



**Gun Owners of Arizona
P.O. Box 18640
Tucson, Arizona 85731-8640**

Permission to use the following is granted as long as proper attribution is given.
Originally written on February 6, 2003

History of Arizona's Self Defense Laws

When deciding the merits of a legislative proposal, one should take in to account the organic law, a contract between the People and those who govern, as well as the history of the law. The following is an attempt to bring the history of the law of Arizona which started in the Arizona Territory up to and including Arizona's Constitutional Convention, acceptance of the Arizona Constitution and the 1st Arizona Legislature.

My purpose is to educate on the status of the law, both past and present and present a persuasive argument on the issue of removing criminal penalties from carrying a deadly weapon upon ones person or within a means of transportation. By removing such penalties, Arizona would correct a grave injustice thrust upon the People of Arizona which has remained in existence since the State's birth.

Carrying a deadly weapon did not become a crime until 1887 (as best as I can determine). The law was amended from time to time by the Territorial fathers. The 1901 Penal Code Of the Arizona Territory was codified in the Arizona Revised Statutes.

The discussion begins.

History surrounding Arizona's right to bear arms:

I must first state that I am not a member of the bar nor am I a trained lawyer. I am merely reporting and commenting on the laws of the Arizona Territory and the State of Arizona throughout the years, both organic and statutory based upon my research.

- **The Howell Code**

The Howell Code was adopted by the First Legislative Assembly of the Territory of Arizona.

The Howell Codes Bill of Rights, Article 5, stated: "The right of the people to keep and bear arms for their own defence and that of the government shall not be infringed."

The statutory law of the day was, "If any person shall be found having upon him or her any picklock, crow, key-bitt, or other instrument or tool, with intent feloniously to break and enter into any dwelling-house, store, shop, warehouse, or other building containing valuable property, or shall be found in any of the aforesaid buildings with intent to steal any money, goods, and chattels, every person so offending shall, on conviction thereof, be imprisoned in the county jail not more than two years; **and if any person shall have upon him any pistol, gun, knife, dirk, bludgeon, or other offensive weapon, with intent to assault any person, every such person, on conviction, shall be fined not more than one hundred dollars or imprisoned in the county jail not more than three months.**" Howell Code, Page 70, Sec. 129. Emphasis added.

Notice the absence of a law prohibiting the carrying of a concealed weapon without a permit.

- **Compiled Laws of Arizona, 1864-1871, Crimes and Punishments**

On page 96, the territorial law was amended on September 30, 1867 to read:

"An Act to prevent the improper use of deadly weapon, and the indiscriminate use of fire arms in the towns and villages of the Territory . . . "

Section 1. That any person in this Territory, having, carrying or procuring from another person, any dirk, dirk knife, bowie knife, pistol, gun or other deadly weapon, who shall in the presence of two or more persons, draw or exhibit any of said deadly weapons in a rude, angry or threatening manner, not in necessary self-defense, or who shall, in any manner, unlawfully use the same in any fight or quarrel, the person or persons so offending, upon conviction thereof in any criminal court in any county of this Territory, shall be fined in any sum not less than one hundred nor more than five hundred dollars, or imprisonment in the county jail not less than one nor more than six months, in the discretion of the court, or both such fine and imprisonment, together with the cost of prosecution.

Section 2. That any person or persons having or carrying any pistol or gun who shall, in the public streets or highways, discharge the same indiscriminately, thereby disturbing the peace and quiet and endangering the lives of the inhabitants of any town or neighborhood in this Territory, such person or persons, upon conviction thereof, before any justice of the peace in the county where such offense may be committed, shall be fined in any sum not less than ten nor more than fifty dollars, and imprisonment in the county jail not less than two nor more than ten days, in the discretion of the justice of the peace, together with the cost of prosecution."

Again, notice the absence of a law prohibiting concealed weapons.

- **Compiled Laws of the Arizona Territory, 1877**

In 1875, the Territorial law was amended by an act. Chapter 10, Crimes and Punishments, Sections 387 & 388 were amended to read:

(387) Section 1. Any person in this Territory having, carrying, or procuring from another person, any dirk, dirk-knife, bowie-knife, pistol, gun or other deadly weapon, who shall in the presence of two or more persons draw or exhibit any of said deadly weapons in a rude, angry, or threatening manner, not in necessary self-defense, or who shall in any manner unlawfully use the same in any fight or

quarrel, the person or persons so offending, upon conviction thereof, in any justices' court in any county in this Territory, shall be fined in any sum, not less than one hundred nor more than three hundred dollars, or imprisonment in the county jail not less than one nor more than six months, in the discretion of the court, or both such fine and imprisonment, together with the costs of the prosecution.

