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TO KEEP AND BEAR THEIR PRIVATE ARMS: THE ADOPTION OF THE SECOND AMENDMENT, 1787-1791

by Stephen P. Halbrook*

After the Constitution was submitted for ratification in 1787, political writings and debates in state conventions revealed two basic positions: the federalist view that a bill of rights was unnecessary because the proposed government had no positive grant of power to deprive individuals of rights, and the anti-federalist contention that a formal declaration would enhance protection of those rights. On the subject of arms, the federalists promised that the people, far from ever being disarmed, would be sufficiently armed to check an oppressive standing army. The anti-federalists feared that the body or the people as militia would be overpowered by a select militia of standing army unless there was a specific recognition of the individual right to keep and bear arms.¹ (pg.14)

While their sojourns abroad prevented their active involvement in the ratification process, John Adams and Thomas Jefferson, the future leaders of the federalist and republican parties respectively, reiterated in 1787 their preferences for an armed populace. In his defense of the American constitutions, John Adams relied on classical sources in the context of an analysis of quotations from Marchamont Nedham's *THE RIGHT CONSTITUTION OF A COMMONWEALTH* (1656) to vindicate a militia of all the people:

"That the people be continually trained up in the exercise of arms, and the militia lodged only in the people's hands, or that part of them which are most firm to the interest of liberty, that so the power may rest fully in the disposition of their supreme assemblies." The

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¹ Relevant state constitutional provisions at this time were: "That the people have a right to bear arms for the defence of themselves and the state" PA. CONST. of 1776, Declaration of Rights, art. 13 (current version at PA. CONST. art. 1 § 21); VT. CONST. of 1777, ch. I, Declaration of the Rights of the Inhabitants of the State of Vermont (current version at VT. CONST. ch. I, art. 16); "That the people have a right to bear arms, for the defence of the State" N.C. CONST. of 1776, A Declaration of Rights, cl. 17 (current version at N.C. CONST. art. 1, § 30); "The people have a right to keep and bear arms for the common defence." MASS. CONST. of 1780, Pt. 1, A Declaration of Rights of the Inhabitants of the Commonwealth of Massachusetts, art. 17 (current version at MASS. CONST. pt. 1, art. 17, § 18). The following provision was adopted during the same period in which the Bill of Rights to the U.S. Constitution was being ratified: "That the right of the citizens to bear arms, in defence of themselves and the State, shall not be questioned." PA. CONST. of 1790, art. 9, § 21 (current version at PA. CONST. art. 1, § 21).

limitation to "That part most firm to the interest of liberty," was inserted here, no doubt to reserve the right of disarming all the friends of Charles Stuart, the nobles and bishops. Without stopping to enquire into the justice, policy, or necessity of this, the rule in general is excellent One consequence was, according to [Nedham], "that nothing could at any time be imposed upon the people but by their consent As Aristotle tells us, in his fourth book on Politics, the Grecian states ever had special care to place the use and exercise of arms in the people, because the commonwealth is theirs who hold the arms: the sword and sovereignty ever walk hand in hand together." This is perfectly just. "Rome, and the territories about it, were trained up perpetually in arms, and the whole commonwealth, by this means, became one formal militia."²

After agreeing that all the continental European states had achieved absolutism by following the Caesarian precedent of erecting "praetorian bands, instead of a public militia,"³ the aristocratic Adams rejected the very right which won independence from England: "To suppose arms in the hands of citizens, to be used at individual discretion, except in private self-defense, or by partial orders of towns ... is a dissolution of the government."⁴ But for the more radical Thomas Jefferson, individual discretion was acceptable for the use of arms not simply for private, but also for public (pg.15) defense. Writing in 1787, Jefferson stressed the inexorable connection between the right to have and use arms and the right to revolution as follows:

God forbid we should ever be twenty years without such a rebellion And what country can preserve its liberties, if its rulers are not warned from time to time, that this people preserve the spirit of resistance? Let them take arms The tree of liberty must be refreshed from time to time, with the blood of patriots and tyrants.⁵

I. THE CONTROVERSY OVER RATIFICATION OF THE CONSTITUTION

A. *The Federalist Promise: To Trust The People With Arms*

It was characteristic of the times that the federalists were actually in close agreement with Jefferson on the right to arms as a penumbra of the right to revolution. Thus, in THE FEDERALIST No. 28, Hamilton wrote: "If the representatives of the people betray their constituents, there is then no resource left but in the exertion of that original right of self-defense which is paramount to all

² 3 J. ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 471-72 (London, 1787-88). Newspaper editorialists of the time also alluded to Rome's disarming of conquered peoples. The Massachusetts Centinel, Apr. 11, 1787, recalled "the old Roman Senator, who after his country subdued the commonwealth of Carthage, had made them deliver up ... their arms ... and rendered them unable ever to protect themselves...." 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 79 (J. Kaminski & G. Saladino eds. 1981).

³ J. ADAMS, *supra* note 2, at 474.

⁴ *Id.* at 475.

⁵ Letter from Thomas Jefferson to Wm. S. Smith, (____, 1787), reprinted in T. JEFFERSON, ON DEMOCRACY 20 (S. Padover ed. 1939). In his influential Letter of January 27, 1788, Luther Martin stated: "By the principles of the American revolution, arbitrary power may, and ought to, be resisted even by arms, if necessary." 1 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS 382 (2d ed. Philadelphia, 1836). See also New York Journal, Aug. 14, 1788, at 2, col. 4 (the people will resist arbitrary power). A writer in the Pennsylvania Gazette, Apr. 23, 1788, criticized "the loyalists in the beginning of the late war, who objected to *associating, arming and fighting*, in defence of our liberties, because these measures were not *constitutional*. A free people should always be left ... with every possible power to promote their own happiness." 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Mfm. Supp.) 2483 (M. Jensen ed. 1976).

positive forms of government...."⁶ And in No. 29, Hamilton related the argument that it would be wrong for a government to require

the great body of yeomanry and of the other classes of citizens to be under arms for the purpose of going through military exercises and evolutions, as often as might be necessary to acquire the degree of perfection which would entitle them to the character of a well-regulated militia.... Little more can reasonably be aimed at with respect to the people at large than to have them properly armed and equipped....

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 (pg.16) ready to defend their rights and those of their fellow-citizens.⁷

In THE FEDERALIST No. 46, Madison, contending that "the ultimate authority ... resides in the people alone,"⁸ predicted that encroachments by the federal government would provoke "[p]lans of resistance" and an "appeal to a trial of force."⁹ To a regular army of the United States government "would be opposed a militia amounting to near half a million of citizens with arms in their hands," and referring to "the advantage of being armed, which the Americans possess over the people of almost every other nation," Madison wrote: "Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms."¹⁰ If the people were armed and organized into militia, "the throne of every tyranny in Europe would be speedily overturned in spite of the legions which surround it."¹¹

The Constitution's proponents agreed that it conferred no federal power to deprive the people of their rights, because there was no explicit grant of such power and because the state declarations of right would prevail.¹² The existence of an armed populace, superior in its forces even to a standing army, and not a paper bill of rights, would check despotism. Noah Webster promised that even without a bill of rights, the American people would remain armed to such an extent as to be superior to any standing army raised by the federal government:

Another source of power in government is a military force. But this, to be efficient, must be superior to any force that exists among the people, or which they can command; for

⁶ THE FEDERALIST No. 28, at 180 (A. Hamilton) (Arlington House ed. n.d.).

⁷ THE FEDERALIST No. 29, at 184-85 (A. Hamilton) (Arlington House ed. n.d.).

⁸ THE FEDERALIST No. 46, at 294 (J. Madison) (Arlington House ed. n.d.).

