

The Right to Keep and Bear Arms

The Legacy of Republicanism vs. Absolutism

By Gary A. Shade

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Introduction

Much of today's debate regarding the individual's right to keep and bear arms, has been shrouded by misapplying various interpretations of the militia clause of the second amendment to the US Constitution. The second amendment states:

"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."

The proponents of gun control insist that the second amendment only apply to an organized militia such as the National Guard. However they overlook the fact the National Guard in times of national crises, comes under direct control of the Federal Government. The Guard works in concert with the regular Army in carrying out the Federal military mission. This was finally put to rest when in the 1980s, then Minnesota Governor Rudy Perpich sued the Federal Government over control of the National Guard. The State of Minnesota lost the case and the Federal Government won.

The act of federalizing the National Guard is due to the law passed by Congress on January 21, 1903. It provides that the "..organized militia known as the National Guard of the state, Territory or District of Columbia.. " is under the command of the Nation's Chief Executive. Furthermore, all arms are controlled by and owned by the Federal Government.

If indeed the National Guard can be placed under Federal Control, then who is the unorganized militia? This question is rooted in historical precedence with ample evidence provided by the ancients, and contemporary thinkers that we are. That is to say, all able-bodied men (and now perhaps women) between the ages of 17 and 45 who are capable of acting in defense of the country. This definition also exists in the current United States Code [10 U.S.C. 311 (a)] which states:

"The militia of the United States consists of all able-bodied males at least 17 years of age, and, except as provided in section 313 of title 32, under 45 years of age . . . "

The US Code further divides the militia into two classes: The organized, and the unorganized militia. The organized militia is viewed in the USC as the National Guard

and Naval Militia, and the unorganized militia that consists of ".. all members of the militia who are not members of the National Guard or the Naval Militia." [10 U.S.C. 311 (c)]

Advocates of gun control not only ignore the definition of militia as that of the citizen soldier, they also ignore that the final clause that uses the verbiage of the "..right of the people..", is the same application of the "the people as used in the First, Fourth, Ninth, and Tenth Amendments.

The application of the First Amendment applies to an individual's right to free speech. The Fourth Amendment secures the individual against unreasonable searches and seizures of property by the government. If the Second Amendment were to be construed as a collective right, then it logically follows that only corporations or collective bodies (such as political parties) would have a right to free speech, and would be free from unreasonable search and seizures.

Yet these Amendments have been interpreted to be individual rights due to the clause that refers to 'the people'. The people refer to the individuals that make up the general populace.

It is precisely this definition that divides today's debate on gun control. The idea of the citizen soldier is older than ancient Rome. The unorganized militia provides for a citizen soldier to be the guardian of liberty and freedom.

Where did this well established but often overlooked view of the militia originate? As will be seen, its history can be found in the most early discussions on politics: From Rome, to Greece, to Virginia.

The most contemporary work on this subject, is:

That Every Man Be Armed - The Evolution of a Constitutional Right

by Attorney Stephen P. Halbrook. Halbrook's work is the most thorough and documented work on the Second Amendment this century. This paper relies heavily upon the work of Mr. Halbrook, and provides the necessary and proper credits in the bibliography.

The Ancient Greeks and Romans



In Plato's Republic, Plato discusses how, through force, an unjust state could win favor. Oligarchy forms of government occur when privilege is fixed by statute. (Republic 139-140.) Plato envisions a move to a democracy, but retains much of the social inequality associated with absolutism. The need for a strong leader is anticipated who would revert to absolute authority and halt the march to democracy. Plato concludes:

"Then to be sure, the people will learn what sort of a creature it has bred and nursed to greatness in its bosom, until now the child is too strong for the parent to drive out. Do you mean that the despot will dare to lay hands on this father of his and beat him if he resists? Yes, when once he has disarmed him." (Republic 295)

The idea of a philosopher king that Plato contemplates, assumes the best in human nature and does not speculate on the more contemporary historical fragility of such assumptions. Even Catherine the Great of Russia, an enlightened despot, later reversed herself from enlightenment to absolutism (*The Western Heritage*, 653.) Whereas once a shrewd promoter of Voltaire and others, Catherine later burned his books and banned them from Russia. (*The Western Heritage*, 679.)

