

## Practical Aspects of Gun Control, Part 3

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In this edition, the study of the historical aspect of gun control is continued with a specific examination of the Second Amendment to the U. S. Constitution.

### 2 The Historical Aspect (continued)

Three very important things must be kept in mind in the course of analyzing the Second Amendment. First, the original Constitution as ratified did not contain a Bill of Rights, nor did it provide any powers to disarm the people. Second, the first eight Amendments to the Constitution apply to individuals, but, contrary to the claims of some, do not *grant* any rights: they *recognize* rights that already existed and cite these as express limitations of the powers of the new federal government. Third, the phrase "well-regulated" in the Second Amendment has two different meanings, neither of which has anything to do with the legitimacy of private arms.

#### 2.1 The Powers of the People Aside from the Constitution

To gain a true understanding of whether the people are to be armed, we need look no further than the comments made by Hamilton, Madison, and Jay in *The Federalist Papers* [1]. Keep in mind that *The Federalist* was written during the ratification period as a means to explain the Constitution to the voters of New York; clearly the amendments were not in existence. Let us examine then the sentiments of the founding generation on the subject of an armed population, referencing the Constitution prior to the adoption of the Second Amendment.

Hamilton advocates a "select" militia in *The Federalist #29*, and then shows it cannot be a danger to liberty given that the people in general are fully armed:

The attention of the government ought particularly to be directed to the formation of a select corps of moderate extent, upon such principles as will really fit them for service in case of need. By thus circumscribing the plan, it will be possible to have an excellent body of well-trained militia ready to take the field whenever the defense of the State shall require it. 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 while there is a large body of citizens, little, if at all, inferior to them in the discipline and use of arms, who stand ready to defend their own rights and those of their fellow-citizens.

Thus Hamilton recognizes the right of the people to defend against the government and its select militia should the need arise; clearly the people must be armed in order to have that power.

Madison lays out in the *Federalist #46* a scenario in which the federal government became tyrannical, and how the people would be expected to respond:

To these [the army of the federal government] would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by government [states] possessing their affections and confidence. It may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops. Those who are best acquainted with the last successful resistance of this country against the British will be most inclined to deny the possibility

of it. Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached, and by which the militia officers are chosen, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of. Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms. ... Let us not insult the free and gallant citizens of America with the suspicion, that they would be less able to defend the rights of which they would be in actual possession, than the debased subjects of arbitrary power would be to rescue theirs from the hands of their oppressors.

It is important to note that the population of the thirteen states at the time of writing was about 3 million or so; the half-million referenced by Madison would constitute about 15 to 20% of the total population, a far higher ratio than the numbers of any standing army. The existing right to possess arms by the people is, as Madison contends, the remedy for a tyrannical government.

It is inconceivable that the original Constitution would recognize the legitimate right of the people not only to be armed, but to take up arms against a domestic tyranny, but then be amended during the first years of operation to remove that right. It is quite the contrary: the Bill of Rights exists because the anti-Federalist faction, ever wary of encroachment by governments, demanded a Bill of Rights so as to clarify the limits of governmental power. Madison was initially opposed to a bill of rights, agreeing with Hamilton that it would cause confusion. As Hamilton put it in *The Federalist #84*:

I go further and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?

## 2.2 The Bill of Rights Limits Powers

The main contention between the Federalists and anti-Federalists was that the anti-Federalists demanded a bill of rights to ensure that those basic guarantees were clear as a limitation on the power of the government. Madison changed his mind about a Bill of Rights once the ninth necessary state ratified it, and many state ratification documents came to Congress with recommendations that a Bill of Rights be added to it. He was one of the people in the First Congress who actively promoted amendments to the Constitution. In his speech before Congress on 8 Jun 1789, Madison laid out the case for a bill of rights, and then indicated his means of proving they were limitations on the power of the government [2]:

There have been objections of various kinds made against the constitution: Some were levelled against its structure, because the president was without a council; because the senate, which is a legislative body, had judicial powers in trials of impeachments; and because the powers of that body were compounded in other respects, in a manner that did not correspond with a particular theory; because it grants more power than is supposed to be necessary for every good purpose; and controls the ordinary powers of the state governments. I know some respectable characters who opposed this government on these grounds; but I believe that the great mass of the people who opposed it disliked it because it did not contain effectual provision against those encroachments on particular rights, and those safeguards which they have been long accustomed to have interposed between them and the magistrate who exercised the sovereign power: nor ought we to consider them safe, while a great number of our fellow citizens think these securities necessary.

