The Lost Amendment

What does the Second Amendment, guaranteeing "the right of the people to keep and bear arms", mean? Does the guarantee extend to the keeping and bearing of arms for private purposes not connected with a militia? These perplexing questions were posed as the subject matter for the 1965 Samuel Pool Weaver Constitutional Law Essay Competition, which is sponsored annually by the American Bar Foundation. Mr. Sprecher's essay was the winner, and the *Journal* is publishing it in two installments—the first herewith and the second next month.

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THE WISDOM OF THE Founding Fathers has proved to have been "infinite" enough to enable the United States for almost the first two hundred years of its history to exist and prosper under its 1789 Constitution with remarkably few amendments. Insofar as the tremendous scientific and technological advances during this time have resulted in a constantly shifting economy and in vastly changed political and social environments, the framework of the original document has proved durable enough to encompass great flexibility through the device of judicial interpretation.

Even before, but especially since, the advent of ever-potential atomic warfare, can any continuing meaning be derived from the Second Amendment? It provides that: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed."

Does the Second Amendment guarantee extend to the keeping and bearing of arms for purely private purposes not connected with the maintenance of a militia? Do the citizens of the United States now need, or will they ever need, the "right" (as opposed to any possible duty) to bear arms either for private purposes or for maintaining a militia?

Except for the Third Amendment, prohibiting the quartering of soldiers in private houses, no amendment has received less judicial attention than the second. However, courts have been confronted with none or few Third Amendment cases because there is universal agreement as to its meaning and desirability,[1] whereas the Second Amendment is not at all clear in its meaning and reasonable minds have differed widely as to the desirability of any assigned interpretation. Lacking the thorough judicial treatment accorded most of the guarantees of the Bill of Rights, the history of both the right (or duty) to bear arms and of the militia becomes important.

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1 MILLER, THE CONSTITUTION 646 (1893).

Plato, observing in about 340 B.C. that "no man can be perfectly secure against wrong ... and cities are like individuals in this", counseled that

> ... Wherefore the citizens ought to practise war—not in time of war, but rather while they are at peace. And every city which has any sense, should take the field at least one day in every month, and for more if the magistrates think fit, having no regard to winter cold or summer heat; and they should go out *en masse*, including their wives and their children ... and they should have tournaments, imitating in as lively a manner as they can real battles.[2]

About the same time Aristotle noted that oligarchies prevailed where the land was adapted for cavalry or heavy infantry since only the rich could afford horses or cannon, while democracies existed in countries suitable for the light arms owned by most citizens.[3] "Citizen soldiers" early became identified with democratic government.

Rousseau looked back in history and found that

> ... all the victories of the early Romans, like those of Alexander, had been won by brave citizens, who were ready, at need, to give their blood in the service of their country, but would never sell it. Only at the siege of Veii did the practice of paying the Roman infantry begin.... [The mercenaries'] swords were always at the throats of their fellow-citizens, and they were prepared for general butchery at the first sign. It would not be (pg.555) difficult to show that this was one of the principal causes of the ruin of the Roman Empire.[4]

Machiavelli detected a similar pattern in Italy:

> [Mercenaries] are useless and dangerous ... disunited, ambitious and without discipline, unfaithful, valiant before friends, cowardly before enemies; they have neither the fear of God nor fidelity to men....
>
> ... the ruin of Italy has been caused by nothing else than by resting all her hopes for many years on mercenaries....[5]

Adam Smith concluded in *The Wealth of Nations* that:

> Men of republican principles have been jealous of a standing army as dangerous to liberty.... The standing army of Caesar destroyed the Roman republic. The standing army of Cromwell turned the Long Parliament out of doors.[6]

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2 Plato, *Laws* viii:829 (Jowett transl.).

3 Aristotle, *Politics*, Book VI, Chapter 7.

4 Rousseau, *Discourse on Political Economy* (38 GREAT BOOKS 380).

5 *The Prince*, Chapter XII (23 GREAT BOOKS 18).

6 Book V, Chapter 1, Part 1 (39 GREAT BOOKS 308).

Mercenaries and standing armies began to be identified with imperialism, suppression of individual liberty and, eventually, moral and economic decay. Toynbee ascribed as one cause of the breakdown and disintegration of civilizations the "suicidalness of militarism".[7]

As in the history of Greece, Rome, Italy and other European countries, English history traces a similar parallel development of the concept of a "militia" in place of mercenaries or standing armies, and the right (or duty) of individual citizens to keep and bear arms.

