"Encroachments of the Crown on the Liberty of the Subject: Pre-Revolutionary Origins of the Second Amendment," 15 *University of Dayton Law Review*, 91-124 (Fall 1989).

ENCROACHMENTS OF THE CROWN ON THE LIBERTY OF THE SUBJECT:

PRE-REVOLUTIONARY ORIGINS OF THE SECOND AMENDMENT

by

Stephen P. Halbrook*

For Publication in University of Dayton Law Review

*Ph.D., Florida State University; J.D., Georgetown University. Attorney at Law, Fairfax, Virginia. Author of A Right to Bear Arms: State and Federal Bills of Rights and Constitutional Guarantees (Greenwood Press 1989) and That Every Man Be Armed: The Evolution of a Constitutional Right (University of New Mexico Press 1984; reprinted Liberty Tree Press 1989).

Introduction

For a Bill of Rights guarantee that has generated so much political controversy, the Second Amendment to the United States Constitution has been the subject of little historical scholarship. In particular, the pre-Revolutionary background to this provision has been all but neglected. The Second Amendment provides: "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."

A key methodology for constitutional interpretation was formulated by the Supreme Court as follows: "In the construction of the language of the Constitution . . . we are to place ourselves as nearly as possible in the condition of the men who framed that instrument. Undoubtedly, the framers . . . had for a long time been absorbed in considering the arbitrary encroachments of the Crown on the liberty of the subject . . . ."[1] It is the purpose of this analysis to consider exactly what were "the arbitrary encroachments of the Crown on the liberty of the subject"[2] that gave rise to the language of the Second Amendment that

[1] Ex Parte Bain, 121 U.S. 1, 12 (1887).

[2] The Court elsewhere expressed the same idea as follows: "The necessities which gave birth to the Constitution, the controversies which preceded its formation, and the conflicts of opinion which were settled by its adoption, may properly be taken into view for the purpose of tracing to its source any particular provision of the Constitution in order thereby to be enabled to correctly interpret its meaning." Knowlton v. Moore, 178 U.S. 41, 96 (1900).

"the right of the people to keep and bear arms shall not be infringed." As the Court quoted Mr. Justice Holmes in an analysis of the pre-Revolutionary background of the Establishment Clause of the First Amendment, "a page of history is worth a volume of logic."[3]

Of course, the experiences of the pre-Revolutionary period demonstrate the impetus for, but do not limit, the respective Bill of Rights guarantees, for the framers intended "to safeguard fundamental values which would far outlast the specific abuses which gave it birth."[4] Moreover, constitutional protections for physical objects--such as the press, arms, and houses--are not frozen into colonial technologies:

> We may assume that the framers of the Constitution . . . did not have specifically in mind the selection and elimination of candidates for Congress by the direct primary any more than they contemplated the application of the commerce clause to interstate telephone, telegraph and wireless communication, which are concededly within it. But in determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses.[5]

Just as the term "arms" is generic and thus includes modern firearms as a whole, the terms "the people" plainly mean members of the populace at large. In 1990, the Supreme Court made clear that all law-abiding Americans are protected by the Second Amendment as follows:

> "The people" seems to have been a term of art employed in select parts of the Constitution. . . . The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people." See also U.S. Const., Amdt. 1, ("Congress shall make no law . . . abridging . .

---

[3] Committee for Public Education v. Nyquist, 413 U.S. 756, 777 n.33 (1973).

[4] United States v. Chadwick, 433 U.S. 1, 9 (1977)("the absence of a contemporary outcry against warrantless searches in public places . . . in colonial America" does not diminish Fourth Amendment protections today). Actually, as will be seen, the colonists did complain about warrantless searches for arms in public places.

[5] Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 226 (1986).

. the right of the people peaceably to assemble"); Art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second year by the People of the several States")(emphasis added). While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.[6]

Traditionally, the Supreme Court has paid little attention to the Second Amendment. It noted in the Dred Scott case that recognition of African Americans as citizens would exempt them from "police regulations" (i.e., slave codes), and allow them "to keep and carry arms wherever they went."[7] During Reconstruction, the Court stated that the rights of the people "peaceably to assemble for lawful purposes" and "of bearing arms for a lawful purpose" were not "granted" by the Constitution because they existed long before its adoption.[8] A later opinion again recognized "the right of the people to keep and bear arms" and

---

[6] United States v. Verdugo-Urquidez, 494 U.S., 108 L.Ed.2d 222, 232-33, 110 S.Ct. 1056, 1060-61.

In his dissent, Justice Brennan noted that "the term 'the people' is better understood as a rhetorical counterpoint 'to the government,' such that rights that were reserved to 'the people' were to protect all those subject to 'the government'. . . 'The people' are 'the governed.'" 108 L.Ed.2d at 247.

Justice Brennan also reviewed the drafting history of the Fourth Amendment, noting that the Framers "could have limited the right to 'citizens,' 'freemen,' 'residents,' or the 'American people.' . . . Throughout that entire process, no speaker or commentator, pro or con, referred to the term 'the people' as a limitation." Id. at 247. Similarly, the Framers could have limited the Second Amendment right to select militias, but instead used the terms "the people."

Finally, Justice Brennan pointed out that rights are not "given to the people from the government. . . . The Framers of the Bill of Rights did not purport to "create" rights. Rather, they designed the Bill of Rights to prohibit our Government from infringing rights and liberties presumed to be pre-existing." Id. at 247.

[7] Scott v. Sanford, 60 U.S. (19 How.) 393, 417 (1857).

[8] United States v. Cruikshank, 92 U.S. 542, 551, 553 (1876).

repeated that the Second Amendment is a limitation "upon the power of Congress and the National government. . . ."[9]

At the turn of the century, the Court wrote of "the freedom of speech and of the press" and "the right of the people to keep and bear arms" that "the law is perfectly well settled that the first ten Amendments to the constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we inherited from our English ancestors . . . ."[10]

Only in United States v. Miller (1939)[11] has the high court addressed the Second Amendment, and even then only in rudimentary form. Absent evidence in the trial court that a sawed-off shotgun "at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot 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."[12] The test was not whether the person in possession of the arm was

---

[9] Presser v. Illinois, 116 U.S. 252, 265 (1886). Miller v. Texas, 153 U.S. 535, 538 (1894) repeats that "the restriction of" the Second and Fourth Amendments operate "upon the Federal power." In Cruikshank, Presser, and Miller, the Court refused to find First, Second, or Fourth Amendment protection against private conspiracies or state action , but did not consider whether the guarantees are incorporated into the Fourteenth Amendment so as to limit state action.

[10] Robertson v. Baldwin, 165 U.S. 275, 281-82 (1897).

[11] 307 U.S. 174 (1939).

[12] 307 U.S. at 178. Since no factual record was made in the trial court that a "sawed-off" shotgun could have militia uses, the Court did not consider whether the tax and related registration requirements of the National Firearms Act violated the Second Amendment. However, the Court has held of a newspaper tax: "It is a license tax--a flat tax imposed on the exercise of a privilege granted by the Bill of Rights. A state may not impose a charge for the enjoyment of a right granted by the federal constitution." Murdock v.

a member of a formal militia unit, but whether the arm "at this time" was "ordinary military equipment" or its use "could" potentially assist in the common defense.

Pennsylvania, 319 U.S. 106, 113 (1943). See Thomas v. Collins, 323 U.S. 527, 538-40 (1944) (state may not require registration of persons who exercise First Amendment rights); Minneapolis Star v. Minnesota Comm. of Rev., 460 U.S. 575 (1983) (special tax on only a few newspapers invalid).

Referring to the militia clause of the Constitution, the Supreme Court stated that "to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made."[13] The court then surveyed colonial and state militia laws to demonstrate that "the Militia comprised all males physically capable of acting in concert for the common defense" and that "these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."[14]

Unfortunately, the scant opinion in Miller does not survey "the arbitrary encroachments of the Crown on the liberty of the subject."[15] This is unsurprising, not only because only the United States filed a brief, but also because no historical scholarship existed on the subject at that time. "The arbitrary encroachments of the Crown" which gave rise to the Second Amendment are only recently coming to light.[16]

Nonetheless, the philosophy behind the Second Amendment was well articulated in the commentaries of Justice Joseph Story and Judge Thomas M. Cooley, which Miller approvingly cites.[17]

---

[13] 307 U.S. at 178.

[14] Id. at 179.

[15] Supra note 2 and accompanying text.

[16] Many of the original sources reviewed in this article are published for the first time since their original publication in the pre-Revolutionary period, and expand on research previously published by this author. See HALBROOK, A RIGHT TO BEAR ARMS: STATE AND FEDERAL BILLS OF RIGHTS AND CONSTITUTIONAL GUARANTEES 1-19 (1989)(chapter entitled "The Inhabitants of Boston Disarmed"); and THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 58-64 (1984).

[17] 307 U.S. at 183 n.3.

