

## ABSTRACT

Title of dissertation: TO KEEP AND BEAR ARMS:  
ARMED POLITICAL POWER IN VIRGINIA, 1648-1791

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This dissertation offers an analysis of the political, ideological, and legal origins of the Second Amendment to the United States Constitution that significantly departs from the current conventions and concerns of constitutional scholars and historians. Succinctly stated, this is a political account about the armed political rights of Virginians in relation to the military power of the federal government—not another essay concerning the highly politicized yet largely apolitical merits of private gun ownership and use. My goal is to understand why Virginians feared national military power and sought constitutional protections against its misuse as an instrument of armed oppression.

The first segment examines the origins and evolution of the Radical Whig ideology that condemned standing armies as a threat to civil liberty and celebrated citizen militias as the safest means to execute military and police power. It also contrasts that theory to the practical utilization of armies and militias in Virginia during

wars and domestic rebellions, and examines the development of semiprofessional forces under statutory law. While the militia rarely met theoretical expectations as a military force, it remained valuable for purposes of social control.

The remaining chapters investigate how Virginians reformed their sword during the Second, Third, and Fourth Revolutionary Conventions to combat Great Britain's standing army. Then, the dissertation examines the crucial Fifth Convention with respect to Article Thirteen of Virginia's Declaration of Rights, which provided constitutional safeguards against the misuse of military and police power. Finally, it evaluates the Virginia Ratifying Convention, where an attempt was made to provide protections against the military clauses in the federal Constitution with a modified version of Article Thirteen. The resultant Second Amendment was an abridged synthesis of revised Article Thirteen that fell far short of expectations. For many Virginians, the Second Amendment was a feeble shield that did not effectively protect the people from the potential abuses of the national government's sword.

TO KEEP AND BEAR ARMS: ARMED POLITICAL POWER IN VIRGINIA,  
1648-1791

By

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Dissertation submitted to the Faculty of the Graduate School of the  
University of Maryland, College Park in partial fulfillment  
of the requirements for the degree of  
Doctor of Philosophy  
2007

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To the memory of

Carl Frederick Vieweg, Private  
33<sup>rd</sup> Infantry Division, A.E.F.  
1917-1919

Robert Seitz Vieweg, Corporal  
82<sup>nd</sup> Airborne Division  
1943-1946

Carroll Eugene Romig, Private  
501<sup>st</sup> Army Security Communications Reconnaissance Group  
1956-1958

## ACKNOWLEDGMENTS

This work would never have been completed without the assistance and encouragement of certain individuals. To my adviser, Dr. James A. Henretta, I owe a special debt of gratitude for his incomparable guidance, advice, and support. I am also indebted to the faculty at George Mason University, in particular Drs. Peter Henriques, Roy Rosenzweig, Jane Censer, and Rosemarie Zagari, who provided the initial inspiration and encouragement to pursue my doctorate degree at the University of Maryland.

My deepest thanks must go to my wife, Kathryn, for her patience and her love. I alone know and appreciate the true value and significance of her contribution to this study, and to my life.

## TABLE OF CONTENTS

Acknowledgments.....	iii
Introduction: The Second Amendment: Political Power and Armed Coercion.....	1
Why Study the Second Amendment?	
A Question of Origins and Outcomes.....	4
Major Arguments and Themes.....	21
Method and Content.....	24
Chapter I: Virginia’s Civil Wars: Cavaliers, Rebels, and English Soldiers, 1652-1682 .....	31
“Conspiring Cavaliers” .....	32
England’s Civil War and Interregnum.....	39
Virginia’s Interregnum.....	49
“Rebellious Rabble” .....	56
White Man’s War: Poor Man’s Rebellion .....	61
Chapter II: Militias and Standing Armies in English Political Theory, 1648-1776 .....	89
The Constitutional Context.....	89
The Origins of a Theory.....	96
Harrington’s “Original” Theory.....	113
Harrington’s Agrarian Republic .....	116
Harrington’s Military Republic.....	118
Subsequent Arguments .....	123
Radical Whigs.....	133
Moderate Whigs.....	140
Chapter III: The Power of the Sword in Virginia Reality, 1648-1699 .....	156
Contextual Contrasts.....	156
Arms and Men Under Virginia Law .....	165
Chapter IV: Virginia’s Militia, 1700-1750: Apathy and Atrophy .....	200
Queen Anne’s War, 1702-1713 .....	202
Virginia’s Militia Policemen.....	224
The War of Jenkins’s Ear, 1739-1741 .....	233

Chapter V: The Right <i>Not</i> to Bear Arms:	
Virginia's Citizens at War, 1754-1763 .....	245
Virginians Prepare for War .....	247
The Virginia Regiment .....	262
Great Britain's Armed Intervention .....	275
Arming Virginians for Self-Defense.....	278
Chapter VI: Virginia's Ambiguous Sword, 1764-1774.....	290
Internal Police and the Stamp Act .....	294
Exploring the Right to Rebel .....	303
Virginia's Defunct Militia.....	306
Virginia's First Convention .....	316
The First Continental Congress .....	322
Chapter VII: Preparing for War:	
The Second Virginia Convention, March 1775 .....	333
Committees of Safety and "Independent" Companies.....	335
The Militia Reconsidered.....	348
Virginia's Second Convention.....	356
Chapter VIII: Virginia's Sovereign Sword:	
Civil Power and the Third Convention .....	372
Gunpowder, Slaves, and Military Power .....	372
Virginia's Minutemen.....	399
Chapter IX: Article Thirteen: Experience Versus Ideology .....	422
Chapter X: Forging the Federal Sword.....	454
The Constitutional Convention .....	466
The Causes and Clauses of the National Sword .....	471
Chapter XI: Crossed Swords:	
Virginia's Ratifying Convention, June 1788 .....	488
The Great Debate: Monday, 14 June 1788 .....	508
Conclusion: The Second Amendment In Principle and Practice .....	527
Bibliography .....	543

## INTRODUCTION

### THE SECOND AMENDMENT: POLITICAL POWER AND ARMED COERCION

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.<sup>1</sup>

“Those, who have the command of arms in a country, says *Aristotle*, are masters of the state, and have it in their power to make what revolutions they please.”

—James Burgh<sup>2</sup>

“Political power grows out of the barrel of a gun.”

—Mao Tse-tung<sup>3</sup>

This dissertation offers an analysis and interpretation of the political, ideological, and legal origins of the Second Amendment to the United States Constitution that significantly departs from the current conventions and concerns of constitutional scholars and historians. Succinctly stated, this is a *political* account about the *political* rights of armed Americans in relation to the *political* power of their federal government—not another essay concerning the highly politicized yet largely apolitical social merits of private gun ownership and use. The major purpose is to provide a historical perspective on the constitutional right “to keep and bear arms” that is neither defined by, nor confined to, the contemporary controversy over “gun control.” In my opinion, such a Second Amendment study is not only long over due, but also may

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<sup>1</sup>United States Constitution, Amendment II.

<sup>2</sup>James Burgh, *Political Disquisitions: Or, An Enquiry into Public Errors, Defects, and Abuses*, 3 vols. (London, 1774; reprint, New York: Da Capo Press, 1971), II, 345 (page references are to reprint edition). Burgh citing Aristotle, *Politica*, VII, 9.

<sup>3</sup>Mao Tse-tung (1893-1976), “Problems of War and Strategy,” speech delivered 6 November 1938.

prove relevant and instructive when considered with respect to an entirely different dilemma confronting twenty-first-century Americans: the two-fold problem of guaranteeing homeland security and waging war against terrorism with the only effective political means available—armed coercion. Without question, most scholarly essays and public perceptions focus primarily upon the central question of “Whose right to bear arms did the Second Amendment protect?” within a purely social context of private firearm possession and use.<sup>4</sup> This study, however, probes an equally vital but less insular issue: In what way did the Second Amendment protect every American citizen from being unjustly coerced by the military and police power of the federal government?

In order to address that question properly, one must first consider the Second Amendment primarily in terms of the political institutions and applications of armed coercion, or “the power of the sword.” As James Burgh recalled for American colonials over two centuries ago, whoever controlled the sword not only controlled the state, but also had the political power “to make revolutions.” Mao Tse-tung, China’s revolutionary “founding father,” more recently reminded us of another truth: modern technology now provides the masters of states with a far more serviceable weapon of political power; one that discharges armed coercion from “the barrel of a gun” (if not even deadlier “Weapons of Mass Destruction”). History likewise evokes two additional political maxims. First, all governments—including self-proclaimed “republics”—are constituted with a reliable means of armed coercion, such as an army or

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<sup>4</sup>This precise question is the working title of a recent collection of essays dealing with the Second Amendment strictly in terms of social gun control. See *Historians At Work: Whose Right to Bear Arms Did the Second Amendment Protect?*, readings selected and introduced by Saul Cornell (Boston: Bedford/St. Martin’s, 2000).

police force, in order to protect and control their populations and territories. Second, striking a proper balance between personal freedom and political power remains the central paradox of governing. The decisive political dilemma is how to organize and employ armed force to protect and control a land and its inhabitants without turning that power into armed oppression; or when viewed from a different angle, how to control armed force without sacrificing internal order and external security. In sum, how do you balance armed coercion without tipping the political scales toward either tyranny (too much control) or anarchy (too little)?

As the Revolutionary generation well understood, armed tyranny and anarchy can arise within any form of government, including democratic republics where “the people” delegate political power to chosen surrogates. Certainly, neither the right to vote nor representation offers unassailable assurances or legal guarantees that elected (and un-elected) officials will not misuse police and military power while in office. As history shows, wars never commence on Election Day—nor do wartime acts that threaten civil liberties. The past also reminds us that the sacrosanct votes of the masses sometimes give inept or corrupt men massive political power. Moreover, the ballots of a misguided or prejudiced majority can become equally harmful for an unprotected minority. Indeed, the whole purpose of a written “Bill of Rights” is to protect *every* citizen from the abuses of political power that lie beyond the intermittent (and imperfect) safeguards of the ballot box.

All the same, a remarkable correlation *has* existed in American history between armed political power and political suffrage. That is to say, bearing arms in times of war (or making similar sacrifices on the home front) has been one of the most signifi-

cant factors in gaining voting rights and political representation for America’s social and cultural minorities—including African Americans after the Civil War (Fifteenth Amendment), and eighteen-year olds during the Viet Nam War (Twenty-Sixth Amendment). In addition, the World War II Serviceman’s Readjustment Act passed after the Normandy Invasion—better known as the “G.I. Bill of Rights” because it granted educational and financial privileges to “government issue” soldiers—is equally notable for equating “social rights” with bearing arms. Thus while ballots may not be ultimate political shields against bullets, it is nevertheless a demonstrated fact that the “political duty” to keep and bear arms has done far more to advance both the political freedom and social privileges of many Americans than their “civil right” to own guns for personal protection and recreation—or their “political right” to overthrow the government with armed force. Even so, the full political range and repercussions of “keeping and bearing arms” are often forgotten by most citizens, and largely overlooked by scholars.

Why Study the Second Amendment?  
A Question of Origins and Outcomes

As a direct result of the ongoing “gun control” controversy, the Second Amendment has become one of the most problematic, perplexing, and publicized rights in modern America. That highly politicized social debate essentially hinges upon deciding one vital constitutional question: Does the Second Amendment prohibit states, cities, or other local jurisdictions from enacting laws and ordinances that regulate the possession and use of private firearms by individuals? Accordingly, most historians and legal scholars study the Second Amendment in an attempt to re-

solve that issue, which concerns both individual and states' rights (federalism). In effect, historians have become interested in the Second Amendment's eighteenth-century origins in order to influence the outcome of a contentious disagreement over its "correct" meaning and purpose within one specific (if not limited) context: the alarming trend in social gun violence as evidenced by a host of serial murders, sniper killings, school and workplace massacres, and shootings of public figures and celebrities over the past four decades—all of which may be generally categorized as indiscriminate "social assassinations" rather than politically motivated acts of armed violence such as political assassinations, military coups, rebellions, terrorism, and war. Consequently, the Second Amendment has been investigated chiefly in terms of either protecting or controlling privately owned guns that are used for social purposes within a social context—specifically recreational sport and self-defense against criminals—rather than as a constitutional means of limiting the excesses of armed political coercion. Therefore the most salient features about modern "gun control scholarship" are its recent development as a new field of study, and the unique circumstances of its origins. Indeed, if not for the politicized social issue of controlling privately owned guns, the Second Amendment's history would be largely ignored, as it has been for over two hundred years. In addition, there is no consensus among Second Amendment scholars on the gun control issue.

The academic debate among constitutional scholars, lawyers, and historians over the Second Amendment's original meaning and intent is argued primarily in professional journals, which are far removed from the purview and interest of the general reading public. A handful of books have been written about the constitutional right

“to keep and bear arms,” but only within the highly charged context of gun control. Even so, those Second Amendment books—as well as numerous articles published in law “journals” and “reviews”—are not read in many private homes (or even public libraries). Nor do more popular venues of public information—such as newspapers and television—discuss the “academic” dimensions of “gun rights.” For the most part, the Second Amendment’s “historiography”—or the origins and outcomes of writing its history within the context of gun control—is of interest only among scholars.

Within that vast body of “gun control” literature, two major Second Amendment interpretive “schools” have predominated over the past two decades: the “Individual Rights” and “Collective Rights” readings. A third “paradigm”—the “Civic Rights” interpretation—has more recently received attention (and self-promotion) among other scholars as a much-needed corrective to the individual and collective views. Each model is most fully explored in a specific law journal: the 1995 “Second Amendment Symposium Issue” of the *Tennessee Law Review* (“Individual Rights” contention); the 2000 “Symposium of the Second Amendment: Fresh Looks” in the *Chicago-Kent Law Review* (“Collective Rights” case); and the 2004 “Symposium: The Second Amendment and the Future of Gun Regulation: Historical, Legal, Policy, and Cultural Perspectives” from the *Fordham Law Review* (“Civic Rights” claim). Each of these schools can be criticized for espousing a contemporary Second Amendment “lecture” about social gun control; they do not teach any meaningful lessons or provide useful instruction on the power of the sword in today’s world. This dissertation attempts to break out of that “mold.”

Briefly summarized (and generalized), the “Individual Rights” school interprets the Second Amendment as protecting the right of individuals to have guns for three major purposes: recreational hunting, self-protection against criminals, and to wage war against the federal government. It does so by emphasizing the Second Amendment’s so-called “operative clause”—“the right of the people to keep and bear Arms, shall not be infringed”—and ignoring as much as possible its “prefatory clause”—“A well regulated Militia, being necessary to the security of a free State.” This methodology essentially detaches the Second Amendment’s political relationship with the sword, which neatly coincides with the agenda of pro-gun advocates: to legitimize the largely nonmilitary aspects of private gun ownership. Indeed, as one prolific Individual Rights scholar recently proclaimed:

we have to free ourselves of the notion that the constitutional right to keep and bear arms is essentially tied up with military service, or that it was meant to create a right of states to maintain a military counterweight against the federal government. Such notions have no basis in the text or history of the Constitution.<sup>5</sup>

This interpretive strategy also allows “Individualists” to disassociate themselves from any conflicting ideas concerning the *positive* control of arms, including placing constitutional limits on armed coercion. In fact, the “Individual Rights” analysis avoids the issue of armed political force—except in one exclusive instance.

Many individual right scholars have argued that the Second Amendment sanctions a unique aspect of armed political coercion; namely, the right of “the people” to mount an insurrection against the federal government with armed force. Since this particular political right is chiefly argued within the context of individualism (or as a

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<sup>5</sup>Nelson Lund, “A Primer on the Constitutional Right to Keep and Bear Arms,” 7 *Virginia Institute for Public Policy* (June 2002): 11.

matter of an individual's right and choice), "Collective Rights" interpreters often criticize it as a recipe for armed anarchy. "Individual Rights" scholars, of course, adamantly deny that they are advocating militant mayhem. Instead, they insist that the right to revolt only applies to ousting despotic rulers, not to overthrowing our republican form of government. A variation on that argument maintains that the Second Amendment allows the ruled to coerce their rulers with political violence—either by direct action, or through indirect awareness—thereby forcing them to govern in the best interests of "the people." In other words, "the right of the people to keep and bear arms" legitimizes the use of armed coercion against politicians who do not represent their political interests, and thus endorses the concept that bullets are far more effective than ballots. Nonetheless, actual incidences of armed political violence and attempted insurrections by individuals or fringe groups—including the political assassinations of President John Kennedy, Martin Luther King, Jr., and Senator Robert Kennedy; the terrorist bombings in Oklahoma City and at the Atlanta Olympics; and the anthrax attacks following 9/11—have effectively undermined the legitimacy of that political "right" for most constitutional scholars, as well as the public at large. Nor have the organization of neo-Nazi and other anti-government hate-groups into privately armed "militias" given the "revolutionary" ramifications of the Second Amendment much credible respect or common acceptance. On the other hand, the constitutional right to revolt has a ring of truth about it in a political culture that cherishes its "revolutionary" roots and romanticizes its anti-government traditions. In fact, one of the paradoxes of "gun control scholarship" is that the right to rebel

against the federal government with armed force also resonates within the “Collective Rights” school.

Even though most collective right advocates refute the individual right notion of armed revolution, many infer (if not outright acknowledge) that the sovereign states have the right to resist armed coercion by the federal government’s armed forces with their own militias. The basic difference between the two camps—at least on the disputed “right of revolution” rendition—is that armed states, rather than armed individuals, have a constitutional right to resist federal oppression with armed force. In essence, the collective argument is far more comfortable with “collective” resistance by state-supported militias, which presumably represent a majoritarian consensus, rather than insurrections mounted by anarchists or other radical factions.

“Individual Rights” scholars, on the other hand, reject state sanctioned rebellions on two anti-statist grounds: that the collective theory mistakenly conflates “the people” with state governments, and that the right to keep and bear arms would only belong to military personnel whose first allegiance is to the state. Collectivists rejoin that in a true republic “the people” *are* the state. As to the Second Amendment belonging only to loyal “citizen-soldiers,” they heartily agree. In fact, collectivists take that point one step further—perhaps too far. Many collectivists argue that since the National Guard has now replaced a defunct universal militia system, no citizen is virtuous enough to own military arms for purely personal reasons without some sort of government regulation. Moreover, if a citizen feels compelled to “keep and bear” military weapons, he or she should volunteer for either the Guard, the regular armed forces, or organized police agencies, rather than form privatized militias that might

threaten the internal security because they are not subordinate to civil authorities. That particular aspect of the “Collective Rights” interpretation, however, leaves the Second Amendment devoid of any meaning for the vast majority of American citizens who are not—or never will be—citizen-soldiers or professional policemen. Such a view also implies that the word “Militia” should be erased from every written constitution, bill of rights, and state and federal codebook because Americans are no longer militiamen.

In many ways, a Second Amendment “right to revolution” has become either “embarrassing” for individual rights scholars or “terrifying” for their collective right counterparts.<sup>6</sup> Nonetheless, the underlining premise of that political right is that a minority political faction has assumed control of the federal government, as well as the nation’s armed forces, and is attempting to rule without the popular consent of the people. However, the United States Constitution was deliberately designed to preclude that possibility from ever occurring. As Abraham Lincoln reminded his audience in the Gettysburg Address, the Founding Fathers created a republican form of government that was “of, for, and by the people”—not tyrannical kings, military dictators, or totalitarian rulers. Moreover, Thomas Jefferson explicitly indicted King George III in the Declaration of Independence for exciting “domestic Insurrections amongst us.” In truth, the framers strove to eliminate all manner of armed violence from politics, including future revolutions by the people at large. The Second Amendment actually reinforced that objective by guaranteeing “the people” (meaning

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<sup>6</sup>For the “Individual Right” to revolt see Sanford Levinson, “The Embarrassing Second Amendment,” 99 *Yale Law Journal* (1989). For the “Collective Right” to resist see David C. Williams, “Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment,” 101 *Yale Law Journal* (1991).

a popular majority) had the “right” (or political power) “to keep and bear” political arms for their common defense and to ensure domestic tranquility—and even more specifically, “to suppress insurrections.” In other words, James Burgh’s political premise assumed a new meaning with respect to the constitutionalism of post-revolutionary America: “Those, who have the command of arms in a country are masters of the state, and likewise have it in their power to *[unmake]* what revolutions they please.” In *this* Second Amendment study, “insurrection theory” is not only “embarrassing” and “terrifying,” but also fallacious.

Clearly, the “Individual Rights” reading of the Second Amendment teaches us very little about political “arms control”—or placing constitutional checks upon the federal sword. From the “Collective Rights” perspective, the Second Amendment allows the states to preserve their well-regulated militias against possible disarmament by Congress and thus protect themselves from domestic insurrections, foreign invasions, and the federal government’s army. Accordingly, collective theorists emphasize the Second Amendment’s “militia preface,” or “statement of purpose clause” as providing its true meaning. As proponents for regulating private gun ownership—especially at the state and local level—their “states’ rights” or “federalism” argument is obviously advantageous. Yet in following that tact, “Collectivists” steer precisely in the direction that many “Individualists” prefer to avoid: the constitutional significance of using military force as an instrument of armed political coercion—which is the major focus of this particular study. However, many “Collective Rights” scholars are largely distracted from (or in some cases deliberately downplay) the coercive power and misuse of the sword because they endorse the exercise of police

power to control private gun ownership and use. Indeed, after emphasizing the significance of state militias as a counterweight to federal military power, some “Collectivists” ultimately relegate that importance into modern-day irrelevancy by rhetorically asking “Have you seen your militia lately?”<sup>7</sup>

My interpretation agrees with many “Collectivists” in that the Second Amendment was first and foremost about protecting “the people” from the federal government’s sword. Even so, it parts company with that rendition in other respects. For one, this study is not preoccupied with the contemporary issue of “gun control” and therefore is not distracted from the fact that eighteenth-century Americans (specifically Virginians) were predominantly concerned about the abuse of centralized police power—as are today’s “pro-gun” advocates. However, the police power Virginians and other colonists considered “dangerous” was exercised by the military—specifically a standing army. In championing the “militia clause,” collectivists typically view the militia as an effective *military* counter-force to a standing army (which was actually its greatest weakness in eighteenth-century Virginia) while overlooking its attributes as a *police* force (its greatest strength there). This Second Amendment study, in contrast, examines the “militia clause”—as well as the “anti-army” ideology that validated it—far more skeptically than most collectivists. In fact, I find the “right to bear arms” clause more interesting and instructive in terms of controlling military and police power. Nor does this dissertation adhere to the recently contrived “Civic Right Paradigm.”

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<sup>7</sup>Keith A. Ehrman and Dennis A. Henigan, “The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?” *University of Dayton Law Review* 15 (1989).

According to “Civic Rights” interpreters, Second Amendment scholarship has reached a significant “crossroads” whereby the individual and collective models—and the dichotomy of arguing one half of the text against the other—are abandoned for a more “holistic reading.” In their interpretation, the Second Amendment protects neither a private right of individuals nor a collective right of the states. Instead, the right to keep and bear arms is exercised by citizens who act collectively for a “distinctly public purpose: participation in a well regulated militia.” That public participation, moreover, demanded “both a collective right and an individual duty” of citizens to arm themselves. This balance of rights and responsibilities promoted “well regulated liberty” and was personified in the quintessential “Minuteman ideal”—not anti-government ideology.<sup>8</sup>

Several points stand out from the “Civic Rights” interpretation of the Second Amendment. First, the “distinctly public purpose” of participating in a well-regulated militia (whether state or federal) is mentioned several times, but rarely as a “distinctly” *political* function—or as a dynamic right of the people to control armed political power. Instead, the major purpose of bearing arms in a militia is put forward as a military “obligation” demanded by “well regulated liberty” that ostensibly presumes an absence of armed political conflict. Consequently, the Second Amendment is never equated to any aspect of armed political coercion—although “well regulated liberty” perhaps implies that if political violence should erupt, the response will be orderly, well intentioned, and thus controlled. Second (and similarly), the “Civic

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<sup>8</sup>Quotes are from Saul Cornell and Nathan DeDino, “A Well Regulated Right: The Early American Origins of Gun Control,” *Fordham Law Review* 73 (November 2004): 491, 493-94.

Rights” reading flatly rejects the idea that the duty of armed citizenship includes a right to rebel. Indeed, an armed revolution or insurgency has no place in a political culture that is “well regulated” or ordered. Third, the militia assumes center stage as the proper vehicle for exercising armed civic duties in a collective capacity. The purpose of the Second Amendment was to ensure that the state militias would not be disarmed, thus ensuring individual citizens had the ability to exercise their collective responsibilities. However, arms owned or used outside of the militia were not constitutionally protected. In fact, we learn far more about how the *private* arms were “well regulated”—and therefore controlled—through various laws imposed by state legislatures rather than how *public* arms controlled the military and police power of the state.

Which brings us to one final point: the “Civic Rights” interpretation of the Second Amendment appears far more committed to refuting “Individual Rights” arguments than offering truly new ones—which is understandable given the fact that the core cadre of “Civic Right” scholars were former “Collectivists.”<sup>9</sup> In my judgment, the “Civic Right” model tastes like old wine in a new bottle: it harvests a similar crop of historical evidence; ferments the same grapes of wrath over social gun control; and at bottom remains as full-bodied in its “well regulated militia” accents as vintage “Collective Rights” scholarship. Aside from pruning the “federalist” right of armed

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<sup>9</sup>Six scholars have credited each other for inaugurating the “Civic Rights paradigm”: Cornell and DeDino, David Thomas Konig, David Yassky, H. Richard Uviller, and William G. Merkel. However, Robert E. Shalhope should receive some credit as their venerable “mentor;” he alternately equated the Second Amendment with *individual* rights and *civic* duties twenty years ago in his seminal essay, “The Ideological Origins of the Second Amendment,” 69 *Journal of American History* (1982).

resistance from the traditional vine, the new “Civic Rights” model should more appropriately be labeled (and marketed) as “Neo-Collectivism.”

All the same, my dissertation does share one aspect in common with today’s “gun control scholarship.” As I interpret the copious literature on the subject, the essential concern of pro-gun advocates is that the attempt by local, state, and federal governments to *protect* the people from armed aggression and violence in the social sphere could result in oppressive *control* over the population. The same parallel can be drawn in the sphere of armed political power: the rationalization of *protecting* the populace from foreign and domestic attacks can result in misusing the sword in diverse ways, perhaps even to the point of *controlling* the people with military force. The determining factor in both situations is popular *consent*—or how much control over the sword (military and police power) the people are willing to give up in exchange for their protection.

Nevertheless, the ultimate outcomes of this copious “gun control” erudition—whether from an “Individual,” “Collective,” or “Civic” interpretation and perspective—are far more significant in terms of how modern Americans understand the Second Amendment than their explicit names or implicit agendas might suggest.

One consequence of “gun control scholarship” is that it sees the Second Amendment largely as protecting “Arms” or “Militias” and rarely in terms of the tangible “manpower” that makes those weapons and institutions politically serviceable. In fact, the final five words of the Second Amendment seem to be the most crucial—and contentious—of all: “Arms shall not be infringed.” No doubt a cynic would expect little more from a materialistic culture that places a higher premium on “things”

rather than people as a valuable resource. Indeed, much has been said and written about America's "gun culture." Yet the focus and fascination on *gun* control, *gun* rights, and *gun* culture obscures the fact that the Second Amendment was primarily about "the people" and their political authority to control armed political coercion.

Another outcome of gun control scholarship is that it basically "privatizes" the Second Amendment among a "select" group of citizens: individual gun owners who, for the most part, wish to exercise their gun rights privately, but collectively lobby as a special interest group. This particular upshot is somewhat ironic considering the fact that pro-gun scholars frequently boast that the Second Amendment is a "universal right" that belongs to "everyman" (and every woman)—regardless of race, ethnicity, sexual orientation, religious preference, or political affiliation. Indeed, when individualist scholars *do* consider the Second Amendment's "Militia Preface," they see "the people" standing there as a common body, rather than a "select" one. Collectivists, on the other hand, pronounce a universal militia as dead on arrival in modern America—and preach no faith in a Lazarian resurrection. Nonetheless, the primary focus upon the social uses of private guns makes us forget that actually owning a political (or military) weapon is not a requirement to possess a Second Amendment political right as an American citizen. In fact, citizen-soldiers were often "armed" by the state (and with the tax dollars of "unarmed" citizens) so they could act in a political capacity; they were never issued political weapons for purely social purposes like hunting or individual self-defense. Obviously, an individual's constitutional right to shoot a rabbit or a robber has absolutely nothing to do with ensuring "the security of a free State," or controlling the armed political power of the federal government. Yet

many “unarmed” citizens today—who prefer to track down their meat at the local supermarket, or call 911 for professional police protection—have few thoughts, feelings, or knowledge about the Second Amendment except for the social debate over “gun control” (sometimes not even then). As a result, the Second Amendment has little value today unless you are a private gun owner and no meaning whatsoever as a political right that belongs to every American. Nor do “the people” understand how the Second Amendment empowers contemporary citizen-soldiers and policemen, or how it relates to our modern military forces and law enforcement agencies.