⁹ *Id.* at 298.

¹⁰ *Id.* at 299.

¹¹ *Id.* at 300. On arms regulation by the French monarchy to prevent democracy, see L. KENNETT & J. ANDERSON, THE GUN IN AMERICA 5-16 (1975).

¹² "The state declarations of rights are not repealed by this Constitution, and, being in force, are sufficient," argued Roger Sherman in the federal convention. 5 J. ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 538 (Philadelphia, 1845). Hamilton averred in THE FEDERALIST No. 84 that a bill of rights "would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted." THE FEDERALIST No. 84, at 513 (A. Hamilton) (Arlington House ed. n.d.). Hamilton's fear appears vindicated in view of the current restrictive interpretation that the Bill of Rights recognizes no individual right to bear arms. See, e.g., L. TRIBE, AMERICAN CONSTITUTIONAL LAW 226 n.6 (1978).

otherwise this force would be annihilated, on the first exercise of acts of oppression. Before a (pg.17) standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretence, raised in the United States. A military force, at the command of Congress, can execute no laws, but such as the people perceive to be just and constitutional; for they will possess the *power*, and jealousy will instantly inspire the *inclination*, to resist the execution of a law which appears to them unjust and oppressive.¹³

Tench Coxe argued in his influential *An American Citizen* that, should tyranny threaten, the "*friends to liberty ... using those arms which Providence has put into their hands, will make a solemn appeal to 'the power above.'*"¹⁴ Coxe also wrote: "The militia, *who are in fact the effective part of the people at large, will render many troops quite unnecessary. They will form a powerful check upon the regular troops, and will generally be sufficient to overawe them....*"¹⁵ Writing as "A Pennsylvanian," Coxe went into even more detail:

The power of the sword, say the minority of Pennsylvania, is in the hands of Congress. My friends and countrymen, it is not so, for THE POWERS OF THE SWORD ARE IN THE HANDS OF THE YEOMANRY OF AMERICA FROM SIXTEEN TO SIXTY. The militia of these free commonwealths, entitled and accustomed to their arms, when compared with any possible army, must be *tremendous and irresistible*. Who are the militia? *Are they not ourselves*. Is it feared, then, that we shall turn our arms *each man against his own bosom*. Congress have no power to disarm the militia. Their swords, and every other terrible implement of the soldier, are *the birth-right of an American....* [T]he unlimited power of the sword is not in the hands of either the *federal or state governments*, but, where I trust in God it will ever remain, *in the hands of the people*.¹⁶(pg.18)

In summary, the Constitution's proponents promised that the individual right to keep and bear arms would be not simply a formal right but a fact which would render an armed citizenry more powerful than any standing army, and consequently a bill of rights was unnecessary. It was natural that the virtue of an armed populace or general militia was stressed in terms of its political value for a free society, since the ratification process involved political issues. Nonetheless the right to have weapons for non-political purposes such as self-protection or hunting—but never for

¹³ Webster, *An Examination into the Leading Principles of the Federal Constitution* in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 56 (P. Ford ed. 1888). *See also id.* at 48, 51-52.

¹⁴ Coxe, *An American Citizen IV* in THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra*, note 2, at 433.

¹⁵ *Id.* at 435; and in Coxe, *Examination of the Constitution*, in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 13, at 151.

¹⁶ Pennsylvania Gazette, Feb. 20, 1788, THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 5, at 1778-80. *See also* Foreign Spectator, Independent Gazetteer, Sept. 21, 1787: "[E]ven the power of a veteran army could not subdue a patriotic militia ten times its number" *Id.* at 384. *A Supplement to the Essay on Federal Sentiments*, Independent Gazetteer, Oct. 23, 1787: "[T]he whole personal influence of the Congress, and their parricide army could never prevail over a hundred thousand men armed and disciplined, owners of the country" *Id.* at 801. Antifederalists agreed with this thesis. Thus, the Freeman's Journal, Feb. 27, 1788, stated that "it would require more troops than even the empress of Russia can command, to chain down the enlightened freemen" *Id.* at 1829. And Detector, Independent Gazetteer, Feb. 11, 1788, gave the reason: "[T]he sons of freedom ... may know the despots have not altogether monopolized these *necessary articles* [powder and lead]." *Id.* at 1695.

aggression—appeared so obviously to be the heritage of free people as never to be questioned. In the words of "Philodemos": "Every free man has *a right to the use of the press*, so he has to *the use of his arms*." But if he commits libel, "he abuses his privilege, as unquestionably as if he were to plunge his sword into the bosom of a fellow citizen" Punishment, not "previous restraints," was the remedy for misuse of either right.¹⁷

B. *Anti-Federalist Fears: The People Disarmed, A Select Militia*

Among the anti-federalist spokesmen, the great fear was that without protection by a bill of rights, creation of a select militia or standing army would result in the disarming of the whole people as militia and the consequent oppression of the populace. This fear had been expressed by the prediction of Oliver Ellsworth in the Federal Convention that the creation of "a select militia ... would be followed by a ruinous declension of the great body of the militia."¹⁸ John DeWitt contended: "It is asserted by the most respectable writers upon government, that a well regulated militia, composed of the yeomanry of the country, have ever been considered as the bulwark of a free people. Tyrants have never placed any confidence on a militia composed of freemen."¹⁹ DeWitt predicted that Congress "at their pleasure may arm or disarm all or any part (pg.19) of the freemen of the United States, so that when their army is sufficiently numerous, they may put it out of the power of the freemen militia of America to assert and defend their liberties...."²⁰

George Clinton, writing as "Cato," predicted a permanent force because of "the fear of a dismemberment of some of its parts, and the necessity to enforce the execution of revenue laws (a fruitful source of oppression)"²¹ "A Federal Republican" foresaw an army used "to suppress those struggles which may sometimes happen among a free people, and which tyranny will impiously brand with the name of sedition."²² The admission by some federalists, particularly James Wilson, that a small standing army was anticipated led to a particularly fearful reaction by anti-federalists. "[F]reedom revolts at the idea,"²³ according to Elbridge Gerry, for the militia would become a federal force which "may either be employed to extort the enormous sums that will be necessary to support the civil list—to maintain the regalia of power—and the splendour of the most useless part of the community, or they may be sent into foreign countries for the fulfilment of treaties"²⁴ Praising the Swiss militia model, "A Democratic Federalist" rejected Wilson's argument for a standing army, "that great support of tyrants," with the following reasoning:

Had we a standing army when the British invaded our peaceful shores? Was it a standing army that gained the battles of Lexington and Bunker's Hill, and took the ill-fated [John] Burgoyne? Is not a well-regulated militia sufficient for every purpose of internal defense?

¹⁷ Pennsylvania Gazette, May 7, 1788, THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 5, at 2579.

¹⁸ 5 J. ELLIOT, *supra* note 12, at 444.

¹⁹ THE ANTI-FEDERALIST PAPERS 75 (M. Borden ed. 1965).

²⁰ *Id.*

²¹ *Id.* at 38.

²² *Id.* at 19.

²³ Gerry, *Observations on the New Constitution in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES*, *supra* note 13, at 10.

²⁴ *Id.* at 11.