Justice Story stated: "The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of the republic; since it offers a strong moral check against usurpation and arbitrary power of the rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them."[18] Miller's reference to Judge Cooley finds him stating:

> Among the other safeguards to liberty should be mentioned the right of the people to keep and bear arms. . . . The alternative to a standing army is 'a well-regulated militia'; but this cannot exist unless the people are trained to bearing arms. The federal and state constitutions therefore provide that the right of the people to bear arms shall not be infringed . . . .[19]

While it has not discussed the Second Amendment in any detail since Miller, the Supreme Court has recently denied that some Bill of Rights freedoms "are in some way less 'fundamental' than" others. "Each establishes a norm of conduct which the Federal Government is bound to honor--to no greater or

---

[18] 2 J. Story, COMMENTARIES ON THE CONSTITUTION 646 (5th ed. 1891). "One of the ordinary modes, by which tyrants accomplish their purpose without resistance is, by disarming the people, and making it an offense to keep arms . . . ." J. Story, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 264 (1893).

[19] T. Cooley, CONSTITUTIONAL LIMITATIONS 729. T. Cooley, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 281-282 (2d ed. 1891) states further:

> The right declared was meant to be a strong moral check against the usurpation and arbitrary power of rulers, and as a necessary and efficient means of regaining rights when temporarily overturned by usurpation.
>
> The right is General--It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent. . . . But the law may make provision for the enrollment of all who are fit to perform military duty, or of a small number only, or it may wholly omit to make any provision at all; and if the right were limited to those enrolled, the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is that the people from whom the militia must be taken shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose.

lesser extent than any other inscribed in the Constitution. Moreover, we know of no principled basis on which to create a hierarchy of constitutional values . . . .'[20] The Supreme Court has also held that "when we do have evidence that a particular law would have offended the Framers, we have not hesitated to invalidate it on that ground alone.'[21]

Once again, to know what would have offended the Framers, one must analyze "the arbitrary encroachments of the Crown on the liberty of the subject" in the pre-Revolutionary period. The following traces the impetus for the Second Amendment in the following stages: the colonists' assertion of the right to keep and bear arms when Boston was first occupied by a standing army in the 1768-69 period; the attempts to disarm the inhabitants of Boston, and the ban on importation of firearms, in 1774; and the use of arbitrary searches and seizures for arms, culminating in the actual disarming of the inhabitants in 1775. These events provide a clear explanation of why the Framers adoped the Second Amendment, give insight into the perceived evil the amendment was designed to prevent, and accordingly contribute to an understanding of the scope of the right guaranteed.

I. "MORE GRIEVOUS TO THE PEOPLE,

---

[20] Valley Forge College v. Americans United, 454 U.S. 464, 484 (1982). The Court stated in Ullman v. United States, 350 U.S. 422, 426-29 (1956):

> This constitutional protection must not be interpreted in a hostile or niggardly spirit. . . . Such a view does scant honor to the patriots who sponsored the Bill of Rights as a condition to acceptance of the Constitution by the ratifying States. . . .
>
> As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion. . . . To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution.

[21] Minneapolis Star v. Minnesota Comm. of Rev., 460 U.S. 575, 583-84 n.6 (1983)

THAN ANY THING HERETO MAKE KNOWN"

In late summer of 1768, Massachussets Governor Francis Bernard informally let it be known that British troops were coming to Boston.[22] Enraged patriots discussed resistance, and on the evening of September 11, James Otis, Samuel Adams and Joseph Warren met to draft resolutions to be presented at a town meeting in the morning.[23] The great number of the people of Boston turned out at the stormy meeting at Faneuil Hall that would last two days.

Speeches were made and resolutions deploring taxation and standing armies adopted. Four hundred muskets--military firearms of the period which belonged to the town--lay exposed on the floor and some were perhaps waved in the air.[24] Some in the assembly argued that the muskets should be given out then and there to the people, but James Otis, moderator of the meeting, persuasively argued: "There are the arms; when an attempt is made against your liberties, they will be delivered. . . ."[25] Instead, the assembly considered among the pre-prepared resolutions the following:

> Upon a Motion made and seconded, the following vote was passed by a very great Majority, viz.
>
> WHEREAS, by an Act of Parliament, of the first of King William and Queen Mary, it is declared, that the Subjects being Protestants, may have arms for their Defence; It is the Opinion of this town, that the said Declaration is founded in Nature, Reason and sound Policy, and is well adapted for the necessary Defence of the Community.

---

[22] J. ALDEN, GENERAL GAGE IN AMERICA 160 (1969).

[23] W. WELLS, THE LIFE AND PUBLIC SERVICES OF SAMUEL ADAMS 212-13 (2nd ed. n.d.).

[24] Id.

[25] R. FROTHINGHAM, THE LIFE AND TIMES OF JOSEPH WARREN 85-86 (1865).

> And Forasmuch, as by a good and wholesome Law of this Province, every listed Soldier and other Householder (except Troopers, who by Law are otherwise to be provided) shall always be provided with a well fix'd Firelock, Musket, Accouterments and Ammunition, as in said Law particularly mentioned, to the Satisfaction of the Commission Officers of the Company; and as there is at this Time prevailing Apprehension, in the Minds of many, of an approaching War with France: In order that the Inhabitants of this Town may be prepared in Case of Sudden Danger: VOTED, that those of the Inhabitants, who may at present be unprovided, be and hereby are requested duly to observe the said Law at this Time.[26]

After passage of several days of uncertainty and probable paranoia both by the royal governor and the patriots, and Boston Gazette reported a warning signed by "A.B.C."--probably Samuel Adams--which would be reprinted throughout the colonies:

> It is reported that the Governor has said, that he has Three Things in Command from the Ministry, more grievous to the People, than any Thing hitherto made known. It is conjectured 1st, that the Inhabitants of this Province are to be disarmed. 2d. The Province to be governed by Martial Law. And 3d, that a Number of Gentlemen who have exerted themselves in the Cause of their Country, are to be seized and sent to Great-Britain.
>
> Unhappy America! When thy Enemies are rewarded with Honors and Riches; but thy Friends punished and ruined only for asserting thy Rights, and pleading for thy Freedom.[27]

Two days after publication of the above, British troops landed and took over key points in Boston, including Faneuil Hall.[28] In response to the allegations which first appeared in the Boston Gazette--the leading patriot organ in all of the colonies, and the mouthpiece of Samuel Adams, James Otis, Josiah

---

[26] Boston Chronicle, Sept. 19, 1768, at 363, col. 2.

[27] Boston Gazette, September 26, 1768, at 3, cols. 1-2; Maryland Gazette (Annapolis), Oct. 20, 1768, at 3, col. 1; Georgia Gazette (Savannah), Nov. 2, 1768, at 1, col. 1.

[28] Boston Evening Post, Oct. 3, 1768, at 3, col. 2.

Quincy, and John Adams[29]--Richard Draper, official printer to the royal governor,[30] issued a denial. "We are authorized to inform the Publick, that the Article of the Report of the Sayings of the Governor . . . is an infamous Lye, invented for the wicked Purpose of raising groundless Fears of, and creating an unnatural Disaffection to his Majesty and his Government."[31] "A.B.C." shot back:

> I observe Mr. Draper in his last paper says he is authorized to assure the Publick, that the Reports mentioned in your Paper of September 26, was an infamous Lie. . . . Mr. Draper (as he was about the Town, and these Reports were the subject of much Conversation) must have known he was publishing a Falsehood . . . . When an armed Force is bro't in upon a peaceable Country against their Consent, and in Violation of their Rights as Men and British subjects, we have Reason to believe that soon unheard of Oppressions are coming upon us.[32]

---

[29] S. KORBE, THE DEVELOPMENT OF THE COLONIAL NEWSPAPER 118-120 (1944).

[30] Id. at 114-15.

[31] The Essex Gazette (Salem), Oct. 4, 1768, at 40, col. 3. This was apparently published first in Draper's Massachusetts Gazette, but the issue is missing from the Library of Congress collection.

[32] Boston Gazette, Oct. 3, 1768, at 2, col. 2.

Efforts may have been made to disarm the citizens. One report stated: "That part of the troops had been quartered in the castle and barracks, and the remainder of them in some old empty houses. That the inhabitants had been ordered to bring in their arms, which in general they had complied with; and that those in possession of any after the expiration of a notice given them, were to take the consequences."[33] The report did not disclose where this surrender of arms allegedly took place.

It is difficult to imagine much compliance with such an order, since such reports were not widespread with extensive protests. However, disarming the colonists was clearly being contemplated. From London, "it is said orders will soon be given to prevent the exportation of either naval or military stores, gun-powder, &c. to any part of North-America."[34]

With the occupation of Boston, there began to be published in colonial newspapers the column "Journal of the Times," which became the most widely circulated pre-Revolutionary writing after Dickinson's Letters from a Pennsylvania Farmer. It was written in Boston, sent to New York secretly and published in the New York Journal, and then reprinted in newspapers all over the colonies and even in England. Its anonymous authors probably included Samuel Adams, John Adams, Josiah Quincy, and various editors.[35]

In the first of several references to the arms issue, the "Journal" found a hidden irony in the illegal quartering of troops among the populace: "Some of the Consequences of bringing the Troops into this

---

[33] New York Journal, Feb. 2, 1769, at 2, col. 2.

[34] Boston Gazette, Oct. 17, 1768, at 2, col. 3.

[35] BOSTON UNDER MILITARY RULE [1768-1769] AS REVEALED IN A JOURNAL OF THE TIMES xiii-ix. (O. Dickerson compl. 1971).

