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Background to the Second Amendment

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AN ABSTRACT OF THE THESIS OF John Thomas Nichols for the
Master of Arts in History presented December 19, 1977.

Title: Background to the Second Amendment.

APPROVED BY MEMBERS OF THE THESIS COMMITTEE:


Thomas D. Morris, Chairman


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Research into the background of the Second Amendment is hampered by its relationship to the current highly emotional debate over gun control. Many otherwise useful secondary sources either ignore the issue completely or give accounts which reflect the controversies of the twentieth century rather than those of the eighteenth. Fortunately, however, the Americans of the revolutionary era wrote extensively about the subject.

With independence, the Americans were faced with the problem of organizing and controlling a defence establish-

ment. The new nation was virtually defenceless: the Continental Army was disbanded and the militia, after years of neglect, emasculated. During the decade following the War for Independence, many unsuccessful attempts were made to revitalize the militia and thus prevent the establishment of a professional army. With the adoption of the Constitution in 1787, military affairs reached a turning point. The central government was granted almost unlimited power to raise a standing army without any firm mandate to reform the militia. In an attempt to prevent this and assure that the people would continue to control the military power of the nation, the Second Amendment was adopted as a part of the Bill of Rights.

BACKGROUND TO THE SECOND AMENDMENT

"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."

by

JOHN THOMAS NICHOLS


A thesis submitted in partial fulfillment of the requirements for the degree of

MASTER OF ARTS
in
HISTORY

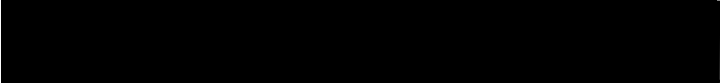
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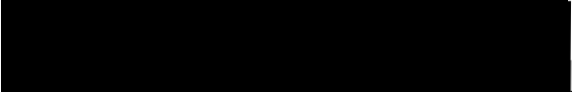
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A WELL REGULATED MILITIA

The Second Amendment is unlike the other articles in the Bill of Rights because its two parallel rights were intended to protect the other primary rights of life, liberty and property.¹ Indeed, the constitutional guarantee of the right to bear arms was considered to be written recognition of the natural right of self defence,² while a popular militia was believed to be inseparable from sovereignty.³ Though today virtually ignored, the Second Amendment formed a vital part of American constitutional theory through most of the nineteenth century. For example, Joseph Story, the conservative protegee of Chief Justice John Marshall wrote:

The importance of this article will scarcely be doubted by any persons, who have duly reflected upon the subject. The militia is the natural defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. It is against

¹Robert A. Sprecher, "The Lost Amendment," The Journal of the American Bar Association, Vol. 51 (June & July, 1965) 554-557, 665-669 (557, 668).

²Robert Green McCloskey, ed, The Works of James Wilson, 2 vols. (Cambridge: The Belknap Press, 1967), p. 657.

³John Adams, A Defence of the Constitution and Government of the United States of America, 3 vols. (New York: Da Capo Press, 1971), p. 475; John Taylor, An Inquiry into the Principles and Policy of the Government of the United States, ed by Loren Buritz (Indianapolis: The Bobbs-Merrill Company, Inc, originally published 1814), p. 430.

sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses, with which they are attended, and the facile means, which they afford to ambitious and unprincipled rulers, to subvert the government, or trample upon the rights of the people. The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them...this truth would seem so clear, and the importance of a well regulated militia would seem so undeniable, it cannot be disguised...⁴

In addition to these obvious benefits, however, militia service seemed to be a perfect method by which the only true basis of republican government, civic virtue, could be spread throughout society. In the words of John Warren (whose physician brother Joseph had been killed while serving as a volunteer at the Battle of Breed's Hill in 1775):

A general prevalence of that love for our country which teaches us to esteem it glorious to die in her defence, is the only means of perpetuating the enjoyment of that liberty and security, for the support of which all government was originally intended...The man who willingly would die to save his Country, would

⁴Joseph Story, Commentaries on the Constitution of the United States, 3 vols., Introduction by Arthur E. Sutherland, (New York: Da Capo Press, 1970), III, pp. 246-247. Similar comments were expressed throughout the nineteenth century. For a late example, See: Thomas M. Cooley, LL.D., A Treatise on the Constitutional Limitations Which Rest Upon The Legislative Power of the States of the American Union, Sixth Edition, with Additional Material by Alexis C. Angle, (Boston: Little, Brown and Company, 1890), p. 427.

surely sacrifice his fortune and possessions,
to secure her peace and happiness...⁵

The reason the American revolutionaries placed so much faith in a universal militia system is to be found in their concept of power. Power, and the desire to acquire it, were considered to be natural, normal, and necessary parts of any political system. However, power, like alcohol, tended to intoxicate and corrupt those who used it. Thus the same power which was intended to protect society could as easily be subverted into an instrument of destruction.⁶ The problem was, as John Adams noted in a letter to Thomas Jefferson, that:

Power always thinks it has a great soul and vast views beyond the comprehension of the weak; and that it is doing God's service when it is violating all His laws. Our passions, ambitions, avarice, love and resentments, etc., possess so much metaphysical subtlety and so much overpowering eloquence that they insinuate themselves into the understanding and the conscience and convert both to their party.⁷

If one accepts, as the American revolutionaries did, the proposition that the ultimate and most dangerous expression of power in society is military force, then the

⁵John Warren, "An Oration, Delivered July 4th, 1783, in Gordon S. Wood, ed, The Rising Glory of America: 1760-1820, (New York: George Bazillier, 1971), pp. 55-69 (56-57).

⁶Bernard Bailyn, The Ideological Origins of the American Revolution, (Cambridge: The Belknap Press, 1965), pp. 55-60.

⁷Quoted in Reinhold Niebuhr, The Irony of American History, (New York: Charles Scribner's Sons, 1962), p. 21.

control of that force becomes an issue of major concern.⁸ It was believed that if this power was placed in the hands of a mercenary standing army controlled by the government, then the rulers would be in a position to enforce their will upon the people. However, if the military power was distributed throughout society in the manner desired by the supporters of the Second Amendment, then the people would be able to resist the inherent tyrannical tendencies of government.⁹ Indeed, under the Federal Constitution, the militia is the only institution charged with the function of law enforcement and defence.¹⁰ The idea was, according to Joel Barlow, an American aristocrat, revolutionary, and supporter of the Constitution of 1787, that the policy of the United States should consist of:

...making every citizen a soldier, and every soldier a citizen; not only permitting every man to arm, but obliging him to arm. This fact, told

⁸Walter Millis, Arms and Men: A Study in American Military History, (New York: G.P. Putnam's Sons, 1956), p. 15.

⁹Pauline Maier, From Resistance to Revolution: Colonial Radicals and the Development of American Opposition to Britain, 1765-1776, (New York: Alfred A. Knopf, 1972), p. 46; Danial J. Boorstin, The Americans: The Colonial Experience, (New York: Random House, Inc, 1958), pp. 351-352; Louis Smith, American Democracy and Military Power, (Chicago: The University of Chicago Press, 1951), p. 306.

¹⁰Article One, Section Eight, Clause Fifteen. An early attempt to institutionalize this provision occurred in 1792 when Congress passed "An Act to provide for calling forth the Militia to execute the laws of the Union, suppress insurrections, and repel invasions." See: United States Statutes at Large, Vol I, Ch 28.

in Europe previous to the French Revolution, would have gained little credit; or at least it would have been regarded as a mark of an uncivilized people, extremely dangerous to a well-ordered society. Men who build systems on an inversion of nature are obliged to invert everything that is to make part of that system. It is because the people are civilized that they are with safety armed. It is an effect of their conscious dignity, as citizens enjoying equal rights that they wish not to invade the rights of others. The danger (where there is any) from armed citizens, is only to the government, not to the society; and as long as they have nothing to revenge in the government (which they cannot have while it is in their own hands) there are many advantages in their being accustomed to the use of arms, and no possible disadvantages.

Power, habitually in the hands of a whole community, loses all the ordinary associated ideas of power...Where the government is not in the hands of the people, there you find oppression...¹¹

Actually this faith in a popular militia was grounded in more than ideology. It was an extremely logical and reasonable position based upon the American revolutionaries experience and supportable by almost endless examples drawn from history and their contemporary world. It seemed that those nations (such as the Swiss or the Americans themselves) which had managed to retain or win their freedom always had done so with a vigilant and well armed population. Once these virtues were abandoned in favor of reliance upon mercenaries, liberty began to decline and was eventually lost, often to the same standing army which had

¹¹Joel Barlow, "Equality in Americans," in William Benton, ed, The Annals of America, 18 vols., (Chicago: Encyclopaedia Britannica Inc, 1968), Vol. III, pp. 504-512 (504-505).

been used for its defense.¹²

The colonial militia, which the revolutionary generation sought to preserve, had developed out of the frontier necessity to survive: both individually and collectively. While it would be wrong to idealize it, it would be equally wrong to dismiss it as useless.¹³ Simply stated, early colonial military policy consisted of keeping as much of the population as well armed as possible.¹⁴ Every man, woman and child was considered to be a soldier because they all lived on a potential battlefield.¹⁵ Maryland, for example, required "every housekeeper, or housekeepers," to maintain specified arms, equipment and ammunition "within his, her or their house, for him or themselves and for every person within his, her or their house able to bear arms." Further, in case of emergency, households with three men and households with five men were to send one and two respectively to a prearranged rallying point.¹⁶

¹²Bailyn, op cit, pp. 63-66. For the effect upon Anglo-American political theory of the seizure of power, in the previous century, by Oliver Cromwell and the New Model Army, See: John McAuley Palmer, General Von Steuben, (Port Washington, New York: Kennikat Press, Inc, 1966), pp. 218-219.

¹³Walter Millis, The Constitution and The Common Defence, (New York: The Fund For the Republic, 1959), pp. 11-12; John Shy, Toward Lexington: The Role of the British Army in the Coming of the American Revolution (Princeton: The Princeton University Press, 1965), p. 18.

¹⁴Boorstin, op cit, p. 353.

¹⁵Ibid, pp. 349-351.