And which of you, my fellow citizens, is afraid of any invasion from foreign powers, that our brave militia would not be able immediately to repel?²⁵

The most influential writings stating the case against ratification of the Constitution without a bill of rights consisted of Richard Henry Lee's LETTERS FROM THE FEDERAL FARMER (1787-1788) (hereinafter LETTERS). Since most of Lee's proposals for specific (pg.20) provisions of a bill of rights were subsequently adopted in the Bill of Rights, some with almost identical wording, the LETTERS provide an excellent commentary on the meaning of the provisions of the Bill of Rights in general and the second amendment in particular. Predicting the early employment of a standing army through taxation, Lee contended:

It is true, the yeomanry of the country possess the lands, the weight of property, possess arms, and are too strong a body of men to be openly offended—and, therefore, it is urged, they will take care of themselves, that men who shall govern will not dare pay any disrespect to their opinions. It is easily perceived, that if they have not their proper negative upon passing laws in congress, or on the passage of laws relative to taxes and armies, they may in twenty or thirty years be by means imperceptible to them, totally deprived of that boasted weight and strength: This may be done in a great measure by congress, if disposed to do it, by modelling the militia. Should one fifth or one eighth part of the men capable of bearing arms, be made a select militia, as has been proposed, and those the young and ardent part of the community, possessed of but little or no property, and all the others put upon a plan that will render them of no importance, the former will answer all the purposes of an army, while the latter will be defenseless.... I see no provision made for calling out the *posse comitatus* for executing the laws of the union, but provision made for congress to call forth the militia for the execution of them—and the militia in general, or any select part of it, may be called out under military officers, instead of the sheriff to enforce an execution of federal laws, in the first instance, and thereby introduce an entire military execution of the laws.²⁶

In his second series of LETTERS, Lee classified as "fundamental rights" the rights of free press, petition, and religion; the rights to speedy trial, trial by jury, confrontation of accusers and against self-incrimination; the right not to be subject to "unreasonable searches or seizures of his person, papers or effects"; and, in addition to the right to refuse quartering of soldiers, "the militia ought always to be armed and disciplined, and the usual defense of the country"²⁷ Since these rights were all to be recognized in the Bill of Rights, it is appropriate to examine in detail the substance of Lee's concept of the militia:

A militia, when properly formed, are in fact the people themselves, (pg.21) and render regular troops in a great measure unnecessary [T]he constitution ought to secure a genuine and guard against a select militia, by providing that the militia shall always be kept well organized, armed, and disciplined, and include ... all men capable of bearing arms; and that all regulations tending to render this general militia useless and defenceless, by establishing

²⁵ Pennsylvania Herald, Oct. 17, 1787, THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 5, at 196-97. See also Z, Freeman's Journal, Mar. 5, 1788: "[T]he people themselves freed America from foreign tyranny." *Id.* at 1925.

²⁶ R. Lee, *Letters of a Federal Farmer* (1787-88), in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 13, at 305-06.

²⁷ R. LEE, ADDITIONAL LETTERS FROM THE FEDERAL FARMER 53 (Philadelphia, 1788).

select corps of militia, or distinct bodies of military men, not having permanent interests and attachments in the community to be avoided.²⁸

Thus, Lee feared that Congress, through its "power to provide for organizing, arming, and disciplining the militia" under article I § 8 of the proposed Constitution, would establish a "select militia" apart from the people which would be used as an instrument of domination by the federal government. The contemporary argument, that it is impractical to view the militia as the whole body of the people, and that the militia consists of the select corps known as the National Guard, also existed during the time of Lee, who refuted it in these terms:

But, say gentlemen, the general militia are for the most part employed at home in their private concerns, cannot well be called out, or be depended upon; that we must have a select militia; that is, as I understand it, particular corps or bodies of young men, and of men who have but little to do at home, particularly armed and disciplined in some measure, at the public expense, and always ready to take the field. These corps, not much unlike regular troops, will ever produce an inattention to the general militia; and the consequence has ever been, and always must be, that the substantial men, having families and property, will generally be without arms, without knowing the use of them, and defenseless; whereas, *to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them*; nor does it follow from this, that all promiscuously must go into actual service on every occasion. The mind that aims at a select militia, must be influenced by a truly anti-republican principle; and when we see many men disposed to practice upon it, whenever they can prevail, no wonder true republicans are for carefully guarding against it.²⁹

Richard Henry Lee's view that a well regulated militia was the armed populace rather than a select group, or "Prussian militia,"³⁰ (pg.22) was reiterated by proponents and opponents of a bill of rights. As "M. T. Cicero" wrote to "The Citizens of America":

Whenever, therefore, the profession of arms becomes a distinct order in the state ... the end of the social compact is defeated.... No free government was ever founded, or ever preserved its liberty, without uniting the characters of the citizen and soldier in those destined for the defence of the state.... Such are a well regulated militia, composed of the freeholders, citizen and husbandman, who take up arms to preserve their property, as individuals, and their rights as freemen.³¹

²⁸ *Id.* at 169.

²⁹ *Id.* at 170 (emphasis added).

³⁰ *A Slave*, Philadelphia Independent Gazetteer, Oct. 6, 1787, THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 2, at 345. Aristocratis, in THE GOVERNMENT OF NATURE DELINEATED 15-17 (1788) (hereinafter ARISTOCRATIS), feared that the active militia would "quell insurrections that may arise in any part of the empire on account of pretensions to support liberty, redress grievances, and the like." THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 5, at 2524. "The second class or inactive militia, comprehends all the rest of the peasants; viz., the farmers, mechanics, labourers, &c. which good policy will prompt government to disarm. It would be dangerous to trust such a rabble as this with arms in their hands." *Id.* at 2526.

³¹ Charleston State Gazette, Sept. 8, 1788, at ____, col. _____. *See also id.*, Aug. 7, 1788, at 3, col. 1-2 (militia as citizenry); Letter from New York, Oct. 31, 1787, 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 390 (M. Jensen ed 1978): "The militia [Art. I, § 8, cl. 15] comprehends all the male inhabitants from sixteen to sixty years of age.... The Constitution ... puts the utmost degree of confidence in the people...."

The armed citizens would defend not only against foreign aggression, but also domestic tyranny. As expressed by another commentator: "The government is only just and perfectly free ... where there is also a *dernier* resort, or real power left in the community to defend themselves against any attack on their liberties."³²

While the view continued to be expressed that "a bill of rights as long as my arm" had no place in the Constitution,³³ a correspondent of the opposite persuasion noted that throughout his state people were "repairing and cleaning their arms, and every young fellow who is able to do it, is providing himself with a rifle or musket, and ammunition," but that civil war would be averted by adoption of a bill of rights.³⁴ If these views reflect the resultant (pg.23) compromise that a bill of rights would guarantee broad rights without being overly detailed, they also indicate that the demand for a bill of rights was as strong as the demand for independence a decade before. And consistent throughout the debate thereon was the general understanding that the right to keep and bear arms was an individual right.³⁵

C. *Demands in The State Conventions for a Written Guarantee that Every Man be Armed*

In the debates in the state conventions over the ratification of the Constitution, the existence of an armed citizenry was presumed by federalists and anti-federalists alike as requisite to prevent despotism. Issues which divided the delegates included whether a written bill of rights guaranteeing the right to keep and bear arms and other individual rights should be added to the Constitution, and whether a provision guarding against standing armies or select militias was necessary. In the Pennsylvania convention, John Smilie warned: "Congress may give us a select militia which will, in fact, be a standing army—or Congress, afraid of a general militia, may say there shall be no militia at all. When a select militia is formed; the people in general may be disarmed."³⁶ This argument assumed that the right to keep and bear arms³⁷ would be protected (pg.24) by the people combining into

³² *On Tyranny, Anarchy, and Free Governments*, New York Morning Post, Aug. 21, 1788, at 2, col. 2.

³³ *A Friend to Equal Liberty*, Philadelphia Independent Gazetteer, Mar. 28, 1788, at ____, col. _____. The Federal Gazette, Mar. 12, 1789, at 2, col. 3 opined: "[I]f it is done, it is to be hoped the friends of *turtle* and *roast beef* will stand upon a clause in the bill of rights, to secure the perpetual enjoyment of those two excellent dishes."