Perhaps scholars would have little need to “interpret” the Second Amendment’s “original meaning” if individual gun owners were volunteering their manpower and private arms to protect their states and nation from domestic and foreign terrorism—or purposely withheld those same resources in order to check the misuse of armed coercion at home and abroad. Clearly, such is not the case. Therefore the major question that remains essentially unanswered—and largely ignored—is this: Does the fundamental political principle within the Second Amendment—the right of the American people to keep, bear, and thereby control the power of the sword—have any real relevancy or meaning today?

In terms of ensuring our homeland security against domestic and foreign terrorism, the answer is quite apparent—none whatsoever. Some brief examples from recent history underscore that point.

During the early 1990s, a heated debate occurred over whether two classes of citizens—women and homosexuals—were a suitable resource of military “manpower” for bearing arms in the armed forces—even though un-naturalized immigrants

have long served in that capacity (and continue to do so today). However, the issue was never addressed or argued as a constitutional (or Bill of Rights) matter of citizenship rights. That is, no one considered whether women and homosexual citizens had a legal and political right to “keep and bear arms” in combat. That once hot topic has cooled somewhat due to the prevalent manpower shortages for fighting the on-going wars in Afghanistan and Iraq. Instead, Americans are now concerned with “back-door drafts” of National Guardsmen, who are filling in for the small volunteer standing army that was created after the Vietnam War. During that conflict, Ohio National Guardsmen killed several anti-draft protestors at Kent State University. More recently, twenty-five law schools banned enlistment recruiters from their campuses in protest against homosexual discrimination as currently practiced in the military. In each and every instance, the Second Amendment was never mentioned or considered. Indeed, it was totally ignored—despite political and legal concerns over mobilizing armed manpower for national security both at home and abroad.

In fact, the possible misuse of armed coercion by ordinary citizen soldiers—such as the recent Abu Ghraib prison scandal—raises an additional question: just how “absolute” is the political right to keep and bear arms? Indeed, does the Second Amendment impose limitations on both “well regulated” and “unregulated” armed citizens? On 19 April 1995 in Oklahoma City, for example, two members of a private “militia”—who championed their Second Amendment right to overthrow the federal government—perpetrated the most deadly act of domestic terrorism in this nation’s history. A full decade later, there is still no public dialogue on the political right—or limits—of perpetrating armed revolution. Nor has there been any relevant

recollection of one of the Supreme Court’s few Second Amendment decisions—the 1886 case of *Presser v. Illinois*. In that particular case, the Court upheld a state statute that banned the organization, training, and marching of private armies and militias, which presumably posed a threat to Illinois.<sup>10</sup> Yet more than a century later, the Second Amendment *is* recalled to negate any state statute that bans privately owned military assault weapons, but without any debate on the major intent and prime purpose for owning those political arms: an individual’s right to wage war against his or her government with the most effective military technology available.

On the other hand, the Second Amendment was never considered when a group of unarmed passengers instantly formed themselves into true “Minutemen” aboard United Flight 93 on 11 September 2001; thus preventing the likely destruction of either the Capitol or the White House. The Second Amendment was likewise disregarded in the post-9/11 debate over arming commercial airline pilots into a federalized “flying militia” for national homeland security. Surely those armed pilots could be viewed as a modern-day *posse comitatus* (Latin for “power of the county”) serving the same age-old police function as a “pilot posse” or “cockpit comitatus.” However, a paramilitary group of anti-Semitic extremists who uphold their Second Amendment gun rights—and maintain that all government authority above the county level is illegitimate—actually call themselves the Posse Comitatus. Even so, the Second Amendment has not been referenced (or proclaimed) with respect to the recent organization of another citizen “militia,” the “Arizona Minutemen,” who patrol the

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<sup>10</sup>*Presser v. Illinois*, 116 U.S. 252 (1886). Herman Presser was a left-wing socialist who was convicted of leading armed members of a fraternal organization in a parade. To date, no privately armed, far-right extremist group has suffered the same Second Amendment “consequences.”

U.S./Mexican border in an effort to secure their local homeland from “foreign invasion.” Once again, the full political and constitutional implications and dimensions of the Second Amendment are largely ignored in each instance—especially in terms of contemporary citizen militias and their proper political role in a modern republic threatened by domestic and foreign terrorism. Nor do Americans reflect upon the historical implications (or possible parallels) of colonial militiamen and the role of the British Army in 1776, compared to Iraqi militias and the mission of the United States armed forces in 2006.

My objective is to explore and explain certain aspects of the Second Amendment that are far more significant and relevant to “the security of a free state”—and “homeland security” today—by examining why and how Virginians used their militias and exercised their rights to keep and bear arms in the seventeenth and eighteenth centuries. Accordingly, this Second Amendment study focuses on the major political “gun control” question that was under consideration over two centuries ago—who could be entrusted with the political power of armed coercion while avoiding three potential outcomes: the tyranny of a military dictatorship, the autocracy of a police state, or the anarchy of an armed mob? Consequently, the founding generation weighed and debated vital political principles that might prevent those historical possibilities from occurring in their newly created republic. Above all, they sought a proper constitutional balance of political power that not only was armed, but also would be used for only two political purposes: ensuring domestic tranquility (police power) and providing for the common defense (military power).

Whether or not modern Americans can constitutionally control the power of the sword amid the terror and turmoil of armed political coercion in today’s world—or even can—is an entirely different question; one that this investigation will not attempt to answer. Indeed, as British scholar Eric Hobsbawm aptly reflects, “the historian’s business is to remember what others forget.”<sup>11</sup> Accordingly, the sole “business” of this work is to refresh our collective memories on the political rights and responsibilities of armed citizens during the eighteenth century—if only to remind ourselves that past and present generations are often separated by more than mere time, and thus can be quite different from each other. My intention is to offer twenty-first-century Americans a different historical perspective—and perhaps a deeper appreciation—as to who we are as an armed nation—and perhaps how we got there—by measuring ourselves against the past.

### Major Arguments and Themes

The Second Amendment consists of two statements: that a well-regulated militia is necessary to the security of a free state, and that the people have an inviolate right to keep and bear arms. A common premise shared by most “gun control” scholars is that the intellectual roots of those declarations can be traced back to successive generations of “Radical Whig” writers in England, beginning with James Harrington’s *Commonwealth of Oceana* (1656). The so-called “anti-army” political theory espoused by these “Commonwealthmen” was grounded on classical republicanism and promoted a deep distrust of any constitutional arrangement that provided gov-

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<sup>11</sup>Eric Hobsbawm, *The Age of Extremes: A History of the World, 1914-1991* (New York: Pantheon Books, 1995), 3.

ernment with a military force—specifically a standing army—that was independent of the militia, which was viewed as the only acceptable military manifestation of the body politic and thus the proper place where citizens exercised their right to keep and bear arms. Without exception, Second Amendment scholars accept the assertions of that political ideology not only as unquestioned truths (if not shibboleths), but also as the intellectual basis of the Second Amendment’s “original meaning.”

This dissertation, in contrast, approaches and analyzes that political theory in greater depth and from a more skeptical point of view. In fact, the validity of the ideas championed by English “Commonwealthmen” were also questioned and challenged by moderate Whigs contemporaries, who were no less committed to civil liberties than their radical opponents, but had a different understanding of the nature of citizenship in a modern society, embraced military professionalism, and argued that a standing army in peacetime was consistent with English constitutionalism as long as it remained subordinate to civil power. Most Second Amendment scholarship has either overlooked or deliberately ignored that alternative ideology, which argued that the classical model professed by radical Whigs was actually incompatible with modern warfare and the reality of English society. Both of those ideologies are examined in detail in Chapter Two. However, this study also rejects the assumption that the “original” (if not only) “meaning” of militias, standing armies, or the right to keep and bear arms can be fully derived or determined from abstract theories.

Most Second Amendment studies have linked the “anti-army” ideology to one generation of Anglo-Americans—the Framers who debated and designed the various Declarations of Rights in several states when the Revolutionary War began, as well as

the federal Bill of Rights. Remarkably, no one has investigated whether or not that theory was applicable or adopted between 1676 and 1776. This study not only attempts to fill that void with a case study of Virginia, but also argues that an examination of various military *experiences* reveals that an entirely different *meaning* was oftentimes attached to militias and the right to keep and bear arms.

The major thesis of this dissertation is summarized as follows: The military establishment created under the military clauses of the United States Constitution embraced professionalism and specialization by *combining* the moderate Whig argument that standing armies were both necessary for and compatible with the survival of free states (Clause 12) with the radical Whig conviction that citizen militias were the safest and least oppressive means to police the population (Clause 15). However, the Constitution implicitly recognized that the state militias were not inherently professional forces—or always properly organized, trained, and armed (Clause 16). Virginia’s militia, in particular, experienced decades of apathy and atrophy and was legally non-existent from 1773 to 1775. Moreover, it was not always the proper, natural, or most reliable defense against enemy attacks because Virginians oftentimes refused to exercise their right to keep and bear arms under terms and conditions that did not satisfy their particular self-interests. However, Virginia’s citizen-soldiers were both trustworthy and adept at crushing domestic insurrections. The Second Amendment did not fundamentally revise—or effectively refute—any of those ideas or impulses. In truth, it basically *reinforced* them by simply noting that a well-regulated militia was “necessary” to state security (but not absolutely or indispensably so), and merely reiterating the federal government’s commitment to ensure its only source of

military manpower—“the people” of the sovereign states—were adequately armed. In short, *a citizen militia requires armed citizens to do its political job*. Therefore the intended political aim of the Framers of the Constitution was to ensure that an organized political institution was composed of reliable people who possessed adequate arms and would use them for three specific political purposes—to enforce federal laws, suppress insurrections, and repel invasions. After all, of what possible political value was an unregulated militia or unarmed citizenry as a counterweight to internal or external armed coercion? However, the Framers also learned from experience that they could not “infringe” upon the “right of the people” to *refuse* bearing those arms if it conflicted with their best interests. Indeed, the underlying premises behind specialization and professionalism were that mass mobilization was militarily ineffective, domestically disruptive, and that the complexity and interdependence of modern societies had altered the universal responsibilities of armed citizenship. Nonetheless, the Second Amendment also reinforced two fundamental maxims of republicanism that were structurally and procedurally embedded within the federal Constitution—first, the military should be under strict subordination to, and governed by, the civil power; second, the power of the sword (military and police power) ultimately belongs to the people at large and must never be wielded by executive magistrates without their freely given consent. Popular authorization, of course, was granted on the basis of representational population and state politics in a bicameral legislature (Congress).

### Method and Content

This examination takes the form of a chronological series of case studies in colonial Virginia. Chapter One examines how and why Virginians called upon Great

Britain's standing army to crush an armed insurrection known as Bacon's Rebellion. Chapter Three compares and contrasts the political theory explicated in Chapter Two with Virginia reality between 1648 and 1699—the era when the anti-army ideology hit full stride in England. Chapter Four covers the first half of the Eighteenth Century, a period when Virginia's militia declined due to apathy and atrophy—even though the radical Whig indictment of standing armies was used to remove two royal governors from office. Chapter Five centers on the French Indian War, a conflict that required mass mobilization of Virginia's armed manpower. However, most citizens refused to bear arms as militiamen, which resulted in the Burgesses raising a provincial army. Even then, Virginia regulars refused to bear arms unless certain terms and conditions were met. Chapter Six explains how Virginia's militia legally ceased to exist, thereby adding a new dimension of ambiguity to the previous traits of apathy and atrophy. Chapters Seven and Eight detail how Virginians experimented with two new armed forces between 1774 and 1775—independent companies and minutemen—as substitutes for the defunct militia, but ultimately relied upon a new provincial army to fight British regulars.

Throughout those chapters, attention will be given to Virginia's various militia laws, which also serve as reliable indicators of reality (or actual behavior that needed to be corrected) and typically lie beyond the purview of political theories (or abstract idealism). Three major “meanings” stand out from those decades of experience: Virginians constantly struggled to keep their militias “well-regulated” (properly trained, adequately armed, and merely thriving); except for crushing insurrections (not generating them), the militia was seldom “necessary” to Virginia's security; and lastly, or-

dinary citizens often refused to keep and bear arms for military service unless it was in their best interest, and if certain terms and conditions were met by both civil and military authorities.

In sum, Virginia's militia experience had discredited the Radical Whig, anti-standing tradition, and convinced many moderate men—particularly George Washington—that a professional “standing” army was not only “necessary” to Virginian's security as a free state, but also the only viable military means to win the War of Independence. Even though British officials were extremely reluctant to enforce colonial policy or otherwise police Americans with regular troops, the “language” of the Radical Whig rhetoric was exceedingly useful in indicting King George III and justifying a political separation from Great Britain. The Revolutionary War is not covered in this dissertation. Nevertheless, most scholars agree that the performance and reputation of the militia was decidedly mixed during that wartime experience; quite proficient as a police force in suppressing Loyalists on the home front, but less effective as a military force in actual combat.

All the same, after examining the historical experience of the militia in those eight chapters one may well wonder why and how the Second Amendment was included in the Bill of Rights. The purpose of the last three chapters is to explain that apparent paradox.

One of my core arguments is that if no military or police power had been granted to the federal government under the Constitution, there would have been little need for the Second Amendment. In fact, the Second Amendment was unique among all of the Bill of Rights protections in that it attempted to deal with specific legislative

powers delineated in the Constitution. For that reason, the final three chapters will be addressed in reverse order beginning with the ultimate outcome of the narrative—the Second Amendment—which resulted from a post-revolutionary battle between the Moderate and Radical Whig intellectual traditions. While the Moderate perspective ultimately prevailed within the Constitution, the Radical view found partial expression within the Bill of Rights. In essence, the Second Amendment was brokered compromise between political pragmatism and principled idealism.

Chapter Eleven covers the Virginia Ratifying Convention of 1788 where the Second Amendment was “originally” written with one intended purpose in mind: to protect the people of the sovereign states from the national government’s consolidated military power, which was established under three clauses within Article 1, Section 8 of the United States Constitution. Clause 12 gave Congress the power “To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two years.” The problem with this particular clause was that it never specified whether those “Armies” would be used strictly in time of war against foreign enemies, or remain “standing” during peacetime, in which case they might be used to “police” the civilian population. Aside from armies, the national government’s sword also included the militias of every state. Under Clause 15, Congress was empowered “To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.” Traditionally, the militia served as the primary military and police force in each and every state and former colony; those armed forces were not “shared” with any other “outside” government. Finally—and most troubling of all to the delegates at the Virginia Convention—was

Clause 16, which gave Congress the authority “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, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.” There were deep-seated fears that Congress would use this clause as a pretext to disarm Virginia’s militia and thus leave Virginians totally defenseless; not only from foreign invasions and domestic insurrections, but also from the potent military and police power of the national government, which might be used to coerce or oppress them—the same ideological indictment previously leveled against Great Britain.

Two men at the Virginia Ratifying Convention—Patrick Henry and George Mason—argued forcefully that the sovereign people of Virginia needed constitutional protections from what they viewed as the dangerous “implications” of the three military clauses within the Constitution. Otherwise, Virginia’s sovereignty and security as a free state might be “annihilated.” Both men demanded that the new Constitution be revised with the following “military amendment” that Mason authored on 11 June 1788:

That the people have a right to keep and bear arms; that a well-regulated militia, composed of the body of the people trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace, are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the community will admit; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power.

The “Virginia amendment” not only declared the right of the people “to keep and bear arms,” but also included three republican “principles” concerning well-regulated militias, standing armies, and the strict subordination of the military to civil power. Not

coincidentally, the “right to keep and bear arms” was directed at Clause 16 in the Constitution; the “militia principle” addressed Clause 15; and the “standing army principle” dealt with Clause 12. In addition, the “military subordination principle” assumed an “in all cases” prominence over both armed forces. A major argument of Chapter Eleven is that Virginia’s “military amendment” subsequently evolved into the Second Amendment, but not to the same degree or extent that Mason and Henry originally intended.

Ironically, George Mason originally proposed Clause 16 at the Constitutional Convention in 1787. Chapter Ten investigates that anomaly and analyzes its significance with respect to the adoption of the Moderate Whig theory by “nationalists.” Chapter Nine is devoted to Article Thirteen of Virginia’s Declaration of Rights in which Mason underscored the “militia,” “standing army,” and “military subordination” principles twelve years before the United States Constitution was framed. In fact, what Mason basically did at the Ratifying Convention in 1788 was graft the “right of the people clause” onto Article Thirteen, which declared:

That a well-regulated Militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State; that Standing Armies, in time of peace, should be avoided as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power.

The major argument in Chapter Nine is that Mason wrote Article Thirteen with two purposes in mind: to condemn Great Britain’s use of its standing army to police and oppress the North American colonists; and to pledge that under whatever constitutional “plan of government” was subsequently created, Virginians would not likewise

be coerced by military power. In sum, the last three chapters relate and reflect on why and how the Second Amendment was written into the Bill of Rights.

However, that “legislative history” is only part of this Second Amendment narrative. In order to discover the experiential meaning of its words, we must understand how and why a well-regulated militia was necessary to Virginia’s homeland security, as well as how and why Virginians exercised their right to keep and bear arms. That part of the story initially takes shape in Chapter One, which begins now.

## CHAPTER 1

### VIRGINIA'S CIVIL WARS: CAVALIERS, REBELS, AND ENGLISH SOLDIERS, 1652-1682

“How miserable that man is that governs a people wher[e] six parts of seven at least are poore endedbted discontented and armed.”

—Sir William Berkeley  
Governor of Virginia  
July 1, 1676<sup>1</sup>

A fundamental argument of this study is that the Second Amendment's constitutional origins are directly related to the armed political coercion imposed by the British Empire upon Anglo-American colonials. The main political purpose of that armed repression was to maintain legislative subservience to Parliament and executive obedience to King George III, which ultimately resulted in this nation's first “civil war,” the American Revolution. The only available means by which that armed political coercion could be exercised during the 1760s and 70s was the Great Britain's “standing army”—a military force that was permanently embodied and kept “standing,” even in times of peace. Nevertheless, that military force was not initially dispatched, or “originally intended,” to threaten the lives, property, or liberties of Englishmen in North America, but rather to protect and preserve colonial provinces and people from two common enemies—French and Indians. Indeed, no one could possibly imagine in 1755 that British soldiers and colonial militiamen—who fought as comrades under arms during a “Great War for Empire”—would begin a civil war in 1775 by exchanging fabled volleys “heard round the world.” One of the primary

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<sup>1</sup>Governor Berkeley to Thomas Ludlow, Coventry Papers of the Marquess of Bath at Longleat House (microfilm in the Library of Congress), LXXVII, fol. 145. Hereafter cited as Coventry Papers, (vol., fol.).

factors that explain that dramatic transition concerns the unprecedented presence—and permanence—of the British Army in mainland North America between 1755 and 1775. While royal arms and munitions were sent over on several occasions, never before had British monarchs exported massive military manpower—or incurred huge financial deficits—to defend mainland North America. For the most part, British colonials were left to their own devices when it came to military self-defense and internal police (including raising, equipping, training, and disciplining armed men).

Even so, smaller contingents of English troops had been sent to colonial America—specifically Virginia—on two prior occasions during the seventeenth century. The primary political purpose of those armed forces, however, was not to protect transplanted Englishmen from foreign foes, but rather to suppress them as rebels and traitors. The primary purpose of this chapter is to relate the circumstances of those seventeenth-century conflicts with one major objective in mind: to determine whether or not—and to what extent—the previous use of armed political coercion in Virginia might have anticipated Second Amendment issues and concerns that arose much later in the eighteenth century. From the perspective of an historian, the principal aim is rather conventional: to determine whether similar situations within entirely different historical contexts—in this particular case, the use of armed political coercion in Virginia during the English Civil War and Bacon’s Rebellion—share any notable continuities or otherwise reveal remarkable changes over time.

### “Conspiring Cavaliers”

The first occasion when English troops came to Virginia took place not at any monarch’s command, but under the authority of an Interregnum Parliament that had

deposed King Charles I. Throughout the English Civil War—and for the first three years of England’s new Commonwealth—Virginia was the only North American colony that remained loyal to the British monarchy (as did the islands of Barbados, Bermuda, and Antigua). Moreover, the Old Dominion’s Governor, Sir William Berkeley, actively recruited elite “Cavalier” (or Royalist) émigrés who desired an asylum from the political oppression of Puritan “Roundheads.” As one contemporary candidly observed: “Virginia [was] the only city of refuge left in His Majesty’s Dominions, in those times, for distressed cavaliers.”<sup>2</sup>

Once safely ensconced in their adopted “Country,” many “distressed cavaliers” received lands, political appointments, and influential titles from Governor William Berkeley (including the rank of Militia Colonel in the counties where they resided or owned land). As a result of their privileged political and social status, many royalist emigrants also became the “founding fathers” of Virginia’s most prestigious—and wealthiest—families. Richard Bland, Landon Carter, Thomas Jefferson, Richard Henry Lee, James Madison, George Mason, John Marshall, James Monroe, Peyton Randolph, Edmund Randolph, and George Washington were all direct descendants—or future “great” grandsons—of émigré Royalists.<sup>3</sup> Yet Virginia did not always remain a peaceful paradise for escaped Cavaliers. For a time, their newfound “city of refuge” was besieged by an armed “invasion” of Puritans.

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<sup>2</sup>“Ingram’s Proceedings” (n.d., ca. 1676), found in Peter Force, ed., *Tracts and Other Papers Relating Principally to the Origin, Settlement and Progress of the Colonies in North America, from the Discovery of the Country to the Year 1776*, 4 vols. (New York: P. Smith, 1947), 1:34. Hereafter cited as Force, *Tracts*.

<sup>3</sup>For more on the “Cavalier Migration”—as well as the historiographical debate over Virginia’s “Cavalier Myth”—see David Hackett Fischer, *Albion’s Seed: Four British Folkways in America* (New York: Oxford University Press, 1989), 207-225.

After beheading King Charles I on January 30, 1649, the Rump Parliament declared its absolute authority over all English dominions and territories. In July, the Council of State notified the colonies of the change in government and demanded their obedience to the newly created Commonwealth.<sup>4</sup> Virginia's General Assembly responded at its October session by declaring Parliament's authority not only "void & null," but also "lawless and tyrannous." The Assembly also proclaimed Prince Charles II as the reigning monarch, and announced that anyone expressing doubt on his right of succession would be guilty of "high treason"—a capital crime. It was also treasonous for anyone to question the authority of Virginia's royalist General Assembly, or to propose a "change of government" by word or deed.<sup>5</sup> For all intents and purposes, colonial Virginians publicly proclaimed a counter-revolution against England's kingless republic.

In response to that challenge to their supreme authority, the Rump Parliament passed an act on 3 October 1650, which prohibited Virginians from trading with foreign nations; announced that colonial Virginians owed their very existence to English money and military might; and declared them to be "rebels and traitors" for ignoring Parliament's right to rule them in exchange for those protections. Governor Berkeley brought Parliament's act and declaration before the General Assembly on 17 March

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<sup>4</sup>*Calendar of State Papers* [British], *Colonial Series, America and the West Indies, 1574-1660* (London: 1880-1939), 330. Hereafter cited as *Calendar S P C* (years).

<sup>5</sup>William Waller Hening, ed., *Statutes at Large; Being a Collection of All the Laws of Virginia, from the First Session of the Legislature, in the Year 1619*, 13vols. (Richmond and Philadelphia, 1809-23; reprint, Charlottesville, VA: University Press of Virginia, 1969), 1:359-61 (page references are to reprint edition). Hereafter cited as Hening, *Statutes*.

1651 and issued a defiant speech in which he compared conditions in Virginia with those in England. “Consider yourselves,” he said, “how happy you are, and have been, how the gates of wealth and honour are shut on no man, and that there is not an arbitrary hand, that dares to touch the substance of either poore or rich.” If Virginians submitted to the legislative power of England’s new Commonwealth Republic, Berkeley pointedly asked, “What is it can be hoped for in a change, which we have not already?” In answering his own question, the Governor told the Assembly that life, liberty, and property would be oppressed. “The Indians, God be blessed, round about us are subdued: we can only feare the Londoners, who . . . would take away the liberty of our consciences, and tongues, and our right of giving and selling our goods to whom we please.” In conclusion, the Governor invited the Council and Burgesses to join him in resisting republican rogues and regicides with armed force. “But Gentlemen, by the Grace of God, we will not so tamely part with our King, and all these blessings we enjoy under him, and if they oppose us, do but follow me, I will either lead you to victory, or loose a life which I cannot more gloriously sacrifice than for my loyalty and your security.”<sup>6</sup>

After hearing Berkeley’s speech and a reading of Parliament’s act, the General Assembly unanimously adopted a formal “vindication,” in which they stoutly protested the “ignominious names of rebels and traitors;” staunchly reminded Parliament that Virginians were only being true to their oaths of allegiance to the King (the ex-

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<sup>6</sup>Berkeley’s speech in Edward D. Neill, ed., *Virginia Carolorum: The Colony under the Rule of Charles the First and Second, A.D. 1625-A.D. 1685* (Albany, NY: J. Munsell’s Sons, 1886), 212-216; and Richard L. Morton, *Colonial Virginia*, 2 vols. (Chapel Hill, NC: The University of North Carolina Press, 1960), 1:169. Hereafter cited as Morton, *Virginia*.

iled Charles II); stubbornly saw no reason to “yield to whosoever possesses themselves of Westminster Hall” among its squabbling factions; that Virginia did not owe obedience to English governance merely because a few Englishmen had invested money in their colonial enterprise; that their debt, if any, was to a gracious King who had given them liberty, care, and protection; and that the obvious attempt to exclude Virginia from the society of nations was due to “the avarice of a few interested persons, who endeavor to rob us of all we sweat and labor for.” This remarkable (but little remembered) document ended with a “resolved” ultimatum:

Therefore of the whole matter we conclude: We are resolved to continue our allegiance to our most gracious King, yet as long as his gracious favor permits us, we will peaceably (as formerly) trade with the Londoners, and all other nations in amity with our sovereign: protect all foreign merchants with our utmost force from injury in the rivers: give letters of reprisal to any injured within our capes; always pray for the happy restoration of our King, and repentance in them, who to the hazard of their souls have opposed him.<sup>7</sup>

While this 1651 resolution was hardly a formal declaration of political independence from England’s newly created republic, it nonetheless shows that Virginians considered themselves capable of making self-determining decisions and self-regulating policies as a sovereign polity under a “most gracious King.” The crucial questions were how far would religious republicans go to make unorthodox Virginians abide by their political faith? Would Virginians accept a gospel that preached a new political trinity: that kingship, the House of Lords, and the Book of Common Prayer were dead, buried, and incapable of a Lazarian resurrection?

In 1652, the Commonwealth decided to bring Virginia’s “rebels and traitors” to heel with the same proven means that was sustaining its political power in Eng-

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<sup>7</sup>*Virginia Magazine of History and Biography* 1 (1893): 75-81. Also see Morton, *Virginia*, 1:170.

land—armed coercion. Nevertheless, “The conquest of the Colony,” in the apt words of one Virginia scholar, “was done in the most gentlemanly manner.” Aside from dispatching a fleet with troops from the New Model Army, Parliament also sent four commissioners who were “moderate men with liberal instructions”: achieve peace if possible; use armed force only if necessary. One of those commissioners, Richard Bennett, not only had lived in Virginia, but also previously served as justice of the peace, Burgess, Councilor, Governor, and Major General of the colony’s militia.<sup>8</sup> Although Governor Berkeley purportedly raised an “army of one thousand men” to oppose the “strong force” of invading Puritans, armed conflict between provincial and Commonwealth troops never occurred; instead of suffering “great miseries and certain destruction,” Berkeley disbanded his soldiers and an amicable accord was quickly reached.<sup>9</sup>

The terms under which Colonial Cavaliers “surrendered” to Rump Roundheads were both remarkable and significant—especially when compared to the political “reformation” inaugurated in 1765. The First Article “consted [constituted] that the plantation of Virginia, and all the inhabitants thereof shall be and remaine in due obedience and subjection to the Comon wealth of England,” thus confirming control over the colony’s land and people. However, two vital points were conceded: “that this submission and subscription bee acknowledged a voluntary act not forced or constrained by a conquest upon the countrey, and that they [colonial Virginians] shall have & enjoy such freedomes and privileges as belong to the free borne people of

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<sup>8</sup>Morton, *Virginia*, 1:164-173. Quotes at page 170.

