

## WHO IS THE MILITIA—THE VIRGINIA RATIFICATION CONVENTION AND THE RIGHT TO BEAR ARMS

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"You are not to inquire how your trade may be increased, nor how you are to become a great and powerful people, but how your liberties can be secured; for liberty ought to be the direct end of your government."<sup>1</sup> With these words Patrick Henry framed the debate in the Virginia Ratification Convention in June of 1788. Henry, whose "Liberty or Death" speech 23 years earlier had sparked Virginia's participation in the Revolution, would muster all his oratorical skill to defeat the proposed Constitution. Eight of the required nine states had already ratified. The fate of the Constitution hung in the balance.

This article will use the Virginia Convention and the Virginia experience as a focal point for exploring the relationship between the right to keep and bear arms and the nature of the militia. It should be pointed out there is little in Virginia historiography that would vary from the Pre-Revolutionary traditions in the other colonies. As the limited jurisprudence of the Supreme Court of the United States has imposed a militia context on the interpretation of the Second Amendment, an understanding of that context and its development to present is essential. This article will further explore, on a limited basis, the militia of the States.

While the substance of debate would vary little from that of other states, Virginia's preeminence dictated its importance. The largest and most populous state in 1788 and with boundaries extending to the Mississippi, Virginia literally split the young nation (pg.2) in half.<sup>2</sup> Without Virginia, any attempt to form a "more perfect union" was doomed to failure. Of most significance was the ideological fervor of the debate, which would provide a "fuller airing" of the issues than any other convention.<sup>3</sup>

The Ratification Convention would assemble one of the greatest collections of luminaries ever gathered in a single place. In addition to Henry, participants included George Mason, John Marshall, George Wythe, James Madison, James Monroe, John Tyler, Edmund Randolph, Benjamin Harrison, Henry Lee and Edmund Pendleton.<sup>4</sup> George Washington, who had presided over the Philadelphia Convention that drafted the proposed constitution, made his opinion on ratification well

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<sup>1</sup> 3 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 44-45 (J. Elliot ed. 1836 hereinafter ELLIOT'S DEBATES).

<sup>2</sup> E. LEE SHEPHARD, RELUCTANT RATIFIERS—VIRGINIA CONSIDERS THE FEDERAL CONSTITUTION 8 (1988).

<sup>3</sup> A.E. DICK HOWARD, THE ROAD FROM RUNNYMEDE—MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 226 (1968).

<sup>4</sup> 2 HUGH BLAIR GRIGSBY, THE HISTORY OF THE VIRGINIA FEDERAL CONVENTION OF 1788 at 363-366 (1969).

known (his nephew, Bushrod Washington, was also a delegate to the convention.)<sup>5</sup> Thomas Jefferson, who was in France, wrote Madison expressing his concerns that the proposed constitution did not contain a Bill of Rights.<sup>6</sup>

The debate would be dominated by Henry and Mason in opposition to the Constitution, the "Anti-Federalists", and Madison and Randolph as its chief proponents, the "Federalists." Henry had refused to attend the Philadelphia Convention as he "smelt a rat." Mason had attended, but refused to sign the Constitution as it did not contain any guarantee of fundamental rights. Madison feared Henry most, saying that "The refusal of Mr. Henry to join in the task of revising the Confederation is ominous."<sup>7</sup> Even George Washington had to acknowledge the tremendous (and from his point of view, frustrating) influence that Henry exerted.<sup>8</sup>(pg.3)

Henry took the lead in a section-by-section argument against the provisions of the Constitution. Historian Forrest McDonald called this "the most dazzling performance of his life." Although ably assisted by Mason and others, Henry was as the "legendary swordsman of the people, single-handedly fending off an entire royal guard [holding] the field for twenty-three days against future presidents, chief justices, cabinet officers, senators, diplomats."<sup>9</sup> This tactic put Madison in a position of responding, and, as a result, he was able to deflect the specific criticisms propounded by Henry.

Concern over the militia was reflected in a number of issues. Under what circumstances could the militia be called into federal service? Would the states retain control over their own militias? Could the militia of one state be called into action in another state? Who would train and equip the militia? What limits would there be on Congress' authority to discipline the militia? Would the states or Congress decide how long citizens would be subject to militia service? What would be the proper relationship of the Commander-in-Chief to the militia?

## HISTORY OF THE MILITIA

Virginia's colonists had brought with them a militia tradition centuries old in England. The "Great Fyrd" of Anglo Saxon England recognized the duty of every member of the community, as early as the 9th century, to be armed for the purpose of common defense. This was "more an abstract ideal than actual military organization...."<sup>10</sup> This tradition also recognized the right of every freeman to be allowed to keep arms suitable to his station in life. The development of this right in English

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<sup>5</sup> Letter from G. Washington to Bushrod Washington (Nov. 10, 1787) *reprinted in* 29 WRITINGS OF WASHINGTON 309 (J.C. Fitzpatrick ed. 1931).

<sup>6</sup> Letter from T. Jefferson to J. Madison (Dec. 20, 1787) *reprinted in* THOMAS JEFFERSON WRITINGS 915-916 (M. Peterson ed. 1984).

<sup>7</sup> Letter from J. Madison to Edmund Randolph (Mar. 25, 1787) *reprinted in* 9 THE PAPERS OF JAMES MADISON 331 (R. Rutland ed. 1975).

<sup>8</sup> The Accts. from Richmond are indeed very impropitious to foederal measures. The whole proceedings of the Assembly, it is said may be summed up on one word, to wit, that the Edicts of the Mr. H[enry] are enregistered with less opposition by the majority of that body, than those of the Grand Monarchy are in the Parliaments of France. He has only to say let this be law, and it is law.  
Letter from G. Washington to J. Madison (Nov. 17, 1788), *reprinted in* 30 WRITINGS OF WASHINGTON 131 (J.C. Fitzpatrick ed. 1931).

<sup>9</sup> F. MCDONALD, E. PLURIBUS UNUM—THE FORMATION OF THE AMERICAN REPUBLIC 1776-1790 at 356 (1979).