³⁴ Independent Gazetteer, Apr. 30, 1788, at ____, col. _____. See also Letter from Thomas B. Wait to George Thatcher (Aug. 15, 1788), in Thatcher Papers, Vol. II (available in Boston Public Library): "The same instrument that conveys the weapon, should refine the shield—should contain not only the powers of the rulers, but also the defence of the people." Brutus" wrote in the New York Journal, Nov. 1, 1787: "Some [natural rights] are of such a nature that they cannot be surrendered. Of this kind are the rights of ... defending life...." THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 31, at 525.

³⁵ As expressed in the Boston Independent Chronicle, Oct. 25, 1787, in a "ship's news" satire on demands for a bill of rights:

[I]t was absolutely necessary to carry arms for fear of pirates, &c. and ... their arms were all stamped with peace, that they were never to be used but in case of an hostile attack, that it was in the law of nature for every man to defend himself, and unlawful for any man to deprive him of those weapons of self-defence.

THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 31, at 523.

³⁶ THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 5, at 509.

³⁷ Not only was the right to keep and bear private arms universally acknowledged, but in Pennsylvania the right of individuals to keep *public* arms was asserted. "Jacob Trusty" queried the editor of the *Freeman's Journal*, Dec. 19, 1787, as follows: I wish you would inform me, through the channel of your paper, of the true meaning of disarming the Militia in this State at this solemn period: The county officer shows us an order of Council for to deliver them for cleaning; but we in our county have, upon second thought, resolved to clean them ourselves. Is this a trick for

general militias to prevent being disarmed by select forces. In response, James Wilson contended that the Constitution already allowed for the ultimate force in the people: "In its principles, it is surely democratical; for, however wide and various the firearms of power may appear, they may all be traced to one source, the people."³⁸

In the Massachusetts convention, William Symmes warned that the new government at some point "shall be too firmly fixed in the saddle to be overthrown by any thing but a general insurrection."³⁹ Yet fears of standing armies were groundless, affirmed Theodore Sedgwick, who queried, "[I]f raised, whether they could subdue a nation of freemen, who know how to prize liberty, and who have arms in their hands?"⁴⁰ In New York, Tredwell feared that "we may now surrender, with a little ink, what it may cost seas of blood to regain."⁴¹ And in the North Carolina convention, William Lenoir worried that Congress can "disarm the militia. If they were armed, they would be a resource against great oppressions.... If the laws of the Union were oppressive, they could not carry them into effect, if the people were possessed of proper means of (pg.25) defense."⁴²

But it was Patrick Henry in the Virginia convention who expounded most thoroughly the dual rights to arms and resistance to oppression: "Guard with jealous attention the public liberty. Suspect every one who approaches that jewel. Unfortunately, nothing will preserve it but downright force. Whenever you give up that force, you are inevitably ruined."⁴³ Fearful of the power of Congress over both a standing army and the militia, Henry asked, "Have we the means of resisting disciplined armies, when our only defence, the militia, is put into the hands of Congress?"⁴⁴ Furthermore, "of what service would militia be to you, when, most probably, you will not have a single musket in the state? For, as arms are to be provided by Congress, they may or may not furnish them."⁴⁵ It was to meet such objections that prompted the adoption later of the second amendment, which sought to

to push upon us the new plan of government whether we will or will not have it; no, Mr. Bailey, those gentlemen in your city who have planned it, are poor politicians, if they depend on our agreeing to give up our mush sticks. THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 5, at 1361.

"A Militia Man" responded in the Pennsylvania Gazette, Dec. 26, 1787, that the Supreme Executive Council had merely directed the lieutenants "to collect all the public arms within their respective counties, have them repaired, and make return to Council ... for payment." *Id.* at 1362. Jacob Trusty was then asserted to be mistaken "if he thinks the militia will be duped into a broil by any antifederalist..." *Id.* To this, "Trusty" responded in the Independent Gazetteer, Jan. 10, 1788, "that the militia of the country rather choose to repair and clean their own *arms* at this critical juncture, than to deliver them up to any one whatever." *Id.* at 1365. And "An Old Militia Officer of 1776" declared in the same paper on Jan. 18, 1788:

The orders, issued by Council, enjoining the delivery of the public arms at this juncture, when a standing army is openly avowed to be necessary, has occasioned no small degree of apprehension.... These orders ... amount ... to a temporary disarming of the people. When the arms will be re-delivered, must depend upon the *discretion* of our rulers.... But if ... these orders originate in that spirit of domination..., will it not be their indispensable duty, as men, as citizens, and as guardians of their own rights, immediately to arm themselves at their own expence? This expedient will convince the enemies of liberty, that the people (their own defenders in the last resort) are prepared for the worst....

Id. at 1369-70. See also ARISTOCRATIS, *supra* note 30, at 29-30, *id.* at 2538-39; Independent Gazetteer, Feb. 27, 1788, *id.* at 1833; Pennsylvania Herald, Feb. 5, 1788, *id.* at 1373; Freeman's Journal, Jan. 23, 1788, *id.* at 1371.

³⁸ THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 5, at 336.

³⁹ J. ELLIOT, *supra* note 5, at 74.

⁴⁰ *Id.* at 97.

⁴¹ *Id.* at 404.

⁴² 4 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS 203 (2d ed. Philadelphia, 1836).

⁴³ 3 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS 45 (2d ed. Philadelphia, 1836).

⁴⁴ *Id.* at 48.

⁴⁵ *Id.* at 51-52.

guarantee the revolutionary ideal expressed by Henry in these words: "The great object is, that every man be armed.... Every one who is able may have a gun."⁴⁶ Henry's objection to federal control over arsenals within the states would apply equally to control over private arms:

Are we at last brought to such a humiliating and debasing degradation, that we cannot be trusted with arms for our own defence? Where is the difference between having our arms in our own possession and under our own direction, and having them under the management of Congress? If our defence be the *real* object of having those arms, in whose hands can they be trusted with more propriety, or equal safety to us, as in our own hands?⁴⁷

George Mason buttressed Henry's arguments by pointing out that pro-British strategists resolved "to disarm the people; that it was the best and most effectual way to enslave them ... by totally disusing and neglecting the militia."⁴⁸ Mason also clarified that under prevailing practice the militia included all people, rich and poor. "Who are the militia? They consist now of the whole people, (pg.26) except a few public officers."⁴⁹ Throughout the debates Madison sought to picture the observations of Henry and Mason as exaggerations and to emphasize that a standing army would be unnecessarily consequent on the existence of militias⁵⁰—in short, that the people would remain armed. And Zachariah Johnson argued that the new Constitution could never result in religious or other oppression: "The people are not to be disarmed of their weapons. They are left in full possession of them."⁵¹

The objections of the anti-federalist pamphleteers and orators, particularly George Mason and Richard Henry Lee, prompted the state ratifying conventions to recommend certain declarations of rights which became the immediate source of the Bill of Rights. Each and every recommendation which mentioned the right to keep and bear arms clearly intended an individual right. The individual character of the right is evident additionally in those proposals made in the conventions wherein a majority of delegates voted against a comprehensive bill of rights. The latter was the case in regard to the proposals of Samuel Adams in the Massachusetts convention "that the said Constitution be never construed to authorize Congress to infringe the just liberty of the press, or the rights of conscience; or to prevent the people of the United States, who are peaceable citizens, from keeping their own arms...."⁵² Similarly, the proposals adopted by the Pennsylvania minority included the following:

That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for

⁴⁶ *Id.* at 386.

⁴⁷ *Id.* at 168-69.

⁴⁸ *Id.* at 380.

