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The Citizen-Soldier under Federal and State Law

James Biser Whisker
West Virginia University

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THE CITIZEN-SOLDIER UNDER FEDERAL AND STATE LAW

JAMES BISER WHISKER*

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I. INTRODUCTION

There are three principal sources of information for understanding citizen-soldiers and their role in the military organization of the United States: tradition, state law, and federal law. The first factor was a major influence on the formulation of law in the first three centuries of American history. The two latter factors have undergone significant change in the twentieth century.

The United States Constitution authorizes Congress "To raise and support Armies"¹ [hereinafter the Army Clause] and "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions [and] . . . organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States."² The states were to appoint officers and train "the Militia according to the discipline prescribed by Congress" [hereinafter the Militia Clause].³

* Professor of Political Science, West Virginia University.

1. U.S. CONST. art. I, § 8, cl. 12.

2. U.S. CONST. art. I, § 8, cls. 15-16.

3. U.S. CONST. art. I, § 8, cl. 16.

The Second Amendment to the United States Constitution was drafted by James Madison. He had promised during the ratification debates that, if the Constitution was ratified, he would propose a set of constitutional guarantees of civil liberties and civil rights to the basic document of the land. The Second Amendment initially had implications only for the individual right to keep and bear arms. As originally drafted, the right to keep and bear arms 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 of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person."

Elbridge Gerry, delegate from Massachusetts and later a leading Anti-Federalist, objected, arguing that the last clause might be used to disarm certain religious minorities. When proposed to the states the amendment read, "A well-regulated militia being necessary to the common defense, the right of the people to keep and bear arms shall not be infringed."⁴

There was little conflict between the state and the federal governments over the meaning and application of the Militia Clause and the Second Amendment during the early years of American history. States maintained militias that were only rarely deployed and the national government maintained a very small standing army except in time of war. Citizens owned arms with which they hunted, fought Amerindians, shot for recreation, and resisted crime. Only rarely did the national government consider calling the state militias into federal service. In the twentieth century there has been a tendency to increase federal powers at the expense of the states, and the militias have not been exempt from this expansion of national governmental power.

The first, and apparently only, thorough examination of the Militia and Army Clauses was undertaken on the eve of World War II by Frederick B. Wiener, a professor of law at Harvard University.⁵ In that article, Wiener traced the history of militia and army

4. 1 ANNALS OF CONG. 451 (Joseph Gales ed., 1789).

5. Frederick B. Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181 (1940).

relations, and gave an overview of the history of militias. Wiener was heavily influenced by the anti-militia military writings of Brevet Major General Emory Upton, a professional soldier.⁶ Upton had stated eloquently the position of the military establishment, and had exercised considerable influence on Elihu Root who served as United States Secretary of War between 1899 and 1904. The only other histories of the army and its policies available to Wiener were written by admirers of Upton.⁷ Wiener acknowledged in his article his large debt to Upton, Spaulding, and Ganoe. Following his sources, Wiener argued that the state militias had been of little value in war and were best suited to marching in "showy parades in harlequin uniforms."⁸ When the United States Supreme Court has ruled on the meaning of the Militia Clause, especially in recent years, it has relied on the prejudices and perspectives of Frederick Wiener.⁹

II. THE MILITIA DEFINED

The citizen-soldier may be defined as one whose interest in, and dedication to, military affairs is secondary to the major business of his life. He is, by vocation, a scholar, physician, lawyer, butcher, baker, candle-stick maker, or farmer; he is, by avocation, a soldier. He is epitomized by the story, so familiar in the early Republic, of Cincinnatus leaving his plow in the field to enter temporary military service in order to save Rome. He returned to the plow as soon as the danger had passed.

The citizen-soldier is seen, again, in medieval times, as the peasant conscripted to fight as a foot soldier.¹⁰ He is seen in the Minuteman of Lexington and Concord who left his business to attend

6. EMORY UPTON, *THE MILITARY POLICY OF THE UNITED STATES FROM 1775* (1904) (printed at the order of Elihu Root, Secretary of War under President Theodore Roosevelt by the U.S. Government Printing Office).

7. WILLIAM A. GANOE, *HISTORY OF THE UNITED STATES ARMY* (1936); OLIVER LYMAN SPAULDING, *THE UNITED STATES ARMY IN WAR AND PEACE* (1937).

8. Wiener, *supra* note 5, at 191.

9. *E.g.*, *Perpich v. Department of Defense*, 496 U.S. 334 (1990).

10. In medieval law, especially where influenced by Saxon law, citizens shouldered a tri-fold obligation, *trinoda necessitas*, to maintain and repair bridges and roads [*pontis reparatio*]; maintenance of the lord's castle [*arcis constructio*]; and militia service as the great fyrd or *levées en masse* [*expedition contra hostem*]. BLACK'S LAW DICTIONARY 1507 (6th ed. 1990).

to the matter of the nation's liberty. The citizen-soldier is a militiaman, a member of the unenrolled or the enrolled militia. Most nations, and certainly international law, recognize the unenrolled militia as the great body of citizens who may rise up to defend their homes in time of invasion or insurrection.¹¹ Those enrolled formally today in the United States belong to the National Guard units of their state. Other nations have similar methods of formally enlisting conscripts into an organized paramilitary body.

A simple dictionary definition of militia is, "a body of soldiers for home use." The term meant "miles" or "troops" and was derived from the latin word for soldiers.¹² In medieval Europe it was "the whole body of freemen" between the ages of 15 and 40 years, who were required by law to keep weapons in defense of their nation.¹³

Adam Smith (1723-1790), author of the influential treatise on economic liberalism, *The Wealth of Nations*, published in 1776, defined the term militia as:

either all the citizens of military age, or a certain number of them, to join in some measure the trade of a soldier to whatever other trade or profession they may happen to carry on. If this is found to be the policy of a nation, its military force is then said to consist of a militia.¹⁴

The *New English Dictionary of Historical Principles*, defined the militia as, "a military force, especially the body of soldiers in the service of the sovereign of the state, [who are] the whole body of

11. In international law the concept is commonly known as *levées en masse*. QUINCY WRIGHT, *A STUDY OF WAR* 305 (2d ed. 1965); CHARLES G. FENWICK, *INTERNATIONAL LAW* 655 (3d ed. 1965).

12. *ETYMOLOGICAL DICTIONARY OF THE ENGLISH LANGUAGE* 368 (Walter W. Skeat ed., 1888).

13. "Assize of Arms" of 1181, in *A CONSTITUTIONAL AND LEGAL HISTORY OF MEDIEVAL ENGLAND* 273 (Bryce Lyon ed., 2d ed. 1980). In the later Middle Ages the militia was the whole body of "citizens, burgesses, free tenants, villeins [serfs] and others from 15 to 60 years of age" who were obliged by the law to be armed. *Id.*

14. ADAM SMITH, *WEALTH OF NATIONS* 660 (Modern Library ed., 1937) (1776). Smith's idea of the militia was influenced by the earlier writings of James Harrington (1611-1677), the political philosopher who developed significant theories of property rights and economic determinism. Harrington defined the militia as "the vast body of citizens in arms, both elders and youth." Harrington also noted that the militia was "[m]en accustomed to their arms and their liberties." Commenting on Harrington's thought, Sir Henry Vance the Younger wrote that the militia was comprised of those who "have deserved to be trusted with the keeping or bearing Their own Armes in publick defense." JAMES HARRINGTON, *POLITICAL WORKS* 109, 443, 696 (J.G.A. Pocock ed., 1977).

men amenable to military service, without enlistment, whether drilled or not A citizen army as distinguished from a body of mercenaries or professional soldiers."¹⁵

American minister and revolutionary leader Simeon Howard (1733-1804), writing in Boston in 1773, said that a militia was "the power of defense in the body of the people . . . [that is], a well-regulated and well-disciplined militia. This is placing the sword in hands that will not be likely to betray their trust and who will have the strongest motives to act their part well, in defence of their country."¹⁶

Benjamin Franklin defined the militia as a voluntary association of extra-governmental, armed troops acting under their own authority. Franklin wrote that a militia is a

voluntary Assembling of great Bodies of armed Men, from different Parts of the Province, on occasional Alarm, whether true or false . . . without Call or Authority from the Government, and without due Order and Direction among themselves . . . which cannot be done where compulsive means are used to force Men into Military Service¹⁷

III. TRADITION

As a nation founded on strong religious, especially Calvinist Protestant principles, America's political and philosophical traditions were heavily influenced by ideas espoused by Saint Augustine of Hippo (354-430), an author favored by both John Calvin and Martin Luther. In his discussion of the just war, Augustine defined the state as "a multitude of men bound together by some bond of concord."¹⁸ A citizen of the state "may do the duty belonging to

15. JÜRGEN SCHÄFER, *NEW ENGLISH DICTIONARY OF HISTORICAL PRINCIPLES* 439 (1980). A French writer of the period observed that "a well regulated militia [is] drawn from the body of the people." It is "accustomed to arms" and "is the proper, natural and sure defense of a free state." He cautioned his readers that a standing army was destructive of liberty. 2 HILLIARD D'AUBERTEUIL, *ESSAI HISTORIQUES SUR LES ANGLO-AMERICAIN* 107 (1782).

16. SIMEON HOWARD, *A Sermon Preached to the Ancient and Honorable Artillery Company in Boston, in AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760-1805* 199 (Charles Hyneman & Donald S. Lute eds., 1983).

17. BENJAMIN FRANKLIN, *Comments on the Pennsylvania Militia Act of 1755*, in *THE POLITICAL THOUGHT OF BENJAMIN FRANKLIN* 127-30 (Ralph Ketcham ed., 1965).

18. SAINT AUGUSTINE OF HIPPO, *The Just War*, in *THE POLITICAL WRITINGS OF SAINT AUGUSTINE* 165 (Henry Paolucci ed., 1962).

his position in the State by fighting by the order of his sovereign" even if the leader is "an ungodly king" and the militiaman is "a righteous man."¹⁹ Augustine followed the Roman philosopher Cicero in agreeing that "a state should engage in war for the safety which preserves the state."²⁰ The evil of war is not in killing and dying; rather it is in the change wrought in the hearts of those who come to love war and violence, and who hate their enemies.²¹ If Christ had intended to condemn war outright, he would have done so. He would have told the soldiers who came to him²² that they could not earn or merit salvation as long as he bore arms.²³

In the early days of the Roman Republic the citizen-soldier provided the armed forces of that nation. Noted Roman General Marcus Porcius Cato (234-149 B.C.) argued that farmers made the sturdiest soldiers and that the nation would endure so long as they made up the defense force. Polybius (204-122 B.C.) and Gaius Sallustius Crispus (86-34 B.C.) found the success of the Romans to be tied to their citizen-army. After the fall of the Roman Empire, defense against external and internal enemies was provided in the many small kingdoms by a complex arrangement of obligations based on class distinctions. The lower classes provided common arms of the day and were known as the *fyrð*. Those subject to discipline were the *select fyrð*, and the untrained masses were known as the *great fyrð*. Nobles maintained a standing army of professionals or mercenaries known as *houscarls*. As early as 690 A.D. the *ceorl*, the lowest freemen in England, were required by law to keep and bear arms as a legal obligation to the lords to whom they were bound in oath.²⁴

American constitutional authority Charles Ellis Stevens commented on the European communal right to bear arms as citizen-soldiers. He called it

19. *Id.* at 165.

