

*[Copyright © 1993 SAF, Journal on Firearms and Public Policy. Originally published as 5 J. ON FIREARMS & PUB. POL'Y 139-151 (1993). Reprints available from SAF at 206-454-7012 Professor Malcolm is the author of numerous books on English History including TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT which may be obtained from [www.amazon.com](http://www.amazon.com)]*

## **THE ROLE OF THE MILITIA IN THE DEVELOPMENT OF THE ENGLISHMAN'S RIGHT TO BE ARMED—CLARIFYING THE LEGACY**

**By Joyce Lee Malcolm<sup>†</sup>**

When it comes to the origins of the Second Amendment Americans seem to have reversed the old adage that it is a wise child that knows its father. Our Constitution's founding fathers are far better known to us than that "mother country" from which those gentlemen sought, and with some difficulty obtained, a divorce. This is doubly unfortunate: first, because the founders' notions of liberty, including the right to be armed, were profoundly shaped by the British model. And secondly, because the language in which they couched the Second Amendment has become obscure. An examination of the English right to have arms, the attitudes it embodied and the intent behind it, can provide some badly needed insight into the meaning of our Second Amendment. Clarifying the (pg.140) English legacy can help us clarify our own.

That aspect of the Second Amendment most in need of clarification is its initial pronouncement: "a well-regulated Militia being necessary to the security of a free state." While it must have seemed straight-forward enough to its drafters, the shared understandings upon which it was based have vanished. Two hundred years later we're no longer sure why is it there or what it means. Was it meant to restrict the right to have arms to militia members, to indicate the most pressing reason for an armed citizenry, or simply to proclaim the necessity of a citizen-army to a free people. And what sort of militia did the framers have in mind—a select group of citizen-soldiers, or every able-bodied male citizen, or didn't it matter? Since the preference for a militia, with all its strengths and failings, was part and parcel of our English heritage, that heritage can help us determine the purpose of that clause in the Second Amendment.

It is important to note at the outset that the English right to have arms is phrased quite differently from our own right. It reads: "That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law." Clearly that language has complications of its own, but the militia is not one of them for the very good reason that it isn't mentioned either in the English right or in later justifications of that right. Such is the zeal of those seeking to confine the American right to members of the militia, however, that they have attempted to graft a non-existent militia clause onto the English right. Roy Weatherup, for example, insists the English guarantee, that "the Subjects which are Protestants may have arms for their defence" actually meant: "Protestant members of the militia might keep and bear arms in accordance with their militia duties for the defense of the realm."<sup>1</sup> With all due respect Weatherup would have done better to ask why the militia was not mentioned than to twist the English right out of all recognition. Why wasn't it mentioned in England? Why was it mentioned in America? Let us see.

It's easy to forget that England had no standing army until late in the seventeenth century and no police force until the nineteenth century. The militia was one of a variety of peace-keeping chores foisted upon the average Englishmen for which he was required to have weapons and to be skilled in (pg.141) their use. All Protestant men between the ages of sixteen and sixty were liable for militia duty, but from the reign of Elizabeth I smaller numbers were selected for more serious training, the so-called trained bands.<sup>2</sup> These numbered some 90,000 men in England and Wales. The militia was under the command of the King who appointed a lord lieutenant, usually a local nobleman, to oversee the militia of each county. The militia's task was defensive. It constituted a home guard to suppress riots and, if need be, repel invasion.

The praises heaped upon the militia by philosophers and historians, Englishmen and Americans, have obscured the fact that the militia was not popular. Men resented having to serve, and tried to avoid spending their leisure hours at mandatory target practice. Not surprisingly, there were complaints of "too much bowling and too little shooting" and in the 1620s Charles I was obliged to close ale houses on Sundays to keep men at their shooting practice.<sup>3</sup>

Militia assessments were also resented. Everyone was assessed for a contribution of weapons in accordance with their income but rates were often unfairly apportioned and cheating was common.<sup>4</sup> Those assessed often supplied faulty weapons and lame horses and those who served sometimes made off with militia equipment.

