreme Court held that allegations of arguably adverse impacts to the headwaters of the Blackfoot River were sufficient to confer standing upon plaintiffs who fished, recreated, and relied upon the Blackfoot River as a source of potable water. *MEIC*, ¶ 45. The Court noted, for clarification, that whether the plaintiffs had demonstrated sufficient harm to ultimately prevail on their claims was a “separate issue.” *Id.* Here, MSSA’s allegations of harm to its members are similar to those of the plaintiffs in *MEIC* and BoR offers no reason why MSSA should not similarly have constitutional standing, as an association, with respect to HB102.

MSSA’s constitutional standing is sufficient to meet the “interest in the property” requirements of intervention. *Aspen Trails Ranch, LLC v.*

Simmons, 2010 MT 79, ¶ 33, 356 Mont. 41, 230 P.3d 808. As the Montana Supreme Court did in *Aspen Trails Ranch*, ¶ 35, the Court should conclude that MSSA, due to its associational standing, has an interest in the subject matter of this action.

2. BoR’s claim that it “may” comply with HB102 in its new firearms regulations means this action is not ripe; if the action is ripe, however, then MSSA’s interests could be impaired by its outcome.

BoR suggests that it may decide to comply with HB102 in its impending adoption of new firearms regulations, and any concerns that, should it prevail in this action, that it could adopt regulations not in compliance with HB102 is “theoretical.” (BoR Br. at 11.) If that argument is meritorious, however, this action is not ripe, and the Court lacks power to adjudicate it. *Reichert v. State ex rel. McCulloch*, 2012 MT 111, ¶ 53, 365 Mont. 92, 278 P.3d 455. “The central concepts of justiciability have been elaborated into more specific doctrines—advisory opinions, feigned and collusive cases, standing, ripeness, mootness, political questions, and **administrative questions**—each of which is governed by its own set of substantive rules.” *Greater Missoula Area Fedn. of Early Childhood Educators v. Child Start, Inc.*, 2009 MT 362, ¶ 23, 353 Mont. 201, 219 P.3d

881 (emphasis added). Ripeness is concerned with whether the case presents an “actual, present” controversy. *Mont. Power Co. v. Mont. Pub. Serv. Commn.*, 2001 MT 102, ¶ 32, 305 Mont. 260, 26 P.3d 91. The ripeness doctrine is “a principle of law, grounded in the federal constitution as well as in judicial prudence, that requires an actual, present controversy, and therefore, a court will not act when the legal issue raised is only hypothetical or the existence of a controversy merely speculative.” *Id.* (citing *Pearson v. Virginia City Ranches Ass’n*, 2000 MT 12, ¶ 30, 298 Mont. 52, 993 P.2d 688; *Portman v. County of Santa Clara*, 995 F.2d 898, 902–03 (9th Cir.1993)). “[T]he ripeness requirement is designed ‘to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.’ (Quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148–49, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967)).

Furthermore, in deciding whether an agency’s decision is ripe for judicial review, it is necessary to examine “both the ‘fitness of the issues for judicial decision’ and the ‘hardship to the parties of withholding court

consideration.” *Ohio Forestry Association v. Sierra Club*, 523 U.S. 726, 732–33, 118 S.Ct. 1665, 1670, 140 L.Ed.2d 921 (1998). Thus, a reviewing court “must consider: (1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented.” *Ohio Forestry*, 523 U.S. at 733, 118 S.Ct. at 1670.

If the BoR is serious in its claim that it is genuinely considering the promulgation of firearm regulations that comply with HB102, then this case is based on a hypothetical. BoR states in its brief:

It is undisputed that BOR is undertaking a review of BOR Policy 1006. See Rogers Decl., ¶ 3. The review will provide opportunities for public participation, and Movants will be free to take part in that process. Simply put, Movants cannot, at this point, know whether their purported “campus carry” rights will be impaired once the review of BOR Policy 1006 is completed, but only assume they will be. Such “theoretical” impairment is insufficient for Rule 24(a)(2) intervention.

If BoR’s can be taken at its word, then, it is possible that its “BOR Policy 1006” will comply with HB102. As a result, until the pending administrative “review” is complete, and the content of the new rules is established by mean of a final agency decision, there are no issues in this

case that the Court has power to decide. *E.g., Montana Power Co.*, ¶ 32.

Finally, it could be that BoR's decision makers have left its trial counsel with misunderstanding of its true purpose and it has absolutely no intention of complying with HB102 under any circumstances. If so, then the interests of MSSA's members is clearly at stake and the "impairment of interest" prong of the intervention test is fully satisfied.

3. Although it can defend HB102 on certain bases, the State of Montana is not in a position to adequately defend the individual Constitutional and Montana Human Rights Act rights at issue in this case.

BoR tenders federal case law to the effect that if the government is a defendant in an action, there arises "a strong presumption" that its representation is adequate to protect the interest of an intervenor who is on the "same side" as the government. (BoR Br. at 17.) This presumption has never been adopted by the Montana Supreme Court under any of the case law cited by BoR or under any discovered by MSSA's research. Rather, no such extraordinary holding was shown or required. For example, returning again to the lead and controlling case law on this issue, *Sportsmen for I-143*, the Montana Supreme Court said: "The requirement of inadequacy of representation is satisfied if an applicant shows that representation of its

interests ‘*may* be’ inadequate and the burden of making this showing *is minimal.*” *Sportsmen for I-143*, ¶ 14 (emphasis added). Thus, the law in Montana is exactly the opposite of the federal law relied upon so heavily by BoR. In Montana, an association which can demonstrate affirmative activities in support of the adoption of a statute under constitutional challenge bears the burden of making only a “minimal” showing that the government’s representation is inadequate. *Id.*

Here, the State has taken the extraordinary step of filing a brief in support of intervention. (State of Montana’s Supplemental Resp. to Mots. to Intervene (June 30, 2021).) The State recognizes it “cannot fully represent” MSSA’s interests. (*Id.*, p. 2.) As the State correctly points out, its counsel, the Montana Attorney General, is not allowed to represent the Interveners individual interests. Yet, at issue here is a statute the Legislature has enacted in execution of § 12, Art. II, Mont. Const., which states:

The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons.

Since the right to keep and bear arms “is explicit in the Declaration of Rights in Montana’s Constitution, it is a fundamental right and any legislation regulating the exercise of a fundamental right must be reviewed under a strict-scrutiny analysis.” *Gryczan*, 283 Mont. at 449, 942 P.2d at 122 (analyzing the right to privacy). “To withstand a strict-scrutiny analysis, the legislation must be justified by a compelling state interest and must be narrowly tailored to effectuate only that compelling interest.” *Id.* HB102 is also designed to execute the “basic personal right” to use force in self-defense. As Montana’s Human Rights Act provides: “Any necessary force may be used to protect from wrongful injury the person or property of one’s self, of a wife, husband, child, parent, or other relative or member of one’s family” Mont. Code Ann. § 49-1-103.

The State acknowledges that its counsel cannot vindicate these individual rights on behalf of MSSA’s members. Its counsel is restricted to making arguments on the constitutionality of HB102 vis-a-vis Art. X of the Montana Constitution. But if fundamental rights are to come into play in this case, as the Court’s order granting a preliminary injunction recognizes it will, the parties most adequate to do so are individual citizens or associations representing individual citizens. In fact, the State’s counsel is

conflicted on this point because it is obligated to defend the BoR against an attack by MSSA against BoR's prerogatives if it is made, as MSSA intends to do, under the Declaration of Rights and the Human Rights Act.

Ultimately, the State and its counsel are not well-suited or even allowed to protect MSSA member individual rights at issue in this case. MSSA has therefore met its "minimal" burden and should be allowed to intervene in the case. *Sportsmen for I-143*, ¶ 14.

CONCLUSION

Accordingly, MSSA requests:

1. That it be allowed to intervene in this case for the purposes of protecting its members individual rights under applicable constitutional and statutory law;
2. That the Court grant leave for MSSA to file its proposed Answer attached to its motion as Ex. A;
3. That MSSA be awarded its attorney fees and costs under applicable law; and
4. That the Court grant such other relief as may be warranted in the circumstances.

DATED this 12th day of July 2021.

Respectfully Submitted,
RHOADES SIEFERT & ERICKSON PLLC

By: 

Quentin M. Rhoades
Attorneys for Intervener MSSA

CERTIFICATE OF SERVICE

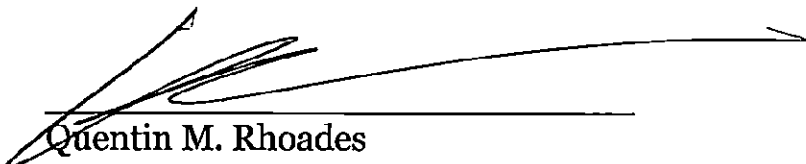
I hereby certify that on the 12th day of July 2021, I served upon the following a true and correct copy of the foregoing by internet email addressed as follows:

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SECOND DECLARATION OF GARY MARBUT

I, Gary Marbut, pursuant to Mont. Code Ann. § 1-6-105, hereby declare, under penalty of perjury, the following to be true and correct:

1. I am over eighteen (18) years of age, and am a resident of Missoula County, Montana. I am mentally sound and competent to attest to the matters set forth herein. The matters set forth in this Declaration are based upon my own personal knowledge, unless otherwise stated.

2. In its brief in opposition to the Montana Shooting Sports Association's (MSSA) Motion to Intervene in Regents v. Montana, Petitioner Regents make certain assertions that I personally know to be incorrect, problematic, or misconstrued and misdirected.

MSSA Members who are Employees, Students, or Alumni of the Montana University System (MUS)

3. Petitioners complain that MSSA has not identified by name any of its members who are associated with the MUS (Page 4, Footnote 5, of Petitioner's Combined Brief in Opposition). Petitioners imply that the doors to the hall of justice should be closed to MSSA and its members because MSSA has not breached the privacy of its members by naming those who are MUS employees or students.

4. Petitioners might be forgiven for posing this attack on MSSA members' First Amendment right to freedom of association because the

United States Supreme Court had not yet issued its decision in *Americans for Prosperity Foundation v. Bonta*. However, that decision has now been released, clarifying that the privacy and anonymity of the individual members of nonprofit organizations such as MSSA is a protected freedom of association under the First Amendment.

5. There is no difference between the California scheme requiring disclosure of nonprofit membership that failed in *Americans for Prosperity Foundation v. Bonta*, and Petitioners' claim that MSSA may not defend the interests of its members in court because it didn't name its members who are MUS employees or students.

6. The logical bottom line of Petitioner's claim is that MSSA cannot access the courts and justice if it is unwilling to surrender its members' First Amendment right to freedom of association and the right to privacy of its members under Article II, Section 10 of the Montana Constitution.

7. MSSA has a long history of promising and delivering privacy to its members, a common feature of many firearms-oriented public interest groups. MSSA does not disclose the names of its members both because of this long and typical MSSA policy, and because MSSA respects the right to

privacy the people of Montana have reserved to themselves at Article II, Section 10 of the Montana Constitution.

8. Further, when MSSA recruits members, the membership form MSSA uses (<https://mtssa.org/mssamembershipform.pdf>) does not collect information about the member's employment or education status. That information is normally irrelevant to MSSA's mission. Requiring such information would be the same as the MUS demanding to know what outside or religious organizations a prospective employee or student belongs to or is associated with as a condition of employment or enrollment.