Blackstone recorded that King Alfred (871-899) first organized a national militia in Anglo-Saxon England and "by his prudent discipline made all the subjects of his dominion soldiers".[8] Throughout feudal England, and indeed from 1066 to 1660, "knight service" required a lord to do military service in the King's host accompanied by the number of knights required by his tenure, a duty which was in the late stages fulfilled by the payment of money instead of service. Thus arose a concept of "duty to bear arms".[9]

For a long time after the Norman conquest in 1066, the authority of the monarch was almost unlimited. "Inroads were gradually made upon the prerogative, in favor of liberty, first by the barons, and afterwards by the people, till the greatest part of its most formidable pretensions became extinct."[10] Among the other rights and promises extracted from King John by the twenty-five barons at Runnymede on June 15, 1215, was that "And immediately after the re-establishment of peace we will remove from the kingdom all foreign-born soldiers, crossbow men, servants, and mercenaries who have come with horses and arms for the injury of the realm."[11]

After Magna Charta the monarchy was held reasonably in restraint until Charles I (1625-1649) tried to govern through the army and without Parliament, a reign followed by the rigorous military rule of Oliver Cromwell.[12] Charles II (1660-1685) maintained a peacetime standing army of 5,000 and James II (1685-1688) increased this number to 30,000 in his fight against Parliament and the people.[13]

The English Bill of Rights, presented to William and Mary in 1688 as a protest against grievances committed by James II, complained that he had endeavored to "subvert and extirpate the protestant religion, and the laws and liberties of this kingdom.... 6. By causing several good subjects, being protestants, to be disarmed, at the same time when papists were both armed and employed, contrary to law", whereupon it was declared:

> 6. That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law.
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> 7. That the subjects which are protestants, may have arms for their defence suitable to their conditions, and as allowed by law.[14]

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[7] 1 TOYNBEE, A STUDY OF HISTORY 336 (2 vol. ed.).

[8] 1 BLACKSTONE, COMMENTARIES *409.

[9] PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 333 (1929).

[10] THE FEDERALIST No. 26, at 160 (Modern Library ed. 1937) (Hamilton).

[11] SOURCES OF OUR LIBERTIES 19 (Perry ed. 1959), hereafter cited as SOURCES. The quotation is Chapter 51 of the original Magna Charta, but it was omitted from subsequent reissues, together with several other chapters deemed unnecessary after King John's death in 1216. *Id.* at 4-5.

[12] *Reid v. Covert*, 354 U.S. 1, 24-26 (1957).

[13] THE FEDERALIST No. 26, at 161 (Modern Library ed. 1937) (Hamilton).

[14] SOURCES 245-246.

Not only was the English Bill of Rights largely declarative of rights which were conceived to have existed theretofore,[15] but those rights persisted in England long beyond their religious significance, so that in 1765 when Blackstone catalogued the methods by which the absolute rights of man (personal security, personal liberty and private property) were secured, he listed:

1. The constitution, powers and privileges of parliament;

2. The limitation of the king's prerogative, by well-defined bounds, which cannot be legally exceeded, except by the consent of the people;

3. The right of everyone to apply to courts of justice for the redress of injuries;

4. By petition for redress; and

5. By bearing arms for defense and these must be "suitable to [the] condition and degree [of the subject], and such as are allowed by law".[16]

Blackstone epitomized the common law view of militias and standing armies as it existed immediately prior to the American Revolution:

> In a land of liberty, it is extremely dangerous to make a distinct order of the profession of arms ... no man should take up arms, but with a view to defend his country and its laws; he puts not off the citizen when he enters the camp. The laws ... [of England] know no such state as that of a perpetual standing soldier, bred up to no other profession than that of war....
>
> Nothing then ... ought to be more guarded against in a free state than making the military power ... a body too distinct from the people.... [I]t should wholly be composed of natural subjects; it ought only to be enlisted for a short and limited time; the soldiers also should live intermixed with the people....[17]

By the time of the American Revolution, the term "militia" had a well-defined meaning. In 1776 Adam Smith wrote that "In a militia, the character of the labourer, artificer, or tradesman, predominates over that of the soldier; in a standing army, that of the (pg.556) soldier predominates over every other character; and in this distinction seems to consist the essential difference between those two different species of military force."[18] It was that portion of the manpower of a society which is enrolled on military rosters and is at least partially trained for local defense in short terms of service.[19] The Supreme Court of the United States said that "the militia comprised all males physically capable of acting in concert for the common defense" and "ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time," together with a supply of ammunition therefor, a blanket, knapsack and canteen.[20]

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15 3 MACAULAY, THE HISTORY OF ENGLAND 1311 (Firth ed. 1913-1915).