¹⁶The Selective Service System, Military Obligation:

However, that the goal was seldom realized is demonstrated by the fact that before 1755, the colonial governments in the area which became the United States, collectively passed more than 5,000 separate statutes related to compulsory militia service.¹⁷ The initial problem to be overcome was that an effective militia system was dependent upon a high population density. Only when there were enough men, so that some could stay behind as home guards, could the militiamen be relied upon to leave their homes when called. In fact, until fairly late in the colonial period, only New England, with its township pattern of settlement, could effectively defend itself strictly with militia.¹⁸

Throughout the seventeenth century, most of New England had laws similar to the Massachusetts Act of May 14, 1645:

All inhabitants are required to keep arms and ammunition in their homes whether or not they are enrolled in the militia and are required to muster.

The American Traditions, A Compilation of the Enactments of Compulsion From the Earliest Settlements of the Original Thirteen Colonies in 1607 Through the Articles of Confederation in 1789, Special Monograph No. 1 Vol. II in 14 parts (Washington: Government Printing Office, 1947), part 5, p. 6.

¹⁷Ibid, part 1, pp. 11-12.

¹⁸Don Higginbotham, The War of American Independence: Military Attitudes, Policies and Practices, 1763-1789, (New York: The Macmillan Company, 1971), p. 8; John W. Shy, "A New Look at the Colonial Militia," The William and Mary Quarterly, third series, XX, No. 2 (April, 1963), pp. 175-185 (178-179).

muster twice a year.¹⁹

New Hampshire and Connecticut required "all persons" over sixteen to be armed and "male persons" were to have a musket and be enrolled in the militia.²⁰ Children between ten and sixteen were to be instructed in the use of arms;²¹ while "single persons" were prohibited from establishing independent households unless they could afford to stock them with the legally required arms and ammunition and men too poor to equip themselves for militia service could be bound out for the cost of the arms.²² Even as late as 1702 Connecticut required that:

All persons shall serve in the watch, those who are absent on lawful occasions, sick or incapacitated or widdows may furnish substitutes in place of personal service.²³

Then gradually, as the population increased and the frontier receded, references to women and children disappeared from the militia laws. Also, the upper age limit was lowered in some areas although the older men were still required to pass muster and were permitted to vote for the company officers.²⁴

¹⁹The Selective Service System, op cit, part 6, p. 29.

²⁰Ibid, part 7, p. 12.

²¹Ibid, part 6, p. 26.

²²Ibid, part 6, p. 11.

²³Ibid, part 2, pp. 14-15.

²⁴Ibid, part 2, p. 119.

New England's militia officers were normally elected: ensigns, lieutenants and captains by the militiamen of their company and majors, lieutenant colonels and colonels by the company officers. Militia affairs were administered locally by a militia committee made up of the senior militia officers and the elected township officials. However, the most important individual was the "Clerk of the Band" or company clerk whose task it was to keep track of the status of every person subject to the militia laws within the companies district.²⁵ Because so much responsibility was placed in local hands, the quality of the militia tended to vary widely from colony to colony and even between the militia districts within a single colony, often in direct relationship to the proximity of danger.²⁶

As the colonies entered the eighteenth century, the colonial governments began to abandon their attempts to create a "nation-in-arms." Even in the more popular colonial wars, the militia had been reluctant to march out of its home districts, but as more and more territory became secure from direct attack from Frenchmen or Indians the problem became progressively more difficult. As defence

²⁵Louis Morton, "The Origins of American Military Policy," Military Affairs (Summer, 1958), pp. 75-82 (76); James H. Huston, The Sinues of War: Army Logistics 1775-1953, (Washington: Office of the Chief of Military History, United States Army, 1966), p. 5.

²⁶Morton, op cit, p. 80.

began to be viewed as an imperial rather than a local problem by both the colonists and the colonial governments, the militia became primarily a law enforcement agency. However, with the law enforcement power in the hands of the people at large, the governments found themselves literally helpless in the face of widespread opposition. Any law which proved to be unpopular with the broad middle class, from which the militia was drawn, was simply ignored unless the colonial authorities could find enough British regulars to enforce it. Even then the authorities were often faced with widespread rioting in which the militiamen participated.²⁷ Beginning about 1709 the colonial governors began increasingly to petition London for regular troops to enforce the law upon unwilling colonists. Finally in 1754, the imperial authorities decided to abandon the militia system in favor of regular troops supported by selectively recruited "Independent Companies of Volunteers."²⁸

These changes were, of course, opposed by the colonial legislatures who had always resisted moves by the Royal governors to gain control of the military power of

²⁷Maier, op cit, p. 17; Hiller B. Zobel, The Boston Massacre, (New York: W.W. Norton & Co. Inc, 1970), pp. 60-61; Shy, Toward Lexington, op cit, pp. 36-44.

²⁸Howard H. Peckham, The Colonial Wars 1689-1762, (Chicago: The University of Chicago Press, 1964), pp. 137-138.

the society.²⁹ One such attempt occurred in Delaware in 1754, where the legislature included a lengthy statement of political philosophy in its militia reform act:

WHEREAS Self-preservation is the first Principle and Law of Nature, and a Duty that every Man indispensibly owes not only to himself but to the Supreme Director and Governor of the Universe, who gave him a Being. AND WHEREAS, in a State of political Society and Government, all Men by their original Compact and Agreement are obliged to unite in defending themselves, and those of the same Community, against such as shall attempt unlawfully to deprive them of their just Rights and Liberties...a well regulated Militia is the most effectual Guard and Security to every Country... that the Inhabitants may be armed, trained and be enabled not only to assert the just Rights of his Majesty's Crown, but also to defend themselves, their Lives and Properties, and preserve the many invaluable Privileges they enjoy under their present happy Constitution.³⁶

This and other attempts at militia reform were largely ineffective in the face of imperial hostility. The militia, except in areas such as New England, continued to deteriorate. Active militia service became more and more a mark of respectability or full citizenship in the community and less and less universal obligation.³¹ Even during the French and Indian War the British government ignored the militia. Instead they recruited their colonial contingents from classes

²⁹Robert Walsh, Jr, An Appeal from the Judgments of Great Britain Respecting the United States of America, Second Edition (1819), Reprinted: (New York: Negro University Press, 1966), p. 11.

³⁰Selective Service System, op cit, p. 13, 16.

³¹Shy, "New Look," op cit, p. 182.

which lay outside the militia system: poor and rootless whites, indentured servants, "tame" and friendly Indians, and free Negroes and mullatoes, the very classes which along with slaves the militia in normal times was expected to keep under control.³² As a result, the overall quality of the American troops was extremely low and the British generally acquired a contempt for the fighting abilities of the colonists which would last until well into the War for Independence.³³

³²Shy, Toward Lexington, op cit, p. 16, 40.

³³Shy, "New Look," op cit, p. 185.

THE ROOTS OF AMERICAN CONSTITUTIONAL THEORY

The causes of the American Revolution were many and varied. Constitutionally it stemmed from Parliament's need to justify the change in the Constitution brought about by the execution of Charles the First and the abolition of the Monarchy and the House of Lords. As part of this justification, the House of Commons, in 1649, enacted a statute which declared all English lands outside the Realm were to be the property of the people of England with the colonists having no other rights than Parliament, for its own convenience, chose to give them.³⁴ Later, after the Monarchy and the House of Lords were restored in 1660, this innovation was retained, never to be abandoned. (Even today, for example, Parliament in theory claims the right to legislate for Canada and other portions of the Commonwealth which recognize the Queen as the head of state.) However, unlike nearby Ireland where this theory was enforced almost immediately, the doctrine of Parliamentary sovereignty had little impact upon England's North American possessions. The colonies were simply too small, too distant, and too unprofitable for the English government

³⁴Charles Howard McIlwain, The American Revolution: A Constitutional Interpretation, (New York: The Macmillan Company, 1923), pp. 21-26.

to bother about.³⁵

It was not until a hundred and twenty-five years later, that Britain had both the time and the inclination to attempt to bring the colonies to heel. As a result of her victory in the Seven Years' War, Britain had gained possession of an extensive, world-wide empire and with it a need for imperial reform. In their attempt to create an integrated colonial system that could be governed, policed and defended from London, the King and his ministers decided to increase the peacetime size of the standing army.³⁶ This decision was complicated by the realities of home politics which prevented the government from either stationing the new regiments in the British Isles or from supporting them from British tax revenues. As a solution to both of these problems, it was decided to quarter most of the expanded army in North America and to tax the colonies for its support.³⁷ However, with the French threat finally gone from Canada, many Americans (who cared little for imperial problems) saw this new policy as a calculated attempt to

³⁵Compare the Irish Declaratory Act of 1719 with the American Declaratory Act of 1766. See: Ibid, pp. 49-61.

³⁶Shy, Toward Lexington, op cit, pp. 45-46; J.F.C. Fuller, A Military History of the Western World, 3 vols., (New York: Funk and Wagnalls Company, 1954-1956), Vol. II, p. 257.

³⁷Shy, Toward Lexington, op cit, pp. 46-51; Bernard Knollenberg, Origin of the American Revolution: 1759-1766, Revised Edition, (New York: The Free Press, 1961), p. 94.

subvert what they considered to be their rightful constitutional relationship with the mother country.

Most of the American colonies had been founded while England was ruled by the King with the aid of a council and when the prevailing constitutional theory was government by compact.³⁸ Once transposed to the New World, theory became fact when social compacts were used as the basis for the governments of Plymouth, Connecticut and Rhode Island colonies, and for Maine between the death of Sir Fernando Gorges and its annexation to Massachusetts-Bay. Also, within colonies social compacts became the standard method of organizing new communities. Before leaving for the frontier, groups of settlers customarily organized themselves into three distinct bodies: "a civil body politick," a military company and a religious congregation.³⁹

There were three principle reasons for the growth of compact government in British North America: first, the isolated pattern of settlements encouraged self-reliance and in practice made the towns as independent of the colonial

³⁸Peckham, op cit, p. 218; George H. Sabine, A History of Political Theory, Third Edition, (New York: Holt, Rinehart and Winston, 1961), pp. 489-490.

