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The Right to Bear Arms: A Reply

By Charles L. Cantrell

Introduction

This article is written to reply to Mr. Robert Elliot's "The Right to Keep and Bear Arms" appearing in the May issue of the Wisconsin Bar *Bulletin*. I feel constrained to write in reply because the issue of gun control has been, and is, constantly at the forefront of various legislatures and their committees. I am concerned that the repeated arguments of only one side of this issue may lead to ill-conceived and unwise laws that would restrict one of our valuable freedoms.

Mr. Elliot's article was short (three pages) and mine is also short. No attempt was made to write the last definitive statement that would necessarily be exhaustive on the subject. Rather, what follows is a presentation of sources and ideas that indicate that the Second Amendment guarantees an individual right to keep and bear arms. In sum, the "other" side is presented by this article.

Pre-Revolutionary Development

There exists a wealth of common law and colonial history that indicates that both Englishmen and pre-revolutionary colonists possessed that individual right to keep and bear arms. It is well known that the founding fathers of this nation recognized Sir William Blackstone as an authority of the common law. Therefore, it should be highly probative of the founding fathers' understanding of an individual's rights to review a portion of Blackstone's authoritative treatise of the common law.

The fifth and last auxiliary right of the subject ... is that of having arms for their defense, suitable to their condition and degree, and such as are allowed by law. Which ... is indeed a public allowance, under due restrictions of the natural right of resistance and self-preservation when the sanctions of society and laws are found insufficient to restrain the violence of oppression.¹

Blackstone termed this as an "auxiliary" right because it was one of the subordinate rights which were to guarantee the existence and enjoyment of the primary rights of personal security, personal liberty and private property.² Thus at common law, the right to keep and bear arms was an individual right—not merely for its own sake—but recognized as a natural and vital instrument for

¹ W. Blackstone, *Commentaries on the Law of England*, 143-144 (1766).

² *Id.*, at 141.

defense and self-protection. It constituted the final barrier from oppression in any form, private or governmental.³

The British did not extend the right to bear arms to their subjects in America. Of course the colonists were deprived of many other common law rights, but these other deprivations were made all the easier by disarming the colonists and preventing the establishment of the militia.⁴

It was this series of well-known outrages which led to the following declaration of the First Continental Congress:

Resolved: that the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.⁵

It seems rather clear that the individual's right to keep and bear arms was part of the common law of England, and more importantly, the founding (pg.22) fathers appreciated this fact and collectively demonstrated that they were entitled to all of the common law rights. Therefore, the First Continental Congress was of the opinion that the colonists were imbued with the natural and lawful right of their English peers—to keep and bear arms.

In addition to the common law right, the state constitutions written during the Revolutionary War period contained an explicit right to bear arms. A few examples are as follows: Vermont, "... the people have a right to bear arms for the defense of themselves and the State...";⁶ Massachusetts, "The people have a right to keep and bear arms for the common defense";⁷ New York, "And whereas it is of the utmost importance to the safety of every State that it should always be in a condition of defense; and it is the duty of every man... to be prepared and willing to defend it...";⁸ Pennsylvania, "... the people have a right to bear arms for the defense of themselves and the State...."⁹ Further examples could be listed, but the point is again demonstrated that the American colonists explicitly reserved the right to bear arms in 1774. Moreover, these state proposals served as models for the federal Bill of Rights, and indicate an awareness that such a right was an integral feature of any listing of freedoms.

The Unorganized Militia

From the above-quoted portions of the state constitutions, it may appear that the colonists jealously reserved the right to keep and bear arms, but that there was a difference of opinion whether the right was solely for the common defense or included the right of self-preservation. Taking into account the common law of England and its explicit right to self-defense and preservation, a persuasive argument could be made that the total sum of interpretive data would favor an understanding on all

³ Another authoritative statement from this era is from *Pleas of the Crown*; "every private person seems authorized by the Law to Arm himself for [various] purposes." 1 Hawkins, *Pleas of the Crown*, Ch. 28, §14 (7th ed. 1795).

⁴ 2 Schwartz, *The Bill of Rights: A Documentary History*, 1107-08 (1971).

⁵ 1 Schwartz, *The Bill of Rights: A Documentary History*, 215, 217 (1971).

⁶ *Id.*, at 319, 324.

⁷ *Id.*, at 337, 342.

⁸ *Id.*, at 301, 312.

⁹ *Id.*, at 262, 266.

the founders' parts that the right to defend one's self was a natural right that required no further exposition.