Town, in direct violation of the Act of Parliament, . . . instead of Quartering them in the Barracks on Castle Island, are likely to be the scattering proper Tutors through the Country, to instruct the Inhabitants in the modern Way of handling the Firelock and exercising the Men . . . .'[36] However, according to reports coming from London, the colonists needed little instruction: "The total number of the Militia, in the large province of New-England, is upwards of 150,000 men, who all have and can use arms, not only in a regular, but in so particular a manner, as to be capable of shooting a Pimple off a man's nose without hurting him.'[37]

The King's speech at the opening of Parliament, and debate in the House of Commons, both of which questioned the loyalty of the colonists, prompted the writers of the "Journal" to make an ongoing defense of the Boston vote calling upon each citizen to arm and of the assembly which adopted it. Samuel Adams, author of the next editorial on the subject, argued:

> For it is certainly beyond human art and sophistry, to prove the British subjects, to whom the privilege of possessing arms is expressly recognized by the Bill of Rights, and, who live in a province where the law requires them to be equip'd with arms, &c. are guilty of an illegal act, in calling upon one another to be provided with them, as the law directs. . . . One man has as good reason to affirm, that a few, in calling for a military force under pretence of supporting civil authority, secretly intended to introduce a general massacre, as another has to assert, that a number of loyal subjects, by calling upon one another to provided with arms, according to law, intended to bring on an insurrection.
>
> It will be equally difficult to prove it illegal, for a number of British subjects, to invite as many of their fellow subjects as they please, to convene and consult together, on the most prudent and constitutional measures for the redress of their grievances . . . .[38]

---

[36] New York Journal, Oct. 27, 1768, at 2, col. 3.

[37] Boston Evening Post, Nov. 21, 1768, at 2, col. 3.

[38] Boston Gazette, Jan. 30, 1769, at 2, col. 1 (signed "Shippen"); l THE WRITINGS OF SAMUEL ADAMS 299 (H. Cushing ed. 1904).

In an article he signed "E.A.," Samuel Adams published perhaps the most remarkable analysis of the right to keep and bear arms in the pre-Revolutionary era. He recalled the absolute English monarchs, with their doctrines of non-resistance and divine right, and traced the reigns of "a race of kings, bigoted to the greatest degree to the doctrines of slavery and regardless of the natural, inherent, divinely hereditary and indefeasible rights of their subjects."[39] Quoting freely from Sir William Blackstone, Adams assessed the results of the

Glorious Revolution of 1689:

> At the revolution, the British constitution was again restor'd to its original principles, declared in the bill of rights; which was afterwards pass'd into a law, and stands as a bulwark to the natural rights of subjects. "To vindicate these rights, says Mr. Blackstone, when actually violated or attack'd, the subjects of England are entitled first to the regular administration and free course of justice in the courts of law--next to the right of petitioning the King and parliament for redress of grievances--and lastly, to the right of having and using arms for self-preservation and defence." These he calls "auxiliary subordinate rights, which serve principally as barriers to protect and maintain inviolate the three great and primary rights of personal security, personal liberty and private property": And that of having arms for their defense he tells us is "a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression."--How little do those persons attend to the rights of the constitution, if they know anything about them, who find fault with a late vote of this town, calling upon the inhabitants to provide themselves with arms for their defence at any time; but more especially, when they had reason to fear, there would be a necessity of the means of self preservation against the violence of oppression.[40]

Adams' last above remark clearly implied that private citizens could use arms to protect themselves from military oppression. The passage continues even more explicitly as follows:

---

[39] Boston Gazette, Feb. 27, 1769, at 3, col. 1; 1 THE WRITINGS OF SAMUEL ADAMS 317.

[40] Id. at 317-18. Adams is quoting verbatim from 1 BLACKSTONE, COMMENTARIES *140-41, 143-44.

> Everyone knows that the exercise of the military power is forever dangerous to civil rights . . . . But there are some persons, who would, if possibly they could, perswade the people never to make use of their constitutional rights or terrify them from doing it. No wonder that a resolution of this town to keep arms for its own defence, should be represented as having at bottom a secret intention to oppose the landing of the King's troops: when those very persons, who gave it this colouring, had before represented the peoples petitioning their Sovereign, as proceeding from a factious and rebellious spirit . . . . [41]

In yet another installment, the "Journal" Authors continued to defend the private right to have arms, and implied that military oppression could be rightfully resisted:

> Instances of the licentious and outrageous behavior of the military conservators of the peace still multiply upon us, some of which are of such a nature, and have been carried to so great lengths, as must serve fully to evince that a late vote of this town, calling upon the inhabitants to provide themselves with arms for their defence, was a measure as prudent as it was legal; such violences are always to be apprehended from military troops, when quartered in the body of a populous city; but more especially so, when they are led to believe that they are become necessary to awe a spirit of rebellion, injuriously said to be existing therein. It is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defence; and as Mr. Blackstone observes, it is to be made use of when the sanctions of society and law are found insufficient to restrain the violence of oppression.[42]

After the initial shock of occupation, and without increased British aggression against the colonists, colonial debate turned to other topics. While tempers flared at the Boston Massacre of 1770, issues concerning the right to keep and bear arms subsided until British policy would seek a military solution in 1774.

II. THE DIVAN PROPOSES DISARMING THE INHABITANTS

In early 1774, the Boston Gazette advertised that a merchant "has just imported for sale, a neat assortment of guns, complete with bayonets, steel rods and swivels, a few neat fowling pieces, pocket

---

[41] Id. at 318.

[42] New York Journal, Supplement, Apr. 13, 1769, at 1, col. 3.

pistols . . . ."[43] This exemplifies the kinds of firearms to which the colonists believed they were entitled: military shoulder arms with bayonets, shotguns for hunting fowl, and small pistols to carry for protection.

The months passed and relations became irreversibly hostile. Besides acts which sought to destroy the New England shipping industry, the Parliament passed legislation to allow numerous positions of colonial authority to be appointed by the Crown rather than through local merchanisms. These "Mandamus Counsellors" who tried to rule Boston were known to the patriots as "the Divan," after the privy council of the Ottoman Empire. Turkish rule was associated with the disarming of the populace and similar policies considered tyrannical.[44]

---

[43] Boston Gazette, Jan. 24, 1774, at 1, col. 3.

[44] The Boston Gazette, March 6, 1769, at 1, col. 3 reported:

> Some time ago the Grand Seignior ordered all his subjects to give up the arms they were possessed of, in order to be publically sold; in consequence of which, great quantities of these arms have been brought to market but they were for the most part in very bad condition. We learn upon this occasion that the Greeks, who inhabit some islands in the Archipelago, refuse to comply with this order, alleging that they want their arms for their own defence.

It is hardly surprising that the "Divan" immediately considered a prohibition on possession of arms by the people of Boston and perhaps the whole province. Two accounts of this matter were widely reprinted throughout colonial newspapers. One explains as follows:

> It is said, it was proposed in the Divan last Wednesday, that the inhabitants of this Town should be disarmed, and that some of the new-fangled Counsellors consented thereto, but happily a majority was against it.--The report of this extraordinary measure having been put in Execution by the Soldiery was propagated through the Country, with some other exaggerated stories, and, by what we are told, if these Reports had not been contradicted, we should by this date have had 40 or 50,000 men from the Country (some of whom were on the march) appear'd for our Relief.[45]

The "Divan" apparently felt a firearms ban to be unenforceable at that time. Besides the anticipated widespread protest, which indeed occurred, the counsellors were personally intimidated by the patriots; the newspapers are filled with reports of large numbers of patriots surrounding houses of counsellors and, through threats, forcing their resignations. Further, General Gage, who also served as governor, may have advised against the measure. As the press reported later in reference to a letter of Gage written in this period: "General Gage's Letters being read in the House of Commons, it appears from one of them that it had been recommended to him by Lord Dartmouth to disarm some of the Colonies, which in his Opinion, was not practicable, till he was Master of the Country."[46]

The second widely-published account of the "Divan's" vote gave notice of another infringement not mentioned above:

> Tis said an article deliberated upon by the Divan last Wednesday was the disarming of the town of Boston, and as much of the province as might be, to which sundry new counsellors advised. Was this also for the good of your country, Gentlemen!

---

[45] Massachusetts Spy, Sept. 8, 1774, at 3, col. 3.

[46] Boston Gazette, April 17, 1775, at 3, col. 2.

> Governor Gage has at length laid his hand on private property, so far as to deny one cask of powder to be delivered out of the powder house whatever.[47]

The colonists obviously believed that the right to keep and bear arms included ammunition. The black gunpowder of that age was far more volatile than modern smokeless powder, and in urban areas larger quantities were stored by merchants and other private owners in a public powder house.[48] Gages' seizure of powder may have extended to shops or other places, for it was also reported "that General Gage has taken possession of all the gunpowder he could discover [in Boston], which is proof that the new Governor thinks there is something to be feared from the virtuous spirit of the Americans."[49]

Gage's seizure of privately-owned gunpowder became a major complaint of the Suffolk County Resolutions, which were widely published and acclaimed throughout the colonies. The meeting of Suffolk delegates resolved in part: "That the Fortifications begun and now carrying upon Boston Neck are justly alarming to this County, and give us reason to apprehend some hostile intention against that town, more especially as the Commander in Chief has in a very extraordinary manner removed the powder from the magazine at Charleston, and has also forbidden the keeper of the magazine at Boston to deliver out to the owners the powder which they had lodged in said magazine."[50]

The Suffolk delegates sent a committee of Joseph Warren and others to General Gage with a list of grievances, including his stating that "the ferment now excited in the minds of the people, is occasioned

---

[47] Id., Sept. 5, 1774, at 3, col. 2.