Nor was it any secret that the militia was a doubtful peacekeeper. Its members sometimes sympathized with rioting neighbors they were sent to subdue, and in wartime the entire force could be woefully amateurish. BUT, and this is a large but, the militia was always regarded as preferable to a professional army.<sup>5</sup> Theoretical tracts and popular opinion portrayed the citizen-soldier as fierce in the defense of home and country but damned his professional counterpart as callous, expensive, and a threat to the liberties of the country that employed him. "The Militia must and can never be otherwise than for English Liberty, Because else it doth destroy itself", wrote a member of parliament, while John Trenchard's best-selling pamphlet found "A Standing Army...inconsistent with a Free Government."<sup>6</sup> As early as *Magna Carta* English kings were promising not to use professional soldiers.<sup>7</sup> The virtues of the militia may have been overblown but subsequent events proved the validity of anti-army prejudice. During the sixteenth and seventeenth centuries professional armies took a heavy toll of both people and parliaments. (pg.142) European parliaments fell victim to ambitious kings aided by ever larger armies while the enormous civilian casualties caused by armies during the Thirty Years' War were not to be equaled until our own century.<sup>8</sup> Imperfect as the militia was, it was far better than the alternative. The armies raised by the English Crown from time to time were treated with grave suspicion, kept to minimal size and disbanded as soon as possible.

England's Civil War in the seventeenth century, provoked by a fight for control of the militia, drove both king and parliament to rely upon field armies. Once the war was over the republican victors reduced the size of their army and reinstated the militia.<sup>9</sup> Given the real danger of counter-revolution this militia of men sworn to defend the new regime found its chief task was the prevention of subversion. Militiamen were ordered

to disarm and secure...all Papists, and other ill-affected persons that have of late appeared, or shall declare themselves in their words or actions against this present Parliament, or against the present Government established or have or shall hold correspondence with Charl(e)s Stuart, the Son of the Late King, or any of his party...."<sup>10</sup>

Accounts from harassed royalists testify to the thoroughness of this new style militia.

In 1660, the revolutionary wheel returned to its starting point: the republic collapsed and monarchy was restored. Those who had supported the republic were now suspect in their turn. Again a militia, this time of loyal royalists, was crucial to the maintenance of order. Charles II had promised a general amnesty but his supporters feared: "many evil and rebellious principles have been distilled into the minds of the people of this kingdom, which unless prevented, may break forth to the disturbance of the peace and quiet thereof".<sup>11</sup> The reconstituted militia went straight to work and we learn that "divers persons suspected to be fanaticks, sectaries or disturbers of the peace have been assaulted, arrested detained or imprisoned and divers arms have been seized and houses searched for arms."<sup>12</sup> The Militia Act passed by a royalist parliament in 1662 perpetuated the trend started under the republic but granted the militia even broader powers to disarm (pg.143) Englishmen. Any two deputies could search for and seize of the arms of anyone they regarded as "dangerous to the Peace of the Kingdom." This definition of who could be disarmed was less precise than in any earlier militia act. It is important to note the republican and the Restoration militia were comprised, as far as possible, of men with politically correct views. They were, to this extent, not general, but select, politically oriented militia.

It didn't seem to occur to the parliament that crafted this act that the militia might be used against them. After all their enemies and the king's enemies were identical, and many MPs were militia officers themselves. But we historians are professional "Monday morning quarterbacks" and Professor A. Hassell Smith, for one, realized the militia acts "provided a sound militia system which could be misused by the Crown."<sup>13</sup>