Most arguments against an individual's right to keep and bear arms center on the wording of the Second Amendment that makes specific reference to a "... well-regulated Militia being necessary to the security of a free State...."¹⁰ Opponents maintain that this wording shows an intent to limit any right to bear arms because the same is expressly dependent upon and limited by the qualifying phrase regarding the Militia. Taking it one step further, they state that the modern-day National Guard fulfills this function, and therefore there is no modern day right.¹¹

The distinction between the organized and the unorganized militias is usually the crucial fact that most people overlook. To understand the difference between the organized and unorganized militias, one need only to look at the express wording of the Constitution. Congress has the express power to "provide for organizing, arming and disciplining the Militia, and for governing such *Part* of them as may be employed in the Service of the United States...."¹² That "part" is the organized militia. The unorganized or reserve militia now statutorily consists of the following:

The militia of the United States consists of all able-bodied males at least 17 years of age and ... under 45 years of age who are, or who have made a declaration to become, citizens of the United States and of female citizens who are commissioned officers of the National Guard.¹³

This modern statutory scheme outlining the unorganized militia closely follows the historical format recognized by many of the founding fathers. It was a distrust of a standing general governmental army that caused Hamilton to write:

When will the time arrive that the federal government can raise and maintain an army capable of erecting a despotism over the great body of the people of an immense empire....¹⁴

The fear of a standing army was viewed as the possible means for the federal government to encroach upon the States and people. On the one hand, there was some protection offered by the organized militia against a despotic federal government and its army. However, Hamilton clearly pointed out that the organized militia must be under the central government's command for it to be an effective military unit. Again, as in the Constitution, reference is made to only a "part" (organized) of the militia:

¹⁰ U.S. Constitution, Amendment II.

¹¹ The National Guard can hardly be considered the solution to the founders' fear of a standing army because the President is considered as the Commander-in-Chief of the National Guard, and can call the Guard into national service at any time. *See*, U.S. Constitution, art. II, §2 and *Gilligan v. Morgan*, 413 U.S. 1, 7 (1973). Thus, this arrangement would provide no real protection for the states or people against a despotic federal government.

¹² U.S. Constitution, art. I, §8, cl. 16.

¹³ 10 U.S.C. §311(a) (1970).

¹⁴ *The Federalist*, No. 28 (Modern Library ed.) at 175 (A. Hamilton).

The attention of the government ought particularly be directed to the formation of a select corps of *moderate extent*, upon such principles as will really fit them for service....¹⁵ (pg.23)

Hamilton had earlier considered the idea that the entire militia, consisting of both the organized and the unorganized sects, should be trained under the auspices of the federal government. He rejected this notion as impractical.

The project of disciplining *all the militia* of the United States is as futile as it would be injurious.... A tolerable expertness in military movements is a business that requires time and practice. [It] 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.¹⁶(emphasis added.)

Thus it is clear that the "people at large" constituted the unorganized militia, and they were to serve as an integral check on possible despotism. The identity of the unorganized militia has been recognized by the United States Supreme Court on at least two important occasions.¹⁷ An unorganized militia would be of no value in protecting the citizens unless there also existed a concomitant right to bear arms. One commentator has succinctly written:

Despite [all] safeguards, the people were still troubled by the recollection of the conditions that prompted the charge of the Declaration of Independence that the King had "effected to render the military independent and superior to the civil power." They were reluctant to ratify the Constitution without further assurances, and thus we find in the Bill of Rights Amendments 2 and 3, specifically authorizing a decentralized militia, guaranteeing the right of the people to keep and bear arms, and prohibiting the quartering of troops in any house in time of peace without the consent of the owner.¹⁸

James Madison was the author of the Second Amendment, and there exists no doubt that he considered the right to bear arms an individual one. In *Federalist* No. 46 he wrote of the danger of a standing federal army of twenty-five or thirty thousand men:

To these would be opposed a militia amounting to near half a million of citizens with arms in their hands.... Besides the advantage of being armed, which the Americans possess over the people of almost every nation... forms a barrier against

¹⁵ *Id.*, No. 29 at 179.

¹⁶ *Id.*, at 178.

¹⁷ "It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States...." *Presser v. Illinois*, 116 U.S. 252, 265 (1886). "The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense." *United States v. Miller*, 307 U.S. 174, 179 (1938).

¹⁸ Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 185 (1962).

the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of.¹⁹

The armed citizenry of which Madison spoke would include approximately 60 to 70 percent of all those capable of bearing arms. These 500,000 militiamen far outnumbered the total of regular militia serving for the states. Therefore, Madison obviously had in mind a militia force that would comprise virtually all of the males in the nation. In his view, the citizenry at large retained the right to bear arms to guard against a possible despotic military government.