[48] A 1792 act, which likely stemmed from colonial legislation, required approval of the fireward for transportation of gunpowder in the streets of Boston "in any quantity, exceeding twenty five pounds, being the quantity allowed by law to be kept in shops for sale." 2 PERPETUAL LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 144 (1801).

[49] Pennsylvania Journal, Dec. 14, 1774, at 1, col. 2.

[50] Boston Gazette, Sept. 19, 1774, at 1, col. 2.

by some late transactions, . . . by withholding the powder lodged in the magazine of the town of Boston, from the legal proprietors . . . .'[51] Ignoring this specific charge, Gage responded by a countercharge: "I would ask what occasion there is for such numbers going armed in and out of the Town, and through the country in an hostile manner? or why were the guns removed privately in the night, from the battery at Charleston?"[52]

Paul Revere rushed copies of the Suffolk Resolutions and Address to the Continental Congress in Philadelphia. The Congress unanimously denounced "these wicked ministerial measures.'[53] The Massachusetts Provincial Congress also attacked

Gage because he

> invaded private property by unlawfully seizing and restraining large quantities of ammunition in the arsenal at Boston and sundry pieces of ordnance in the same town--committed to the custody of his troops the arms, ammunition, ordnance and warlike stores of all sorts, provided at the public expense for the use of the province . . . . Resolved, that as the Security of the Lives, Liberties and Properties of the inhabitants of this Province depends under Providence on their knowledge and skill in the art military, and in their being properly and effectually armed and equipt, if any of said inhabitants are not provided with arms and ammunition according to law, they immediately provided themselves therewith. . . .[54]

When Gage declared the Provincial Congress to be an unlawful assembly, a patriot with a sense of humor responded with a poem:

> Since an Assembly most unlawful,
> At Cambridge met in Congress awful,

---

[51] Id. at 2, col. 1.

[52] Id. at 2, col. 1.

[53] 1 JOURNALS OF THE CONTINENTAL CONGRESS 39 (1904).

[54] Boston Gazette, Oct. 31, 1774, at 3, col. 1.

October last, did then presume,
The Powers of Government t' assume;
And slighting British Administration,
Dar'd rashly seek their own Salvation;
By ordering every strudy Farmer,
To be prepar'd with proper Armour.
('Tis what indeed the Law requires,
But different quite from our Desires.)[55]

III. "WHAT MOST IRRITATED THE PEOPLE NEXT TO SEIZING THEIR ARMS AND AMMUNITION"

Warrantless searches for and seizures of firearms became the next major grievance of the patriots. British policy quickly evolved from debates in the Divan and closing of the powder house to the temporary detention of citizens and searches of their persons and places in order to confiscate their weapons. Searches and seizures were targeted first against persons bearing arms in public places, and finally against persons keeping arms in their homes.

While the Mandamus Counsellors found an official ban temporarily impolitic, the Redcoats were already beginning to seize firearms. Just days after the vote in the Divan, Joseph Warren wrote to Samuel Adams: "Mr. Samuel Phillips, jun., of Andover, was this day carrying about a dozen fire-arms over Charleston ferry. The sloop-of-war lying in the river dispatched a boat, and seized them.'[56]

By mid-October 1774, the British must have instituted a general policy of searching places for arms and seizing them, which only induced the populace to arm themselves even more. The address from Worchester County presented to General Gage stated:

This County are constrained to observe, they apprehend the People justified in providing

---

[55] Id., Nov. 14, at 3, col. 2.

[56] R. FROTHINGHAM, THE LIFE AND TIMES OF JOSEPH WARREN 382 (1865).

> for their own Defense, while they understood there was no passing the Neck without Examination, the Cannon at the North-Battery spiked up, & many places searched, where Arms and Ammunition were suspected to be; and if found seized; yet as the People have never acted offensively, nor discovered any disposition so to do, as above related, the County apprehend this can never justify the seizure of private Property.[57]

Gage denied any hostile intent, but refused to respond to the specific charges.[58]

While assuring the authorities of their loyalty, the patriots made thinly-veiled threats concerning their prowess with firearms. The Gazette stated: "Besides the regular trained militia in New-England, all the planters sons and servants are taught to use the fowling piece from their youth, and generally fire balls with great exactness at fowl or beast.'[59] However, it reiterated complaints about seizures of gunpowder stores, both public and private, and added: "But what most irritated the People next to seizing their Arms and Ammunition, was the apprehending six gentlemen, select men of the town of Salem, who had assembled a Town meeting. . . .'[60] In short, the seizure of arms irritated the people even more than violation of the right to assemble.

Meanwhile, individuals armed themselves and formed into independent militias to oppose the standing army. These were not the governmentally-sanctioned, select militia, but, in the words of Josiah Quincy, "a well regulated militia composed of the freeholders, citizens, and husbandmen, who take up arms

---

[57] Boston Gazette, Oct. 17, 1774, at 2, col. 2-3.

[58] Id., col. 3.

[59] Id., Dec. 5, 1774, at 4, col. 1.

[60] Id.

to preserve their property as individuals, and their rights as freemen.'[61]

In one incident, "a party of the militia being at exercise on Boston common, a party of the army surrounded them and took away their fire arms; immediately thereupon a larger party of the militia assembled, pursued the Army, and retook their fire arms. Whereupon the Governor ordered the man of war to fire upon the Town, which was instantly obeyed; several houses were damaged, and only 6 people killed.'[62]

As is usual in police search and seizure operations, a cat-and-mouse game was played in which the searchers and the searchees exchanged charges which strained creditility. A tory queried, "who carried cannon off privately in a boat to a mill-pond, and when detected declared it to be nothing but a boat-load of old iron?"[63] An observer in Boston wrote: "Have seen twenty load [of military supplies] covered with dung go out of town myself, but lately all carts have been searched by the [British] guards, and unluckily last Saturday evening a load of cartridges were seized packed in candle boxes . . . ."[64] By contrast, a patriot--whose comrades were arming themselves as rapidly as possible--sought to depict them as penmen: "We are told, that it is an undoubted act, that the supposed boxes of small arms, lead, & c. which were lately seized by the custom-house officers at New York, and caused so much disturbance there, turns out to be--What?--Why only a few boxes of Printing Types! Aye, says a wag, and what was the Gun-

---

[61] J. QUINCY, OBSERVATIONS ON THE ACT OF PARLIAMENT COMMONLY CALLED THE BOSTON PORT-BILL 413 (Boston 1774).

[62] Massachusetts Gazette, Dec. 29, 1774, at 2, col. 2.

[63] Id., Jan. 19, 1775, at 2, col. 2.

[64] R. GROSS, THE MINUTEMEN AND THEIR WORLD 68 (1976).

Powder?--Why truly, nothing but two cakes of Printing Ink!"[65]

Despite this feigned innocence, patriots sought to scare the British with talk about the colonists' expertise with guns. The pamphlet printed all over the colonies and even England credited with convincing the British of this expertise was written by Charles Lee, who was influential in the Continental Congress.[66] A key passge states: "The yeomanry of America besides infinite advantages over the peasantry of other countries, are accustomed from their infancy to firearms; they are expert in the use of them. Whereas the lower and middle people of England, are, by the tyranny of certain laws, almost as ignorant in the use of a musket, as they are of the ancient Catapulta."[67]

Search and seizure for contraband always leads to entrapment, and the colonial epoch was no exception. A rural man named Thomas Ditson merely asked to buy a gun, and ended up being tarred and feathered by British soldiers. In his affidavit, Ditson claimed, "I enquired of some Townsmen who had any Guns to sell; one of whom I did not know, replied he had a very fine Gun to sell."[68] Since the one who offered the gun was a soldier, Ditson continued:

> I asked him if he had any right to sell it, he reply'd he had, and that, the Gun was his to dispose of at any time; I then ask'd him whether he tho't the Sentry would not take it from me at the Ferry, as I had heard that some Persons had their Guns taken from them, but never tho't there was any law against trading with a Soldier; . . . I told him I would give four Dollars if there was no risque in carrying it over the Ferry; he said there was not . . . . I was afraid . . . that there was something not right . . . and left the Gun, and coming away

---

[65] Connecticut Courant, Jan. 16, 1775, at 2, col. 3.

[66] G. YEOMANS, Introduction to C. Lee, Strictures on a Pamphlet, reprinted in PAMPHLETS AND THE AMERICAN REVOLUTION iii-iv, vii (1976).

[67] Essex Gazette, Jan. 17, 1775, at 4, col. 1.

[68] Massachusetts Gazette; and Boston Weekly News-Letter, March 17, 1775, at 3, col. 1.

he followed me and urg'd the Gun upon me . . . .[69]

When he finally paid money to the soldier, several other soldiers appeared and seized Ditson, who they proceeded to tar and feather. However, instead of entrapment, the soldier swore in his affidavit, it was a case of a rebel trying to obtain arms and urging a soldier to desert. The citizen said "that he would buy more Firelocks of the Deponent, and as many as he could get any other Soldier to sell him . . . ."[70]

Samuel Adams described the Ditson affair in a letter as follows:

> A simple Country man was inveigled by a Soldier to bargain with him for a Gun; for this he was put under Guard and the next day was tarred and feathered by the Officers and Soldiers of the 47. . . . We are at a Loss to account for this Conduct of a part of the Army in the face of the Sun unless there were good Assurances that the General [Gage] would connive at it. However, he says he is very angry at it.[71]

Meanwhile, the British Ministers were taking steps to dry up firearms from the source.