9. MSSA recently conducted a query of individuals in the MSSA orbit seeking permission to identify MSSA members who are MUS employees, students, or alumni, and asking their permission to identify them and their MUS association by name for this lawsuit only. Some MSSA members have released MSSA from its privacy constraints to list their names for this specific purpose. Others declined. These are some results of our inquiry:

10. MSSA Board of Directors (BoD) member Matt Egloff is a member of the faculty at Montana Tech.

11. Michelle Simpson is an MSSA member and an enrolled student in the MUS and has allowed MSSA to identify her as such specifically for the purpose of this litigation.

12. One MUS student responded to MSSA's inquiry as follows: "I am a Senior in the Montana University System and a proud member of the Montana Shooting Sports Association. I prefer that my name not be released for the Regents v. Montana litigation for personal reasons, including fear of retaliation by elements of the MUS that could affect my academic standing. The MSSA represents many of my values as well as the values of many of my fellow MUS students. I believe MSSA's association with myself and others in the MUS gives MSSA sufficient standing to join the Regents v. Montana lawsuit."

13. One senior campus administrator who is an MSSA member believes it might cause employment risk to become known to the MUS as an MSSA member in this lawsuit and so declines to be identified by name for this lawsuit.

MSSA Only "lobbied" for HB 102

14. In attempt to minimize and thereby dismiss MSSA's role in HB 102, Petitioners admit only that MSSA "lobbied" for HB 102 (Page 8, et. seq., of Petitioner's Combined Brief in Opposition). This tepid admission

dramatically underreports MSSA's long term commitment to "campus carry."

15. First, MSSA's commitment to campus carry reform did not begin with HB 240 in 2013. (See, Exhibit 3.1, attached, consisting of a letter from MSSA to officials at MSU in July 2007 discussing campus carry policies; Ex. 3.2 attached, consisting of a follow up letter in November of 2007; Ex. 3.3 attached, consisting of a memo to MSU concerning campus carry; Ex. 3.4, attached, consisting of position paper about campus carry that MSSA published in February of 2008; Ex. 3.5, attached, consisting of a letter to Shiela Sterns, Commissioner of Higher Education from July of 2010 concerning campus carry; Ex. 3.6, consisting of her reply.)

16. MSSA's activity concerning campus carry is not a small turnip that just happened to fall off the turnip wagon sometime after HB 102 was introduced in the 2021 legislative session. Campus carry has been an active and ongoing endeavor for MSSA since at least 2007, albeit an effort continuously rebuffed, rejected, ignored, and opposed by Montana's higher education establishment.

17. Second, when MSSA wishes to seek a change in law, that involves a long, complex, and very active process. The MSSA BoD first selects the issue at its Annual Meeting in March. Then, MSSA will circulate

a question about that issue to all candidates for the Legislature in its Candidate Questionnaire.

18. Then MSSA drafts a bill to effect the desired law change. Bill drafting is a complicated and technical process, which includes compliance with the Legislature's Bill Drafting Manual.

19. MSSA must solicit an eligible legislator to submit a bill draft request for that subject to the Legislative Services Division (LSD) per legislative rules. MSSA provides the pre-drafted bill, which the legislator submits along with the official bill draft request. The legislator will list MSSA for contact about the bill as the bill is worked on by attorneys of the LSD. MSSA usually has extensive interaction with LSD drafters before the bill is in its final, introducible form.

20. Then, MSSA will select and recruit a suitable sponsor for the prepared bill, a legislator who may or may not be the one who submitted the bill draft request. MSSA will select a sponsor who serves on the committee to which the bill is likely to be assigned and one who has expressed interest in the topic of the bill. MSSA will inform the sponsor of all of the nuances about the bill, and all of the arguments for and against, to prepare the sponsor. Only after all of that work will the bill get introduced into the Legislature.

21. MSSA did all of this with several bills that were introduced in and passed in previous sessions of the legislature, bills that were ultimately combined to become HB 102 in the 2021 session of the Legislature. The campus carry features of HB 102 were substantially a repeat of HB 240 introduced in the 2013 legislative session, and SB 143 in the 2015 legislative session.

<https://leg.mt.gov/bills/2013/billpdf/HB0240.pdf>

<https://leg.mt.gov/bills/2015/billpdf/SB0143.pdf>

22. HB 240 in 2013 was sponsored by Rep. Cary Smith, who was then a member of MSSA's Board of Directors. SB 143 in 2015 was sponsored by Senator Cary Smith, who was then a member of MSSA's Board of Directors.

23. So, HB 102 did not happen by accident or in a vacuum. It happened because MSSA made it happen, very deliberately, and with a lot of effort over a period of many years. See the Declaration of Gary Marbut, an Exhibit to Intervenor's Motion to Intervene. For example, it took MSSA a decade of dedicated effort, including two constitutional initiative attempts and a successful constitutional referendum, to put the right to hunt, fish, and trap into the Montana Constitution (Article IX, Sec. 7., M.C.).

24. Third, I recruited Rep Barry Usher to submit the bill draft request for what would become HB 102 in November of 2020 (See record of HB 102 on the Montana Legislature's Website). During September, October, and November of 2020, I crafted a pre-draft of what would become HB 102. Rep. Usher submitted his bill draft request to the LSD on November 27, 2020 (See record of HB 102 on the Montana Legislature's Website). I provided Rep. Usher with the pre-draft of HB 102, which he forwarded to the LSD with the official bill draft request.

25. I worked extensively with Ms. Julianne Burkhardt, staff LSD attorney for the Senate Judiciary Committee, in refining my pre-draft to become the introduced version of HB 102.

26. Sponsor Rep. Seth Berglee was very deliberately selected and recruited to sponsor HB 102, in part because he has an extensive background with firearms, but also because he sits on the House Judiciary Committee and is Chairman of the House Education Committee. Rep. Berglee pre-introduced HB 102 for the 2021 legislative session on December 31, 2020 (See record of HB 102 on the Montana Legislature's Website).

27. Nothing about this was casual or accidental. It all happened because MSSA made it happen. Once all of this was done and HB 102 was introduced, MSSA did support the bill in various ways.

28. To claim that MSSA “lobbied” for HB 102, besides an attempt to be dismissive, is even technically incorrect under Montana law. A lobbyist is defined as a person who is paid to influence the Legislature (5-7-102, M.C.A.). As President of MSSA, I serve in an elected but unpaid capacity. I am a volunteer. So, I am not a lobbyist as defined in Montana law. MSSA was not a “lobbyist” for HB 102 because MSSA was not paid anything concerning HB 102. MSSA did alert its grassroots network to message legislators in support of HB 102, which request did garner wide support among the citizens of Montana’s vibrant firearm culture. And, I did appear as a citizen advocate and president of MSSA before the House Judiciary Committee and the Senate Judiciary Committee in support of HB 102.

29. For Petitioners to claim that MSSA “lobbied” for HB 102 dramatically underreports MSSA’s years of dedicated involvement in the issue of campus carry that culminated in 2021 with HB 102.

30. As is said colloquially, it’s like ham and eggs. With ham and eggs, the chicken is involved but the pig is committed. With HB 102, MSSA

is three generations of pigs. Petitioners, however, would like to dismiss MSSA as a simple chicken.

**The Attorney General will Not Adequately Defend MSSA's
Interests—Import of Petitioner's Opposition to MSSA
Intervention as an Admission**

31. Petitioners argue that the Attorney General will adequately represent MSSA's interests, so MSSA's intervention will add nothing to the case and is therefore unnecessary (Page 12, et. seq., Petitioner's Combined Brief in Opposition).

32. However, Petitioner's staunch opposition to MSSA's intervention effectively constitutes an admission by them that MSSA's intervention will be disadvantageous to Petitioners. This is likely because MSSA will bring gravitas, interest, perspective, and facts to the case that the Attorney General is not adequately prepared or informed to bring or has not considered, notwithstanding his best intentions.

33. The Attorney General simply does not have the full immersion and depth of experience in this issue that MSSA has. His primary interest and legal duty is to defend the acts of the Legislature rather than to defend individual Montanans. Plus, he has other legal duties and challenges demanding his attention. These other duties include responding to

multiple other lawsuits currently challenging other laws enacted by the 2021 Montana Legislature.

“Only About Article X”

34. Petitioners assert that this lawsuit is only and exclusively about the power of the Board of Regents under Article X of the Montana Constitution. Petitioners claim that the rights the people have reserved to themselves specifically from government interference in Article II of the Montana Constitution are simply not relevant.

35. Abraham Lincoln: “If we call a tail a leg, how many legs does a dog have? The answer is four. That’s because a tail is a tail, not a leg, no matter what you call it.”

36. No matter how much they may assert otherwise, Petitioners cannot escape that their quest for total and ultimate political power under Article X of the Montana Constitution necessarily runs afoul of the rights the people have reserved to themselves from interference by all government entities in Article II of the Montana Constitution.

37. If Petitioners obtain the outcome they seek with this lawsuit, then they will be approved and empowered to deny Montana citizens any of the rights the people have reserved to themselves from government interference in Article II of the Montana Constitution. Then, with

impunity, the MUS could hold “trials” and punish people with any form of punishment, including execution, without juries or legal counsel for the accused. The MUS could satisfy its workforce needs by literally enslaving people. This and much more could be done under the guise of the BoR simply “managing” the affairs of the MUS. Such is the import of this lawsuit.

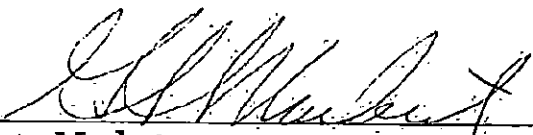
38. Any reasonable person would need extraordinary blinders on to believe that Petitioner’s effort has only to do with Article X and nothing to do with Article II. Applying law in the way Petitioners seek will effectively but improperly amend the Montana Constitution to add a line in Article X, Section 9(2) that declares, “When implementing these powers, the board is subject to no other law.” Without being approved by the people at a ballot, of course, such a change to the Montana Constitution would be improper and without effect.

39. In *Board of Regents v. Judge*, 168 Mont. 433 (1975), the Montana Supreme Court admitted that the board is subject to constraints other than from the Legislature when it said, “At this point we observe that if Article X, Section 9, 1972 Montana Constitution, was read literally without reference to the rest of the Constitution, the Regents’ argument and position would be correct; but, as will be hereinafter developed, the

Constitution is not so read." The Court also stated that even if Article X contains broad language, "it must not be read or construed in isolation."

40. Thus, Petitioner's argument fails that *Regents v. Montana* is only about the Regents' powers under Article X.

I DECLARE UNDER PENALTY OF PERJURY THAT THE
FOREGOING IS TRUE AND CORRECT.



Gary Marbut

Date of Signature: 7/9/21

City and State of: Missoula Montana

Montana Shooting Sports Association
P.O. Box 4924
Missoula, Montana 59806
mssa@mtssa.org - <http://www.mtssa.org>
406-549-1252

July 5, 2007

Allen Yarnell
Vice President for Student Affairs
Montana State University

Glenn Puffer
Associate Dean of Students
Montana State University

Dear Sirs;

Greetings from Missoula.

This is the comment, for the record, of the Montana Shooting Sports Association (MSSA) upon the proposed new firearms policy being considered by MSU. For introduction, MSSA is the primary organization in Montana asserting the rights and prerogatives of gun owners in Montana, is affiliated with the National Rifle Association and associated with Gun Owners of America and the Citizens Committee for the Right to Keep and Bear Arms.

We wish to begin this comment by saying that we grant that the intent of MSU with this proposed policy is to make the MSU campus safer for faculty, staff and students and we commend that intent. We do agree that it is time to revisit MSU firearms policy in light of what happened at Virginia Tech. We also believe, for the reasons stated below, that the proposed policy will have the opposite effect, that the policy is short-sighted, and that the policy as proposed will actually make MSU personnel more vulnerable to malicious attack on campus.