Finally, we should give attention to Mr. Elliot's conclusion that the Second Amendment must be interpreted to reserve to the people a right to bear arms "where the 'people' are individual states vis-a-vis the federal government." The Second Amendment speaks of both the "militia" and "the people"—that is, the framers intentionally used the latter and not "states." The Constitution mentions "states" numerous times throughout its text. The term "people" in the Second Amendment was purposely used to denote only those individuals who were qualified to own arms. In other words, the entire white male population would be considered to be the "people." By construing "people" to mean only those qualified to do so the right to bear arms would, in present times, accrue to all citizens of the United States not under some legal disability.

More importantly, one cannot confuse the terms "people" and "states." While the latter is a recognizable political unit, the former also exists as a viable civil and political entity. While the civil component of "people" could theoretically be the amalgam of interests of the individuals comprising the group, the collectivity is separate and distinct from its delegated political unit. Thomas Jefferson recognized the difference: "That whenever any Form of Government becomes destructive of these ends, it is the *Right of the People* to alter or abolish, and to institute new Government...."²⁰

Indeed, the "people" in the Second Amendment cannot be equated with the "states," nor can there be serious doubt that Jefferson, Hamilton and Madison were fully aware of the difference in the terms.

Sidestepping Judicial Interpretation

A careful analysis of the United States Supreme Court cases that have interpreted the Second Amendment reveals that the five reported decisions (pg.24) suffer from a lack of consistent and enlightened methodology in their constitutional interpretations. The following examinations of the cases reflects several deficiencies that ultimately limit the precedential value of the decisions.

Mr. Elliot cited the case of *United States v. Cruikshank*²¹ for the initial Supreme Court opinion stating that the Second Amendment conferred no constitutionally protected right upon a private citizen where another private citizen threatens and intimidates the former. The prosecution in the case was under a statutory conspiracy that forbade conspiring parties to combine to "threaten or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured him by the Constitution or laws of the United States"²²

¹⁹ Note 14, *supra*, at 311.

²⁰ *Declaration of Independence*.

²¹ 92 U.S. 542 (1876).

²² Enforcement Act, 16 Stat. 140 (1870).

The Supreme Court's opinion in *Cruikshank* was typical of an era that contained several court decisions that refused to recognize the power of Congress to regulate the actions of private parties where the alleged actors' conduct was harmful to the newly freed slaves.²³ The Supreme Court of that era was obviously more attuned to the delicate nature of federalism and states' rights issues. The *Cruikshank* opinion stated that the Second Amendment was not applicable to the states, and set out an express limit on the power of Congress to infringe on the right to bear arms.

In correctly refusing to apply the strictures of the Second Amendment to the acts of a private party, the Court was doing nothing more than adhering to the 1875-1882 nondeferential stance toward Congressional civil rights acts, and demonstrating, by its decision, that direct congressional legislation aimed at regulating private acts was an unwarranted and unconstitutional foray into matters best left to individuals and to the states under the Tenth Amendment. As further evidence of the Court's myopic stance in this time frame, it should be noted that *Cruikshank* also held that the "right of the people to peacefully assemble and petition the Government for a redress of grievances"²⁴ was construed as only applying to the national government.²⁵ This part of the decision was later reversed in the *Hague* case, and protection against state abridgement of the right to assemble and petition were guaranteed.²⁶

The second case of *Presser v. Illinois*²⁷ involved the successful prosecution of a man who led four hundred armed men in a parade in direct violation of the Illinois Military Code which forbade "any body of men, other than the regular organized volunteer militia ... to associate themselves together as a military company or organization, or to drill or parade with arms in any city ... without the license of the Governor...."²⁸ This case, if anything, directly supports the proposition that the right to bear arms is an individual one that is protected under the Second Amendment.

It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States; and, in view of this prerogative of the General Government, as well as of its general powers, the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the General Government. But, as already stated, we think it clear that the sections under consideration do not have this effect.²⁹

The Court recognized that the right to bear arms was bonded to the concept of the "unorganized" militia, and that a state could not interfere with the relationship between the unorganized militia and the federal government. Arguably, the Court interpreted the right to bear arms as an integral one which has as its basis the individual's ability to respond to his nation's call for distress. Balanced against this important right is the state's legitimate interest in controlling the

²³ *United States v. Harris*, 106 U.S. 629 (1883). See also, *United States v. Reese*, 92 U.S. 214 (1876).