The militia's power to disarm suspicious persons was part of a broader campaign to restrict weapons. The import of firearms was banned, a license was required to transport guns, and royal proclamations forbid anyone who had fought for parliament from carrying weapons. Gunsmiths were ordered to submit weekly lists of those who bought the weapons they made. Lastly, in 1671 a game act was passed which, for the first time, made it illegal for anyone unqualified to hunt—anyone with less than £ 100 a year in income from land—to have a gun.<sup>14</sup> Hunting had long been a privileged activity and previous game acts had banned devices designed exclusively for hunting. But guns had legitimate purposes and had only been confiscated if actually used in poaching. The 1671 act was to be enforced by the country gentry and their gamekeepers, not the king. This strange legislation doesn't square with the subjects' peacekeeping duties and, if strictly enforced, would have disarmed not only some 90% of the country population but all professionals and merchants whose income was not from land. But there seems to have been no attempt to enforce it. The real aim may have been to give gentry the power to disarm Catholics who, ever since the Reformation, were believed to be conspiring to overthrow the government. As with the militia acts, parliament had provided a tool that could be used by the Crown.

The potential these acts might have for the Crown may have escaped the notice of parliament but was not lost on the Stuart kings. Starting in 1680 Charles II used the militia to (pg.144) disarm leading Whigs. His successor, James II, purged the militia itself, removing many lord lieutenants and hundreds of Protestant officers and *justices-of-the-peace* who were less than enthusiastic about his religion and policies, frequently replacing them with Catholics. Those gentlemen summarily sacked by the king often suffered the added indignity of being forcibly disarmed.<sup>15</sup> James even attempted to use the game act of 1671 to achieve a more general disarmament. In December 1686 the lord lieutenants of six northern and western counties were informed "that a great many persons not qualified by law under pretence of shooting matches keep muskets and other guns in their houses."<sup>16</sup>

They were commanded "to cause strict search to be made for such muskets or guns and to seize and safely keep them till further order." Even if James had not begun to purge the lieutenants who received these orders, it is unlikely they and their men could have carried out such an ambitious and risky task.<sup>17</sup> But the mere threat was enough. The "governing classes" had been made painfully aware that two acts of parliament, the militia act and game act, had given the Crown the ability to disarm law-abiding subjects. Possession of firearms had been a duty and a privilege. Now it seemed to them an essential right.

The chance to establish such a right came two years later when outrage at James had reached such a height that William of Orange and his wife, James's daughter Mary, were persuaded to come to England to "rescue" the rights and religion of Englishmen. As thousands of his subjects flocked to join William, a panic-stricken James fled to France. What England calls its Glorious Revolution had begun.

A convention was elected to settle the throne and restore the ancient constitution. Its members were determined to protect their liberties from future royal encroachment. High on their agenda of outrages suffered, they placed the disarmament of law-abiding citizens. Their discussions did not lay the blame entirely at the king's door, however. They faulted the Convention of 1660 that had restored the monarchy "for taking no better care" and angrily denounced the Militia Act of 1662. "An Act of Parliament", Sir John Maynard fumed, "was made to disarm all Englishmen, whom the Lieutenant should suspect, by day or night, by force or otherwise."<sup>18</sup> Sir Richard Temple agreed the militia act had given the Crown "power to disarm all England. Hugh Boscawen complained (pg.145) that the militia, "under pretense of persons disturbing the Government, disarmed and imprisoned men without any cause" adding, "I myself was so dealt with." The Game Act was not specifically mentioned.

The Convention decided to separate rights it wished to affirm from grievances that would need new legislation, and concentrated exclusively on the assertion of rights. Revision of the militia act, therefore, was left to a future parliament. The Declaration of Rights they drew up listed King James's supposed violations of his subjects' liberties and paired these with reassertions of allegedly injured rights. One complaint in an early version read: "The Acts concerning the Militia are grievous to the Subject."<sup>19</sup> By the final version this complaint had been recast to point specifically to disarmament and shift the blame from an act of parliament to James who was accused of having trespassed upon their liberties, "By causing several good Subjects, being Protestants, to be disarmed, at the same time when Papists were both armed and employed, contrary to Law."<sup>20</sup>