16 1 BLACKSTONE, COMMENTARIES *143-144.

17 *Id.* at *408, *414.

18 THE WEALTH OF NATIONS, Book V, Chapter 1, Part 1 (39 GREAT BOOKS 304).

19 15 ENCYC. BRIT. 484 (1961).

20 *United States v. Miller*, 307 U.S. 174, 179, 180-182 (1939). The Court also noted at 178-179 that "The Militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without the consent of Congress. The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia—civilians primarily, soldiers on occasion."

Also by the time of the Revolution it was apparent that free citizens had some kind of a right to bear arms, but it was not as unassailable a right as, for example, the right to a jury trial. It has been said that "Weapon bearing was never treated as anything like an absolute right by the common law."[21] Such statements are based primarily upon the Statute of Northampton of 1328 which declared that no man should "go nor ride armed by night or by day in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere".[22] Blackstone commented: "The offense of *riding* or *going armed* with dangerous or unusual weapons is a crime against the public peace, by terrifying the good people of the land, and is particularly prohibited by statute.... By the laws of Solon, every Athenian was finable who walked about the city in armor."[23] This was part of the common law which was adopted by the various states.[24]

British troops were quartered at Boston from 1768 until the Revolutionary War to harass and intimidate the people. The Battle of Lexington on April 19, 1775, occurred while the British were marching to Concord to seize the colonists' arms.[25] The Declaration of the Causes and Necessity of Taking Up Arms of July 6, 1775, cited as one cause of war: "The inhabitants of Boston ... accordingly delivered up their arms, but in open violation of honour, in defiance of the obligation of treaties, which even savage nations esteemed sacred...".[26]

Even the Englishman Tom Paine, who had watched the first motley citizen army line up in Philadelphia Commons in 1775, some with only sticks as weapons, less than a year later wrote that "The Continent hath at this time the largest body of armed and disciplined men of any power under Heaven; and is just arrived at that pitch of strength, in which no single colony is able to support itself, and the whole, when united, is able to do anything."[27]

A year later the Declaration of Independence protested that George III had "affected to render the military independent of, and superior to the civil power".[28]

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[21] *United States v. Tot*, 131 F.2d 261, 266 (3rd Cir. 1942), *rev'd on other grounds*, 319 U.S. 463.

[22] 2 Edw. 3, c. 3.

[23] 4 BLACKSTONE, COMMENTARIES *149.

[24] See *State v. Workman*, 35 W. Va. 367, 372, 14 S.E. 9, 11 (1891). For example, Illinois has a statute providing "That the common law of England ... and all statutes or acts of the British Parliament made in aid of, and to supply the defects of the common law" prior to the 1607 "shall be the rule of decision and shall be considered as of full force until repealed by legislative authority." ILL. REV. STAT. ch. 28, § 1.

[25] 1 COMMAGER, DOCUMENTS OF AMERICAN HISTORY 89-90 (3d ed. 1943).

[26] SOURCES 298.

[27] *Common Sense*, THE SELECTED WORKS OF TOM PAINE 31 (Modern Library ed. 1937). Adam Smith may have explained the reason for the success of the American Revolutionary War militia when he wrote in THE WEALTH OF NATIONS, Book V, Chapter 1, Part 1 (39 GREAT BOOKS 305): "A militia, however, in whatever manner it may be either disciplined or exercised, must always be much inferior to a well-disciplined and well-exercised standing army.... A militia of any kind, it must be observed, however, which has served for several successive campaigns in the field, becomes in every respect a standing army." George Washington often became frustrated with the militia: "... [They] come in, you cannot tell how; go, you cannot tell when, and act, you cannot tell where, consume your provisions, exhaust your stores, and leave you at last at a critical moment." Nevertheless, without them (they constituted 165,000 of his 396,000 troops), victory would have been impossible. 15 ENCYC. BRIT. 485 and 16 ENCYC. BRIT. 146 (1961).