³⁹Morrison Sharp, "Leadership and Democracy in the Early New England System of Defence," American Historical Review, Vol. L, No. 2, (January, 1945), 244-260 (245).

government as the latter was of London;⁴⁰ second, most of the established and essentially feudal forces of European civilization (the great landed estates, the hereditary social classes and a powerful autonomous church) failed to make the transition across the Atlantic in a viable form;⁴¹ and third, the fact that most of the colonists were drawn from the seventeenth century "middle class" (farmers, artisans and tradesmen) which, as a group, were most susceptible to the ideas of the radicals and non-conformists.⁴²

Once planted in the New World, both the theory and practice of self-government by social compact began to grow rapidly. Its development was aided by hundreds of electoral "reforms" many of which were instituted for partisan advantage, but which were democratic in effect.⁴³ Thus, by 1763, when the British government finally got around to enforcing its concept of sovereignty, it ran up against a century and

⁴⁰Thomas J. Wertenbaker, The First Americans: 1607-1690, (New York: The Macmillan Company, 1927), pp. 3-4; Herbert Collis Parsons, A Puritan Outpost: A History of the Town and People of Northfield Massachusetts, (New York: The Macmillan Company, 1937), p. 178.

⁴¹Stephen Foster, Their Solitary Way: The Puritan Social Ethic in the First Century of Settlement, (New Haven: Yale University Press, 1971), pp. 155-156; Dan Lacy, The Meaning of the American Revolution, (New York: The New American Library, 1964), p. 67.

⁴²Gilman Ostrander, The Rights of Man in America: 1606-1861, (Columbia, Mo: University of Missouri Press, 1960), p. 12.

⁴³Ibid, p. 41; Milton R. Konvitz, ed, Law and Social Action: Selected Essays of Alexander H. Pekelis, (New York: Da Capo Press, 1970), p. 95.

a half tradition that every government, from town to colony, was a self-governing commonwealth which was governed by men who were locally chosen and democratically elected.⁴⁴

Although American revolutionary principles and practices were primarily a native development, the terms which the Americans used to describe them were drawn from many different sources: the political writers of ancient Greece and Rome; European authors such as Bodin, Montesquieu, and Pufendorf; the English radicals of the mid-seventeenth century; and the English "Coffee House Radicals" of the first half of the eighteenth century. However, the authority against which theories, actions and events were measured was provided by the seventeenth century English Whig, John Locke. Indeed, by using selected passages from his Second Treatise of Government, it is possible to duplicate almost the entire first section of Jefferson's Declaration of Independence with much of the same language and style.⁴⁵ Yet Locke, himself, did not originate the theories which he did so much to popularize.

The theories of natural law and government by compact had originated in the political philosophies of Greece and Rome and the political practices of the Germanic tribes

⁴⁴Hannah Arendt, On Revolution, (New York: The Viking Press, 1965), p. 175.

⁴⁵Ostrander, op cit, pp. 90-91.

which had overwhelmed the Western Roman Empire. However, these theories had been unable to compete successfully with feudalism which developed as a reaction to the assaults of the Norsemen and Magyars. Nevertheless, they remained in the background of European political thought and occasionally came to the fore, causing trouble for the ruling classes. Natural law was, for example, used by the leaders of the Peasant's Revolts which shook the foundations of feudal society throughout most of fourteenth century Europe, and in England nearly toppled the government and social order.

But it was not until these theories were used during the seventeenth century struggle against Stuart autocracy that natural law and compact government became forces to be reckoned with. During the first phase, which ended with the execution of Charles the First, natural law formed one of the important elements in the argument for a more limited monarchy. However, once the Puritans gained power, they ruthlessly suppressed elements (such as the Diggers and the Levellers) who advocated putting these ideas into practice. Once the monarchy was restored in 1660, natural law again became an important argument for the opponents of unlimited royal prerogative.

Of all the radicals who wrote in England from 1630 to 1690, the most important was John Locke. Until recently, it was assumed that because his Two Treatises of Government

were published in support of "The Glorious Revolution" of 1688, that Locke wrote to justify that event. However, it is now generally accepted that he wrote a decade earlier, during the Exclusion Controversy, to justify an armed Whig uprising. This uprising never took place and the Whig opposition collapsed after the failure of the "Rye House Plot." Locke was forced to hide his manuscript and flee to exile in Holland. Only when James the Second had been driven from the throne, could he return and publish the surviving portions of the Two Treatises as a defence of the Revolution and the claim of William and Mary to the Crown.⁴⁶

An exponent of individual rights, Locke held that property (which he defined as life, liberty and those things necessary for their preservation) existed prior to the establishment of societies and governments.⁴⁷ Indeed, society and government had been specifically invented to better protect the property of the individual and were strictly limited to that end.⁴⁸

According to this theory, all the world had once been in a state of nature which resembled the conditions to be

⁴⁶For the full story of Locke's work, See: John Locke, Two Treatises of Government with Introduction and Notes by Peter Laslett, revised edition, (New York: New American Library, 1963), Introduction, pp. 1-170.

⁴⁷J.W. Gough, John Locke's Political Philosophy, (Oxford: The Clarendon Press, 1950), p. 73.

⁴⁸Locke, (Laslett, ed), op cit, p. 413.

found in America.⁴⁹ Into this primitive forest, God had placed man, whom He had created both reasonable and rational and had given him, in common, dominion over the earth and the creatures upon it.⁵⁰

While in the state of nature, conduct was governed by the law of nature which was simply the law of reason. No man could destroy himself or any creature in his possession except for his own preservation. Further every man was bound to defend the rest of mankind to the best of his ability and, except when punishing a criminal, forbidden to "take away, or impair the life, or what tends to the Preservation of the Life, Liberty, Health, Limb or Goods of another."⁵¹ Even though all men were free from and equal to each other in the state of nature, they were willing to give up their freedom and equality for the states of society and government. The main problem with the state of nature was that the law of nature was unwritten and was found only in the minds of men. Because of this, it was frequently misapplied, and as every man was his own judge, interpreter and executioner, it frequently lead to conflict. Indeed, even if a man was right in his interpretation of the law, he had difficulty defending his position with only his own

⁴⁹Ibid, pp. 343.

⁵⁰Ibid, pp. 328-332.

⁵¹Ibid, p. 311.

strength.⁵²

To avoid the state of war which usually resulted from the lack of any appeal except to heaven,

...is one great reason of Men putting themselves into Society and quitting the State of Nature. For where there is an Authority, a Power on Earth, from which relief can be had by appeal, there the Controversie is decided by that Power.⁵³

Everyone entering into the state of society, surrendered to society his "Executive Power of the Law of Nature," that is, the power to interpret the law, to be its judge in his own case, and to punish criminals. In return he was to receive a set of known laws, fair and impartial judges and the aid of his fellow citizens in defending his rights.⁵⁴

But just because an individual entered into a state of society with some men, did not mean that the state of nature or the law of nature ceased to exist. Men always remained in a state of nature with respect to all other individuals except those with whom they shared a common judge.⁵⁵ In this respect, the subjects of an absolute monarch might be equal to each other, but they remained in a state of nature with their ruler because they had no source of appeal this side of heaven.⁵⁶ Also, if the

⁵²Ibid, p. 311.

⁵³Ibid, p. 404.

⁵⁴Ibid, pp. 368-369.

⁵⁵Ibid, p. 369.

⁵⁶Ibid, pp. 370-371.

members of society who were entrusted with the powers of government subverted the law for their own gain, and justice was unobtainable, then the compact was dissolved and the people are absolved of any further obedience.⁵⁷

Because a man could only give up that portion of his powers under the law of nature which tended to preserve himself and the rest of mankind, the powers of government were, by definition:

...limited to the public good of the Society.
It is a Power that hath no other end but preservation, and therefore can never have the right to destroy, enslave, or designedly to impoverish the Subjects.⁵⁸

Governments could only be founded upon the consent of the people and in no other way. Yet, because "the noise of War" has "so great a part of the History of Mankind," consent is often ignored and conquest is thought of as an origin of government. "But Conquest is as far from setting up any Government, as demolishing a House is from building a new one in its place." Thus until rule by force is replaced by rule by consent, no civil government could, in fact exist.⁵⁹

Once a compact was made between the rulers and the ruled, it remained in force as long as rights and proper-

⁵⁷Ibid, pp. 91-92.

⁵⁸Ibid, pp. 401-403..

⁵⁹Ibid, p. 431.

ties of the people were protected. However, when the rulers violated their trust, they might be resisted as often and to whatever extent necessary to restore the compact:

Where the Body of the People, or any single Man is deprived of their Right, or is under the Exercise of a power without right, and have no Appeal on Earth, there they have a liberty to appeal to Heaven, whenever they judge the Cause of sufficient moment...they have, by a Law antecedent and paramount to all positive Laws of men reserv'd that ultimate Determination to themselves, which belongs to all Mankind, where there lies no Appeal on Earth, viz. to judge whether they have just Cause to make their Appeal to Heaven. And this judgment they cannot part with it being out of a Mans power to submit himself to another, as to give him a liberty to destroy him; God and Nature never allowing a Man to so abandon himself, as to neglect his own preservation: And since he cannot take away his own life, neither can be give another the power to take it. Nor let anyone think this lays a perpetual foundation for Disorder: for this operates not till the Inconvenience is so great that the Majority feel it, and are weary of it, and find a necessity to have it ammended...⁶⁰

Because the Two Treatises were published to support William the Third's claim to the throne, they received a degree of official acceptance which otherwise would have been denied them. Consequently, when Locke's book reached the colonies it was at once accepted as a factual, rather than theoretical, statement about the origin of government and the rights of individuals.⁶¹ Locke's writings were an

⁶⁰Ibid, p. 426.

⁶¹Andrew C. McLanghlin, A Constitutional History of the United States, (New York: Appleton-Century Crofts, 1935), p. 93.

immediate success, particularly in the North American colonies where they appeared to confirm the native political theories.

The breakdown of imperial authority in the colonies after the passage of the so-called "Intolerable Acts" in 1774, provided the test of the American commitment to their Lockean version of natural law and government by compact. Power, at all levels, was assumed by extra legal organizations (Committees' of Safety, Provincial Congresses, and the Continental Congress) which had no real mandate other than that provided by the muskets of their supporters. In most other countries at most other times, those groups who had seized power have simply kept it. However, the American revolutionaries believed their own rhetoric and the fact that their governments, though popular in origin, had no real mandate from the governed people at all levels of society.

On the "national level" power lay in the hands of the Continental Congress which was basically an assembly of "angry local politicians."⁶² Because it had no official standing its actions were ignored by the British government. Yet, almost from the very first, the Continental Congress was forced by events to behave as if it were a legally constituted though extremely limited central government.