Section 2. That any person or persons having or carrying any pistol or gun who shall, in the public streets or highways, discharge the same indiscriminately, thereby disturbing the peace and quiet, and endangering the lives of the inhabitants of any town or neighborhood in this Territory, such person or persons, upon conviction thereof, before any justice of the peace in the county where such offense may be committed, shall be fined in any sum not less than ten nor more than fifty dollars, and imprisonment in the county jail not less than two nor more than ten days, in the discretion of the justice of the peace, together with the costs of prosecution.

Again, no law prohibiting concealed carry.

• Revised Statutes of Arizona, 1887, Title XI, Of Crimes against the Public Peace

On page 726, the law read:

Section 661. Any person who shall purposely or carelessly discharge any gun, pistol or other fire-arm in any saloon, dance-house, store or other public house or business house in this territory, thereby endangering the life or person of another, or thereby disturbing any of the inmates thereof, or who shall thereby injure, destroy or damage any property therein, or who shall discharge the same in any city, village or town of this territory, except in necessary self-defense, shall be fined in any sum not exceeding three hundred dollars, or be imprisoned in the county jail for a period not exceeding six months, or shall be punished by both such fine and imprisonment.

Section 662. Any person in this territory having or carrying concealed any dirk, dirk-knife, bowie-knife, slung-shot, brass-knuckles, or pistol, or other weapon within any city, village or town in this territory, shall be fined in any sum not more than three hundred dollars, or be imprisoned in the county jail not more than six months, or be punished by both such fine and imprisonment.

Section 663. Every person who, not in necessary self-defense, in the presence of two or more persons, draws or exhibits any deadly weapon in a rude, angry, or threatening manner, or who, in any manner, unlawfully uses the same, in any fight or quarrel, is guilty of a misdemeanor.

NOTE: This is the first occurrence I could find where a law prohibited carrying a concealed weapon. One must take in to consideration the problems the territory was experiencing with armed corporations and border bandits which will be discussed later.

• **Minutes of the Constitutional Convention of the Territory of Arizona 1910, page 297:**

Mr. Baker moved, seconded by Mr. Webb, to strike out all of Section 32¹.

Mr. Crutchfield moved to amend, seconded by Mr. Baker, to insert the following after the word "impaired" in line 9, page 7: "But the legislature shall have the right to regulate the wearing of weapons to prevent crime."

Lost.

The Chair then put Mr. Crutchfield's amendment which was lost.

Mr. Baker's motion to strike out Section 32 lost by the following vote:

Ayes — Baker, Cassidy, Cobb, Cunningham, Curtis, Ellinwood, Franklin, Hutchinson, Jones, F.A., Kegan, Kinney, Langdon, Lovin, Moore, Orme, Pusch, Scott, Short, Simms, Mit., Standage, Tovrea, Webb. Total 22.

Nays — Bolan, Bradner, Coker, Colter, Connelly, Cooper, Crutchfield, Cunniff, Feeney, Ingraham, Jacome, Jones, A.M., Kingan, Osborn, Parsons, Roberts, Sims, R.B., Weinberger, White, Wells, Winsor, Wood, Mr. President. Total 23.

Absent — Goldwater, Lynch, Morgan, Tuthill, Wills.

Excused — Doe, Moeur.

Section 32 Approved as read.

The following propositions were made, but were not brought to a vote²:

Proposition No. 98, section 4: "The right of the people to keep or bear arms for their own defense and that of the State shall not be infringed. The Legislature shall have the power to regulate the wearing of arms to prevent crime."

Proposition No. 104, section 9: "The right of the people to keep and bear arms shall not be denied or abridged; but this section shall not be construed to deny the right of the law-making power to regulate or prohibit the carrying of concealed weapons up the person."

Proposition No. 116, section 17: "That the right of no citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereto legally summoned, shall be called in question; but nothing herein contained is intended to justify the practice of wearing concealed weapons."

¹ Section 32 became what is now Arizona Constitution, Article II, Declaration of Rights, Section 26, Bearing Arms, which reads in its entirety: "The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men."

² Arizona State Law Journal, Volume 33, Number 1, Spring 2001, *Some Explicitly Guaranteed Rights Are More Fundamental Than Others: The Right to Bear Arms in Arizona*, page 347, Footnote 44.

● **Arizona Constitution**

Preamble

We, the people of the State of Arizona, grateful to Almighty God for our liberties, do ordain this Constitution

Article 2 - DECLARATION OF RIGHTS

Fundamental principles; recurrence to

Section 1. A frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government.

Political power; purpose of government

Section 2. All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.

Bearing arms

Section 26. The right of the individual citizen to bear arms in defense of himself or the state shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men.

Article 13 - MUNICIPAL CORPORATIONS

Charter; preparation and proposal by board of freeholders; ratification and approval; amendment

Section 2. Any city containing, now or hereafter, a population of more than three thousand five hundred may frame a charter for its own government consistent with, and subject to, the Constitution and the laws of the state . . .