A. Comment on proposed policy

1. Constitutional problems -- self defense. For good reason, the Montana Constitution reserves from government interference the right of every person to bear arms for his or her own self defense. We assert that MSU is a subdivision of Montana state government and subject to the rights the people of Montana have reserved to themselves from government interference in the Declaration of Rights at Article II of the Montana Constitution, specifically at Article II, Section 12. Just as MSU could not legitimately prevent faculty, staff or students from voting in elections, receiving a jury trial if accused of a crime, or exercising their freedom of speech, MSU may not prohibit them from

exercising their right to defend themselves, nor the tools for self defense, as reserved in Article II, Section 12.

2. Flawed logic -- gun bans do not inhibit criminals. It has been demonstrated beyond rebuttal that jurisdictions in which peoples' ability to defend themselves is unfettered the denizens of such jurisdictions enjoy a reduced level of victimization. See *More Guns; Less Crime* by Professor John Lott. Conversely, those places with the most severe restrictions on the ability of people to protect themselves impose on people the highest levels of victimization. Someone intent on a Virginia Tech-type incident at MSU -- a person determined to commit murder or multiple murders -- will not abandon his plans simply to avoid violating a policy MSU has adopted. To think otherwise is delusional. The only thing a gun banning policy will accomplish is to insure that this madman has a pool of defenseless victims to kill -- that he will encounter no effective resistance as he carves a swath of death through the MSU campus.

3. Liability and responsibility for protection. Let us assume that MSU has some level of responsibility for the safety and well being of people on campus. MSU would not, for example, allow an attractive or dangerous nuisance to exist on campus, such as a building with no fire exits. If MSU were to allow a hazard such as a lecture hall with no fire exits, and a fire were to occur where lives were lost because of the absence of fire exits, MSU would be held to have been negligent and liable because of this negligence. The same principle applies to preventing people from possessing the means to defend themselves from unlawful attack, especially when such possession is protected from MSU interference by the Montana Constitution. We believe that MSU will incur significant liability if it denies people the means to protect themselves and fails to protect them, individually and actually, to the same extent that they could protect themselves were they not disarmed.

4. Prohibited places; 45-8-328, M.C.A. In its proposed University Firearms Policy (at: http://www.montana.edu/legalcounsel/firearms_policy_06_07.html), MSU declares that 45-8-328 (prohibited places) applies "in MSU buildings or on the MSU campus." Yet 45-8-328 itself only applies to a much more narrow area, "(a) portions of a building used for state or local government offices and related areas in the building that have been restricted." If 45-8-328, M.C.A. applies at all (is MSU a "state or local government office"), it certainly only applies to restricted areas inside buildings, but not the asserted broader area of "on the MSU campus."

The proposed policy raises another interesting question when citing 45-8-328, M.C.A. That is, to what extent is MSU subject to (or may avail itself of) the laws passed by the Legislature? There has long been some contention about the extent to which the Legislature may or may not direct the affairs of the Montana university system, given that the Montana Constitution seems to reserve management of the university system to the Board of Regents. Thus, citing legislative authority in its proposed policy seems to acknowledge greater legislative authority over campus affairs than has previously been admitted.

5. Persons not students, faculty or staff not subject to MSU policy. MSU has little or no authority over persons who are not faculty, staff or students. MSU may fire

employees and expel students who violate MSU policy -- not much of a threat to a madman who is determined to kill others. MSU has no real authority over persons not employed or students at MSU.

It is axiomatic that a person bent on mayhem on the MSU campus will not be deterred by a simple MSU policy. MSU has no real authority over persons not faculty, staff or students. In Virginia Tech-type incidents, the perpetrator almost always expects his own demise, either at his own hand or at the hands of others, in addition to killing however many others he may. A person determined to kill others and then die himself simply will not forego his plans because he learns that MSU has adopted a policy that would make his plan a violation of that policy, employee of MSU, student, or otherwise.

It is very unlikely that this theoretical person determined to kill others can be stopped by anyone not armed. It takes an armed person to stop an armed killer. That's exactly why we have armed police. However, the police will not arrive until this theoretical madman has already killed some, perhaps many. Meanwhile, the proposed MSU policy will guarantee that a killer will have defenseless victims.

Gentlemen, I am accepted in state and federal courts as an expert concerning self defense, firearm safety, use of force, and other related topics. If MSU were to adopt the proposed firearms policy, as is, and if there were a Virginia Tech-type incident on the MSU campus (notwithstanding the policy), and if I were engaged by the attorney for the next-of-kin of a non-survivor of the incident asserting negligence by MSU, it would be my testimony and expert opinion that MSU contributed to the demise of the victim by having prevented the victim from effectively defending himself or herself.

While this comment is critical of the proposed policy as it is drafted, this comment would be incomplete, I believe, if no improvements or alternatives were suggested. So, we offer MSU some alternatives, not to be considered complete or universal, that will help insure the safety of all persons on campus. Before offering these alternatives, some discussion is in order.

B. Discussion

1. **Concealed weapon permittees.** A majority of states, including Montana, have adopted mandatory-issue concealed weapon permit laws. There is now a vast amount of statistical data available about the various effects of this public policy direction taken by most states. Two important points become clear from examining available data. The first is that states which adopt shall-issue CWP laws confer upon their citizens a noticeable, in some cases dramatic, reduction in interpersonal, violent crime. If predators know that some of their potential victims are armed, there is less predation. Professor Lott's research determines that the rates of crimes such as murder, assault, rape and robbery fall on the order of 20% in states which adopt shall-issue CWP laws. Most important, the crime of multiple or mass murder (like at Virginia Tech) decreases on the order of 80% in states which adopt shall-issue CWP laws.

The second point established by the data is that people who have taken firearm safety training, passed a criminal records background check, offered references, photo and

fingerprints, and been screened by local law enforcement, all in order to obtain a concealed weapon permit, are statistically the most safe and law abiding group identifiable. That is, CWP-holders have a lower incidence of violence, of law-breaking, and of misadventures with firearms than nearly all other identifiable groups, including police officers, military personnel and teachers.

2. **"Gun free" zones.** As alluded to above, so-called "gun free" zones do not prevent criminals from having guns in those places. It is the chosen vocation of criminals to break or ignore laws -- that is exactly why they are and are called criminals. "Gun free" zone laws and policies only insure that law-abiding people cannot defend themselves or each other in those zones. Such zones might as well be called "guaranteed defenseless victim" zones, as these zones only increase the safety of predators and madmen, but not of other, law abiding people there. "Gun free" zones artificially create the most fertile possible ground for criminal activity. Further, "gun free" zones neutralize the societal benefit and criminal deterrence generated by shall-issue CWP laws.

3. **Police - no duty to protect.** The courts have held that police have no duty to protect any individual, but only to provide a general level of protection to the community. If police are called, they have no duty to respond or to act. If there were a Virginia Tech-type incident on the MSU campus, police might respond to the edge of campus and hold there, waiting for a madman to complete his mayhem, as Bozeman police did recently when responding to an incident at a local convenience store. This makes it practically incumbent upon every individual to be able to provide for his or her own protection, essentially a responsibility of every citizen. Police protection is a dangerous myth. The mission of police is to bring violent perpetrators to justice -- they are the cleanup crew, no matter how much individual police officers would like to be able to interdict individual crimes.

4. **Trustworthy citizens.** The Montana Constitution mandates and the Legislature has concurred that the majority of citizens are decent, law abiding people, to be trusted with possession of firearms for self-defense. One would hope and suppose that MSU selects exemplary people for faculty, staff and students, people who may even be a cut above average Montanans concerning responsible behavior. Montana law allows persons 18 years or older, and having met other statutory requirements, to obtain concealed weapon permits. In Montana's near two-decade experience with this public policy, there is no -- zero -- data to suggest that young and eligible persons with CWPs have misused their CWPs. Further, federal law allows persons between 18 and 20 to be legally in possession of handguns with parental consent. While gang related and criminally inclined youth have been known to abuse these rights, the remaining 99% of the population have not. If Montana people generally are responsible and lawful, and MSU denizens are at or above average, and if all Montana people (exempting felons and mental incompetents) are trusted to possess firearms, then it just makes no sense to distrust and disrespect MSU personnel to the extent indicated by the proposed policy.

5. **Montana culture.** Montana has a long and honorable culture of safe, appropriate and effective use of firearms, beginning with the Lewis and Clark expedition and continuing today. Firearm possession is very much a part of Montana culture. MSU seeks to deny this culture for faculty, staff and students. MSU might as well insist that Jews attend only

Christian services, that Asians must eat nothing but steak and potatoes, or that no student may wear a cowboy hat or cowboy boots on campus. Such insensitivity to culture is surprising coming from MSU.

6. Mass murder. It is laudable for MSU to seek to prevent a Virginia Tech-type incident on campus. However, scapegoating firearms misses the mark. In the largest mass murder in U.S. history airplanes were the weapon of choice when terrorists flew them into the World Trade Center in New York. The next largest mass murder in history also happened in New York City when a vengeful person threw an ignited quart bottle of gasoline into a crowded nightclub. Firearms are not the problem. People who would kill other people are the problem. When these madmen are armed, it takes another armed person to stop them.

7. Seat belt analogy. People wear seat belts because it is prudent and it enhances safety for the seat belt user. As a motive for seat belt users, it is never said that they are exceptionally paranoid and unusually fearful of getting in an auto accident. It is also never said that seat belt users get into their cars in the hope of being able to crash into something. It is just prudence. Actually, very few people need seat belts. Only those very few who become involved in an accident need belts, and then, once the accident begins, it is too late to buckle up. The motivation for those who carry a firearm for personal protection is the same. Relatively few actually need a firearm. These people are not highly fearful - paranoid - of being victimized. They just choose not to be subject to victimization. Nor do these people get up in the morning hoping to find something to crash into. But, like the auto crash victim, when a person becomes victim of predatory crime, it is then too late to buckle up (or go home and get a firearm).

8. Note about "dangerous chemicals." The proposed MSU University Firearms Policy declares that: "Prohibited weapons may not be carried or possessed by individuals while in MSU buildings or on the MSU campus." The policy defines "prohibited weapons" to include "dangerous chemicals." It would probably be wise for the administrative and legal staff to consult the departments of Chemical Engineering and Chemistry and Biochemistry, and various other research entities on campus, before invoking this blanket ban. It is a near certainty that these departments and entities have plentiful stocks of what must fit the definition of "dangerous chemicals." Under the proposed policy, either MSU would need to engage in a comprehensive process of inventorying stocked chemicals, make determinations about which ones might be "dangerous" if misused, and destock and properly dispose of "dangerous" chemicals, or MSU would be forced to engage in selective enforcement of its policy. Selective enforcement is a slippery slope.

9. Note about ROTC. According to pictures posted on the MSU Website, the ROTC department uses paint ball guns, banned under the proposed policy, for training. The ROTC probably also possesses real firearms. Since the proposed policy, as is, has no exemption for ROTC, again one must imagine significant changes at MSU, or selective enforcement of the proposed policy.

C. Alternatives

It is recommended that:

1. All persons who have a concealed weapons permit valid in Montana be exempted from the proposed University Firearms Policy;
2. any student, staff or faculty under the age of 18 who wishes to be in possession of a rifle or shotgun on campus must provide MSU with written parental permission consenting to that possession;
3. any student, staff or faculty who is 18, 19, or 20 years old and who wishes to possess a handgun on campus must provide MSU with written parental permission consenting to that possession (required by federal law);
4. the MSU policy require that no student may keep a firearm in his or her dorm room unless with the consent of his or her roommate(s);
5. MSU provide secured storage in each dorm for firearms students do not wish to keep in their rooms, and that an adequate system be devised to both prevent unauthorized access to such storage and to allow students to retrieve stored firearms at any reasonable hour;
6. discharge of firearms anywhere on campus except at an approved shooting range and except for self defense be strictly prohibited (which won't inhibit a madman but will promote safety, and which is already covered under state law if MSU is within the Bozeman city limits);
7. a criminal records background check be run on all staff and faculty and that any who are not legally eligible to possess firearms be reevaluated for employment; and
8. suitable self defense instructors be recruited and engaged to offer classes on campus both about the safe and effective use of firearms, and about how affected persons can without firearms and most quickly neutralize a threat to themselves and others (not relying totally on summoning police and waiting for them to arrive to hopefully do something effective).