<sup>9</sup>“Report of the Commissioners,” *Virginia Magazine of History and Biography* 11 (1904): 32.

England.” Ensuing articles likewise granted generous allowances: that Virginia was still governed under the authority of the “Grand” (General) Assembly; that no “taxes, customs, and impositions whatsoever” would be imposed “without the consent of the Grand assembly”; that no “fforts nor castles bee erected or garrisons maintained” without the Assembly’s approval; “That noe charge shall be required” for sending over the fleet and army; and “That all ammunition, powder & armes, other then for private use, shall be delivered up, securitie being given to make satisfaction for it.” Those who refused to swear allegiance to the republic were given one year to remove themselves and their property. One year’s grace was even granted for using the Book of Common Prayer, “provided that those things which relate to kingship or that government be not used publiquely.”<sup>10</sup>

In view of “God’s terrible swift sword” that was still purging England of unrepentant political and religious sinners, these terms were truly benign and lenient. The reason why such “gentlemanly” terms and conditions were decided upon in Cavalier Virginia—instead of using readily available troops to enforce harsher measures through strong-armed repression and political violence—merit some thought and speculation. But to begin that deliberation, one must first appreciate just how repressive England’s newly created republic was—or exactly how far its republican leaders used armed force to impose their political rule. Such an understanding also serves another vital purpose: it offers insight into the major constitutional issues that ulti-

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<sup>10</sup>“Articles of surrender and general amnesty” appear in the following sources: Hening, *Statutes*, 1: 363-68; Thomas Jefferson, *Notes on the State of Virginia*, ed. William Peden (Chapel Hill, NC: The University of North Carolina Press, 1955), “Query XIII,” 114-17; and Edmund Randolph, *History of Virginia*, ed. Arthur H. Shaffer (Charlottesville, VA: The University Press of Virginia, 1970), 150-51. Hereafter cited as Randolph, *History*.

mately arose from using guns to resolve internal political conflicts among Englishmen.

### England's Civil War and Interregnum

The issue of centralized military power was a core constitutional concern that occupied English politics and political thought during the seventeenth and eighteenth centuries. The heart of the matter was whether supreme authority over the power of the sword (the militia) should remain with the executive (royal monarch) or be vested in the legislature (Parliament). As such, it was a crucial component—and a vital expression—of a larger constitutional question: who had the ultimate authority to govern Englishmen—those who enacted the laws or those who executed them? Everyone recognized that armed force (coercion) was more powerful than any law and whoever controlled that power had ultimate sovereignty in the state. Since positive laws were poor weapons in any contest with pointed muskets, parliamentarians argued that the legislature should have complete control over the armed forces of the state, thereby ensuring that England would be a nation ruled by just laws rather than just by armed men. The only armed forces that were “always in being,” or readily available to perform police and defense functions, were the county militias.

On 7 December 1641, Oliver Cromwell, along with three fellow members in the House of Commons, proposed a Militia Bill that transferred command and control over those local forces from King Charles I to Parliament. More than a few men, however, were disinclined to assume control over a political power that touched the very essence of royal sovereignty. Even so, the king not only vetoed the legislation, but also ordered its sponsors arrested. In response, a now fully united Parliament

passed the measure on 2 March 1642 as a “Militia Ordinance”; a declaration by both Houses that did not require the king’s official consent, which in itself was logically (and legally) inconsistent with traditional constitutional principles. Then again, the whole notion that Parliament alone should command the militias was also illegal and unconditional. The ultimate consequences of that decree were monumental.<sup>11</sup>

Indeed, the idea that Parliament should have sole command over the sword was a revolutionary concept in English constitutionalism that ultimately propelled men along a path of political radicalism, which left little room for moderation or conciliation. There was no one on either side who possessed enough wisdom, courage, or intellectual vigor to compel a compromise. To have two sovereign powers (the legislature and the executive) excising mutual control over the nation’s armed forces seemed incredible, illogical, and impracticable at that time. Indeed, once the political question of sovereignty and military power was raised, it was impossible to resolve it without resorting to war.

The provisional instrument Parliament created in 1645 to win that armed conflict—the New Model Army commanded by Oliver Cromwell—was the largest military force ever known in English history. That armed force soon evolved from a provisional instrument into a permanent institution that was “kept standing” for fifteen years; thus becoming England’s first-ever “standing army.” As a result, England’s sword was truly double-edged; armed political power now included county militias at

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<sup>11</sup>The text of the Militia Ordinance is in Samuel R. Gardiner, ed., *The Constitutional Documents of the Puritan Revolution, 1625-1660* (Oxford, England: Oxford University Press, 1906), 245-47. For a more detailed account, see Lois G. Schworer, “The Fittest Subject for a King’s Quarrel,” *Journal of British Studies* 11 (1971): 45-76.

the local level, as well as a centralized army. Moreover, both forces were eventually used to perpetuate a government that became narrower in its popular base, increasingly intolerant of its critics, and more willing to use armed coercion against its opponents. Even before Charles I was beheaded on 31 January 1649—the symbolic (and staged) final act of the English Civil War—a second internal conflict over armed sovereignty erupted between Parliament and Cromwell’s Army; each side claiming to be the true “representatives of the people” and thus the best guardians of their interests, rights, and welfare.

The outcomes of that second “civil war” proved disastrous. For the first time in their history, Englishmen directly experienced not only the fiscal effects of a permanent military establishment, but also the repercussions that resulted from forcibly intervening in domestic politics with politicized guns. Political factions became far more concerned with pounding political rivals rather than hammering out a constitutional accord that might have eradicated future kings. Ironically, the threat of being ruled “under the gun” rather than “under the law” did not become a political reality in England under any royal monarch, but rather within a kingless republic. It was, in fact, the intolerance of religious republicans, the dictates of a republican Caesar, and the repression of a republican army that ultimately undermined England’s short-lived republic. It was, in other words, English republicans who killed the English republic.

That harsh truth (and acute paradox) would trouble three generations of liberal republican thinkers from James Harrington to James Burgh who tried to puzzle out why things went so dreadfully wrong. To a man, their solution remained the same: first, no more permanent, professional, paid armies that might financially overload,

politically destabilize, and constitutionally capsize England's ship of state; second, local autonomy over local militias by the local landed gentry; third—and most importantly—that a legislative body (Parliament) rather than executive heads of state (monarchs or ministers) must control the swords of justice (police power) and war (military power). But in making their case, they rarely mentioned (and largely overlooked) Oliver Cromwell, the New Model Army, and the Interregnum as a whole. In fact, the use of history in their arguments was, in general, quite selective. And yet their entire ideology was a conscious attempt to repair past failures.

More specifically, England's ill-fated attempt to establish a constitutional republic began its slippery slide into military despotism on 6 December 1648—the day that Colonel Thomas Pride used armed force to “purge” the House of Commons of its Presbyterian members; thus violating the very parliamentary independence that the Civil War against King Charles I had been fought to preserve. The major cause of that military *coup d'état* was a separate Militia Ordinance passed by the Commons just four days earlier.<sup>12</sup> The intended goal of that law was to give control over the local militias to Presbyterian lawmakers to counter the New Model Army Parliament created in 1645. The terms of the ordinance made that political aim abundantly clear. First, ultimate authority over the militia was granted solely to Parliament. Second, the militia's command structure was placed in the hands of men who owned substantial land as commissioned “county lieutenants” (as opposed to the lower social orders that composed the New Model's officer corps). Indeed, for the first and last time in English history, property qualifications for militia commissions were ascribed in

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<sup>12</sup>C. H. Firth and C. S. Rait, eds., *Acts and Ordinances of the Interregnum: 1642-1660* (London: Wyman & Sons, 1911), 1:1247-51.

statutory form. Third, the precise powers exercised by militia commanders were carefully spelled out, such as the authority to lead their armed men out of their respective counties, but only with Parliament's specific permission. Finally, the number of troops in the New Model Army was to be cut in half. In sum, the 1648 Militia Ordinance was the opening volley in another battle over armed political power and constitutional prerogatives; one that now pitted a Commonwealth Parliament against a Commonwealth Army. However, it was a constitutional contest in which only one side actually held guns—and thus called all the shots.

There is, of course, an extraordinary irony in this battle over yet another militia ordinance; after all, a major cause of the English Civil War was Charles's claim, backed by common law precedent (and court lawyers), that Parliament had no lawful authority to enact *any* ordinance without royal consent, let alone one that would have taken away his executive authority over the militia. In truth, Parliament's direct control over the nation's sword was illegal, unconstitutional, and logically inconsistent with traditional political principles. Now, apparently, the same point was being made with an army bayonet. Without question, Parliament's novel attempts to seize control of the militia through ordinances had opened a Pandora's box of political troubles and constitutional dilemmas. Placing armed political power solely in the politicized hands of factious lawmakers without any constitutional checks and balances was clearly no remedy in a "representative" republic. Even so, English scholar J. R. Western regards the voided 1648 ordinance as "the true parent of all subsequent militia legislation" that tried to find a viable alternative to standing armies. Moreover, "It was the first time that all the law and custom relating to the subject [the militia] was

reduced into a single measure of reform and codification.”<sup>13</sup> According to American historian Lois Schwoerer, “If the Militia Ordinance of 1648 had been implemented, it would have gone a long way toward returning the local government to the substantial gentry and providing Parliament with a counterweight to the professional army. The legislation of 1648 was the first occurrence of a law framed to create a local militia that would protect Parliament from a professional army; it would not be the last.”<sup>14</sup>

The army patrons in the truncated “Rump” not only rescinded the ordinance, but also passed one of their own in 1650 that gave local control over the county militias to members of their own political persuasion and party. The intent, in effect, was to make provincial militias the political pawns of New Model Army supporters. If the local gentry refused to comply, more direct measures could be taken. Even so, the military-theocracy that was rapidly rising to power provided perils aplenty for anxious squires and gentlemen philosophers to ponder. In the weeks after beheading the king, the Rump Parliament summarily lopped off its own “head” by abolishing the House of Lords as a useless and dangerous body of titled aristocrats. Although the Rump owed its very existence to Pride’s Purge, it shamelessly pronounced itself as the genuine guardian of parliamentary freedom against armed repression; seized direct control over the county militias; attempted to dismantle the New Model Army; and thus set the stage for its own infamous execution by Oliver Cromwell and a com-

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<sup>13</sup>J. R. Western, *The English Militia in the Eighteenth Century: The Story of a Political Issue, 1660-1802* (London: Routledge & Kegan Paul, 1965), 6. Hereafter cited as Western, *The English Militia*.

<sup>14</sup>Lois G. Schwoerer, “No Standing Armies!” *The Antiarmy Ideology in Seventeenth-Century England* (Baltimore, MD: The Johns Hopkins University Press, 1974), 57. Hereafter cited as Schwoerer, *No Standing Armies*.

pany of musketeers on 20 April 1653. English scholar Simon Schama best relates the final acts and actors of that dramatic event with this concise script:

The symbols of parliamentary sovereignty were now treated like trash. The Speaker was ‘helped’ down from his chair by Major- General Thomas Harrison; the mace, carried before him, was called ‘the fool’s bauble’ and taken away by the soldiers on Cromwell’s orders. The immunity of members was exposed as a joke. When Alderman Allen tried to persuade Cromwell to clear the chamber of soldiers, he himself, as treasurer of the army, was accused of embezzling funds and put in armed custody. The records of the house were seized, the room emptied, the doors locked.<sup>15</sup>

We would do well to remember the above “mace incident” in the many years (and pages) yet ahead when, during ratification debates, Virginia’s Patrick Henry rhetorically ruminated on the ultimate outcome if the House of Burgesses’ own macebearer had to confront an armed regiment of federal troops. But for now we should look to Professor Schama’s appraisal of what Cromwell’s political act meant to seventeenth-century Englishmen: “the bludgeoning of a representative assembly by armed coercion. . . . But what he really wounded, and fatally, was the Commonwealth itself, whose authority (if it was not to be grounded on pure Hobbesian force) had to be based on the integrity of parliament.”<sup>16</sup>

Yet in an ironic reversal of historical roles, England’s “Puritan Caesar” continued to stab at the political heart of the republic while avowing that he was saving the nation’s religious soul. In the space of eight months, the new “Barebone’s” Parliament met the same fate as the previous Rump on 12 December 1653; only this time the members resigned their elective posts on their knees before Cromwell in a “volun-

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<sup>15</sup>Simon Schama, *A History of Britain*, vol. 2, *Wars of the British* (New York: Hyperion, 2001), 225. Hereafter cited as Schama, *Wars of the British*.

<sup>16</sup>*Ibid.*, 226.

tarily” act of institutional suicide. Named for its London representative Praisegod Barbon (his actual Christian name), the legislature was dominated by the same “ride-to-hounds” class of country gentlemen who tried (once again) to establish a militia under parliamentary and local civil control. Four days later, Oliver Cromwell was sworn in as Lord Protector under a prefabricated constitution known as the “Instrument of Government.” That same day, Cromwell began his lordly protection by blocking the entrance to the House of Commons with soldiers until its new lawmakers swore an oath of loyalty to him and pledged that they would not alter the government. (They were well aware, of course, of the probable outcome if they tried.) Now the constitutional mantra of England’s “remodeled” republic was rule by “One Person and a Parliament”—which, apparently, was still better than any “King in Parliament.”

Even so, the ever-present New Model Army made sure the “One” reigned above the many. In 1655, Cromwell consolidated his power at the local level by creating twelve military cantons over the collective counties, each governed by a Major General. As a supplemental (not supplanting) component of the New Model Army, the “new militia” was actually no different from that standing force. It was composed of volunteers who were paid £8 a year in return for required attendance at quarterly musters and for always being on call. It was financed by a tax on wealthier ‘malignants’ (Catholics, Royalists, and unreformed Protestant sectaries) whom it existed to keep in check. Thus internal security and pre-emptive deterrence against possible rebels were economically combined. Unlike former trained bands, the “new militia” was liable for service beyond the local community and commanded by professional army officers. On the other hand, the 6020 horse and 200 foot were under the su-

preme authority of the executive; not any monarch, of course, but the Lord Protector.<sup>17</sup> Moreover, their mission was first and foremost a police action aimed at pacifying both the political and religious unfaithful, which included confiscating their arms.

However, the cavalry units were also employed as “flying squads of righteousness,” or a mounted “morals police” charged with imposing “religious liberty” at the point of their bayonets, which basically meant wiping out all manner of fun in Merry Ole England. All sports, games, and gambling were outlawed, as was the celebration of feasts and Christmas. Alehouses were subject to strict licensing and inspection and purged of fiddlers and other entertainers. Adults caught swearing or cursing were punished with a fine suitable to their social rank (more for squires of the shires, less for their tenants, laborers, and servants) while children under twelve were whipped. Convicted fornicators were sentenced to three months in prison, while adulterers suffered the death penalty. Needless to say, imposing morals with muskets did not turn black sheep into meek lambs. Even so, the experiment in compelling godliness on horseback failed to achieve its moral objective mainly because Cromwell lacked ample manpower to serve as “Enforcers for Christ.”<sup>18</sup> The New Model Army simply could not perform two functions at once; win wars against the Dutch and Spanish abroad, and fight religious battles against recalcitrant Englishmen at home—even with its mounted auxiliary. The only truly viable option was to rely upon the county constables and justices of peace, who proved extremely unwilling to

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<sup>17</sup>Western, *The English Militia in the Eighteenth Century*, 8.

<sup>18</sup>Schama, *Wars of the British*, 239-240.

punish people who were not endangering lives and property by raising rebellions or committing other armed criminal acts. After all, they had no arms.

All the same, Cromwell's military regime clearly demonstrated that armed force was a realistic means by which a ruler could dominate society and remold it to his bidding. Therefore everyone seeking political power wanted to control political arms and the politicized men who bore them. For those who were more interested in safeguarding parliamentary institutions, what constituted proper control was a perennial pickle. Clearly, the executive required a reliable means to defend the state against foreign aggression, and yet the domestic power those armed forces gave him—both directly as a police force and indirectly through political patronage—also required a reliable means of keeping that armed political power in check. In effect, Englishmen were presented with a new political lesson that took years of theorizing (and several wars) to learn: a constricted choice between a spontaneous militia and a standing army were not viable alternates in a new age of warfare; a modern state needed both to survive—if it could afford the resources to maintain them.

While the Interregnum is often viewed as an anomaly in English history, it nevertheless marks the true beginning not only of the modern English state, but also of the British Empire. It was during this period of English-style republicanism when more pragmatic (and moderate) men realized that it was in the state's better interest to follow more mechanical and commercial pursuits and less evangelical endeavors. For the first time in its history, England actively supported overseas mercantilism with outright militarism by fighting wars with Holland and Spain to win trade, not territory

or souls. As always, the island nation relied primarily upon its full-time navy. But it also needed a professional army. After all, people live (and usually make their living) on land, not on water. Moreover, militias were never the best means for conquering (or defending) a vast commercial empire. So when trouble arose in far-off Virginia in 1652, the Commonwealth sent its standing army aboard its settled navy to preserve provincial political order, and thus ensure the stable production of its most important staple—tobacco.

### Virginia's Interregnum

After gaining a deeper understanding of the turbulent Interregnum Era, we now can revisit the question originally posed: Why were colonial Virginians spared the armed coercion and repression that Englishmen experienced at home under a military regime that was clearly unafraid to use troops to impose its rule?

Two major rationales come to mind—political expediency and economic necessity. Not only was the Commonwealth under Cromwell embroiled in a war with the Dutch over commercial trade—which prompted the first Navigation Act in 1651 (and in terms of colonial administration, the most lasting legacy of England's Republic)—it was equally concerned with perpetuating its political power at home after the Civil War. The Rump Parliament and New Model Army could little afford any distractions from those more pressing concerns—such as maintaining and managing an army and fleet in far-off North America that might be needed elsewhere. Nor was it politically realistic to enforce more draconian dictates upon a possibly unreceptive (if not potentially rebellious) cadre of Cavaliers who, after all, posed no real threat to “state security” in their political exile and physical isolation. The shrewder option,

apparently, was to confiscate and control the political weapons of Virginia Royalists (as opposed to their “private” arms); to remove their ring-leader, “Billy” Berkeley, from political power; and ultimately to replace him with dependable Dick Bennett who would keep a watchful eye on the people and land he knew so well. Thus a change in political regimes could be effected without resorting to political violence, armed repression, or a standing army. Guns, in short, were kept out of provincial politics.

So lay the way for taming Virginia’s “rebels and traitors” during England’s brief Commonwealth Era—or as Edmund Randolph more pithily put it many years later, thus “Virginia was exempt from pollution by the fanaticism and hypocrisy of Cromwell.”<sup>19</sup> Of course, if displaced Cavaliers actually attempted to repel invading Roundheads from Virginia with armed force, history might provide us with an entirely different story to relate and appreciate. The same holds true if Commonwealth soldiers remained “standing” to prod tobacco planters with their bayonets.

Nevertheless, the destruction of royal executive authority and transition to parliamentary control that took place in 1652 was by no means a political “revolution” in colonial Virginia. If anything, there was a concerted attempt on everyone’s part not to disrupt the status quo. However, one major change did occur: the House of Burgesses became “supreme” in all legislative, executive, and judicial matters within Virginia; thus trumping not only the Council, but also Governor Bennett. The Assembly’s authority included overall control over Virginia’s sword, which was re-

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<sup>19</sup>Randolph, *History*, 153. Edmund Randolph was prominent in Virginia politics both during and after the American Revolution. As Governor, he was a delegate to the Constitutional Convention and President of Virginia’s Ratification Convention. He also served in Washington’s Cabinet as the first United States Attorney General.

flected in a militia ordinance it issued to Surry County in 1652. Significantly, this is the first time the word “militia” was used in an official Virginia document—even though the term first appeared in the English language around 1590 during the reign of Elizabeth I—the “Virgin” Queen for whom Virginia was named. In that decree, certain specified individuals were given delegated authority over “the power of the millitia upon Every Emergent occasion.” The appointed commanders of the Surry “millitia” had specific administrative duties to perform: “to draw the people into Armes, to appoint their under officers, to [organize] their souldiers musteres, and [to ensure that] their Armes to bee Lookt [and] that they be kept fixt [and] to take Charge of the pouders.” The political purposes of that managed “millitia”—as well as its political chain of command—was also made clear: “To Suppress all violent mutineyes, and Insurrections of Indians, or other Enemyes, and Generallye to proceede therein from time to time, as they shall be ordered, and appointed by this Assemblye, or by the governor and Council.”<sup>20</sup> Although relegated to the county level and regulated by local commanders, the power of Virginia’s sword was ultimately under the legislative control of elected Burgesses in Jamestown, “or” (meaning in times when that body was adjourned) the executive authority of “the governor and Council.” In essence, the Surry Ordinance gave Virginia’s “parliamentarians” precisely what their English counterparts desired in the voided 1648 Militia Ordinance—gentry control over the county militias. Of course, Virginia’s squires had no standing army around to figuratively “shoot down” their law by brusquely throwing them out on their ears at gun point.

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<sup>20</sup>Warren M. Billings, ed., “Some Acts Not in Hening’s *Statutes*,” *Virginia Magazine of History and Biography* 83 (January 1975): 30-31.

Even so, the Surry ordinance was somewhat similar to the administrative and command structure instituted under Queen Elizabeth in 1558 whereby county militias were placed directly in the hands of “lord-lieutenants” (who were titled peers), and their “deputy-lieutenants” (who were chosen exclusively from the gentry), while ultimate authority over the militia remained with the queen (or king) and the royal Privy Council. As expected, however, the legislative power of Parliament was excluded from this command and control structure. Under England’s common law constitution, the monarch’s prerogative over the realm’s military forces was supreme (at least under the Tudors). Yet in practice, the actual command and exercise of the militia regularly conferred upon the deputy-lieutenants—or “country gentry,” who, as a social and political class, exclusively officered and largely financed the local county militias, and dominated the House of Commons. Not coincidentally, that command and control structure dovetailed perfectly not only with England’s social and political realities, but also with those that prevailed in Virginia.

Ever since the Norman Invasion, the feudal aristocracy (lords and peers) commanded the feudal array while the landed gentry commanded the militia. Since the feudal array had long since expired in England, it was only natural (if not good politics) to put “lord-lieutenants” over the one military institution that remained “in force”—the county militias. However, the peers were prone to neglect their royal appointments (including colonial governorships) through frequent absenteeism. Consequently, their assigned duties usually fell upon the landed gentry as acting “deputies” (which raised little complaint considering the economic and political benefits that came with the job). Thus despite the ranks and titles, the country gentry essentially

remained in control of their local militias. Virginia, of course, never had a titled aristocracy or a feudal array (master/servant relations and chivalry being other matters). But the colony did have county militias and its own “ride-to-hounds” class that always commanded and controlled those armed forces—both in the field and in the legislature. In fact, many lawmakers unbuckled their militia swords before entering the House of Burgesses (arms were not permitted inside). At any rate, Virginia’s militia law fit the social and political hands that created it like a mailed glove.

Nonetheless, the Surry Ordinance also marked a fundamental transition in the exercise of armed political power in Virginia. Indeed, just four years earlier, the House of Burgesses wrote very different laws. For example, Act IV of its October 1648 session described, “some treacherous attempts threatened by the savages [Native Americans] toward the person of the Gov’r [Berkeley],” as well as “many disaffections to the government from a schismaticall party [anti-monarchists], of whose intentions our native country of England hath had and yet hath too sad experience.” Because Berkeley’s life was so threatened, the Burgesses thought it “fitt and enacted, That the Govern’r will please to presse ten able men as a guard to his person and to employ them in such services, either in publique or private affaires as he shall think fitt.” To pay the “salary or wages” of each of these latter-day Secret Servicemen, the House “leavied two thou-sand pounds of tobacco, in toto 20000 lb. of tob’o. from the publique the next year (vizt.) 1649.” Still, the Burgesses not only considered it proper that the Governor had his own personal sword (armed bodyguard); they also had some interesting thoughts on the executive’s constituted authority over every Virginian’s sword.

In the very next decree of that session (Act V), the Assembly affirmed “having knowledge that divers persons vpon [sic] occasion of a presse of souldiers by warrant from the Govern’r, or by order from the Gov’r. and council out of mistake in opinion do conceive their liberties and the lawes of the collonie thereby infringed and themselves particularly injured, the authority of an Assembly not concurring therein.” In other words, certain citizens believed their individual liberties were “infringed” because they were subjected to military conscription without their consent through political representation—or as the Assembly phrased it, without their “concurring authority.” Therefore to set the record straight—and thereby correct any error in public “opinion”—elected Burgesses “thought fitt *not by law to establish*, but to declare the judgment of this Assembly” on that particular matter. In short, the Assembly was about to make a constitutional “judgment” much like a high appellate court, not “establish law” as a legislative body by enacting a statute.<sup>21</sup>

The Assembly’s irrefutable decision was this: “full and ample power is derived from his Majesty [King Charles I, who still had royal power (and his head) in 1648] to the Governour and Council to make peace or warr, and as a necessary consequent to levy or presse men or other provisions for the warr vpon any emergent occasion to which power . . . we may not presume to conceive, that any act of Assembly can add strength or vigor, but that all his Ma’ts. [Majesty’s] subjects are in loyaltie and in due obedience to his sacred Ma’tie [Majesty].” The Assembly, in sum, decided that the constitutional chain of command ran from the king of England down to his appointed Governor and Councilors in Virginia; that a provincial legislature (Vir-

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<sup>21</sup>Hening, *Statutes*, 1:354.

ginia's House of Burgesses) had no constituted authority to add (or presumably detract) from the "strength and vigor" of the king's sword; and that all of Virginia "subjects" must remain loyal and obedient under that armed political power. The Assembly, in short, could "presume" no legislative control over the sword whatsoever, let alone protect Virginians from being conscripted without their consent. Indeed, "levied" men were merely "other provisions" for making "warr."<sup>22</sup> Much had changed in 1652. Aside from the Surry County ordinance, there is additional evidence that Virginia's Burgesses fully intended not only to keep legislative control over the sword, but to assume the executive responsibilities of military command as well.

In 1656, some six hundred Rappahannock Native Americans threatened to settle at present-day Richmond (at that time, the territorial "fringes" of the colony). The General Assembly (not Governor Bennett) dispatched Colonel Edward Hill—the Speaker of the House—with an armed force of militia and Algonquin allies to remove the intruders "without making warr." However, after murdering five chiefs who came to parley with Hill, his force was summarily—and devastatingly—defeated by the enraged tribesmen. The hapless Hill was tried for his "crimes and weaknesses" by the Assembly, found guilty by unanimous vote, suspended of all civil and military offices, and ordered to pay the costs of arranging peace terms with the victorious Rappahannocks.<sup>23</sup> Clearly, Virginia's elected representatives held military *and* civil

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<sup>22</sup>Ibid., 1:355. My emphasis.

<sup>23</sup>Hening, *Statutes*, 1: 402-403, 422, 426. Colonel Hill's political punishment, however, was short-lived. As a "big wig" in Charles City County, Hill was reinstated as House Speaker in 1659, but never again held any military office. Yet like many wealthy Virginia gentry, he retained the title of "Colonel." See Hening, *Statutes*, 1:506.

officials strictly accountable for the misuse of military power—and had the political clout to correct those abuses.

Of course, one could also argue that the legislature's tight control over the sword was an inheritance—and direct consequence—of Commonwealth republicanism, which had given Virginia's "provincial parliament" full rein over its internal military and police affairs under the Articles of Surrender. More importantly (and perhaps providentially), English republicans kept their own Interregnum largely to themselves. They did not deliberately export their religious repression, political violence, and politicized guns to colonial Virginia in exchange for tobacco. All the same, the story of "Virginia's Interregnum" provides us with a remarkable irony: despite the unsolicited visit by New Model troops, the House of Burgesses enjoyed everything their parliamentary counterparts desired, but failed to achieve: no standing army; gentry control over their local militias; and legislative—not executive—supremacy over armed political power. Yet within two decades, the General Assembly's firm grip on the sword would be shaken loose in a homegrown civil war—a notable episode in Virginia history known as "Bacon's Rebellion."