<sup>10</sup> W.L. SHEA, THE VIRGINIA MILITIA IN THE SEVENTEENTH CENTURY 1 (1983).

history is particularly significant, in that England never underwent a foreign invasion after 1066.<sup>11</sup> (pg.4)

Whether by tradition or not, the participation by Virginia's early settlers in the armed defense was a matter of absolute necessity. Actual conflicts with the Indians were frequent and, in the case of the Indian massacre of 1622, nearly fatal to English settlement. This incident prompted the House of Burgesses to pass a law requiring:

That no man go or send abroad without a sufficient partie will [sic] armed.  
That men go not to worke in the ground without their arms (and a centinell upon them).<sup>12</sup>

Later, this requirement was made specific in:

That every man able to beare arms have in his house a fixt gunn two pounds of powder and eight pounds of shott.

Failure to make such provision subjected the offender to a fine of "Ffiftie pounds of tobacco", to be used for buying a "common stock of ammunition."<sup>13</sup> The threat of foreign invasion, be it by the Spanish, Dutch, or the French, also was a constant concern through most of the colonial period.

Internal conflict within 17th century England demonstrated the necessity of an armed citizenry as a defense to tyranny, a lesson not lost on Virginians. Virginia served as a refuge for the Cavaliers who fled England after Oliver Cromwell. Following the restoration, Charles II attempted to forbid the owning of arms by his political opponents. He directed his supporters that "disaffected persons [be] watched and not allowed to assemble, and their arms seized."<sup>14</sup> Further, he had an act passed allowing officials to seize arms of all persons deemed "dangerous to the peace of the kingdom."<sup>15</sup> James II attempted to build a standing army made up of Catholics.<sup>16</sup>

In light of these abuses, James II and the Stuart dynasty came to an end in the Glorious Revolution of 1688. The ascension of (pg.5) William and Mary to the English throne was conditioned upon the adoption of the English Bill of Rights, which included the following:

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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<sup>11</sup> For a Concise history, *see generally* Hays, *The Right to Bear Arms, A Study in Judicial Misinterpretation*, WM. & MARY L. REV. 381 (1960); *see also* U.S. Sen. 97th Cong. 2nd Sess., THE RIGHT TO KEEP AND BEAR ARMS—REPORT OF THE SUBCOMMITTEE ON THE CONSTITUTION OF THE COMMITTEE ON THE JUDICIARY (1982) [hereinafter REPORT OF THE SUBCOMMITTEE].

<sup>12</sup> 1 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619 at 127 (W. Hening ed. 1823 & photo. reprint 1969) [hereinafter STATUTES AT LARGE].

<sup>13</sup> *See id.* at 525.

<sup>14</sup> As cited in REPORT OF THE SUBCOMMITTEE 2 n.18 (Feb. 1982).

<sup>15</sup> 14 Car. II c. 3 (1662).

<sup>16</sup> 1 A.E. HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 268 (1974). *See also* J. MALCOLM, DISARMED: THE LOSS OF THE RIGHT TO BEAR ARMS IN RESTORATION ENGLAND (1980).

That the Subjects which are Protestants, may have Arms for their Defense suitable to their condition, and as are allowed by Law.<sup>17</sup>

When Virginians spoke of their rights as Englishmen, it is these rights they had in mind.

By the 18th century, the militia was an integral part of Virginia society. Militia musters, along with church and court days, were typically the only regular gatherings of a community. Drinking and tumultuous behavior, as well as military drill, was associated with these musters. William Byrd described the close of a militia muster:

About 3 o'clock we went to Colonel Randolph's house and had a dinner and several of the officers dined with us and my hogshead of punch entertained all the people and made them drunk and fighting all the evening....<sup>18</sup>

An argument could be made that the desire to have the militia "well-regulated" was aimed at riotous conduct as much as military performance.<sup>19</sup>

The pre-revolutionary militia reflected the social order, with gentlemen assuming their proper role as officers. As in England, full participation in the militia was denied to those who did not enjoy full privileges of citizenship.

That all such free mullatoes, negros and Indians as are or shall be inlisted, as aforesaid, shall appear without arms, and may be employed as drummers, trumpeters, or pioneers, or in such other servile labor as they shall be directed to perform.<sup>20</sup> (pg.6)

In this context, George Mason's comments on gentlemen standing in the ranks as common soldiers suggests the egalitarian spirit of the Revolution.<sup>21</sup>

At the approach of the Revolution, Henry would push for action. Asking rhetorically when the colonists would be stronger, "Will it be when we are totally disarmed, and when a British Guard shall be stationed in every house?" He continued in saying that "Three millions of people, armed in the holy cause of liberty ... are invincible by any force our enemy can send against us."<sup>22</sup> Some three weeks after Henry spoke those words, General Gage would attempt to seize arms and munitions at Lexington, Massachusetts, resulting in the "shot heard round the world."

The following day Virginia's Royal Governor, Lord Dunmore, had the gunpowder removed from the public magazine in Williamsburg. Henry, at the head of militia troops, successfully forced compensation for the stolen gunpowder.<sup>23</sup> Mr. Jefferson described the incident as follows:

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<sup>17</sup> S. HALBROOK, *THAT EVERY MAN BE ARMED* 45 (1984). *See also* D. HARDY, *ORIGINS AND DEVELOPMENT OF THE SECOND AMENDMENT* (1986).

<sup>18</sup> L. WRIGHT, *THE SECRET DIARY OF WILLIAM BYRD OF WESTOVER* 233-234 (1941).

<sup>19</sup> For a magnificent study of this society, *see* ISSAC RHYS, *THE TRANSFORMATION OF VIRGINIA 1740-1790* (1982), winner of the Pulitzer Prize in History.

<sup>20</sup> 7 *THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619* at 95 (W. Hening ed. 1820 & photo. reprint 1969).

<sup>21</sup> 1 *THE PAPERS OF GEORGE* 229 (R. Rutland ed. 1970).

<sup>22</sup> WILLIAM W. HENRY, 1 *PATRICK HENRY—LIFE, CORRESPONDENCE AND SPEECHES* 265 (1891). It should be noted that three million represented the entire population of the American colonies.

<sup>23</sup> ROBERT D. MEADE, *PATRICK HENRY—PRACTICAL REVOLUTIONARY* ch. 4 (1969).

Our first overt act of war was Mr. Henry's embodying a force of militia from several counties, regularly armed and organized marching them in military array, and making reprisal....<sup>24</sup>

While the "gunpowder episode" was not as dramatic as activities in Massachusetts, it demonstrated the utility of the militia and Virginia's resolve in the cause of independence.