I would be happy to converse with either of you by phone or email, or collaborate further about how MSU can craft a reasonable and effective policy to enhance the safety of all persons on campus. Please call or email me if you care to pursue this.

Sincerely yours,

Gary Marbut
President

Cc: Senator Joe Balyeat, Bozeman
Representative Roger Koopman, Bozeman
Representative Rick Jore
MSSA Board

Montana Shooting Sports Association
P.O. Box 4924
Missoula, Montana 59806
mssa@mtssa.org - <http://www.mtssa.org>
406-549-1252

November 20, 2007

Leslie C. Taylor
Legal Counsel
211 Montana Hall
Montana State University
Bozeman, Montana

Dear Ms. Taylor;

Greetings from Missoula.

This is the comment, for the record, of the Montana Shooting Sports Association (MSSA) upon the proposed new firearms policy being considered by MSU. For introduction, MSSA is the primary organization in Montana asserting the rights and prerogatives of gun owners in Montana, is affiliated with the National Rifle Association and associated with Gun Owners of America and the Citizens Committee for the Right to Keep and Bear Arms.

We wish to begin this comment by saying that we grant that the intent of MSU with this proposed policy is to make the MSU campus safer for faculty, staff and students and we commend that intent. We do agree that it is time to revisit MSU firearms policy in light of what happened at Virginia Tech. We also believe, for the reasons stated below, that the proposed policy will have the opposite effect, that the policy is poorly-considered, not well crafted, and that the policy as proposed will actually make MSU students and employees more vulnerable to malicious attack on campus.

We note that the proposed policy, as written, effectively asserts a universal ban on handguns on campus (except, perhaps, for campus security). Although handguns are the tool of choice for self defense from sudden and life-threatening attack, the proposed MSU policy would theoretically deny everyone on campus this important tool of self defense.

We ask that MSU focus academic and scientific rigor on examination of this question, an issue that should be resolved through careful and rational thinking, avoiding false assumptions, false deductions and subsequent false conclusions. We ask you to set aside emotion and emotional arguments and instead look at the facts available, an approach that would be appropriate for an institution of higher education..

EXHIBIT 3.2

Finally, we ask that MSU include as response to this round of comment all of the comments previously submitted in June and July to the similar policy revision proposed then.

A. Comment on proposed policy

1. Constitutional problems -- self defense. For good reason, the Montana Constitution reserves from government interference the right of every person to bear arms for his or her own defense and for the defense of others. MSU is a subdivision of Montana state government and subject to the rights the people of Montana have reserved to themselves from government interference in the Declaration of Rights at Article II of the Montana Constitution, specifically at Article II, Section 12. Just as MSU could not legitimately prevent faculty, staff or students from voting in elections, receiving a jury trial if accused of a crime, or exercising their freedom of speech, MSU may not prohibit them from exercising their right to defend themselves, nor prohibit the tools for self defense, as reserved in Article II, Section 12. The Montana university system is not exempt from restrictions imposed on governmental entities and actors by the rights Montana citizens have reserved to themselves in the Montana Constitution, notwithstanding that MSU may genuinely believe it has good reason to deny constitutional rights.

2. Flawed logic -- gun bans do not inhibit criminals. It has been demonstrated beyond rebuttal that jurisdictions in which peoples' ability to defend themselves is unfettered the denizens of such jurisdictions enjoy a reduced level of victimization. See *More Guns; Less Crime* by Professor John Lott. Conversely, those places in the U.S. with the most severe restrictions on the ability of people to protect themselves impose on people the highest levels of victimization. Someone intent on a Virginia Tech-type incident at MSU -- a person determined to commit murder or multiple murders -- will not abandon his plans simply to avoid violating a policy MSU has adopted. To think otherwise is delusional. The only thing a gun banning policy will accomplish is to insure that this madman has a pool of defenseless victims to kill -- that he will encounter no effective resistance as he carves a swath of death through the MSU campus.

Elaboration upon this point is in order. This policy revision appears to have been sparked by the horrendous mass murder incident earlier this year at Virginia Tech. People who decide to commit mass murder invariably expect to die as a part of their killing spree, either at their own hand or at the hands of others. A mass murderer does not expect to survive. A mass murderer chooses to violate the strongest prohibitions of our society -- the fundamental religious and moral prohibition against taking innocent lives, the prohibitions against murder inherent in our constitutions and laws, the prohibitions against using weapons offensively, the forfeit of their own life, and more.

This proposed policy is dependent on the essential assumption that a person determined to murder others and to violate all of these strong prohibitions will get to the edge of campus, realize what he intends is against MSU policy, and abandon his plans for carnage so as not to offend campus policy. Unlike the irrational White Queen, we are unwilling to believe six impossible things before breakfast. We reject this essential assumption, without which the whole policy makes little sense.

3. **Liability and responsibility for protection.** Let us assume that MSU has some level of responsibility for the safety and well being of people on campus. MSU would not, for example, allow an attractive or dangerous nuisance to exist on campus, such as a building with no fire exits. If MSU were to allow a hazard such as a lecture hall with no fire exits, and a fire were to occur where lives were lost because of the absence of fire exits, MSU would be held to have been negligent and liable because of this negligence. The same principle applies to preventing people from possessing the means to defend themselves from unlawful attack, especially when such possession is protected from MSU interference by the Montana Constitution. We believe that MSU will incur significant liability if it denies people the means to protect themselves and fails to protect them, individually and actually, to the same extent that they could protect themselves were they not disarmed.

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While this comment is critical of the proposed policy, this comment would be incomplete, I believe, if no improvements or alternatives were suggested. So, after the following discussion, we will offer MSU some alternatives that will actually help insure the safety of all persons on campus.

B. Discussion

1. **Concealed weapon permittees.** A majority of U.S. states, including Montana, have adopted mandatory-issue concealed weapon permit laws (called "shall-issue" laws). There is now a vast amount of statistical data available about the various effects of this public policy direction taken by most states. Two important points become clear from examining available data.

The first is that states which adopt shall-issue CWP laws confer upon their citizens a noticeable, in some cases dramatic, reduction in interpersonal, violent crime -- shall-issue

CWP laws confer greater safety for all. If predators know that some of their potential victims are armed, but they don't know which ones, there is less predation. Professor Lott's research determines that the rates of crimes such as murder, assault, rape and robbery fall on the order of 20% in states that adopt shall-issue CWP laws. Most important, the crime of multiple or mass murder (like at Virginia Tech) decreases on the order of 80% in states which adopt shall-issue CWP laws (except within "gun-free" zones, like MSU proposes).

The second point established by the data is that people who have taken firearm safety training, passed a criminal records background check, offered references, photo and fingerprints, and been screened by local law enforcement, all in order to obtain a concealed weapon permit, are statistically the most safe and law abiding group identifiable. That is, CWP-holders have a lower incidence of violence, of law-breaking, and of misadventures with firearms than nearly all other identifiable groups, including police officers, military personnel and teachers.

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3. **Police - no duty to protect.** The courts have held that police have no duty to protect any individual, but only to provide a general level of protection to the community. If police are called, they have no duty to respond or to act. If there were a Virginia Tech-type incident on the MSU campus, police might or might not respond, or might respond to the edge of campus and hold there, waiting for a madman to complete his mayhem, as Bozeman police did recently when responding to an incident at a local convenience store. This makes it practically incumbent upon every individual to be able to provide for his or her own protection, essentially a responsibility of every citizen. Police protection is a dangerous myth. The actual work of police is to bring violent perpetrators to justice, when they can. Police are the cleanup crew, no matter how much individual police officers would like to be able to interdict individual crimes.

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5. **Montana culture.** Montana has a long and honorable culture of safe, appropriate and effective use of firearms, beginning with the Lewis and Clark expedition and continuing today. Firearm possession is very much a part of Montana culture. MSU seeks to deny this culture for faculty, staff and students. MSU might as well insist that Jews attend only Christian services, that Asians must eat nothing but steak and potatoes, or that no student may wear a cowboy hat or cowboy boots on campus. Such insensitivity to culture is surprising coming from MSU where cultural tolerance should be embraced.

6. **Mass murder.** While it is laudable for MSU to seek to prevent a Virginia Tech-type incident on campus, scapegoating firearms misses the mark. In the largest mass murder in U.S. history airplanes were the weapon of choice when terrorists flew them into the World Trade Center in New York. The next largest mass murder in history also happened in New York City when a vengeful person threw an ignited quart bottle of gasoline into a crowded nightclub. Firearms are not the problem. People who would kill other people are the problem. When these madmen are armed, it takes another armed person to stop them.

7. **Seat belt analogy.** People wear seat belts because it is prudent and it enhances safety for the seat belt user. As a motive for seat belt users, it is never said that they are exceptionally paranoid and unusually fearful of getting in an auto accident. It is also never said that seat belt users get into their cars in the hope of being able to crash into something. Wearing seat belts is just prudent. Actually, very few people actually need seat belts. Only those very few who become involved in an accident need belts, and then, once the accident begins, it is too late to buckle up. The motivation for those who carry a firearm for personal protection is the same. Relatively few actually need a firearm. These people are not highly fearful - paranoid - of being victimized. They simply choose not to be victims. Nor do these people get up in the morning hoping to find something to crash into (or shoot at). But, like the auto crash victim, when a person becomes victim of predatory crime, it is then too late to buckle up (or go home and get a firearm).

8. **Note about "dangerous chemicals."** The proposed MSU University Firearms Policy declares that: "Weapons are prohibited on campus, except as follows." The policy defines "weapons" to include "dangerous chemicals." The proposed policy then offers exceptions to the general ban, but only for student housing and campus security. It would probably be wise for the administrative and legal staff to consult the departments of Chemical Engineering and Chemistry and Biochemistry, and various other research entities on campus, before invoking this blanket ban and unexcepted ban on "dangerous chemicals" throughout campus. It is a near certainty that these departments and entities have plentiful stocks of what must fit the definition of "dangerous chemicals." Under the proposed policy, MSU will need to engage in a comprehensive process of inventorying stocked chemicals, make determinations about which ones might be "dangerous" if misused, and un-stock and properly dispose of "dangerous" chemicals. Otherwise, MSU

will be forced to engage in selective enforcement of its policy. Selective enforcement is a slippery slope.

9. **Note about ROTC.** According to pictures posted on the MSU Website, the ROTC department uses paint ball guns, banned under the proposed policy, for training. The ROTC probably also possesses real firearms. Since the proposed policy, as is, has no exemption for ROTC, again one must imagine significant changes at MSU, or selective enforcement of the proposed policy. There may also be an issue about the effect of MSU contracts with the Department of Defense for ROTC.

10. **Utah.** The State of Utah overtly allows citizens with CWP's to exercise their CWP's on the campuses of the state university system, including students and employees. It would be no more disingenuous than MSU's proposed ban to state that Utah universities and colleges have not had a single incident of mass killing since legislative adoption of this policy. Certainly, there has been zero incidences of CWP-holders having misadventures with or involved in misuse of firearms on Utah campuses under this sensible and tolerant Utah policy.