⁴⁹ *Id.* at 425.

⁵⁰ *See, e.g., id.* at 413.

⁵¹ *Id.* at 646.

⁵² 2 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 681 (1971).

disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals....⁵³ (pg.27)

New Hampshire was the first state to ratify the Constitution and recommended that it include a bill of rights, including a provision that "Congress shall never disarm any Citizen, unless such as are or have been in Actual Rebellion."⁵⁴ Not only are these words in no way dependent upon militia uses, but the provision is separated from another article against standing armies by a provision concerning freedom of religion.⁵⁵ The New Hampshire convention was the first wherein a majority proposed explicit recognition of the individual right later expressed in the second amendment.⁵⁶ The New Hampshire and Pennsylvania proposals for the right to keep and bear arms were viewed as among "those amendments which particularly concern several personal rights and liberties."⁵⁷

George Mason's pen was at work in Virginia, which suggested the following provision:

That the people have a right to keep and bear arms; 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; that standing armies, in time of peace, are dangerous to liberty, and therefore ought to be avoided....⁵⁸

Since these three propositions are stated independently of one another, it is obvious that the first is a general protection of the individual right to have arms for any and all lawful purposes, and is in no way dependent on the militia clause that follows. Madison's draft of the second amendment as later proposed with the Bill of Rights in Congress relied specifically on the recommendation by the Virginia convention.⁵⁹

The New York convention predicated its ratification of the Constitution on the following interconnected propositions:

That the powers of government may be reassumed by the people whensoever it shall become necessary to their happiness.... That the people have a right to keep and bear arms;

⁵³ Dissent of Minority, THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 5, at 597-598, 623-24; E. DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 12 (1957). *See also id.* at viii-ix, 51-52. "The amendments proposed by the Pennsylvania minority bear a direct relation to those ultimately adopted as the federal Bill of Rights." B. SCHWARTZ, *supra* note 52, at 628. *See also id.* at 665. While the cited provision explicitly supports an individual right to have arms for more than militia purposes, the minority was very concerned about the specter of a select militia. "The militia of Pennsylvania may be marched to New England or Virginia to quell an insurrection occasioned by the most galling oppression, and aided by the standing army, they will no doubt be successful in subduing their liberty and independency." THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 5, at 638.

⁵⁴ B. SCHWARTZ, *supra* note 52, at 761.

⁵⁵ *Id.*

⁵⁶ *Id.* at 758. "The right to bear arms, going back to the English Bill of Rights, received recognition in the Second Amendment to the Constitution.... Counting this article, seven out of twelve of New Hampshire's proposals were ultimately accepted." E. DUMBAULD, *supra* note 53, at 21 n.37.

⁵⁷ A Foreign Spectator, *Remarks on the Amendments*, No. XI, Federal Gazette, Nov. 28, 1788, at ____, col. ____.

⁵⁸ 3 J. ELLIOT, *supra* note 43, at 659. *See also* 3 G. MASON, PAPERS 1068-71 (1970).

⁵⁹ E. DUMBAULD, *supra* note 53, at 21 and 51-52; 2 B. SCHWARTZ, *supra* note 52, at 765.

that a well regulated ^(pg.28) militia, including the body of the people *capable of bearing arms*, is the proper, natural, and safe defence of a free state.⁶⁰

Explicit in this language are the two independent declarations that individuals have a right to be armed and that the militia is the armed people. Similar language was adopted by the conventions of Rhode Island⁶¹ and North Carolina.⁶²

II. THE RATIFICATION OF THE BILL OF RIGHTS

A. *Madison's Proposed Amendments: Guarantees of Personal Liberty*

In acknowledgement of the conditions under which the state conventions ratified the Constitution, and in response to popular demand for a written declaration of individual freedoms, in 1789 the first U.S. Congress, primarily through the pen of James Madison, submitted for ratification by the states the Amendments to the Constitution which became the Bill of Rights. Relying upon the Virginia Declaration of Rights and the amendments proposed by the state conventions,⁶³ on June 8, 1789, Madison proposed in the House of Representatives a bill of rights which included the following: "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."⁶⁴ That Madison intended an individual right is clear not only from this wording, but also from his notes for his speech proposing the amendment: "They [proposed amendments] relate 1st. to private rights—fallacy on both sides—espey as to English Decln. of Rts.—1. mere act of parl. 2. no freedom of press—Conscience ... attainders—arms to protestts."⁶⁵ ^(pg.29)

Madison's colleagues clearly understood the proposal to be protective of individual rights. Fisher Ames wrote: "Mr. Madison has introduced his long expected amendments.... It contains a bill of rights ... the right of the people to bear arms."⁶⁶ Ames wrote another correspondent as follows: "The rights of conscience, of bearing arms, of changing the government, are declared to be inherent in the people."⁶⁷ And William Grayson informed Patrick Henry: "Last Monday a string of amendments were presented to the lower House; these altogether respected *personal liberty*...."⁶⁸

⁶⁰ 1 J. ELLIOT, *supra* note 5, at 327-8.

⁶¹ *Id.* at 335.

⁶² 4 J. ELLIOT, *supra* note 42, at 244.

⁶³ R. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS* 206 (1955); E. DUMBAULD, *supra* note 53, at viii-ix, 21, 51-52.

⁶⁴ 1 ANNALS OF CONG. 434 (June 8, 1789).

⁶⁵ Madison, Notes for Speech in Congress, June 8, 1789, 12 MADISON PAPERS 193-94 (C. Hobson & R. Rutland eds. 1979). In a letter to Edmund Pendleton, Oct. 20, 1788, Madison referred to proposed amendments as "those further guards for private rights...." 4 MADISON PAPERS 60 (C. Hobson & R. Rutland eds. 1979). In a Rough Draft of Proposed Bill of Rights that he would have presented had he not been defeated for election by Madison, James Monroe proposed "a declaration in favor of the equality of human rights; ... of the right to keep and bear arms...." James Monroe Papers, N.Y. Public Library, Miscellaneous Papers.

⁶⁶ Letter from Fisher Ames to Thomas Dwight (June 11, 1789), in 1 WORKS OF FISHER AMES 52-53 (Philadelphia, 1854).

⁶⁷ Letter from Fisher Ames to F. R. Minot (June 12, 1789), in *id.* at 53-54.

⁶⁸ June 12, 1789, 3 PATRICK HENRY 391 (1951) (emphasis added). *See also* Letter from Joseph Jones to James Madison (June 24, 1789), in 12 MADISON PAPERS, *supra* note 65, at 258 (the Amendments are "calculated to secure the personal rights of the people...."); Letter from William L. Smith to Edward Rutledge (Aug. 9, 1789), in 79 S.C. HIST. MAG. 14 (1968) (the amendments "will effectually secure private rights....").

Ten days after the Bill of Rights was proposed in the House, Tench Coxe published this *Remarks on the First Part of the Amendments to the Federal Constitution* under the pen name "A Pennsylvanian" in the Philadelphia Federal Gazette, June 18, 1789, at 2, col. 1. Probably the most complete exposition of the Bill of Rights to be published during its ratification period, the *Remarks* included the following:

As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed by the next article in their right to keep and bear their private arms.⁶⁹

In short, what is now the second amendment guaranteed the right of the people to have "their private arms" to prevent tyranny and to overpower an abusive standing army or select militia.