#### "Rebellious Rabble"

The second occasion when an English army was sent to Virginia took place in 1676 by order of King Charles II—the very monarch Virginians declared as their sovereign in 1649; a rebellious act that precipitated the first detachment of troops in 1652. Ironically, Virginia's sitting Governor during "Bacon's Rebellion" was, once again, Sir William Berkeley who, like Charles II, was "restored" to power in 1660. As in 1652, commissioners were dispatched with generous peace terms (royal par-

dons for all rebels and a pledge to hear grievances) along with yet another armed escort—but a far larger task force that included eleven ships under Sir John Berry (one of the three commissioners), and an army regiment of one thousand men commanded by Colonel Herbert Jeffreys (another commissioner who also was armed with instructions to replace Berkeley as governor). The third commissioner, Colonel Francis Moryson, had served as acting governor in 1661 during Berkeley’s absence. Like Bennett before him, Moryson was a moderate man familiar with both Virginia and Virginians. In fact, he was a major in the Cavalier army during the English Civil War and, like so many others of his class and political persuasion became a Virginia refugee in 1649. Unlike the “military commissioners” (Berry and Jeffreys), Moryson openly advised against sending any armed forces to the colony as an unwarranted—and perhaps untenable—means of subduing Virginians.<sup>24</sup> In a letter to England’s Attorney General William Jones, Moryson expressed the following concerns on the eve of his departure: “Where will the troops live, as there are in Virginia no towns and the plantations are scattered? With sickness so common among new arrivals in the colony, who will take care of sick soldiers? What will be the source of pay for the troops? Lacking funds, will they not attempt to extort them from the colonists, thereby increasing Virginia’s difficulty?”<sup>25</sup> Moryson’s hard questions were not only immediately relevant, but also proved pertinent in the far distant future. Neverthe-

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<sup>24</sup>Ship and troop strengths in *Calendar S P C, 1677-1680*, 12-13. Moryson’s advice against armed intervention in *Calendar S P C, 1675-1676*, 480-481.

<sup>25</sup>Moryson to Jones, Public Record Office, Colonial Office Papers 5/1371; quoted and cited in Douglas Edward Leach, *Roots of Conflict: British Armed Forces and Colonial Americans, 1677-1763* (Chapel Hill, NC: The University of North Carolina Press, 1986), 169-170, note 4. Hereafter cited as Leach, *Roots of Conflict*.

less, English troops once again played a limited political part on Virginia's provincial stage. Aside from a rather pedestrian show of force (cruising in ships up and down the James and York Rivers), recorded evidence concerning the army's active role during the rebellion's finale reads as a relatively silent script—except for two notable asides.

First, Virginia's indigenous rulers repeatedly petitioned King Charles II "to keep" royal troops and ships in the colony as a police force, not only to quell any future internal uprisings, but also to protect the property of the wealthy from an undesirable lower class. As strange as it may seem, Virginia's landed gentry were requesting what their English counterparts had refused to accept: armed intervention in local political affairs with a standing army. But as the colony's Secretary, Thomas Ludwell, summed up their elitist fears in 1678: "the meaner sort who pressed by their necessities and desiring againe to have the spoyle of other mens estates are in my humble opinion not to be trusted without a force of 200 foot and 50 horse."<sup>26</sup> Although Virginia's entitled elite always commanded their county militias—and wore swords to prove that point—they apparently did not trust the poorer men who carried guns to protect their opulent manors. However, Virginia's upper-class rulers also let it be known that they did not intend "to bear" the expense of "keeping" the king's armed forces in their colony. While Charles II was perfectly willing to leave some of his horses and men in Virginia to put tobacco growing (and English mercantilism) back on a solid footing again, he fully expected Virginians to pay for those military forces as part of their self-defense responsibilities—a minor impasse at that time (1676) be-

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<sup>26</sup>Coventry Papers, LXXVIII, 157, 162, 168. Ludwell quote at 202.

tween a king and his colonial subjects which, nonetheless, resulted in a second point worthy of note.

By 1682, all that remained in Virginia of the “occupation army” were just two companies of infantry (100 men in each) commanded by lowly lieutenants: a force, in essence, that was “materially” irrelevant in every sense of that word. Lacking barracks, the soldiers were quartered in civilian abodes and outbuildings (an old English custom). But when promised compensation became overdue, the armed “guests” became unwelcome annoyances; prompting “landlords” to cry foul of their rights (when coins jingled, they were jocund). Moreover, the troops themselves were so irregularly paid and provisioned that they faced one of three desperate alternatives: either sell themselves into indentured servitude, fend for themselves as landless and homeless laborers (an unknown number evidently chose both), or mount a mutiny (which one company apparently tried, but with no recorded results).<sup>27</sup> All the same, His Majesty’s soldiers apparently chose a totally different option: after receiving their discharges on 7 June 1682, they simply retreated from further public attention (and printed mention) and quietly marched en masse into unrecorded oblivion. Such were the destinies—and history—of English soldiers in seventeenth-century Virginia: armed men who were abandoned by their king; left isolated among uncaring strangers; and who ultimately served no useful political purpose. After all, the rebellion they were sent to put down had ended long before they arrived. Moreover, the king had graciously pardoned everyone involved. In short, there were no civilians to po-

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<sup>27</sup>Jeffreys (prob.) to Williamson, 6 June 1678, *Virginia Magazine of History and Biography* 5 (1898): 50-52; *Calendar S P C, 1681-1685*, 168-69, 241-244; *Coventry Papers*, LXXVIII, 206, 218, 264, 396, 398, 406-407.

lice or protect. No wonder the troops were mostly disregarded and mainly forgotten by their contemporaries (and contemporary history).

On the other hand, historians of Colonial Virginia have not overlooked the recorded actions and actors of “Bacon’s Rebellion.”<sup>28</sup> Unfortunately, the same cannot be said of Second Amendment scholars.<sup>29</sup> For the most part, they have ignored the reasons why civil war broke out among white Virginians, as well as how they participated in it as armed citizens. Even though that long-ago revolt occurred exactly one hundred years before the American Revolution—and one decade before England’s Declaration of Rights—it nevertheless has something to say about keeping and bearing arms in Virginia, particularly for scholars who posit a theory of “legitimate”

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<sup>28</sup>The major primary sources on “Bacon’s Rebellion” are: Charles M. Andrews, ed., *Narratives of the Insurrections, 1675-1690* (New York: C. Scribner’s Sons, 1915), 15-141; Force, *Tracts*, I, Nos. 8-11; Coventry Papers, vols. LXXVII and LXXVIII; and *Calendar S P C, 1675-1676, 1677-1680*. The most complete secondary accounts are: Thomas Jefferson Wertenbaker, *Torchbearer of the Revolution: The Story of Bacon’s Rebellion and its Leader* (Princeton, NJ: Princeton University Press, 1940), which is favorably biased toward Bacon; and Wilcomb E. Washburn, *The Governor and the Rebel: A History of Bacon’s Rebellion in Virginia* (Chapel Hill, NC: University of North Carolina Press, 1957), which is equally biased toward Berkeley. Useful short versions are: Edmund S. Morgan’s Chapter on “Rebellion,” in *American Slavery, American Freedom: The Ordeal of Colonial Virginia* (New York: W. W. Norton & Company, 1975), which finds both men equally blameworthy; and Chapters 13-16 in Morton, *Virginia*, which sees Berkeley as the worse of two bad choices.

<sup>29</sup>Stephen P. Halbrook, for example, gives an extremely shortsighted—and highly slanted—account of Bacon’s Rebellion. Relying upon an obscure editorial note by William Waller Hening, Halbrook emphasizes this quoted passage: “A repetition of abuses such as those of which Bacon and his adherents complained, and an accumulation of oppressive acts on the part of the British government, without doubt, produced the American revolution . . . .” Without equal doubt (but with doubtful analysis), Halbrook infers that the major “abuses” Bacon and his followers “complained” about were “Berkeley’s collective gun control policies”—a fallacious, if not disingenuous, supposition. See Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right* (Oakland, CA: The Independent Institute, 1994), 55-57.

insurrections, as well as others who focus primarily upon the timeless composition, republican character, and overall allure of militias. While royal troops were of small influence and importance during that historical event, comprehensive consideration should be given to those who actually participated in Bacon's Rebellion. That detailed attention will concentrate on two key factors: how armed manpower was raised and used during the insurrection; and why that armed force was considered an illegitimate exercise of political power.

### White Man's War: Poor Man's Rebellion

The first actor to strut across the stage during the opening act of Bacon's Rebellion was Colonel George Mason—the direct ancestor and namesake of a distant revolutionary who would write Virginia's first Constitution and Declaration of Rights. In the summer of 1675, Colonel Mason marched a Westmoreland County “trainband” across the Potomac River into Maryland on his own volition—and contrary to contemporary principles (both then and now). In theory, militiamen defended local land and people by repelling invasions; they did not purposely launch offensive invasions beyond their homeland borders. That limitation also applied to “trainbands,” which were first formed within each county's militia in 1661 to put the colony in a better defensive posture against Dutch invasions and Indian attacks that occurred during the 1660s and 70s. As specialized forces, they were required “to be in readinesse at an howers warning with their armes and 12 shott of powder and ball a man.” They were also expected to march “to the rescue of such distressed places or persons as he their Commander shall direct.” Like latter-day “Minutemen,” trainbands were expected to assemble quickly and march rapidly to the sound of guns.

Furthermore, they were composed of handpicked men, or “select” individuals from the universal body of available manpower. Militia officers in Charles City County, for example, were specifically instructed to choose only “freemen or servants of undoubted Fidelity” for such serious duty.<sup>30</sup>

In practically every respect, Virginia’s trainbands mirrored English “trained bands,” which were first formed in 1573 during Queen Elizabeth’s reign. As their foremost English historian notes, those highly trained (and highly selective) bands of “well-to-do householders, farmers, franklins, yeomen, or their sons” were “a novel, and important, development in the militia.” Whereas the practice of “passing muster” for inspection was an old-established tradition, “specialized training, as an adjunct to musters, was virtually unknown before 1573.” Since “the government feared to arm and train the lower orders,” only the “well-to-do” could join these “bourgeois” militia units. Naturally, there were added advantages: “The better-off the soldiers were financially, the more able they would be to buy their own arms and pay for their own training, except for powder”<sup>31</sup>—no small consideration for the notoriously parsimonious Queen. Of course, Virginians had sound reasons of their own why unreliable freemen and, in particular, unpredictable servants were excluded from performing that exclusive duty.

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<sup>30</sup>Quoted references on “trainbands” are borrowed from William L. Shea, *The Virginia Militia in the Seventeenth Century* (Baton Rouge, LA: Louisiana State University Press, 1983), 74. Hereafter cited as Shea, *Virginia Militia*.

<sup>31</sup>Lindsay Boynton, *The Elizabethan Militia, 1668-1638* (London: Routledge & Kegan Paul, 1967), 13, 91, 108-109. Boynton devotes an entire (and extremely informative) chapter on “The Trained Bands.”

For one thing, the 1660s and 70s witnessed a number of abortive plots and uprisings by discontented servants against their masters. One uprising, for example, was attempted by a group of Cromwell's ex-soldiers who were serving out their prisoner of war sentences as indentured servants in Virginia. On 13 September 1663, they planned to seize arms stored in a Councilor's home, then march house to house collecting more arms and followers, killing anyone who got in their way. Another servant, turned informant, foiled the plot. The House of Burgesses passed the following resolution three days later: "*Resolved*, that the 13<sup>th</sup> of September be annually kept holy, being the day those villains intended to put the plot in execution."<sup>32</sup> Since Governor Berkeley estimated that some 1,500 servants were arriving yearly, the General Court issued an order in 1770, subject to the approval of the King and Privy Council, "that it shall not be permitted to any person tradeing hither to bring in and land any *jaile birds* or such others, who for notorious offences have deserved to dye in England."<sup>33</sup>

Even ex-servants appeared to be a menace. Again in 1670, Virginia's General Assembly decided that it was both unsafe and unwise to let former servants vote as new freemen. In their disenfranchisement law, the Burgesses stated that these irresponsible men "haveing little interest in the country doe oftner make tumults at the election to the disturbance of his majesties peace, then by their discretions in their

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<sup>32</sup>Hening, *Statutes*, 2:204. Original italics.

<sup>33</sup>Servant estimates from "Inquiries to the Governor of Virginia," answered by Gov. Berkeley in Hening, *Statutes*, 2:515. General Court order in *ibid.*, 2:509-510. Original italics.

votes provide for the conservation thereof.”<sup>34</sup> The danger of unrest had become so acute that during a threatened Dutch invasion in 1673, Governor Berkeley barred all servants from bearing arms—even though, as he openly admitted, there were as many servants as freemen among the arms-bearing population.<sup>35</sup> That decision had its drawbacks, however, especially if a real invasion occurred. According to militia scholar William L. Shea, “the exclusion of servants greatly decreased the pool of trained manpower in the colony and demolished the concept of the militia as the community in arms.”<sup>36</sup> Although often relegated to community doormat status, white indentured servants—unlike African-American slaves—were standing on the threshold of economic and political opportunities that presumably came with freedom. Of course, “truly” free men were not altogether reliable or responsible either when it came to arms.

Absenteeism among all militiamen had become such a widespread problem that the Assembly began instituting laws in 1666 that punished delinquents with stiff tobacco fines. The fact that tobacco fines were levied was perhaps indicative of another disturbing mid-century trend: an increasing number of freemen—many of whom were former servants—did not possess their own lands or homes. Instead, they had to work the land of others for the only form of “cash” that was available—tobacco. That social reality resulted in another militia reform; specifically, the method of reimbursing militiamen was revised. Beginning in 1624, freemen called up for ac-

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<sup>34</sup>Hening, *Statutes*, 2:280.

<sup>35</sup>This incident is related in Morgan, *American Slavery, American Freedom*, 241.

<sup>36</sup>Shea, *Virginia Militia*, 76.

tive militia duty had their land worked and farms tended by those who stayed at home. By 1660, militiamen received tobacco payments for their military labors in the field in lieu of the *quid pro quo* fieldwork done by neighbors.<sup>37</sup> The new policy was a mixed blessing for landless and homeless Virginians, who were largely young bachelors with little economic stake in the community. The opportunity to earn a regular salary and find some adventure was probably appealing compared to the drudgery of working someone else's land for infrequent advantages and few rewards. Conversely, poorer militiamen were penalized with stiff fines if they failed "to pass muster," which slashed their living wages and put their lives at risk as much as any tomahawk. More fortunate freemen, of course, could pay militia penalties with the tobacco they grew, or similarly afford the tax assessments that paid those who served in their stead. In truth, militia duty during the last half of the seventeenth century was becoming "more impersonal and more expensive," and increasingly the task of a subset of Virginians who were "hired to shoulder the burdens of a great many others."<sup>38</sup>

We will never know for certain what sort of men marched into Maryland with Colonel Mason in the late summer of 1675. However, we can guess that there were not many who owned farms that needed care, or had families that needed protection. Odds are that most were landless bachelors who could run fast toward the sound of guns without a worried backward glance. Perhaps they could afford the luxury of a risky adventure because they had nothing better to do—or to lose; perhaps their neighbors could afford to send them beyond their local community because they were

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<sup>37</sup>Hening, *Statutes*, 1:401-402, 408; 2:246-247.

<sup>38</sup>Shea, *Virginia Militia*, 66, 81-82.

socially and politically expendable. In any case, Mason had “emergency” military powers to proceed as he saw fit (Westmoreland was Virginia’s northernmost county at the time, and about as far away from Jamestown as one could get). The Colonel’s armed men—no matter their personal reasons or individual choices—obediently followed. No doubt, they all had an “immediate” and “just” cause for their actions.

In July, a group of Maryland Native Americans known as Doegs stole some hogs from Thomas Mathew in neighboring Stafford County, Virginia (formed in 1664 from adjacent Westmoreland), claiming Mathew had reneged on a payment for trade goods. Mathew and a group of armed whites pursued the Doegs, recovered the hogs, and murdered several robbers. Predictably, the Doegs retaliated with another raid in which they killed one of Mathew’s white indentured servants. Armed with that dreadful provocation and dire crisis, Mason marched his armed men into Maryland seeking retribution.<sup>39</sup> What happened next, however, went far beyond the principles and protocol of a model militia.

Whether by mistake, indifference, or ineptitude, Mason’s men murdered fourteen friendly Susquehannahs before their Colonel realized they were the wrong Indians.<sup>40</sup> This was not the first time, however, that Mason exercised poor military judgment. In 1662, he was convicted by the House of Burgesses for capturing a tribal king of the Potomacs without just cause.<sup>41</sup> Like Colonel Edward Hill before him, Mason was suspended from holding civil or military offices, a punishment which,

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<sup>39</sup>Charles M. Andrews, ed., *Narratives of the Insurrections* (New York: C. Scribner’s Sons, 1915), 16-18, 105-106. Hereafter cited as Andrews, *Narratives*.

<sup>40</sup>*Ibid.*, 17, 106.

<sup>41</sup>Hening, *Statutes*, 2:150-51.

again like Hill, was not long-lived. The next year, Mason became justice of the peace for Westmoreland County; he was sheriff of Stafford County in 1669; and, of course, he was a Colonel of Militia in 1675.<sup>42</sup> Yet there was no dodging the ultimate consequences of his latest military exploits.

In a classic case of armed escalation, the Susquehannahs conducted reprisal raids in Westmoreland and Stafford. In response, Governor Berkeley stepped in and commissioned Colonel John Washington—the direct ancestor of George Washington—and Major Isaac Allerton to investigate and perhaps punish the perpetrators. Out of 13,000 white men capable of bearing arms, Washington raised an armed force estimated at “neer a thousand” troops—by modern standards, an army regiment. Since the total tithables (or taxable adult men and women) in Westmoreland and Stafford Counties numbered 538 and 436 respectively, the armed force under Colonel Washington clearly exceeded the capacity of local militia rolls. The total number of warriors in the area, by comparison, was only 725. Even so, Washington’s little army did far more punishing than investigating.

Colonel Washington promptly laid siege to a Susquehannah fort on the Maryland side of the Potomac—almost directly across from the site of present-day Mount Vernon. When five chiefs came out to parley for peace, they were seized and murdered on the spot. The date was September 26, 1675. For the next thirteen months, Virginia would be embroiled not only in a racial war of color, but also a political rebellion between classes. The colony’s militia would perform no major part in subse-

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<sup>42</sup>Mason’s civil offices are borrowed from Edmund S. Morgan’s footnote on page 250 in *American Slavery, American Freedom*.

quent events. Those who bore arms during the war and rebellion would do so as hastily formed army regiments—or in the minds of more than a few, armed renegades.<sup>43</sup>

Governor Berkeley was furious over the disastrous blunders of armed Virginians. Since 1646, he had tried to forge a peace treaty and amicable alliance with all tributary tribes. He was determined to establish a policy of separate and peaceful co-existence, even going so far as to demarcate a territorial line between the races, provide tribal reservations, and enact numerous laws that would protect Native Americans from dishonest Englishmen.<sup>44</sup> He also was damned determined not to let a bunch of bloodthirsty, land-grabbing whites entangle the colony in an all-out racial war. Moreover, he had a sure-fire means at hand to ensure that did not happen—at least not on his gubernatorial watch.

When Berkeley returned to power in 1660, he apparently borrowed a page from Puritan political scripture. He created a “Long” Assembly that lasted fourteen years without an intervening general election (1662-1676). Appreciating their habitual seats (as well as the social status and fiscal comfort those chairs “represented”), the long-tenured Burgesses returned the favor by enacting any law the governor desired—including statutes concerning the sword. When Berkeley learned of the fort debacle, he “called” the Assembly “in” for a special session—and undoubtedly for some “special” favors as well. Unsurprisingly, the legislators designed a law that was intended to ease fears but halt armed aggression. Rather than rely upon Washington’s

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<sup>43</sup>Statistical numbers from Morgan, *American Slavery, American Freedom*, 250, 252. The fort events are in Andrews, *Narratives*, 19, 47-48, 106, and Force, *Tracts*, I, No. 9.

<sup>44</sup>Hening, *Statutes*, 1:323-325, 353-354, 467-468, 541, 547.

“flying army,” defensive forts would be built at the head of each major river, manned by a “standing army” of 500 soldiers. The troops would be paid 1,500 pounds of tobacco apiece, the average annual income of an average tobacco-growing yeoman. Moreover, they would be recruited from the quieter lower counties, not the “up-in-arms” upper districts. To meet these hefty expenses, a burdensome tax was levied. To ensure the armed men were “well regulated,” severe “Articles of War” were spelled out in no uncertain detail. Finally, the law included a crucial proviso: no one was to attack any tribe or tribesman without first notifying Governor Berkeley and receiving his approval.<sup>45</sup> But rather than lessening social tensions and stabilizing political situations—which laws are supposed to do—this particular statute both enflamed and destabilized the entire colony. In fact, it triggered an armed political rebellion. This would be the last session of the “Long Assembly.” From that moment on the House of Burgesses, like the colony’s militia, more or less sat on the sidelines and watched as two power-hungry men threatened the Old Dominion with the very worst of political choices: armed anarchy or armed despotism.

The law was bad from the get-go. Virginians knew from brutal experience that “sneaky Indians” did not openly (or obligingly) attack standing forts; they raided isolated farmsteads. They knew that waiting for the Governor’s approval before mounting an attack gave Indians a golden opportunity to exercise their “hit-and-run” tactics with impunity. They knew that Indians were not only masters of guerrilla warfare, but also master terrorists who butchered any and everyone, striking fear wherever they roamed. By the time the Long Assembly met, two months had gone by

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<sup>45</sup>Hening, *Statutes*, 2: 326-336. (At ten pages, quite a “long” law.)

since the first attacks and nearly three hundred lives had been lost. How much more time would go by, how many more Virginians would be slaughtered, before the forts were built?

Virginians were quickly losing confidence in their government. They alleged that the government was fleecing them by raising taxes for useless forts and permanent troops that profited no one except military contractors. They assumed Berkeley's policy of peaceful coexistence benefited the Indians far more than themselves. They believed they were denied the opportunity to put men in office that would look after their best interests. And most of all, they thought their Governor and government had failed to carry out the very thing both had promised and, in truth, were pledged to do—protect the lives and property of Virginians from known (and sworn) enemies.

Although no one could possibly envision it at the time, this was perhaps a quintessential “Second Amendment moment” in Virginia history—the perfect political situation in which the people had an unfringeable right to keep and bear arms to defend themselves from enemy attacks because an inept and indifferent government had failed to preserve and protect them in their greatest hour of need. In other words, Virginians were in a Hobbesian state of war with savages, living in “continual fear, and danger of violent death.” The “civil covenant,” in which their obedience was exchanged for security, had failed them. Nonetheless, they still had an unalienable right to self-preservation under that contract. Furthermore, there was a “natural” punishment for negligent government: political rebellion.<sup>46</sup> But there were Lockean stipula-

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<sup>46</sup>Thomas Hobbes, *Leviathan* (1651).

tions: “The use of force without authority” was also “a state of war.” In short, the “natural right” to rebel could not be exercised as long as a duly constituted government existed—at least not legitimately.<sup>47</sup> Of course, there were no political philosophers, or book-bound barristers, or hind-sighted historians in attendance to explain the theoretical implications, constitutional corollaries, or historical parallels of their perilous predicament. Instead the people simply acted as they best saw fit.

When news of the Long Assembly’s act reached the Southside counties, men eagerly volunteered to march against the Indian invaders with their own arms and without pay. They also petitioned Berkeley to commission a commander who would lead them in the defense of their homeland. The Governor not only refused their request, but also issued a proclamation forbidding any further petitions on that score.<sup>48</sup> Berkeley declined their appeals for several reasons. He knew from the Mason and Washington episodes that there were considerable risks in sending armed expeditionary forces that might not take the time or trouble to differentiate between friendly natives and hostile ones. He also understood the caustic chain of suspicion, fear, and hatred most white Virginians held for all Native Americans. And above of all, Berkeley believed he could not trust discontented Virginians who, once armed and organized for war, might turn their disgruntlement—and their guns—against him. Ironically, Berkeley’s persistent refusal to appoint a leader over unhappy Virginians turned his conviction into a self-fulfilling prophecy. The Southside volunteers lost whatever patience they had left, organized themselves into an armed camp, and waited for

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<sup>47</sup>John Locke, *Two Treatises of Government* (1690).

<sup>48</sup>Andrews, *Narratives*, 20, 109.

someone—anyone—to lead them. Unfortunately, the man they got was Nathaniel Bacon.

If Bill Berkeley ultimately evolved into a despot, Nat Bacon eventually emerged as a dictator. More than any other factor in the forthcoming chain of events, it was Bacon's leadership that tainted the political right of the people to keep and bear arms for the purpose of defending themselves against Native American attacks. In effect, Bacon turned those otherwise legitimate guns toward illegitimate purposes. The people, of course, followed. They followed because they loved Bacon. At twenty-nine, he was young, vigorous, and aggressive; nothing like the stuffy, irascible, and irresolute seventy-year-old Berkeley. Even the Governor recognized Bacon's charisma and leadership potential straight away. Although he had been in Virginia only a few months, Berkeley appointed Bacon to the prestigious post of Councilor because, "Gentlemen of your quality come very rarely into this country, and therefore when they do come are used by me with all respect."<sup>49</sup> Then again, Berkeley and Bacon's wives were chummy cousins, and kinship connections were always important considerations in Virginia's tight circle of political power. In fact, Bacon's decision to migrate might have been influenced by his cousin's example, Nathaniel Bacon, Sr., who, after escaping from debtors' prison in England ten years earlier, had quickly acquired colonial fame and fortune (and despite his kinsman's revolt, became Deputy Governor in 1689). In any case, Bacon's background, bearing, and rank commanded the social respect and political deference of ordinary Virginians. As if to

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<sup>49</sup>Wertenbaker, *Torchbearer*, 54.

emphasize that point, men immediately cried out, “a Bacon! a Bacon! a Bacon!” when he first entered their encampment.<sup>50</sup>

Like those armed volunteers, Bacon hated and despised Native Americans—perhaps even more so. After all, the savages had killed one of his favorite servants (but no family member). As far as Bacon was concerned, a “friendly” native was an oxymoron; a truly good Indian was a dead one; and he was perfectly willing to protect Virginians by making sure all Indians were very good. So the people followed Nathaniel Bacon’s lead no matter where his leadership might take them—even into a civil war with other Virginians.

At first, Bacon had no intention of turning his political popularity—and emerging armed political power—into an illegitimate insurrection. In fact, he tried to assure Berkeley (and all of Virginia’s upper-class rulers) that his proposed expedition against Native Americans would divert lower-class anger away from the Governor, the Council, and the House. As Edmund Morgan concisely explains: “Bacon was offering Berkeley a way to suppress a mutiny. The Indians would be the scapegoats. Discontent with upper-class leadership would be vented in racial hatred, in a pattern that statesmen and politicians of a later age would have found familiar.”<sup>51</sup> Moreover, it is equally interesting—and important—to note that Bacon was just as persistent in his efforts to obtain a legally binding commission as Berkeley was in refusing it. In other words, the entire legitimacy of Virginia’s armed men—and their legal right to bear those arms for political purposes—hinged upon Bacon’s lawful authority to lead

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<sup>50</sup>Andrews, *Narratives*, 109-11.

<sup>51</sup>Morgan, *American Slavery, American Freedom*, 257.

them. In terms of constitutionalism, this was a prime example of “top-down” sanctioning: a duly constituted government (Virginia’s Governor, Council, House) had the sovereign authority to constitute lawful armed political power (Bacon and his army). Of course, the ultimate chain of constitutional legitimacy (and military command) ran from King Charles II down to his royal Governor who, in turn, exercised surrogate control over the land and people of the king’s royal colony. We should also keep in mind that the traditional means of exercising armed power for political purposes—the county militias—were unused and essentially ignored. The Assembly and Bacon were both raising armies made up of either paid or unpaid volunteers; they were not marshalling militiamen to their cause—at least not yet.

In any case, Berkeley refused Bacon’s offer to divert lower-class anger as well as his commission. Bacon, in turn, decided to attack Native Americans anyway. In the ensuing campaign, Bacon’s men slaughtered almost the entire tributary tribe of Occaneechees, including unarmed women and children. Upon his return, Bacon issued a “Humble Appeale of the Voluntiers to all well minded and Charitable People” which—from the distance of time, circumstance, and arm-length skepticism—reads like a judicious apology, or perhaps jaded accountability. In the “Appeale,” Bacon justified his “moving force” (as opposed to Berkeley’s “stationary forts”), as well as the unpaid volunteers (or untaxed manpower) who had “become both actours and paymasters of the necessary defensive warr.” He also made assurances that gunning the Occaneechees into oblivion without proper orders did not constitute a “Rebellion, and mutiny.”<sup>52</sup> Of course, Bacon did not consider his political act as a mass murder

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<sup>52</sup>The “Appeale” is in Coventry Papers, LXXVII, 445, and *Calendar S P C, 1675-1676*, 386-87.

either. Berkeley, however, quickly fired back with his own well-aimed volley: he denounced Bacon as a traitor and suspended him from the Council. Moreover, Berkeley offered a flag of truce to the people: for the first time in fourteen years, the Governor called for a general election of the House of Burgesses and offered Virginians an opportunity to voice their grievances against the government.<sup>53</sup> By reconstituting the consent of the people in a representative lawmaking body, Berkeley hoped to defuse the powder keg upon which he had precariously perched himself.