20. *Id.* at 163.

21. *Id.* at 164.

22. *Matthew* 8:9-10.

23. Saint Augustine, *supra* note 18, at 181.

24. LAWS OF INE 1.51 (ca 690).

a right involving the latent power of resistance to tyrannical government. From prehistoric days the right to bear arms seems to have been the badge of a Teutonic freeman, and closely associated with his political privileges. Such armed freemen made up the military host of the tribe. During Saxon times in England there was a fyrd, or national militia service, in which was one of the three duties, *trinoda necessitas*, to which every able bodied proprietor was subject.²⁵

Three of the most significant sources of American political theory were the writings of John Locke (1632-1794), James Harrington (1611-1677), and Charles-Louis de Secondat, Baron de la Brede et de Montesquieu (1689-1755). Locke noted that when people "have given themselves to the absolute power and will of a legislator, they have disarmed themselves, and armed him, to make prey of them when he pleases."²⁶ Harrington emphasized general property ownership as a pre-condition for establishing and maintaining republics. He conceived one form of property, arms, to be the primary means by which individuals affirmed their political participation. How they exercised the right to possess arms told us much about their ability to act as responsible moral agents. Bearing arms, simply, symbolized political independence. Because the landed gentle class had leisure time on its hands it could exercise many attributes of citizenship, including voting and bearing arms. As Harrington wrote, "Men accustomed unto their arms and liberties will never endure the yoke" of tyranny.²⁷ Montesquieu was one of Thomas Jefferson's favorite authors. In his best known work, *The Spirit of the Laws*, Montesquieu observed, "[I]t follows that the laws of an Italian republic, where bearing fire-arms is punished as a capital crime and where it is not more fatal to make an ill use of them than to carry them, is not agreeable to the nature of things."²⁸

The English Puritans believed that arms bearing was a symbol of freedom. Algernon Sidney, in writing of the militia, noted that it was a truly distributive right because "every man is armed."²⁹

25. CHARLES ELLIS STEVENS, *SOURCES OF THE CONSTITUTION OF THE UNITED STATES* 223-24 (1894).

26. JOHN LOCKE, *SECOND TREATISE OF CIVIL GOVERNMENT* 114-15 (Chicago ed., 1955) (1689).

27. JAMES HARRINGTON, *PREROGATIVE OF POPULAR GOVERNMENT IN POLITICAL WORKS* 443 (J.G.A. Pocock ed., 1977).

28. CHARLES LOUISE DE SECONDAT, *BARON DE LA BRÈDE ET DE MONTESQUIEU, SPIRIT OF THE LAWS* 79-80 (Thomas Nugent trans., 1949) (1748).

29. ALGERNON SIDNEY, *DISCOURSES CONCERNING GOVERNMENT* 157 (1698).

Matthew Rokeby (1713-1800) observed that the colonists had established "all democratical governments where the power is in the hands of the people and where there is not the least difficulty or jealousy about putting arms into the hands of every man in the country."³⁰

William Blackstone (1723-1780), through his compilation of the English legal tradition, was the source consulted and studied by most American lawyers. In his *Commentaries* on England's laws, written on the very eve of the American Revolution, Blackstone listed the individual and collective right to bear arms for self-defense as an auxiliary right of the individual. Blackstone wrote:

The fifth and last auxiliary right of the subject that I shall at present mention, is that of having arms for their defense, suitable to their condition and degree, and such as are allowed by law. [It] is indeed a public allowance, with 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. In these several articles consist the rights, or, as they are frequently termed, liberties of Englishmen³¹

IV. THE COLONIAL MILITIA

The militia was the mainstay of armed resistance to both the French and the Amerindians during the colonial period of American history. As each colony was formed the settlers and proprietors sent along with the first wave of settlers a professional soldier to train the entire community in the use of arms. Likewise, the political authorities usually appointed a smith to serve the settlers to keep the colonials' arms in good repair. Colonial military organization consisted exclusively militias, comprised of farmers, gentry, tradesmen, and yeomen of the colony. Each able-bodied male citizen was

30. MATTHEW ROKEBY, *CONSIDERATIONS ON THE MEASURES CARRYING ON WITH RESPECT TO THE BRITISH COLONIES IN NORTH AMERICA* 133-35 (1774). Writing after the English civil war was over, political commentator Richard Price observed, "Free States ought to be bodies of armed citizens, well regulated and well disciplined and always ready to turn out . . . Such, if I am rightly informed are the citizens of America . . . hardy yeomen . . . trained to arms and instructed in their rights." In contrast, British citizens who are far less free, have a political system "consisting as it does . . . of unarmed inhabitants and threatened by tyrannical governors and by foreign enemies." RICHARD PRICE, *OBSERVATIONS ON THE IMPORTANCE OF THE AMERICAN REVOLUTION* 16, 69, 76 (1784).

31. 1 WILLIAM BLACKSTONE, *COMMENTARIES* *143-44.

required by most colonial governments to obtain an arm at his own expense. If a militiaman could not afford an arm, one was provided at the public expense, and a method of repayment of debt was worked out.³² The citizen-soldier had to maintain his arm, along with appropriate and necessary accoutrements, and to present them on militia training days.³³ In practice, the colonies drilled and inspected the militia only in times of danger.

Control over the militia was localized, with men being drawn into units formed in their home areas. There was no centralized command, except that occasionally enacted within a specific colony. Each state, and often, each city, town or district, had its own organization and hierarchy. Militiamen usually elected their own officers.³⁴ They entered into service in their own areas. When service would take them out of their own immediate areas, they usually balked at accepting service. The militias usually served for short periods of time, commonly sixty days or less. When service was to be for longer terms or the men were to be deployed outside their own areas, the militia served primarily as a reservoir of volunteers, ready to serve in or with the standing British army when there was an emergency.

Volunteers were formed in militia units who came under the command of professional, usually British, officers and served in regular military units. While a few militias were organized into recognizable units, these militiamen rarely fought as members of defined units, nor were they expected to. The militia system was created only to discipline and train the men, not to produce combat units. These militias were pools of talent to be used to fill vacancies in combat units and to provide select militiamen to perform assigned missions, such as were carried out by frontier rangers. Many militiamen vol-

32. For example, the Massachusetts General Court in March 1631 ordered all able-bodied men, including indentured servants, but not slaves, to equip themselves with a musket or other appropriate arm within two weeks. If the militiaman did not have the funds to buy a gun he would receive an advance out of public funds, with liberal repayment terms allowed. See 1 MASS. COLONIAL RECORDS 85; 4 MASS. COLONIAL RECORDS 222; DANIEL BOORSTIN, *THE AMERICANS: THE COLONIAL EXPERIENCE* 355 (1958).

33. See, e.g., 3 COLONIAL RECORDS OF RHODE ISLAND 430-33.

34. Morrison Sharp, *Leadership and Democracy in the Early New England System of Defense*, 50 AM. HIST. REV. 244 (1945).

unteered to serve on specific, and often dangerous, assignments. If there were insufficient volunteers, some of the militiamen might be drafted. Some militia units were assigned specific quotas of especially able and trained men for active service when needed. Usually only volunteers and conscripts served outside the local area.³⁵

Each colony enacted and re-enacted militia laws. The eligible age varied considerably. Sometimes youths as young as fourteen years of age were eligible for military duty. Adults, as old as sixty-five years of age, were enlisted by some colonies.³⁶ No able-bodied man was exempted, except for occasional clergy and the members of religious groups known to be conscientiously opposed to war.³⁷ Colonial militia laws specified fines, corporal punishment, and imprisonment for failure to appear or to have and maintain the equipment required by law. Militiamen had no regular uniforms, appearing in their normal clothing of buckskin and homespun.³⁸

The militia units were well adapted to fighting in the American hinterland. While the British regular army had acquitted itself very well against the French army in Canada, it had proven wholly inadequate to deal with the native aborigine. European style military training did not prepare the British army to deal with opponents who appeared from behind rocks and trees and who refused to stand and fight as armies had in Europe for many centuries. Time and again, the colonial militias had rescued the regular British units in engagements in the wilderness.

There had been no American standing army during the colonial period. After we declared our independence, Congress and the state

35. Louis Morton, *The Origins of American Military Policy*, in 22 *MILITARY AFFAIRS* 75, 79-80 (1958).

36. The militia laws of Connecticut illustrate the wide variance in ages of militiamen encompassed by legislation. Initially, men between ages 16 and 30 served. In 1708 the upper limit was extended to 55. The upper limit was reset at 50 and finally at 45. 5 *PUBLIC RECORDS OF CONN.* 83; see also 7 *id.* at 884; 8 *id.* at 36; and 12 *id.* at 248. A militia law of 14 May 1645 of Massachusetts created a "junior militia" of young men between 10 and 16 who were trained ("pre-induction militia training") in the use of bows and arrows, pike and guns. 3 *MASS. COLONIAL RECORDS* 12.

37. See, e.g., 7 *COLONIAL RECORDS OF PENN.* 744ff; 1 *NEW YORK COLONIAL DOCUMENTS* 272-73; 27 *MD. ARCHIVES* 103-04 & 120; Benjamin Franklin, *The Pennsylvania Gazette*, Dec. 18, 1755.

38. *Training Day*, in *CONCISE DICTIONARY OF AMERICAN HISTORY*, 961 (Thomas L. Cochran & Wayne Andrews eds., 1962).

governments had no choice initially but to rely on the militia. As the war dragged on, Washington, supported by others, decided to form a regular army. Congress called some militiamen into its service as the Continental Line, but the mainstay of the American revolutionary army remained the militia.