● **Revised Statutes of Arizona, 1913, Penal Code**

Title 12, Of Crimes Against the Public Peace, page 90 read as follows:

Section 426. It shall be unlawful for any person (except a peace officer in actual service and discharge of his duty), to have or carry concealed on or about his person, any pistol or other firearm, dirk, dagger, slung-shot, sword-cane, spear, brass knuckles, or other knuckles of metal, bowie-knife or any kind of knife or weapon, except a pocket knife, not manufactured and used for the purpose of offense and defense. (Codified from Section 381 of the 1901 Arizona Territory Penal Code)

Section 431. Persons traveling may be permitted to carry arms within settlements or towns of the state, for one-half hour after arriving in such settlements or towns, and while going out of such towns or settlements; and sheriffs and constables of the various counties of this state and their lawfully

appointed deputies may carry weapons in the legal discharge of the duties of their respective offices. (Codified from Section 390 of the 1901 Arizona Territory Penal Code)

COMMENTARY: It should be noted that the code commissioner was charged with codifying the territorial laws for the newly born state³. The commissioner was compelled to compile all laws, or codify if you will, all Territorial laws not repealed by the legislature or adjudged unconstitutional by the Supreme Court of Arizona⁴.

Therefore, the code commissioner codified every Territorial law that was not 1) repealed by the legislature, or 2) adjudged unconstitutional by the Arizona Supreme Court.

The subsequent passage of a statute, or the lack of repealing it in this case, by the legislature cannot change the original intent of the constitutional guarantee proven during the Constitutional Convention debates on the matter of concealed weapons.

Those on the side, albeit by a close vote, simply won the vote on that day. Allowing a clearly unconstitutional law to stand due to the political atmosphere of the time does not justify the encroachment upon a fundamental right. If one does not accept the constitutional guarantee as written, there are legal remedies available to every individual to change it.

The Arizona Supreme Court has failed to uphold their duty and responsibility to the Citizens of Arizona.

The Arizona Supreme Court has had several opportunities to hear cases that involve Article II, Section 26, Bearing Arms, of Arizona's Constitution. However, they have denied review on all cases, except one,⁵ they later denied review after hearing oral arguments. The justices of the Arizona Supreme Court have skirted their duty as jurors and protectors of the People's fundamental rights and constitutional guarantee's.

When a legislative body enacts a statute which raises a substantial question of constitutionality, it is appropriate for the court to review the facts and determine the proper scope of the fundamental right in question.

I shall also note that Section 431, which was codified in to the Arizona Revised Statutes, went so far as to ban the bearing of arms, with only minor exceptions, of all citizens to include law enforcement (unless they were on duty) while in a town or village.

One should make special note of what was happening during this era of Arizona's history.

"Article 2, Section 26 is a verbatim adoption from the Washington Constitution. The Washington provision was apparently adopted to curb the use of "private armies" and to ensure that every citizen would have the right of meaningful self-defense in cases of political or criminal unrest. The wording was so strikingly well-suited to Arizona's situation. By 1910, Arizona already had a history of labor unrest, including use of hired police forces by management. In addition, there had been sharp outbreaks of banditry along the Mexican

³ The Arizona Constitution, Article XXII, Section 2 states, "All laws of the Territory of Arizona now in force, not repugnant to this Constitution, shall remain in force . . ."

⁴ Act of May 2, 1912, ch. 12, § ` , 1912 Ariz. Sess. Laws 25 and Act of May 16, 1913, ch. 64, § 2, 1913 Ariz. Sess. Laws 17 (3d Special Sess.).

⁵ *Dano v. Collins*, 802 P.2d 1021 (Ariz. Ct. App. 1990), review granted January 15, 1991, and review denied 167 Ariz. 535 (Apr. 16 1991).

border and repeated instances of Indian insurrection. It was only natural that the delegates would desire strong constitutional protection of the right to possess weapons for self-defense⁶."

In closing, the foregoing treatise shows the intent of the founding fathers of Arizona's Constitution. It was clearly stated during the debates that the individual right to bear arms for self defense extended to carrying concealed weapons.

The 1st Arizona Legislature either overlooked or did not have the courage to correct the 1901 Penal Code of the Arizona Territory as it relates to the fundamental rights of citizens to bear arms.

My hope is that one day the legislature will finally recognize the importance of restoring fundamental rights as it relates to bearing an arm and has the courage to correct the mistakes of past legislatures and the courts.

Kenneth R. Rineer
President, GOAz

⁶ Ariz. St. L.J. 20 (1988), 141. By Stanley G. Feldman, Vice Chief Justice, Arizona Supreme Court and David L. Abney.