IV. KING GEORGE'S BAN ON IMPORTATION OF FIREARMS

News travelled slowly from England across the Atlantic, but in December 1774 the colonists learned that two months before King George and his Ministers had decreed a ban on importation of firearms into the colonies as a further method of disarming the populace.

The Gazette reported this new violation of the colonists' rights as follows:

> We learn from undoubted Authority, that Lord Dartmouth, Secretary of State, has wrote a circular Letter to the Governors upon this Continent, informing them, That his Majesty has thought fit, by his Order in Council, dated the 19th October 1774, to prohibit the Exportation from Great Britain, of Gun Powder or any Sort of Arms or Ammunition, and has signified to them his Majesty's Command, that they do take the most effectual Measures for arresting, detaining and

---

[69] Id.

[70] Id., col. 2.

[71] 3 THE WRITINGS OF SAMUEL ADAMS 200 (1907).

securing any Gun Powder or any Sort of Arms or Ammunition, which may be attempted to be imported into the Province over which they respectively preside, unless the Masters of the Ship having such Military Stores on Board shall produce a License from his Majesty or the Privy Council for the Exportation of the same from some of the Ports of Great-Britain.[72]

The decree strictly regulated any exportation of arms and ammunition from England, and was endorsed by Townshend, North, and the other hated Ministers.[73] Accounts published in London and

---

[72] Boston Gazette, Dec. 12, 1774, at 3, col. 1.

[73] As reprinted in the Connecticut Courant, Dec. 19, 1774, at 3, cols. 2-3:

At the Court at St. James's the 19th Day of October, 1774.

PRESENT,
The KING'S most excellent MAJESTY in Council,
Earl of Rockford, Lord Visount Townshend,
Earl of Dartmouth, Lord Mansfield,
Earl of Suffolk, Lord North.

WHEREAS an Act of Parliament has passed in the Twenty Ninth Year of the Reign of his late Majesty King George the Second, intitled, "An Act to empower his Majesty to prohibit the Exportation of Saltpetre, and to enforce the Law for impowering his Majesty to prohibit the Exportation of Gunpowder, or any sort of Arms or Ammunition, and also to empower his Majesty to restrain the carrying coastways of Saltpetre, Gunpowder, or any sort of Ammunition.

And His Majesty judging it necessary to prohibit the Exportation of Gunpowder, or any sort of Arms or Ammunition, out of this Kingdom, doth therefore, with the advice of his Privy Council, hereby order, require, prohibit and command that no Person or Persons Whatsoever (except the Master General of the Ordnance for his Majesty's Service) do, at any time during the space of Six Months from the date of this Order in Council, presume to transport into any parts out of this Kingdom, or carry coastways any Gunpowder, or any sort of Arms or Ammunition, on board any Ship or Vessel, in order to transporting the same to any part beyond the Seas or carrying the same coastways, without Leave and Permission in that behalf, first obtained from his Majesty or his Privy Council, upon Pain of incurring and suffering the respective Forfeitures and Penalties inflicted by the aforementioned Act. . . .

Signed, G. Chetwynd.

The decree was published in 5 Acts Privy Council, 401 and was renewed from time to time until 1783.

reprinted in colonial newspapers explain what precipitated the import ban. First, exaggerated accounts of armed struggle in the colonies were reaching England. One such account states:

> An order of the council, dated the 19th inst. is published in this night's Gazette, prohibiting the exportation of gun powder and arms, from any point of the kingdom. . . .
>
> By a letter received by a merchant in this city from New York . . . [the ship left New York in mid-September] the Captain says an express was just mailed there from Boston, with an account that there had been an engagement between the troops and the Bostonians; the Troops set fire to the town, which was all in flames when the express came away. What gives the greatest credit to this account is, the entire prohibition of gunpowder, and all sorts of arms and ammunition.
>
> Notwithstanding the ministerial accounts from America are kept a profound secret the late embargo on gunpowder proves their fears respecting that country to be very great. Great quantities of nitre and salt-petre just shipped, are again disembarking in consequence of Saturday night's Gazette.[74]

While British intelligence may have discounted the credibility of such reports, they could see tangible evidence that the colonists were arming themselves, because English gunmakers were receiving orders for vast numbers of arms from the Americans. As was originally published in a London newspaper:

> Saturday's proclamation, it is said, was occasioned by intelligence received from Sheffield and Birmingham of amazing quantities of fire arms, & c. being nearly ready to be sent to America, in consequence of an order received from thence some time since.
>
> Two vessels, laden with gun-powder and other military utensils, bound for the other side of the Atlantic, were stopped at Gravesend on Monday by the out clearers, in consequence of the King's Proclamation inserted in Saturday night's Gazette. . . .
>
> A letter received in town from an English Gentleman at Brest says, that a french frigate and a snow lately sailed from that port for America, laden with firelocks, gunpowder, & c. . . .
>
> The letters received for Friday from Boston, dated the 21st of September, are of the most alarming nature. They assert, that the inhabitants of Boston, and of the province of Massachusetts

---

J. ADAMS, REVOLUTIONARY NEW ENGLAND 1691-1776 at 412 (1923).

[74] Pennsylvania Gazette, Dec. 14, 1774, at 2, col. 3.

Bay are now in arms. . . .[75]

As noted, the royal proclamation meant the immediate stoppage of firearms shipments going to America. "Some ships fitting out at Liverpool could not have permission to take on board any gun-powder, guns, or swords, . . . which . . . proves the fears of the ministry, respecting America, to be very great."[76] An American sympathizer in England asserted that "the proclamation against sending guns and gun powder out of this kingdom will be of very little use or effect, because the Americans will certainly procure whatever quantity of them they want from Holland, France, and Spain . . . ." [77]

The royal instructions and a secret letter from Lord Dartmouth to the colonial governors directing the prohibition of importation of firearms and ammunition into America was revealed by the governor of Rhode Island. Upon receiving it, the Boston patriots sent the news by Paul Revere to their friends in New Hampshire, who proceeded to seize muskets and one hundred barrels of gunpowder from Fort William and Mary at Portsmouth.[78]

This action was justified by a New Hampshire patriot who described the import ban as a violation of the right to keep and bear arms. "A Watchman" recalled the lesson of the ancient Carthaginians, who complied with the demand "that they must deliver up all their Arms to the Romans," only to be destroyed.[79]

---

[75] Id., Dec. 21, 1774, at ___, col. 1-2.

[76] Massachusetts Gazette, Dec. 29, 1774, at 3, col. 1.

[77] Connecticut Courant, Jan. 9, 1775, at 2, col. 2.

[78] J. ADAMS, REVOLUTIONARY NEW ENGLAND 1691-1776 at 412 (1923); J. ALDEN, GENERAL GAGE IN AMERICA 224 (1969).

[79] New Hampshire Gazette and Historical Chronicle, Jan. 13, 1775, at 1, col. 1.

He continued:

> Could they [the Ministry] not have given up their Plan for enslaving America without seizing . . . all the Arms and Ammunition? and without soliciting and finally obtaining an Order to prohibit the Importation of warlike Stores in the Colonies? . . . And shall we like the Carthaginians, peaceably surrender our Arms to our Enemies, in Hopes of obtaining in Return the Liberties we have so long been contending for? . . .
>
> I . . . hope that no Person will, at this important Crisis, be unprepared to act in his own Defence, should he by Necessity be driven thereto. And I must here beg Leave to recommend to the Confederation of the People of this Continent, Whether, when we are by an arbitrary Decree prohibited the having Arms and Ammunition by Importation, we have not by the Law of Self Preservation, a Right to seize upon all those within our Power, in order to defend the LIBERTIES which GOD and Nature have given us . . .?[80]

The same arguments were being made in England by the American sympathizers. Edmund Burke pointed out in debates in Parliament in 1775 that such injustices had been tried before in Wales:

> Sir, during that state of things, parliament was not idle. They attempted to subdue the fierce spirit of the Welsh by all sorts of rigorous laws. They prohibited by statute the sending all sorts of arms into Wales, as you prohibit by proclamation (with something more of doubt on the legality) the sending arms to America. They disarmed the Welsh by statute, as you attempted, (but still with more question on the legality) to disarm New England by an instruction. They made an Act to drag offenders from Wales into England for trial, as you have done (but with more hardship) with regard to America.[81]

Meanwhile, searches and seizures of arms and ammunition were being stepped up in the Boston area. An account published in April 1775, alleges that troops killed several people along a road near the following seizure: "The Neck Guard seized 13,425 musket cartridges with ball, (we suppose through the information of some dirty scoundrel, of which we have now many among us) and about 300 lb. of ball, which we were carrying into the country--this was private property.--The owner applied to the General

---

[80] Id.