This complaint was balanced in the list of proclaimed rights by the claim that "The Subjects, which are Protestants, may have Arms for their Defence suitable to their Conditions and as allowed by Law." The first version of this right stated that it was necessary for the public safety that Protestant subjects "provide and keep Arms for their common Defence". A second version dropped the reference to public safety and necessity and merely announced that Protestants "may provide and keep Arms, for their common Defence".<sup>21</sup> The final version omitted the phrase "their common Defence" in favor of "their Defence" and added the clauses "suitable to their Conditions, and as allowed by Law." To J.R. Western, who has written extensively on the militia, the right had been "emasculated" "The original wording implied that everyone had a duty to be ready to appear in arms whenever the state was threatened. The revised wording suggested only that it was lawful to keep a blunderbuss to repel burglars."<sup>22</sup> To Western's regret the English right to have arms was an exclusively individual right.

The language of the English right to have arms, as already noted, was open to interpretation, but its intent became crystal clear in the years following its enactment. Although the Game Act of

1671 had not been specifically mentioned during (pg.146) Convention debates all new game acts dropped guns from the list of prohibited devices. And despite the reference to weapons suitable to one's condition and as allowed by law in practice the right of all Protestants to have weapons was confirmed. As London's chief legal adviser explained to the mayor and council in 1780 "The right of his majesty's Protestant subjects, to have arms for their own defence, and to use them for lawful purposes, is most clear and undeniable."<sup>23</sup>

In the course of the eighteenth century the right of individual Englishmen to be armed began to be regarded as protecting not only the individual but the constitution itself. The Whigs had pressed for this viewpoint during the debates on the Bill of Rights but it was not until 1765 that William Blackstone, in his Commentaries on the Laws of England, accepted this crucial function of the right to be armed, at a stroke transforming it into orthodox opinion. Blackstone lists all the rights of Englishmen then observes:

But in vain would these rights be declared, ascertained, and protected by the dead letter of the laws, if the constitution had provided no other method to secure their actual enjoyment. It has therefore established certain other auxiliary rights of the subject, which serve principally as outworks or barriers, to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property.<sup>24</sup>

To enable them to vindicate their rights, if these were violated, Blackstone explains that the subjects of England were entitled,

in the first place, to the regular administration and free course of justice in the courts of law; next to the right of petitioning the king and parliament for redress of grievances, and lastly to the right of having and using arms for self-preservation and defence.<sup>25</sup>

We should note that neither the Whigs nor Blackstone mentioned in the militia in this regard. But what of the militia? Despite the complaints about the powers in the Militia Act that were "grievous" to Englishmen, that act remained on the (pg.147) books, unaltered, for many more years. Presumably since individuals were protected in their right to be armed there was less urgency about militia reform. Parliament's belated attempts to revise and revitalize the militia failed to transform it into the home guard idealized by the philosophers. In the course of the eighteenth century the militia's peacekeeping role was gradually taken over by the national army.

To sum up, the role of the militia in the development of an Englishman's right to keep firearms was a negative one. Notwithstanding the genuine sentimentality it engendered, the militia was, at base, an organ of the central government, and its personnel and powers were shaped by the militia act of the moment. Its members could be selected to reflect a particular political viewpoint, as had been the case in the 1650s, 1660s and late 1680s. The right for Englishmen to be armed was asserted, not as Weatherup maintained, to ensure arms to the militia, but to prevent the disarming of law-abiding subjects by the militia. Even after an armed population was recognized as having the larger purpose of protecting English liberties the militia is not mentioned as the source of redress. Blackstone refers only to the right of the individual subject.

While prepared to ignore the militia, the drafters of the English Bill of Rights were anxious to keep professional armies from undermining English liberty. To that end they devised another

supposedly ancient right: "That the raising or keeping a standing Army within the Kingdome in time of Peace unlesse it be with Consent of Parlyament is against Law." Professional soldiers were openly branded a regrettable necessity and handled with extreme caution. Nearly sixty years later Blackstone still considered the Crown regulars "as temporary excrescences bred out of the distemper of the State, and not as any part of the permanent and perpetual laws of the kingdom-"<sup>26</sup> The authors of the Bill of Rights settled the power of the sword with these twin measures—the people were to be armed, the professionals were to be kept under strict civilian control.