11. **Thought experiment.** Allow me to conduct a thought experiment for the reviewer. Suppose you, your spouse and/or children are being stalked by someone known to have violent intentions -- someone likely to kidnap, rape or kill. Would it make you more or less comfortable about the safety of yourself or your family members to post a sign in your front yard asserting "No guns on these premises"? This is a very close analogy to what MSU proposes with its effective ban on handguns and severe restriction on long guns -- to leave the MSU family exposed to and unprotected from the violent stalker, *and to announce that vulnerability.*

12. **Drafting of the proposed policy.** Having been involved in drafting legislation for over two decades, I am sensitive to the difficulties inherent in drafting clear yet effective policy. While admitting that this is a difficult topic about which to draft clear policy (because the underlying concept is flawed), the currently proposed draft has some genuine drafting problems.

Comment based on policy iteration posted at:
http://www.montana.edu/legalcounsel/firearms_policy_11_07.html

a. Use of the word "weapon". "Weapon is defined by dictionary.com as: "1. any instrument or device for use in attack or defense in combat, fighting, or war, as a sword, rifle, or cannon. 2. anything used against an opponent, adversary, or victim: the deadly weapon of satire." One may suppose other definitions will substantially agree.

The problem with using the word "weapon" as a keystone for the proposed MSU policy is that whether or not something is a weapon depends on how it is used. For example, the second example used by dictionary.com acknowledges that words can be used as a weapon, yet all use of words is not necessarily use of a weapon. Also, although firearms may be used as a weapon, much, perhaps most, use of firearms is not as a weapon. Firearms are used widely for shooting competition, such as trap or skeet, where no weaponization is involved or intended. Some people collect firearms for historical value,

such as most included in a recent and excellent Museum of the Rockies exhibition. Some people purchase firearms as a store of value and hedge against inflation.

To repeat the logical content: Not all things capable of being used as weapons are always weapons, and not all things described as weapons in the policy are necessarily weapons. So, a word or phrase should be chosen as the keystone for this policy that doesn't seem as overtly pejorative as "weapons".

b. Use of the word "explosives". This is another illusive term. It is understood that dynamite is not wanted in student rooms, but there is much else that is explosive. Probably more buildings have been damaged or destroyed in the U.S. from propane or natural gas explosions than from dynamite. Should propane and natural gas be prohibited also? Propane is used as the propellant in common products, such as hair spray. These can explode with incredible violence if heated. Another common agent that can be very explosive is flour -- common, ordinary baking flour. Fuel-air bombs using flour are applied effectively in warfare to utterly demolish large buildings. Flour dust explosions in grain silos can be among the most devastating of explosions. So, is flour an explosive? Certainly, under the right conditions. Is flour in student quarters prohibited by the proposed policy? Maybe; maybe not.

c. Pepper spray. Pepper spray is classed as a weapon "(except for small, personal protection dispensers) (sic)." What is a "small, personal protection dispenser"? Is it the size of canister recommended by the Montana Department of fish, Wildlife and Parks for bow hunters to carry in bear country? If so, how is that size defined?

d. Family housing. A plain reading of numbered paragraph 2 seems to allow loaded shotguns and crossbows to be stored in family housing, but not unloaded rifles.

e. Transport. In numbered paragraph 3, there is no provision for a student to transport any way other than in a vehicle. Is a student expected to drive his vehicle into the housing unit or dorm storage facility, or will he or she be disciplined for carrying a firearm from a housing unit or dorm to a vehicle in a parking lot? Also, the semantics of this paragraph are very confusing, especially the "onto and off of campus" language that seems first to say that a firearm may only be transported "off of campus with the immediate intent of proper storage on campus" (sic), but then contradicts itself and says something different.

Taken together, it appears that whomever drafted this policy was 1) not very familiar with the issues involved, and 2) not very focused on the drafting process. By pointing out these drafting problems we do not suggest that fixing these problems will turn a flawed policy into a good policy.

C. Alternatives

MSSA recommended that:

1. All persons who have a concealed weapons permit valid in Montana be exempted from the proposed University Firearms Policy;

2. any student, staff or faculty under the age of 18 who wishes to be in possession of a rifle or shotgun on campus must provide MSU with written parental permission consenting to that possession;
3. any student, staff or faculty who is 18, 19, or 20 years old and who wishes to possess a handgun on campus must provide MSU with written parental permission consenting to that possession (required by federal law);
4. the MSU policy require that no student may keep a firearm in his or her dorm room unless with the consent of his or her roommate(s);
5. MSU provide secured storage in each dorm for firearms students do not wish to keep in their rooms, and that an adequate system be devised to both prevent unauthorized access to such storage and to allow students to retrieve stored firearms at any reasonable hour;
6. discharge of firearms anywhere on campus except at an approved shooting range and except for self defense be strictly prohibited (which won't inhibit a madman but will promote safety, and which is already covered under state law if MSU is within the Bozeman city limits);
7. a criminal records background check be run on all staff and faculty and that any who are not legally eligible to possess firearms be reevaluated for employment; and
8. suitable self defense instructors be recruited and engaged to offer classes on campus both about the safe and effective use of firearms, and about how affected persons can without firearms and most quickly neutralize a threat to themselves and others (not relying totally on summoning police and waiting for them to arrive to hopefully do something effective).

I would be happy to converse with either of you by phone or email, or collaborate further about how MSU can craft a reasonable and effective policy to enhance the safety of all persons on campus. Please call or email me if you care to pursue this.

Sincerely yours,

Gary Marbut
President

Cc: Senator Joe Balyeat, Bozeman
Representative Roger Koopman, Bozeman
MSSA Board
Others

MEMORANDUM

Date: February 6, 2008
To: MSU ad hoc committee on firearms and weapons policy
From: Gary Marbut
Subject: Thoughts for policy evolution

Dear Committee Members,

It was interesting to be able to hear the committee discussion yesterday. I appreciate that opportunity.

On the drive back to Missoula yesterday, I had plenty of time to consider what committee members discussed. Two impressions of that discussion prevail:

- 1) Although the policy reconsideration may have been sparked by the Virginia Tech tragedy, most committee members seem to be concerned primarily with more ordinary and less catastrophic problems potential in the university environment; and
- 2) the topical area in which the committee is attempting to formulate policy is a very slippery and difficult area in which to develop pristine policy, policy that is easy to understand and simple to comply with.

Perhaps I may be able to help with some thoughts about this second issue. Here is what I offer:

1) **Policy direction.** There are two general and polar directions for regulatory policy formulation. They are - a) everything not permitted is prohibited, and alternately, b) everything not forbidden is allowed. One difficulty with the current, evolving policy structure is that it is a mix of these two directions, resulting in turbulence both for the committee and for those expected to comply with an eventual policy. It appears to me that a policy will be more coherently formulated, and more easily understood, if the policy direction is limited to just one of the two schemes mentioned above. The first scheme is more commonly found in very authoritarian systems. The second scheme may be more suitable for university employees and students in the U.S.

2) **Regulating objects versus regulating conduct.** As I see it, the committee wishes to devise rules to accomplish the result that people will not be injured and property will not be damaged. As Ms. Taylor pointed out, defining "weapons" is slippery business because whether or not an object is or is not a weapon depends on the intent and conduct of the person using the object. Col. Puffer mentioned, correctly, that a baseball bat can be a fearsome weapon, but only if intended and used that way. Consider another example. Ice falling from the roof of a building might injure a person passing below. Ice occurring

naturally, and melting and falling naturally might be fodder for building codes or maintenance policy, but would not logically be included within the sweep of a weapons policy. However, if a chunk of ice were deliberately or accidentally dropped from a roof by a person, jeopardizing or injuring someone below, that conduct would certainly be appropriate fodder for the sort of policy the committee seems to desire. The dividing key is human conduct and intent. Therefore, the proposed policy might better speak to prohibited conduct than to prohibited objects. For example, the policy might declare it to be a violation of policy for any person to deliberately injure another person or damage University property (willful), or to do either because of reasonably avoidable accident (reckless or careless). Such a direction avoids the difficulty - maybe the impossibility - of defining what may or may not be weapons.

3) **Rights and responsibilities.** One of the many goals of the University is to help develop young people into becoming productive and/or fulfilled citizens. To enhance the environment in which students learn to self-regulate, so as to better equip them as cooperative and contributing members of society, it may work better to allow students more rather than less opportunity to exercise rights and responsibilities, with serious sanctions for any who abuse rights or fail to assume responsibility for rights' exercise. In our system, we try to avoid prior restraint (Ms. Taylor can explain this concept) in the exercise of rights. Rather, we rely generally on punishment afterwards for abuse of rights exercise. For example, we don't put duct tape over the mouths of theater-goers fearing that some unrestrained person will shout "fire" in a crowded theater. Rather, we punish someone later if they should, without valid reason, shout "fire" in a crowded theater. In terms of the proposed policy, the long-term mission of the University may be better served by leaning decidedly towards allowing exercise of rights and privileges, rather than attempting to narrowly channel behavior with regulatory policy.

I hope these generic thoughts about formulation of regulatory policy will help the committee arrive at a most workable solution to this admittedly difficult topic.

There are three other bits of information I wish to pass on to the committee for consideration.

1) I once taught Fire Science for the University of Alaska. With that background, it occurs to me that the University might prefer to more logically include the treatment of incendiary materials and explosives within fire safety or life safety policies than within a weapons and firearms policy.

2) I have reviewed the Board of Regents policy about firearms, found at:
<http://mus.edu/borpol/bor1000/1006.htm>

That policy is silent about honoring concealed weapon permits authorized under Montana law. Sections 1, 2, and 3 of this policy are all about carrying firearms by university security personnel and contract security personnel. Section 4 leaves discretion over remaining firearms issues to the separate units of the university system. The Board of Regents assumes no police power and authority over persons not students and not

employees. The university system certainly has greater authority over employees as an employer, and via employment contracts. And, the university system has some authority as a landlord, over tenants. While there is legitimate debate over whether a government employer or government landlord may abrogate the constitutional rights of an employee or tenant, that issue will not be decided by this committee. However, the Board of Regents has declared no policy (that I can find) about recognition of concealed weapon permits authorized by state law. This void, and the language of Section 4 of the Board policy, leave discretion over such matters to the individual units of the university system.

3) During committee discussion, I heard several comments about false reports by persons unfamiliar with our Montana firearms culture or perhaps people even intolerant of our Montana firearms culture, reports interpreted as potential or pending violence. Certainly, campus police have no choice but to respond to these reports, just as the fire department has no option but to respond to pulled fire alarms or reports of fire or smoke. However, if any or many such reports come from people who are culturally unaware or culturally intolerant, perhaps some mechanism should be created to upgrade the cultural awareness of such people, or even to sanction anyone making repeated false reports as would be done in the case of a person pulling a fire alarm as a prank.

These comments do not replace my comment of record about the proposed policy, but I hope these thoughts and pieces of information are helpful to the committee.

Analysis

The Montana University System and Firearms

Authority, Policy, Discussion and Conclusions

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I. Introduction

This paper will discuss the treatment of firearms by the Montana university system, the authorities available, the policies applied, discussion of the reasonableness of any regulatory effort, and conclusions.

Excluded from this discussion will be laws and policies relating to regulating campus security personnel and the firearms they are allowed to carry.

In the wake of the tragedy at Virginia Tech, there is renewed interest in the role of firearms on university and college campuses, and in regulation of firearms on campus. This is an issue of national interest. University and college administrators desire to make campuses as safe as possible for students and employees, and may have a legal duty to do so. Some believe that adopting campus policies limiting or banning firearms will make campuses safer for everyone. Others believe that those intending Virginia Tech-type assaults will not be deterred by mere campus policies, the only effect of which will be to insure a defenseless pool of unarmed victims incapable of mounting effective resistance to mayhem.