On 23 March 1775, the Continental Congress debated the use of the militia. It chose to retain the basic military organization that had served the colonies well over the past two centuries. Congress thus resolved:

That a well regulated Militia, composed of Gentlemen and Yeomen, is the natural strength and only security of a free Government; that such a militia . . . would forever render it unnecessary for the Mother Country to keep among us, for the purpose of our defence, any Standing Army of mercenary forces, always subversive of the quiet, and dangerous to the liberties of the people, and would obviate the pretext of taxing us for their support. That the establishment of such a Militia is at this time peculiarly necessary, by the state of our laws for the protection and defence of the Country³⁹

On 28 October 1775, the Congress passed the first national militia law. That law directed:

That each and every Captain in the Colonies within ten days after the publication hereof shall make out a list of all persons residing in his District capable of bearing Arms, between the ages of sixteen and fifty years, . . . to enroll themselves by signing a Muster Roll And it is further Resolved, That every person directed to be enrolled as above shall at his place of abode be also provided with one pound of Powder and three pounds of Bullets of proper size to his Musket or Firelock . . . [and] to furnish himself with a good Musket or Firelock, and Bayonet, Sword or Tomahawk, a steel ramrod, Worm, Priming Wire and Brush fitted thereto, a Cartouch Box to contain twenty-three rounds of Cartridges . . . under the forfeiture of two Shillings for the want of a Musket or Firelock⁴⁰

39. 4 AMERICAN ARCHIVES 2, 341. The Congress made a distinction between the militia and a standing army.

And here lies the distinction between the Militia-men and Regulars: the former, at the hazard of their lives, are to execute no unjust, unnatural, unconstitutional orders; the latter, even at the peril of their lives, must implicitly and unhesitatingly obey every order they receive from their commanding officers, even if it were to lay the whole City of London in ashes this very moment, or to rip open the bowels of every pregnant woman in the Kingdom, their own Mothers not excepted.

Id. at 841.

40. *Id.* at 1235-37.

Americans were unfavorably disposed to accept a standing army, so long and satisfying was their experience with the militia. Of the wrongs done to the colonists, Chief Justice Earl Warren wrote that none were more offensive than those committed by the standing British army. Of the Minutemen of Massachusetts, and the role of the citizen-soldiers, Warren wrote:

Among the grievous wrongs of which [the Americans] complained in the Declaration of Independence were that the King had subordinated the civil power to the military, that he had quartered troops among them in times of peace, and that through his mercenaries he had committed other cruelties. Our War of the Revolution was, in good measure, fought as a protest against standing armies. Moreover, it was fought largely with a civilian army, the militia, and its great Commander-in-Chief was a civilian at heart [Fears of despotism] were uppermost in the minds of the Founding Fathers when they drafted the Constitution. Distrust of a standing army was expressed by many. Recognition of the danger from Indians and foreign nations caused them to authorize a national armed force begrudgingly.⁴¹

General George Washington lamented the lack of discipline and dedication of the militia and demanded that a real, trained army be formed.⁴² That was accomplished with the help of Baron Friedrich von Steuben (1730-1794). After observing what von Steuben was creating, one Connecticut writer complained that "it looks too much . . . like a standing army."⁴³ After the Revolution the standing army was reduced to only a few troops who guarded arsenals and gunpowder magazines.

V. FEDERALISTS AND ANTI-FEDERALISTS

The grand age of American political debate was centered around the adoption of the new federal constitution drafted in 1787 and

41. Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 183-84 (1962).

42. Washington wrote,

Regular troops alone are equal to the exigencies of modern war, as well for defence as for offence No militia will ever acquire the habits necessary to resist a regular force The firmness requisite for the real business of fighting is only to be attained by a constant course of discipline and service. I have never yet been witness to a single instance that would justify a different opinion The Jealousies of a Standing Army and the Evils to be apprehended from one are remote, and in my judgment, situated and circumstanced as we are, not at all to be dreaded; but the consequence of wanting one, according to my Ideas . . . is certain and inevitable ruin.

6 THE WRITINGS OF GEORGE WASHINGTON 112 (John C. Fitzpatrick ed., 1932) and 20 *id.* at 49-50.

43. Quoted in THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 378 (Merrill Jensen ed., 1976) [hereinafter THE DOCUMENTARY HISTORY OF THE RATIFICATION].

immediately proposed to the states for ratification. In general, the Federalists preferred a strong national government, as proposed in the Constitution, while the Anti-Federalists distrusted any centralization of power. The Anti-Federalists noted that the national government had been granted significant power over the state militias because the militias could be nationalized to quell insurrections and to repel invasions.

Alexander Hamilton, writing as Publius, defended the Federalist position during the debates over the ratification of the proposed Constitution of 1787. "Nor can tyranny be introduced into this country by arms," Hamilton wrote, "the spirit of the country with arms in their hands and disciplined as a militia, would render it impossible."⁴⁴

44. 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 831 (Julius Goebel, Jr. ed., 1964). In defense of an army Hamilton wrote,

An army, so large as seriously to menace those liberties, could only be formed by progressive augmentations . . . not merely a temporary combination between the legislature and executive, but a continued conspiracy for a series of time

Few persons will be so visionary as seriously to contend that military forces ought not to be raised to quell a rebellion or resist an invasion; and if the defence of the community under such circumstances should make it necessary to have an army so numerous as to hazard its liberty. This is one of those calamities for which there is neither preventative nor care.

Hamilton wrote that a militia

will not only lessen the call for military establishments, but if circumstances should at any time oblige the government to form an army of any magnitude that army can never be formidable to the liberties of the people while there is a large body of citizens, little if at all inferior to them in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow-citizens.

THE FEDERALIST No. 26 (Alexander Hamilton).

Hamilton argued further that only a select, trained militia could perform the duties required to protect and defend the nation.

[W]ere the Constitution ratified and were I to deliver my sentiments to a member of the federal legislature on the subject of a militia establishment, I should hold . . . [that] [t]he project of disciplining all the militia of the United States is as futile as it would be injurious To oblige the great body of yeomanry and of the other classes of the 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, would be a real grievance to the people and a serious public inconvenience and loss Little more can reasonably be aimed at with respect to the people at large than to have them properly armed and equipped; and in order to see that this not be neglected, it will be necessary to assemble them once or twice in the course of a year.

[I]t is a matter of the utmost importance that a well-digested plan should, as soon as

James Madison, also writing as a Federalist under the same pen name used by Hamilton, argued that the final authority of government and governmental power resided in and with the people. His position on the militia was closer to the Anti-Federalists. He wrote of a Europe which had not maintained a strong militia system as in the past. "The throne of every tyranny in Europe would be speedily overturned in spite of the legions [of professional military] which surround it," Madison wrote, had they maintained arms in the hands of the people; but "the governments are afraid to trust the people with arms."⁴⁵

The Anti-Federalists thought that the Federalists only pretended to want only a militia-based military system. To many Anti-Federalists the "select militia" sounded a great deal like a standing

possible, be adopted for the proper establishment of the militia.

Id.

The people at large, possessing arms and a certain level of skill as marksmen would form a reservoir of manpower "little if at all inferior to them [the select militia] in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow-citizens." *Id.* Hamilton argued that there would be no discernable difference in the populating of a select militia and a great militia. Each would be comprised of "our sons, our brothers, our neighbors, our fellow-citizens" and there was absolutely no reason to fear either militia. *Id.* All militiamen share the "same feelings, sentiments, habits, and interests." *Id.* Hamilton seemed to suggest that the select militia would have many of the characteristics of a standing army when he wrote,

The American militia, in the course of the late war, have, by their valor on numerous occasions, erected eternal monuments to their fame; but the bravest of them feel and know that liberty of their country could not have been established by their efforts alone, however great and valuable they were. War, like most other things, is a science to be acquired and perfected by diligence, by perseverance, by time, and by practice.

THE FEDERALIST No. 25 (Alexander Hamilton).

45. THE FEDERALIST No. 46 (James Madison). In this article, we find the most complete statement of James Madison's view. An invading army devoted to destroying the states for the benefit of the federal government

would be opposed by a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties and united and conducted by governments [of the states] possessing their affections and confidence. It may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops. Those who are best acquainted with the late successful resistance of this country against the British arms will be most inclined to deny the possibility of it. Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached and by which the militia officers are appointed, forms a barrier against the enterprizes of ambition, more insurmountable than any which a simple government of any form can admit of.

Id.

army. In Connecticut one delegate observed that there was no significant difference between Hamilton's select militia and a standing army. The power to create a select militia granted to the proposed national government "looks too much like Baron von Steuben's militia, by which a standing army was meant and intended."⁴⁶

The Anti-Federalists argued against the creation and maintenance in peace time of anything except a militia broadly drawn from among all able-bodied males. They also objected strenuously to the provision in the proposed new Constitution that enabled the national government to call the state militias into federal service (the Militia Clause). Once the national government was granted any power over the state militias it was only a matter of time until federal supremacy would wring control of the militia from the states permanently.

The Militia Clause removed any possibility that the states could count on the militias in any meaningful way to resist federal tyranny; nor was the individual right of the citizenry to keep and bear arms any more secure. The position of the Anti-Federalists on the right of the people to form a militia and to keep and bear arms their own arms was simple. "The people are not to be disarmed of their weapons; they are to be left in full possession of them."⁴⁷

George Mason (1725-1792), one of the leading Anti-Federalists, argued "that a well regulated militia, composed of gentlemen freeholders and other freemen is the natural strength and only stable

46. 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 43, at 378. A delegate from Pennsylvania agreed. He argued that "[c]ongress may give us a select militia which will, in fact, be a standing army or Congress, afraid of the general militia, may say that there will be no militia at all. When a select militia is formed, the people in general may be disarmed." 2 *id.* at 508.

47. An Anti-Federalist, writing under the pen name of "A Democratic Federalist," argued that Federalists James Wilson and Alexander Hamilton had let it slip. The Federalists were really plotting against our rights. The people were not supposed to know that a standing army would result from the new federal Constitution. A select militia was really just another name for a standing army. He denounced that notion boldly.

Had we a standing army when the British invaded our peaceful shores? Was it a standing army that gained the battles of Lexington and Bunker Hill and took the ill-fated Burgoyne? Is not a well regulated militia sufficient for every purpose of internal defense? And which of you, my fellow citizens, is afraid of any invasion from foreign powers, that our brave militia would not be able immediately to repel?