Although Bacon had been branded as a traitor, Henrico County voters predictably elected him as their Burgess. On June 6, Bacon traveled to Jamestown with fifty armed soldiers to guarantee his assembly seat and personal safety. The armed escort failed in its job. Not only was Bacon barred from entering Virginia's capital, he was captured quite easily without a single shot fired. Berkeley proudly presented the rebel before the General Assembly (Burgesses and Councilors) on bended knee. On the advice of his influential cousin, Bacon then handed Berkeley a written confession of his guilt and a request to be pardoned. With Bacon both physically and politically beneath him, the Governor felt magnanimous: he granted Bacon a full pardon; reinstated him as Councilor; and officially promised him a commission to fight Indians.<sup>54</sup>

By all accounts, this story should have ended here, and more or less happily for everyone involved—except, of course, for Native Americans. However, it was at this point that Nathaniel Bacon began his declension into a dangerous demagogue.

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<sup>53</sup>Election Proclamation in *Calendar S P C, 1675-1676*, 391.

<sup>54</sup>Andrews, *Narratives*, 22-23, 54, 114-15.

After begging for his pardon, Bacon fled Jamestown; whether because he feared assassination or simply had his tail between his legs is a matter of conjecture, but certainly without his promised commission.<sup>55</sup> Growing insolent, Bacon returned to the colonial capital just two weeks later with about one hundred angry and armed men determined to get a commission for their commander.<sup>56</sup> Bacon posted his troops on the approaches to Jamestown, disarmed undependable citizens, and surrounded the Statehouse. Virginia's capital and government were now captured. Shaken legislators tried to reassure Bacon that they were working on better laws and offered to read their new proposals. Bacon would have none of it. He ordered his armed soldiers into the Statehouse to threaten the Governor, Council, and Burgesses "with fyre and sword"—menacing and memorable words that would be repeated a century later in an entirely different historical context.

Governor Berkeley was certainly no coward. He rushed outside from the Council Chamber to confront Bacon, who remained out of doors. Baring his breast, Berkeley shouted, "Here! Shoot me, foregod, fair Mark, shoot!" At first, Bacon responded coolly: "I came not nor intend to hurt a haire on your Honor's Head, and for your sword your Honor may please to putt it up, it shall rust in the scabbard before ever I shall desire you drawe it." But with his adrenalin rising, Bacon then yelled, "God damne my blood, I came for a commission, and a commission I will have be-

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<sup>55</sup>Rumors of Berkeley plotting to kill him are in Bacon's own account, *William and Mary Quarterly*, 1<sup>st</sup> ser., 9 (1900-1901): 9.

<sup>56</sup>Bacon humbly asked for his pardon on June 7. He returned to Jamestown on June 23, far more confident and assertive. Aside from suffering from public humiliation and nursing a badly bruised ego, it is difficult to account for his quick impatience and abrupt frustration.

fore I goe!” Among the anxious by-standers were a number of Burgesses who watched the duelists and listened to their verbal volleys from afar—the upstairs windows of the Statehouse. Abruptly, Bacon ordered his men to aim their cocked weapons at them. An unknown Burgess frantically waved a white handkerchief while others cried out, “For God’s sake hold your handes and forebear a little, and you shall have what you please.”<sup>57</sup> With that wave and those words, the House of Burgesses—the very first legislative body created in colonial North America—unconditionally surrendered whatever sovereign authority it possessed. Within minutes, Virginia’s “parliament” experienced the major events of an entire Interregnum. Cromwell had arisen in Jamestown.

All the same, the legislators, with loaded guns pointed at their heads, were pleading for their lives with empty words. Only the Governor, as commander-in-chief, had the constitutional authority to make military appointments; he did not require their advice or consent, no matter how prudent (or panic-stricken). Berkeley, for his part, was facing *his* worst nightmare: an armed rebellion that was literally on the doorsteps of elite political power. Realizing the gravity and enormity of the situation, the Governor reluctantly gave Bacon his commission. Unlike others, he did not cower or cringe in the face of armed coercion. Yet in the end, he ultimately followed their example. Berkeley waved his political principles like a fluttering handkerchief and surrendered his constituted authority to make executive appointments—at gunpoint.

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<sup>57</sup>The Statehouse drama is in Andrews, *Narratives*, 28-29, 55, and 116-17.

What Bacon accomplished on that 23<sup>rd</sup> day of June was not exactly a military *coup d'état*. He did not depose Berkeley or topple the government, nor was it his intention to do so. In the words of one historian, Bacon repeatedly “protested that in taking the sword he was not planning a political or social revolution.”<sup>58</sup> However, another scholar also reminds us that Bacon’s actions did produce one certain outcome: “the threat of coercion by Bacon’s angry frontiersmen undoubtedly affected all legislation.”<sup>59</sup> Without doubt, the newly elected House was far more responsive to the demands of the people. It should also be noted, however, that the Burgesses were already committed to revising and rescinding much of the “Long Assembly’s” laws before Bacon pointed guns at them. The unpopular fort scheme, for example, was already abandoned; instead, a one-thousand-man standing army was authorized to launch offensive operations against Native Americans. As before, the troops were to be paid 1500 pounds of tobacco, but as an added bonus they also were entitled to “have the benefit of all plunder,” which also was a windfall for the vast majority of Virginia’s non-combatants—“plunder” did not cost taxpayers one single shilling in revenue. Legalized pillaging also included taking Native Americans as personal property, as attested by this codicil: “all Indians taken in warr be held and accounted slaves dureing life.” These seemingly straightforward provisions for obtaining paid “volunteers” were, however, pregnant with convoluted meaning.

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<sup>58</sup>Morton, *Virginia*, 259.

<sup>59</sup>Thomas Jefferson Wertenbaker, *Bacon’s Rebellion, 1676, Jamestown 350<sup>th</sup> Anniversary Historical Booklets*, E. G. Swem, ed., (Williamsburg, VA: Virginia 350<sup>th</sup> Anniversary Celebration Corp., 1957), 25.

In the first place, the Berkeley-controlled Assembly was clearly hiring armed manpower that would be contractually obligated to do their bidding in exchange for fiscal incentives and benefits. These armed Virginians, in short, would be under government pay—and under direct government control. Like all “free” wage earners, soldiers were dependent upon their bosses and served their demands. Unlike most wage laborers, however, they could not simply quit and “freely” walk away whenever they chose. Second, by adding “bonuses” in the form of plunder and slaves, the lawmakers obviously raised the fiscal stakes to ensure ample enlistments. But in doing so, they also lowered the political ante: rather than making the war against Native Americans a public venture to protect the collective community—much less a civic “virtue” of armed citizenship—civil defense was ultimately relegated to realm of private enterprise whereby individuals, now motivated by the self-interest of private gain, could reap personal profits.

Finally, those same self-serving bonuses essentially put white men on an equal footing with Indian “savages,” who also expected to receive loot and captives as their just rewards for waging war against Virginians. Of course, there was a huge cultural difference between the two races: for Native American warriors, plunder served as “trophies” that proved their martial (and manly) prowess in combat, while white captives often served as replacements for friends and kinsmen killed in battle. In short, economic rewards were not part and parcel of an Indian’s code of ethics in war. In fact, one could make an argument that Native Americans were actually “Old Model Militiamen” (and republicans): armed men who voluntarily fought to protect their families and homelands from hostile invaders with few personal motives in mind

other than community defense and collective security. However, Native Americans also had a custom of “specialized armed labor” that English republicans neither practiced nor preached. In their culture, men did not put down hoes to take up bows because women were assigned the chores of cultivation. As a result, Native American warriors were more constantly (and consistently) embodied as an armed force than colonial militiamen. Only in 1776 was Adam Smith able to convince most Englishmen (and Americans) that a “division of labor” was extremely profitable in more ways than one—including the specialization of armed manpower into professional armed forces.<sup>60</sup>

All the same, the newly elected Assembly did instill some sense of civic mindedness within its revised legislation. Specifically, voting rights that were revoked in 1670 were restored to ex-servants and poorer freemen who owned no land or did not “keep” a household; thus divorcing two fundamental political rights of citizenship—voting and bearing arms in the militia—that traditionally (and theoretically) were wedded to property ownership. Clearly, Virginia’s lawmakers had either not read or taken to heart James Harrington’s *Commonwealth of Oceana* (1656), which linked political independence with economic independence. In Harrington’s formulation, individuals who did not own land were dependent upon others for their livelihoods and therefore could be neither citizens nor soldiers.<sup>61</sup> Rather than rely upon theoretical abstractions, Virginia’s affluent pragmatists apparently assumed poor

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<sup>60</sup>Adam Smith, *The Wealth of Nations* (London, 1776).

<sup>61</sup>James Harrington, *The Commonwealth of Oceana; and A System of Politics*, ed. J. G. A. Pocock (Cambridge, England: Cambridge University Press, 1992), 11-13, 100-41, 269-70.

bachelors would express their grievances with ballots rather than bullets and, with at least some political stake in the community, politically protect wealthier Virginians who “owned” people as well as land.

Nevertheless, Bacon’s armed coercion had immediate political consequences of its own. No doubt written as a “window-waving” postscript, Bacon was included in the amended defense act as “generall and commander in chief” of the authorized standing army. Lawmakers also penned a “general pardon and oblivion” for all treasonous acts committed before June 24, which plainly included the armed seizure of Jamestown and the Statehouse. In addition, negligent and grasping officeholders who sided with Berkeley were ousted from power—including that incorrigibly inept politician, Colonel Edward Hill, who once again was suspended from holding public office, in this particular case, as a sitting Charles City County Burgess.<sup>62</sup>

Some Second Amendment scholars might argue that this was a “model” insurrection and an “ideal” way for citizens to use arms to achieve their political objectives. They might have a good case—at least up to this point in the rebellion. But once Bacon tasted the fruits of armed political power, its acrid seeds—arrogance and jealousy—soon poisoned him, and ultimately de-legitimized the right of “the people” to defend themselves by repelling the armed invaders with equal armed force. What happened next underscores that point.

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<sup>62</sup>Hening, *Statutes*, 2:341-365. As always, Hill bided his time well. In 1691, he became the first person chosen for a newly created position—Treasurer of the Colony (see *ibid.*, 3:92-94). Apparently, it was hard to keep a well-connected man down—at least not for very long—which perhaps speaks volumes about the resiliency of elite political power in “Ole Virginy.”

Unsurprisingly, Berkeley again declared Bacon a rebel and traitor as soon as he left Jamestown to consolidate and organize the newly created army. The Governor also attempted to raise armed forces of his own from among the people—an effort that proved totally vain and hopeless. According to contemporary accounts, Berkeley formed a twelve hundred-man army from the Gloucester and Middlesex County militias, armed Virginians who apparently thought they were going to fight Indians, not Bacon. When Berkeley informed them of their true mission, there “arose a murmuring before his face, ‘Bacon Bacon Bacon,’ and all walked out of the field, muttering as they went, ‘Bacon Bacon Bacon’ leaving the Governor and those that came with him to themselves.”<sup>63</sup> The commissioners later reported Berkeley’s reaction to the failed recruiting effort: “. . . he grew sick of the essay and with very grieve and sadness of spirit for soe bad successe (as is said) fainted away on horseback in the field.”<sup>64</sup> After regaining consciousness (but not his composure), Berkeley fled across the Chesapeake Bay to Accomack County, thus abandoning the field (and Jamestown) to Bacon. Feeling politically isolated, overpowered, and desperate, Berkeley wrote from his sanctuary this oft-quoted passage to his friend, Thomas Ludwell, on July 1, 1676: “How miserable that man is that governs a people wher six parts of seven at least are poore endebted discontented and armed”—words that King George III might empathize with one hundred years later, and almost to the very day.<sup>65</sup>

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<sup>63</sup> Andrews, *Narratives*, 34, 56-58.

<sup>64</sup> *Ibid.*, 121.

<sup>65</sup> Coventry Papers, LXXVII, 145.

But unlike future revolutionaries, Bacon knew full well that Berkeley was a defeated man in July 1676—at least militarily. Nonetheless, he issued a “Manifesto” on August 3, 1676, from his headquarters at Middle Plantation (the present site of Williamsburg). Officially entitled a “Declaration of the People,” Bacon demanded that Berkeley and nineteen named confederates surrender themselves within four days. If they failed to do so, they would be seized as traitors and their estates confiscated. The “Declaration” was signed “Nathaniel Bacon, General by Consent of the People.” The political power Bacon assumed as the “people’s general,” however, went much farther—and in the minds of Virginia’s social and political elite, dangerously too far.

Bacon required all elite “gentlemen and officers” of the militia to sign an oath that they would pledge their arms and men to Bacon personally, and give no military aid whatsoever to their former commander-in-chief, Sir William Berkeley. Even more significantly (and ominously), Bacon demanded that they “oppose what Forces shall be sent out from England by his Majesty against Me, till such time as I have acquainted the King with the state of this Country, and have had his Answer.”<sup>66</sup> One of Bacon’s confidants, John Goode, warned that such a drastic step would alienate Virginia’s upper classes and possibly encourage them to join whatever armed forces King Charles II decided to send. Goode posed the matter in no uncertain terms: “Sir, you speak as though you designed a total defection from His Majesty and our country.” Bacon’s response was equally direct—and unequivocal: “Why, have not many

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<sup>66</sup>Quoted in Leach, *Roots of Conflict*, 9, from Public Record Office, Colonial Office Papers 1/39, 54.

princes lost their dominions so?”<sup>67</sup> Although many “gentlemen” initially refuse to swear that they would oppose the King’s troops, Bacon allegedly used “threats, force and feare” behind “locked doors” to render their compliance.<sup>68</sup> In the end, they all signed over their militias to the one man who clearly was “in charge.” In effect, a popular demagogue had pronounced himself military dictator of Virginia. He had overthrown the existing government, threatened to fight royal troops with his private army, and used armed political coercion (if not outright physical intimidation) against fellow Virginians.

Without any demonstrated provocation—but perhaps as a symbolic gesture denoting “the decline and fall” of Virginia’s “Elite Empire”—Bacon burned Jamestown to ground on September 19, 1676. He also began seizing supplies for his army from the general populace and instituted martial law. Even more shockingly, he started enlisting (and arming) white servants and black slaves to his cause, offering unfettered freedom in exchange for their unfaltering allegiance. That particular policy drew a prescient prediction from Councilor Thomas Ludwell: “it will in a short time ruine him, since he will make all masters his Enimies.”<sup>69</sup> Sure enough, Bacon’s popular support began to dissolve in short order after sacking Jamestown, looting local provisions, and enrolling bondsmen. From an estimated 13,000 men of military age among a total population of 35,000, Bacon had approximately one thousand men

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<sup>67</sup>Quoted in Morton, *Virginia*, 263, from Public Record Office, Colonial Office Papers 5/1371, 232-240.

<sup>68</sup>Bacon’s “Manifesto” is in *The Virginia Magazine of History and Biography* 1 (1893-94), 55-61. Bacon’s “strong-armed” tactics are related in Andrews, *Narratives*, 30-34; and Force, *Tracts*, I, No. 8, pp. 6-7.

<sup>69</sup>Thomas Ludwell to the Privy Council, Coventry Papers, LXXVII, 332.

left under arms who lacked military training and discipline and, in general, were viewed as “*banditti* rather than soldiers” by most Virginians.<sup>70</sup>

Thus within two short months, the armed autonomy to defend oneself against enemy attacks—which only became an issue because citizens lost confidence in a duly constituted government that was charged with protecting their lives and property with armed political power—all too easily degenerated into a military dictatorship—which, in turn, contradicted the very concept of armed self-autonomy within a representative government of delegated powers. Indeed, Bacon’s Rebel Army had become as much (if not more) of a threat to life, liberty, and property as hostile Indians. The lesson to be learned should have been obvious to many contemporaries, as it should be to us: too much centralized control over armed political power can be dangerously ineffective; too little can be dangerously disruptive. But in the summer of 1676, Virginians had no concrete checks and balances in place that could effectually limit the excesses of armed political power. In that respect, they were constitutionally related to Interregnum Englishmen.

We will never know how Virginia would have fared under a regime of the sword. Struck down by a “bloody flux” (most likely dysentery), Nathaniel Bacon died on October 26, 1676. His rebellion expired with him. Much like his hidden burial place, it is difficult to find the lasting legacy—or ultimate political and constitutional consequences—of Bacon’s armed insurrection. There was little bloodshed among white Virginians during the revolt. Moreover, there were only eighty slaves and twenty servants who refused to surrender after Bacon died; not, perhaps, because

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<sup>70</sup>Shea, *Militia*, 114.

they felt any lingering loyalty to their dead leader, but because of the opportunity the rebellion offered them—to be free of coercion from social despots and political dictators alike. Nevertheless, they were soon captured and returned to their owners and masters.<sup>71</sup>

The leaders of the rebellion, however, met a different fate. Berkeley executed many of them as traitors. Among their number was Captain Thomas Hansford, one of Bacon's chief lieutenants. He was tried by military court-martial—which the royal commissioners later declared an illegal use of judicial power—and hanged. Even though he pleaded to be shot like soldier, Hansford was the first native Virginian (white, black, or red) ever to be hung in the Old Dominion. Historian Richard L. Morton relates Hansford's final words: "When brought to the gallows he denied being a rebel, asked the people to witness that he died a loyal subject and a lover of his country, and protested that he had taken up arms only against the Indians, who had killed many Christians."<sup>72</sup> Perhaps we should accept a condemned man's words at face value; that the political right to "take up arms" does not always—or even necessarily—equate to violently overthrowing one's own government. Then again, Hansford's dying testimony could lend additional support to the "obvious lesson in the rebellion" discovered by Edmund Morgan: "Resentment of an alien race might be more powerful than resentment of an upper class."<sup>73</sup>

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<sup>71</sup>Washburn, *Governor and Rebel*, 85-89.

<sup>72</sup>Morton, *Virginia*, 274.

<sup>73</sup>Morgan, *American Slavery, American Freedom*, 269-270.

And yet for most of Virginia's ruling elite, that historic episode was interpreted in an entirely different way: that a lower class "rabble" *did* rebel against—and, for a brief time, actually overthrew—their political power with armed force. In fact, it would take a full century before Virginia's upper class leaders *absolutely* trusted, *heartily* praised, *fully* relied upon, or *enthusiastically* enlisted the armed manpower—and thus the armed political power—of those who were socially and economically beneath them. It also took a tremendous "leap of faith" on their part to believe that all white Virginians were politically equal to one another, and thus entitled to the same political rights of self-government. So the more jarring facts and uncomfortable aspects of Bacon's Rebellion (and the Interregnum Republic) were relegated to the dustbin of history, to a long dead past that was best forgotten rather than remembered—especially by Radical Whigs who launched another rebellion in Virginia in 1776.

Nevertheless, the full account of Bacon's Rebellion is worth relating not only because of its political drama and personal stories, but also because it offers insight into the original meanings, intended purposes, inner dynamics, and eventual outcomes of Virginia's first armed insurrection. It also gives historical insight into how and why Virginians were quick to redesign the composition, character, and competence of their militias—even to the point of totally abandoning them in times of acute political crisis. In other words, there were periods in Virginia's history when militias were not the best means for providing the colony with reliable armed protection. Of course, that same history proved that England's standing army was hardly "neces-

sary” to Virginia’s provincial “security” either—at least not until the Great War for Empire erupted in Virginia’s own back yard.

But in the meantime, the only “law full” political means for defending and policing Virginians was the county militia. That traditional military institution, however, had serious troubles of its own. As its foremost scholar aptly notes: “The Virginia militia was never the same after 1676. It, too, was a victim of Bacon’s Rebellion.”<sup>74</sup> Indeed, the very issue that triggered Virginia’s civil war—security from enemy attacks and invasions—remained unresolved (as did the problem of enforcing unpopular laws and suppressing insurrections). If a “well regulated Militia” was to remain “necessary to the security” of individual Virginians and their collective polity, necessary militia reforms were in order.

How that traditional institution managed to survive—both in theory and in practice—during periods of peace, sporadic wars, and a political revolution receives close attention in the following chapters.

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<sup>74</sup>Shea, *Virginia Militia*, 121.

## CHAPTER 2

### MILITIAS AND STANDING ARMIES IN ENGLISH POLITICAL THEORY, 1648-1776

“A Standing Army is inconsistent with A Free Government, and absolutely destructive to the Constitution of the English Monarchy.”

—John Trenchard  
“Country” Pamphleteer  
1697<sup>1</sup>

“In former times, says our Author [John Trenchard], there was no difference between the Citizen, the Souldier, and the Husband-man; but ‘tis otherwise now, Sir, War is become a Science, and Arms an Employment.”

—Daniel Defoe  
“Court” Pamphleteer  
1697<sup>2</sup>

#### The Constitutional Context

Wielding the political power of the sword was a crucial component—and a vital expression—of a larger constitutional question that occupied English politics and political thought during the seventeenth century: who had the ultimate authority to govern Englishmen—those who enacted the laws of the realm (Parliament), or those who executed and enforced them as heads of state (monarchs)? Parliamentarians argued that they held supreme sovereignty to rule because they were elected by the ruled, represented their best interests, made laws in consideration of those interests, and thus held the consent and confidence of the people to be governed by those laws. The summary statement of their position was that English constitutionalism and gov-

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<sup>1</sup>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).

<sup>2</sup>Daniel Defoe, *Some Reflections on a Pamphlet Lately Published, Entitled, an Argument Shewing That a Standing Army Is Inconsistent . . .* (London, 1697).

ernance rested upon “the rule of law, not men.” Monarchists countered that kings and queens ruled by “divine right” and had done so for centuries. In their formulation, chief executives were the better caretakers and determiners of the people’s welfare, and that no law could be foisted upon any Englishman by the legislature without the executive’s prior approval. “The king’s law,” in other words, ruled the king’s subjects.

It was within that broader context that a related struggle arose over who should command and control the military and police powers of the state—the legislature (Protestant parliamentarians) or the executive (Stuart monarchs). It was (and still is) axiomatic that whoever commands and controls armed political power was supremely sovereign. Like all governments, the English state required two swords—the sword of war (military power) and a sword of justice (police power). No one believed England could long endure without a means to preserve internal order and provide external security. Since a constitution establishes, or “constitutes,” the basic principles and working procedures of government that ensure domestic order and common defense, the choice and connection between legislative and executive supremacy also concerned other issues that were vital to English constitutionalism—local autonomy versus centralized authority; and what political class of armed manpower should lawfully (or “rightfully”) police the population and protect the nation. Those core constitutional concerns can be posed in the form of fundamental questions: Who should lawfully command and control the political power of the sword; and what type of legitimate force should be used to exercise that armed political power? The constitutional purpose of the sword (or the reason for constituting such

potent political power in the first place) was already predetermined—to police the population and defend territory. Yet many Englishmen recognized and feared that armed political power could become excessive—or unlimited and unrestrained—which was precisely why the issues of command, control, and manpower were so vital. The most extreme example of an unchecked use of police and military power is, of course, a police state under a military regime. Therefore, another definitive dilemma was also apparent: How to constitute sufficient armed political power to perform police and military functions, and yet also restrain that armed authority from becoming so excessive that it poses as much of a threat to lives, liberties, and property as unruly citizens and hostile enemies. Balancing the political power of the sword on a reasonable and workable fulcrum was no easy task—no matter who was supremely sovereign. Moreover, it was a matter of considerable disagreement and debate.

Englishmen would spend most of the seventeenth century trying to achieve that crucial balance within their particular framework of government, which actually caused all of the trouble in the first place. Indeed, the core concerns about armed political power were all directly related to three fundamental features (some would say flaws) of England's "ancient" constitution. First, the nation state and national church were one; they were not "separated." Consequently, religion was always a vital matter of national politics and law. Second, hereditary monarchs were the sovereign rulers of the nation state and the national religion, but were never chosen or elected by "the people." Historically, there were only two ways to effect dynastic changes: death or conquest. Third, as the defenders of the realm and religion, monarchs had

absolute control over the power of the sword under the constitution. Since Protestant parliamentarians thoroughly mistrusted the executive sovereignty of a Catholic Crown, they argued that the legislature should control the sword of war by deciding when the nation was to be defended; how (and how many) armed men were to be raised, equipped, and trained; and who commanded those armed forces in battle (no Catholics allowed). They also claimed that lawmakers should control the sword of justice to ensure the laws they made were enforced—especially those concerning religious matters. In essence, the legislature was attempting to take away the armed political power of heads of state to make war and ensure domestic obedience on their terms alone, which would have resulted in one of two likely outcomes: a kingless form of government (a republic), or one in which the monarch served as a mere figurehead. In either case, the political function and constitutional authority of the sword would be assumed solely by Parliament. The English Civil War, the Exclusion Crisis, and the Glorious Revolution pitted Protestant Parliaments against Catholic Kings in epoch struggles over religion, the monarchy, and armed political power. Those momentous events were sparked by one overarching fear—that a Catholic Crown would use armed coercion to enact and enforce laws unfavorable to a Protestant majority. By the same token, parliamentarians wanted to disarm and oppress a Catholic minority. Both sides sought constitutional protections for their respective political aims and religious agendas. Moreover, both sides were willing to use armed force against their opponents to achieve their objectives.

In brief and blunt synopsis, a Protestant Parliament armed, trained, and organized Protestant Englishmen into a strong military force commanded by Oliver Crom-

well (The New Model Army). That army won the English Civil War by defeating Royalist regiments and Cavalier cavalry under a Catholic monarch (Charles I) at the Battle of Naseby on 14 June 1645. Militias were not relied upon to win that battle or any others during the Civil War. In fact, the last time such forces saw hard combat was at the Battle of Hastings on 14 October 1066. On that occasion, the Anglo-Saxon “fyrd” were thoroughly routed and defeated, thus enabling a Norman Invasion to become a Norman Conquest. In stark contrast, the major outcome of the English Civil War was a kingless, non-aristocratic republic. It was the most revolutionary episode—and anomaly—that ever occurred in English history. The immediate post-war challenge was how to adapt to such a monumental change.

After the Civil War ended, the parliamentary army was not disbanded, but remained standing to perform the functions of an internal police force: suppress insurrections among political and religious dissenters, and enforce laws. Subsequently, the Commonwealth Era exhibited two traits that have become, to a greater or lesser degree, common to all modern republics—paranoia and police—whereby fear and suspicion of an “enemy within” results in excessively policing the population. Moreover, the unprecedented “peacetime” use of the New Model Army—along with its auxiliary police component, the “new militia”—drastically changed the political circumstances and conditions for exercising domestic police power, which exacerbated rather than eased political anxieties and constitutional uncertainties. Protestants began squabbling with each other. A second “civil war” broke out even before Charles’s execution punctuated the finality of the first.

During the Commonwealth Interregnum, the House of Commons *was* Parliament. In that peculiar political situation and constitutional setting, the landed gentry—a social and political class that was legally represented as “the Commons”—should have had complete control (supremacy) over the sword, whether it was wielded as a permanent army or readily available militias. The gentry tried to provide a legal (statutory) basis for their supreme authority over military and police power on three separate occasions: on 6 December 1648 (Pride’s Purge); on 20 April 1653 (Cromwell’s dissolution of the Rump); and on 13 October 1659 (expulsion of the revived Rump by army officers). Rather than saluting the legislature’s supreme authority, the New Model Army performed an abrupt about-face, leveled its guns, and forced Parliament’s surrender. Ironically, the revolutionary precedent established under Cromwell’s original 1642 Militia Ordinance—legislative supremacy over the sword—was judged “unconstitutional” at bayonet point by military tribunes who claimed that *they* were superior guardians of plebeian rights, not patrician rulers. In effect, parliamentarians had created an armed monster (the New Model Army) that they no longer politically commanded or legally controlled. It was within the context of that second power conflict that a few republicans began to question (and openly criticize) their own republic—and with very good reason. The republican “experiment”—and experience—had turned into a total disaster. For the first and only time in their history, Englishmen were living in a police state under a military dictatorship.