This has been a matter of policy debate in Utah for several years, and is the subject of proposed legislation in Virginia, South Dakota, Arizona and other states. What is the status of this discussion in Montana?

II. Authority

Montana Constitution. The chief controlling authority in Montana is the Montana Constitution. The right of individuals to bear arms in Montana is secured from government intrusion by the people of Montana with a clear statement at Article II, Section 12 of the Montana Constitution. It is worth repeating that declaration of right here in full:

Section 12. Right to bear arms. The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons.

Several points are worth noting about this declared right.

- 1) The Montana Supreme Court has said that the individual rights reserved by the people to themselves in the Montana Constitution are specifically a direct bar to government actors. (St. v. Long, 216 M 65, 700 P2d 153, 42 St. Rep. 643 (1985))
- 2) There is no question but what the Montana university system is a government entity - a creation of government -, and that its employees and managers are government actors. It is funded by government and its structure and activities are determined and governed by Montana law, including the Montana Constitution. The university system exists only as authorized by law, perhaps an exact definition of a government entity.
- 3) The wording of the right to bear arms in the Montana Constitution is unchanged since the adoption of the territorial constitution in 1884 and the statehood constitution in 1889, including with the Montana constitutional revision in 1972.
- 4) The right to bear arms in Montana is a personal and individual right under the Montana Constitution, and no sort of right of government as is sometimes argued about the Second Amendment to the U.S. Constitution.
- 5) The right to bear arms clearly contemplates the right of "any person" to defend himself or herself, and to defend their home, whatever their home may be.
- 6) The right to bear arms does not include a right to carry concealed weapons, defined in the law as concealed by an article of clothing, a practice in Montana that is a privilege granted by the Legislature.
- 7) The right to self defense and the right to possess the necessary tools for that purpose is well-supported by other provisions in the Declaration of Rights in the Montana Constitution, including Sections 3, 4, and 10. [1]

The Montana Constitution says at Article X, Section 9:

(2) (a) The government and control of the Montana university system is vested in a board of regents of higher education which shall have full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system and shall supervise and coordinate other public educational institutions assigned by law.

While this is a broad grant of constitutional authority, it does not grant the Board of Regents authority to dismiss, ignore or override other parts of the Constitution. Also, there has been tension between the Board of Regents and the Legislature concerning the extent of the authority of each over the university system, especially concerning funding by the Legislature. The courts have supported the Board of Regents in resolving this tension, saying that the Legislature may not assert control with budgeting action that is given to the Board of Regents by the Constitution in Section 9.(2)(a).

Other relevant authorities of the university system. In addition to the foregoing, the university system has some other common authorities. These include an employer's

authority over employees as a part of the employer/employee contract, a landlord's authority over tenants as a part of the landlord/tenant relationship, and it includes some authority over enrolled students as a condition of enrollment. All of these authorities may be tempered by whatever effect is produced from the restraint upon government actors by reserved constitutional rights. For example, the Montana Constitution reserves the right for citizens to bear arms to defend their homes. Given this constitutional right, and given that the property a tenant rents becomes his home and castle, may the university system, acting as a government agent, bar tenants in university housing from possessing firearms to defend themselves and their homes? Probably not, but this is not settled law.

Authorities not derived from the Board of Regents. The Montana preemption law at 45-8-351, M.C.A. generally prohibits local government entities, cities and counties, from regulating firearms. It does allow cities and counties to prohibit the carrying of concealed or unconcealed firearms into public buildings and other places. At (2)(a) this statute says:

A county, city, town, consolidated local government, or other local government unit has power to prevent and suppress the carrying of concealed or unconcealed weapons to a public assembly, publicly owned building, park under its jurisdiction, or school, and the possession of firearms by convicted felons, adjudicated mental incompetents, illegal aliens, and minors.

Under this statute, a school is a K-12 school as defined in other Montana law. It is at most a misdemeanor to violate a city ordinance. Most first class cities in Montana have adopted an ordinance to implement the authority granted under 45-8-351(2)(a), M.C.A., and most, perhaps all, of the campuses of the Montana university system are located at those cities. Some question may exist about whether or not some campuses have been annexed into the cities in question, and, therefore, whether or not a local city ordinance is enforced or enforceable on campus.

The Montana "prohibited places" law at 45-8-328, M.C.A. makes it a misdemeanor for a person to carry a concealed weapon into a staffed building used by a local or state governmental entity, but it does not apply to unconcealed carrying of firearms in the places it covers (including bars and banks).

Application of these state laws may be problematic given the historic resistance by the Board of Regents to legislative authority. That is, it may not be possible for the Board of Regents to both claim full autonomy from legislative authority *and* claim authority from the Legislature. Certainly the Board of Regents allows some expression of legislative authority on university system campuses, such as prosecution by the state of a person committing theft on a university campus. But, even the Constitution offers the Board of Regents no police power, such as the power to criminalize prohibited conduct and punish violators with imprisonment. The question of the extent to which 45-8-351, M.C.A. and 45-8-328, M.C.A. may be relied upon by the university system to address firearm issues on campus may remain a murky area of law.

Other state laws remain in effect on campuses, laws that criminalize the misuse of a firearm for a criminal purpose, such as murder, assault, robbery and endangerment (title 45-5-201, 213 M.C.A.). Also in effect are laws prohibiting discharge of a firearm inside city limits, except in self defense (45-8-343, M.C.A.), prohibiting carrying of a concealed firearm by an intoxicated person (45-8-327, M.C.A.), and carrying a concealed firearm inside city limits without a permit (45-8-315, 316, 317, M.C.A.).

Civil Liability. It is assumed that the chief concern of university managers is the safety of students and employees. In addition to their personal interest, managers may even have a legal duty to provide for a reasonable climate of safety. As a secondary issue, managers cannot ignore the issue of civil liability for safety issues that are untreated or addressed inappropriately. For example, if the fire exits on a campus public assembly were chained shut (perhaps to avoid unwanted ingress) and deaths from a fire resulted, the civil liability implications would be huge. If there were a catastrophic incident on campus involving what law enforcement call an "active shooter," having denied students and employees the means to defend themselves by university policy might be seen as analogous to having chained fire exits closed.

Prior restraint. In our system, we try to avoid prior restraint of the exercise of rights. Rather, we rely generally on punishment afterwards for rights exercise abuse. For example, we don't put duct tape over the mouths of theatergoers fearing that some unrestrained person will shout "fire" in a crowded theater. Rather, we punish someone later if they should, without valid reason, shout "fire" in a crowded theater. Other avenues than prior restraint are required by case law. For example, rather than gag the press to prevent inflaming community sentiment about a heinous crime and resulting taint of the jury pool, jurists must order public officials to silence, sequester jurors if necessary, or move a trial to a location where an unbiased jury pool is available and free from influence by pre-trial publicity. Preventing exercise of the right to bear arms in advance on the theory that some of those allowed to exercise their right may abuse the right is in conflict with the practice of avoiding prior restraint.

III. Policy

The area of policy is more easily discussed. The Board of Regents has established minimal policy concerning firearms. What policy exists is announced at: <http://mus.edu/borpol/bor1000/1006.htm>

Sections 1, 2, and 3 of this policy relate only to carrying of firearms by university security personnel and contract security personnel. Section 4 leaves discretion over remaining firearms issues to the separate units of the university system.

The various units of the university system have implemented this grant of authority by the Board of Regents by adopting policies for specific campuses. Generally, these policies specify under what narrow circumstances those subject to campus policy may possess and store certain types of firearms, and forbid other types of firearms.

As stated previously, the university system has some authority over students as a condition of enrollment, including required good behavior conducive to a learning environment and conducive to safety for all. The system also has some authority over employees as a feature of the employer/employee relationship, and over tenants (students living in campus housing) as an element of the landlord/tenant relationship. These authorities will be affected by the rights all citizens possess under the Montana Constitution and the Regents' lack of police power. Further, it appears that the university system lacks any authority over persons not employees or students, and must rely on legislated authority concerning firearms possession by persons not employees or students, and that current legislated authority applies only inside public buildings.

IV. Discussion

It is assumed that university system administrators have the motive, even the duty, to keep all personnel within their purview as safe as can reasonably be done. Safety has many aspects, including building safety, fire safety, accident prevention, safety in laboratories, safety in residential life and more. Some safety issues are easily quantifiable. For example, building codes prescribe how many fire exits a building must have in relation to building size, use and capacity. Other safety issues may not be so simple to quantify and resolve. Whether or not to allow firearms on campus, and under what conditions, likely falls into this category.

In observation of discussion among university administrators considering firearm policy, it becomes apparent that there are two distinct types of risk to be considered.

One type of risk concerning university managers is the potential for a Virginia Tech-type mass murder, which we may call a "catastrophic incident" for the sake of this discussion. The other type of risk of concern let us call an "isolated incident," a single event of misuse of or misadventure with a firearm, such as an accidental discharge, use of a firearm to threaten another person, or an emergency report of a firearms sighting that may be an innocent event except for an unwarranted assumption on the part of an uncultured or panicked person making the report. Before discussing these separate types of risk, some comment about the background against which these are assessed is in order.

Background/culture. The Montana university system exists in a culture of high traditional acceptance of firearms. The first recorded travelers to Montana, the members of the Lewis and Clark expedition, were well-equipped with firearms, and depended on firearms for their survival. The ubiquity of firearms has not changed much since Lewis and Clark traveled here.

It is estimated that over 90% of the homes in Montana contain firearms. It is also estimated that the average home in Montana that does contain firearms probably has about 27 firearms. Montana has a higher percentage of residents purchasing hunting licenses than any other state, significantly higher than the number two and three states, Alaska and Wyoming. Montana has a very strong and entrenched firearm culture. The employees of the university system live amid this firearm culture, and many university system students come from Montana and are steeped in this culture. The income of the

university system is derived primarily from people who are a part of Montana's firearm culture.

Competitive shooting sports activity in Montana is common and pervasive. Active practice and competition occur in trap, skeet, sporting clays, highpower, bullseye, smallbore, cowboy action, mounted cowboy, practical pistol (IPSC and IDPA), long range precision rifle, blackpowder silhouette, metallic cartridge silhouette and others. Active training with firearms in Montana includes ROTC, National Guard, military reserve forces, law enforcement, self-defense, hunter education for youth and all of the shooting disciplines mentioned preceding. Hunting with firearms may be done in any month in Montana. When limited seasons are not open for deer, elk, moose, mountain sheep, mountain goats, antelope, bear, lion, ducks, geese, pheasants, or grouse, a person may hunt coyotes, Prairie Dogs, Columbia Ground Squirrels, Richardson Ground Squirrels, and others. Lots of Montana citizens possess firearms in order to be able to defend themselves - to be able to choose not to be victims. The U.S. Department of Justice has estimated that, nationwide, there are 1.5 million defensive uses of firearms each year.[2] 16,000 Montanans have concealed weapons permits (CWP) (45-8-321, M.C.A.) issued by county sheriffs after training and background checks. Many university system employees and students engage in these activities.

The university system campuses do not exist in isolation. They are a part of the Montana social landscape and the local communities in which they exist. University employees live in the Montana culture as do many students, and many university students are derived from our Montana culture. Against this cultural background, how can university managers realistically assess risk associated with firearms, and how can any such risk be managed?