1 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 646 (Jonathan Elliot ed., 1836) [hereinafter Elliott's DEBATES].

security of a free Government [whose men were required to] provide themselves [with their own arms]."⁴⁸ He stated his loathing for a standing army. "I abominate and detest a government where there is a standing army When once a standing army is established in any country the people lose their liberty."⁴⁹

During the debates over the adoption of the proposed new American Constitution of 1787, Patrick Henry (1736-1799) of Virginia, a leading Anti-Federalist, fearing that the militia principle was undermined in the new document declared, "[T]he militia, sir, is our ultimate safety. We can have no security without it."⁵⁰ In 1788 Henry made it clear that he viewed the right to keep and bear arms to be an individual right. He observed, "the great object is that every man be armed Everyone who is able may have a gun."⁵¹ Henry

48. 1 THE GUASTON HALL COLLECTION OF THE PAPERS OF GEORGE MASON 212, 215-16 (Joseph F. Anzenberger ed., 1980).

49. Elliot's DEBATES, *supra* note 47, at 286. Luther Martin (1748-1826) of Maryland, speaking to the Maryland assembly, likewise warned of the potentially grave consequences of adopting a national constitution in which control of the militia was transferred from the states to the national government.

This extraordinary provision, by which the Militia, the only defense and protection which the State can have for the security of their rights against arbitrary encroachments of the general government, is taken entirely out of the power of their respective States, and placed under the power of Congress It was argued at the Constitutional Convention that, if after having retained to the general government the great powers already granted, and among those, that of raising and keeping up regular troops, without limitations, the power over the Militia should be taken away from the States, and also given to the general government, it ought to be considered as the last *coup de grace* to the State governments; that it must be the most convincing proof, the advocates of this system design the destruction of the State governments, and that no professions to the contrary ought to be trusted

3 RECORDS OF THE FEDERAL CONVENTION OF 1787 208-09 (Max Farrand ed., 1937).

50. 3 Elliot's DEBATES, *supra* note 47, at 385. He restated his case:

My great objection to this Government is, that it a does not leave us the means of defending our rights; or of waging war against tyrants. It is urged by some Gentlemen that this new plan will bring us an acquisition of strength, an army and the militia of the States: this is an idea extremely ridiculous: Gentlemen cannot be in earnest Have we the means of resisting disciplined armies, when our only defence, the militia, is put into the hands of Congress? . . . Your arms wherewith you could defend yourselves are gone You will find all the strength of this country in the hands of your enemies Of what service would militia be to you, when most probably you will not have a single musket in the State; for as arms are to be provided by Congress, they may or may not furnish them. . . . If they neglect or refuse to discipline or arm our militia, they will be useless.

3 *Id.* at 386.

51. *Id.*

objected to federal control over various aspects of the select militia.⁵²

While the Constitution was, of course, adopted, the stage was set for a prolonged struggle between the state and the national governments for control over the complete entire forces of the nation. The federal and state courts have ruled frequently on the nature of the right to keep and bear arms, and the right of the people and the people to have and maintain a militia, as guaranteed under the Second Amendment to the United States Constitution and under similar provisions in state constitutions. The federal courts had little to do with the Militia Clause before World War I for there was little federal militia legislation to consider. The state courts were more active, ruling primarily in support of an individual, as well as collective, right to keep and bear arms.

VI. FEDERAL LAW

During President George Washington's first term of office the administration and the Congress considered legislation dealing with the militia. The result was the Militia Act of 1792 which implemented the Militia Clause of the United States Constitution, and the portion of the Second Amendment applicable to the militia. The Militia Act required that:

Every citizen shall . . . provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball or with a good rifle, knapsack, shot pouch and powder horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder; and he shall appear, so armed, accoutered, and provided when called out to exercise, or into service, except that when called out on company days to exercise only, he may appear without a knapsack. And [all] arms, ammunition, and accoutrements required . . . shall be held the same exempted from all suits, distresses, executions, or

52. Mason asked,

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

3 Elliot's *DEBATES*, *supra* note 47, at 168-69.

sales, for debt or for payment of taxes. [The] commissioned officer . . . shall be armed with a sword or hanger and spontoon . . .⁵³

That law remained in effect, as the basic law of its subject matter, long after it made good sense, until 1901. By that time many of the items required under the act were obsolescent, even obsolete. The term firelock was used to describe early arms such as wheel-locks of the sixteenth century and may refer to other muzzle-loading firearm, fired with a flint-lock mechanism. The term musket refers to a muzzle-loading arm equipped with a flint-lock or percussion cap mechanism. These arms had not been in use since the American Civil War or earlier. Spontoons were short spears used by officers as a symbol of authority as well as a weapon. These were not commonly used after the American War of Independence. Powder horns were vestiges of the muzzle-loading era which ended with the Civil War. Guns with bores as large as those firing twenty round balls to the pound had been rendered obsolete by the introduction of breech-loading arms firing brass-case cartridges of smaller diameter at high velocity. After cartridge guns came into use, loose gunpowder was of no use.⁵⁴ At a minimum, the law had to be revised to allow for modern technology and equipment.

Under the 1792 Militia Act, training, additional equipment, discipline, and oversight of the militia had all been left exclusively to the states. The federal government neither interfered with the states nor offered advice on the improvement of the militias. The regular armed force of the United States, despite the fears of many Federalists and nearly all Anti-Federalists, became a standing army. It became adept at fighting against the Amerindians, as did the frontier militias. A combined force of the regular army and the militia under General Arthur St. Clair suffered a major defeat near Fort Jefferson, Ohio, in 1791. General Anthony Wayne avenged that defeat, but only after he had unmercifully drilled both the militia and the army outside Fort Pitt before engaging the aborigine at the Battle of Fallen Timbers.⁵⁵

53. The Militia Act of 1792, ch. 23, 1 Stat. 271-72.

54. THE COMPLETE ENCYCLOPEDIA OF ARMS AND WEAPONS 445-48, 183, 347-49 (Leonid Tarassuk & Clark Blair eds., 1986).

55. RUSSELL F. WEIGLEY, HISTORY OF THE UNITED STATES ARMY 91-97 (1967).

During the War of 1812, neither the standing army nor the militia acquitted themselves well. The one bright spot in the land engagements of that war was the victory at New Orleans. Militia consisting of backwoodsmen and pirates under Andrew Jackson, at that point a regular army officer, handily defeated the regular British army. During this war the militias of several states refused to leave the United States to invade Canada. The New York militia refused to cross over into Canada. Their mission to repel invasions did not include moving onto alien soil.⁵⁶ Massachusetts Governor Caleb Strong refused to honor President James Madison's request to call up the militia to support the regular army. As the crisis grew, the Governor of Connecticut joined in the boycott. They found support in the state court.⁵⁷ The United States Supreme Court disagreed, calling this an act of nullification, and ordering that the states comply with a reasonable action of the President in his capacity as Commander-in-Chief.⁵⁸

During the Spanish-American War, one militia unit refused to serve abroad because service in Cuba had nothing to do with the powers extended to the national government under the Militia Clause of the United States Constitution.⁵⁹ Fighting with Spain in Cuba had nothing to do with repelling invasions.⁶⁰

In the Mexican War, the militia was not a factor because its service was limited to the territorial confines of the United States. Volunteers appeared to swell the ranks of the military from both

56. UPTON, *supra* note 6, at 100-04, 127. There was no book on this subject before Upton, a Brevet Major General and a regular army professional, wrote his. Upton had little but contempt for militia and any non-professional military. Elihu Root, Secretary of War from 1899 through 1904, favored Upton's ideas, and caused the U.S. Government Printing Office to print the work. Upton's ideas permeate the standard works that came after his such as WILLIAM A. GANOE, *HISTORY OF THE UNITED STATES ARMY* (1936) and OLIVER L. SPAULDING, *THE UNITED STATES ARMY IN WAR AND PEACE* (1937). All of these works, in turn, heavily influenced Frederick B. Wiener. Frederick D. Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181 (1940). Wiener heavily influenced the U.S. Supreme Court in *Dukakis v. Department of Defense*, 686 F. Supp. 30, (D. Mass.) *aff'd*, 859 F.2d 1066 (1st Cir. 1988), *cert. denied sub. nom. Massachusetts v. United States*, 490 U.S. 1020 (1989) and *Perpich v. Department of Defense*, 496 U.S. 334 (1990).

57. 8 Mass. 549 (1812) (advisory opinion).

58. *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827).

59. WALTER MILLIS, *THE MARTIAL SPIRIT* (1931); Wiener, *supra* note 5, at 192.

60. Thomas J. Moncure, Jr., *Who is the Militia? The Virginia Ratification Convention and the Right to Bear Arms*, 19 LINCOLN L. REV. 1, 13 (1990).

the enrolled and unenrolled militia. Many volunteers were frontiersmen who had considerable experience in both the Texas War for Independence of a decade earlier and fighting the Amerindians. Likewise, the Spanish-American War of 1898 enrolled volunteers because service was outside the national territories. And, again, some militia, notably western frontiersmen, acquitted themselves as well as the standing army.

The Civil War was a clear application of the Militia Clause in that the militia was called to quell civil insurrection.⁶¹ The Union Army fought the war with an odd and often ill-defined mixture of regular army, militia, and volunteers. It is difficult to say whether the officers of the regular army, those of the volunteers, or those of the militia, acquitted themselves worst overall. Few Union commanding officers, at least in the first two years of the war, are remembered for their outstanding generalship.⁶² The major weakness of the militia was that its members were enlisted for only three months' service. The day before the first battle of Manassas (or First Bull Run); two union militia regiments left the field since their ninety day enlistment had expired.⁶³

Between 1865 and 1898, without any threat of war, save for the Indian skirmishes, there was little interest in either the regular army or the militia. Most militiamen and regular soldiers trained only for parade service and guard duty. A recent historian of the army called this period "the twilight of the old army."⁶⁴ Professor Wiener,⁶⁵ commenting on the Militia Clause in his highly significant article,⁶⁶ noted that "the States relied more and more upon select bodies of men trained after a fashion . . . [and dressed] in harlequin uni-

61. ANNA ELLA CARROLL, *THE WAR POWERS OF THE GENERAL GOVERNMENT* (1861).

62. WEIGLEY, *supra* note 55, at 231-57.

63. BRUCE CATTON, *THIS HALLOWED GROUND* 58 (Washington Square Press, 1961) (1956).

64. WEIGLEY, *supra* note 55, at 270-92.

65. Wiener, *supra* note 5, at 181-220.

66. Wiener's opinion was quoted extensively, and to the exclusion of all other articles, in *Perpich v. Department of Defense*, 496 U.S. 334 (1990) and *Dukakis v. Department of Defense*, 686 F. Supp. 30 (D. Mass. 1988), *aff'd*, 859 F.2d 1066 (1st Cir. 1988), *cert. denied sub. nom. Massachusetts v. United States*, 490 U.S. 1020 (1989). We must bear in mind the strong prejudices against the militia that Wiener had developed from his sources, notably Upton, Ganoe, and Spaulding.

forms.”⁶⁷ Although Wiener singled out the militia for ridicule, it was no more the proper subject of criticism for lapses in training than was the standing army. Following the lead of his professional military sources, Wiener argued for greater federal control over the organization, discipline, and equipment of the state militias.