### THE CONVENTION DEBATE

The debate over the militia reflected republican concerns over tyranny inherent in standing armies. Having resorted to arms to gain independence, there was little doubt of the value of an armed populace. Henry, in asking whether the state or federal governments would have the responsibility for arming the militia, stated simply that "The great object is, that every man be armed... Everyone who is able may have a gun."<sup>25</sup> It would have never occurred (pg.7) to Henry and the others that the militia was anything other than the body of the people.

To the extent that membership in the militia was addressed, it was by George Mason. Mason had long recognized the "Militia... is the natural Strength and only safe & stable security of a free Government."<sup>26</sup> He posed the question directly:

"I ask, Who are the militia? They consist now of the whole people, except a few public officers. But I cannot say who will be the militia of the future day. If that paper on the table gets no alteration, the militia of the future day may not consist of all classes, high and low, and rich and poor; but they may be confined to the lower and middle classes of people, granting exclusion to the higher classes of people.... Under the present government, all ranks of people are subject to militia duty."<sup>27</sup>

While both English and Virginia tradition recognized the use of highly trained militia units, "trainbands", Mason's concern was over a "select" militia which would exclude part of the people.<sup>28</sup>

This is not to suggest that recognition of the right to bear arms was solely an anti-federalist position. Madison had already written, Federalist No. 46, of "the advantage of being armed, which Americans possess over the people of almost every other nation." His description of the militia showed that he shared the same republican principles of the anti-federalists:

Citizens with their arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence.

He finally noted that in the "several kingdoms of Europe ... governments are afraid to trust the people with arms."<sup>29</sup>

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<sup>24</sup> JEFFERSON WRITINGS, *supra* note 6, at 1419.

<sup>25</sup> ELLIOT'S DEBATES, *supra* note 1, at 386.

<sup>26</sup> R. Rutland, *supra* note 21, at 215.

<sup>27</sup> ELLIOT'S DEBATES, *supra* note 1, at 425-426.

<sup>28</sup> W. SHEA, *supra* note 10, at 74-76.

<sup>29</sup> THE FEDERALIST 321-322 (J. Cooke ed. 1961).

Federalist Zachariah Johnston, evidencing concern over possible discrimination because of religious preference, notes in the convention debate that, "The people are not to be disarmed of their weapons. They are left in full possession of them."<sup>30</sup>

On the issue in main, Mason and Henry would be undone by (pg.8) their success. The one unavoidable objection propounded by Henry was the absence in the Constitution of a declaration of rights. Madison, while arguing against the necessity of such a declaration due to the limitations on federal power, recognized that Henry could defeat ratification on that basis. Madison ultimately agreed to seek a bill of rights, and the convention ratified by a vote of 89-79. Mason and Henry would subsequently prevail on their single greatest concern.<sup>31</sup>

## THE SECOND AMENDMENT

When the new Federal Congress met, five states would submit proposals for a bill of rights.<sup>32</sup> Virginia submitted Mason's Declaration of Rights, adopted by Virginia in 1776, which had served as a model for other states.<sup>33</sup> Of those states, three had versions dealing with the militia and the right to bear arms.<sup>34</sup> North Carolina and Rhode Island did not initially ratify because of the absence of a bill of rights. In the proposals submitted subsequently, North Carolina copied Virginia's proposal for a right to bear arms amendment,<sup>35</sup> and Rhode Island copied New York's.<sup>36</sup> Right to bear arms provisions also appeared in minority reports in Pennsylvania and (pg.9) Massachusetts.<sup>37</sup>

Of some eighty substantive amendments proposed, twelve were submitted to the states for consideration. Madison's proposal for a provision guaranteeing the right to bear arms was changed in Congress.<sup>38</sup> While by no means unique in this regard, the language change has been viewed as not

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<sup>30</sup> ELLIOT'S DEBATES, *supra* note 1, at 646.

<sup>31</sup> See THE LEGACY OF GEORGE MASON 20 (J.F. Pacheco ed. 1983).

<sup>32</sup> Va., Mass., S.C., N.H., N.Y. See 4 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 1789-1791 LEGISLATIVE HISTORIES AMENDMENTS TO THE CONSTITUTION THROUGH FOREIGN OFFICERS BILL (C.B. Bickford and H.E. Veit eds. 1986) [hereinafter DOCUMENTARY HISTORY].

<sup>33</sup> S.P. HALBROOK, A RIGHT TO BEAR ARMS 51 (1989).

<sup>34</sup> Virginia: 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, as far as the circumstances and protection of the Community will admit; and that in all cases the military should be under strict subordination to and governed by the Civil authority.

New Hampshire: Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion.

New York: 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 defence of a free State.

That the Militia should not be subject to Martial Law, except in time of War, Rebellion or Insurrection.

That standing Armies in time of Peace are dangerous to Liberty, and ought not to be kept up, except in Cases of necessity; and that all times, the Military should be under strict Subordination to the civil Power.

DOCUMENTARY HISTORY, *supra* note 32 at 15-20.

<sup>35</sup> 4 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 244 (J. Elliot ed. 1836).

<sup>36</sup> 1 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 335 (J. Elliot ed. 1836).

<sup>37</sup> HARDY, ORIGINS AND DEVELOPMENT OF THE SECOND AMENDMENT 62-69 (1986).

<sup>38</sup> Version as introduced by Madison: 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.

House version: A well regulated militia, composed of the body of the People, being the best security of a free state, the right of the People to keep and bear arms, shall not be infringed, but no person religiously scrupulous

particularly significant.<sup>39</sup> So fundamental was this right in the view of the founders that it generated very little discussion in its subsequent adoption.<sup>40</sup> No state rejected the adoption of the Second Amendment.

In the treatment of the Second Amendment, the Supreme Court of the United States has shed remarkably little light. Only the Third Amendment has generated less interest, and the likelihood of quartering troops as a legal issue is certainly not as great as one associated with guns. The current controversy centers around the fact that the Second Amendment has never been a "marvel of clarity."<sup>41</sup> Indeed, both sides of the gun issue have pointed to Supreme Court cases as support for their positions. Three cases were decided in the last century and one in this century.