The Civil War and Interregnum witnessed the emergence of England’s first-ever standing army and, in consequence, the magnification of the militia as a more venerable, but no less permanent body of armed men. The period also gave birth to

all of the consequential questions of whether the nation should rely on one or the other or both of those armed institutions, as well as what the relationship between them should be in terms of exercising police and military power. The relative benefits and burdens of exercising armed political power with either a standing army or a regular militia were analyzed, assessed, and argued among assorted political theorists (and polemicists) from 1648 to 1697. More often than not, militias were perceived (and portrayed) as exemplifying legislative sovereignty and a certain political class of armed manpower. Standing armies, on the other hand, were viewed as the instruments of executive supremacy and an entirely different class of manpower. More generally stated, a militia symbolized majority rule and popular consent while a standing army “stood” for minority rule and despotism. For the most part, their ideas offered solutions to the constitutional questions that were raised from the on-going struggles for control over the nation’s sword. In a period that was peppered with puzzles and paradoxes, perhaps the greatest was that a Protestant republican’s worst nightmare—armed despotism—had come true in a protestant republic. The reason for that reality was recognized at once: republicans had failed to constitute legal restraints and controls over police and military power that would protect them from the likely excesses and abuses of that armed authority. It was at that exact moment of realization—and for that precise reason—that the “intellectual origins” of the Second Amendment were “originally” sown. Those seeds were nurtured by one fertile conviction—a deep distrust of any constitutional configuration or design that put the swords of justice (police power) and war (military power) in the hands of rulers who could exercise that armed authority independently of the ruled (or without the active

consent and participation of “the people”), which would enable those rulers to perpetuate and proliferate their political power through armed coercion and oppression. The great object in view was clear: Englishmen must be governed by the rule of law (legislative power) rather than ruled by the sword (executive power).

### The Origins of a Theory

Four years after Virginia’s Cavaliers surrendered to the New Model Army without firing a shot, a “Commonwealthman” in England by the name of James Harrington (1611-1677) did something no Royalist dared (or was permitted) to do: he challenged Oliver Cromwell’s potent sword with the point of his pen. Harrington’s first and most famous work—*The Commonwealth of Oceana* (1656)—was written to encourage Cromwell and the officers of the New Model Army to establish an English republic, and offered a model on how the power of the sword should be constituted without posing a threat to free institutions or individual liberties. As such, the treatise was seen as an audacious (if not antagonistic) commentary on Cromwell’s *de facto* military regime; so much so, in fact, that Harrington had trouble getting it published. After Cromwell died on 3 September 1658, Harrington wrote fourteen additional essays on the proper relationship between armed citizenship, political power, and constitutional balance in untainted republics. It is important to note that all of Harrington’s writings and ideas about constitutional balance, armed political power, and citizenship were aimed at reforming the current military establishment, and provided the intellectual basis for Radical Whig indictment against standing armies, which included a reformation of the militia. Nevertheless, *Oceana* remained Harrington’s

magnum opus and was destined to become one of those rare works that transcend their immediate historical context.<sup>3</sup>

In the words of intellectual historian J. G. A. Pocock, James Harrington was the “fountainhead” of “classical republicanism” that flowed from seventeenth-century England to eighteenth-century America.<sup>4</sup> Another respected scholar, Paul A. Rahe, submits this additional appraisal:

*The Commonwealth of Oceana* is today but seldom read, and the same can be said for the various works that Harrington published during the last four years of the Interregnum in its defense. In truth, they can hardly be counted among the master works of political philosophy. But they deserve careful consideration from historians nonetheless, for Harrington’s thinking exercised considerable influence

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<sup>3</sup>The only single volume compilation of Harrington’s entire writings is *The Oceana and Other Works of James Harrington, Esq., with an Exact Account of His Life*, which was edited by John Toland and published in London in 1727. A 1771 reprint by T. Becket, T. Cadell, and T. Evans can be found in the Rare Book/Special Collections at the Library of Congress. More recent collections of Harrington’s essays are not as all-inclusive as Toland’s original volume, but are far more accessible. Harrington is quoted in this chapter from one of those collections—*The Commonwealth of Oceana; and A System of Politics*, ed. J. G. A. Pocock (Cambridge, England: Cambridge University Press, 1992)—hereafter cited as Pocock, *Harrington’s Oceana* (or) *Harrington’s System of Politics*.

The following secondary sources provide valuable summaries of Harrington’s major arguments: Paul A. Rahe, *Republics Ancient & Modern* (Chapel Hill: The University of North Carolina Press, 1994), vol. 2, *New Modes & Orders in Early Modern Political Thought*; Lois G. Schworer, “No Standing Armies!” *The Antiarmy Ideology in Seventeenth-Century England* (Baltimore, MD: The Johns Hopkins University Press, 1974); Caroline Robbins, *The Eighteenth-Century Commonwealthman* (New York: Atheneum, 1968); J. R. Western, *The English Militia in the Eighteenth century: The Story of a Political Issue, 1660-1802* (London, England: Rutledge & Kegan Paul, 1965); and three vital works by J. G. A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge, England: Cambridge University Press, 1957); *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, NJ: Princeton University Press, 1975); and “Machiavelli, Harrington, and English Political Ideologies in the Eighteenth Century,” *22 William and Mary Quarterly* (October, 1965): 549-583.

<sup>4</sup>J. G. A. Pocock, “Machiavelli, Harrington, and English Political Ideologies in the Eighteenth Century,” *William and Mary Quarterly* 22 (October 1965): 552. Hereafter cited as Pocock, “English Political Ideologies.”

in radical Whig circles in seventeenth- and eighteenth-century England, and it gave rise to a genre of constitutional science that helped the proponents of revolution in Britain's colonies justify their break with the mother country, and that subsequently guided them in constructing governments all their own.<sup>5</sup>

More specifically, Harrington is recognized as the “founding father” of the “Country,” or “Whig,” indictment against standing armies, which ultimately became the intellectual basis of Articles VI and VII in the English Bill of Rights, as well as the American Second Amendment. Without question, James Harrington's political ideology provides vital insight into a core constitutional concern that arose during the seventeenth and eighteenth centuries: the military's proper role and relationship to civil government and by extension, the boundaries of the executive's prerogative to use that armed force—especially as a means to police the population.

Nevertheless, it is also important to recall and recognize that Harrington's works were not the first criticisms leveled against the Commonwealth's misuse of the sword. In other words, his “original” political ideology was not created in an intellectual vacuum. In truth, there were a number of opposing points of view across a broad political spectrum. Indeed, some people were even questioning the limits of Parliament's prerogative over armed force even before the 1648 Ordinance was voided at gunpoint. Opposition to upper-class rule in the legislature was especially evident among the Levellers, a political faction within the New Model Army who had become disillusioned with a republic run by a self-serving oligarchy of “gentlemen” that ignored the “common men” in the “Commonwealth.” A principal Leveller leader, John Lilburne, made that position quite clear before a soon-defunct House of Lords in 1646: “All you intended when you set us a-fighting was merely to unhorse and dis-

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<sup>5</sup>Rahe, *Republics Ancient & Modern*, 2:179.

mount our old riders and tyrants, that so you might get up and ride in their stead.”<sup>6</sup>

The Levellers argued that control over the sword did *not* rest solely in a gentry-controlled Parliament, but belonged to all of “the people”—which included those who did not own land and thus could not vote. In fact, the Levellers were the most “liberal” group in arguing for individual rights—especially the political rights that were associated with “keeping and bearing arms.”

In their *Agreements of the People* in 1648 and 1649, the Levellers held that the military obligations the legislature could impose on individuals must be limited and restrained. Indeed, the very first of six “particulars” that were “excepted and reserved from our representatives” in the 1649 *Agreement* read as follows:

(1) We do not empower them [legislators] to impress or constrain *any* person to serve in foreign war, either by sea or land, nor for any military service within the kingdom; save that they may take order for the forming, training, and exercising of the people in a military way, to be in readiness for resisting of foreign invasions, suppressing of sudden insurrections, or for assisting in the execution of the laws. And [legislators] may take order for the employing and conducting of them for those ends, provided that, even in such cases, none be compellable to go out of the county he lives in, if he procure another to serve in his room.<sup>7</sup>

Even more specifically, the Commons was denied the power “to impress” (draft) men for military service on the grounds that “every man’s conscience . . . [must be] satisfied in the justnesse of that cause wherein he hazards his life”—the first constitutional proposal, as Lois Schwoerer notes, to affirm the right of a “conscientious” person to

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<sup>6</sup>John Lilburne quoted (without reference) in Schama, *Wars of the British*, 184.

<sup>7</sup>*Agreement of the People, 1649*, in Bernard Schwartz, ed., *The Bill of Rights: A Documentary History*, Vol. 1 (New York: Chelsea House Publishers, 1971), 27. Italics are mine. Hereafter cited as Schwartz, *Bill of Rights*.

“object” to an unjustifiable war for either political or religious reasons.<sup>8</sup> Historian Bernard Schwartz also reminds us that the 1649 *Agreement* was “the first written organic instrument in Anglo-American history.” Moreover, the Levellers fully realized that “With the disappearance of the monarchy, . . . the chief danger to feared was the misuse of power by a legally omnipotent legislature.”<sup>9</sup> The Leveller lesson was plain and simple: whoever held supreme political power could become supremely dangerous.

I can only add (but nonetheless emphasize) that the Levellers were the first to assign specific military and police tasks to “the people” within a written constitution—repel foreign invasions, assist with law enforcement, and suppress sudden insurrections. Just as significantly, the last article in 1649 *Agreement* further defined the boundaries of “insurrections” in these terms:

Tenthly, it is agreed that whosoever shall by force of arms resist the orders of the next or any future representative—except in case where such representative shall evidently render up, or give, or take away the foundations of *common right, liberty, and safety* contained in this agreement—he shall forthwith . . . lose the benefit and protection of the laws and shall be punishable with death as an enemy and traitor to the nation.<sup>10</sup>

This was the first organic expression of a “common man’s right” to resist lawmakers who might become despotic, inept, or corrupt while in office.

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<sup>8</sup>John Lilburne, *Foundations of Freedom: Or an Agreement of the People* (London, December 10, 1648), 11; cited and quoted in Schwoerer, *No Standing Armies*, 53-54.

<sup>9</sup>Schwartz, *Bill of Rights*, 1:22.

<sup>10</sup>*Ibid.*, 28. Emphasis is mine.

Even more significantly, they contended that only the chosen representatives of the people could raise an army. While those representatives could appoint a commander-in-chief and general staff, all other officers were to be elected by citizens in the counties where the troops volunteered. Those officers, however, were to be barred from holding elective office so as not to “corrupt” civil government with bloated self-interest and overfed patronage. All armed political power, in sum, would remain subservient to civilian control through the peoples’ representatives, as well as subject to public oversight (armed involvement and unarmed interest by citizens). Hence “the people” would rule the sword rather than being ruled by it—which was also Harrington’s primary aim in constructing Oceana’s constitution.<sup>11</sup>

In some respects, Harrington had strong liberal affinities with the left-wing Levellers; particularly their maxim that the people should be “masters of their own Arms, and . . . commanded in the use of them by a part of themselves (that is their Parliaments) whose interest in [is?] the same with theirs.”<sup>12</sup> By giving “the people” both specific and surrogate control over the nation’s sword, the central government (both executive *and* legislative) would be checkmated in any move to exercise intrusive armed coercion at the local level without popular concurrence. Ostensibly, local autonomy would have thwarted the religious right from creating a “new Militia” system under Major Generals who not only selected and commanded their hired troops, but also used them to impose a mounted moral crusade in the counties. On the other

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<sup>11</sup>Ibid., 26.

<sup>12</sup>*The Leveller: Or the Principles & Maxims Concerning Government and Religion, Which are Asserted by Those That Are Commonly Called, Levellers* (London, 1659); cited and quoted in Schwoerer, *No Standing Armies*, 68.

hand, Harrington had very different ideas about which “people” could be entrusted with armed political power. According to historian Christopher Hill, “His main concern in *Oceana* was to find a constitution which would preserve the essential gains of the Civil War, and yet protect the republic against what he regarded as the dangers of excessive democracy.” More specifically, “one object of *Oceana* was to establish a constitution which would protect the gentry from an absolute monarchy or military dictatorship, another was to protect ‘the people’ from the poor, from ‘Robbers and Levellers’.”<sup>13</sup>

Without question, whenever Harrington wrote of “the people” or positively used the term “democracy,” he was referring to one particular economic class—those who owned enough land to vote. Indeed, he began his “narrative” on *Oceana*’s model republic with these notable words:

In the institution or building of commonwealth, the first work (as that of builders) can be no other than fitting and distributing the materials. The materials of the commonwealth are the people; and the people of *Oceana* were distributed by casting them into certain divisions, regarding their quality, their ages, their wealth, and the places of their residence or habitation, which was done by the ensuing orders.

In the first of those four orders—which were decidedly military in character—“the people” were divided “into freemen and citizens, and servants, while such; for if they [servants] attain unto liberty, that is to live of themselves, they are freeman or citizens.” In Harrington’s judgment, “This order needeth no proof, in regard of the nature of servitude, which is inconsistent with freedom or participation of government

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<sup>13</sup>Christopher Hill, *Puritanism and Revolution: Studies in Interpretation of the English Revolution of the Seventeenth Century* (New York: St. Martin’s Press, 1997), 270, 276. Hereafter cited as Hill, *Puritanism and Revolution*. The reference to “Robbers and Levellers” is in Pocock, *Harrington’s Oceana*, 181.

in a commonwealth.” Consequently, servants were barred from keeping and bearing arms, which was a right of citizenship; or as Harrington phrased it, “A commonwealth whose arms are in the hands of the servants had need be situated . . . out of the reach of such clutches.” The second order further divided “citizens into youth and elders (such as are from 18 years of age to 30 being accounted youth, and such as are of 30 and upwards elders) and establisheth that the youth shall be the marching armies, and the elders the standing garrisons of this nation.” Significantly, Harrington does not use the term “militia” within this order, but rather “marching armies” of youth and “standing garrisons” of elders.

The third order separated “the citizens into horse and foot” based on the “valuation of their estates; they who have above one hundred pounds a year in land, goods or monies, being obliged to be of the horse, and they who have under to be of the foot.” Harrington justified that classification on the grounds that “Citizens are not only to defend the commonwealth, but according to their abilities,” or capacity to acquire property and wealth. He also held that “the necessary prerogative”—or the authority to govern the commonwealth—should be given “unto estates in some measure.” Accordingly, “those chosen out of the horse” held the majority of seats in Oceana’s Parliament.

The last institutional order, or building block of republic, distributed “the people” according to their “places of habitation, unto parishes, hundreds and tribes.” A “tribe” was Harrington’s idiomatic expression for “native” autonomy organized at local county level “as in the late monarchy.” The rationale for this order was obvious: “For except the people be methodically distributed, they cannot be methodically

collected,” and “the being of a commonwealth” consisted “in the methodical collection of the people,” which was for their common benefit (or “collective good”).<sup>14</sup> As the foregoing construction of “the people” reveals, Harrington was obviously a product of his particular social class (the landed gentry) and cultural time—so too was *Oceana*. In sum, political hegemony was grounded upon social and economic hierarchy.

Even so, it is also important to remember (and realize) that Harrington’s philosophy was created within a peculiar political and constitutional context; one in which a particular political and legal class—the substantial gentry—had the opportunity to exercise supreme governing power within a unicameral Parliament (the House of Commons). He also shaped his ideas with a particular motive in mind—to guarantee the gentry’s ruling autonomy in the counties and Commons. Indeed, “the gentry” and “the people” were both crucial cornerstones to his commonwealth. While agreeing in most respects with what Niccolo Machiavelli—“the only politician of later ages”—had written long ago about popular government, Harrington believed the learned Florentine had “missed” the gentry’s importance “very narrowly and more dangerously” when “he speaks of the gentry as hostile to popular governments, and of popular governments as hostile unto the gentry, and makes us believe, that the people in such are so enraged against them, that where they meet a gentleman they kill him.” To the contrary, “a nobility or gentry in a popular government . . . is the very life and soul of it.” Moreover, it “is a pernicious error” for “such as go about to insinuate”—“such as” Machiavelli and the Levellers, for instance—that the “interests” of the gen-

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<sup>14</sup>Pocock, *Harrington’s Oceana*, 75-76, 95-96

try and the people “were each destructive unto other; when in truth an army may as well consist of soldiers without officers, or of officers without soldiers, as a commonwealth (especially such an one as is capable of greatness) of a people without a gentry, or of a gentry without a people.” In point of fact, “There is something first in the making of a commonwealth, then in the governing of her, and last of all in the leading of her armies, which . . . seems peculiar unto the genius of a gentleman.” Indeed, “if any man have founded a commonwealth, he was first a gentleman”—just as Harrington was a “gentleman” himself.<sup>15</sup> In that respect, he shared a keen kinship with landed gentlemen who stood to the far right on political and religious issues.

Even though the righteous right used the New Model Army and “new militia” to oppress Catholics, there were those among them who nonetheless preached the sins of lower-class soldiers. One of those devout critics was William Prynne, who preferred having the Levellers “levelled to the very ground,” which was about as close as the gentry wanted them to get to “owning” a piece of land.<sup>16</sup> (The Leveller “insurrection” was, in fact, severely suppressed during the second “civil war.”) In a tract published the same year as Harrington’s *Oceana*, Prynne opposed standing armies on economic, class, and moral grounds. Prynne’s primary purpose (and immediate motive) was to prove that stationary forts and standing garrisons were militarily and fiscally useless, unsound, and unnecessary—much like Virginians had argued on the eve of Bacon’s Rebellion. Since England was an island nation, he favored the floating fortresses of the navy for homeland defense. Even though the construction and main-

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<sup>15</sup>Ibid., 15, 36.

<sup>16</sup>William Prynne, *The Levellers Levelled to the Very Ground* (London, 1647); cited in Schwoerer, *No Standing Armies*, 55.

tenance of ships was just as expensive as forts, Prynne apparently found added advantages beyond their offshore mobility; seamen were less likely to undertake “maiden voyages” into interior ports of call. This becomes clearly apparent when one considers his interesting moral argument (and notable social prejudice) against land-based soldiers:

What do the soldiers do all day? These lusty men spend their time eating, drinking, whoring, sleeping, and standing watch at night but only to gaze about and call to one another, ‘Who goes there?’ They make off with wives and daughters and leave ‘not a few great Bellies and Bastards on the inhabitants and the countries’s charge.’<sup>17</sup>

For the pious Prynne, “social gun control” had a unique meaning in the seventeenth century; indeed, the potent “weaponry” that needed to be “muzzled” fired a totally different caliber of “bullets.” That same moral phobia (and social bias) perhaps explains his class corrective: disband the New Model Army; reassign its idle soldiers to more “productive duties” on farms and in factories; and leave domestic defense in the responsible hands (and institutions) of those whose birthright and privilege it had always been—the titled nobility (feudal array) and landed gentry (militia). In sum, Prynne did not pillory the power of a Puritan state to police depraved Catholics and decadent Protestants with armed force; he just wanted to ensure that true “Christian Soldiers” were marching on as to war—properly led, of course, by proper gentlemen. In any case, his notions about useless soldiers and armies in peacetime were nothing new. Such ideas, in fact, were more of a tautology rather than an ideology for most seventeenth-century Englishmen.

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<sup>17</sup>William Prynne, *Pendennis and All Other Standing Forts Dismantled: Or Eight Military Aphorismes* (London, 1657), 8, 29-30; cited and quoted in Schwoerer, *No Standing Armies*, 61-62.

When Harrington began setting his political philosophy down on paper, two basic attitudes and arguments against standing armies were already well established. Neither one required an ideological validation. First, peacetime armed forces were regarded as unnecessary, inefficient, and expensive. One of the best summary statements of that position was delivered in a renowned remark by Queen Elizabeth's chief advisor, Lord Burghley: "soldiers in peace are like chimneys in summer."<sup>18</sup> Despite the enduring truth of that observation, there was also the perennial problem of how to be militarily prepared in times of immediate crisis; like the threatened invasions by Spanish Armadas in 1588, 1596, and 1599. The solution—barring direct intervention by the Royal Navy, or an indirect act of God—was select "trained bands" of militiamen. Even though trained bands were reputedly exempt from foreign service, that immunity—or individual "right" that was collectively enjoyed—was repeatedly violated between 1585 and 1603 when the government was forced to raid the counties for manpower and arms, and subsequently drafted 100,000 men for duty abroad. Burghley's response to the protests militiamen raised over the infringement of their traditional liberty became another timeless adage: "if you want peace, prepare for war."<sup>19</sup> Even so, placing additional burdens and obligations upon the shoulders of part-time militiamen was far better than maintaining an expensive full-time force—especially for the notoriously parsimonious "Good Queen Bess." Moreover, taxpayers only overwhelmingly opt to have their pocketbooks picked by the government

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<sup>18</sup>William Cecil, Lord Burghley, quoted from Paul A. Jorgensen, *Shakespeare's Military World* (Berkeley, CA: University of California Press, 1956), 220.

<sup>19</sup>Elizabeth Boynton, *The Elizabethan Militia, 1558-1638* (London: Routledge & Keagan Paul, 1967), 166-67. Hereafter cited as Boynton, *Elizabethan Militia*.

when they are overwhelmingly frightened by foreign foes. Due to their overwhelming trust in Her Majesty's Navy and God, those fears never reached such a fevered (or fiscal) pitch that accorded a permanent army. Moreover, while Elizabeth I presumably boasted she had "the heart and stomach of a man" when it came to actual combat, her feminine mind and temperament were not prone to armed aggression, or erecting a standing military state so she could "play soldier."

At any rate, the second attitude and argument against standing armies was far more important in terms of constituting armed political power: above all, an army was *dangerous* because it was certain to have, and to fight for, an interest of its own that was distinct from the nation as a whole. One reason why it was perceived as having a distinct interest (which made it dangerous) was because it was hired, paid, commanded and, in a word, controlled by its "master"—an executive head of state who might use that armed force independently for his or her own (and equally dangerous) self-interests, such as enforcing unjust laws and perpetuating tyrannical rule. Yet deeply embedded within that separate self-interest was an equally dangerous (and far more obvious) matter of distinct social classes. Armies were considered to be composed entirely of hired mercenaries, or social dregs and misfits that could not make a productive living other than by being wage-earning warriors who ostensibly enjoyed the prospect of destroying property and people for individual tribute rather than collective retribution. Without any ties to the local community or stake in the general polity (most could not vote), their loyalty rested solely with whoever paid them the most (if even then). Even Queen Elizabeth referred to the men in her own expedi-

tionary armies as mostly “thieves [who] ought to hang.”<sup>20</sup> While it may have been good penal policy to export such social undesirables—and perhaps let a Frenchman or Spaniard serve as their hangman—it was absurd to let them “stand” at home with weapons in their hands, or to think that criminals would make upstanding policemen. No wonder such armies (and armed men) were always quickly disbanded (and disarmed) upon their return to the “home front.” From the reality that the government customarily conscripted men who were socially undesirable and expendable—and had no political freedom or legal rights—Englishmen abstractly assumed that armies composed of such soldiers posed a threat to the lives, properties, and liberties of those who stayed safely at home. No one, apparently, considered another reality—that the forced sacrifices of those who were unwanted, disposable, and un-free ensured the continued enjoyment of life, property, and liberty by their social and political “betters.” The classic statement of that armed inequality is “rich man’s war, poor man’s fight.”

Militiamen, on the other hand, were the antithesis of hired thugs and thieves. They were productive citizens who only became policemen and soldiers when a need arose to preserve (not destroy) property, people, and territory. Moreover, this was an age that valued manpower more than weapons. It was sheer madness to send the most talented and productive men abroad to be maimed or killed unless there were absolutely no other choices (and English prisons were full of choices). Instead, the “better-sort” of English manpower (and manhood) were “reserved” for homeland defense—which explains why an individual militiaman had a truly valuable “right” to

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<sup>20</sup>Jorgensen, *Shakespeare’s Military World*, 144.

stay close to home. In addition, as one scholar reminds us, Elizabethans made a conscious effort to create a thoroughly “bourgeois militia” by only calling upon “well-to-do householders, farmers, franklins, yeomen, or their sons, to fill the trained bands,” which were obviously a physically, socially, and economically select group of men. In that sense, the old-established custom of “Passing Muster” assumes its original meaning and true significance. Not everyone could meet its middle-class standards—nor was everyone invited to try. Nor is it surprising that Elizabethans found it “necessary to magnify membership into a desirable privilege” in order to coax (not coerce) valued manpower away from the fields and trades and go into the ranks and files, and only then on the rarest of occasions.<sup>21</sup>

Even so, every Elizabethan militiaman knew exactly who commanded and controlled his unit as well as his loyalty (and had the constitutional authority to do so)—Good Queen Bess. As we shall soon see, Harrington chose to ignore that bygone reality. Indeed, his use of Tudor history was just as “selective” in its facts as Tudor trainbands were in their men.

One final written argument merits particular attention: an anonymous tract published in August 1648 entitled, *The Peaceable Militia, or the Cause and Cure of the late and present War*. It was in this pamphlet that term “standing army” first appeared in the English written record. It was used in direct reference, of course, to the New Model Army. Like the Levellers, the essayist maintained that no man should be pressed into arms or be required to serve outside his local county except during an actual invasion, or be subject to martial law in times of peace. In the author’s view,

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<sup>21</sup>Boynton, *Elizabethan Militia*, 108.

the debate over whether the King or Parliament should control the militia was not the crucial issue; instead it was far more essential to “restrain and guard the Power (whatsoever it is, and in whomever it resides) which is exercisable over the Subjects of England.” The most important restraint on armed political power was made clear: “upon no pretence whatsoever” should a standing army be maintained since it inevitably promoted arbitrary rule—no matter who commanded and controlled it. But if a choice had to be made, it was best to entrust the sword in the hands of an executive instead of lawmakers given that it was easier to deal with one armed tyrant rather than many.<sup>22</sup> In other words, it would be far wiser (and safer) to place the power of the sword and the power of the purse in separate hands—which was precisely the way armed political power would be constituted (and thus controlled) following the Glorious Revolution. Then again, the Revolutionary Settlement in 1689 did not create a republican commonwealth.

To be sure, many Interregnum republicans argued against separating the powers of the purse and sword—including Harrington, who imagined a military Parliament composed of “horse and foot” lawmakers. In fact, one of Harrington’s later disciples, Andrew Fletcher, deduced an entirely different moral from “the separation of powers” principle in 1737: “He that is armed is always master of the purse of him that is unarmed.”<sup>23</sup> Fletcher’s meaning was plain: the constitutional right of the Com-

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<sup>22</sup>*The Peaceable Militia* (London, 1648), 2-6, 12; cited and quoted in Schworer, *No Standing Armies*, 55-56.

<sup>23</sup>Andrew Fletcher, *Political Works* (London, 1737), 9; cited and quoted by Caroline Robbins in *The Eighteenth-Century Commonwealthman: Studies in the Transmissions, Development and Circumstances of English Liberal Thought from the Restoration of Charles II until the War with the Thirteen Colonies* (New York: Atheneum, 1968), 105.

mons (landed gentry) to raise taxes might not be respected by a royal executive who had armed soldiers at his independent command to enforce his wishes and will. Virginians would ponder that same political proverb when their own legislative purse strings looked like flimsy cords compared to King George's sharp sword.

Even so, one must be aware that all of these "original" political perspectives were *not* advocating "anti-military" attitudes based upon religious or moral convictions, historical experiences, or anything else.<sup>24</sup> Most were aimed at eradicating, or at least controlling, the executive's (or for some, the legislature's) authority over armed political power, not eliminating the swords of justice and war themselves. If nothing else, all sides wanted to keep those potent weapons handy for their own purposes, which were basically to protect, preserve, or promote their social status, economic assets, and political power—not provoke political violence that might run amok and thus be used against them. Clearly, the mutual goal was to ensure political stability and the survival of the commonwealth, not foment further turmoil or bloodshed.