⁶²Marshall Smelser, The Winning of Independence, (New York: Quadrangle Books, 1972), p. 9.

The First Continental Congress, like its predecessor the Stamp Act Congress, was more representative of overall colonial opinion than later Congresses. It contained radicals, moderates and conservatives. Several of its members were ultimately to decide that loyalty to the crown was more important than largely theoretical colonial "rights." Still it passed some strongly worded documents which fell within the bounds of the eighteenth century definition of treason: it approved and published the inflammatory Suffolk County "Resolves;"⁶³ issued its own Declarations and Resolves which included an unequivocal denial of Parliamentary authority;⁶⁴ and it declared economic warfare on the Mother Country by adopting the Continental Association.⁶⁵

Later when the Second Continental Congress met, just twenty days after the Battle of Lexington and Concord, it began to function as the national government. It adopted the army beseiging Boston, authorized a navy, appointed a

⁶³Drafted by Dr. Joseph Warren, the resolves declared that: rights of Massachusetts were based on nature, that the King's power was derived from compact, that the Intolerable Acts were a gross violation of American rights and consequently obedience was not required, trade with Great Britain, Ireland and the West Indies should stop, courts and tax collectors should be ignored, and the people should establish a popular militia and prepare the defensive war. See: Worthington Chauncey Ford, ed, Journals of the Continental Congress, 34 vols. (Washington: Government Printing Office, 1904-1937), Vol. 1, pp. 31-39.

⁶⁴Ibid, Vol. 1, pp. 67-70.

⁶⁵Ibid, Vol. 1, pp. 75-80.

Commander-in-Chief, printed money, engaged in international diplomacy, and made laws defining treason against the United Colonies.⁶⁶

Throughout the fifteen year period during which it acted as a central government, the Continental Congress was hampered by the fact that it had no mandate for the responsibilities which it had assumed. It tried to remedy this defect by passing the Articles of Confederation and submitting them to the new state governments for approval: a process which was blocked by Maryland until 1781.⁶⁷ Yet the nation under the Articles was little more than a league of semi-independent states and Congress could do little more than reason and plead. Indeed, to the nationalists of the mid-1780's, the greatest single defect of the Union under the Articles was that it was based upon the action of state legislatures alone. Thus, while the responsibilities of the Continental Congress increased dramatically from 1774 to 1786, its actual power remained approximately the same as it was when the Continental Association was passed with the hope that it would be enforced by local jurisdictions.

On the provincial level too, the revolutionaries were faced with the problem of mandate. After the collapse of Royal authority, most colonies were governed by assemblies,

⁶⁶Smelser, op cit, p. 94.

⁶⁷Journals, op cit, Vol. XIV, pp. 619-622.

which were more or less popularly elected, under the "authority" of their colonial charter and with the executive "absent." While this did allow government to function, it was by no means a satisfactory solution to the problem: especially as the colonies drifted ever closer to independence. In Massachusetts, for example, as early as December 26, 1775, the town of Pittsfield protested the resumption by the General Assembly of the old colonial charter, which had been abolished by the Massachusetts Government Act (May 20, 1774). It demanded that government, both civil and military, be reorganized along more democratic lines. The town meeting protested that:

...We have with Decency and Moderation attended to the various Arguments of those Gentlemen lately created our Rulers...in favor of re-assuming our antient Constitution...but...we are of opinion that unlimited passive obedience and Non-Resistance to any human power whatever is what we are contending with Great Britain and to transfer that power to any other Body of Men is equally dangerous to our Security and happiness... We...shall be restless in our endeavor that we may obtain the privilege of electing our Civil and Military officers. We assure your Honors that some of those who have been appointed to rule us are greatly obnoxious to People in General...If the right of nominating to office is not invested in the people we are indifferent who assumes it whether any particular persons on this or the other side of the water.⁶⁸

Eventually, in the autumn of 1776, the government of Massachusetts yielded to the petitions for constitutional

⁶⁸Richard B. Morris, ed, The American Revolution: 1763-1783, (Columbia, S.C.: University of South Carolina Press, 1970), pp. 290-293.

reform. However, instead of calling a constitutional convention, the General Court proposed to empanel itself to draft a constitution. This action was protested by the town of Concord which demanded an independent convention whose work would be submitted to the people.⁶⁹

...First, because we conceive that a Constitution in its proper idea intends a system of principles established to secure the subjects in the possession and enjoyment of their rights and privileges, against any encroachment of the governing part. Second, because the same body that forms a Constitution have of consequence a power to alter it. Third, because a Constitution alterable by the Supreme Legislature is no security at all to the subject against any encroachment of the governing part on any or on all of their rights and privileges.⁷⁰

Ignoring this advice, the Massachusetts General Court drafted a constitution to replace the colonial charter. However, when they presented it for ratification by county conventions, it was rejected for a variety of reasons: including the lack of a bill of rights and the fact that it had been written by members of the government. In addition to its negative vote, the Convention of Essex County included a lecture on the origin and purpose of free government.

According to the convention's admonition, the supreme power within society is composed of the collective powers

⁶⁹Samuel Eliot Morison, ed, Sources and Documents Illustrating the American Revolution 1764-1788 and the Formation of the Federal Constitution, second edition, 1929, reprint, (New York: Oxford University Press, 1967), pp. 176-177.

⁷⁰Ibid, p. 177.

of the individual members. It can only be exercised by government for the common good and "...ONLY WHEN THE GOOD OF THE WHOLE REQUIRES it." Any other use constitutes a usurpation of power and the individual is not required to obey. Also, "...ALLEGIANCE AND PROTECTION ARE RECIPROCAL" so that if the government fails to perform its duties the people are absolved of their obligations. Moreover, when framing a constitution which guarantees political honesty and has an "...upright regard to the interests of the body of the people and the civil rights of each individual..." it is necessary to go to the people. This is because "... the people have always a disposition to promote their own happiness, and that when they have time to be informed, and the necessary means of information given them they will be able to determine upon the necessary measures therefor..."⁷¹

Finally, in 1779, the Massachusetts General Court gave in to popular pressure and called a convention for the sole purpose of drafting a constitution, which would then be referred to the people. The result was the Constitution of 1780 which had an extensive Bill of Rights and which lasted until the separation of Maine from Massachusetts in 1820.

The experience of Massachusetts is of particular importance both because of the depth of political knowledge

⁷¹Morris, op cit, pp. 313-315.

among the electorate and for the innovation of the constitutional convention. Moreover, each of the former colonies, with the exception of Connecticut and Rhode Island whose charters were based on social compacts, went through the constitution making process at least once. Gradually the concept was adopted that constitutions should be written by bodies apart from the government and that they should be ratified by the people: a principle which was to be adopted nationwide by the late 1780's.

While the people of Massachusetts were engaged in their protracted discussion about the proper foundation of written constitutions, most of the other states were experimenting with constitutional forms. Excluding Connecticut and Rhode Island (which were governed under their social compact colonial charters until 1818 and 1842 respectively) the remaining eleven states collectively adopted nineteen constitutions between 1776 and 1800. If Kentucky, Tennessee, and Vermont are added to the list, the number of state constitutions adopted before the turn of the century jumps to twenty-five.⁷² Twenty-three of these (the exceptions are Georgia's second and third) contain explicit statements of the peoples' right to rebel against arbitrary power. Maryland's Constitution of 1776, for example, contained a phrase which was later widely copied:

⁷²Delaware (2), Georgia (3), Kentucky (2), Massachusetts (1), Maryland (1), New Hampshire (3), New Jersey (1),

The doctrine of non-resistance, against arbitrary power and oppression, is absurd, slavish, and destructive to the good and happiness of mankind.⁷³

These statements began with the Virginia Declaration of Rights which was adopted June 29, 1776⁷⁴ and remained a vital part of the constitution-making process of the states until well into the nineteenth century when natural law theory was replaced by positive law theory.

New York (1), North Carolina (1), Pennsylvania (2), South Carolina (3), Tennessee (1), Vermont (3), Virginia (1), See: Francis Newton Thorpe, The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming The United States of America, 7 vols. (Washington: Government Printing Office, 1909).

⁷³Ibid, Vol. 3, p. 1687.

⁷⁴Hezekiah Niles, Principles and Acts of the Revolution in America, (New York: A.S. Barnes & Co, 1876), pp. 301-303.

THE PATRIOT MILITIA 1774-1786

To enforce the Continental Association upon unwilling Tories and neutralists as well as to prepare for an armed struggle with the Mother Country, the Patriots needed a force superior to that provided by organizations of the type known as the Sons of Liberty. Unlike most revolutionary movements, the Americans did not have to start from scratch but were able to begin their struggle in control of an organized military force: the colonial militia.⁷⁵

Thirty years of official neglect had permitted the "more responsible men of the community" to purchase exemptions from militia service with the result that the militia companies were dominated by the "radical, and on occasion, more irresponsible elements."⁷⁶ Because these were precisely the elements which already supported the struggle for colonial rights, the extra-legal Provincial Congresses and the local Committees of Safety had little trouble taking over the militia. They simply directed the men to resign from their existing companies, form new units, and elect Patriots as

⁷⁵Higginbotham, op cit, p. 10.

⁷⁶Lawrence Henry Gipson, The British Isles and the American Colonies: The Northern Plantations, 1748-1754, (New York: Alfred A. Knopf, 1960), pp. 88-90.

officers while excluding Tories.⁷⁷ This process of radicalizing the militia, was nowhere more important than in Virginia because it involved so many of the men (Patrick Henry, Thomas Jefferson, James Madison, George Mason, Edmund Pendleton and George Washington, to name a few) whose ideas were to help shape the constitutional structure of the new United States.

Beginning with local efforts, such as the Fairfax County Militia Association, the Virginians attempted to create a force which could successfully resist regular troops. Written by George Mason, who later wrote the Virginia Declaration of Rights, the "Plan" was similar to one adopted two months earlier in December 1774 by the Annapolis, Maryland Convention.⁷⁸ In addition to simply detailing organization and equipment, Mason included a statement of intent which strictly conforms to natural law and compact government theory:

Threatened with the Destruction of our ancient Laws and Liberty, and the Loss of all that is dear to British Subjects and Freeman, justly alarmed with the prospect of impending Ruin—firmly determined, at all hazard of our Lives, to transmit to our Children and Posterity those sacred Rights to which ourselves were born; and thoroughly convinced that a well regulated Militia, composed of the Gentlemen, Freeholder, and other Freeman,

⁷⁷Lee Nathaniel Newcomer, The Embattled Farmers: A Massachusetts Countryside in the American Revolution, (New York: King's Crown Press, 1953), p. 52.