The first major revision of the 1792 Militia Act came in 1901 with the Army Reorganization Act⁶⁸ which, among other things, reorganized the militia. This law was the brain child of Elihu Root, Secretary of the Army under President Theodore Roosevelt.⁶⁹

The Dick Act⁷⁰ followed. It organized the militia so that the enrolled militia of the states was to be known now as the National Guard. These units were to be trained by regular army instructors and equipped through federal funding. Militia officers were to be trained at regular army schools. The militia was to attend regular drills and army camps. Still sensitive to the problems of federalism, the national government provided a number of escape clauses and provisions for approval by the states of training schedules. Militia called out under the Militia Clause of the Constitution were limited to nine months of service.

In 1908 Congress again amended the basic militia law.⁷¹ The National Guard was to be called out before an order for volunteers was issued. The nine month enlistment rule was repealed and Congress authorized itself to determine, by appropriate legislation, the length of service. The militia was to be available for deployment anywhere, without territorial or geographic limitations. However, in 1912 the United States Attorney General advised that there was no constitutional authority to order militiamen to serve outside the

67. Wiener, *supra* note 5, at 191. This lack of discipline and penchant for show over substance was noted in *Dukakis v. Department of Defense*, 686 F. Supp. at 33.

68. Army Reorganization Act of 1901, ch. 192, 31 Stat. 748.

69. Root reported that “it is really absurd that a nation . . . should run along as we have done for one hundred and ten years under a militia law which never worked satisfactorily in the beginning, and which was perfectly obsolete before any man now fit for military duty was born. . . . [W]e have practically no militia system, notwithstanding the fact that the Constitution makes it a duty” 1 REPORTS OF THE SECRETARY OF WAR 34-35 (1902).

70. Act of Jan. 21, 1903, ch. 196, 32 Stat. 775.

71. Act of May 27, 1908, ch. 204, 35 Stat. 399.

United States.⁷² The military authorities got around this limitation by getting militiamen to volunteer for service outside the continental United States.⁷³

The National Defense Act of 1916⁷⁴ provided for the training of militia officers and created a system of training for civilians, especially college students. The National Guard attained dual status. Each guardsman took an oath of allegiance to his state and to the federal government. Each man agreed to a simultaneous dual enlistment, in the national and the state National Guard. All cooperating state National Guard units were to receive federal money for training and equipment. They were to consist of trained, tactical units. As war in Europe came, Congress, acting under the 1916 law, drafted national guardsmen into federal service. The act allowed for the creation of an army reserve. No serviceman had to accept the new oath and those who had previously enlisted could refuse to take the new dual obligation oath.⁷⁵

In June 1920 Congress responded to states' rights arguments and refined the legal conception of the militia. The Army Reorganization Act of 1920⁷⁶ allowed states to refuse to release National Guardsmen to a national draft. In peacetime the state National Guard units were separated from the United States Army.⁷⁷

In 1933, the National Defense Act Amendment⁷⁸ placed the "one army" concept into the law. National Guard units were henceforth to be considered integral parts of the United States Army. The well regulated militia was to be attained only by placing the militia under the Army, not the Militia, Clause of the Constitution.

With the Act, Congress made several changes to the militia system. The Act served to reaffirm the system of dual service. National

72. Authority of President to send Militia into a Foreign Country, 29 Op. Att'y Gen. 322 (1912).

73. 1 REPORTS OF THE SECRETARY OF WAR 21-28 and 109-35 (1915).

74. National Defense Act of 1916, ch. 134, 39 Stat. 166.

75. *Sweetser v. Lowell*, 236 F. 169 (1st Cir. 1916).

76. Act of June 4, 1920, ch. 227, 41 Stat. 759.

77. *Id.* at 760. The Secretary of the Army had strongly favored a wholly integrated "one army" approach to the military organization of the United States. 1 REPORTS OF THE SECRETARY OF WAR 9 (1920); see also 3 REPORTS OF THE SECRETARY OF WAR 17, 116 (1927).

78. Act of June 15, 1933, ch. 87, 48 Stat. 153.

Guardsmen were enrolled simultaneously in the National Guard of their states and the National Guard of the United States, a reserve component of the armed forces of the United States. Now whole units of the state National Guard could be called into federal service.

In 1952 the federal government acted to bring state organized militia training under federal standards.⁷⁹ For reasons that were purely political,⁸⁰ the act contained a clause that said that “[t]he Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor”⁸¹ Many state officials and officers in state National Guard units had wished to limit the federalization of the enrolled state militias. These officers had argued that the Militia Clause limited the Army Clause. Rather than debate the constitutional questions at that moment, Congress agreed to place this restriction on the training of the state militias.⁸²

In the 1960s Congress considered cutting the appropriations to the Office of the Director of Civilian Marksmanship (DCM) and the National Board for the Promotion of Rifle Practice (NBPRP). These programs provided low cost ammunition for civilian rifle practice and assisted citizens in obtaining obsolete and obsolescent small arms which would otherwise be destroyed. They also sponsor national rifle and pistol shooting matches and support the United States Olympic and other international shooting teams. The Secretary of the Army authorized a study to be done on contract by a private consulting firm to determine the value of its support to the unenrolled militia.

The Arthur D. Little firm won the contract. The firm was headed by former General James Gavin. The report was prepared during 1965 and submitted to the United States Army in 1966. It concluded that among the unenrolled militia, when comparing those which had

79. Armed Forces Reserve Act of 1952, ch. 608, 66 Stat. 481.

80. This clause was inserted to convince the states that the national government was not making a play for additional power or attempting to void any Constitutional limitations on the deployment of the state militias, such as had been suggested in *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827).

81. 10 U.S.C. §§ 672(b) & (d) (1988).

82. *Armed Forces Reserve Act: Hearings on H.R. 5426 Before the Senate Subcommittee on Armed Services*, 82d Cong., 2d Sess. (1952).

prior training with firearms with those who had not had such expose, the trained militiamen: (a) had fewer casualties in battle, (b) were more likely to use their weapons in battle, (c) qualified in training more quickly with their small arms, (d) learned how to field strip their weapons and learned the nomenclature of the parts more quickly, and (e) were able to clear jammed or obstructed weapons more rapidly. In short, arms-trained unenrolled militiamen made a better reservoir of manpower for the enrolled militia or army than untrained men and the program was cost-effective.⁸³

There was no further legislative activity until the Montgomery Amendment⁸⁴ was passed in 1986. That amendment to the armed forces appropriation bill of 1986 was offered in response to the action taken by several governors who withheld their permission for their state National Guard units to participate in federally scheduled training exercises in Honduras.

VII. STATE LAWS AND COURT DECISIONS

The militia is recognized variously in nearly all state constitutions. The notable exceptions are New York, New Jersey, and Maryland. There are no constitutional protections in the constitutions of these three states for either an individual or a collective right to keep and bear arms. Protection and recognition of the individual right to keep and bear arms and the collective defense of the state are mixed in many state constitutions, as is the case with the Second Amendment to the United States Constitution. Some state constitutions generally avoided the equivocation that marked the Second Amendment in that they clearly confer on citizens an individual right to keep and bear arms. Only in Massachusetts⁸⁵ has the constitutional provision been interpreted to exclude an individual right, although the identical language in at least three others states has been interpreted to confer an individual right.⁸⁶

83. Arthur D. Little Report to the U.S. Army, 1966. The full report exists in five copies, one of which was made available by Colonel Louis J. North, U.S.A. (Ret.). Colonel North served as liaison between the Army and the Little firm. A summary of the report may be found as an appendix in JAMES B. WHISKER, *THE CITIZEN-SOLDIER AND UNITED STATES MILITARY POLICY* (1966).

84. 10 U.S.C. § 672(f) (1988).

85. *Commonwealth v. Davis*, 343 N.E.2d 847 (Mass. 1976).

86. See Moncure, *supra* note 60, at 21.

In the majority of states the defense of the state and the support of civil authority or both are given as justification for the constitutional right to bear arms. Many states also mention a right to protect home, family, self, and neighbors. The constitutions of Arkansas, Nebraska, Massachusetts, and Tennessee mention the "common defense."⁸⁷ It is the clear intention of state constitutions generally to guarantee an individual right to keep and bear arms while simultaneously reaffirming the right of the state to maintain a militia.

Two states placed in their constitutions stipulations that private militias, or other private armed forces, may not be created under the constitutional guarantee to keep and bear arms. Several state constitutions also contain the Anti-Federalist sentiment that a standing army ought not to exist in time of peace. None of these limitations really bear on the common and ordinary powers of the state to create, equip, maintain, and support a legal militia.⁸⁸

In the nineteenth and early twentieth centuries most state court activity centered on deciding what rights accrued to the people under state constitutions and statutes pertaining to the militia.⁸⁹ The best known state case on the right of the people to keep and bear arms as a part of the militia was a Tennessee case, *Aymette v. State*.⁹⁰ The case set the criterion for deciding if a weapon was protected under a general militia right to keep and bear arms. In order to be a legal, that is, a protected arm, there had to be a demonstrable connection with potential militia use. Specifically not included were gangster-type weapons, such as dirks, saps, and clubs. *Aymette* included as protected arms those that might normally be used by an

87. ARK. CONST. art. II, § 5; NEB. CONST. art. I, § 1; MASS. CONST. pt. I, art. XVII; TENN. CONST. art. I, § 26.

88. A recent commentary contained this observation, "When a state of the union has control of a well-regulated militia, it can resist the encroachments of a tyrant or a dictator. The autocrat cannot long survive who does not have complete control of the armed forces. The Constitution seeks to discourage one man rule by dividing control of the militia. The only right of bearing arms here granted is that which is done in a lawfully recognized group or militia." J.A. RICKARD & JAMES McCROCKLIN, *OUR NATIONAL CONSTITUTION: ORIGINS, DEVELOPMENT AND MEANING* 235-36 (1955).