Where does this leave the American Second Amendment, with its reference to a well-regulated militia necessary to the security of a free state, and its insistence that the right of the people to keep and bear arms shall not be infringed? I would argue that the Second Amendment mirrors English belief in the individual's right to be armed, the importance of that right (pg.148) to the preservation of liberty, and the preference for a militia over a standing army.

The main clause of the Second Amendment preserves one of those rights of Englishmen we Americans had fought for, and preserves it as Blackstone understood it—a right to be armed for individual self defense and to preserve essential liberties. Americans had never copied English restrictions on the right so it was not surprising that in contrast to the English right's religious and class restrictions and caveat that the right was "as allowed by law" the American amendment forbid any "infringement" upon the right of "the people" to keep and bear arms.

Secondly, Americans inherited English antagonism to professional armies and English preference for a militia, always mindful that a select militia could be dangerous. Nevertheless, just as the English tolerated a standing army, the framers felt compelled to structure a permanent army into the Constitution to guard the frontiers. As a counterbalance to the army they felt the militia must be made a viable force. "As the greatest danger to liberty is from large standing armies," Madison argued, "it is best to prevent them by an effectual provision for a good Militia."<sup>27</sup> For that reason control over state militias was granted to the central government.

The combined military power this gave the central government caused much dismay. So too did the absence of any statement in the Constitution about the undesirability of standing armies in time of peace. Many state bills of rights had copied the English Bill of Rights provision against a standing army in time of peace without consent of the state legislature. Five of the eight states that proposed specific amendments urged the federal government to include a similar or stricter prohibition. Some asked that a two-thirds or even a three-fourths vote of members present in each house of Congress be required to approve a standing army in time of peace.<sup>28</sup>

The framers had considered such a clause but worried about its consequences. George Mason feared "an absolute prohibition of standing armies in time of peace might be unsafe" but wished "at the same time to insert something pointing out and guarding against the danger of them."<sup>29</sup> Madison urged the Constitution "discountenance" armies but only "as far as will consist with the essential power of the Government on that head". And Gouverneur Morris argued that (pg.149) might set "a dishonorable mark of distinction on the military class of Citizen."<sup>30</sup> The framers had failed to find an appropriate strategy in 1787.

When the Constitution was amended a different approach was tried, a strong statement of preference for a militia. This was surely more tactful than an expression of distrust for the army. Why is the militia clause in the Second Amendment? Quite simply to state, as it quite clearly does, that it is the militia, and not the army, that is necessary to the security of a free state. What sort of militia did the framers have in mind? As the amendment went through various drafts Madison's description of the militia as "well-armed" and a later stipulation that it be "composed of the body of the people" were removed, either as sufficiently understood or unnecessary since the right of the

people in general to have arms was not to be infringed.<sup>31</sup> As in the English right the shape of the militia was not crucial.

The Federal Gazette and Philadelphia Evening Post of Thursday, June 18, 1789, in language reminiscent of the English legacy, explained to readers the purpose of the article which became the Second Amendment:

As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed...in their right to keep and bear their private arms.<sup>32</sup>