The case of *United States v. Cruikshank*<sup>42</sup> involved two men "of African descent and persons of color" who had their weapons confiscated by more than a hundred Klansmen in Louisiana. At (pg.10) contest were underlying conspiracy charges, where federal prosecutors contended that the Second Amendment protected the right to keep and bear arms and could not be infringed by the state. The court rejected this argument, contending that citizens have "to look for their protection against any violation by their fellow-citizens: from the state, rather than the national, government."

In *Presser v. Illinois*,<sup>43</sup> the defendant led a parade of some 400 armed men through Chicago. This mini-army had as its purpose the intimidation of certain immigrant groups. Charged with violating the military code of Illinois and parading without a permit, Presser asserted Second Amendment rights. Here, as in *Cruikshank* the court held that the amendment was a limitation only on the authority of Congress and not the States.

The court in *Presser* did hold that a state could not disarm its citizens, because these citizens were also a part of the federal militia:

It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States; and, in view of the prerogative of the General Government, as well as of its general powers, the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the General Government.<sup>44</sup>

In accord with the preceding cases is *Miller v. Texas*,<sup>45</sup> where the court once again did not extend the protection of the Second Amendment to state action.

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of bearing arms, shall be compelled to render military service in person.

Senate version: 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.

DOCUMENTARY HISTORY, *supra* note 32, at 10, 28, 46.

<sup>39</sup> A.E. DICK HOWARD, *supra* note 16, at 272.

<sup>40</sup> L.D. Cress, *A Well-Regulated Militia: The Origins and Meaning of the Second Amendment* in THE BILL OF RIGHTS—A LIVELY HERITAGE 66 (J. Kukla, ed. 1987).

<sup>41</sup> Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 644 (1989).

<sup>42</sup> 92 U.S. 542 (1876).

<sup>43</sup> 116 U.S. 252 (1886).

<sup>44</sup> *Id.* at 265. This decision holds that banning armed marches does not infringe on the right to bear arms, as military organizations are properly regulable by the state.

<sup>45</sup> 153 U.S. 535 (1894).

The case decided in this century, *United States v. Miller*,<sup>46</sup> involved a demurrer challenging the enforceability of the National Firearms Act of 1934. Specifically involved was the question of whether Congress could prohibit, absent registration, the possession of a short-barreled shotgun. The court ruled that:

In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen (pg.11) inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we can not say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.<sup>47</sup>

Presumably, the court would have ruled differently had the shotgun in question had a demonstrated military use. Notably, only one side of the case was presented.

The legislative history of the National Firearms Act was not before the court in *Miller*. In the hearings before the Congress, concern was expressed over the impact of the Second Amendment. Congressman Lewis commented:

The theory of the individual rights that is involved ... in the Constitution, for example, about the right to carry firearms ... I was curious to know how we escaped that provision of the Constitution.

Attorney General Cummings responded:

Oh, we do not attempt to escape it. We are dealing with another power, namely, the power of taxation, and of regulation....<sup>48</sup>

Absent a vigorous adversarial proceeding, the value of this case is suspect.<sup>49</sup>

The *Miller* court explores the history of the militia without making a definitive statement as to its makeup. At one point, the court refers to the assize of arms [implying] the general obligation of all male inhabitants to possess arms; and further that men called for militia service "were expected to appear bearing arms supplied by themselves...."<sup>50</sup> While the court incorrectly reads in a common defense purpose, there is nothing to suggest that the militia is anything other than "the whole people."

To the extent that the Second Amendment is judged in light (pg.12) of the militia, the composition of that militia has never been squarely joined. Most of the questions regarding the militia have been reminiscent of the questions posed in the Virginia Convention. The relation of federal and state authority remains a source of conflict.

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<sup>46</sup> 307 U.S. 174 (1939).

<sup>47</sup> *Id.* at 178.

<sup>48</sup> Hearings Before the Committee on Ways and Means—House of Representatives Seventy Third Congress Second Session on H.R. 9066 at 18, 19 (1934).

<sup>49</sup> Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 No. 1 FORDHAM URBAN L.J. 31 (1976).

<sup>50</sup> 307 U.S. at 179.

## Constitutional Militia Issues

This conflict was written into the Constitution. In Article I, Section 8, Congress was given the authority:

Clause 12—To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; [the "Army Clause"]

Clauses 15 and 16—To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions ... 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; [both clauses referred to collectively as the "Militia Clause"]

These clauses represent a compromise between those who wanted a regular military force and those who feared a standing army. By limiting the appropriations to two years and reserving certain authority to the States, the objections to a standing army were alleviated.

The War of 1812 was the nation's next major conflict, and immediately demonstrated the problems with squaring the army and militia clauses. The Governor of Massachusetts, Caleb Strong, did not honor President Monroe's calling up of the militia, as did the Governor of Connecticut. The actions of Governor Strong were upheld by his Supreme Judicial Court, on the grounds that the President was Commander-in-Chief of the Army only and that the President had no power to declare if an emergency existed.<sup>51</sup> This act of nullification by New England governors was overturned by the Supreme Court of the United States.<sup>52</sup>

Following the War between the States, the United States was to become a world power. Considering the problems of governors (pg.13) who refused to commit militia troops outside a state to defend the nation within its boundaries, larger questions arose with regard to troops going outside the United States. The Spanish-American War focused on this problem, as one militia unit refused to go to Cuba because this was not the repelling of an invasion.<sup>53</sup>

These circumstances, and the increasing complexity of modern warfare, prompted Secretary of War Elihu Root to see legislation passed as the Dick Act.<sup>54</sup> The Act renamed the organized militias of the States as the "National Guard", providing federal funds and regular army officers for training conditioned on meeting standards for training and organization. The National Defense Act of 1916 strengthened the 1903 Act, requiring members of the National Guard to take an oath to the United States as well as to their states, and permitting their drafting into federal service when troops in excess of regular forces were needed.<sup>55</sup>

The Selective Draft Law cases<sup>56</sup> would test the draft aspects of the National Defense Act of 1916 upon the United States entry into World War I. The defendants contended that the Constitution had not granted Congress the authority to compel military service. The court extensively reviewed

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<sup>51</sup> 8 Mass. 549 (1812)—Supplemental Opinion to the Governor.

<sup>52</sup> *Martin v. Mott* 25 U.S. (12 Wheat) 19 (1827).

<sup>53</sup> Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181 (1940).

<sup>54</sup> Dick Act, ch. 196, 32 Stat. 775 (1903).

<sup>55</sup> Act of June 3, 1916, ch. 134, 39 Stat. 166.

