The Role of the Militia in the Development of the Englishman's Right to be Armed - Clarifying the Legacy

By Joyce Lee Malcolm

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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

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."[1] 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.

Its 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 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.[2] 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 "to much bowling and to little shoting" and in

the 1620s Charles I was obliged to close ale houses on Sundays to keep

men at their shooting practice.[3]

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.[4] 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.[5] 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."[6] As early as

Magna Carta English kings were promising not to use professional

soldiers.[7] 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. European parliaments fell victim to

ambitious kings aided by ever larger armies while the enormous civilians

casualties caused by armies during the Thirty Years' War were not to be

equaled until our own century.[8] 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.[9] 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 correspondency with

Charl(e)s Stuart, the Son of the Late King, or any of his party ...

."[10] 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".[11] 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."[12] 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

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."[13]

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.[14] 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 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.[15] 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."[16] 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.[17] 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."[18] Sir Richard Temple agreed the militia act had

given the Crown "power to disarm all England. Hugh Boscawen complained

that the militia, "under pretence 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."[19] 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 imployed, contrary to Law."[20]

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".[21] 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."[22] 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 Convention debates all new game acts

dropped guns from the list 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.[23]

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.[24]

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.[25]

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 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."[26] 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 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."[27] 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.[28]

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."[29] Madison urged the Constitution "discountenance" armies but

only "as far as will consist with the essential power of the Government

on that head". And Governeur Morris argued that might set "a

dishonorable mark of distinction on the military class of Citizen."[30]

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.[31]

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.[32]

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Footnotes

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. l,

1500-1650 (New York, 1969), pp. 220-30.

9. See CSPD, 1649-50, pp. 109, 112, 127, 199, 205.

10. C.H. Firth and R.S. 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. "Amonymous 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.

59-60.

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 Constitution, 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.