Aristotle argued that citizens must be protected from tyranny, and that tyranny was achieved through the King's use of a standing army. (*Politics*, 82) Both Plato and Aristotle spoke of the King's use of the standing army to wage war, and to heavily tax the populace. These efforts would preoccupy the general populace to prevent an overthrow the oligarchy. (*That Every Man be Armed*, 12)

Rome's Cicero also put forth the notion that an individual also has the right to bear arms in self defense. When defending Titus Annius Milo in 53 B.C. for the murder of Publius Claudius Pulcher, he stated:

There are, many occasions on which homicide is justifiable. In particular, when violence is needed to repel violence, such an act is not merely justified but unavoidable" (*Selected Political Speeches*, 78-81)

Here the natural law of self defense is eloquently stated by Cicero. Cicero states:

".. there exists a law, not written down anywhere but inborn in our hearts; a law which comes to us not by training or reading but by natural intuition."

He further discusses the moral righteousness of using ".. every method to protect ourselves." Not only is Cicero speaking of the individual's right to bear arms in self defense from another individual, but also to defend one's person and property from violence by the state.

Rome stood as a free republic until Gaius Marius abolished the citizen soldier in 49 B.C. (*That Every Man Be Armed*, 18) Caesar's reign marked the beginning of the Empire. Caesar was ruthless in his conquests. He would not accept surrender from his enemies until all the arms of the conquered town had been collected. He would mutilate those who bore arms against him by cutting off their hands. (*That Every Man Be Armed*, 18) Caesar knew that an armed populace was more difficult to conquer.

Machiavelli

Machiavelli was also a believer in the citizen soldier or citizen militia. In his work *Discourses on the First Ten Books of Titus Livy*, he praises Rome before the reign of Caesar. Machiavelli was also against large standing armies as shown in the following passage.

"..in attacking a foreign country, [the Romans] never sent out armies greater than fifty thousand men; but for home defense against the Gauls after the first Punic war eighteen hundred thousand....In conclusion, therefore, I say again that a ruler who has his people well armed and equipped for war, should always wait at home to wage war.." (*Discourses*, 107)

Machiavelli also notes that:

"Rome remained free for four hundred years and Sparta for eight hundred" with an armed populace, while other countries who disarmed their citizens "lost their liberties in less than forty years." (*The Art of War*, 18)

The comparison of Machiavelli's writing to similar wording found in our Constitution proves to be surprisingly similar.

Machiavelli wrote that private citizens made up the "*..regular and well ordered militia..*" (*The Art of War*, 39) and our Constitution reads "*A well regulated Militia being necessary to the security of a free State..*" To Machiavelli, well ordered, and to our founding fathers well regulated, meant the same thing: Citizens trained to arms.

Seventeenth Century Thought

In the 17th century, great thinkers attempted to justify the existence of absolute rulers, while others such as Algernon Sidney and John Locke argued for a democratic republic. In arguing for a monarchy, Jean Bodin sees the deprivation of arms essential to maintaining a ruler's authority. Bodin believed that such ruler's were above the law.

Similar to today's argument's for gun control, Bodin saw arms control as a means of people control, to control the masses and prevent seditions. Similar to today, the arguments used in achieving an unarmed populace were to prevent murders, and seditions. Bodin states in his *Six Bookes of A Commonweale* (1606),

"..the law may be good, just, and reasonable, and yet the prince to be no way subject or bound thereto: as if he should forbid all his subjects, except his guard and garrison soldiers, upon pain of death to carry weapons, so to take away the fears of murders and seditions; he in this case ought not to be subject to his own law, but to the contrary, to be well armed for the

defense of the good, and punishment of the evil." (*Six Bookes on A Commonweale*, 106)

To Bodin, the ruling monarchy was to be placed above the laws that governed their subjects. Acts not unlike what Bodin had envisioned, occur today where citizens are disarmed by law, yet the privileged class is exempted.