Coxe sent a copy of his article to Madison along with a letter of the same date. "It has appeared to me that a few well tempered observations on these propositions might have a good effect.... It may perhaps be of use in the present turn of the public opinions in New York state that they should be republished there."⁷⁰ Madison wrote back acknowledging "[Y]our favor of the 18th instant. (pg.30) The printed remarks inclosed in it are already I find in the Gazettes here [New York]." Far from disagreeing that the amendment protected the keeping and bearing of "private arms," Madison explained that ratification of the amendments "will however be greatly favored by explanatory strictures of a healing tendency, and is therefore already indebted to the co-operation of your pen."⁷¹

Coxe's defense of the amendments was widely reprinted.⁷² A search of the literature of the time reveals that no writer disputed or contradicted Coxe's analysis that what became the second amendment protected the right of the people to keep and bear "their private arms." The only dispute was over whether a bill of rights was even necessary to protect such fundamental rights. Thus, in response to Coxe's article, *One of the People* replied with *On a Bill of Rights*, which held "the very idea of a bill of rights" to be "a dishonorable one to freemen." "What should we think of a gentlemen, who, upon hiring a waiting-man, should say to him 'my friend, please take notice, before we come together, that I shall always claim the liberty of eating when and what I please, of fishing and hunting upon my own ground, of keeping as many horses and hounds as I can maintain, and of speaking and writing any sentiments upon all subjects." In short, as a mere servant, the government had no power to interfere with individual liberties in any manner absent a specific delegation. "[A]

⁶⁹ Madison's proposals had been published two days before in the same paper. Federal Gazette, June 16, 1789, at 2, col. 2.

⁷⁰ Letter from Tench Coxe to James Madison (June 18, 1789), in 12 MADISON PAPERS, *supra* note 65, at 239-40.

⁷¹ Letter from James Madison to Tench Coxe (June 24, 1789), in *id.* at 257.

⁷² See, e.g., New York Packet, June 23, 1789, at 2, col. 1-2; Boston Massachusetts Centinel, July 4, 1789, at 1, col. 2. Coxe's *Remarks on the Second Part of the Amendments*, which appeared in the Federal Gazette, June 30, 1789, explicated what is now the ninth amendment as follows:

It has been argued by many against a bill of rights, that the omission of some in making the detail would one day draw into question those that should not be particularized. It is therefore provided, that no inference of that kind shall be made, so as to diminish, much less to alienate an ancient tho' unnoticed right, nor shall either of the branches of the Federal Government argue from such omission any increase or extension of their powers.

Id. at 2, col. 1-2.

master reserves to himself ... every thing else which he has not committed to the care of those servants."⁷³

The House Committee on Amendments subsequently reported the guarantee in this form: "A well regulated militia, composed of the body of the people, being the best security of free state, the right of the people to keep and bear arms shall not be infringed; (pg.31) but no person religiously scrupulous shall be compelled to bear arms."⁷⁴ The House debated this proposal on August 17 and 20, 1789. Elbridge Gerry clarified that the purpose of the amendment was protection from oppressive government, and thus the government should not be in a position to exclude the people from bearing arms:

This declaration of rights, I take it, is intended to secure the people against the maladministration of the Government; if we could suppose that, in all cases, the rights of the people would be attended to, the occasion for guards of this kind would be removed. Now, I am apprehensive, sir, that this clause would give an opportunity to the people in power to destroy the constitution itself. They can declare who are those religiously scrupulous, and prevent them from bearing arms.

What, sir, is the use of militia? It is to prevent the establishment of a standing army, the bane of liberty. Now, it must be evident, that, under this provision, together with their other powers, Congress could take such measures with respect to a militia, as to make a standing army necessary. Whenever Government mean to invade the rights and liberties of the people, they always attempt to destroy the militia, in order to raise an army upon their ruins. This was actually done by Great Britain at the commencement of the late revolution. They used every means in their power to prevent the establishment of an effective militia to the Eastward. The Assembly of Massachusetts, seeing the rapid progress that administration were making to divest them of their inherent privileges, endeavored to counteract them by the organization of the militia; but they were always defeated by the influence of the Crown.⁷⁵

Representative Gerry's argument was that the federal government should have no authority to categorize any individual as unqualified under the amendment to bear arms. "Now, if we give a discretionary power to exclude those from militia duty who have religious scruples, we may as well make no provisions on this head."⁷⁶ The point was that keeping and bearing arms was a right of "the people," none of whom should thereby be disarmed under any pretense, such as the government determining that they are religiously scrupulous or perhaps that they are not active members of a select militia (e.g., the National Guard).(pg.32)

In reply, Representative Jackson "did not expect that all the people of the United States would turn Quakers or Moravians; consequently, one part would have to defend the other in case of invasion."⁷⁷ The reference to "all the people" indicated again the centrality of the armed populace for defense against foreign attack. After further discussion, Gerry objected to the wording of the first part of the proposed amendment:

⁷³ Federal Gazette, July 2, 1789, at 2, col. 1.

⁷⁴ 1 ANNALS OF CONG. 750 (1789). The committee on amendments made its report on July 28. *Id.* at 672.

⁷⁵ *Id.* at 750.

⁷⁶ *Id.*

⁷⁷ *Id.*

A well regulated militia being the best security of a free State, admitted an idea that a standing army was a secondary one. It ought to read, "a well regulated militia, trained to arms;" in which case it would become the duty of the Government to provide this security, and furnish a greater certainty of its being done.⁷⁸

Gerry's words exhibit again the general sentiment that security rested on a generally—rather than a selectly—armed populace. The lack of a second to his proposal suggests that the congressmen were satisfied that the simple keeping and bearing of arms by the citizens would constitute a sufficiently well regulated militia to secure a free state, and thus there was no need to make it, in Gerry's words, "the duty of the Government to provide this security...."

Further debate on the exemption of religiously scrupulous persons from being compelled to bear arms highlights the sentiment that not only bearing, but also the mere keeping, of arms by all people was considered both a right and a duty to prevent standing armies. The exemption would mean, objected Representative Scott, that "a militia can never be depended upon. This would lead to the violation of another article in the Constitution, which secures to the people the right of keeping arms, and in this case recourse must be had to a standing army."⁷⁹ "What justice can there be in compelling them to bear arms?" queried Representative Boudinot. "Now, by striking out the clause, people may be led to believe that there is an intention in the General Government to compel all its citizens to bear arms."⁸⁰ The proposed amendment was finally agreed to after insertion of the words "in person" at the (pg.33) end of the clause.⁸¹

In the meantime, debate over the proposed amendments raged in the newspapers. The underlying fear against a government monopoly of arms was expressed thusly: "Power should be widely diffused The monopoly of power, is the most dangerous of all monopolies."⁸² The understanding that the keeping and bearing of private arms contributed to a well regulated militia was represented in the following editorial:

A late writer ... on the necessity and importance of maintaining a well regulated militia, makes the following remarks:—A citizen, as a militia man, is to perform duties which are different from the usual transactions of civil society.... [W]e consider the extreme importance of every military duty in time of war, and the necessity of acquiring an habitual exercise of them in time of peace....⁸³

At the same time, what was to become the second amendment was not considered to condition having arms on the needs of the citizens in their militia capacity, but was seen as having originated

⁷⁸ *Id.* at 751.

⁷⁹ *Id.* at 766.

⁸⁰ *Id.* at 767. Actually, the opposite may be inferred by the eventual deletion of this part of the amendment, the purpose of which was to guarantee the individual "right" to keep and bear arms rather than to create a "duty" to do so. Arguably, this deletion was meant to preclude any constitutional power of government to compel any person to bear arms rather than to exempt only the religiously scrupulous.

⁸¹ *Id.* at 767.

⁸² *Political Maxims*, New York Daily Advertiser, Aug. 15, 1789, at 2, col. 1. *See also* Letter from Patrick Henry to Richard Lee (Aug. 28, 1789): "For Rights, without having power and might is but a shadow." PATRICK HENRY, *supra* note 68, at 398.