Harrington certainly shared that aim by arguing that history had handed Englishmen a golden opportunity to create a model republic in which there was no longer any need to use armed political violence to gain political power. Significantly, not one anti-army tract advocated armed rebellion against Cromwell or the Commonwealth, or pitted militias and the New Model Army at war with each other. In any case, militias were viewed as safe repositories of armed political power precisely because they could be relied upon to suppress rather than mount insurrections. To be

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<sup>24</sup>On this point, I disagree with Lois G. Schwoerer, who devotes her first chapter in *No Standing Armies* to the "Origins of the English Antimilitary Attitude." Nevertheless, her superb study remains the best single-volume work dedicated to the anti-army ideology that originated in seventeenth-century England.

sure, the right to overthrow the government would be defended by a few stalwart republicans in due course, but not before English kings had regained their thrones—and their armed executive power—under a new constitutional monarchy. But for whatever reason, the political right to rebel was not invented when it was most needed (or expected); when Roundheads actually committed regicide. Lastly—but most importantly—everything written about standing armies and militias by Radical Whigs was totally devoid of any thoughts or ideas about the relative virtues and values of militias and armies as military forces *in times of war*. The primary concern was what a standing army could do domestically *in times of peace*. The crux of the controversy was whether or not a people policed by standing armies could be free. The point of this particular paragraph is hopefully apparent: things not spoken of, and arguments not made, can provide additional insight into the motives that create, and the attitudes that sustain, any belief system. With that said, it is time to take closer look at an ideal sword in a model republic.

#### Harrington's "Original" Theory

As historian Lois Schwoerer observes, “The *Oceana* offered a theory about military affairs that marked its author as the first genuine theoretician on the subject in England.”<sup>25</sup> Nonetheless, Niccolò Machiavelli, the noted Italian political theorist who wrote extensively on military power during sixteenth century, influenced Harrington's theory to a large extent. Machiavelli's major theme was that the public must assume a monopoly over the “art of war”; indeed, only citizens may practice it as soldiers, only magistrates may execute it as commanders, and only under the pub-

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<sup>25</sup>Schwoerer, *No Standing Armies*, 64.

lic's authority and at the public's command can war be exercised at all. He maintained that the possession and use of arms in war was a necessary trait of political personality, or citizenship; that "a state ought to depend upon only those troops composed of its own subjects; that those subjects cannot be better raised than a citizens' militia;" and that a professional army and hired mercenaries should be avoided at all costs. Since republics only make war when they must—or for defensive rather than aggressive purposes—the right to bear arms included the ability to refuse military service under a dictator or in an unjust war, thus providing a popular check on the use of the sword as an instrument of political power. Machiavelli therefore celebrates "the important privilege accorded Roman citizens of not being forced into the army against their will," but instead "entered voluntarily into the service." The use of arms must be at the individual citizen's command—and by his free choice—if he was to serve the republic as a free man. But while noting "compulsion makes men mutinous and discontented," Machiavelli also recognized that "experience and courage are acquired by arming, exercising, and disciplining men properly." Indeed, without a "regular and well-ordered militia people cannot live in security." Moreover, "men who are well disciplined will always be as cautious of violating the laws when they have arms in their hands as when they have not. . . ." According to Machiavelli, a citizen militia is a public institution that promotes civic virtue by transforming divisive, self-interested factions into a unified whole pursuing the common good of all. In his words, "by establishing a good and well-ordered militia, divisions are extinguished, peace restored, and some people who were unarmed and dispirited, but united, continue in union and become warlike and courageous; others who were brave

and had arms in their hands, but were previously given to faction and discord, become united and turn against the enemies of their country those arms and that courage which they used to exert against each other.” Even so, Machiavelli offered a means that would ensure militias did not become armed instruments of sedition and insurrection: “But to prevent a militia from injuring others or overturning the laws and liberties of its country (which can only be effected by the power and iniquity of the commanders), it is necessary to take care that the commanders do not acquire too great an authority over their men.”<sup>26</sup>

Machiavelli argued another central point: the business of war must never become a separate organized profession that men depend upon for their livelihoods. In his view, men who hire themselves out to “make” war were mercenaries. In addition, a soldier who is strictly a soldier on a full-time or permanent basis is not only less active as a citizen, but also neglects the common good in a very antisocial way, since the practice of his “*arte*” concerns armed coercion and the destruction of lives and property. Such a man is prone to threaten the body politic rather than preserve it. The paradox within Machiavelli’s theory is that only a part-time soldier can be trusted to serve the full-time commitments and purposes of war. A full-time citizen who only becomes a warrior when necessary has a proper regard for the public good because he has a home and an occupation (*arte*) other than the military camp and service. Because a citizen has his own place within the body politic, he understands that wars are fought to preserve the common body and when called to arms, he is moti-

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<sup>26</sup>Machiavelli, *The Art of War* (1521), revised edition of the Ellis Farnsworth translation, with an Introduction by Neal Wood (Indianapolis: Bobbs-Merrill, 1965), 33, 18, 29, 39-41.

vated to win those conflicts as soon as possible so he can return to his home. A paid mercenary, on the other hand, is better off if the war drags on and will make no attempt to win it. Since he has no home or political standing within the body politic, he could easily become the tool of tyrants who attempt to gain political power through political violence (armed force). At bottom, a man who bore arms as a mercenary—or was hired to fight someone else’s battles rather than his own—was incapable of citizenship in a republic. As Professor Pocock summarizes, “The mercenary soldier is a mere instrument in another man’s hand; but the citizen-warrior is more than an instrument in the public hand, since his *virtù* is his own and he fights out of knowledge of what it is he fights for.”<sup>27</sup> Consequently, Machiavelli championed militias composed of citizen-soldiers as being essential to the survival of free republics and denigrated mercenary armies as ultimately endangering them.

Harrington was a Machiavellian to the extent that he agreed with all of the above arguments. But he revised that basic republican theory by importing his own fundamental doctrine: the basis of political personality and civic virtue was not merely the possession of arms, but the possession of property.

#### Harrington’s Agrarian Republic

Harrington’s fundamental—and most important—premise was that private power was the basis (or a necessary precondition) for public power, and that the ability to exercise either as a “freeman” depended solely upon the possession of landed property. Harrington directly linked political power—or the capacity to operate

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<sup>27</sup>Much of this paragraph on Machiavelli’s theory is from Pocock, *The Machiavellian Moment*, Chapter VII, “Rome and Venice,” 199-204, *passim*. Pocock’s quote is at page 203.

freely in public affairs—to economic independence: “The man that cannot live upon his own must be servant” to his economic and political master; “but he that can live upon his own may be a freeman.”<sup>28</sup> Economic independence (land ownership) also conveyed the right and responsibility to bear arms to defend oneself as well as the state. Those who did not possess land could not bear arms for either purpose. More importantly, he was the first to expose and explain the connection between owning property (land) and the power of the sword. As he explained, it was impossible to govern—or “to oblige, contain, constrain or to protect any man”—without “the public sword.” Yet just as “the law without this sword is but paper,” so too “this sword without an hand is but cold iron. The hand which holdeth this sword is the militia of a nation; and the militia of a nation is either an army in the field, or ready for the field upon occasion. But an army is a beast that hath a great belly and must be fed; wherefore this will come unto what pastures you have, and what pastures you have will come unto the balance of property, without which the public sword is but a name or mere spitfrog.” Whoever controls the nation’s farmland “can graze this beast with the great belly,” and thus controls the militia, or the public sword.<sup>29</sup>

Moreover, Harrington noted that there were several different kinds of militia—a significant line of reasoning that has been virtually ignored by Second Amendment scholars and intellectual historians alike. He makes that point in *A System of Politics* while explaining the “military part” that comprises every form of government. That chapter begins with two related observations. First, “A man may per-

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<sup>28</sup>Pocock, *Harrington’s System of Politics*, 269-270.

<sup>29</sup>*Ibid.*, 13.

ish by the sword; yet no man draws the sword to perish, but to live by it.” Second, “So many ways there are of living by sword, so many ways there are of a militia.” The “way of living by the sword” in a popular government occurs when at least “two parts in three of the whole territory” are divided among the population. In that situation, “If a people, for the common defence of their liberty and of their livelihood, take their turns upon the guard or in arms,” then the “way of the militia” becomes “the sword of democracy.” However, another “kind of militia” was composed “of men living more immediately by the sword, which are soldiers of fortune or a mercenary army.”<sup>30</sup> Significantly, that type of armed force has no attachment whatsoever to landed property, or legitimate government.

To be sure, we may scratch our heads at Harrington’s tendency to conflate militias and armies, which is particularly evident throughout the pages of *Oceana*. Nevertheless, his major point was that the power of the sword could be constructed, constituted, and perhaps even characterized in many different ways, but must be legitimately grounded upon the proper balance of landed property. Indeed, as he stated more definitively in another treatise: “Wherever the Balance of a Government lyes, there naturally is the Militia of the same.” By the same token, “a Government founded upon the underbalance of Property, must of necessity be founded upon Force, or a standing Army.”<sup>31</sup> Harrington’s preference was clear: a militia of landowners and voters called citizen-soldiers.

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<sup>30</sup>Pocock, *Harrington’s System of Politics*, 285.

<sup>31</sup>Harrington, *The Art of Lawgiving*, in Toland, *Works of Harrington*, 388, 487.

## Harrington's Military Republic

In Harrington's kingless commonwealth (*Oceana*), the state and the militia were one and the same. Standing at the center of both were independent citizen-soldiers who performed civic and military duties (voting and mustering) in combination and on the same occasions. Those militarized citizens were also "agrarian-soldiers"; yeoman who continued to labor at making their own livelihoods from the land, but were also educated and trained in the science of military warfare. As such, they stood perpetually armed, persistently prepared, and permanently embodied to provide the "necessary" internal and external "security" of *Oceana*—an agrarian-military state that was just as "free" as its armed citizens. In that crucial sense, the republic and its self-governing citizens were cast from the same mold: both were fundamentally agrarian and armed. As Harrington elaborated: "Agriculture is the bread of the nation; we are hung upon it by the teeth; it is a mighty nursery of strength, the best army and the most assured knapsack; it is managed with the least turbulent or ambitious, and the most innocent hands of all other arts. Wherefore I am of Aristotle's opinion, that a commonwealth of husbandmen (and such is ours) must be the best of all others."<sup>32</sup>

Just as importantly, Harrington worked out a detailed design in *Oceana* as to how a citizen's military obligations were to be fulfilled. In the first place, all independent citizens were expected to serve while dependent servants, who were considered unsuited for bearing military and political responsibilities, were not allowed to carry arms in a public capacity. Every man above the age of eighteen—"except an

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<sup>32</sup>Pocock, *Harrington's Oceana*, 197

only son without the consent of his parents” (presumably because he might be killed in battle)—was required to bear arms in either one of two “military orbs.” The youth (those 18 to 30) were assigned to “the standing army of this commonwealth, to be always ready upon command to march . . . for foreign expeditions.” Any one refusing to serve “without sufficient cause” was “fined a fifth part his yearly rent, or of his estate, for protection” and was “deemed an herlot or public servant.” All elders (those “above 30”)—along with the youth who were not “marching” abroad—were assigned to the “provincial guard or army” to repel invasions. In addition, “the services performed by the youth or by the elders, in case of invasion . . . shall be at their proper cost and charges that are any ways able to endure it; but if . . . [anyone] be so indigent that they cannot march out of their tribes [counties], nor undergo the burden in this case incumbent, the congregations of the parishes shall furnish them with sufficient sums of money, to be repaid upon the certificate of the same by the parliament when the action shall be over.” Any “person that shall fail” to his duty, “is to answer for it at the council of war, as a deserter of his country.” In addition, armed duties were to be proportionate to the wealth of individual citizens, ostensibly because men with more land had greater private independence (more time, money, and thus incentives) to devote to public affairs. Significantly, Harrington attached “obligations of good citizenship” to Oceana’s citizen-soldiers, which presumably replaced (or perhaps reflected) former feudal duties and commitments; the chief difference being that the armed burdens and liabilities of Harrington’s “virtuous” citizens were accepted freely, willingly, and without the expectation of fiscal reward or the threat of coer-

cion. There was no need for conscription or a “draft” in Oceana; every “freeman” was a soldier.<sup>33</sup>

Secondly, Harrington devised a complex scheme of lots and elections, whose purpose was to organize the citizenry into ranks and files, provide for their periodic training, and select officers. In fact, there was a wide range of civil and military offices that were decided by ballot (passing an urn and drawing a marked ball) at several voting “musters.” The franchise was clearly the civil manifestation of the political freedom represented by arms. The instruction and drilling plan, in Professor Schwoerer’s estimation, was equivalent to a “seventeenth-century version of universal military training”<sup>34</sup>—at least “universal” in terms of “all” landowners. Naturally, the idea of universal military training—or the obligation of every able-bodied landowner to sacrifice valuable time, money, and effort toward perpetual armed preparedness—was not a popular proposal in Harrington’s day (or thereafter). Harrington tried to parry possible disparagement, however, with pointed words of caution: “there is no other [system] that dos not hazard all.” In fact, under any other alternative scheme, “you are some time or other a Prey to your Enemys, or to your Mercenarys.”<sup>35</sup> Universal training had other benefits as well. Having the wealthiest citizens so employed, for example, would eliminate idleness and luxury, thus “ploughing out the rankness” of a possible “aristocracy.” Keeping a large “magazine of men” in a constant state of armed preparedness—much like a standing army—would also pre-

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<sup>33</sup>Ibid., 238, 195-97.

<sup>34</sup>Schwoerer, *No Standing Armies*, 66.

<sup>35</sup>Harrington, *The Art of Lawgiving*, in Toland, *Works*, 454.

vent foreign attacks and wars. Moreover, “To make wars with small forces is no husbandry, but a waste, a disease, a lingering and painful consumption of men and money.”<sup>36</sup> In time, Harrington’s views would evolve into “a well-regulated militia, composed of the body the people, trained to arms, is the proper, natural, and safe defense of a free state.”

All the same, Harrington apparently realized that the predominantly pro-military republic he had in mind would not receive a warm welcome among Interregnum parliamentarians who, after all, remained powerless to disband the Commonwealth’s “original” standing army. Perhaps foreseeing their censure and condemnation, he gave Oceana’s leading “orator,” Hermes de Caduceo, the honor of providing a lengthy justification for what was, in truth, a highly militarized state:

We have this day solemnized the happy nuptials of the two greatest princes that are upon the earth or in nature: arms and councils, in the mutual embraces whereof consisteth your whole commonwealth; whose councils upon their perpetual wheelings, marches and counter-marches, create her armies, and whose armies with the golden volleys of the ballot at once create and salute her councils. There be (such is the world nowadays) that think it ridiculous to see a nation exercising her civil functions in military discipline, while they, committing their buff unto their servants, come themselves to hold trenchers. For what availeth it, such as are unarmed (or, which is all one, whose education acquainteth them not with the proper use of their swords) to be called citizens? What were two or three thousand of you, well affected to your country but naked, unto one troop of mercenary soldiers? What causeth the monarchy of the Turks but servants in arms? What was it that begot the glorious commonwealth of Rome, but the sword in the hands of her citizens? Wherefore my glad eyes salute the serenity and brightness of this day with a shower that shall not cloud it.<sup>37</sup>

Without question, the power of the sword promised to be a potent weapon in Oceana. Nevertheless, military power—and armed citizenship—posed no threat whatsoever to

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<sup>36</sup>Pocock, *Harrington’s Oceana*, 211.

<sup>37</sup>*Ibid.*, 97-98.

that constituted republic. Moreover, Harrington did not assign Oceana's militia-men—whether they served a “marching army” or a “provincial army” of “home guards”—with specific police duties, such as enforcing laws upon disobedient citizens or. In fact, he said almost nothing at all about police power, or using military force to enforce the law, suppress insurrections, or otherwise make unruly citizens obedient. Instead, he simply observed that “Good orders [laws] make evil men good, and bad orders make good men evil.”<sup>38</sup>

Harrington's association of propertied independence, political personality, and military obligation with political stability and constitutional balance provided a useful point of departure for latter-day Radical Whig thought on militias and armies. His major concern (and argument) was that economically independent “agrarians” must be the “masters”—not the “servants” (or slaves)—of the sword, and that they had a political right and responsibility to wield that power. Military power, in short, must always be associated with those who held the balance of property, that is, political power. All the same, the nature of military institutions and their relationship to the constitutional order continued to be a subject of intense debate (and intellectual history) for over a century.

#### Subsequent Arguments

As Professor Pocock elaborately explains in the best single essay on the subject, a long line of “neo-Harringtonians” restated and reconstructed Harrington's ideas to fit their personal agendas in post-Restoration England. Beginning in 1675 with the Earl of Shaftsbury, Harrington's “radical Whig” disciples presented the

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<sup>38</sup>Pocock, *Harrington's System of Politics*, 274.

standing army as a threat emanating from the King's evil courtiers and corrupt ministers in a conspiracy against the balanced constitution, or the accepted equilibrium that presumably existed between Kings, Lords, and Commons. In this guise, "The standing army was a bogey intended for country gentlemen, part of a hydra-headed monster called Court Influence or Ministerial Corruption, whose other heads were Placemen, Pensioners, National Debt, Excise, and High Taxation." In effect, a standing army was rhetorically portrayed as an armed instrument of the King's executive administration that could be used to coerce and oppress the gentry and lords in Parliament, but in reality served as a convenient (and equally compelling) tool for "Country" politicians to smear their "Court" rivals. Yet as Professor Pocock further notes, the political peril associated with a "standing army—though I repeat that it was nothing but a bogey in political reality, at any rate after 1689—is one of the seminal historical and political ideas of the period."<sup>39</sup>

Pocock's assessment is reaffirmed by intellectual historian Lois Schwoerer, who has written the best single monograph on the history of anti-army ideology in England. According to Professor Schwoerer,

the cry "Reform the militia," like the cry "No Standing Army," had propagandist rather than substantive meaning. For the politician, as opposed to the intellectual, the militia had become a sacred cow. In a measure, the standing army menace had become a bogey which could be invoked to discredit the court while the demand to reform the militia could be served up to assure the politically conscious that the defense of the nation was not being neglected. By the end of seventeenth century, this tactic was assuredly a part of the antistanding army ideology.<sup>40</sup>

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<sup>39</sup>Pocock, "English Political Ideologies": 562-63.

<sup>40</sup>Schwoerer, *No Standing Armies*, 170.

Without question, the motives of the army's critics were mixed. Propaganda, partisanship, parliamentary ploy, parochialism, personal profit, and principle all played their particular parts. All the same, "The pamphlet controversy in 1697-99 seeded a tradition, whose echoes were heard for another century in England and the American colonies."<sup>41</sup>

The core political concern in the anti-standing army dispute was the military's relationship to the civil constitution and by extension, the boundaries of the executive's prerogative to use that armed force. In its practical and theoretical formulations, a standing army was viewed solely as the instrument of tyrants that would destroy constitutional law and political liberty either by coercion or by corruption, while its institutional opposite, a standing militia, would preserve the constitutional order, protect freedom, and defend the people and their property against foreign and domestic enemies. However, it is also important to remember and realize the overarching political and constitutional context in which the anti-army ideology was created.

To begin, the Restoration Settlement largely negated the political ambitions and constitutional aims of republican gentlemen. A kingless, non-aristocratic Commonwealth no longer existed. At best, the landed gentry in the Commons now had to share political power with the restored House of Lords and royal monarchy—just as they had before the Civil War. Even so, most men who owned substantial estates were quite satisfied with the Restoration; in fact, the re-establishment of the Crown and titled peerage would not have been possible without their active support. Fearing that their property (land) and privileges (power) were at greater risk by the anarchy

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<sup>41</sup>Ibid., 190.

(“democracy”) of the lower orders, they welcomed a return to a stable system of governance that promised to protect and promote their particular self-interests. In effect, they recognized and accepted the fact that English republicanism was a failed experiment. Such was not the case, however, for a cadre of “real republicans” who were not so inclined (or so conservative). Their political and constitutional agendas remained the same as before. Indeed, many refused to adapt to their changed circumstances and suffered accordingly. James Harrington, for one, was imprisoned on a conspiracy charge that was mainly due to his penned politics, not because of any hard evidence that he actively plotted to overthrow the Restored Monarchy. He was never brought to trial, went insane (some believed with the assistance of the prison doctor), and eventually died in 1677.

Without question, the Restoration Era repudiated republicans and their dreams of a kingless republic with measured vengeance, but not before the possibility of armed resistance was also nullified. For example, the New Model Army was dismantled by the Convention Parliament in its Disbanding Act of 13 September 1660, which ironically was the same objective of every Interregnum Parliament since 1647—at least before those assemblies were purged and prorogued at gunpoint. But the army’s demise did not come about solely because of a positive law pronouncement, but rather through the “inducements” offered through additional legislation, which Professor Schwoerer has collectively referred to as “a kind of G. I. Bill of Rights.”<sup>42</sup> In the Declaration of Breda (14 April 1660), King Charles II not only promised the troops back pay that was long in arrears, but also an additional week’s

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<sup>42</sup>Schwoerer, *No Standing Armies*, 77-78.

wages if they took a permanent leave of absence. Moreover, the House of Commons decreed that all maimed and disabled soldiers would be cared for at government expense. In addition, all soldiers were granted permission to open a shop or practice a trade without meeting the usual apprenticeship requirements, thus easing their transition back into the general population as a productive (not a destructive) workforce. Of course if Cromwell's veterans refused to disarm themselves "voluntarily," the assistance they received was less altruistic: indentured servitude in far off Virginia. Even so, parliamentarians had finally won their battle against the New Model Army (although largely by default due to charitable Cavaliers). On the other hand, the far more important war over constitutional principle—legislative supremacy over the nation's sword—was most decidedly lost.

Indeed, the pendulum of armed political power swung back fully toward the restored monarch, Charles II. For instance, clause four of the 1660 Disbanding Act specifically allowed King Charles to keep as many standing soldiers as he wished as long as he paid for them out of his own pocket, which had always been the political prerogative (and constitutional right) of past English monarchs. Such privatized forces, in effect, could be raised without the consent of Parliament and were totally dependent upon the king. Charles quickly took advantage of that statutory clause by establishing a personal bodyguard of 3,200 men and 374 officers in public ceremony on 14 February 1661. That armed band (now known as the Coldstream Guards) was originally formed to perform one function: protect the restored royal from recalcitrant republicans who might attempt to harm him through illicit political violence such as assassinations and insurrections. Even though the "King's Guards" were no different

than Governor Berkeley's select sentinels created by the House of Burgesses in 1648 (or today's Secret Servicemen), they were soon viewed as a private, taciturn force that only defended the body of the king, not the body of the people. As such, those forces only served the interests of the head of state and not the entire state.<sup>43</sup>

Even more significantly, the first Militia Act passed by the Cavalier Parliament on 30 July 1661 unequivocally stated that “the sole supreme government, command and disposition of the militia”—as well as “of all forces by land and sea”—“is, and by the laws of England ever was, the undoubted right” of royal monarchs. All military and police power, in sum, belonged to the crown. Indeed, Parliament's relationship to those same armed forces was made equally clear: “both or either of the Houses of Parliament cannot, nor ought to, pretend to the same [supreme authority].” The purpose of that statement was plain: Parliamentarians had no legal right to raise its own army or wage war against the crown; any such treasonable action or assumed authority would be lawfully repressed. To assure the same “loyalty” from the local militias, all officers and soldiers were required by law to swear oaths of allegiance and supremacy to their new commander in chief (Charles II).<sup>44</sup> This particular Militia Bill was truly significant: it marked the first time in English history that a legislative statute defined a monarch's military and police prerogatives. Even so, a few die-hard republicans—particularly Algernon Sidney—began theorizing that they had a right to assassinate or otherwise depose kings by political violence. Significantly, Sidney

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<sup>43</sup>Ibid., 81-82.

<sup>44</sup>*Statutes of the Realm: From original records and authentic mss.* (London: G. Eyre and A. Strahan, printers to the King, 1810-1828), 5:308-9. Hereafter cited as *Statutes of the Realm*.

never claimed the same entitlement when Cromwell's soldiers forced him out of the Rump Parliament in 1653.

However, as long as Charles II kept his Catholic faith out of national politics (which he did), there would be no public outcry over his firmly strapped sword (which there was not). Unhappily, his pious brother and heir (James II) failed to grasp the fragile (and flammable) relationship between guns, politics, and religion. As an unpopular (and un-elected) Catholic successor to the throne, he provided a Protestant Parliament with all the kindling it needed to re-ignite smoldering fears of armed despotism. In large measure, his reign was a prime example of Civil War history repeating itself, except for one particular. During the Exclusion Crisis over James's succession, the antagonists stopped calling themselves "Roundheads" and "Cavaliers." Instead, they maligned their opponents with the most malicious terms that came to mind; that is to say, something associated with either the despicable Scots or the loathsome Irish. Those who upheld the crown's supremacy accused their rivals of advocating another civil war and equated them to Scots-Presbyterian outlaws known as 'Whiggamores.' Returning the favor in kind, the so-called Whigs viewed James's supporters as Irish-Catholic rebels and tagged them as 'Tories,' which came from the Gaelic word *torraighe*, meaning 'bogtrotter' or bandit.<sup>45</sup> The labels stuck fast. And yet, the struggle for power between Whigs and Tories was bloodless and did not result in another military regime; in fact, the lasting outcome was considered "glorious" by both sides.

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<sup>45</sup>The origins of the "Whig" and "Tory" party designations are in Schama, *Wars of the British*, 295.

Ultimately, the Glorious Revolution resolved the bitter conflicts over religion and the sword—or essentially took religion and guns out of English politics—by settling the monarchy problem. For the first and last time in English history, a Protestant Parliament was able to choose (“invite”) joint Protestant monarchs (William and Mary) to defend the state and the state church. Accordingly, the core issues concerning armed political power—legislative versus executive supremacy and reliable armed manpower—were also constitutionally settled under a written Bill of Rights, which the new monarchs were required to affirm and uphold as a condition of their summons to rule. As a result, monarchs could legally command and control the power of the sword to defend the realm and religion “in” Parliament, which was now absolutely sovereign. More specifically, Article Six declared “that the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law.”<sup>46</sup> In other words, it was illegal for magistrates to marshal or maintain a permanent armed force on their own volition; peacetime standing armies could only be sanctioned by Parliament, which also gave lawmakers the power to disband armies that were raised for war. On the other hand, the Restoration Militia Acts, which gave the king sole military command over those local forces, were not repealed (and never have been). As a result, the king remained commander-in-chief of the army and militia in both war and peace. In addition, the precise limits of the executive’s authority over military forces as commander-in-chief were not fully explored or specifically spelled out. Yet as Professor Schwoerer contends, “Parliamentary control of the army in peacetime was simply asserted, and in that assertion,

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<sup>46</sup>*Statutes of the Realm*, VI: 142.

sovereignty was shifted from the crown to Parliament.<sup>47</sup> That “assertion” soon evolved into a constitutional principle more commonly known as “civilian control of the military”, which prohibits a military establishment from becoming a military regime, or assuming total control over armed political power and policy in times of war or peace.

The issue of armed manpower—or the political class and character of Englishmen who had a right to keep and bear arms—was likewise settled under Article Seven, which declared, “that the subjects which are Protestants may have arms for their defense suitable to their conditions and as allowed by law.”<sup>48</sup> When viewed solely in the context of past religious struggles between the crown and Parliament, this particular right served two key purposes. First, it limited the type of armed manpower that future monarchs could constitutionally command in three ways: by nationality (English “subjects”), by religious preference (“Protestants”), and by economic class (“suitable to their conditions”). In fine, royal magistrates could not hire foreign mercenaries, or arm Catholics and the dependent poor to fight their battles. Instead, Protestant Englishmen could fight their own battles in “defense” of their religion and property. Second, it ensured that Parliament literally had the last word (thus ultimate authority) to select armed manpower with the highly significant “and as allowed by law” addendum. In large measure, Article Seven reflected neo-Harringtonian ideas about the caliber of independent citizens who had a right to bear arms “for their defense,” and that legitimate military power resided in that citizenry as embodied in a

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<sup>47</sup>Schwoerer, *No Standing Armies*, 151.