John Locke was also an advocate of the citizen soldier. Locke explained in great detail in his *Two Treatises on Civil Government* (1689), that government of man must be based on mutual consent, and that each individual remains free due to the natural laws of nature. Because of this, each man has the right to overthrow a despotic government. As each individual maintains their natural rights, they also have the right to defend those rights against any individual or group who threatens them. Locke wrote:

".. it being reasonable and just I should have a right to destroy that which threatens me with destruction." (*Second Treatise of Civil Government*, 14)

Locke firmly believed that man had a moral right to use force to overthrow an unjust government. That the right to resist an unjust government with arms was little different than protecting one's self from an individual's aggression.

Framer's Intent

Locke's influence on our founding fathers was profound. His major contribution that all men retain their natural rights to life, liberty, and property became a major influence on how our Constitution was written. The Virginia Declaration of Rights, (which was largely written by George Mason on June 12, 1776), nearly echoed verbatim Locke's views on natural rights. Article One states:

"That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life, liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."

Article 13 of the Virginia Bill of Rights further states:

"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; 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."

Here again we plainly see that the early framers of the Declaration of Rights believed that the new nation's security rested upon a citizen militia. The idea presupposes a natural

right for the citizens to keep and bear arms. Virginia's Declaration of Rights would later serve as the model for our own Constitution.

During the Philadelphia Convention of 1788, Patrick Henry argued passionately for the individual's rights against the Federalists James Madison and Edmund Randolph. Henry was insistent that the new Constitution of the United States contain a Bill of Rights similar to Virginia's. Madison did not believe one was necessary as the people retained the right to overthrow an unjust government. He also believed that all rights not given up to the new government were retained by the people.

Henry and Mason both argued against ratifying the new Constitution unless specific rights were enumerated as had been done with their own State Constitution. Randolph, himself an ally of Madison's, refused to sign the new Constitution unless a Bill of Rights were present. (*Madison and The Bill of Rights*, 4)

The original language of the Second Amendment as proposed by Madison, read:

"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 to a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person." (Madison and the Bill of Rights, 5)

Madison added the language of the right to keep and bear arms in first draft. A right of the people. The wording the house committee chose read:

"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 shall be compelled to bear arms."

This draft, reversed the people and militia clauses but retained Madison's conscientious objector clause. Additionally author Halbrook points out that it is clearly shown from Madison's notes that he would use to propose the Amendment:

"They [the proposed amendments] relate first to private rights .." (That Every Man be Armed, 76)

The Senate version dropped the conscientious objector clause all together, and what was to become our nation's second amendment was finally adopted by the states:

"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."

During the House debates, of our Second Amendment, Representative Elbridge Gerry begged the question:

"What, Sir is the use of a militia? It is to prevent the establishment of a standing army, the bane of liberty."

The well-regulated clause of the second amendment suggests that the citizen soldier must retain not only the right to keep and bear arms, but must be proficient in their use. (*That Every Man Be Armed*, 78)

The argument that the "well-regulated militia" clause implies a collective rather than an individual right can be rebuked with the Federalist Papers number 29, where Alexander Hamilton wrote:

"..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." (*Federalists #29, 184-185*)

Here, as can be clearly seen, a well-regulated militia is composed of ordinary citizens who are trained to arms. The contemporary argument used by gun control advocates that the militia clause means only police or the government should be allowed to have arms, has no historical, or factual precedence what so ever.

Conclusion

The militia is quite simply you and me. It is our moral duty to be proficient in the use of arms for our own self preservation and that of our country. Standing armies have been viewed as the bane of liberty, and not the protectors of it. Freemen have a right and moral duty to oppose the unlawful taking of our natural rights by any means available to us. As radical and revolutionary as this may sound today, it has been said many times before. It is as true today as it was in Ancient Rome, Sparta, or in Eighteenth Century Virginia.

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