Risk assessment. Any valid risk assessment must first separate actual, historical or quantifiable risk from perceived risk. For example, a person with a phobia of spiders might argue for an expensive program to fumigate all university buildings to protect against the risk of spider contacts and spider bites. Because of extreme concern about spiders, this person might be willing to ignore the expense, which might detract from financial ability to address more well-documented risks, might overlook the potential health consequences to people of the fumigants used to kill spiders, and might not even think about the possibility that spiders could help control even more dangerous pests. An accurate assessment of any risk associated with firearms in the university setting must guard against bias not founded in quantifiable information, and must consider both intended and unintended consequences of measures taken to manage the risk.

It is supposed that risk assessment for an academic setting would be more rather than less likely to be driven by a cool, rational consideration than in other settings. For example, a recent news story examined existing policies of banning firearms in national parks and recent political pressure to revise those policies. A park manager was quoted as saying that continuation of the decades-long prohibition of firearms in national parks is necessary to prevent poaching of wildlife in parks, *and* that poaching has increased nearly every year since the prohibition has been in effect.[3] It is difficult to admire this as fully rational thinking when the advocate posits continuation of past behavior with the

assumption that repeat of this historic behavior will somehow generate a different outcome than it always has before.

While information may not be available to assess the actual or historic risk of misadventure with firearms on university campuses, there certainly is data to allow assessment of firearms risk in the Montana culture in which Montana university campuses exist, as compared with the nation as a whole and other parts of the nation. Whether the estimate cited above (that over 90% of Montana homes contain an average of 27 firearms) can be scientifically proven, there is little doubt that Montana has firearm densities per capita near the greatest in the nation, if not the greatest. If the mere presence of firearms caused misadventure (accidents) or misuse (crime), then Montana would have among the highest incidents of those in the Nation. Yet notwithstanding the ubiquity of firearms in Montana, we enjoy much lower crime rates than many other places where firearms are difficult or impossible to possess legally. [4]

Also, for risk assessment purposes it is useful to know that all recent occasions of catastrophic firearm incidents, such as the tragedy at Virginia Tech, happen in what are called "gun-free zones," such as schools and other places where the intended victims have been prohibited the means to defend themselves. We may or may not be able to conclude from this that gun-free zones are especially dangerous places. What we can conclude is that those deranged individuals bent on mayhem appear to select gun-free zones as a relatively successful venue to commit their mayhem.

This thought experiment is offered for risk assessment associated with firearms: If you and your family members were being stalked by a person known to be intending personal violence (assault, rape, kidnapping or murder), would you feel more or less safe for having planted a sign in your yard announcing "No guns in this home"? The answer to this question is one that university managers should integrate into consideration of the actual risk of firearms in the university setting.

Types of incidents. With this background it is time to evaluate the two different types of risk that university managers need to address. As offered previously, these are catastrophic incidents and isolated incidents. Let us first discuss catastrophic incidents. While rare, such incidents are horrendous. Rather than discuss fires and earthquakes, this discussion will be limited to catastrophic incidents involving firearms.

Catastrophic incidents. A catastrophic incident is typified by the massacre at Virginia Tech. The hallmark of this and similar incidents is that, no matter how much they wish it were otherwise, the authorities always arrive too late to save those who die. While this analysis is under preparation, another such incident occurred at Northern Illinois University, perpetrated by a person not a student and not a university employee. While NIU claims success because only five victims have died so far (unlike the 30-something dead in Virginia), that assurance is slim comfort to the next of kin of the dead victims.

At NIU, authorities brag that they were on site within two minutes of the onset of the incident. In a video demonstration for television news [5], this author fired 36 accurate shots in 30 seconds from a revolver, firearm technology that dates back to the 1800s.

This rate of fire is sustainable for two minutes. Each round fired is potentially fatal. This means that a madman with similar skills could kill up to 120 people during NIU's touted two-minute response time.

In response to this NIU incident, Citizens Committee for the Right to Keep and Bear Arms asserted that this incident was "another failure of the 'gun free zone' mentality that has created a false sense of security on college campuses and other public venues across the country." CCRKBA Chairman Alan M. Gottlieb continued, "This giant loophole in public safety is becoming a national disgrace and it is time to dramatically change our perspective on self-defense in this country. This incident is particularly distressing because it happened in Illinois, one of two remaining states in which anti-gun state lawmakers and equally-anti-gun governors have repeatedly thwarted common sense efforts to put law-abiding citizens on a level playing field with criminals and crazies by adopting right-to-carry laws," Gottlieb stated. "Illinois ... lawmakers have chosen to leave their citizens at the mercy of killers who have no mercy." [6]

It is obvious that "gun-free zones" are only gun-free for victims. Such zones create only an illusion of safety, but no actual safety (witness Virginia Tech and NIU). Illusion will not stop a madman bent on mass murder. Only another person with a firearm is likely to be able to stop such a madman. This is exactly why police (who can rarely be there) carry guns. Since authorities are at best two minutes away, disarming victims is surely not the answer. For the disarmed potential victims of such a madman, fervent prayer that the madman will kill someone else becomes the most viable solution to the first minutes of such a threat.

It is worth noting that police have no legal duty to respond at all to these type of incidents, much less respond quickly. This question has been litigated repeatedly and the courts have routinely held that police have only a duty to provide a general level of protection to the community, but have no legal duty to respond to specific incidents or protect any individual.

There is an alternative. Montana is one of 37 states that has authorized law abiding and trained people to carry concealed firearms for self-defense. There is a vast amount of empirical data about the millions of people who have been authorized to carry concealed weapons over the past 30 years. As a class of people, they have a lower incidence of misadventure with firearms and misuse of firearms than the general public at large (most of whom don't carry firearms), and lower than any other known class of citizens about which data exist. The theory that CWP holders are somehow dangerous just because they possess firearm is a myth, perhaps slander. They are less dangerous than the average member of the general public, except to criminals. This author is not aware of any CWP holder in Montana who has been convicted of a crime for misuse of his or her concealed firearm in the 26 years that Montana's modern CWP law has been in effect - this despite approximately 136,000 permittee-years of CWP experience and exercise in Montana. [7]

Further, in his book, *More Guns, Less Crime*, [4] Professor John Lott examines FBI crime data in every county in America reaching back 19 years. He statistically analyzes the effect on crime when states adopt the sort of CWP laws Montana now has (45-8-321,

M.C.A., *et. seq.*). Lott discovered that by adopting such laws, and without spending any money, legislatures confer a considerable boon of increased safety upon all citizens. The major interpersonal crimes of violence such as murder, rape, robbery, kidnapping and assault decrease significantly in states adopting "shall-issue" CWP laws, not because lots of criminals are getting shot, but because criminals have a strong preference to avoid victimizing a person who may be armed. In about 75% of defensive firearm instances, a shot is never fired and the threat is dissuaded via a defensive display or warning. [8]

Lott discovered an even greater societal benefit of such shall-issue laws. In states adopting such laws, the incidence of mass murder drops on the order of 80%, except in artificially created gun-free zones where this dynamic is not allowed to operate. Said differently, the risk of mass murder is five times greater in gun-free zones where trained and approved people are not allowed to exercise CWPs than in areas where CWP-holders may exercise their permits. This difference in risk has been quantified and documented.

There are two accepted reasons for this dramatic reduction of risk. The first is that a mass murderer seeks success and notoriety. The mass murderer is less likely to achieve these goals if he is stopped before he can accomplish a truly horrendous crime. That's why mass murderers do not attempt their crimes in police stations, at shooting ranges, or on military installations. The likely presence of armed persons able to immediately interdict the event would rob the mass murderer of the opportunity for success and the notoriety he requires, so he avoids occasions and locations where interference would be likely.

The reason for the difference in risk reduction between crimes of victimization of individuals and the crime of mass murder relates to the density of firearms among a criminal's potential targets. In Montana, for example, approximately 2% of the adult public have CWPs. If a criminal is attacking one individual, there is a one in 50 chance that the victim will be armed and able to resist effectively - to choose not to be a victim - a definite risk to the criminal but not daunting odds. However, if a criminal attacks a crowd of 50 people, there is a near certainty that someone in the crowd will be armed and able to thwart the attack, at least outside of a gun-free zone.

Finally, it is definitely worth noting that nearly all cases of mass murder in recent U.S. history, and many other acts of violence, have been linked to use or misuse of antidepressant drugs. These include "Selective Serotonin Reuptake Inhibitors (SSRIs), of which Prozac was the first. Other SSRIs are Zoloft, Paxil (Seroxat), Celexa, Sarafem (Prozac in a pink pill), Lexapro, and Luvox. Other newer antidepressants included in this list are Remeron, Anafranil and the SNRIs Effexor, Serzone and Cymbalta as well as the dopamine reuptake inhibitor antidepressant Wellbutrin." [9]

Isolated incidents. The type of isolated incidents of firearm misadventure or misuse which university system managers must analyze and address are varied. There are both real problems *and* problems of perception only.

The real problems probably include an accidental discharge of a firearm, a student using or threatening to use a firearm to solve an interpersonal conflict, the theft or loss of a

firearm inadequately secured, the misuse of a firearm by a person under the influence of alcohol or drugs, or the misuse of a firearm in an irresponsible, playful or prank manner.

The problems of perception may include false reports of pending violence because of a firearm sighting by a person not accustomed to Montana culture, concerned reports of conversations about firearms, mock or actual firearms used for display only, such as museum displays or theatrical productions, and other similar events in which the perception of risk is greater than the reality of risk.

Many of these problems, both real and perceived, should yield to education, an endeavor that is the strong suit of a university. While education may not eliminate the potential problem altogether, education can be used to manage the problem to within acceptable limits of risk. The educational approach is accepted for other types of risk management, such as fire drills for fire safety and water safety training to address risk issues around water. Firearm safety training is commonly done for young hunters in Montana, has been done for generations, and is an accepted and productive practice.

Before educational approaches can be initiated to manage any risks associated with firearms, the nature and reality of the risk must be assessed. For example, it would be misleading to assume the need for specific risk management because someone says, "I am afraid that XYZ could happen." Rather, it would be appropriate to examine the history of whether or not a particular risk actually occurs, with what frequency, over what period, and how the density of that risk occurs in the demographic examined, and how the seriousness of that risk compares with other known risks.

For example, it is very traumatic physically and emotionally to be struck by lightning. It is sometimes fatal. Yet it is also very rare. Does that mean we don't need to tell people to not stand under a tree during a lightning storm? No. But, should we require everyone to graduate from a six-week class on lightning avoidance before being allowed to go outside? That would not be a wise use of time and resources given the density of risk. And, should the lightning avoidance training be required in lieu of training about use of seat belts in automobiles? The comparative densities of risk would not support that allocation of time and resources.

Once any risk associated with firearms is assessed in an objective manner, then consideration may properly be applied to risk management through education, and through regulation.

Youth and firearms. Discussion is in order about the theory that young people are more prone to act irresponsibly, and that allowing students to possess firearms will result in misadventure with those firearms. Available data does not support this theory, at least when applied to young adults with CWPs. In Montana a person is allowed to apply for and obtain a CWP if they are 18 years old or older. In CWP classes instructed by this author, with nearly 1,500 graduates over 15 years, it is estimated that about 15% of graduates are 21 years old and younger. So, we know that there are people in the 18-21 age range who are obtaining CWPs in Montana. These people have the same incidence of misadventure with firearms as all others - zero. This does not prove young people

generally are as responsible and trouble-free as those who are older. It does demonstrate, however, that young people who take the required training to obtain a CWP, who submit to the required background check, who pay \$50 to apply for the permit and who provide a photograph and fingerprints have a documented history of behaving as responsibly as older CWP-holders.