⁷⁸For the Maryland Plan, See: Hezakiah Niles, Principles and Acts, op cit, pp. 260-262.

is the natural Strength and only safe and stable security of a free Government, and that such Militia will relieve our Mother Country from any Expense in our Protection and defence, will obviate the pretence of a necessity for taxing us on that account, and render it unnecessary to keep any standing Army (ever dangerous to liberty (in this County, WE the subscribers, Inhabitants of Fairfax County) have freely and voluntarily agreed, and hereby do agree and solemnly promise, to enroll and embody ourselves into a Militia for this County, intended to Consist of all able-bodied Freeman from eighteen to fifty Years of Age, under Officers of their own Choice: and for that Purpose to form ourselves in Readiness in case of Necessity, Hostile Invasion, or real Danger, to defend and preserve to the utmost of our Power, our Religion, the Laws of our Country, and the just Rights and Privileges of our fellow-Subject, our Posterity and ourselves, upon the Principles of the English Constitution.⁷⁹

A month later, the local efforts aimed at creating an effective militia were transferred to the provincial level. On March 23, 1775, Patrick Henry introduced a resolution to the Virginia Provincial Convention, which he supported with his "give me liberty or give me death" speech:

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 establishing of such a militia is at this time peculiarly necessary...in this time

⁷⁹Robert A. Rutland, ed, The Papers of George Mason, 3 vols., (Chapel Hill: The University of North Carolina Press, 1970), Vol. 1, pp. 215-216.

of danger and distress...to secure our inestimable rights and liberties from those farther violations with which they are threatened...⁸⁰

The results of this and other attempts to rejuvenate the militia have been the subject of debate ever since. In particular, the militia system has been blamed (primarily by professional army officers, who until recently, have dominated military writing in the United States) for every military mistake and disaster that occurred. However, more objective analysts have concluded that most of the failures of the militia were caused by its misuse: as, for example, when militiamen who generally lacked bayonets, were expected to withstand a bayonet charge by the British who made a fetish of "cold steel;"⁸¹ or from abuse, as when exemptions from militia service were treated as political favors.⁸²

The militia during the Revolution performed best when

⁸⁰Niles, op cit, pp. 277-280; At the same time, a Militia Committee was appointed which immediately (March 24) reported back with a plan basically the same as that of the Fairfax County Association. It was read, amended, and adopted on March 25, 1775. See: Julian P. Boyd, ed, The Papers of Thomas Jefferson, 10 vols. to date, (Princeton NJ: Princeton University Press, 1950), Vol. 1, pp. 160-161. For Patrick Henry's "Liberty or death" speech, See: Niles, op cit, pp. 277-280.

⁸¹Brigadier Peter Young, George Washington's Army, (New York: Hippocrene Books, Inc, 1973), p. 33; So keenly was the lack of bayonets felt among the Americans, that some years later, 1500 US Model 1795 muskets were manufactured with their bayonets permanently fixed. See: Major James E. Hicks, U.S. Military Firearms: 1776-1956, (LaCanada, Calif: James Hicks & Son, 1962), pp. 16-17.

⁸²Journals, op cit, Vol. VII, p. 343.

drawn from areas where Patriot sentiment predominated and where the militia laws were fairly and evenly enforced. In addition, it was most aggressive when defending its home district and was commanded by officers it trusted and who understood it. Indeed, a fact that is often overlooked is that the local militia won several important victories, such as Breed's Hill, More's Creek Bridge, King's Mountain, Bennington, and Oriskany, alone or with only token help from the Continental Army.⁸³ It's existence meant that any British force which moved away from its fortified base was in grave danger of being overwhelmed, not by the Continental Army, but by swarms of hostile militia.⁸⁴ However, the most immediate tasks of the Patriot militia were to prevent the Tories from organizing a counter revolution,⁸⁵ and to fill out the Continental Army before a battle, and, in the early years, to hold the line between the dissolution of one army and the creation of its replacement.⁸⁶

Throughout the War for Independence, much was recom-

⁸³Jim Dan Hill, "The National Guard in Civil Disorders: Historical Precedents," in Robin Higham, ed, Bayonets in the Streets: The Use of Troops in Civil Disturbances, (Lawrence: The University Press of Kansas, 1969), pp. 61-84 (69-70).

⁸⁴John Richard Alden, General Gage in America, (Baton Rouge: Louisiana State University, 1948), p. 88.

⁸⁵Millis, Arms and Men, op cit, pp. 34-35.

⁸⁶Ibid, p. 31.

mended and little was accomplished to strengthen the militia. Until the final ratification of the Articles of Confederation in 1781, the Continental Congress had no authority whatsoever over the matter. The states were concerned with the problem that if they enforced the militia laws properly, they would be arming Tories as well as Patriots. Then too there was a shortage of both money and muskets. As a result, by the end of the war most of the militia east of the Appalachian Mountains was virtually disarmed.⁸⁷ Only after peace was secured could serious attention be given to the problem of military reorganization.

Early in 1783, the Continental Congress appointed a military committee which included three men (Alexander Hamilton, James Madison, and James Wilson) who would be of great importance in the movement for constitutional reform in the closing years of the decade. The Committee's first act was to dispatch a letter to General Washington requesting his assistance and views.⁸⁸ Then the Committee turned its attention to the problem of the Continental Army.

⁸⁷Andrew A. Lipscomb and Albert E. Bergh, ed, The Writings of Thomas Jefferson, 20 vols., (Washington: The Thomas Jefferson Memorial Association, 1903-1904), Vol. II, pp. 123-126.

⁸⁸Harold C. Syrett, ed, The Papers of Alexander Hamilton, 8 vols., (New York: Columbia University Press, 1961-1965), Vol. VIII, p. 322.

A combination of boredom and lack of pay had resulted in a few scattered strikes or "mutinies" and a deputation of officers had presented Congress with a list of complaints.⁸⁹ Even though the situation lacked the potential for a military coup of the type which had made Cromwell Lord Protector, it appeared serious enough to give Congress a good case of republican jitters. Deciding, however, that the real danger lay in men deserting enmass, before a peace treaty was secured, the Committee took steps to assure that the army would be paid. In addition, it recommended that the non-commissioned officers and men should be given their issue weapons and accoutrements in an attempt to keep the army in being.⁹⁰

On May 2, 1783, General Washington sent the Military Committee his "Sentiments on a Peace Establishment."⁹¹ Drawing upon both his own experience and that of his staff, the Commander-in-Chief recommended a six point program consisting of: first, a small standing army (between 2500 and 3000 officers and men) to guard the frontiers, and "for the

⁸⁹William T. Hutchinson and William M.E. Rachal, ed, The Papers of James Madison, 8 vols. to date, (Chicago: The University of Chicago Press, 1962-), Vol. VI, pp. 32-33.

⁹⁰Journals, op cit, pp. 269-270.

⁹¹John C. Fitzpatrick, ed, The Writings of George Washington, 39 vols., (Washington: Government Printing Office, 1931-1944), Vol. 26, pp. 374-398.

security of our Magazines;" second, "A well organized Militia; upon a Plan that will prevade all the States, and introduce similarity in their Establishment, Manoeuvres, Exercise and Arms;" third, establishment of national Arsenals; fourth, establishment of military "Accademies, one or more" for the Instruction of the Art Military; fifth, "Manufactories of some kinds of Military Stores," and sixth, a Navy.⁹²

Then on the subject of a standing army Washington wrote:

Altho' a large standing Army in time of Peace hath ever been considered dangerous to the liberties of a Country, yet a few Troops, under certain circumstances, are not only safe, but indispensably necessary. Fortunately for us our relative situation requires but few...we are too poor to maintain a standing Army adequate to our defense, and was our Country more populous and rich, still it could not be done without great oppression of the people.⁹³

With regard to the militia, Washington believed that "this great Bulwark of our Liberties and independence" must be made to "appear truly respectable in the Eyes of our Friends and formidable to those who would otherwise become our enemies." Only then could the United States reasonably expect to be free from "insult or hostility...and...the consequent calamities of War." To achieve this every citizen between 18 and 50 years (with a few legal exemp-

⁹²Ibid, Vol. 26, pp. 374-376.

⁹³Ibid, Vol. 26, p. 375.

tions) should be enrolled in the militia, armed with weapons of the same pattern"...and so far accustomed to the use of them, that the total strength of the Country might be called forth at a short Notice on any very interesting Emergency." In order to assure that the militia would not again be allowed to deteriorate, there should be at least one or two general musters each year at which the militiamen would have their arms and accoutrements inspected and at which they would receive some training.⁹⁴

...But as it is obvious that amongst such a Multitude of People (Who may indeed be useful for temporary domestic Circumstances, bodily defects, natural awkwardness or disinclination, can never acquire the habits of Soldiers...and as there are a sufficient proportion of able bodied young men, between the Age of 18 and 25,...that the former, being as a denier resort, reserved for some great occasion, a judicious system might be adopted for forming and placing the latter on the best possible Establishment...a kind of Continental Militia...⁹⁵

On June 18, 1783, the Military Committee issued its report. Noting that Article 9 Clause 5 of the Articles of Confederation gave Congress the power to set the number of land forces, to establish state quotas, and to make requisition of troops without mentioning either war or

⁹⁴Ibid, Vol. 26, p. 389. These statements were echoed about a month later in Washington's circular letter to the governors of the states which announced his retirement: "The militia of this country must be considered as the palladium of our security, and the first effectual resort in case of hostility." Ibid, Vol. 26, p. 494.

⁹⁵Ibid, Vol. 26, p. 389.

peace, the Committee recommended an expandable regular army which would consist of 3034 officers and men in peacetime and 6068 in War.