89. Among the more important state court decisions on this point of law are: *Nunn v. State*, 1 Ga. 243 (1846); *Simpson v. State*, 14 Tenn. (6 Yer.) 356 (1833); *Aymette v. State*, 21 Tenn. (2 Hum.) 154 (1840); *State v. Kerner*, 107 S.E. 222 (N.C. 1921); *State v. Workman*, 14 S.E. 9 (W. Va. 1891).

90. *Aymette v. State*, 21 Tenn. (2 Hum.) 154 (1840).

army, a militia, or in defense of a state against civil disturbance. In 1939, the United States Supreme Court drew heavily on *Aymette* to set its own standards for protecting under the Second Amendment various classes of arms in *United States v. Miller*.⁹¹ The Court observed that "the Second Amendment was adopted with the obvious purpose of assuring the effectiveness of the state militias."⁹²

Among the more significant state court decisions of the militia rights of citizens under state law is a North Carolina case decided in 1921. North Carolina's constitution guarantees both an individual and a collective right to keep and bear arms.⁹³ In *State v. Kerner*⁹⁴ the North Carolina Supreme Court referred to the right to keep and bear arms as "a sacred right based upon the experience of the ages in order that people may be accustomed to bear arms and ready to use them for protection of their liberties or their country when occasion serves." Like the Tennessee court, the North Carolina court realized that reasonable distinctions may be made between those weapons which people may lawfully possess and those which naturally belong only to a state National Guard or national armed force. Courts in fact make these fine distinctions normally and as a matter of course.⁹⁵

One of the few other issues related to the militia that state courts have been called upon to decide is the use of the great, or unenrolled,

91. *United States v. Miller*, 307 U.S. 174 (1939).

92. *Id.* at 178.

93. The constitution of North Carolina, art. I, § 30, reads as follows:

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; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice.

94. *State v. Kerner*, 107 S.E. 222, 223 (N.C. 1921).

95. The Court reasoned further that,

It is true that the invention of guns with a carrying range of probably 100 miles, submarines, deadly gases, and of airplanes carrying bombs and other modern devices, have much reduced the importance of the pistol in warfare except at close range. But the ordinary private citizen, whose right to carry arms cannot be infringed upon, is not likely to purchase these expensive and most modern devices just named. To him the rifle, the musket, the shotgun, and the pistol are about the only arms which he could be expected to "bear" and his right to do this is that which is guaranteed by the Constitution.

Id. at 224.

militia. Situations have been few in which the states have deployed the unenrolled, militia. In 1946 Virginia Governor William Mumford Tuck issued a call to the state's unorganized militia to come to the aid of the state and to quell a labor dispute. The employees of the Virginia Electric and Power Company had threatened to strike against the public interest.⁹⁶ The state constitution had defined a militia as "the body of the people, trained to arms" and ordered it to be the "proper, natural and safe defense of a free state." Unlike some other state constitutions, the Virginia Constitution did not give it a specific charge to assist the state in the legitimate exercise of its civil authority and power.⁹⁷

VIII. FEDERAL COURT DECISIONS

During the first 150 or so years of the existence of the Republic, the United States Supreme Court heard very few cases on either the individual or collective right to keep and bear arms. In 1820, in *Houston v. Moore*, the United States Supreme Court heard a case involving the militia. It ruled that:

Congress has the power to provide arming, organizing, and disciplining them; and this power [is] unlimited except, in the two particulars of officering and training them . . . it may be exercised to any extent that may be deemed necessary by Congress . . . the power of the state government to legislate on the same subjects, having existed prior to the formation of the Constitution, and not having been prohibited by that instrument, it remains with the states, subordinated nevertheless to the paramount law of the general government⁹⁸

Likewise, the Supreme Court heard few cases involving the Second Amendment and individual and collective rights guaranteed there. The High Court ruled in *Barron v. Baltimore*⁹⁹ that the rights covered by the Bill of Rights¹⁰⁰ were protected against encroachment by only the national government. If states encroached on individual rights, citizens had to seek protection under their own state constitutions.¹⁰¹

96. Moncure, *supra* note 60, at 17 (citing W.B. CRAWLEY & BILL TUCK, A POLITICAL LIFE IN HARRY BYRD'S VIRGINIA ch. 4 (1978)).

97. VA. CONST. art. I, § 13.

98. *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 16-17 (1820).

99. 32 U.S. (7 Pet.) 464 (1833).

100. U.S. CONST. amend. I-X.

101. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 464 (1833).

The power to deploy the militia in times of emergency in a state lies with the governor of the state. The state and national governments have concurrent power over the militia when the militia must be deployed because of some emergency. The first major ruling involving questions under the Second Amendment was *United States v. Cruikshank*¹⁰² in 1873. The defendants were charged under the Enforcement Act of 1870¹⁰³ of depriving two men "of African descent and persons of Color" of their rights under the First and Second Amendments. The Afro-Americans, former slaves, had attempted to defend themselves, their families and their property with what was essentially a private militia. These people had a cause for concern after the Union Army of Occupation withdrew.

The Supreme Court, citing *Barron*, ruled that the Bill of Rights did not limit state, but only the federal, government. The High Court did not deny the existence of individual rights, but did deny that the federal government could intervene between the state and its citizens. "The Second Amendment declares that it shall not be infringed; but this . . . means no more than it shall not be infringed by Congress. This is one of the Amendments that has no other effect than to restrict the powers of the national government"¹⁰⁴

Cruikshank is interesting because the Supreme Court made two observations concerning the right to keep and bear arms. It wrote that the individual and collective right "of bearing arms for a lawful purpose . . . [i]s not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence." The Court had concluded that this right had existed for a long time before the people contracted to form the federal union.¹⁰⁵

The case of *Presser v. Illinois*¹⁰⁶ is quite similar to *Cruikshank*. Here the armed citizenry were German immigrants, members of a fraternal educational and exercise group known as *Lehr und Wehr Verein*. They had marched, some 400 strong, down the streets of

102. *United States v. Cruikshank*, 92 U.S. 542 (1875).

103. Act of May 31, 1870, ch. 114, 16 Stat. 140.

104. *Cruikshank*, 92 U.S. at 553.

105. *Id.*

106. *Presser v. Illinois*, 116 U.S. 252 (1886).

Chicago without first obtaining a permit to do so. The High Court again had to deny protection to the defendants because of the *Barron* precedent. The Supreme Court was not especially sympathetic to what was, in the Court's view, little more than a private militia. *Presser* was as much a limitation on the right of assembly as it was on the right to keep and bear arms. It is also a limitation on the creation of militias other than state National Guard units. As the Court said, "Military organization and military drill and parade under arms are subjects especially under the control of the government of every country."¹⁰⁷

Presser provided strong support of the right of the people to keep and bear arms with minimal interference from government. The *Presser* decision warned that the militia constituted a reservoir of manpower skilled and trained in the use of firearms upon which the states might draw for National Guard recruits and upon which the federal government might draw for regular army recruits in time of war. The United States Supreme Court ruled:

It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force of the United States as well as of the states; and, in view of this prerogative of the General Government, as well as of its general powers, the states cannot, even laying the Constitutional provision out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resources for maintaining the public security, and disable the people from performing their duty to the General Government.¹⁰⁸

Congress was attracted to the subject of arms and the militia in the 1920s and 1930s. It sought to prevent criminal activity through the control of certain weapons. It acted to restrict sawed off shotguns, fully automatic weapons, and certain other arms that it believed to be unassociated with the militia. The first major ruling by a federal court on federal arms control legislation came in 1939. The court was asked to decide the constitutionality of an act of Congress restricting ownership of machine guns, sawed off shotguns and similar gangster-type weapons. The Supreme Court seemed to grant an individual right to own, keep and bear militia-type weapons, following earlier state court guidelines.

107. *Id.* at 267.

108. *Id.* at 265.

In 1939 the Supreme Court registered its first and only major opinion on the right to keep and bear arms since the Court adopted the doctrine of selective incorporation. Under this doctrine, *Barron* was overturned and the federal courts (and government) began to protect Bill of Rights liberties, immunities, and rights against state encroachment through the operation of the Fourteenth Amendment. The High Court in *United States v. Miller*¹⁰⁹ was asked to decide the constitutionality of the National Firearms Act¹¹⁰ which controlled the ownership and sales of certain firearms. The Supreme Court had little difficulty in upholding that legislation because the controlled arms had no relationship to an armed militia.

Justice McReynolds wrote the opinion of the court. He took the opportunity to discuss the right to keep and bear arms at length. He cited much of the Tennessee case of 1840, *Aymette v. State*.¹¹¹ The Court liked the distinction originated in *Aymette* between gangster-type weapons and arms that a militiaman might legitimately buy, keep, practice with, and bear in defense of home, state, family, and nation. McReynolds defined a militia as, "a body of citizens enrolled for military discipline."¹¹² He noted that "ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."¹¹³

McReynolds drew heavily on a wide variety of sources to give historical understanding to the right to keep and bear arms. His sources justified and supported not only the militia concept, but also the individual right to keep and bear arms. McReynolds examined English law and William Blackstone's commentaries thereon. He quoted from Adam Smith's *Wealth of Nations*. Both Smith and Blackstone were writing at the very time Americans were establishing their independence from England. McReynold's purpose is obvious. He wanted to convey a clear understanding of the original intent of the Founding Fathers and the climate of opinion in which they created a nation.

109. *United States v. Miller*, 307 U.S. 174 (1939).

110. 26 U.S.C. § 1132 (1934) (amended by 26 U.S.C. § 5845 (1988)).

111. *Aymette v. State*, 21 Tenn. (2 Hum.) 154 (1840).

112. *Miller*, 307 U.S. at 179.

113. *Id.*

McReynolds also found instructive Osgood's *The American Colonies in the Seventeenth Century*, a classic study of the life, times, and thought of America before we achieved independence. Few books present better the militia laws of the colonies and the importance thereof to the early nation. He also drew on a variety of militia and other appropriate period laws.

In *Miller*, the defendant had carried a sawed off shotgun having a gun barrel less than eighteen inches in length. McReynolds indicated that the conviction could be sustained because no evidence was produced that such a gun had "some reasonable relationship to the preservation or efficiency of a well regulated militia."¹¹⁴ It was "not within judicial notice that this weapon is any part of the ordinary military equipment."¹¹⁵ Miller had not shown that "its use could contribute to the common defense."¹¹⁶ Had Miller shown that a sawed off shotgun might be a military weapon, the outcome of the case might have been different, but he did not make any argument along that line.