[81] 18 COBBETT, PARLIAMENTARY HISTORY OF ENGLAND 512 (1813).

first, but he absolutely refused to deliver it.'[82] One writer linked this illegal seizure to the import ban as follows:

> It is said that the troops, under your command, have seized a number of cartridges which were carrying out of the town of Boston, into the country; and as you were pleased to deny that you had meddled with private property, to the President of the Continental Congress, I would gladly be informed on what different pretence you now meddled with those cartridges. . . . . I cannot conceive you will urge the late ridiculous proclamation [banning export of arms and ammunition to America] in defence of the action. That CREATURE, absurd and strained as it is, can have no reference to the carriage of powder and shot from any one inland place to another. But admitting it had, are Royal Proclamations again to be forced upon us for LAWS? I can, indeed, Sir, account for your conduct in this and many other instances, upon no other footing than that of an actual conspiracy to overthrow the laws and constitution of the country you are sworn to protect . . . .[83]

Although not subjected to the same intense repression as New England, the other colonies saw the import ban as violative of the right to keep and bear arms. The General Committee, South Carolina's patriotic governing body, found that "by the late prohibition of exporting arms and ammunition from England, it too clearly appears a design of disarming the people of America, in order the more speedily to dragoon and enslave them. . . .'[84] But the worst was yet to come.

V. GAGE DISARMS THE PEOPLE OF BOSTON AND DECLARES MARTIAL LAW

When governments conduct police actions involving searches and seizures for contraband, many items go undetected for every successful seizure. So it was that the provincials accumulated vast stores

---

[82] Id., Connecticut Courant, Apr. 3, 1775, at 2, col. 2.

[83] Newport Mercury (R.I.), Apr. 10, 1775, at 2, col. 1.

[84] J. Drayton, MEMOIRS OF THE AMERICAN REVOLUTION . . . AS RELATING TO SOUTH CAROLINA 166 (Charleston 1821).

of arms and ammunition, and secreted them at some thirty private homes and farms in Concord.[85] Gage anticipated orders from England to seize the patriots' arms, and on April 15, 1775 Lord Dartmouth wrote to the General to do just that.[86] "The policy of disarming the people had been acted on, though it had not been followed up very energetically. The indications now were, that this policy would be carried out in earnest."[87]

As Gage planned his search-and-seizure operation against Concord, all able-bodied males ages 16 though 60 of that town, from its gentlemen and yeomen to its laborers and apprentices, were carrying their muskets everywhere they went.[88] These minutemen and militia were in fact the people themselves who provided their own arms.[89]

As the British began their march into the countryside on that day of April 19, 1775, Lexington's militiamen responded to the alarm, assembled at the town common, and began exercising with their arms. The widely published American account of what

happened when the Redcoats arrived, began with the order shouted by British Major Pitcairn: "'Disperse you Rebels -- Damn you, throw down your Arms and disperse.' Upon which the Troops huzz'd, and immediately one or two Officers discharged their Pistols, which were instantaneously followed by the Firing

---

[85] R. GROSS, THE MINUTEMEN AND THEIR WORLD 69 (1976).

[86] J. ADAMS, REVOLUTIONARY NEW ENGLAND 1691-1776 at 418 (1923).

[87] R. FROTHINGHAM, THE LIFE AND TIMES OF JOSEPH WARREN 454 (1865).

[88] R. GROSS, THE MINUTEMEN AND THEIR WORLD 69-70 (1976). Excluded from the militia were the town's Harvard students and a dozen black slaves. Id.

[89] Only a few poor men had to be loaned weapons. Id. at 61.

of four or five of the Soldiers, then there seemed to be a general discharge from the whole Body.'[90]

While not skirmishing with the armed citizens of Lexington and Concord, the troops searched the farms and houses for arms and ammunition. Some were seized and destroyed, while other supplies escaped seizure due to the artifice of Concord's women, who talked soldiers out of searching certain rooms of houses.[91]

Three days after Lexington and Concord, Gage represented to the Selectmen of Boston that "there was a large body of men in arms" hostilely assembled, and that the inhabitants could be injured if the soldiers attacked.[92] The next day a town committee met with Gage, who promised "that upon the inhabitants in general lodging their arms in Faneuil Hall, or any other convenient place, under the care of the selectmen, marked with the names of the respective owners, that all such inhabitants as are inclined, may depart from the town . . . . And that the arms aforesaid at a suitable time would be return'd to the owners.'[93]

The committee recommended "that the town accept of his excellency's proposal, and will lodge their arms with the selectmen accordingly.'[94] "The town unanimously accepted of the foregoing report, and

---

[90] Essex Gazette, April 25, 1775, at 3, col. 3.

[91] R. GROSS, THE MINUTEMEN AND THEIR WORLD 120-23 (1976).

[92] Attested Copy of Proceedings Between Gage and Selectmen, Apr. 22, 1775, in Connecticut Courant, July 17, 1775, at 1, col. 3, and 4, col. 1.

[93] Id. at 4, col. 2 (Apr. 23, 1775).

[94] Id.

desired the inhabitants would deliver their arms to the Selectmen as soon as may be.'[95] While the agreement called for the temporary safekeeping of the arms in the hands of the selectmen, Gage must have planned all along to seize them, and the selectmen may have been aware of this plan. British Lieutenant John Barker kept a diary with the following entry: "The Townspeople have to day given up their Arms to the Select Men, who are to deliver them over to the Gen[era]l. I fancy this will quiet him a little for he seemed apprehensive that if the Lines shou'd be attack'd the Townspeople wou'd raise and assist; they wou'd not give up their Arms without the Gen[era]l promising that they shou'd have leave to quit the Town as many as pleased.'[96]

In his contemporary account, Richard Frothingham noted: "On the 27th of April the people delivered to the selectmen 1778 fire-arms, 634 pistols, 973 bayonets, and 38 blunderbusses; and on the same day it was announced in a town-meeting, that General Gage had given permission to the inhabitants to remove out of town, with their effects, either by land or by water; and applications for passes were to be made to General Robertson.'[97] A sample of one of the passes reads: 'Boston, May, 1775. Permit [name illegible], together with his family, consisting of seven persons, and their effects, to pass over the lines between sunrise and sunset. By order of his Excellency the Governor. No arms nor ammunition is allowed to pass nor merchandize.'[98]

The committee continued to meet with Gage through April 30, when it reported to the town: "The

---

[95] Id., col. 3.

[96] THE BRITISH IN BOSTON 38 (1924).

[97] R. FROTHINGHAM, HISTORY OF THE SIEGE OF BOSTON 95 (Boston 1903).

[98] S. HALBROOK, A RIGHT TO BEAR ARMS 19 (1989).

committee waited on his Excellency General Gage with the papers containing the account of the arms delivered to the selectmen, and the return made to them by the constables of the town relative to the delivery of the arms in their respective wards.'[99]

An editorial described the background in more detail and told the predictable result. The Sunday after the battle at Lexington, a town meeting chose a committee of selectmen to meet with Gage. "The General covenanted with them--that if the inhabitants of Boston would give up their arms and ammunition, and not assist against the King's troops, they should immediately be permitted to depart with all their effects, merchandise included; finally, the inhabitants gave up their arms and ammunition--to the care of the Selectmen: the General then set a guard over the arms . . . ." Gage was then in a position to, and did, refuse the passage of both merchandise and people.[100] On announcing that no Bostonian could leave, "the same day a town meeting was to be held in Boston, when the inhabitants were determined to demand the arms they had deposited in the hands of the select men, or have liberty to leave town."[101]

The Massachusetts Provincial Congress sent the following protest to Gage:

> We think it our duty to remonstrate to your excellency, that, from the papers communicated to us by the said selectmen, it appeared, that the inhabitants were promised, upon surrendering their arms, that they should be permitted to leave the town, and carry with them their effects. The condition was immediately complied with, on the part of the people; since which, though a number of days have elapsed, but a very small proportion of the inhabitants have been allowed to take the benefit of your covenant.
>
> We would not affront your excellency by the most distant insinuation, that you intended to

---

[99] Attested Copy of the Proceedings between Gage and Selectmen, Ap. 30, 1775, in Connecticut Courant, July 17, 1775, at 4, col. 3.

[100] Connecticut Courant, May 8, 1775, at 3, col. 1.

[101] Connecticut Journal and New-Haven Post-Boy, May 19, 1775, at 6, col. 2.

> deceive and disarm the people, by a cruel act of perfidy. A regard to your own character, as well as the fatal consequences which will necessarily result form the violation of your solemn treaties, must [suggest] sufficient reasons, to deter a gentleman of your rank and station from so injurious a design. But your excellency must be sensible, that a delay of justice is a denial of it, and extremely oppressive to the people now held in duress.[102]

An anonymous patriot attacked "the perfidious, the truce-breaking Thomas Gage" in the latter's dealings with the people of Boston as follows:

> But the single breach of the capitulation with them, after they had religiously fulfilled their part, must brand your name and memory with eternal infamy--the proposal came from you to the inhabitants by the medium of one of your officers, through the Selectmen, and was, that if the inhabitants would deposit their fire-arms in the hands of the Selectmen, to be returned to them after a reasonable time, you would give leave to the inhabitants to remove out of town with all their effects, without any lett or molestation. The town punctually complied, and you remain an infamous monument of perfidy, for which an Arab, a Wild Tartar or Savage would dispise [sic] you!!![103]

On June 12, Gage proclaimed marital law and offered a pardon to all who would lay down their arms except Samuel Adams and John Hancock.[104] The decree was suggested by Lord Dartmouth, the British Secretary of State, and drafted by General Burgoyne.[105] A patriot responded by asking, "are you not ashamed to throw out such an insult upon human understanding, as to bid people disarm themselves till you and your butchers murder and plunder them at pleasure! We well know you have orders to disarm us, and what the disposition of the framers of these orders is, if we may judge from the past, can be no

---

[102] JOURNALS OF THE PROVINCIAL CONGRESS OF MASSACHUSETTS IN 1774 AND 1775 at 213 (Boston 1838).