⁸³ Philadelphia Independent Gazetteer, Aug. 18, 1789, at 3, col. 1.

in part from Samuel Adams' proposal (which contained no militia clause) that Congress could not disarm any peaceable citizens:

It may well be remembered, that the following "amendments" to the new constitution of these United States, were introduced to the convention of this commonwealth by ... SAMUEL ADAMS... [E]very one of the intended alterations but one [i.e., proscription of standing armies] have been already reported by the committee of the House of Representatives, and most probably will be adopted by the federal legislature. In justice therefore for that long tried Republican, and his numerous friends, you gentlemen, are requested to republish his intended alterations, in the same paper, that exhibits to the public, the amendments which the committee have adopted, in order that they may be compared together...

And that the said constitution be never construed to authorize congress ... to prevent the people of the United States, who are peaceable citizens, from keeping their own arms⁸⁴

Although many of the proposed amendments were subjected to criticism, what became the second amendment was apparently (pg.34) never attacked, aside from one editorial which argued that the militia clause was insufficient, but never questioned the right to bear arms clause. After quoting the language of the proposal as it was approved by the House, the well known anti-federalist Centinel opined:

It is remarkable that this article only makes the observation, 'that a well regulated militia, composed of the body of the people, is the best security of a free state;' it does not ordain, or constitutionally provide for, the establishment of such a one. The absolute command vested by other sections in Congress over the militia, are not in the least abridged by this amendment. The militia may still be subjected to martial law..., may still be marched from state to state and made the unwilling instruments of crushing the last efforts of expiring liberty.⁸⁵

This indicates the understanding that the militia clause was merely declaratory and did not protect state rights to maintain militias to any appreciable degree. That anti-federalists of the ink of Centinel never attacked the right to bear arms clause demonstrates that it was considered to recognize a full and complete guarantee of individual rights to have and use private arms. Surely a storm of protest would have ensued had anyone hinted that the right applied only to the much objected-to select militia.

B. *From the Senate to the States: The Adoption of the Second Amendment*

When the Senate came to consider the proposed amendments in early September, 1789, it became evident that while the right of individuals to keep and bear arms would not be questioned, attempts to strengthen recognition of state rights over militias and to proscribe standing armies

⁸⁴ *From the Boston Independent Chronicle*, Philadelphia Independent Gazetteer, Aug. 20, 1789, at 2, col. 2.

⁸⁵ Centinel, Revived, No. xxix, Philadelphia Independent Gazetteer, Sept. 9, 1789, at 2, col. 2.

would fail. Amendments mandating avoidance of standing armies were rejected,⁸⁶ as was a proposal "that each state respectively, shall have the power to provide for organizing, arming and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same."⁸⁷

The form of the amendment adopted by the Senate, and approved by both houses on September 25, 1789, was the same as subsequently became the second article of the Bill of Rights: "A (pg.35) 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." Comparing the House resolve with that of the Senate, the former redundantly mentions "the people" twice—once as militia, again as the entity with the right to keep and bear arms—while the latter more succinctly avoided repetition by deleting the well recognized definition of militia as "the body of the people." The Senate also deleted the phrase that "no person religiously scrupulous shall be compelled to bear arms," perhaps because the amendment depicts the keeping and bearing of arms as an individual "right" for both public and private purposes, and perhaps to preclude any constitutional authority of the government to "compel" individuals without religious scruples to bear arms for any purpose. Finally, the Senate specifically rejected a proposal to add "for the common defense" after "to keep and bear arms,"⁸⁸ thereby precluding any construction that the right was restricted to militia purposes and to common defense against foreign aggression or domestic tyranny.

That the Senate's deletion of the well recognized definition of militia as "the body of the people" implied nothing other than its wish to be concise, but that its rejection of the proposal to limit the amendment's recognition of the right to bear arms "for the common defence" meant to preclude any limitation on the individual right to have arms, e.g., for self-defense or hunting, is evident in the joint recommendation by the Senate and House of the Amendment to the states. "The conventions of a number of the states having, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added,"⁸⁹ was the language of Congress which prefaced the proposed amendments when submitted to the states. In short, Congress modelled the Bill of Rights, including the second amendment's implicit definition of militia as the whole people and explicit guarantee of the right to have arms to "the people," on the (pg.36) proposals submitted by the states, which in turn through their adoption thereof made the articles of amendment a part of the Constitution.

The adoption of the amendments by the states was by no means a foregone conclusion, and the ratification struggle ensued through 1791. Three positions emerged in the controversy: (1) the proposed amendments were adequate, (2) further guarantees were needed, and (3) freemen had no need of a bill of rights. None of the proponents of these respective positions ever called into question that keeping and bearing arms was a basic individual right. The common understanding was that the proposed bill of rights sought to guarantee personal, unalienable rights, but that unenumerated rights

⁸⁶ Senate Journal, Ms. by Sam A. Otis, Virginia State Library, Executive Communications, Box 13 (Sept. 4, 1789) at 1; (Sept. 8, 1789) at 7.

⁸⁷ *Id.* (Sept. 8, 1789) at 7.

⁸⁸ *Id.* (Sept. 9, 1789) at 1. Another alteration by the Senate may have also been significant. In changing the House's version that a militia was "the best security" to the version that a militia was "necessary to the security" of a free state, the Senate may have sought to answer the objections like that made by Representative Gerry in the House: "A well regulated militia being the best security of a free State, admitted an idea that a standing army was a secondary one." 1 ANNALS OF CONG. 751 (1789). It is noteworthy that Richard Henry Lee was a member of the Senate at that time.

⁸⁹ 2 B. SCHWARTZ, *supra* note 52, at 1164.

were also retained by the people.⁹⁰ Patrick Henry, Richard Henry Lee, and others were pleased with the bill of rights as far as it went, but wanted guarantees against standing armies and direct taxes.⁹¹ Since these same prominent anti-federalists were among (pg.37) the most vocal in calling for a guarantee recognizing the individual right to have arms, it is inconceivable that they would not have objected to what became the second amendment had anyone understood it not to protect personal rights.

The view that the rights of freemen were too numerous to enumerate in a bill of rights was coupled with the argument that the ultimate protection of American liberty would be the armed populace rather than a paper bill of rights. An opponent of a bill of rights, Nicholas Collins argued that the American people would be sufficiently armed to overpower an oppressive standing army. "While the people have property, arms in their hands, and only a spark of noble spirit, the most corrupt Congress must be mad to form any project of tyranny."⁹² On the other hand, the pro-amendment view was that both the existence of a bill of rights *and* an armed populace to enforce it would provide complementary safeguards. The following editorial advances this view, and assumes not only that keeping and bearing arms contributes to a well regulated militia, but also that militia exercises in effect demonstrate the peoples strength so that government would not consider infringing on the right to keep and bear arms:

The right of the people to keep and bear arms has been recognized by the General Government; but the best security of that right after all is, the military spirit, that taste for martial exercises, which has always distinguished the free citizens of these States; From various parts of the Continent the most pleasing accounts are published of reviews and

⁹⁰ "The lower house sent up amendments which held out a safeguard to personal liberty in great many instances...." Letter from William Grayson to Patrick Henry (Sept. 29, 1789), PATRICK HENRY, *supra* note 68, at 406. "The whole of that Bill [of Rights] is a declaration of the right of the people at large or *considered as individuals*.... [I]t establishes some rights of the individual as unalienable and which consequently, no majority has a right to deprive them of." (emphasis added). Letter from Albert Gallatin to Alexander Addison (Oct. 7, 1789), A.G. Papers, at 2, Ms. in N.Y. Hist. Soc. "But there are some rights too essential to be delegated—too sacred to be infringed. These each individual reserves to himself; in the free enjoyment of these the whole society engages to protect him.... All these essential and sacred rights, it would be difficult, if not impossible, to recount, but some, in every social compact, it is proper to enumerate, as specimens of many others...." *An Idea of a Constitution*, Independent Gazetteer, Dec. 28, 1789, at 3, col. 3. *See also The Scheme of Amendments*, Independent Gazetteer, March 23, 1789, at 2, col. 1: "The project of muffling the press, which was publicly vindicated in this town [Boston], so far as to compel the writers against the government, to leave their names for publication, cannot be too warmly condemned." Registration of persons for exercise of basic freedoms was considered to be infringement.