²⁴ U.S. Constitution, Amendment I.

²⁵ 92 U.S. at 552.

²⁶ *Hague v. C.I.O.*, 307 U.S. 496 (1939).

²⁷ 116 U.S. 252 (1886).

²⁸ *Id.* at 253.

²⁹ *Id.*, at 265.

militia of its own state. As *Presser* demonstrates, the individual right will remain protected against state encroachment, but the state does have a legitimate interest in protecting the public safety when a private army marches the street. Without prior approval of the Governor, an armed parade or demonstration could presumably constitute a greater menace to the peace. Perhaps it would be logical to assume that private armies such as *Presser's* would provoke the same outcries of suspicion and distrust that the Founding Fathers cast against the spectre of a "standing" federal army. Clearly, this case stands for the proposition that an individual does have the right to bear arms, but he does not have the right to organize a private military organization and conduct armed parades or drill without being subject to some reasonable regulation.^(pg.25)

The third case of *Miller v. Texas*³⁰ is an unremarkable decision that followed the precedent of *Cruikshank* and *Presser* holding that the Second Amendment was not applicable to the State of Texas. The defendant challenged a state law that authorized the warrantless arrest of a person carrying a pistol upon a public street.

In upholding the conviction, the Court again reflected the non-incorporationist theme of the era. Historically, many of the provisions of the Bill of Rights were not incorporated through the Fourteenth Amendment and made applicable to the states at the time of *Miller* in 1893. In any event, it is highly unlikely that the case is of any precedential value because the issue was first raised on a motion for rehearing and the Supreme Court declared that the issue had been waived.³¹

The case of *United States v. Miller*³² is the most often cited example of those who maintain there is no individual right to bear arms. The issue presented was whether the National Firearms Act³³ could constitutionally prohibit the interstate shipment of a sawed-off shotgun. The Court stated:

In the absence of any evidence tending to show possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.³⁴

The quoted phrase "In the absence of any evidence" is crucial to the opinion of the Court. The defendants did not appear nor were they represented before the Supreme Court. One learned commentator has characterized the one-sided presentation as follows:

The Court did not benefit from the vigorous presentation of conflicting views which is considered a basic advantage of our adversary system of justice. The case was argued solely by the government attorneys who failed to alert the Court to the

³⁰ 153 U.S. 535 (1893).

³¹ *Id.*, at 538.

³² 307 U.S. 174 (1938).

³³ National Firearms Act, ch. 757, 48 Stat. 1236 (1934), *as amended*.

³⁴ 307 U.S. at 178.

existence of several holdings clearly in favor of the individual's right to keep and bear arms.³⁵

It would seem a simple matter for any advocate to demonstrate that a sawed-off shotgun would have a reasonable relationship to the militia's function in defending the homeland. As a matter of fact, this showing should have been made because such weapons were used by the United States in World War I for trench warfare.

The Court's holding would then seemingly validate weapons that could be considered "military" in nature because they would obviously bear a reasonable relationship to the efficiency of the militia. Indeed, the *Miller* case may extend protection to any "normal" type of firearm that is ordinarily kept by citizens. Shotguns, pistols and rifles are examples of some weapons that could be used for the defense of the country.³⁶

In a more theoretical sense, the *Miller* test and its reliance on showing that a weapon bears a reasonable relationship to the preservation or efficiency of the militia is not altogether comprehensible as a constitutional standard. It would be rather simple to show all weapons met the test, but it is extremely doubtful that the Supreme Court had this intention. On the other hand, if Second Amendment protection is going to be decided by the technical nature of the weapon, the forthcoming rule will be outside of a valid constitutional test. While *Miller* emphasized that the purpose of maintaining a militia was the basis of the Second Amendment, the case offers no standard and no guidance to the difficult constitutional questions.³⁷

Finally Mr. Elliot asserts that the case of *Dennis v. United States*³⁸ sounded the "death knell for any argument that the Second Amendment reserves to the individual a constitutional right to keep and bear a weapon."³⁹ In support of this proposition he cites language in *Dennis* that indicated that the federal government has the power to protect itself from acts which would constitute "preparation for revolution,"⁴⁰ and that there is no right to revolt against a despotic government when the existing structure provides for a peaceful and orderly change.⁴¹ Of (pg.26) course, this is not a novel proposition—the Constitution specifically provides that Congress has the power to call "forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."⁴²

Notwithstanding the fact that the *Dennis* case adds nothing to the express power of Congress to suppress rebellions, the real question is "how far" may Congress go in suppressing treason or related activities. It may obviously call up the militia. May it also suspend the Bill of Rights?