[103] Connecticut Courant, June 19, 1775, at 4, col. 2.

[104] Connecticut Journal and New-Haven Post Boy, June 21, 1775, at 3, cols. 1-2.

[105] J. ALDEN, GENERAL GAGE IN AMERICA 263-64 (1969).

secret."[106] A patriot in a more humorous mood offered a poem entitled "Tom Gage's Proclamation," which told how the general had sent an expedition "the men of Concord to disarm" and how he afterwards reflected:

> Yet e'er I draw the vengeful sword
> I have thought fit to send abroad
> This present gracious Proclamation,
> Of purpose mild the demonstration;
> That whoseoe'er keeps gun or pistol,
> I'll spoil the motion of his systole;
> Or, whip his breech, or cut his weason
> As has the measure of his Treason:--
> But every one that will lay down
> His hanger bright, and musket brown,
> Shall not be beat, nor bruis'd, nor bang'd,
> Much less for past offences, hang'd,
> But on surrendering his toledo,
> Go to and fro unhurt as we do:--
> But then I must, out of this plan, lock
> Both SAMUEL ADAMS and JOHN HANCOCK;
> For those vile traitors (like debentures)
> Must be tuck'd up at all adventures;
> As any proffer of a pardon,
> Would only tend those rogues to harden:--
> But every other mother's son,
> The instant he destroys his gun,
> (For thus doth run the King's command)
> May, if he will, come kiss my hand. . . .
> Meanwhile let all, and every one
> Who loves his life, forsake his gun . . . .[107]

The references to several types of arms in the above poem as well as in the inventory of arms seized

---

[106] Pennsylvania Evening Post, June 27, 1775, at 1, cols. 1-2.

[107] Connecticut Courant, July 17, 1775, at 4, col. 1.

by Gage in Boston[108] warrant explanation. What types of arms did the colonists believe they had a right to keep and bear?

The arms the people of Boston turned in to their selectmen included 1778 "firearms"--apparently muskets and other shoulder weapons, 634 pistols, 38 blunderbusses, and 973 bayonets.[109] The above poem mentions "gun or pistol" separately, for as Noah Webster, who would play an important role in ratification of the Constitution, wrote in America's first dictionary: "the smaller species [of guns] are called muskets, carbines, fowling pieces, &c. But one species of fire-arms, the pistol, is never called a gun."[110] The poem also referred to a "musket brown," meaning a Brown Bess musket, which was used with a bayonet. This was the official British infantry weapon, which many Americans owned personally or captured from the British.[111] The colonists imported other military muskets from France, and made highly accurate, long range Pennsylvania rifles (owned mostly by civilians) locally.[112]

The carbine is a short-barreled shoulder weapon designed to fire a single projectile. The blunderbuss is a short-barreled shotgun designed to fire multiple projectiles, and was popular with civilians

---

[108] The selectmen's lists of names and specific arms turned in and seized by Gage are not known to be extant. Letters to author from Massachusetts Historical Society, Nov. 25, 1988, and William L. Clements Library, University of Michigan, Jan. 30, 1989, which houses the Gage collection. Such a list would be valuable both to historians and to students of antique firearms.

[109] R. FROTHINGHAM, HISTORY OF THE SIEGE OF BOSTON 95 (Boston 1903).

[110] N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York 1828)("Gun").

[111] G. NEUMANN, WEAPONS OF THE AMERICAN REVOLUTION 14, 22 (1967).

[112] Id. at 22, 134-35.

for defense against highwaymen or a group of intruders attacking a house.[113] Civilians in urban areas and travellers commonly carried pocket pistols, and larger pistols were widely used for military purposes.[114] The pistols turned in and seized by Gage may well have been mostly pocket pistols, although any militia horseman who turned in pistols would have surrendered larger pieces. It seems probable that many would have turned in junk or defective weapons, and secreted their quality arms.

The poem mentions two types of swords, the hanger (a short military sword) and the Toledo, named after its place of production in Spain.[115] The small sword was the popular civilian pattern in America.[116]

Such was the vast array of firearms and edged weapons which the colonists believed they were entitled to keep and bear. Seizure of these arms from the peaceable citizens of Boston who were not even involved in hostilities sent a message to all of the colonies that fundamental rights were in great danger.

The final break came when the Continental Congress adopted the Declaration of Causes of Taking Up Arms on July 6, 1775, which had been drafted by Thomas Jefferson and John Dickinson and which complained: "It was stipulated that the said inhabitants having deposited their arms with their own magistrates, should have liberty to depart . . . . They accordingly delivered up their arms, but in open violation of honor, in defiance of the obligations of treaties, which even savage nations esteem sacred, the governor ordered the arms deposited as aforesaid, that they might be preserved for the owners, to be

---

[113] Id. at 36, 38.

[114] Id. at 150-51.

[115] Id. at 216-17.

[116] Id. at 217.

seized by a body of soldiers . . . ."[117]

Even though it mentioned only the disarming of Boston, by the time the Declaration passed the colonists believed that the Ministry's intention was to disarm all Americans. The Virginia House of Burgesses responded to Governor Dunmore's seizure of gunpowder in that state just after Lexington and Concord as follows:

> The inhabitants of this country, my Lord, could not be strangers to the many attempts in the northern colonies to disarm the people, and thereby deprive them of the only means of defending their lives and property. We know, from good authority, that the like measures were generally recommended by the Ministry, and that the export of pow[d]er from Great Britain had been prohibited. Judge then how very alarming a removal of the small stock which remained in the public magazine, for the defence of the country, and the stripping of the guns of their locks, must have been to any people, who had the smallest regard for their security.[118]

Patriot newspapers throughout the colonies published a report from London that in fact all the colonists were to be disarmed: "It is reported, that on the landing of the General Officers, who have sailed for America, a proclamation will be published throughout the provinces inviting the Americans to deliver up their arms by a certain stipulated day; and that such of the colonists as are afterwards proved to carry arms shall be deemed rebels, and be punished accordingly."[119]

Such reports could have only prompted more colonists to take up arms and join the resistence.

---

[117] Connecticut Courant, July 17, 1775, at 2, col. 1. The Continental Congress also adopted an address "To the People of Ireland" which complained that "the citizens petitioned the General for permission to leave the town, and he promised, on surrending their arms, to permit them to depart with their other effects; they accordingly surrender their arms, and the General violated his faith . . . ." Id., Aug. 21, 1775, at 1, col. 3.

[118] Virginia Gazette (Williamsburg), Aug. 5, 1775, at 2, col. 1.

[119] Id., June 24, 1775, at 1, col. 1; Maryland Gazette (Annapolis), July 20, 1775, at 1, col. 2.

The right to have arms--and the rights protected by that right--would be protected ultimately by the use of those arms against governmental oppression. The Declaration of Independence of 1776 was based on the philosophy that armed citizens may rightfully free themselves from tyranny through armed struggle.

By 1777, confident of a British military victory, Colonial Undersecretary William Knox circulated to members of the Ministry a comprehensive policy entitled "What is Fit to be Done with America?" Besides a state church, unlimited tax power, a standing army, and a governing aristocracy, the plan anticipated: "The Militia Laws should be repealed and none suffered to be re-enacted, & the Arms of all the People should be taken away, . . . nor should any Foundery or manufactuary of Arms, Gunpowder, or Warlike Stores, be ever suffered in America, nor should any Gunpowder, Lead, Arms or Ordnance be imported into it without Licence . . . ."[120] But the British could not take the arms of all of the people away, and independence was won.

VI. TOWARD THE ADOPTION OF THE SECOND AMENDMENT

Given the primacy of deprivation of the right to keep and bear arms as a grievance leading to the Revolution, it was perhaps inevitable that this right would be recognized explicitly in four of the eight declarations of rights adopted in the Revolutionary period.[121] Pennsylvania and Vermont adopted the following language: "That the people have a right to bear arms for the defense of themselves, and the state . . . ."[122] North Carolina declared: "That the people have a right to bear arms for the defense of the state

---

[120] 1 SOURCES OF AMERICAN INDEPENDENCE 176 (H. Peckman ed. 1978).

[121] See S. HALBROOK, A RIGHT TO BEAR ARMS 21-77 (1989).

[122] PA. DEC. OF RIGHTS, Art. XIII (1776); VT. CONST., Art. I, Sec. 15 (1777).

. . . ."[123] Given that Massachusetts took the burnt of Gage's efforts to seize arms from homes, it is not suprising that John Adams added the term "keep" to the declaration of that state, which read: "The people have a right to keep and bear arms for the common defense."[124]

Virginia did not adopt Thomas Jefferson's proposed bill of rights, which included the provision: "No freeman shall ever be debarred the use of arms."[125] However, George Mason's draft, which was adopted, declared "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 . . . ."[126] The three other states with bills of rights also sanctioned a well regulated militia, i.e., an armed populace.[127] The six states with no written bills of rights were just as committed to the rights to bear arms and a free press as those with formal declarations.[128]

When the Constitution was proposed in 1787 without a bill of rights, the federalists argued that one was unnecessary, since Congress had no enumerated power to control rights such as a free press and bearing arms.[129] In The Federalist No. 29, Alexander Hamilton wrote that the government should not

---

[123] N.C. DEC. OF RIGHTS, Art. XVII (1776).