⁹¹ Patrick Henry "is pleased with some of the proposed amendments; but still asks for the great desideratum, the destruction of direct taxation." Letter from Edmund Randolph to James Madison (Aug. 18, 1789), in 12 MADISON PAPERS, *supra* note 65, at 345. Jefferson was dissatisfied with the bill of rights but did not object to the arms bearing provision. Letter from Thomas Jefferson to James Madison (Aug. 28, 1789), in 12 MADISON PAPERS, *supra* note 65, at 363-64. The bill of rights was "short of some essentials, as Election interference & Standing Army &c...." Letter from Richard Henry Lee to Charles Lee (Aug. 28, 1789), in 2 Letters of Richard Henry Lee 499 (Ballagh ed. 1914). Most of those in the Virginia House who opposed the adoption of the amendments "are not dissatisfied with the amendments so far as they have gone" but wanted delay to prompt an amendment on direct taxes. Letter from Hardin Burnley to James Madison (Nov. 5, 1789), in 12 MADISON PAPERS, *supra* note 65, at 460. In the Virginia Senate, there was extensive criticism of the proposed free speech guarantee and other amendments as too narrow, but no one questioned the right to bear arms provision. Objections to Articles, VA. SEN. J. 61-65 (Dec. 12, 1789). Virginia forestalled adoption of the bill of rights until the end of 1791. Nor did the Massachusetts General Court, which rejected the bill of rights, object to the arms bearing provision in its verbose Report of the Committee of the General Court on Further Amendments. *See* Report reprinted in MASSACHUSETTS AND THE FIRST TEN AMENDMENTS 25-29 (D. Myers ed. 1936).

⁹² Remarks on the Amendments, Fayetteville Gazette, Oct. 12, 1789, at 2, col. 1.

parades in large and small assemblies of the militia.... Such men form the best barrier to the Liberties of America.⁹³

While many people were thus flexing their muscles by engaging in armed marches to ward off tyranny and secure the right to keep and bear arms, the debate over ratification of the Bill of Rights raged through 1790. Some reiterated that no bill of rights could enumerate the rights of the peaceable citizen, "which are as numerous as sands upon the sea shore...."⁹⁴ President Washington (pg.38) reminded members of the House of Representatives that "a free people ought not only to be armed, but disciplined...."⁹⁵ Still, right to arms provisions were not necessarily associated with the citizen's militia, but were also coupled with different provisions. For instance, a widely published proposed bill of rights for Pennsylvania included a militia clause in a separate article from the following: "That the right of the citizens to bear arms in defence of themselves and the State, and to assemble peaceably together ... shall not be questioned."⁹⁶

During the ratification period the view prevailed that the armed citizenry would prevent tyranny. Theodorick Bland wrote Patrick Henry that "I have founded my hopes to the single object of securing (*in terrorem*) the great and essential rights of freemen from the encroachments of Power—so far as to authorize resistance when they should be either openly attacked or insidiously undermined."⁹⁷ While the proposed amendments continued to be criticized due to lack of a provision on standing armies,⁹⁸ no one questioned the right to bear arms amendment.⁹⁹ Two days before Rhode Island ratified the bill of rights, newspapers in that state republished its declaration of natural rights included in its recent ratification of the Constitution: "That the people have a right to keep and bear arms: That a well-regulated militia, including the body of the people capable of bearing arms, is the proper, natural and safe defense of a free state...."¹⁰⁰

As more and more states adopted the amendments and debate thereon began to dwindle, even proponents of an anti-standing (pg.39) army provision conceded that an armed citizenry, as a well regulated militia, would prevent oppression from that quarter. As "A Framer" argued to "The Yeomanry of Pennsylvania":

Under every government the *dernier* resort of the people, is an appeal to the sword; whether to defend themselves against the open attacks of a foreign enemy, or to check the insidious

⁹³ The Gazette of the United States, Oct. 14, 1789, at 211, col. 2.

⁹⁴ "A bill of rights for freemen appears to be a contradiction in terms.... [I]n a free country, every right of human nature, which are as numerous as sands upon the sea shore, belong to the quiet, peaceable citizen." Federal Gazette, Jan. 5, 1790, at 2, col. 3. "The absurdity of attempting by a bill of rights to secure to freemen what they never parted with, must be self-evident. No enumeration of rights can secure to the people *all* their privileges...." Federal Gazette, Jan. 15, 1790, at 3, col. 3. This article ridiculed a bill of rights as analogous to conveying a house and lot but excepting out of the grant an enumeration of other houses and lots retained by the seller.

⁹⁵ Speech of Jan. 7, 1790, Boston Independent Chronicle, Jan. 14, 1790, at 3, col. ____.

⁹⁶ Providence Gazette & Country Journal, Jan. 30, 1790, at 1, col. ____.

⁹⁷ Letter from Theodorick Bland to Patrick Henry (March 19, 1790). PATRICK HENRY, *supra* note 68, at 417-18.

⁹⁸ "A well regulated militia is the best defence to a free people, a standing army in time of peace are not equal to a well regulated militia." Political Maxims, Independent Gazetteer, July 24, 1790, at 2, col. 1. "Where a standing army is established, the inclinations of the people are but little regarded." Political Maxims, Independent Gazetteer, July 31, 1790, at 2, col. 2.

⁹⁹ *E.g.*, *Summary of the Principal Amendments Proposed to the Constitution*, post May 29, 1790 Ms. College of Wm. & Mary, Tucker-Coleman coll., Box 39b notebooks, Notebook VI, at 212-22.

¹⁰⁰ Providence Gazette and Country Journal, June 5, 1790, at 23.

encroachments of domestic foes. Whenever a people ... entrust the defence of their country to a regular, standing army, composed of mercenaries, the power of that country will remain under the direction of the most wealthy citizens.... [Y]our liberties will be safe as long as you support a well regulated militia.¹⁰¹

CONCLUSION

In recent years it has been suggested that the second amendment protects the "collective" right of states to maintain militias, but not the right of "the people" to keep and bear arms. If anyone entertained this notion in the period in which the Constitution and Bill of Rights were debated and ratified, it remains one of the most closely guarded secrets of the eighteenth century, for no known surviving writing of the 1787-1791 period states that thesis. Instead, "the people" in the second amendment meant the same as it did in the first, fourth, ninth and tenth amendments, i.e., each and every free person. A select militia as the only privileged class entitled to keep and bear arms was considered as execrative to a free society as would be select spokesmen approved by government as the only class entitled to freedom of the press. Nor were those who adopted the Bill of Rights willing to clutter it with details such as non-political justifications for the right (e.g., self-protection and hunting) or a list of what everyone knew to be common arms, such as muskets, scatterguns, pistols and swords. In light of contemporary developments, perhaps the most striking insight made by those who originally opposed the attempt to summarize all the rights of a freeman in a bill of rights was that, no matter how it was worded, artful misconstruction would be employed to limit and destroy the very rights sought to be protected.

¹⁰¹ Independent Gazetteer, Jan. 29, 1791, at 2, col. 3.