<sup>56</sup> *Arver v. United States*, 245 U.S. 366 (1917).

English and colonial history demonstrating that service in the militia could be compelled. In reading the army clause in light of congressional authority to declare war, the court held:

There was left therefore under the sway of the States undelegated the control of the militia to the extent that such control was not taken by the exercise by Congress of its power to raise armies.

The court found state authority over the militia and congressional authority to raise armies coexistent.

In a case decided the next year,<sup>57</sup> the petitioner sought release from compulsory military duty on the grounds that Congress was limited to the characterization of service in the militia clause. As military service in a foreign country did not constitute the repelling of an invasion, it was beyond congressional authority. Here, as (pg.14) in the Selective Service Draft Law cases, the court upheld congressional authority under the army clause and the power to declare war. The army clause was not "qualified or restricted" by the militia clause.

The two acts passed prior to World War I had brought the National Guard more into line with the regular forces and had permitted the drafting of individual guardsmen. The National Guard essentially remained under state control and guard units could not be called up *in toto*. Accordingly, unit effectiveness through coordinated training was lost by this inability to call up cohesive organizations.

To remedy this problem, Congress passed the National Defense Act Amendments of 1933.<sup>58</sup> This Act formally created the "National Guard of the United States" which "shall be a reserve component of the Army of the United States", bringing it under the auspices of the army clause. The Act creates a dual enlistment, wherein the individual enlisted in both the National Guard (the organized militia) and the National Guard of the United States (a reserve component). The clear purpose of the Act was to allow Congress to call up the guard, in intact units, in the event of national emergency.

Following World War II, Congress once again moved to bring about uniformity in training among all branches of the armed forces. This created the now familiar fifteen day "summer camp" period. For reasons not entirely clear, the sections dealing with involuntary orders for fifteen days (or longer on a voluntary basis) contains language to the effect that units or members:

Of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor.<sup>59</sup>

Arguably, this language would eliminate any objections under the training provision of the militia clause.<sup>60</sup>

In 1986, Governor Joseph Brennan of Maine refused to permit members of the Maine National Guard to attend training in Honduras. He simply withheld his consent as required under 10 U.S.C. (pg.15) § 672(b). When several other governors indicated similar action, a Senate Committee

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<sup>57</sup> *Cox v. Wood*, 247 U.S. 3 (1918).

<sup>58</sup> Act of June 15, 1933, ch. 87, 48 Stat. 153.

<sup>59</sup> 10 U.S.C. §§ 672(b), 672(d).

<sup>60</sup> Kester, *State Governors and the Federal National Guard*, 2 HARV. J.L. & PUB. POL'Y 177 (1988).

began to look in to possible revisions to 10 U.S.C. § 672. The Senate did not act, but Representative "Sonny" Montgomery of Mississippi managed to add an amendment to the Defense Authorization Act of 1987. The "Montgomery Amendment" provided that a governor could not withhold consent because of objections to location, purpose or scheduling of training missions.<sup>61</sup> This amendment was codified as 10 U.S.C. 672(f).

In an action reminiscent of Caleb Strong, Massachusetts Governor Michael Dukakis subsequently sought to prevent certain members of the Massachusetts National Guard from being sent to Central America for training. Minnesota Governor Rudy Perpich acted in like manner. Citing the retention by the States of authority to train the militia in the Militia Clause, both governors filed suit to contest the constitutionality of the Montgomery Amendment.

### The Militia in Statute

Congress had first established a federal militia in 1792. This act required every "free able-bodied white male citizen" between the ages of 18 and 45 to "provide himself with a good musket or firelock...."<sup>62</sup> Even into this century commissioned officers were required to be equipped with "sword or hanger" and a "spontoon".

The federal statutory scheme controlling the Dukakis and Perpich cases did not significantly vary from that of 1792, except that militia equipment was not spelled out with such specificity (assuming that "spontoons" were available anyway). "[A]ll able-bodied males" between 17 and 45 years who are (or intend to become) citizens, and female officers of the National Guard, are members of the militia.<sup>63</sup> The statute created two classes of militia:

- (1) The organized militia, which consists of the National Guard and the Naval Militia; and
- (2) The unorganized militia, which consists of the members of the militia who are not members of the National Guard or the Naval Militia.<sup>64</sup><sub>(pg.16)</sub>

Among the limited exemptions to militia duty are members of the armed forces on active duty.<sup>65</sup>

Under the "total force" concept currently utilized by the Department of Defense, the wartime structure of active units is substantially augmented by the reserve components.<sup>66</sup> The Army National Guard provides forty-six percent of the combat units and twenty-eight percent of support units for the entire army.<sup>67</sup> The dual enlistment of the National Guard has allowed governors to retain some

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<sup>61</sup> Act of Nov. 14, 1986, Pub. L. No. 99-661, § 522, 100 Stat. 3816, 3871 (1986).

<sup>62</sup> Act of May 8, 1792, 1 Stat. 271.

<sup>63</sup> 10 U.S.C. § 311 (a) (1983).

<sup>64</sup> 10 U.S.C. § 311 (b) (1983).

<sup>65</sup> 10 U.S.C. § 312 (a) (3) (1983).

<sup>66</sup> H.R. Rep. No. 107, 98th Cong., 1st Sess., 202 (1983), *reprinted in* 1076 U.S. Code Cong. & Admin. News 1034.

<sup>67</sup> *Hearing of Federal Authority over National Guard Training Before the Subcommittee on Manpower and Personnel of the Senate Committee on Armed Service*, 99th Cong., 2nd Sess. (1986).

control; over the organized National Guard for natural disasters or civil disorders exceeding normal police capacity.<sup>68</sup>

All states, in either constitutions or statutes or both, have provisions dealing with the militia.<sup>69</sup> These provisions may or may not (pg.17) specify any particular organization for the

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<sup>68</sup> An interesting use of the National Guard by a state involves the extended declaration of martial law in Phenix City, Alabama in the mid 1950's. See E. STRICKLAND & G. WORTSMAN, PHENIX CITY (1955).