Again the main reliance was to be placed on the militia, this time embodying all free white males between 20 and 50 who were to be divided into two classes: single and married. The single men were to be assembled "for inspection and exercise once in two months by companies and once in four months regimentally," while the married men were to be mustered once every three months by companies and once every six months by regiments. In the event of war alternate halves of first the single corps followed by alternate halves of the married corps were to serve for a year (at the end of four years, assuming that the war lasted that long, the rotation would begin again). Each class was to be organized into corps of infantry and dragoons according to their inclination and financial ability. In addition, there was to be a third class raised from volunteers in the towns and cities (not exceeding a proportion of one in fifty of the rest of the militia) known "as fencibles, fussileers, trainbands or whatever else may be thought proper." This "Continental Militia" would be organized as infantry and would be furnished with arms, equipment and uniforms and would be paid at the same rate as the regular troops. It would be enlisted for eight years and be permitted to keep its weapons upon discharge. Unlike the

general militia it was obligated to serve three years in time of war and could be marched anywhere within the United States.⁹⁶

Before submitting their Plan to the Congress, the Military Committee sent a copy to Washington for his comments.⁹⁷ In replying the general wrote that while he could accept most of the Plan, "the general outlines for the Establishment of a national Militia do not seem...so well calculated to answer the object...as could be wished." The idea of a separate select corps raised in the towns and cities "will not afford that prompt and efficacious resistance to an Enemy, which might be expected from...Light Infantry Companies, or a general selection of the ablest Men from every Regt. or Brigade of Militia in either of the Mode I had formerly the honor to propose...(or as)...the Companies...of Minute Men did at the Commencement of the late War..."⁹⁸ However, the Committee chose to issue its report as written and on October 23, 1783, five days after the disbanding of the Continental Army, it was submitted to Congress.⁹⁹

Under the Articles of Confederation, the Continental

⁹⁶Syrett, op cit, Vol. 3, pp. 378-397; Journals, op cit, Vol. 25, pp. 722-744.

⁹⁷Fitzpatrick, op cit, Vol. 27, pp. 140-144.

⁹⁸Ibid, Vol. 30, p. 647.

⁹⁹Journals, op cit, Vol. 25, p. 722.

Congress could only recommend the plan to the state legislatures which showed little inclination to adopt the proposed system. Nor was anything constructive accomplished until 1786 when the Congress directed Secretary for War (as he was known under the Articles of Confederation), Henry Knox to prepare a plan to place the militia on "a respectable and effective footing..." In the course of his work, Knox drew heavily upon the work of the 1783 Military Committee, Washington's Sentiments on a Peace Establishment," a plan prepared by General Steuben in 1784, the Ancient Greek and Roman military structure, the Swiss militia system, and the Anglo-American military history and tradition. This plan was completed and passed by Congress on September 11, 1786.¹⁰⁰

Even though the States, as usual, took no action upon the recommended plan, it is important because it was sent to James Madison for use at the Constitutional Convention in 1787.¹⁰¹ Also, it was submitted to the new Congress by President Washington in 1790, with only minor modifications such as a reduction in the period of training.¹⁰² Although never adopted, one American military historian has asserted

¹⁰⁰Ibid, Vol. 30, p. 647.

¹⁰¹Edmund C. Burnett, ed, Letters of Members of the Continental Congress, 8 vols., (Washington: Carnegie Institution of Washington, 1921-1936), Vol. 8, p. 489.

¹⁰²John McAuley Palmer, American in Arms: The Experience of the United States with Military Organization, (New Haven: Yale University Press, 1941), p. 40.

that it served the United States as the theoretical basis for "all reserve policy down to 1917, if not to 1940."¹⁰³

While the plan was generally well received in theory, its supporters were dubious about its chances. On March 12, 1786, David Ramsay wrote Secretary Knox praising his plan as a deterrent against aggression. At the same time, however, he expressed grave doubts about both the time and expense involved in its implementation and feared that the State governments would reject it on those accounts.¹⁰⁴ Some months later, Henry Lee sent a copy of the plan to James Madison who had left Congress (to prepare for the constitutional convention) before its passage. In his covering letter, Lee praised the plan as one well adapted to the defense of the nation. But, lamenting over the eight months of inaction which had followed its recommendation to the states, he expressed doubts that, under the existing system of government, it would ever be adopted.¹⁰⁵

¹⁰³Walter Millis, ed, American Military Thought, (Indianapolis: The Bobbs-Merrill Company, Inc, 1966), pp. 60-61.

¹⁰⁴Burnett, op cit, Vol. 8, p. 321.

¹⁰⁵Ibid, Vol. 8, p. 489.

CONSTITUTIONAL REFORM AND THE MILITIA 1787-1813

By and large, the old Radicals such as Thomas Jefferson, Patrick Henry, and Thomas Paine who distrusted government and who wished to limit it severely, either did not seek or refused to serve as delegates to the Constitutional Convention in 1787. This meant that the proceedings were dominated by men who believed that government was a necessary and positive instrument of society. They believed, as James Wilson told the Convention, that bad governments were of two sorts: those which did too little and failed through weakness; and those which did too much and destroyed through oppression.¹⁰⁶ Their problem, as they saw it, was to strike a balance between the two extremes.

Moreover, in their search for a form of government, most of the members of the Convention were not overly concerned with proclaiming individual rights. Rather they believed that government, in the words of Roger Sherman:

...is instituted for those who live under it. It ought therefore to be so constituted as not to be dangerous to their liberties...The question is not what rights naturally belong to men; but how they may be most equally and

¹⁰⁶James Madison, Notes of Debates in the Federal Convention of 1787 with an Introduction by Adrienne Koch, (New York: W.W. Norton & Company Inc, 1969), p. 222.

effectually guarded in Society...¹⁰⁷

In an attempt to keep the new government from becoming oppressive, the authors of the Constitution designated the militia as the primary instrument of law enforcement and defense.¹⁰⁸ Then to prevent either the states or the central government from gaining control of the militia, the Framers divided the administrative authority between the two levels of government.¹⁰⁹ The states retaining the responsibility for training the militia and for commissioning the officers; while the Congress was to arm, organize and discipline the militia.¹¹⁰

These three federal functions were then defined for the Convention by Rufus King of the Committee which had prepared them (King also had been on the Military Committee of the Continental Congress when the Knox Plan had been drafted) as meaning: proportioning the officers and men; specifying the kind, size and caliber of weapons; and prescribing such organizational matters as the manual of arms, field exercises and close order drill. Then in answer to questions, he added:

...That arming meant not only to provide uniformity of arms, but included authority to

¹⁰⁷Ibid, pp. 195, 208.

¹⁰⁸Article One, Section Eight, Clause Fifteen.

¹⁰⁹Millis, Arms and Men, op cit, p. 48.

¹¹⁰Article One, Section Eight, Clause Fifteen.

regulate the modes of furnishing, either by the Militia themselves, the State Governments, or the National Treasury: that "laws" for disciplining must involve penalties and every thing necessary for enforcing penalties.¹¹¹

Speaking in support of this article, James Madison declared that:

The primary objective is to secure an effectual discipline of the Militia. This will no more be done if left to the States separately than the requisitions have been hitherto paid by them. The States neglect their Militia now, and the more they are consolidated into one nation, the less each will rely on its own interior provisions for its safety and the less prepared its Militia for that purpose;...The Discipline of the Militia is evidently a National concern, and ought to be provided for in the National Constitution...¹¹²

Madison's position was supported by his fellow Virginian, Edmund Randolph, who observed "that the Militia were every where neglected by the State Legislatures, the members of which courted popularity too much to enforce a proper discipline..."¹¹³

While the militia clause passed, objections to it and to the power of Congress to "raise and support Armies" were revived toward the end of the proceedings. This latter provision had already been criticized as implying that there was to be a standing army of unlimited size in

¹¹¹Madison, op cit, p. 513.

¹¹²Ibid, pp. 514-515.

¹¹³Ibid, p. 515.

time of peace; while its supporters defended it as necessary because Congress was to be elected biannually and might not be in session to renew an annual appropriation in the case of an emergency.¹¹⁴ Finally, on September 14, three days before the close of the Convention, George Mason proposed what he hoped would be a compromise. According to James Madison's recollection, Mason was:

...sensible that an absolute prohibition of standing armies in time of peace might be unsafe, and wishing at the same time to insert something pointing out and guarding against the danger of them, moved to preface the clause... 'To provide for organizing, arming and disciplining the Militia & C' with the words 'And that the liberties of the people may be better secured against the danger of standing armies in time of peace.'¹¹⁵

Edmund Randolph seconded the motion and Madison spoke in favor of it. However when the question was put to the vote, it carried only the Virginia and Georgia delegations.

In spite of several attempts to alter its military articles, the Constitution was adopted by the Convention with little substantial change in the original committee drafts: Congress was empowered, but not specifically directed, to arm, organize and discipline the militia; while, at the same time, it was given a virtually unqualified power to raise a standing army. Moreover, the proba-

¹¹⁴Madison, op cit, p. 580.

¹¹⁵Ibid, p. 639.

bility of effective militia reform was hampered by dividing authority between the national and state governments. These features, combined with the lack of a bill of rights, caused a small revolt among the delegates: Elbridge Gerry, George Mason, and Edmund Randolph followed the lead of Luther Martin (who had already left the Convention in protest) and refused to sign the completed Constitution.

Once the proposed new Constitution was published, it was met with a storm of criticism from a loose coalition of old Radicals and disillusioned Nationalists jointly known as Anti-Federalists. Generally their objections centered around the lack of a bill of rights and specifically about the dangers of the military articles which they felt gave the national government the power to destroy the militia by neglect while it raised a standing army. Alexander Hamilton and James Madison (together with John Jay) attempted to answer these and other criticisms in a series of essays (all signed Publius) which collectively have become known as the Federalist Papers.¹¹⁶

With regard to the general problem, Hamilton wrote that bills of rights were by definition, grants of privilege to subjects by rulers. Hence they were unnecessary in a constitutional system founded upon the authority of the people and in which the governors were their "repre-

¹¹⁶Ibid, pp. 639-640.

representatives and servants" rather than their masters. Further, such documents represented a danger because:

...They contain various exceptions to powers not granted; and on this very account, would afford a colorable pretext to claim more than is granted. For why declare that things shall not be done which there is no power to do? ...it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power...that the provision against restraining...liberty...affords a clear implication that the power to proscribe proper regulations concerning it was intended to be vested in the national government...¹¹⁷

The greatest safety lay in the fact:

...that the whole power of the proposed government is to be in the hands of the representatives of the people. This is the essential, and...only efficacious security for the rights of the people which is attainable in civil society.