[124] MASS. DEC. OF RIGHTS, Art. XVII (1780).

[125] 1 JEFFERSON, PAPERS 344-45 (1951).

[126] VA. DEC. OF RIGHTS, Art. XIII (1776).

[127] MD. DEC. OF RIGHTS, Art. XXV (1776); DEL. DEC. OF RIGHTS, Art. XVIII (1776); N.H. DEC. OF RIGHTS, Art. XXIV (1784).

[128] S. HALBROOK, A RIGHT TO BEAR ARMS 79-106 (1989).

[129] On the controversies surrounding the Constitution and Bill of Rights in the 1787-1791 period leading to the adoption of the Second Amendment, see S. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 65-84 (1984).

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 ready to defend their rights and those of their fellow citizens.[130]

In The Federalist No. 46, James Madison, in contending that "the ultimate authority . . . resides in the people alone,"[131] predicted that encroachments by the federal government would provoke "plans of resistance" and an "appeal to a trial of force."[132] To a regular army of the United States government "would be opposed a militia amounting to near half a million citizens with arms in their hands." Alluding to "the advantage of being armed, which the Americans possess over the people of almost every other nation," Madison continued, "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."[133] If the people were armed and organized into militia, "the throne of every tyranny in Europe would

---

[130] MADISON, HAMILTON, & JAY, THE FEDERALIST PAPERS 184-85 (Arlington House ed. n.d.)

[131] Id. at 294.

[132] Id. at 298.

[133] Id. at 299.

be speedily overturned in spite of the legions which surround it."[134]

The Founding Fathers were even more explicit in insisting that American citizens would be able to possess military-type small arms. Noah Webster, the influential federalist whose name still appears on dictionaries, stated: "Before a 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."[135] Similarly, Tench Coxe, a friend of James Madison and a tireless federalist, wrote:

> 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.[136]

The antifederalists demanded that these promises be made in writing. Insisting on a bill of rights, Richard Henry Lee wrote that "to preserve liberty, it is essential that the whole body of the people always

---

[134] Id. at 300.

[135] N. Webster, An Examination into the Leading Principles of the Federal Constitution (1787), in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 56 (P. Ford ed. 1888).

[136] Pennsylvania Gazette, Feb. 20, 1788, in 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES (Mfm. Supp.) 1778-80 (Jensen ed. 1976).

possess arms, and be taught alike, especially when young, how to use them . . . ."[137] The Supreme Court recently noted:

> The remarks of Richard Henry Lee are typical of the rejoinders of the Antifederalists. . . . The concerns voiced by the Antifederalists led to the adoption of the Bill of Rights. . . .
>
> The fears of the Antifederalists were well founded.[138]

Given his role in the pre-Revolutionary period, it is hardly surprising that Samuel Adams would propose in the Massachusetts ratifying convention a bill of rights affirming "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. . . ."[139] Similarly, the proposals adopted in the Dissent of Minority at the Pennsylvania convention included the following: "That the people have a right to bear arms for the defense of themselves, their state, or the United States, and for killing game, and no law shall be enacted for disarming the people except for crimes committed or in a case of real danger of public injury from individuals. . . ."[140]

New Hampshire was the first state convention to recommend that the Constitution 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."[141] In Virginia, George Mason added a new clause to that state's declaration which the

---

[137] R. LEE, ADDITIONAL LETTERS FROM THE FEDERAL FARMER 170 (1788).

[138] Minneapolis Star v. Minnesota Com. of Rev., 460 U.S. 575, 584 (1983).

[139] 2 B. SCHWARTZ, THE BILL OF RIGHTS 681 (1971).

[140] 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 597, 623-24 (1976).

[141] 2. B. SCHWARTZ, THE BILL OF RIGHTS 761 (1971).

convention demanded that the federal constitution guarantee: "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 . . . ."[142] The conventions of North Carolina, New York, and Rhode Island repeated this insistence on a federal bill of rights with the clause, "that the people have a right to keep and bear arms. . . ."[143]

When James Madison proposed the Bill of Rights to Congress in 1789, he wrote that the proposed amendments concerning the press and arms "relate first to private rights . . . ."[144] Ten days after its introduction, federalist leader Tench Coxe wrote of what became the Second Amendment: "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."[145] Madison endorsed Coxe's analysis, which was reprinted without contradiction.[146] In fact, what became the Second Amendment was seen as embodying the proposal drafted by Samuel Adams, "that the said constitution be never construed to authorize congress . . . to prevent the people of the United States,

---

[142] 3 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS 659 (1836).

[143] Id., 1, at 327-28, 335, and 4, at 244.

[144] 12 MADISON PAPERS 193-194 (Rutland ed. 1979).

[145] "Remarks on the First Part of the Amendments to the Federal Constitution," Federal Gazette, June 18, 1789, at 2, col. 1.

[146] See 12 MADISON PAPERS at 239-40, 257 (1979).

who are peaceable citizens, from keeping their own arms . . . ."[147]

St. George Tucker, the first major commentator on the Bill of Rights,[148] explained the Second Amendment as follows: "The right of self-defense is the first law of nature . . . . Wherever . . . the right of the people to keep and bear arms is, under any color or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction."[149]

CONCLUSION

Such, then, is how "the arbitrary encroachments of the Crown on the liberty of the subjects" prompted adoption of the Second Amendment. This history demonstrates that, to the patriots who were interested in preserving civil liberty, the mere possibility in 1768 that the government would seize arms gave rise to a robust philosophical defense of what was considered a fundamental, personal right. When in 1774 the rulers of Boston dared even to consider disarming the inhabitants, thousands of armed citizens felt justified in assembling and marching to the town to demonstrate their opposition. The Founders considered a ban on importation of firearms and ammunition to violate the individual right to obtain and possess arms.

The patriots' aversion to the governmental policy of searching persons, places, and houses and seizing firearms demonstrates the close connection between the Second Amendment right to keep arms

---

[147] Independent Gazetteer (Philadelphia), Aug. 20, 1789, at 2, col. 2.

[148] New York Times v. Sullivan, 376 U.S. 254, 296-97 (1964).

[149] 1 Tucker, BLACKSTONE'S COMMENTARIES (Appendix) 300 (1803). Henry St. George Tucker, another major commentator, wrote that "the right of bearing arms" was one of the "protections or barriers [which] have been erected which serve to maintain inviolate the three primary rights of personal security, personal liberty, and private property." 1 Tucker, COMMENTARIES ON THE LAWS OF VIRGINIA 43 (1831). Blackstone's influence is just as clear here as it was on Samuel Adams' defense of this right in 1768-69.

and the Fourth Amendment prohibition on warrantless searches and seizures. Gage's trickery in inducing the inhabitants to turn in their arms for "temporary safekeeping" and then in seizing those arms, never to be returned, gave rise to the traditional American skepticism toward benevolent rulers who promise only limited infringements on such rights. Imposition of martial law only exasperated the American citizen's belief that he or she is entitled to possess military-style small arms for parity against an oppressive standing army.

As social philosophers recognize, the mere selection of a topic for study, and the recognition of selected events as significant, imply value judgments.[150] Hopefully, its presence in the Bill of Rights excuses interest in what has been termed "the embarrassing Second Amendment."[151] Unfortunately, scholars have never analyzed the "arbitrary encroachments of the Crown on the liberty of the subject" which gave rise to the Second Amendment, perhaps because that hidden history could conflict with the questionable premise that banning firearms would not infringe on individual rights. Thus the need for such conventional wisdom as is expressed in the following law review comment: "In all the writings on the Revolutionary War and the turbulent times preceding it, there is no evidence showing that the colonists or their revolutionary leaders believed that they had a personal right to carry firearms, nor that the British were violating a personal right

---

[150] May Brodbeck summarizes Max Weber's observations about how values intrude into objectivity as follows: "First, they determine the subject matter we select for study, and, secondly, they influence our judgment about the cause of a specific event. By virtue of these evaluative choices, we endow certain situations and not others with 'significance.'" M. BRODBECK, READINGS IN THE PHILOSOPHY OF THE SOCIAL SCIENCES 80 (1968).

The social function of condemning, simply by ignoring, important human events to the dust bin of history, is well recognized by "radical" historians such as Howard Zinn. H. ZINN, THE POLITICS OF HISTORY 35-55 (1970).

[151] L. Levinson, The Embarrassing Second Amendment, 99 YALE LAW JOUR. 637 (1989).

to carry firearms."[152] It is understandable that the author eschews original sources, which demonstrate quite the opposite.

To restate the postulate of social philosophers, failure to select a topic for study, or consignment of the history of a concept to the Orwellian memory hole, implies a value judgment as well. When the concept subjected to this treatment is a guarantee in the Bill of Rights, it remains to be seen whether the libertarian hopes of the Revolutionary Founding Fathers will be realized in the third century of the American body politic.

---

[152] Comment, Banning Handguns: Quilici v. Village of Morton Grove and the Second Amendment, 60 WASH. UNIV. LAW QUARTERLY 1087, 1093 (1982).