V. Conclusions

"We can't solve problems by using the same kind of thinking we used when we created them." - Albert Einstein

The legal authority of the Montana university system to address firearm issues is murky. While the Montana Constitution gives the Board of Regents extensive authority to manage the university system, it does not offer or confer authority to abrogate constitutional rights reserved by the people to themselves. The right of "any person" to bear arms in defense of self or home is clearly reserved as a right of individual citizens in the Montana Constitution. The level of judicial review of this right is specified within the right as "shall not be called in question."

The university system has some authority over employees as an aspect of the employer/employee relationship, as it does over those living in campus housing as a part of the landlord/tenant relationship. And, the university system has some authority over students in order to avoid disruption, and to maintain safety and a suitable learning environment. These employer, landlord and administrative authorities are far from absolute, and are tempered by the constitutional rights enjoyed by all citizens and by the doctrine that constitutional rights act as a direct bar to government actors. The university system appears to have no authority over persons not employees or students.

The university system may rely on local or legislated authority that prohibits carrying firearms in state-owned buildings, but those laws do not apply to the areas of campus outside buildings.

The only policy about firearms that the Board of Regents has adopted leaves discretion over firearms, other than campus security, to the individual campuses of the university system.

In minimizing any risk associated with catastrophic incidents, the most effective policy has proven to be to allow especially law-abiding people to possess firearms for defense, and to avoid creating the gun-free zones that are demonstrated to be such fertile ground for mayhem.

To address risks associated with isolated incidents of firearm misuse or misadventure, education would seem to be the best tool for risk management, especially in a university setting. Educational efforts must be based on objective risk assessment and not cater to unsupported or irrational fear.

Finally, all of these issues must be examined and perceived through the lens of a firearms culture that is ubiquitous in Montana and embraced by the Montana Constitution.

Since university managers are limited in their authority to restrict firearms on system campuses, and since firearm prohibition only creates fertile ground for criminal acts, perhaps the best outcome could be obtained through an open tolerance of firearms coupled with safety and skill instruction for those willing to undertake the responsibility of firearm possession.

End

Endnotes

[1] See: "Concepts within the Montana Constitution relating to the right to bear arms", 2008, by Gary Marbut (attached)

[2] National Institute of Justice, NCJ 155476, May 1997

[3] <http://www.missoulian.com/articles/2008/02/13/news/local/news02.txt>

[4] *More Guns, Less Crime*, Professor John R. Lott, Jr.; University Of Chicago Press; 2nd edition (June 15, 2000); ISBN-10: 0226493644; ISBN-13: 978-0226493640

[5] <http://www.marbut.com/videos> - Assault Weapons

[6] <http://www.ccrkba.org/pub/rkba/press-releases/NorthernIllinoisShooting.htm>

[7] Montana currently has 16,000 CWP's issued. See: <http://www.missoulian.com/articles/2008/02/03/news/local/news03.txt>
Montana's shall-issue CWP law was adopted in 1991, for 17 years in effect. Assume zero CWP in 1991 (underestimate), with an average of 8,000 CWP's in effect each year for 17 years = 136,000 man years. The number will actually be a bit larger because there was a surge of CWP issuance in 1991, 1992, and 1993 when the new law took effect.

[8] Gary Kleck and Marc Gertz, "Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun," *Journal of Criminal Law and Criminology* 86(1):150-187, Fall 1995.

[9] <http://www.ssristories.com/index.html>

*Gary Marbut is president of the Montana Shooting Sports Association, author of the book *Gun Laws of Montana*, the author of many Montana laws relating to firearms, an active self defense firearms instructor, certified as a firearms instructor by the State of Montana, a competitive shooter, a member of the International Association of Law Enforcement Firearms Instructors, and has been accepted in state and federal courts as an expert in firearm use, firearm safety and use of force. <http://www.marbut.com/expert>

Sheila Sterns
Montana Commissioner of Higher Education

Dear Sheila,

Greetings from Missoula, and Happy Independence Day (although I expect you won't see this email until Tuesday).

Pasted below is an email I sent recently to the MSSA email list of several hundred people across Montana. This email is about a story in the Great Falls Tribune (linked below) concerning the recent U.S. Supreme Court's *McDonald v. Chicago* decision. As you probably know the legal and public tolerance landscape about firearms is shifting. It has been shifting for over a decade and will continue to do so, steadily in the direction of individual freedom and against government regulation of firearms.

I was surprised at how many Montana gun owners responded to this email below, and how strongly they expressed themselves.

Given the volume and strength of that response, it is now time to revive the discussions I attempted in the past with you, and through you the Board of Regents, about campus gun bans in Montana.

In the past, your bottom line response to my overtures has been to offer that any citizen may address the Board of Regents at one of their meetings and ask for relief on any subject.

I need to clarify something for you. I am addressing an issue of natural and constitutional rights. Rights are something that sovereign citizens (see Montana Constitution, Article II, Section 1) have reserved to themselves from government interference. If something is a boon optionally granted by a governmental entity upon request, it is a privilege, not a right. So, you see, being told to seek the indulgence of the Board of Regents during public comments in their meeting demonstrates an initial misunderstanding about what is actually up for discussion.

Allow me to refresh/reframe the approach. We ask that you, as Commissioner of Higher Education and a member of the Board of Regents, carry to the Board the recommendation that the Board undertake a complete review and revision of all campus policies about firearms, AND that MSSA be an effective voice in that process representing a whole lot of people who pay the bills for the U. system. The goal is to revise and mature campus policies about firearms to be consistent with the law, consistent with best and proven practices, and consistent with Montana culture.

I understand that at first blush you may not be impressed with any need to honor this request. We would very much like to keep this discussion genteel and reasonable, but we will absolutely tolerate no more "move to the back of the bus" responses on this issue, nor will we allow this to get stuffed into some bureaucratic, administrative jungle of endless meetings, a process designed to derail the discussion by sapping the energy from our concerns and effort and diluting results.

This is our last request to talk with you or an empowered delegate of the Board of Regents. If the result of this request is silence, more "go to the back of the bus," or attempt to shunt effort into some infinitely-absorbent bureaucratic jungle, we will be forced to move directly to other methods of dispute resolution available to us. I believe that working succinctly with you and the Board of Regents would be better for everyone, but that's now your call.

Sheila, I REALLY hope we can address the issue of campus gun bans, bans that become less legally, politically and publicly supportable every day (note the comment about "irrationality" below), through reasonable dialog, and that we won't be required to fall back to more adversarial and less collaborative processes to get some sensible changes in the Montana university system policies about firearms on campus.

Best wishes,

Gary Marbut, president
Montana Shooting Sports Association
<http://www.mtssa.org>
author, Gun Laws of Montana
<http://www.mtpublish.com>

Dear MSSA Friends,

From the Great Falls Tribune:

The head of a prominent gun-rights group is mulling whether to challenge a firearms ban on Montana's public college campuses now that the U.S. Supreme Court has given gun owners a green light to take on local and state governments over Second Amendment protections. Gary Marbut, president of the Montana Shooting Sports Association, said Thursday that he will review state regulations and laws to see whether it's worth challenging any gun restrictions. Although he said the state is pretty good about respecting rights of firearm owners, he said the ban on guns at public colleges stands out as an infringement that should be removed. "The Montana Constitution does give the Board of Regents broad power to manage the university system, but it doesn't give them any power at all to suspend people's constitutional rights. But they're doing it," he said. Marbut and gun-rights advocates across the country are feeling more empowered after recent Supreme Court rulings - one in 2008 that struck down a handgun ban in Washington, D.C., and re-affirmed the right to keep and bear arms; and a 5-4 decision Monday in a Chicago case that allows gun owners to challenge local regulations as a violation of their Second Amendment rights. Experts predict that the high court's decision could encourage lawsuits over many regulations, such as gun-licensing requirements and limits on firearms carried outside the home...

<http://www.greatfallstribune.com/article/20100702/NEWS01/7020317/State-university-ban-on-guns-may-take-fire>

BTW, GFT reporter Ledyard King did a very fair job with this story and reported my comments accurately.

As an anecdotal aside, I was interviewed the same day by another reporter for another daily Montana paper. The reporter seemed to need education about RKBA issues. At one point in delivering this education, I offered the observation that most gun control advocates are irrational. The reporter stopped me and challenged me to justify that comment. Since we were talking about guns on campus, I responded this way to the reporter's challenge:

Suppose a madman determines to commit a Virginia Tech-style massacre on the Montana State University campus. Gun control advocates believe that this madman, who has already decided to violate humanity's most profound taboo against taking innocent life and all the laws associated with that, and who expects to die in the process (all mass murderers expect to die in the process) - gun control advocates believe this madman will somehow become aware of an unenforceable university *policy* against guns on campus and because of this existing policy the madman will abandon his plans for mayhem, mass murder and his own death simply out of respect for this policy. Such thinking, I told the reporter, is clearly irrational by anyone's standard.

There was a period of silence. Then the reporter said "Thank you for the interview." End of interview.

HAPPY INDEPENDENCE DAY! I encourage you to be thinking about what independence, liberty and individual freedom mean to you and to those in your orbit.

Best wishes,
Gary Marbut, president
Montana Shooting Sports Association
<http://www.mtssa.org>

author, Gun Laws of Montana
<http://www.mtpublish.com>

Greetings Gary. I read your email on our Independence Day, and hope you too experienced a fine independence celebration. Yesterday on the radio I listened to a variety of voices reading the entire Declaration of Independence, a moving highlight of the weekend for me.

Our legal counsel noted last week that the recent Supreme Court case certainly bears close review in the context of – or relationship to - our MUS policies. The Board has a short business meeting in Missoula in a couple weeks. Its next regular business meeting is in Butte in mid-September. We don't have time to do additional analysis by mid-July, but may be putting the issue on the Board's agenda for an update and for direction at their September meeting. I will share your message with the chair of the Board, Regent Clayton Christian.

I understand your frustration with the fact that action by the Board of Regents is not always speedy. It is like a legislature that way, in the sense that important policy decisions can only be made by the whole Board of 7 voting regents, not a few regents acting individually. Unlike a city council or some such group, they don't meet every week, but rather quarterly for general-issue meetings involving all or most campuses. Yes, that can make our processes seem slow but they generally work fast enough to achieve the ends of sound governance.

As a non-voting ex officio regent I can and do place items on the Board's agenda, either as an information/submission item, or for direct action. I don't often do so if I'm well-aware that the issue is highly unlikely to receive support from the Board, because that would just waste everyone's time. There are of course a whole range of issues in which I can act as the executive and just "get it done," but because of the very different points of view of various regents and campus presidents and the fact that current policy exists in writing, this issue must be addressed by the Board. The last time you brought it up, there was no regent, including me, who was persuaded enough that change was needed to put it on the Board agenda. As you note, we invited you to make a case yourself or on behalf of MSSA through Public Comment. And I would submit that Public Comment is a right, and an important one, - not "just" a privilege. The obligation to provide that platform is in Montana law with roots in the Montana Constitution, and always respected by the Board. It is always on the agenda, always, - and it has been used effectively over the years by individuals or organizations who believe the Board and the commissioner are mistakenly declining or simply overlooking the opportunity to place an item on the agenda themselves. This is not to say that Public Comment is necessarily the only avenue available this year. The issue has to be looked at again.

Please understand I don't fault the extensive research you shared with me two years ago, even if we disagreed about the conclusion. You obviously are extremely well-informed on the topic and care deeply that, in your view, MUS is not on the right side of the policy issue when it comes to the Board's position. Doing our best, within the current and relevant legal framework, to ensure student and employee safety is a goal shared by all.

The legal framework may have changed with the recent SC decision, and my staff and I intend to look at the current policy & legal landscape closely and promptly. I will let you know about our timeline so that you will know the status of our review well in advance of the publication of the agenda for the September meeting of the Board of Regents.

Best regards,

Sheila