³⁵ Caplan, *Restoring the Balance: The Second Amendment Revisited*, V Fordham Urban Law Journal, 31, 44 (1976). Interested readers should also read pages 46-48 of Caplan as he details how the government attorneys failed to disclose the relevant state law of Tennessee, and selectively cited portions of the *Aymette* decision which probably gave too much weight to the government's position.

³⁶ See, Note, *The Right to Keep and Bear Arms: A Necessary Constitutional Guarantee or an Outmoded Provision of the Bill of Rights?*, 31 Albany L. Rev. 74, 78 (1967).

³⁷ See, *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942) and *United States v. Warin*, 530 F.2d 103 (6th Cir. 1976), *cert. den.* 426 U.S. 948 (1975) for cases that reject *Miller* as formulating a general rule.

³⁸ 341 U.S. 494 (1951).

³⁹ Elliot, *The Right to Keep and Bear Arms*, 53 Wis. Bar Bull., 34, 35 (May 1980).

⁴⁰ 341 U.S. at 501.

⁴¹ *Id.*

⁴² U.S. Constitution, art. I, §8, cl. 15.

Certainly not, and there is no reason to believe that it may ignore the individual's right to keep and bear arms under the Second Amendment.

There is also grave doubt concerning the appropriateness of utilizing *Dennis* for any proposition in the Second Amendment area. The case dealt with the First Amendment issue of whether parties could be punished under the Smith Act for conspiring to organize the Communist Party of the United States. Chief Justice Vinson's broad language constituted the nadir of First Amendment jurisprudence when he distorted the "clear and present danger" test to effectively suppress all radical political doctrines.⁴³ Vinson's opinion could not command a majority of the court, and was later repudiated in *Yates v. United States*.⁴⁴

It is nothing less than ironic that a discredited case which dealt with the First Amendment freedoms of those who profess to believe in a proletarian revolution should ultimately be used to support the notion that the citizenry of the United States has no right to keep and bear arms. *Dennis* is inapposite to the Second Amendment issue, and should be regarded as an embarrassment because of its cold war view of individual liberties.

Alternative Constitutional Grounds

At this point in the history of our nation and constitutional jurisprudence other sources of constitutional protection are available to reaffirm the individual's right to keep and bear arms. Foremost among these arguments is that the Second Amendment right, over a period of two hundred years, has become a fundamental one.

One postulated argument could be that private gun ownership has become engrained in our concept of "liberty" under the due process clauses of the Fifth and Fourteenth Amendments. The right to keep and bear arms has been firmly established in the tradition of our nation. Moreover, there is a natural right of an individual in his personal security and a concomitant right to protect one's family and self. Any attempt of the government to confiscate or register certain guns would amount to an invasion of privacy into the homes of tens of millions of citizens. Nothing remotely similar has ever happened before, and it is doubtful that the courts would allow it to happen now.

The Ninth Amendment indicates that the Bill of Rights is not an exhaustive list of freedoms enjoyed by the people. For reasons that may never be clearly understood, the Supreme Court has consistently found fundamental rights existing under the due process clauses of the Fifth and Fourteenth Amendments. However, one could argue that the "people" have "retained" the right to keep and bear arms for over two hundred years, and that the right must be recognized as fundamental under the Ninth Amendment.

Conclusion

As the foregoing illustrates, there exists strong support for the proposition that the right to bear arms has roots in the common law heritage of our nation, and that the common law right was recognized by the founding fathers of this nation. In addition, there is strong evidence that Hamilton and Madison, among others, specifically intended that the Second Amendment would provide an individual right to keep and bear arms.

⁴³ See, Shapiro, *Freedom of Speech: The Supreme Court and Judicial Review*, 65 (1966).

⁴⁴ 354 U.S. 298 (1957).

The case law that has been discussed is of very little precedential value in attempting to derive a constitutional norm for interpreting the Second Amendment. When a proper case reaches the Supreme Court there will be a substantial body of supportive evidence that favors the recognition of an individual right to keep and bear arms. Until that time, one should be aware that our valuable freedom is based upon more solid constitutional dogma than the "right to revolt."

About the Author

Charles L. Cantrell is the Assistant Professor of Law at Marquette University Law School, Milwaukee. He teaches courses in criminal, constitutional and procedural law. Mr. Cantrell received his J.D. from Baylor University; his LL.M. from the University of Texas.