In 1942 the United States Court of Appeals for the First Circuit rendered a decision which has been called a "rebellion by the lower federal courts against the holding in *Miller*."¹¹⁷ In *Cases v. United States*¹¹⁸ the lower court emasculated the Supreme Court decision of 1939. *Cases* marks the first time that a federal court held that "[t]he right to keep and bear arms is not a right conferred upon the people by the federal constitution."¹¹⁹ The case had the effect of making the Second Amendment only an adjunct to, and a restatement of, the principles of the Militia Clause. The Supreme Court, for unknown reasons, refused to hear the case on appeal.¹²⁰ The circuit court gave its own perspective on *Miller*:

114. *Id.*

115. *Id.*

116. *Id.* at 178.

117. Stephen P. Halbrook, *The Jurisprudence of the Second and the Fourteenth Amendments*, 4 GEO. MASON U. L. REV. 1, 51 (1981).

118. *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942), *cert. denied sub. nom. Velazquez v. United States*, 319 U.S. 770 (1943), *reh'g denied*, 324 U.S. 889 (1945).

119. *Id.* at 921.

120. *See Cases*, 131 F.2d 916 (1st Cir. 1942).

Apparently, then, under the Second Amendment, the federal government . . . cannot prohibit the possession or use of any weapon which has any reasonable relationship to the preservation or efficiency of a well regulated militia At any rate the rule of the *Miller* case, if intended to be comprehensive and complete would seem to be already outdated, in spite of the fact that it was formulated only three and a half years ago, because of the well known fact that in the so-called "Commando Units" some sort of military use seems to have been found for almost any modern lethal weapon. In view of this, if the rule of the *Miller* case is general and complete, the result would follow that, under present the day conditions, the federal government would be empowered only to regulate the possession or use of weapons such as a flintlock musket or a matchlock harquebus. But to hold that the Second Amendment limits the federal government to regulations concerning only weapons which can be classified as antiques or curiosities — almost any other might bear some reasonable relationship to the preservation or efficiency of a well regulated militia unit of the present day — is in effect to hold that the limitation of the Second Amendment is absolute.¹²¹

In 1976 the United States Supreme Court heard the case of *United States v. Warin*.¹²² Francis Warin had purchased a machine gun without having paid the transfer tax that the federal government required and without having registered the gun. Warin advanced two arguments in his defense.

First, Warin claimed protection under the militia law of the state of Ohio. The Constitution of Ohio defines the sedentary, or unenrolled, militia as follows:

Article IX: MILITIA. Who shall perform military duty. All citizens, resident of this state, being seventeen years of age, and under the age of sixty-seven years, shall be subject to enrollment in the militia and the performance of military duty, in such manner, not incompatible with the Constitution and the laws of the United States¹²³

Warin argued that the arm which he had manufactured and possessed:

was of a type which is standard for military use, and fires the ammunition which is in common military use for the weapons used by individual soldiers in combat. The defendant [also] testified that he had designed and built the weapon for the purpose of testing and refining it so that it could be offered to the Government as an improvement on the military weapons presently in use.¹²⁴

121. *Id.* at 922.

122. *United States v. Warin*, 530 F.2d 103 (6th Cir. 1976), *cert. denied*, 426 U.S. 948 (1976).

123. *Quoted in id.* at 105 n.1.

124. *Id.* at 105.

In the early history of the Republic, at least through the War of 1812, private, cottage industry contractors had supplied a significant portion of the arms purchased by both the federal government and by state militias. Much of the innovation that led to the replacement of the flintlock by the percussion, or cap, lock; and of the muzzle-loading arm with breech-loading cartridge arms had come from the private sector. The vast majority of the cavalry arms used during the American Civil War had been developed by non-governmental inventors. During both the Mexican War and the Civil War, the central government awarded large contracts to private contractors, many of which had never made arms before. The M-1 carbine of World War II had been developed by a convict in prison.

The United States Court of Appeals for the Sixth Circuit rejected Warin's arguments. It ruled simply that "the Second Amendment guarantees a collective, rather than an individual right."¹²⁵ It continued, "Thus we conclude that the defendant has no private right to keep and bear arms under the Second Amendment which would bar his prosecution and conviction."¹²⁶

The second argument that Warin advanced was that of illegal taxation. "Warin argues that to uphold a tax on firearms transactions by one entitled to Second Amendment protection would be a sanction to tax on an activity which is constitutionally guaranteed and protected."¹²⁷ The appellate court rejected that argument also. It held that the only rights to which the principle of exemption from license or tax applied were the "preferred" First Amendment rights.

The Second Amendment Foundation filed an *amicus curiae* brief, delineating arguments based on the historical background and early application of the right to keep and bear arms. The court rejected that brief out of hand, observing that, "it would unduly extend this opinion to deal with every argument made by the defendant and *amicus curiae*" and it made no difference what those arguments were anyway because all of them "are based on the erroneous supposition that the Second Amendment is concerned with the rights of indi-

125. *Id.* at 106.

126. *Id.* at 106-07.

127. *Id.* at 107.

viduals.”¹²⁸ As in other cases filed since 1942, the court decision in *Warin* interpreted the Second Amendment as a mere extension of the Militia Clause.

XI. STATE AND FEDERAL MILITIAS IN THE COURTS

From the time of the Federalist and Anti-Federalist debate, the states had been suspicious of the national government's potential power over the militia. The states jealously guarded, even hoarded, their militias. There were occasional clashes between the state and federal governments over the use of the militia.

As we have seen above, during the War of 1812 the New York militia refused to cross over into Canada. Their mission to repel invasions did not include moving into alien soil.¹²⁹ The governors of Massachusetts and Connecticut joined in the boycott. They found support initially in the state courts.¹³⁰ However, the United States Supreme Court disagreed, calling this an act of nullification. It ordered the states to comply, sustaining James Madison's order, calling it a reasonable action of the President in his capacity as Commander-in-Chief of the armed forces of the nation.¹³¹ During the Spanish-American War one militia unit refused to serve abroad because service in Cuba had nothing to do with the powers extended to the national government under the Militia Clause of the United States Constitution.¹³² The war with Spain in Cuba had nothing to do with repelling invasions as stated in the Militia Clause.¹³³

128. The court did find the space to invite the creation of additional gun control legislation in its opinion.

There can be no question that an organized society which fails to regulate the importation, manufacture and transfer of the highly sophisticated lethal weapons in existence today does so at its peril . . . We simply do not conceive of the possession of an unregistered submachine gun as one of those "additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments."

Id. at 108 (quoting *Griswald v. Connecticut*, 381 U.S. 479, 488 (1965) (Goldberg, J., concurring)).

129. UPTON, *supra* note 6, at 100-04, 127.

130. *See, e.g.*, 8 Mass. 549 (1812).

131. *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827).

132. WALTER MILLIS, *THE MARTIAL SPIRIT* 158-59 (1931); Wiener, *supra* note 5, at 192.

133. Moncure, *supra* note 60, at 13.

Following American entry into World War I, the issue of militia service beyond America's territory was raised again as was the issue of compulsion in militia service.¹³⁴ The United States Supreme Court found that militia service may be compelled and that, indeed, militiamen may be required to serve wherever and whenever the national government ordered. The Supreme Court ruled, "It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need, as the right to compel it."¹³⁵ The nation is by no means limited to volunteers in filling the ranks of the army.¹³⁶ One object of the federal Constitution of 1787 was to "cure the impotence" of previous systems of governance in filling the ranks of the military.¹³⁷ The Court also noted that compulsory military service is not contrary to the spirit of democratic institutions for the Constitution implies equitable distribution of the burdens no less than the privileges of citizenship.¹³⁸

State authority over the militia and federal authority over the militia serving in the nation's armed forces were co-terminus and co-extensive. Actions of Congress or the federal government were not qualified or restricted by the Militia Clause.¹³⁹ A militiaman is by no means exempted from service in the regular army. Justice White noted that "[t]he mind cannot conceive an army without the men to compose it."¹⁴⁰ The army and militia systems, like the respective clauses of the Constitution, are separate, but cognate, entities. The one clause does not limit the other. Drafting some men out of the militia in no way impairs either state control over the militia nor the existence of the militia. The drafting of some is a matter of prudent selection of pre-trained manpower; allowing oth-

134. Selective Draft Law Cases, 245 U.S. 366 (1918); *Cox v. Wood*, 247 U.S. 3 (1918).

135. Selective Draft Law Cases, 245 U.S. 366, 378 (1918) (citing *EMMERICH DE Vattel*, *LAW OF NATIONS* ch. 2, pts. 8 and 10 (1758)).

136. *Id.* at 369.

137. *Id.* at 370.

138. The Court said, "[There is] want of foundation for the contention that the army into which [an individual] enters after the call is to be limited in some respects to services for which the militia it is assumed may only be used . . . [The army power] when exerted [i]s . . . complete to the extent of its exertion." *Id.* at 381-82, 383.

139. *Id.* at 381.

140. *Id.* at 377.

ers to remain in the National Guard is also wise as they may train new militiamen.¹⁴¹ The individual citizen may incidentally or temporarily be restrained in the exercise of his liberties in order to protect the whole people.¹⁴²

In a 1965 tort case involving the civil liability of a Maryland Air National Guard pilot in state (not federal) service, the United States Supreme Court discussed the changes made by the National Defense Act and subsequent amendment to the militia system.

The passage of the National Defense Act of 1916 materially altered the status of the militias by constituting them as the National Guard [T]he Guard was to be formed, equipped and trained in much the same way as the regular army, subject to federal standards and capable of being "federalized" by units, rather than by drafting individual soldiers. In return, Congress authorized the allocation of federal equipment to the Guard, and provided federal compensation for members of the Guard, supplementing any state emoluments. The Governor, however, remained in charge . . . except when the Guard was called into active federal service The basic structure of this 1916 Act has been preserved to the present day.¹⁴³

Under the dual enlistment system state National Guard units have been called into federal service and deployed abroad in "police actions," which were not declared wars, in both Korea and Vietnam.¹⁴⁴ In 1966 Congress authorized the President to call up National Guard into federal service "when he deems it necessary . . . [as] the Ready Reserve of an armed force for a period of not to exceed twenty-four months."¹⁴⁵ In 1969 several Kentucky guardsmen who were members of a unit called into federal service sought release from their enlistments in order to avoid being sent to Vietnam. They argued in court that deployment of the National Guard overseas violated the Militia Clause. The case differed from the *Selective Draft Law Cases* in that Vietnam, unlike World War I, was not a declared war. The United States Court of Appeals for the Fifth Circuit re-

141. *Id.* at 383-85.

142. *Id.* at 390.

143. *Maryland v. U.S.*, 381 U.S. 41, 46-47, *petition for reh'g and motion for remand granted on other grounds*, 382 U.S. 189 (1965).

