

# There is No Second Amendment Right to a Gun

Steve Max

*I wrote the following article in 2013 in the wake of the Washington, DC Navy Yard shooting in which twelve people died. The Newsletter has reprinted it several times after subsequent major shootings. In May, as twenty-one people were killed in a Texas school shooting, we heard the Second Amendment cited many times in opposition to even the most moderate gun control legislation. It is long past time for Democrats to stand up and proclaim that there is not, and has never been, a Second Amendment right to individual gun ownership. Here is a short history of the Second Amendment.*

S.M. 05/26/2022

-----

Every discussion of gun control starts with the advocates saying, “Of course I support the Second Amendment but ... .” Having given away the argument right at the start, they then ask, “But must there be quite so many bullets in the magazine?” It is time to take the strongest position. There is no individual right to own a gun. The Second Amendment guaranteed the right to have state militias. The gun ownership clause was there to make the militia possible. There have been no state militias since 1903, and there is no longer a constitutional right to gun ownership. It doesn’t exist!

The congressional debate over the Second Amendment is most instructive. The overall context was this: The Constitution (1787) had created two institutions new to the United States, a standing army and a President who was also Commander in Chief. In this combination, many feared European despotism. What if the President made himself a king and used the army against the people? The answer was close at hand. The Governors of the states would call out the militia to restore democracy. But in those days, every militiaman was required to bring his own gun. The states didn’t have any to give them. But, what if the President first took away all the guns? Well, the Constitution would have to say that he can’t, hence the Second Amendment.

As always, nothing is simple. The Federalists (Hamilton) wanted a strong national standing army and hoped that by guaranteeing the state militias, they could overcome popular objection. Many among the Jeffersonian Republicans didn’t even trust the militia, and wanted to guarantee individual gun ownership without reference to militia service.\* Both sides agreed that the main threat to democracy would be was the Army of the United States, and the debate was over how citizens could best defeat the Army.

Here is Madison’s first draft of what became the Second Amendment.

“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. “

To get his provision through Congress, Madison had linked together both concepts – armed citizens and militia service. Note that because of that linkage, the amendment ends with a

---

\* Strictly speaking, the terms Federalist and Republican weren’t organized parties until 1795, at this time (1789) they were less formal points of view in Congress, and were known as the pro and anti-Administration factions.

contentious objector clause for Quakers, Moravians and others. The Bill was sent to committee and came back with an interesting addition:

“A well regulated militia, composed of the body of the people, being the best security of a free State, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms.”

The phrase “composed of the body of the people,” (which in 1789, meant free White men\*,) reflected another debate of that era. Some thought that militia service should be a universal requirement. This language paralleled existing militia laws in many states, and was in keeping with colonial tradition that had required all able bodied men to serve and to bring their own guns. Alexander Hamilton had argued against this view in Federalist Paper 29, saying that so large a body could not possibly be “well regulated,” meaning well drilled and disciplined. Federalists tended to support a smaller “select” militia. These two views were reflected in the congressional debate between Federalists and anti-Federalists over this clause.

The bill went back and fourth between the two houses of Congress. The Federalist Senate took out the universal service clause along with the conscientious objection. In those days it was well remembered that England had tried to use colonial era conscientious objection provisions discourage participation in revolutionary state militias and the Continental Army. During the debate, the anti-Federalists attempt\*ed to add amendments abolishing a peace-time standing army, but these were defeated. The final version read:

“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.”

Clearly, the right to bear arms was connected to militia service. There were not the votes in either house to pass a stand-alone right to gun ownership.

The year after ratification, Congress passed the Militia Acts of 1792. We need not go into the wicked purposes to which the militia was put under federal direction. For the sake of this argument it is sufficient to note that once again the idea of universal gun ownership was linked to universal military service. Under the Second Militia Act, all (free White) men of military age were conscripted into the militia, and every such man was required, at his own expense, to go out and buy a gun along with prescribed quantities of shot, powder a bayonet and other equipment.

In asserting the link between the right to bear arms and military service, we should not be distracted by the 2008 Supreme Court decision (District of Columbia v. Heller,) that discounted the militia clause of the Second Amendment. The five justices who voted for it were all Reagan and George Bush appointees, and the decision is no more worthy of respect than such repudiated decisions as those declaring African Americans ineligible for citizenship, or upholding the Japanese Internment Act.

The lesson of this history is clear. The Second Amendment was rooted in the then living memory of the militia fought battles of Concord, Lexington and Bunker Hill. We need to start saying loudly and strongly that if you want a military type of gun, go join the National Guard - they have one for you to use. Otherwise, government at all levels has the right to limit guns just as it does drugs, tobacco, alcohol, tainted meat, vaping and host of other evils. There is simply no constitutional right to individual gun ownership.

---

\* Free as distinct from indentured servants.

† Provisions for a draft existed before, during and after the Revolution. During the Revolution, the British liked to remind the population that there was a contentious objector provision available to them.