If the representatives of the people betray their constituents, there is then no recourse left but in the exertion of that original right of self-defence which is paramount to all positive forms of government...The citizens must rush tumultuously to arms...¹¹⁸

Then in another of the Federalist Papers, Hamilton argued for giving the power to organize, arm and discipline the militia to the federal government as a further check on the development of tyranny:

...If a well-regulated militia be the most natural defence of a free country, it ought certainly to be under the regulation and at the

¹¹⁷Alexander Hamilton, James Madison, and John Jay, The Federalist Papers with an Introduction, Table of Contents and Index of Ideas, by Clinton Rossiter, (New York: The New American Library, 1961).

¹¹⁸Ibid, pp. 180-182.

disposal of that body which is constituted the guardian of the national security...

(However) the prospect of disciplining all the militia of the United States is as futile as it would be injurious if it were capable of being carried into execution. A tolerable expertness in military movements is a business that requires time and practice. It is not a day, or even a week, that will suffice for the attainment of it. To oblige the great body of the yeomanry and of the other classes of citizens to be under arms for the purpose of going through military exercises and evolutions, as often as might be necessary to acquire the degree of perfection which would entitle them to the character of a well-regulated militia, 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 be not neglected, it will be necessary to assemble them once or twice in the course of a year...This will not only lessen the call for military establishments, but if circumstances should at any time oblige the government to form an army of any magnitude that army can never be formidable to the liberties of the people while there is a large body of citizens, little if at all inferior to them in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow citizens...¹¹⁹

To these sentiments, Madison added that according to the best calculations the largest standing army which could be supported in any country did not exceed "one hundreth part of the whole number of souls; or one twenty-fifth part of the number able to bear arms." Applying this formula to the population of the United States, this

¹¹⁹Ibid, pp. 183-185.

army would not exceed twenty-five or thirty thousand men. Opposing these would be a militia of "near half a million of citizens with arms in their hand, officered by men chosen from themselves, fighting for their common liberties." That such a militia could ever be defeated by that proportion of regulars is to be doubted, especially by those who are familiar with the course of the War for Independence. "Besides the advantage of being armed, which the Americans possess over the people of almost every other nation," they are also in the possession of local, popularly elected governments which form an additional barrier to ambition.¹²⁰

However, the Anti-Federalists were unconvinced by such arguments. To them, the proposed new government looked too much like the old imperial system. While there was little organized interstate action for or against Ratification, the general course of debate was the same. The Anti-Federalists criticized the lack of a bill of rights of the type which formed such a prominent part of the radical state constitutions and feared that the military articles of the Constitution would inevitably lead to the replacement of the militia by a standing mercenary army.¹²¹ While there were many arguments made in support

¹²⁰Ibid, pp. 299-300.

¹²¹Higginbothan, op cit, p. 458.

of this point at the state ratifying conventions, one of the best summaries was formulated by John Taylor of Virginia and later published as part of a book on American constitutional theory and practice:

Arms can only be controlled by arms, An armed nation only can keep up an army, and also maintain its liberty. The constitution of the United States, overlooking this undeniable truth, has placed both the raising of an army, and the arming of the militia, among the potential attributes of the general government; whereas the first belongs to the principle of accumulation and the latter to the principle of division. One therefore, is a power, and the other a check upon that power. One is a foe, and the other a friend of liberty. One strengthens the government; the other the nation. And a sound militia make a government dependant on the nation; a bad one, a nation dependant on a government. An armed militia divides the power to raise mercenary armies; wherefore governments, which can raise armies, will seldom be inclined to arm the militia... An Armed nation only can protect its government against an army. Unarmed, and without an army, a nation invites invasion. Unarmed and with an army, it invites usurpation. A standing army of mercenary civil officers, being as fatal to a free government, as an army of soldiers, the militia principle may be as useful and necessary in the one case as the other...¹²²

Faced with the possibility that their new Constitution would be either rejected out of hand or crippled by amendments, the Federalists yielded to the call for the inclusion of a bill of rights. Once this point had been conceded, ratification was quickly accomplished with most states adding lists of suggested alterations to their

¹²²Taylor, op cit, pp. 159-161, 499.

returns.

While there was no specific agreement as to whether the amendments should be organized as a separate section or be incorporated into the body of the text, there was general agreement about the type of changes which could be made: civil rights such as free speech and trial by jury should be protected; there should be a statement that government was formed by compact and that the people retained the power of altering or abolishing it at will; and finally, there should be a guarantee that the militia would not be replaced by a standing army and that the people's right to keep and bear arms would be protected.¹²³

Yet of all the recommendations for change in the Constitution, those of the Virginia Convention were perhaps the most important. Not only did these debates include such well known Anti-Federalists as George Mason, Patrick Henry, and Richard Henry Lee, but it also included James Madison who introduced the subject of amendment to the First Congress. The Virginians wanted:

...a declaration or bill of rights asserting, and securing from encroachment, the essential and unalienable rights of the people, in some such manner as the following-

¹²³The New Hampshire Convention went so far as wanting an article which stated that "Congress shall never disarm any Citizen unless such are or have been in Actual Rebellion," Documentary History of the Constitution of the United States, 3 vols. (Washington: Department of State, 1894-1900), Vol. II, p. 143.

1st. That there are certain natural rights of which men, when they form a social compact, cannot deprive or divest their posterity; among which are the enjoyment of life and liberty, and the means of acquiring, possession, and protecting property, and obtaining happiness and safety.

2nd. That all power is naturally invested in, and consequently derived from, the people; that magistrates therefore are their trustees and agents; at all times amenable to them,

3rd. That government ought to be instituted for the common benefit, protection, and security of the people; and that the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive to the good and happiness of mankind...

17th. That the people have a right to keep and bear arms; that a well regulated militia, composed of the body of the people trained to arms, is the proper, natural and safe defence of a free state; that standing armies, in time of peace, are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the community will admit; and that in all cases, the military should be under strict subordination to, and governed by, the civil power...¹²⁴

Two of the major items of business which faced the First Congress when it assembled in New York were the related subjects of constitutional amendment and military reform. Had these been accomplished in the manner anticipated, they would have had the effect of transforming the Federal Constitution into a document similar to the radical state constitutions and of placing the military power

¹²⁴Jonathan Elliot, ed, The Debates in the Several State Conventions on the Adoption of the Federal Constitution of 1787 Together with the Journal of the Federal Convention, 5 vols., (Philadelphia: JB Lippincott Company, 1901), Vol. III, pp. 657-659.

of the nation firmly in the hands of the people.

Constitutional amendment, as originally introduced by James Madison would have resulted in a rewriting of the document. To begin with, a preface would have been added stating that:

...all power is originally vested in, and consequently derived from, the People. That Government is instituted and ought to be exercised for the benefit of the People; which consists in the enjoyment of life and liberty, with the rights of acquiring and using property, and generally pursuing and obtaining happiness and safety.

That the people have an indubitable, unalienable, and indefeasible right to reform or change their Government, whenever it be formed adverse or inadequate to the purposes of its institution...¹²⁵

This was followed by a proposed series of alterations and additions to the text which were calculated to protect various rights such as: freedom of religion, press and speech; assembly and petition; and trial by jury. Then, with regard to the military, Madison suggested that Article I Section 8 Clause 16 should be prefaced with the statement that:

The Rights 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...¹²⁶

¹²⁵Joseph Gales, Senior, ed, The Annals of Congress, 18 vols., (Washington: Gales and Seaton, 1834-1856), Vol. I, p. 452.

¹²⁶Ibid, Vol. I, p. 452.

While the concept of amending the Constitution was accepted by the First Congress, the idea of altering the text was not. Eventually, it was decided to drop the preface and put the changes at the end of the document.¹²⁷ Finally twelve amendments were passed by the Congress of which ten (including the present Second) were adopted by the states.

While they were going through the motions of producing a bill of rights, the Federalists introduced a slightly modified version of the Knox Militia Plan which had been passed by Congress in 1786. Its purpose as stated in its introduction was to create a system of defence which could be:

...adequate to the probable exigencies of the United States whether arising from internal or external causes; and at the same time to erect a standard of republican magnanimity, independent of, and superior to, the powerful influences of wealth...

The idea is therefore submitted, whether an effective military branch of Government can be invented, with safety to the great principles of liberty, unless the same shall be formed of the people themselves and supported by their habits and manners...

An energetic national militia is to be regarded as the capital security of a free Republic; and not a standing army, forming a distinct class in the community.

It is the introduction and diffusion of vice and corruption of manners into the mass of the

¹²⁷Unfortunately attempts to follow the progress of the Bill of Rights through Congress are hampered by the fact that the records are incomplete and in some cases inaccurate. Julius Geobel, Jr, History of the Supreme Court of the United States, 1 vol. to date, (New York: The Macmillan Company, 1971-), Vol. 1, p. 102.

people, that renders a standing army necessary. It is when public spirit is despised, and avarice, indolence, and effeminacy of manners predominate, and prevent the establishment of institutions which would elevate the minds of the youth in the paths of virtue and honor, that standing army is formed and riveted forever...¹²⁸

Knox felt, however, that to supplement "(a)n energetic national militia," which he "regarded as the capital security of a free Republic," a small regular army (approximately 3,000 men) would be necessary "for the protection of the frontiers, and the magazines and arsenals." These regulars would be prevented from "forming a distinct class in the community" by enlisting them for definite periods after which they were "to be returned to the mass of the citizens."

The militia, itself, was to consist of all free white males between eighteen and sixty (minus the usual occupational exemptions) and were to be divided into three classes: the advanced corps composed of the young men aged 18 through 20; the main corps consisting of men 21 through 45; and the reserve corps aged 46-60. In addition "(a)ll actual mariners or seamen" were to be divided into two classes: 16 to 30 and 31 to 45 years. The first class was to be liable to serve three years in a ship of war and the second class to serve "as needed" in the same manner as the land militia.

¹²⁸Annals, op cit, Vol. 2, p. 2141-2146.

While serving in the advanced corps, militiamen would be obligated to attend three annual encampments (30 days in each of his first two years and 10 days in his third year). Then, upon turning twenty-one, the militiaman passed from the advanced to the main corps. This training process would assure that:

...the republic receives disciplined and free citizens, who understand their public rights, and are prepared to defend them.