144. *Johnson v. Powell*, 414 F.2d 1060 (5th Cir. 1969); *Drifka v. Brainand*, 294 F. Supp. 425 (W.D. Wash. 1968).

145. Act of Oct. 15, 1960, Pub. L. No. 89-687, 80 Stat. 980, 981.

jected the guardsmen's petition because the Militia Clause was not a limitation on the Army Clause. Creation of the dual enlistment system violates no rights of the appellants and no constitutional provision. The power is unaffected by the relative position of declared or undeclared war, or even of national emergency. Even though the 1966 law had not been passed by Congress when the petitioners enlisted, it was not a violation of their contractual rights to enforce that law because it might have been reasonably foreseen.¹⁴⁶

In 1986 Maine Governor Joseph Brennan refused to call up the state's National Guard to attend training sessions held in Honduras.¹⁴⁷ In response to this act asserting states' rights, Congress in 1987 amended the Armed Forces Reserve Act of 1952¹⁴⁸ to withdraw the power of a governor to refuse to call up the National Guard for training because of his objections to location, type, schedule, or purpose of the training.¹⁴⁹

The constitutionality of this provision of the law was challenged by former Massachusetts Governor Michael Dukakis, who objected to Massachusetts National Guard units being sent to Central America for training. He was joined by Minnesota Governor Perpich. These cases¹⁵⁰ differed from *Martin v. Mott*¹⁵¹ of the War of 1812 and the *Selective Draft Law Cases*¹⁵² of World War I in that the troops were being sent abroad for training, not for combat in a declared war.

The United States District Court for Massachusetts found for the Department of Defense and against Dukakis. The federal power to raise and support armies was not invalidated by the states' au-

146. *Johnson v. Powell*, 414 F.2d 1060 (5th Cir. 1969).

147. *Noted in Perpich v. Department of Defense*, 666 F. Supp. 1319, 1321 (D. Minn. 1987), *aff'd*, 880 F.2d 11 (8th Cir. 1989), *aff'd*, 496 U.S. 334 (1990); *see also* 132 CONG. REC. H6264-68 (daily ed. Aug. 14, 1986) (House of Representatives floor debate on the Montgomery Amendment).

148. The Montgomery Amendment, 10 U.S.C. § 672(f) (1988).

149. *Id.*

150. *Dukakis v. Department of Defense*, 686 F. Supp. 30 (D. Mass.), *aff'd*, 859 F.2d 1066 (1st Cir. 1988), *cert. denied sub. nom. Massachusetts v. Department of Defense*, 490 U.S. 1020 (1989) and *Perpich v. Department of Defense*, 666 F. Supp. 1319 (D. Minn. 1987), *aff'd*, 880 F.2d 11 (8th Cir. 1989), *aff'd*, 496 U.S. 334 (1990).

151. *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827).

152. *Selective Draft Law Cases*, 245 U.S. 366 (1918); *see also Cox v. Wood*, 247 U.S. 3 (1918).

thority over training and disciplining the militia. The Militia Clause does not prevent the national government from calling up the militia from the states and into federal service when the motivation is training. In any event, since the guardsmen were called into federal service as a part of their dual enlistment, they were no longer in state service, and were thus under Congressional orders through the Army, not the Militia Clause.¹⁵³ The court evaluated one of Dukakis' principal arguments,

[T]he dual enlistment system makes the militia dependent upon Congress for its existence because, in a practical sense at least, the militia exists only when Congress does not want or need it as part of the Army. Under such a dual enlistment concept, pushed to the logical limit, Congress could at any time order the entire militia into active duty year-round, thus abolishing the militia, and leaving the Militia Clause without practical application The spectre of pressing the dual enlistment rationale to its logical limit is matched by the counterpoint that if the Militia Clause is interpreted as limiting Congress' power to order the militia to active duty as part of the Army, then the Armies Clause would be without practical application because the states could enlist all citizens in the organized militia and thereby 'abolish' the Army.¹⁵⁴

The issue came to the United States Supreme Court in *Perpich v. Department of Defense*,¹⁵⁵ although it was Dukakis who had initiated the opposition to the training in Central America. Governor Perpich, in the district and court of appeals had argued that, absent a national emergency, and given the location of the training outside the territory of the nation, the law was unconstitutional. The court of appeals upheld the law and rejected the governors' suit in a highly divisive and bitterly debated decision.¹⁵⁶

The Supreme Court reviewed the Eighth Circuit's decision. It discussed the dual enlistment provision¹⁵⁷ of the Armed Forces Reserve Act of 1952,¹⁵⁸ and found that,

153. Dukakis, 686 F. Supp. at 32-34.

154. *Id.* at 36.

155. *Perpich v. Department of Defense*, 496 U.S. 334 (1990).

156. The district court found for the Department of Defense. Initially, a divided panel of the Eighth Circuit Court of Appeals found for Perpich. It found that the Militia Clause preserved state authority over National Guard training unless "there was some sort of exigency or extraordinary need to exert federal power." On rehearing *en banc*, the Eighth Circuit Court of Appeals vacated this finding. *Perpich v. Department of Defense*, 880 F.2d 11 (8th Cir. 1989) (*en banc*), *aff'd*, 496 U.S. 334 (1990).

157. The 1933 amendments to the National Defense Act of 1916 provided that "[a]ll persons

[under] the dual enlistment system . . . members of the National Guard . . . who are ordered into federal service with the National Guard of the United States lose their status as members of the State militia during their period of active duty. If that duty is a training mission, the training is performed by the Army in which the trainee is serving, not by the militia from which the member has been temporarily disassociated.¹⁵⁹

The High Court noted that an enrolled militia is necessarily, and by definition, a part-time and non-professional fighting force so that a series of changes in enlistment is neither remarkable nor unusual. Previous limitations on National Guard service were the result of politics and of limitations set by enrollment in only state militias, not as at present in both state and national militias. The Militia Clause cannot and does not limit the Army Clause. The Court found that it was as permissible to have Congress arm, equip, and train the National Guard as it had previously been to have the militiamen equip themselves. The states have a right to prescribe appropriate training and exercise for their National Guard, but the federal government has the same right for militia in its service.¹⁶⁰ The Court noted that “[i]n a sense, all . . . [state National Guard unit members] must keep three hats in their closets — a civilian hat, a state militia hat, and an army hat.”¹⁶¹

IX. CONCLUSION

The militias were instituted in America, as they had been in Europe two millennia earlier, as a means of protecting the citizens, their families, and their property from barbarian marauders. On both cases, the citizens had both a right and an obligation to keep and maintain their own arms and to bear these arms in defense of the nation and in defense of their own lives, families, and property. As in Europe, the great, or unenrolled, militia was used only locally. These citizen-soldiers seldom had uniforms or uniform weaponry,

so ordered into the active military service of the United States shall from the date of such order stand relieved from duty in the National Guard of the respective States, Territories and the District of Columbia” Act of June 15, 1933, ch. 87, 48 Stat. 153, 160.

158. 10 U.S.C. § 672 (1988).

159. *Perpich*, 496 U.S. at 347.

160. *Id.*

161. *Id.* at 348.

and fought as much as *levees en masse* as militia. In America there was democracy shown both in the formation of militias and in the selection of militia officers.

Centralized control of colonial militias, rejected at first in Benjamin Franklin's proposed military union, the Albany Plan, became partially a reality during the Revolution, as a matter of necessity and not of principle. The new Constitution created a vehicle, the Militia Clause, which allowed for some minimal centralized control over the militias. The Anti-Federalists objected because they feared that even greater centralization of control over the state militias would follow. That centralization did not occur until the twentieth century, but, once begun, it proceeded in a 'rapid fashion.

Three major factors are important in the reconstruction of the militia at the federal level. First, after nearly one hundred years of benign neglect, the national government began to take an interest in the state militias. The movement was spearheaded by Secretary of War Elihu Root, backed by professional military men whose biased histories of the armed forces led to the conclusion that the militias as constituted in 1900 were of little practical military value.

Second, Root's ideas, and General Emory Upton's martial histories, were accepted by Professor Wiener. These materials formed the basis of his article. Since none rose to challenge Wiener, his article, in turn, was accepted by successive Supreme Courts and formed the base of their post-1940 decisions.

A third major factor in the reformulation of the militia was the reinterpretation of the Second Amendment in the federal appeals courts. Before 1939 the federal courts had done little with the Second Amendment. In 1939 the United States Supreme Court found it to be a source of protection of individual rights to keep and bear arms. The armed citizenry was to be coveted and protected as a reservoir of trained manpower for the armed services. But the 1942 appeals court decision reinterpreted the Second Amendment, making it into a collective, not an individual, right. Its exclusive function after *Cases* was to buttress the Militia Clause.

The traditional role of the unenrolled militia had been that of providing a steady supply of manpower already trained in the use

of current small arms. After centralization through early twentieth century law, and after *Cases*, the national government looked at the state National Guard units as the sole reservoir of trained manpower for the regular armed forces. The enrolled state militias, rather than the unenrolled militia, are now viewed as a primary source of manpower for the standing army.

Economic inducements supplemented federal law in making the enrolled militia into the National Guard, which has both state and federal standing. Legislation affected only the enrolled militia. The role of the unenrolled militia is ill-defined today, except that it may still be regarded as a secondary reservoir of manpower for the regular army and a primary reservoir for the states' National Guard units.

Federal legislation and court decisions, notably *Perpich*, have reduced state control over militias, while expanding the national role in controlling and deploying these military units. Because of the dual enlistment provision, and because the national government provides arms, training, remuneration, equipment, and other support for the militias, the traditional state controls over the militia have been reduced. National Guard units are still composed of residents of a state or territory, but are subject to significant federal controls, including training when, where and under what conditions the national government may set. The nation has completed a cycle, moving from a wholly state controlled militia system to a militia that, for all intents and purposes, belongs to the federal government, and is under its orders, whenever and however the national government wills and legislates. The state militias have moved over into the select militias favored initially by George Washington and many Federalists and feared and opposed by the Anti-Federalists.

The fears of the Anti-Federalists, and of a few Federalists, that a strong national government would necessarily be tyrannical, especially if backed by a standing army, have proved to be unfounded. The states, at least since the American Civil War, had not found it necessary to defend their power, or the liberties of their citizens, by force of arms, against the national government. In the twentieth century, no one seriously suggests that the primary defense of the nation should be entrusted to the militia in any guise. Modern mil-

itary technology and advanced military training techniques alone require more standardized training than the states can give on their own.