It has been a fortunate thing that the objection to the government has been made on the ground I stated; because it will be practicable on that ground to obviate the objection, so far as to satisfy the public mind that their liberties will be perpetual, and this without endangering any part of the constitution, which is considered as essential to the existence of the government by those who promoted its adoption.

The amendments which have occurred to me, proper to be recommended by congress to the state legislatures, are these:

Madison then pointed out specific places in the text of the existing Constitution where specific changes to the language were to be made. After discussing the preamble, mode of election and apportionment, and compensation to representatives, he then began on the rights of the people:

Fourthly. That in article 1st, section 9, between clauses 3 and 4, be inserted these clauses, to wit, The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext infringed.

The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the legislature by petitions, or remonstrances for redress of their grievances.

The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.

Note that the insertion of the guarantees of freedom of the press, religion, assembly, and keeping and bearing arms are all to be located in the same place in the Constitution on equal terms. Note also that the principle of being armed precedes the statement about militias. The intent of what we now know as the bill of rights was to insert these provisions into Article 1, Section 9 of the Constitution, but was probably put into the familiar form as a matter of readability. It is this Section 9 which lists all the powers *denied* to the federal government. It is clear then, that far from granting any rights, the Second Amendment, just as with the other portions of the Bill of Rights, recognizes pre-existing rights and expressly denies the government any power to negate any of them.

But that is not all. The expert jurist St. George Tucker, who wrote interpretation of the Constitution as used in most law schools for at least one hundred years, applied this same logic even in light of the Second Amendment as actually adopted [3]:

"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."

This may be considered as the true palladium of liberty. ... The right of self defense is the first law of nature: in most governments it has been the study of rulers to confine this right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any color or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction. In England, the people have been disarmed, generally, under the specious pretext of preserving game: a never failing lure to bring over the landed aristocracy to support any measure, under that mask, though calculated for very different purposes. True it is, their bill of rights seems at first view to counteract this policy: but the right of bearing arms is confined to protestants, and the words suitable to their condition and degree, have been interpreted to authorize the prohibition of keeping a gun or other engine of destruction of game to any farmer or inferior tradesman, or other person not qualified to kill game. So that not one man in five hundred can keep a gun in his house without being subjected to a penalty.

### 2.3 The Meaning of "Well-Regulated"

General Washington made numerous comments and complaints regarding difficulties with the militia in the early stages of the Revolution. He wrote to William Livingston, Governor of New Jersey, on 24 Jan 1777 [4]:

Sir: The irregular and disjointed state of the militia of this province makes it necessary to inform you, that, unless a law is immediately passed by your legislature, to reduce them to some order, and oblige them to turn out, in a different manner from what they have hitherto done, we shall bring very few into the field, and even those few will render little or no service.

He wrote a similar letter to the Pennsylvania Council of Safety five days later [5]. Washington requested aid from Governor Jonathan Trumbull (a colonial governor who sided with the Americans) on 6 Mar 1777 [6]:

Sir: I flatter myself, that I should never again be under the necessity of trespassing upon the public spirit of your state, by calling upon her for another supply of militia; but, such has been the unaccountable delay in the recruiting of the Continental Battalion, chiefly owing to the long time that unhappily elapsed before the officers were appointed, that I see no prospect of keeping the field till the new levies can be brought into it, but by a reinforcement of militia. For want of proper laws in the southern governments, their militia were never well regulated; and since the late troubles, in which the old government were unhinged, and new ones not yet firmly established, the people have adopted a mode of thinking and acting for themselves. It is owing to this, that when a summons is issued for militia, those only turn out that please, and they for what time they please, by which means they sometimes set off for their homes in a few days after they join the army.

After New Jersey passed a law establishing the rules for calling out militia, Washington wrote again to Livingston on 5 Apr 1777 [7]:

As you must certainly be best acquainted with the circumstances of your own state, I entirely acquiesce with any mode which you may think most expedient in regard to calling out your militia at this time.

During this time, and at other times thereafter, Washington notes that the militia was not reliable in the early part of the war, as he mentions in a letter to the President of Congress on 26 Mar 1777 [8]:

For want of proper coercive powers, from disaffection, and other causes, the militia of this state are not to be depended upon. They are drawn out with difficulty; and at a most enormous expense, as their acts will show; they come, you can scarce tell how, they go, you hardly know when. In the same predicament are those of Pennsylvania. Numbers from this state have joined the enemy, and many more are disposed to do so ...