The main corps is instituted to preserve and circulate throughout the community the military discipline acquired in the advanced corps; to arm the people; and to fix firmly, by practice and habit, those forms and maxims which are essential to the life and energy of a free Government.¹²⁹

While the Second Amendment became a part of the Constitution, it failed to preserve the Militia from further decay. The Knox Plan, which had been resubmitted to the First Congress and which would have provided the organization and arms for an effective militia system—failed partly because Henry Knox lacked the tact of Alexander Hamilton who argued the Federalist case for economic reform.¹³⁰

It was not until 1792 that a national Militia Act was passed.¹³¹ At first glance, this law would appear to

¹²⁹Ibid, Vol. 2, pp. 2146-2161.

¹³⁰Palmer, op cit, pp. 43-44.

¹³¹Statutes at Large Vol. 1, Chapter 34, pp. 271-274, May 8, 1792, "An Act more effectually to provide for

be extremely comprehensive, specifying down to the last spare gun flint and cartridge the arms and ammunition that every free white male was required to possess. However, during the legislative process every feature of constructive reform, through which compliance with the law could be assured, was amended out, and, in the end, its sponsor voted against it.¹³² With everything left to the states and no provision for checking returns, the Militia Act of 1792 spawned a largely non-existent paper "army greater than that which massed against Napoleon."¹³³ Ineffectual as it was, it nonetheless remained the law of the land for 111 years until it was replaced by the Military Reorganization Act of 1903.

Periodically, over the succeeding two decades, attempts were made to compensate for the shortcomings of the Militia Act of 1792. Finally, on the eve of the War of 1812, two bills were introduced into Congress: one of these revived the idea that the militiamen should be divided into classes by age and marital status and held responsible for varying degrees of service; the other

the national defence by establishing a uniform militia throughout the United States." This Act, though never enforced, remained on the books until repealed on January 21, 1903; Statutes at Large, Vol. 32, Pt. 1, pp. 775-780, Chapter 196, "An Act to promote the efficiency of the militia, and for other purposes."

¹³²Palmer, op cit, pp. 50-51.

¹³³Millis, Arms and Men, op cit, p. 52.

would have provided every free white male with a stand of arms (muskett, bayonett, cartridge box, and other basic equipment), at public expense, when he reached the age of eighteen years. In favor of this latter provision, it was said:

...that it having been provided by the constitution, 'the right of the people to keep and Bear Arms shall not be infringed,' it was the duty of Congress to provide them, as if it were left to the people themselves, experience had shown, that some citizens will provide themselves with arms and some will not...Besides, more strictly complying with the constitutional provision...Having them in possession, they would be ready for any emergency which might occur...

When the nation shall be thus armed...who will dare to molest us? The country will be safe from any enemy within or without. The government would have nothing to fear from a standing army, or an ambitious military chief. A well-informed people, understanding their rights, with arms in their hands, cannot be subdued. They are invulnerable. And being the real sovereigns of the country, government has nothing to fear from them; because the government is, and will be, at all times, what they please to make it...Give the people but arms...and the Republic is safe.¹³⁴

Unfortunately for the supporters of militia reform, these two bills were considered together. They passed the House of Representatives but they failed by two votes in the Senate. Still, several of the Senators who voted against the two bills, stated that they would vote for the provision for arming the militia if it were to be submit-

¹³⁴Annals, op cit, Vol. 12, pp. 1021-1029 (1023-1025).

ted separately from the question of classifying the militiamen.

Before the subject of militia reform could be reconsidered, however, the War of 1812 intervened. While both the militia and the regular army performed indifferently during that conflict, it was the former which received most of the blame for the disastrous course of the land war. Later, reformers would, without much success, point out that the cause of the poor performance of the militia had been government neglect in peacetime, and that not only was the militia ill-equipped and poorly trained, but the militiamen were, by and large, unenfranchised and thus reluctant to fight for a government which neglected them and in which they had little confidence.¹³⁵ Although the War of 1812 ended all serious attempts at reform, the fiction of a universal militia system continued for another quarter of a century when it collapsed completely at the outbreak of the Mexican War.¹³⁶

¹³⁵Chilton Williamson, American Suffrage: From Property to Democracy, 1760-1860, (Princeton: Princeton University Press, 1960), pp. 188 & 227.

¹³⁶Harry A. Marion, Selective Service: Conflict and Compromise, (New York: John Wiley & Sons, Inc, 1968), p. 56.

CONCLUSION: THE FAILURE OF THE SECOND AMENDMENT

The Second Amendment failed because the political philosophy upon which it was based was discarded. Within a generation the new American government abandoned the ideals¹³⁷ of American revolutionary theory for their anti-thesis, traditional European political principles and practices:¹³⁸ one of the most fundamental of which is that established government must "seek to monopolize, control, or at least contain" both the means and the use of force within society.¹³⁹

The willingness of the revolutionaries to abandon their ideals is to be found in the nature of the leadership itself. A sizable percentage had been reluctant rebels, swept along by the course of events. They had, from the very beginning, looked askance at the "democratick" consequences of the separation from Great Britain and shuddered before the specter of mob rule. As soon as practical, such men as Gerry, Dickenson, and even Wilson,

¹³⁷Wood, Rising Glory, op cit, p. 1.

¹³⁸Hannah Arndt, Crisis of the Republic, (New York: Harcourt, Brae, Jananovich, Inc, 1972), p. 108.

¹³⁹Charles Tilly, "Collective Violence in European Perspective," in Hugh Davis Graham and Ted Robert Gurr, eds., Violence in America: Historical and Comparative Perspective, (New York: Bantam Books, 1969), pp. 4-44 (41).

moved to raise the qualifications for voting, reenfranchise former tories (who after all were of the "better sort") and institute economic policies which proved to be especially hard on the poorer classes who had been among the staunchest supporters of the revolution. Even among the old radicals such as Samuel Adams (who wanted to hang Shay's rebels) there was an unconscious denial of revolutionary theory, at least as being applicable to themselves. Having established what was by definition (albeit their own) a free government, they believed that any attempt to alter it by force must be, also by definition, rebellion against lawful authority.¹⁴⁰

Although the American revolution came to an effective end during the pentad which followed the conclusion of the War of 1812, its final act was postponed until the 1840's. Rhode Island, like Connecticut, had retained its social compact based colonial charter after the separation from Great Britain. However, unlike Connecticut (which yielded to popular pressure and replaced its 1662 Charter¹⁴¹ in 1818¹⁴²) the government of Rhode Island had

¹⁴⁰For James Wilson's remarks about rulers denying the right of "every revolution in government...except the single one which conducted them to the throne." See: McCloskey, op cit, p. 79.

¹⁴¹Thorpe, op cit, Vol. 1, pp. 529-536.

¹⁴²Ibid, Vol. 1, pp. 536-546.

consistently refused to abandon the Charter of 1663¹⁴³ in favor of a Constitution based on the authority of the people.¹⁴⁴ In addition to this constitutional dispute, there was the problem of franchise: Rhode Island's voting qualifications, though extremely liberal by seventeenth century standards, excluded more than fifty percent of the potential voters after 1830.¹⁴⁵ These two elements combined in 1842 to produce a political crisis which exploded into the violence known as the Dorr Rebellion or Dorr War.

Frustrated by years of being ignored by the Charter government and the established political parties, the reformers took matters into their own hands. At first this action was peaceful: writing and adopting a People's Constitution¹⁴⁶ in the fall of 1841; and the election of Thomas Dorr as governor in April of 1842. However the Charter government, claiming that the majority of those voting could not meet the pre-existing suffrage requirements, refused to accept the validity of either action. As a result, the Dorrites decided to take by force that

¹⁴³Ibid, Vol. 6, pp. 3211-3222.

¹⁴⁴Arthur May Mowry, The Dorr War: The Constitutional Struggle in Rhode Island, (New York: Chelsea House Publishers, 1970), p. 25.

¹⁴⁵Marvin E. Gettleman, The Dorr Rebellion: A Study in American Radicalism, 1833-1849, (New York: Random House, 1973), p. 6-7.

¹⁴⁶Mowry, op cit, pp. 322-346.

which they believed was being illegally denied them.

The military phase of the Dorr Rebellion bearly lived up to the definition of the term.¹⁴⁷ It began with an attempt to seize the state arsenal in Providence. This move was frustrated because poor security allowed the loyalists to replace the watchmen with a strong garrison among whom were several relatives of the more prominent rebels (including both a brother and a brother-in-law of Thomas Dorr). This was followed by a period of relative calm while Dorr left the state for the nation's capitol in an unsuccessful attempt to persuade the federal government to aid the rebels or at least remain neutral. He returned to Rhode Island a month later and attempted to organize a last ditch attempt to gain power by force. However, this also failed when most of his "army" disbanded upon receiving news that the Charter government had authorized a constitutional convention.¹⁴⁸ By the end of June, 1842, Dorr had fled the state and the rebellion, for all practical purposes, was over.

Constitutional reform when it arrived in November of 1842¹⁴⁹ only superficially resembled the people's constitution and did little to alter the political realities in

¹⁴⁷Williamson, op cit, p. 256.

¹⁴⁸Mowry, op cit, pp. 282-283.

¹⁴⁹Thorpe, op cit, Vol. 6, pp. 3222-3240.

Rhode Island.¹⁵⁰ Government remained as unenlightened as ever and the electorate lapsed into a state of political apathy which saw the number of eligible voters casting ballots drop from a high of 15,000 in 1843 to a low of 4,000 or approximately 20% in 1850.¹⁵¹

The defeat of the Dorrites signified more than the failure of a political reform movement within a single state. Nationally, it sounded the death knell for revolutionary theory which (like the militia system) had been moribund since its defacto abandonment by those in control of the machinery of government a quarter of a century before. Once the federal authorities decided to back Rhode Island's Charter government, it became necessary to bury revolutionary theory once and for all.

As a result, American political theory began to undergo a transformation designed to firmly establish the authority of the state governments over the people and of the federal government over them both. Once sovereignty had been transferred from the people to the government, the Second Amendment became little more than an embarrassing reminder of revolutionary theory to be ignored or explained away as being designed to protect state governments.

¹⁵⁰Williamson, op cit, pp. 256-257.

¹⁵¹Ibid, p. 259.

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