<sup>69</sup> Statutes  
ALA. Code § 31-2-2 (1989)  
ALASKA STAT. § 2605.010 (1986)  
ARIZ. REV. STAT. ANN. § 26-121 (1976)  
ARK. STAT. ANN. § 12-60-102 et. seq. (1987)  
CAL. MIL. & VET. CODE § § 121-122;  
CONN. GEN. STAT. ANN. § 27-1, 27-2 (West 1975)  
DEL. CODE ANN. tit. 20, § 301 (1985)  
D.C. CODE ANN. § 39-102 (1986)  
FLA. STAT. ANN. § 250.02 (West 1975)  
GA. CODE ANN. § 86-101 et. seq. (Harrison 1935 & Supp. 1989)  
HAW. REV. STAT. § 121-1 (1985)  
IDAHO CODE § 46-102 (1977)  
ILL. ANN. STAT. ch. 129, para. 220.001 et. seq. (Smith-Hurd 1953)  
IND. CODE ANN. § 10-3-1-1-et. seq. (Burns 1988)  
KAN. STAT. ANN. § 48-101 (1983)  
KY. REV. STAT. ANN. § 37-170 (1985)  
LA. REV. STAT. ANN. § 29:3 (West 1989)  
ME. REV. STAT. ANN. tit. 37-B § 222 (1989)  
MD. ANN. CODE art. 65, § 1 (1957)  
MASS. GEN. LAWS ANN. ch. 33, § 2 (West 1985)  
MICH. COMP. LAWS ANN. § 32.509, 32.555 (West 1985)  
MINN. STAT. ANN. § 190:06 (West 1962 & Supp. 1990)  
MISS. CODE ANN. § 33-5-1 (1972)  
MO. ANN. STAT. § 41.050 (Vernon 1990)  
MONT. CODE ANN. § 10-1-101 et. seq.(1989)  
N.C. GEN. STAT. § 127A-1 (1986)  
N.D. CENT. CODE § 37-02-01 (1980)  
NEB. REV. STAT. § 55-106 (1988)  
NEV. REV. STAT. § 412.026 (1987)  
N.H. REV. STAT. ANN. § 110-B:1 (Supp 1989)  
N.J. STAT. ANN. § 38A:1-1 (West Supp. 1989)  
N.M. STAT. ANN. § 20-2-2 (1989)  
N.Y. MILITARY LAW § et. seq. (McKinney 1953 & Supp. 1990)  
OHIO REV. CODE ANN. § 5923.01 (Anderson 1977 & Supp. 1990)  
OKLA. STAT. ANN. tit. 44 § 41 (West Supp. 1990)  
OR. REV. STAT. § 396.105 (1989)  
51 PA. CONS. STAT. § 301 (1976)  
R.I. GEN. LAWS § 30-1-2 (1982)  
S.C. CODE ANN. § 25-1-60 (Law Co-op 1989)  
S.D. CODIFIED LAWS ANN. § 33-2-2 (1986)  
TENN. CODE ANN. § 58-1-104 (1989)  
TEX. GOV'T. CODE ANN. § 431.071 (1989)  
UTAH CODE ANN. § 39-1-1 (1988 & Supp. 1989)  
VA. CODE ANN. § 44-1 (1986 & Supp. 1989)  
WASH. REV. CODE ANN. § 38.04.030 (1964 & Supp. 1990)  
WIS. STAT. ANN. § 21.01 (West 1986)  
WYO. STAT. § 19-2-102 (1989)  
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militia. Instances of calling up the unorganized militia are rare. Governor William Munford Tuck of Virginia used this authority for calling up the unorganized militia to break a strike in 1946 by employees of Virginia Electric and Power Company.<sup>70</sup> A subsequent strike threat by railroad workers brought suggestions that President Truman act as had Governor Tuck.<sup>71</sup>

Reminiscent of state defense forces during World War II, a number of states have established organized militia units.<sup>72</sup> This is (pg.18) a recognition of the National Guard's primary mission as a component of the armed forces, and that in event of war (assuming a foreign conflict) the Guard will be unavailable to provide for defense or security needs of the State. In addition, some states maintain militia units which serve special purposes.<sup>73</sup>

The foregoing suggests characteristics of a standing army, to include a select militia, as follows:

1. Consists of a distinct and select group, full or part time.
2. It is a permanent military establishment.
3. The federal government provides the arms.
4. The federal government owns the arms.
5. The arms are secured in armories and are subject to federal recall.
6. The arms are borne only in professional military training and service.
7. Its function is war.

By way of comparison, the characteristics of the militia are:

1. Consists of "the people," i.e., all able-bodied persons capable of bearing arms.
2. Its members are civilians primarily.

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ALA. CONST. art. XII § 1; ARIZ. CONST. art. XVI § 1; ARK. CONST. art. XI § 1; CAL. CONST. art. VIII § 1; COLO. CONST. art. XVII § 1; FLA. CONST. art. X § 2; GA. CONST. art. III § 11; IDAHO CONST. art. XIV § 1; ILL. CONST. art. XII § 1; IND. CONST. art. XII § 1; IOWA CONST. art. VI § 1; KAN. CONST. art. VIII § 1; ME. CONST. art. VII § 4; MICH. CONST. arts. III & IV; MINN. CONST. art. XIII § 9; MISS. CONST. art. IX § 214; MO. CONST. art. III § 46; MONT. CONST. art. VI § 13; NEB. CONST. art. XIV § 1; NEV. CONST. art. XII § 1; N.H. CONST. art. XXIV; N.J. CONST. art. V § 3; N.M. CONST. art. XVIII § 1; N.Y. CONST. art. XII § 1; N.D. CONST. art. XI § 16; OHIO CONST. art. IX § 1; OKLA. CONST. art. V § 40; OR. CONST. art. X § 1; S.C. CONST. art. XIII § 1; S.D. CONST. art. XV § 1; TENN. CONST. art. IV § 1; TEX. CONST. art. 16-46; UTAH CONST. art. XV § 1; VT. CONST. Ch. 2 § 59; VA. CONST. art. I § 13; WASH. CONST. art. X § 1; WIS. CONST. art. IV § 29; WYO. CONST. art. XVII § 1.

<sup>70</sup> W.B. CRAWLEY, *BILL TUCK—A POLITICAL LIFE IN HARRY BYRD'S VIRGINIA*, Ch. 4 (1978).

<sup>71</sup> *Id.* at 108.