[28] *Reid v. Covert*, *supra* note 12, at 27 and 29.

The right to bear arms was secured in the early constitutions of Virginia (1776),[29] North Carolina (1776),[30] New York (1777)[31] and Massachusetts (1780)[32] in the context of the militia, but the constitutions of Pennsylvania (1776) and Vermont (1777) contained identical provisions which secured an absolute right to bear arms: "That the people have a right to bear arms for the defense of themselves and the State...".[33]

Some of the states did not adopt a constitutional provision regarding the right to keep and bear arms, but of those which did, many granted that right to the individual for the purpose of defending "himself *and* the state", thereby apparently intending that the individual might bear arms in his own (pg.557) private defense.[34] At the same time the Articles of Confederation, approved in 1781, provided that "every State shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred".[35]

"There was a protracted controversy in the Constitutional Convention over whether there should be a standing army or whether the militia of the various states should be the source of military power."[36] The Constitution as agreed upon by the convention on September 17, 1787, contained provisions designed to keep military power under the civilian control of Congress, the President and the people, and under the dual control of the Federal Government and the states:

> The Congress shall have Power ...
>
> To raise and support Armies, but no Appropriation of money to that Use shall be for a longer Term than two Years; ...[37]
>
> To provide for calling forth the Militia to execute the laws of the Union, suppress Insurrections and repel invasions;...[38]
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> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;...[39]
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> The President shall be Commander in Chief ... of the Militia of the several States, when called into the actual Service of the United States....[40]

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[29] VA. CONST. (June 12, 1776): "Sec. 13. That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State...".

[30] N.C. CONST. (December 4, 1776): "XVII. That the people have a right to bear arms, for the defence of the State ...".

[31] N.Y. CONST. (1777). A militia was to be kept in readiness for service in time of peace, as well as in war. SOURCES 309-310.

[32] MASS. CONST. (October 25, 1780): "XVII. The people have a right to keep and bear arms for the common defence...".

[33] PA. CONST. art. XIII (August 16, 1776); VT. CONST. art. XV (July 8, 1777).

[34] For a catalogue of state constitutional provisions, see McKenna, *The Right To Keep and Bear Arms*, 12 MARQ. L. REV. 138, 138-141 (1928).

[35] Art. 6, para. 4.

[36] *Kinsella v. United States* ex rel. *Singleton,* 361 U.S. 234, 268 (1960) (dissenting opinion).

[37] Art. I, § 8, cl. 12.

[38] Art. I, § 8, cl. 15.

[39] Art. I, § 8, cl. 16.

[40] Art. II, § 2.

During the struggle over ratification of the Constitution by the states, Alexander Hamilton considered how the provisions for the militia might best be implemented. After dismissing as impracticable the arming *and training* of every citizen, he concluded:

> The attention of the government ought particularly to be directed to the formation of a select corps of moderate extent, upon such principles as will really fit them for service in case of need. By thus circumscribing the plan, it will be possible to have an excellent body of well-trained militia, ready to take the field whenever the defence of the State shall require it. This will not only lessen the call for military establishments, but if circumstances should at any time oblige the government to form an army of any magnitude that army can never be formidable to the liberties of the people while there is a large body of citizens, little, if at all, inferior to them in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow-citizens. This appears to me the only substitute that can be devised for a standing army, and the best possible security against it, if it should exist.[41]

On June 8, 1789, James Madison introduced his proposed amendments, which included:

> The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.[42]

In view of the parallel history of the militia and the right (or duty) to bear arms, it is not surprising that the Second Amendment as adopted coupled the two ideas in a single sentence. But history does not warrant concluding that it necessarily follows from the pairing of the concepts that a person has a right to bear arms solely in his function as a member of the militia.

(EDITOR'S NOTE: *This is the first of two installments of Mr. Sprecher's winning essay on the Second Amendment and the right to bear arms. The second installment will appear in the July, 1965, issue.*)

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41 THE FEDERALIST No. 29, at 179 (Modern Library ed. 1937) (Hamilton).

42 SOURCES 421-422.