This is not to imply that Washington held the militia in low regard; he commended their conduct numerous times [9]. The salient point to be made from these passages, given the general difficulties of acquiring sufficient troops (and money) to prosecute the war, that the phrase "well-regulated" in the Second Amendment has nothing to do with "regulation" of who may and may not possess arms; it does not even refer to training per se. It refers to a set of laws by which the militia, when called into service, will actually show up for duty. The Second Amendment, in its militia capacity, simply allows the federal government to call upon the armed people for duty, should a national emergency require it.

The phrase "well-regulated" had other meanings during the colonial period, often used as a euphemism for "disciplined" or "practiced". While it is impossible to know if Madison had that connotation in mind when we wrote the text of the Second Amendment, it certainly fits the notion of a militia requiring little training when called into service. Hamilton, as General Washington's aide during the war, was certainly familiar with the concept of readiness: he illustrates this "disciplined" and "practiced" notion in *The Federalist* #29:

To oblige the great body of yeomanry, and of 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 a 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.

## 2.4 Conclusion

Neither the text of the Constitution nor the Second Amendment grants any powers to prohibit the right of the people to possess arms of the people; given that the purpose of arms was for defense of self and liberty, it may be safely concluded that the arms in question are those equal in nature to the professional armies and the "select" militia.

Only the most casual thinker could believe that the National Guard is the "militia" referred to in the Second Amendment. There are several reasons why it could not be so. First, the militia was expected to provide their own arms; but the members of the National Guard are supplied arms by the government, and are to be turned into the government when their duty is over. Secondly, the militia is to be commanded by officers chosen at the state level; but the National Guard is under the plenary authority of the President; the state only asks the President to call them out. Third, the Second Amendment refers to the "people" which everywhere else means individuals; it is inconceivable that Madison would use the word "people" here if he meant specific military organizations controlled by the federal government.

As to whether the Second Amendment curtails only the federal powers, but leaves the states open to impose any restrictions they please, it is necessary that only three things be observed. First, the first eight amendments define pre-existing liberties of the people. Second, they exist to clarify limitations on the power of government. Third, according to Article 6 of the Constitution, all state officers are required to support the Constitution by oath or affirmation. It is illogical to suppose that the officers of state governments, having taken an oath to support the federal Constitution that recognizes limitations on powers due to the liberties of the people, should have powers at the state level to circumvent those liberties. But I further recognize that there is no end of arrogance among the power-mad at either state or federal levels.

## References

- [1] The Federalist papers are a series of newspaper essays published by Alexander Hamilton, James Madison, and John Jay between 27 Oct 1787 and 28 May 1788. Their purpose was to explain the Constitution to the voters of New York State and encourage them to urge their representatives to ratify it. The Federalist may be downloaded for free at <http://edduvall.com>.
- [2] Jack N. Rakove, ed., *Madison: Writings*, New York: The Library of America, 1999, pp. 441, 442
- [3] St. George Tucker, *View of the Constitution of the United States*, Indianapolis, IN: Liberty Fund, 1999, pp. 238, 239. (First published in 1803)
- [4] John C. Fitzpatrick, editor, *The Writings of Washington*, Washington, United States Printing Office, (1832) Vol. 7, pp. 56, 57
- [5] *ibid.*, Vol. 7, p. 79

[6] *ibid.*, Vol. 7, pp. 253, 254

[7] *ibid.*, Vol. 7, p. 363

[8] *ibid.*, Vol. 7, p. 319

[9] *ibid.*, Letter to the President of Congress, 5 Jan 1777 (Vol. 6, pp. 467-471); to the Pennsylvania Council of safety, 12 Jan 1777 (Vol. 6, pp. 504, 505); in General Orders, 5 Sep 1777 (Vol. 9, p. 182); to Brig. General Samuel Holden Parson, 10, and 11 Jul 1779 (Vol. 15, pp. 396, 407); to the President of Congress, 13 Jul 1779 (Vol. 15, p. 419); to James Bowdoin, 14 Jun 1780 (Vol. 19, pp. 8 - 10); in General Orders, 16 Jun 1780 (Vol. 19, p. 17); in General Orders 22 Jun 1780 (Vol. 19, pp. 54, 55); to the President of Congress, 25 Jun 1780 (Vol., 19, p. 65); in General Orders, 20 Oct 1781 (Vol. 23, pp. 243-248). This last one came the day after the victory at Yorktown.