<sup>72</sup> Alabama, Alaska, California, Georgia, Indiana, Louisiana, Maryland, Massachusetts, Mississippi, Montana, Nevada, New Mexico, New York, Ohio, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia Washington. Also Puerto Rico and District of Columbia. From list of "Active State Defense Forces" provided the author by the National Guard Bureau in letter of Jan. 24, 1990.

<sup>73</sup> For example, faculty members of the Virginia Military Institute and the South Carolina Military College (Citadel) are commissioned in the Virginia and South Carolina unorganized militias.

3. They provide their own arms.
4. They privately own these arms.
5. They keep these arms in their homes.
6. Their keeping and bearing of arms is not limited to actual militia service.
7. Its federal function is to execute the laws, suppress insurrections, and repel invasions.<sup>74</sup> (pg.19)

State defense forces generally fit the characteristics of militia, having the "trainbands" as an historical analogy.

### *DUKAKIS AND PERPICH*

The facts in *Dukakis v. Department of Defense* were not at issue.<sup>75</sup> The department of Defense, through the National Guard Bureau, had determined to send the 65th Public Affairs Detachment, Massachusetts Army National Guard to Central America for training. Governor Dukakis contended that the Montgomery Amendment was an unconstitutional usurpation of the State's authority to train the militia. As distinguished from the Selective Service Draft law cases, this matter involved commitment overseas for training purposes only.

The court first noted that the dual enlistment created both state and federal authority over the National Guard. The ordering of the National Guard into active duty for training under federal auspices did not destroy its use as the organized militia, but was a function of its dichotomous nature. In ruling that the reservation to the States of the power to train in the militia clause "does not apply to the circumstances presented," it would be difficult to imagine any circumstance where federal authority over the National Guard would be inferior to that of the States.<sup>76</sup>

Mr. Madison had, in the convention debate, suggested this distinction between the Army and Militia purposes:

The state governments are to govern the militia when not called forth for general national purposes; and Congress is to govern such part only as may be in the actual service of the Union. Nothing can be more certain and positive than this.<sup>77</sup>

Thus he described the careful compromise reached in Philadelphia.

Governor Perpich had concurred with Governor Dukakis that the ordering of the Minnesota National Guard to Honduras for training did not serve a "general national purpose" sufficient to overcome the Militia Clause. In challenging the Montgomery (pg.20) Amendment, he lodged objections similar to

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<sup>74</sup> Brief of Amicus Curiae of the Firearms Civil Rights Legal Defense Fund filed before the Eighth Circuit in *Perpich v. Department of Defense*, 880 F.2d 11 (8th Cir. 1989), cert. granted 110 S.Ct. 715 (1990).

<sup>75</sup> 686 F. Supp. 30 (D. Mass. 1988). The First Circuit adopted the District Court opinion in affirming the judgment. 859 F.2d 1066 (First Circuit, 1988), cert. denied 109 S. Ct. 1743 (1989).

<sup>76</sup> 686 F. Supp. at 38.

<sup>77</sup> ELLIOT'S DEBATES, *supra* note 1 at 424.

those of Governor Dukakis in *Perpich v. Department of Defense*.<sup>78</sup> The district court held that the dual enlistment allowed Congress to exercise authority over the training of the National Guard without the Governor's approval.

A divided panel of the Eighth Circuit overruled the district court by holding the Montgomery Amendment unconstitutional absent the declaration of a national emergency.<sup>79</sup> On rehearing, *en banc*, the court rejected the panel determination and upheld the district court.<sup>80</sup> The majority opinion and a vigorous dissent clearly joined the issue over the meaning of the militia clause when applied to overseas training of the National Guard of the United States.

The Supreme Court of the United States will hear *Perpich* during this term.<sup>81</sup> A review of *Dukakis* and *Perpich* would indicate the prominence of the National Emergency question as a basis for the Supreme Court taking the *Perpich* case. Previously cited cases, as well as those decided during the Vietnam War,<sup>82</sup> would strongly indicate the Court will decide in favor of the Department of Defense. This would further confirm the reality of the National Guard as part of the armed forces of the United States.

### State Constitutions

While the use of the unorganized militia since World War II has been virtually non-existent, an examination of constitutional provisions shows a substantial relation between the militia and the right to keep and bear arms. That this right is fundamental is shown in that only seven states do not have such provisions.<sup>83</sup>

Two states, Alaska and Hawaii, track the language of the federal Second Amendment. Two states, North Carolina and South Carolina, track the language of Mr. Mason's provision in the Virginia Declaration of Rights. This appears in the Virginia Constitution as Article I, Section 13:(pg.21)

That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.

It should be noted that the people of Virginia, in 1970, added the phrase "therefore, the right of the people to keep and bear arms shall not be infringed" to Mr. Mason's original language. This only clarifies Mason's understanding that the militia is the "whole people".

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<sup>78</sup> 666 F. Supp. 1319 (D. Minn. 1987).

<sup>79</sup> 880 F.2d 11 at 14 (1989).

<sup>80</sup> 880 F.2d 11.

<sup>81</sup> *Cert. granted*, 110 S. Ct. 715 (1990).

<sup>82</sup> *Johnson v. Powell*, 414 F. 2d 1060 (1969) and *Drifka v. Brainand*, 294 F. Supp. 425 (1968).

<sup>83</sup> Cal., Iowa, Md., Minn., N.J., N.Y. and Wis.

Four states, Arkansas, Massachusetts, Nebraska and Tennessee, have provisions that relate the right to keep and bear arms to the common defense without specific reference to the militia.<sup>84</sup> In only one of those states, Massachusetts, has that language been held to limit an individual's right to keep and bear arms<sup>85</sup> where Arkansas and Tennessee have reached the opposite result.<sup>86</sup>

The majority of states join the defense of state (or the summoning of the civil authority) without special reference to the militia.<sup>87</sup> Six states, Georgia, Idaho, Illinois, Louisiana, Maine and (pg.22) Rhode Island, guarantee the right to keep and bear arms without reference to any specific purpose.<sup>88</sup> (pg.23)

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<sup>84</sup> ARK. CONST. art. II, § 5

MASS. CONST. pt. I art. XVII

NEB. CONST. art. I, § 1

TENN. CONST. art. I § 26

<sup>85</sup> *Commonwealth v. Davis*, 369 Mass. 886, 343 N.E. 2d 847 (1976)

<sup>86</sup> *Glasscock v. City of Chattanooga*, 157 Tenn. 518, 11 SW. 2d 678 (1928); *Wilson v. State*, 33 Ark. 557.