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1. Roy Weatherup, "Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment", Constitutional Law Quarterly, vol. 2 (1975), pp- 973-4.
2. See C. Cruickshank, Elizabeth's Army (Oxford, 2nd ed. 1966), pp. 24-5.
3. See G. Roberts, The Social History of the People of the Southern Counties of England in Past Centuries (London, 1856), pp. viii-ix.
4. See A. Hassell Smith, "Militia Rates and Militia Statutes, 1558-1663" in The English Commonwealth, 1547- 1640: Essays in Politics and Society Presented to Joel Hurstfield ed. Peter Clark et. al. (Leicester,1979), pp. 93-100.
5. The history of this national prejudice is recounted by Lois Schwoerer in "No Standing Armies!': The Antiarmy Ideology in Seventeenth-Century England" (Baltimore, 1974).
6. T.E., "A Letter from a Parliament-Man to His Friend" (London, 1675) in State Tracts (1693), p. 70, John Trenchard, "An Argument shewing that a Standing Army Is Inconsistent with A Free Government, and absolutely destructive to the Constitution of the English Monarchy" (London, 1697). The Trenchard quotation is taken from the title.
7. See Magna Carta (1215), article 51.
8. For information on the so-called military revolution occurring in Europe during this period see Michael Roberts, "The Military Revolution," in Orest Ranum, ed. Searching for Modern Times, vol. 1, 1500- 1650 (New York 1969), pp. 220-30.
9. See CSPD. 1649-50, pp. 109, 112, 127, 199, 205.
10. C.H. Firth and RS. Rait, eds., Acts and Ordinances of the Interregnum 1642-1660, 3 vols. (London, 1911), 2:397-402.
11. This justification for the activities of Charles's impromptu militia and its treatment of suspects comes from 13 Car. II, c.6' "An Act declaring the sole right of the Militia to be in the King; and for the present Ordering and Disposing the same", July 1661.
12. Ibid.
13. A. Hassell Smith, "Militia Rates and Militia Statutes, 1558-1663, The English Commonwealth: 1547-1640, ed. Peter Clark et. al. (Leicester, 1979), p. 110.
14. 22&23 Car. 2, ch. 25 (1671).
15. See J. Western, The English Militia in the Eighteenth Century: The Story of a Political Issue. 1660-1802 (London, 1965), pp. 48-51; CSPD. 1686-87, (London, 1964), p. 314.
16. See Sunderland to Burlington, December 6,1686, CSPD. 1686-7, p. 314.
17. Of the six lord lieutenants whose orders to execute the Game Act survive, four were displaced within the year for their unwillingness to remove the Test Act against Catholics.
18. Somers MS in Miscellaneous State Papers from 1501-1726 ed. Philip Yorke, Earl of Hardwicke, 2 vols. (London, 1778), 2:415.
19. For the complaint against the militia acts see Schwoerer, Declaration of Rights, p. 299.

20. "The Declaration of Rights", 12 February 1688/89. For a fine, detailed account of the drafting of the Declaration of Rights see Lois G. Schwoerer, The Declaration of Rights" 1689 (Baltimore, 1981).
21. "Anonymous Account of the Convention Proceeding, 1688", Rawlinson MS D1079, fol. 8, Bodleian Library, Oxford; House of Commons Journal: 1688-93, vol. 10, pp. 21-2.
22. J. Western, Monarchy and Revolution: The English State in the 1680s (London, 1972), p. 339.
23. W. Blizard, Desultory Reflections on Police (London, 1785), pp. 5960.
24. William Blackstone, Commentaries on the Laws of England 4 vols., (London, 1765-9, 1st ed.; reprinted Chicago, 1979) 1:136.
25. Blackstone, Commentaries, 1:139, 140.
26. Blackstone, Commentaries, 4th ed. (London, 1777), Book I, ch. 13, I:412 and see p. 395.
27. James Madison, Notes of Debates in the Federal Convention of 1787 Reported by James Madison, (Ohio, 1966), p. 388. And see Max Ferrand, ed., Records of the Federal Convention of 1787. 3 vols. (New Haven, 1911), vol. 3, appdx A, CCCXI, 319.
28. Documentary History of the Constitution of the United States of America, 3 vols. (Washington, 1894), 2:143, 191, 269, 314; Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitutions, 5 vols. (Philadelphia, 1863), 2:406.
29. Madison, Notes, p. 639.
30. Ibid.
31. Madison, Papers, 12:201; Annals of Congress, 1:434, 750.
32. The Federal Gazette and Philadelphia Evening Post, June 18, 1789.