<sup>87</sup> Alabama: That every Citizen has a right to bear arms in defense of himself and the state. ALA. CONST. art. I, § 26.

Arizona: The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men. ARIZ. CONST. art. II, § 26.

Colorado: The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons. COLO. CONST. art. II, § 13.

Connecticut: Every citizen has a right to bear arms in defense of himself and the state. CONN. CONST. art. I, § 15.

Delaware: A person has the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use. DEL. CONST. art. I, § 20.

Florida: The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law. FLA. CONST. art. I, Sec. 8.

Indiana: The people shall have a right to bear arms, for the defense of themselves and the State. IND. CONST. art. I, § 32.

South Dakota: The right of the citizens to bear arms in defense of themselves and the state shall not be denied. S.D. CONST. art. VI, § 24.

Texas: Every citizen shall have the right to keep and bear arms in lawful defense of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime. TEX. CONST. art. I, § 24.

Utah: The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the State, as well as for the other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms. UTAH CONST. art. I, § 6.

Vermont: That the people have a right to bear arms for the defense of themselves and the State—and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to and governed by the civil power. VT. CONST. Ch. I, art. XVI.

Washington: The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men. WASH. CONST. art. I, § 24.

West Virginia: A person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use. W.VA. CONST. art. III, § 22.

Wyoming: The right of citizens to bear arms in defense of themselves and of the state shall not be denied. WYO. CONST. art. I, § 24.

<sup>88</sup> Georgia: The right of the people to keep and bear arms shall not be infringed, but the General Assembly shall have the power to prescribe the manner in which arms may be borne. GA. CONST. art. I, § 1, 8.

Idaho: The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person, nor prevent passage of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent any passage of legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage of any legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition. Nor shall any law permit the Confiscation of firearms, except those actually used in the commission of a felony. IDAHO CONST. art. I, § 11.

Nevada: Every citizen has the right to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes. NEV. CONST. art. I, § 1, 1.

Implicit in the Second Amendment, as largely demonstrated by its ancestry on the state level, is the individual's right to keep <sup>(pg.24)</sup> and bear arms for personal as well as common defense.<sup>89</sup> The development of professional police forces was a half century removed from the colonial period,<sup>90</sup> and even today a state is under no obligation to "protect an individual against private violence."<sup>91</sup>

## CONCLUSION

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New Hampshire: All persons have the right to keep and bear arms in defense of themselves, their families, their property, and the state. N.H. CONST. pt. 1, art. II-a.

New Mexico: No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons. No municipality or county shall regulate, in any way, an incident of the right to keep and bear arms. N.M. CONST. art. II, § 6.

North Dakota: All individuals are by nature equally free and independent and have certain inalienable rights, among which are ... to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed. N.D. CONST. art. I, § 1.

Ohio: The people have the right to bear arms for their defense and security; but standing armies, in time of peace are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power. OHIO CONST. art. I, § 4.

Oklahoma: The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons. OKLA. CONST. art. II, § 26.

Oregon: The people shall have the right to bear arms for the defence (sic) of themselves, and the State, but the Military shall be kept in strict subordination to the civil power. OR. CONST. art. I, § 27.

Pennsylvania: The right of the citizens to bear arms in defence of themselves and the State shall not be questioned. PA. CONST. art. I, § 21.

Kansas: The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power. Kans. Bill of Rights, § 4.

Kentucky: All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: ... 7. The right to bear arms in the defense of themselves and of the state, subject to the power of the general assembly to enact laws to prevent persons from carrying concealed weapons. Ky. Bill of Rights, § 1, 7.

Michigan: Every person has a right to keep and bear arms for the defense of himself and the state. MICH. CONST. art. I, § 6.

Mississippi: The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons. MISS. CONST. art. III, § 12.

Missouri: That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed weapons. Mo. Const. art. I, § 23.

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

Nebraska: All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are ... the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof. NEB. CONST. art. I, § 1.

Illinois: Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed. ILL. CONST. art. I, § 22.

Louisiana: The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person. LA. CONST. art. I, § 11.

Maine: Every citizen has a right to keep and bear arms and this right shall never be questioned. ME. CONST. art. I, § 16.

Rhode Island: The right of the people to keep and bear arms shall not be infringed. R.I. CONST. art. I, § 22.

<sup>89</sup> Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. No. 3 (1982).

<sup>90</sup> Levinson, *supra* note 41, at 646.

<sup>91</sup> *DeShaney v. Winnebago County Department of Social Services*, 109 S. Ct. 998, 1004 (1989).

The militia of 1788 was the whole people. A basic republican principle was the viewing of the body of the people as society's natural strength, and combined with a fear of a standing army, dictated a reliance on the militia. The only exclusions from the militia were those who enjoyed less than the full benefits of citizenship. Any attempt at understanding the Second Amendment and similar provisions of the States must be in this context.

The National Guard of the United States is not the militia consisting of the whole people, but a select militia which is exclusive of the people. The dual enlistment leaves some state authority over the National Guard, but this authority is exercised only in the absence of federal dictates. All states and the federal government have provisions dealing with the militia independent of the National Guard of the United States.

Even if incorrectly interpreting the nature of the militia, the weight of reason dictates that the Second Amendment conveys a right to keep and bear arms to the whole people. Professor Sanford Levinson has suggested that it is incongruous to read the First, Fourth, Ninth and Tenth Amendments as applicable to the people without giving the same dignity to the Second Amendment.<sup>92</sup> Chief Justice Rehnquist has applied the same logic in reaching the conclusion that the Second Amendment protects "the right of the people to keep and bear arms."<sup>93</sup>

Advocates of gun control will argue that the militia, however constituted, is so outmoded as to warrant judicial nullification of any provisions that would permit individual ownership and use of firearms. Although recent militia history would lend substance to (pg.25) those arguments, Patrick Henry provided the answer in 1788 that is relevant today:

The voice of tradition, I trust, will inform posterity of our struggles for freedom. If our descendants be worthy the name of Americans, they will preserve, and hand down to their latest posterity, the transactions of the present times.<sup>94</sup>

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<sup>92</sup> Levinson, *supra* note 41, at 645.

<sup>93</sup> *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056 (1990).

<sup>94</sup> ELLIOT'S DEBATES, *supra* note 1, at 56.