<sup>48</sup>*Ibid.*

militia, not in a standing army that was an instrument of the executive. However, the religious, socioeconomic, and legal “tests” imposed by Article Seven were never exploited to build up a readily available and politically dependable pool of manpower to serve as militiamen. Moreover, England would fight numerous wars over the course of the next century with hired mercenaries, the poor, and many other socially undesirable and politically expendable men who were publicly armed for defense abroad, but often privately disarmed as a menace at home. In truth, the “original meaning” of Article Seven in terms of attaching certain citizenship requirements with the conditional right to possess arms for defense was ambiguous from the very beginning. Even so, the “original intent” of the entire Bill of Rights is clear: to limit the legislative, judicial, and military powers of the crown and increase the prerogatives and supremacy of Parliament.<sup>49</sup>

To be sure, neither Article made any explicit reference to militias. That did not imply, however, that those forces were totally forgotten or purposely ignored. To the contrary, that unwritten silence within the Bill of Rights spoke volumes. In effect, the 1689 Convention Parliament informally endorsed the 1661 Restoration Militia Bill, which fixed the crown’s legal authority to command the militia. Indeed, the 1661 Militia Bill remained unchanged (and unchallenged) until 1757 during the Great War for Empire. Moreover, the Bill of Rights did not alter or abolish the monarch’s authority to govern (train or otherwise regulate), personally command, and deploy the militia,

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<sup>49</sup>Many “Individual Rights” scholars of the Second Amendment interpret Article Seven primarily in terms of an individual’s right to self-defense in a non-military context. In making that argument, however, they must largely overlook the struggles over the sword that occurred between Protestant lawmakers and Catholic monarchs during the Civil War, Restoration, Exclusion Crisis, and Glorious Revolution. In my estimation, the “original *political* intent” of that Article is as argued above.

the army, or the navy for internal and external security. In truth, a truce was finally brokered under English law: Parliament could raise armed men and levy war, but not against the crown. By the same token, Article Six and Seven ensured that the crown could not raise armed men or levy war against Parliament. As a result, a *quid pro quo* relationship—or constitutional balance—existed between the legislature and executive in terms of armed political power; neither party could raise the power of the sword against the other in a struggle for political power (armed rebellion). The apparent aim was to take guns out of domestic politics with the expectation (and hope) that the Civil War, Interregnum, Restoration, Exclusion Crisis, and Glorious Revolution were all past—not current, and surely not future—episodes in English history. With a newfound trust and confidence in each other, the legislature and executive could once again act jointly (and cooperatively) under a constitutional monarchy.

For all practical intents and purposes, the revolutionary settlement constitutionally resolved all the major concerns, issues, and questions parliamentarians had struggle over since Civil War. The English Bill of Rights granted Parliament complete control over military expenditures and guaranteed every Protestant the right to “have arms for their defense.” For most Englishmen, the Glorious Revolution alleviated anxieties that a Catholic king’s army would become the vehicle of political oppression and tyranny. Even so, the attempt by William III to keep a large army “standing” after his victorious war against the French fired off a renewed analysis of the relationship between the military and the civil constitution that reverberated well into the American Revolutionary Era.

## Radical Whigs

As Lois Schwoerer explains, “The climax in the history of protest against maintaining professional soldiers in peacetime occurred between the fall of 1697 and the spring of 1699, following the Treaty of Ryswick. The immediate practical question was what to do with King William’s large, victorious army”—should it be totally disbanded, or kept standing in force to deter or counter future French aggression in Europe and North America. “The ideological issue at this time was not whether Parliament had the right to approve the military force in peacetime (that had been established at the Revolution), but whether the king would accept Parliament’s decision on the size of the army and abide by it.” Significantly, “The standing army issue was not argued in 1697-99 with innuendo that William wanted an army to Catholicize the nation or bring England within the French orbit, as had been the case with his predecessors.”<sup>50</sup> Indeed, there were no substantial fears that William would use the army to impose his royal will, or even increase his executive power, by force. Instead, the army was viewed as an instrument of corruption rather than coercion. In essence, the controversy revolved around a major political question: Would military power in the king’s court control the legislative power of party groups in Parliament?

That question arose due to a deep division within the Whig party between “Court” or ministerial Whigs and so-called “Old” or “Radical Whigs,” men who did not hold office but claimed they represented the interests of the “Country” members in Parliament—the landed gentry. In short, a minority party feared that the majority was trying to assume one-party rule at the executive, legislative, and judicial levels of

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<sup>50</sup>Schwoerer, *No Standing Armies*, 155-157.

government and thereby exercise their political will without opposition. In that context, the army was a political and constitutional “bogey”—an armed force that did not pose a real threat to the constitutional order, but rather was viewed as a means to enhance the political influence and patronage of “Court” ministers, or “Junto Whigs,” so they could remain in office. And yet the army was also a political instrument in the hands of the Radical Whigs: a convenient and highly charged weapon that could be used to discredit the opposition, further their own agenda to recapture “Country” dominance in Parliament, and thus isolate and control the “Court” party at the executive level. Thus the anti-army ideology was once again a matter of legislative versus executive supremacy, but one that was triggered by party factionalism rather than religious intolerance.

A small cadre of Radical Whigs—most notably John Trenchard, John Toland, Walter Moyle, Robert Molesworth, and Andrew Fletcher—wrote the major anti-standing army tracts during this period. As historian Lawrence Cress aptly notes, “Their essays betray a naiveté about the realities of contemporary warfare and an insensitivity to the constitutional safeguards placed over the army by the revolutionary settlement.” But even more importantly, “their works attest to the persistence of Harrington’s ideas about government and society and to the continued Opposition distrust of royal power even after the exile of James II.”<sup>51</sup> Like Harrington, the Radical Whig writers argued that the continued association of civil and military power with those who owned the most land was essentially to maintaining political stability and the

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<sup>51</sup>Lawrence Delbert Cress, *Citizens in Arms: The Army and Militia in American Society to the War of 1812* (Chapel Hill: University of North Carolina Press, 1982), 19. Hereafter cited as Cress, *Citizens in Arms*.

constitutional order. However, these “Neo-Harringtonians” parted company with their mentor in three particulars: they abandoned Harrington’s view of England’s feudal past; rejected his conclusion that military power could not be exercised at the expense of the landed citizenry and gentry; and most significantly, added a right of armed rebellion that Harrington never affirmed in his “model” republic. After all, if republican citizens denied their common interests and made war against each other, it would mean that “the people” were incapable of governing themselves without resorting to political violence. Robert Moleworth, however, cogently explained why the people retained that right when their chief magistrate was a monarch:

‘Tis certainly as much a *Treason and Rebellion* against this *Constitution* and the *known* laws, in a *Prince* to endeavor to break thro them, as ‘tis in the *People* to rise against him, whilst he keeps within their Bounds and does his Duty. Our Constitution is a government of *Laws*, not of *Persons* . . . Our Constitution considers no *Power* as *irresistible* but what is *lawful*.<sup>52</sup>

Nevertheless, Harrington’s most fundamental premises were the heart and soul of the anti-army ideology.

Trenchard, for example, made no distinction between “a citizen, soldier, and a husbandman,” and maintained “their arms were never lodged in the Hands of any who had not an Interest in preserving the Public Peace.” He argued that the sword and sovereignty must be united in the hands of the people and that no constitution could long remain balanced if military power was vested solely in an executive monarch. An army not only enhanced the power and prerogative of the crown, but also threatened the moral character of society. Placing military officers in the Commons who were more loyal to their employer, the king, than the historical independence of

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<sup>52</sup>Robert Molesworth, *An Account of Denmark* (1696), 246; quoted and cited in Robbins, *The Eighteenth-Century Commonwealthman*, 108.

Parliament, would corrupt the legislature. Indeed, the hierarchical arrangement of military life reflected the dependence and decadence of the old feudal array and promoted political intrigue. Free institutions require the regular rotation of public servants, not permanent placemen. Professional soldiers were also totally dependent on the government for their livelihood, which separated them from economically independent citizens. Men who made a career in the military lost their usefulness in peacetime and became insensitive to the freedoms of citizenship. Bearing arms in a militia, on the other hand, was an essential part of the responsibilities associated with civic citizenship. Not only could the militia provide for the national defense, it also would return that responsibility over to those citizens who were most interested in homeland security—those who owned property—and thus restore the balance between land and government. Trenchard argued that a “deluge of tyranny” was overspreading the entire world, and that Englishmen were able to retain their precious liberty against the floodtides of evil only because they had no standing army in their midst. However, if citizens refused to perform their civic duties as soldiers and thus provided no bulwark against a standing army, then they would be culpable of promoting the spread of political despotism and corruption.<sup>53</sup>

Moyle, in turn, maintained that “Whenever a Nation suffers their Servants to carry their arms, their servants will make them hold their Trenchers.” Therefore the militia must “consist of the same persons as have the property; or otherwise the gov-

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<sup>53</sup>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* (1697), 3-4, 7-8, 10-13, 15-17, 19-22, 27-29, 38-40; quoted and cited in Cress, *Citizens in Arms*, 20, n. 9.

ernment is violent and against nature.”<sup>54</sup> Fletcher likewise contended, “No bodies of military men can be of any force or value, unless many persons of quality or education be among them.”<sup>55</sup> More importantly, “The possession of arms is the distinction between a free man and a slave. He who has nothing, and belongs to another, must be defended by him, and needs no arms: but he who thinks he is his own master, and has anything he may call his own, ought to have arms to defend himself and what he possesses, or else he lives precariously and at discretion.”<sup>56</sup>

Toland, on the other hand, openly admitted that the militia was in poor (if not appalling) shape, which he blamed on pro-army ministers who deliberately allowed it to atrophy. He argued at length on how the militia could be remodeled into effective fighting force and thus become a reliable substitute for a standing army. To ensure that the militia’s upper ranks were held by those most interested in local security, he recommended that a property qualification be required for officers. Toland recommended that only freeholders should own arms and serve in the militia. To prevent a single party from gaining control of the local militias—thus sacrificing the common good of the community to special interests—he suggested that officer tenures be set at three years. Fletcher, in kind, contended that the “officers should be named and preferred, as well as they and the soldiers paid, by the people that set them out,” thereby

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<sup>54</sup> Walter Moyle, *The Whole Works of Walter Moyle* (1749), 173; *An Essay Upon the Constitution of the Roman Government* (1698), 123; quoted and cited in Cress, *Citizens in Arms*, 19, n. 8.

<sup>55</sup> Andrew Fletcher, *A Discourse of Government with Relation to Militias* (1698), 45; quoted and cited in Cress, *Citizens in Arms*, 20, n. 10.

<sup>56</sup> Andrew Fletcher, *Political Works*, 221. Cited and quoted in Halbrook, *That Every Man Be Armed*, 47, n. 72.

ensuring local autonomy rather than centralized authority over the militia. Toland additionally argued that no one now under eighteen years of age could seek any future public office without first serving in the militia, thus guaranteeing that later generations properly understood the relationship between their civic and military obligations as free citizens.<sup>57</sup> Fletcher and Trenchard agreed that compulsory service, increased training, and stricter discipline were necessary reforms that not only would boost military proficiency, but also enhance public virtue among the citizenry. As Fletcher put it, regular militia encampments were “as great a school of virtue as the military discipline.” While Trenchard essentially concurred, he also declared that technological advances in warfare could be “as much gained in the closet as in the field,” and that militiamen could master that expertise quite easily.<sup>58</sup> If Trenchard had actually practiced what he preached, however, he would have known that a “closet” is not the best place to practice close-order drill with a musket, nor did such isolated, individual practice promote unit cohesion in combat. That obvious lack of practical sophistication is most likely due to the fact that the authors were primarily political polemicists rather than dedicated reformers; men who had never served in either the army or the militia, and never bore arms in battle.

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<sup>57</sup>John Toland, *The Militia Reform'd, or an Easy Scheme of Furnishing England with a Constant Land-Force* (1697), 2:594-613; Fletcher, *A Discourse of Government with Relation to Militias* (1698), 49-65. Cited and quoted in Lawrence Delbert Cress, “Radical Whiggery on the Role of the Military: Ideological Roots of the American Revolutionary Militia,” *Journal of the History of Ideas* 40 (January 1979): 50-51.

<sup>58</sup>Fletcher, *Discourse of Government*, 45-65; Trenchard, *An Argument Shewing*, 24; quoted and cited in Schwoerer, *No Standing Armies*, 182-83.

In any case, their major theme was that a standing army in peacetime enhanced the already swollen power of the crown and court, and thereby upset the constitutional balance between the legislature and executive, which ultimately endangered the liberties of Englishmen. Yet as Professor Schwoerer summarizes, “In theory, they wanted no standing at all; in practice, they were willing to accept a small army. They gave lip service to the idea that the nation would be safe with a remodeled militia.” To be sure, the anti-army coalition in Parliament “introduced bills to reform the militia, but failed to push them.” Just as significantly, when reforms were eventually instituted more than a half-century later, the 1757 Militia Act recognized that militia was merely an armed auxiliary of Great Britain’s professional army. The outcome of the 1697-99 controversy is well known among historians. Professor Schwoerer tells us that “A compromise was reached in the end, and a small force was allowed. By the end of the century, no one in Parliament suggested that England could be safe with no standing force at all.” According to Professor Cress, Radical Whig schemes “had little or no impact on contemporary political debate. William III got his standing army with the consent of Parliament, and the English militia system entered the eighteenth century in a state of general disarray.”<sup>59</sup>

### Moderate Whigs

We also know that the 1697-99 controversy produced counter-arguments to the anti-army ideology that were presented by “Court” writers and Moderate Whigs. But as Lois Schwoerer relates, the pro-army faction had “two formidable challenges” before them: “one was to answer Trenchard’s central charge that a standing army meant

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<sup>59</sup>Schwoerer, *No Standing Armies*, 162, 156; Cress, *Citizens in Arms*, 21.

the overthrow of a balanced government and the end of English freedom. The second was to persuade the reader that an army was necessary without antagonizing the widespread pride in the fleet and faith in the militia.”<sup>60</sup> Two capable and knowledgeable polemicists responded to those two challenges: Daniel Defoe and John Somers. Defoe confronted the “threat to freedom and balanced constitution” issue head on with an argument based on the constitutional prerogatives of Parliament. While admitting that an army had posed a danger during the Restoration Era, he reminded his audience “the Mischief does not lie in an Army, but in the Tyrant” who misuses that armed force. If proper safeguards were in place, an army would pose no danger to English liberties, and no better protections existed than England’s Bill of Rights, which vested Parliament with the power of the purse that allowed the legislature to raise or disband an army according to the best interests of the people and with their consent. As Professor Cress summarizes, “A simple syllogism settled the issue for Defoe: The acts of Parliament are legal, and Parliament had constitutional authority to raise an army, thus the army was constitutional because Parliament chose to create it.”<sup>61</sup> In other words, Englishmen had the constitutional means to be ruled by black letter law rather than black-hearted men, and should have the confidence and capacity to govern themselves accordingly. However, Defoe was arguing against men who had little faith that a paper document could blunt the sword of a would-be despot who had soldiers at his command to enforce his wishes. Indeed, Andrew Fletcher subse-

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<sup>60</sup>Schwoerer, *No Standing Armies*, 184.

<sup>61</sup>Cress, *Citizens in Arms*, 26; Defoe, *An Argument Shewing, That a Standing Army, with Consent of Parliament is Not Inconsistent with a Free Government* (1698), 36-39, 41-50.

quently parried Defoe's syllogism with a pointed aphorism: "He that is armed is always master of the purse of him that is disarmed."<sup>62</sup> Nevertheless, Defoe also measured Parliament's prerogative powers from an entirely different angle. He argued that a revitalized militia might produce what Trenchard feared most—the ultimate demise of balanced government and political freedom. Much as Harrington had inferred, Defoe reasoned that a proficiently trained, well organized, and fully manned militia was nothing more than a standing army by another name. More importantly, the militia was an armed force commanded by the crown under current English law and legally independent of Parliament's control. As such, it could be used to prop up executive sovereignty, perhaps even support an absolute monarchy.

That line of argument, of course, essentially denied (or at least ignored) the fabled virtue and incorruptibility of citizen-soldiers—unless those county warriors exercised a political right *not* to bear political arms for illicit political purposes (if granted that free choice). All the same, Defoe maintained that the revolutionary settlement had assured Parliament fiscal supervision over the army, and thus a constitutional foundation for internal and external security. Besides, the existing army—which radical Whigs were so eager to disband now that King William III had won his war with the French—had proven over the past decade to be both militarily capable and constitutionally compatible. The militia, on the other hand, was not a proficient armed force or subject to parliamentary oversight. Reviving it would only undermine Parliament's sovereignty and weaken national security, and thus introduce the precise

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<sup>62</sup>Fletcher, *Political Works* (1737), 9; quoted in Robbins, *The Eighteenth-Century Commonwealthman*, 105.

conditions for creating constitutional instability and tyranny. Clearly, England's political, military, and constitutional situation had been literally revolutionized since Harrington wrote his theories about a model English republic. "What then comes of the *History of Standing Armies*?" Defoe asked. "Tho' there had never been any in the World, they [standing armies] may be necessary now, and so absolutely necessary, as we cannot be safe without them." A perpetually dangerous world required permanent protections: "War is become a Science, and Arms an Employment"; which meant the raw courage of irregular troops could no longer compete with the seasoned training, discipline, and professionalism provided by a permanent military establishment in an age of modern warfare.<sup>63</sup>

Somers, in contrast, confronted "the naval pride and militia faith" issue with finesse and circumspection (he was, after all, the lord high chancellor and, apparently, a very judicious fellow). For example, he testified, "When I seem to prepare you to consider the necessity of keeping a land-force, I am far from the thought of a standing army." He also confessed that he would "reject the proposition with horror" if the military and international affairs of state were different. On one hand, he artfully praised the militia as "much the best in the world"; on the other, he candidly questioned its inability to be deployed overseas, and to assemble in force at a moment's notice. Somers more prudently argued, "The best guaranty of a peace is a good force to maintain it," not only by sea, but also by land. Like paid seamen, paid troops could do no harm so long as Englishmen were dedicated to the principles of liberty and willing to defend their constitution. Unlike the anti-army polemicists, Somers tried to

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<sup>63</sup>Defoe, *Some Reflections* (1697), 12-13, 16-22; quoted in Cress, *Citizens in Arms*, 28.

be less argumentative, and more reasonable, which usually does not sway the entrenched convictions of single-minded opponents. For the most part, the radical opposition ridiculed his arguments.<sup>64</sup>

Nevertheless, Radical and Moderate Whigs did share a small patch of common ground. Neither faction thought the army was capable of defying the constitutional order on its own volition. As far as all post-revolutionary Whigs were concerned, the army was a danger to political freedom only if ambitious princes and corrupt ministers used it to undermine the civil constitution, and thus gain political power at the people's expense. As Defoe astutely said, "the Mischief does not lie in an Army, but in the Tyrant." They quickly parted company, of course, over whether the post-revolutionary constitution provided the necessary institutional framework to check the executive's misuse of armed political power.<sup>65</sup> Post-revolutionary Americans would debate that same issue—and essentially express the same concerns, and make the same arguments—over their own constitution. And yet everyone who participated in militia/army debates of 1697-99 and 1787-89 were animated by the same guiding principle: the sword of war (military power) and the sword of justice (police power) must be exercised with the free consent of the people to protect their lives and property, not against their collective wills to coerce or endanger them. Or to put the entire matter another way, the armed political power of the sword should be on the side of the people, not in their backs or at their throats. That, in a nutshell, was what

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<sup>64</sup>John Somers, *Letter, Balancing the Necessity of Keeping a Land-Force in Times of Peace: With the Dangers that May Follow on It* (1697); quoted in Schworer, *No Standing Armies*, 184-86.

<sup>65</sup>The basis of the shared common ground between radical and moderate Whigs is borrowed from Lawrence Cress, *Citizens in Arms*, 32.

the standing army controversy was all about—a fundamental difference of opinion over a shared fundamental principle. It was also an argument that refused to go away.

The most complete restatement of the Radical Whig position—and James Harrington’s political philosophy—came in 1775 when James Burgh published his three volume work, *Political Disquisitions: Or, An Enquiry into Public Errors, Defects, and Abuses*. Not an especially original thinker, Burgh repeated all of the century-old ideas that were now the shibboleths Radical Whigism: a standing army in peacetime is “one of the most hurtful and most dangerous of abuses,” and was always the “creature of the court”; the possession of arms was the “distinction between a freeman and a slave”; the unification of civil and military power in the hands of the people kept the “love of liberty by which alone the freedom of government can be preserved”; “A good militia will always preserve the public liberty [but] if the militia be not upon a right foot, the liberty of the people must perish”; the militia must be composed of “men of property, whose interests is involved in that of their country,” otherwise “it is . . . but a mongrel army.”<sup>66</sup> Remaining true to the basic tenets and themes of his intellectual forerunners, Burgh condemned military professionalism as divorcing the obligation of homeland defense from the function of citizenship, and destroying the relationship between property, arms, political power, and free political institutions. Just as significant (and sinister), a permanent military establishment was an extension of the crown and court and therefore an instrument of executive will. As always, a standing army created constitutional imbalance and political instability by increasing

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<sup>66</sup>James Burgh, *Political Disquisitions: Or, An Enquiry into Public Errors, Defects, and Abuses* (London: E. and C. Dilly, 1774-75; reprint, New York: Da Capo Press, 1971), 1: preface, 2:341, 346-48, 352, 359-60, 389-92, 396-97, 401-02. (Page references are to reprint edition).

the chief magistrate's political power at the expense of legislature, which represented the sovereignty of the people.<sup>67</sup>

All the same, Burgh did forge a new link in the veritable (and venerable) chain of coercion, corruption, constitutionalism, and causation: the connection between the military and ministry gave court ministers the confidence to initiate colonial policies they would not have considered otherwise. With a professional army that was independent of colonial control at its beck and call, the ministry had the armed political clout to intimidate or forcibly coerce the American colonists into paying taxes, which (not coincidentally) provided the fiscal means to maintain that same army in North America.<sup>68</sup> But by the time Burgh's *Disquisitions* crossed the Atlantic, the British Army was enforcing the 1774 Coercive Acts in Massachusetts. What is more, the American colonists were actively preparing their militias for war, and probably too busy to read what they already knew to be true.

There was also another work most Americans had little time to ponder or fully appreciate—Adam Smith's *An Inquiry into the Nature and Cause of the Wealth of Nations*, which was published in the hectic and historic year of 1776. Smith's ideas were born of the Scottish Enlightenment, which had a tremendous influence in America. His mentor at the University of Glasgow was Francis Hutcheson whose teachings were familiar to many American revolutionaries. Hutcheson, in turn, knew the works of James Harrington and Andrew Fletcher, and like them, argued that military service should be the civic duty of every citizen, the profession of none. When the

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<sup>67</sup>Ibid., 2:343-44, 348-53, 432, 438-89, 443.

<sup>68</sup>Ibid., 2:374.

Walpole ministry won a major debate in Parliament over the legitimacy of Great Britain's standing army in 1738, Hutcheson and Burgh were the only political theorists who continued to argue against the army's place in the constitutional order. However, the noted Tory jurist and legal scholar, William Blackstone, also associated soldiering with property ownership and the rights of citizenship. In his widely read and notable work, *Commentaries on the Laws of England*, which was published between 1765 and 1769, Blackstone judged, "In a land of liberty it is extremely dangerous to make a distinct order of the profession of arms."<sup>69</sup> All the same, Adam Smith thrust aside the combined opinions of Blackstone, Burgh, and his teacher, Francis Hutcheson, in his now famous work.

Smith expanded on the 1697-99 pro-army tracts and presented the most logical argument that a standing army was both necessary for national defense and compatible with the English constitution. He based his thesis on an analysis of the economic functions and civic duties of citizens in a commercial nation, an assessment of self-interest as an incentive in human nature and most famously, the advantages of a division of labor in complex societies. In sum, his defense of a professional military establishment rested on an economic value system that was quite different from the agrarian independence espoused by Harrington and his many followers.

Smith began by arguing that societies evolve through four stages of complexity that determine the type of military power that is available to resist "the violence and invasion of other independent societies." In each stage of development, moreover, the military obligations of citizens decline in proportion to the increasing advance-

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<sup>69</sup>William Blackstone, *Commentaries on the Laws of England*, ed. by Edward Christian (London: 1809 ed.), 1:143-44.

ment and complexity of those societies. “Among nations of hunters, the lowest and rudest state of society, . . . every man is a warrior as well as a hunter.” Such a society, however, had a major military shortcoming: “An army of hunters can seldom exceed two or three hundred men” because the “precarious subsistence” afforded by chasing game would “seldom allow a greater number to keep together for any considerable time.” Due to their limited numbers and short, sporadic engagements, “A nation of hunters can never be formidable to the civilized nations in their neighborhood.” Among nomadic shepherds (or “Arabs”), “a more advanced state of society,” the whole nation, “being accustomed to a wandering life, even in time of peace, easily takes the field in time of war.” In fact, the entire population goes “to war together . . . and every one does as well as he [or she] can.” Nevertheless, “if they are vanquished, all is lost, and not only their herds and flocks, but their women and children, become the booty of the conqueror.” Smith’s final words on this particular society are interesting and worth noting: “If the hunting nations of America should ever become shepherds, their neighborhood would be much more dangerous to the European colonies than it is at present.”<sup>70</sup> In any case, the next stage of social progress was quite familiar to “pro-militia agrarians.”

“In yet a more advanced state of society; among nations of husbandmen who have little foreign commerce and no other manufactures, but those coarse and household ones which almost every private family prepares for its own use; every man, in the same manner, either is a warrior, or easily becomes such.” While Smith allowed

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<sup>70</sup>Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* [London, 1776] (London: Oxford University Press, 1976; reprint, Indianapolis: Liberty Fund, 1981), 2:689-92 (page references are to reprint edition). Hereafter cited as Smith, *Wealth of Nations*.

“The hardiness of their ordinary life prepares them for the fatigues of war,” he quickly added that agrarians “are soldiers, but soldiers not quite so much masters of their exercise.” The reason for that lack of military expertise was because a nation of farmers were bound by the seasonal demands of crop production, which limited their time to train for war. As Smith addition-ally noted, farming also limited the season to fight: “If the campaign too should begin after seed-time, and end before harvest, both the husbandman and his principal labourers can be spared from the farm without much loss. He trusts that the work which must be done in the mean time can be well enough executed by the old men, the women and children” [and perhaps overseers and slaves]. “He is not unwilling, therefore, to serve without pay during so short a campaign.” That meant, of course, that an agrarian society could only wage war during the dead of winter or the heat of summer. And yet as long as a farmer fought his “seasonable” battles, “the interruption of his business will not always occasion any considerable diminution of his revenue.” The situation was quite different for those who pursued other trades, however:

But the moment that an artificer, a smith, a carpenter, or a weaver, for example, quits his workhouse, the sole source of his revenue is completely dried up. Nature does nothing for him, he does all for himself. When he takes the field, therefore, in defence of the publick, as he has no revenue to maintain himself, he must necessarily be maintained by the publick. But in a country of which a great part of the inhabitants are artificers and manufacturers, a great part of the people who go to war must be drawn from those classes, and must therefore be maintained by the publick as long as they are employed in its service.<sup>71</sup>

Here, for the first time ever, is clear statement that military “service” among non-agrarians was a form of “employment” that deserved a living wage, paid at public expense, in exchange for the public’s defense. Nevertheless, Smith also genuflected

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<sup>71</sup>Ibid., 2:694-95.

before Harrington, his disciplines, and all those who worshipped ancient agrarian republics with these lines:

In the republics of antient [sic] Greece and Rome, during the whole period of their existence, and under the feudal governments for a considerable time after their first establishment, the trade of a soldier was not a separate, distinct trade, which constituted the sole or principal occupation of a particular class of citizens. Every subject of the state, whatever might be the ordinary trade or occupation by which he gained his livelihood, considered himself, upon all ordinary occasions, as fit likewise to exercise the trade of a soldier, and upon many extraordinary occasions as bound to exercise it.<sup>72</sup>

But to some extent, those words were merely a soliloquy compared to what Smith really wanted to communicate to his audience; the fourth, and most advanced of all societies—the wealthy commercial nation.

Smith introduced the wealthy, complex society by first expressing his classic “division of labor” theory in terms of war, individual interest, and the state’s astuteness to assume full responsibility for the public’s defense. Due to the modern intricacies and mechanization of “The art of war,” he explained, “it is necessary that it should become the sole or principal occupation of a particular class of citizens, and the division of labor is as necessary for the improvement of this, as of every other art.” With respect to a division of arms,

it is the wisdom of the state only which can render the trade of a soldier a particular trade separate and distinct from all others. . . . It is the wisdom of the state only which can render it for his interest to give up the greater part of his time to this peculiar occupation: and states have not always had this wisdom, even when their circumstances had become such, that the preservation of their existence required that they should have it.<sup>73</sup>

In fact, “a wealthy nation is of all nations the most likely to be attacked,” and yet “the natural habits of the people render them altogether incapable of defending them-

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<sup>72</sup>Ibid., 2:696-97.

<sup>73</sup>Ibid., 2:697.

selves.” Under “these circumstances,” a complex state had “but two methods” available “for the publick defence.”

First, the state could “enforce the practice of military exercises, and oblige either all the citizens of military age, or a certain number of them to join in some measure the trade of a soldier to whatever other trade or profession they may happen to carry on.” This, by the way, was precisely how Harrington constructed his “military orb” in the agrarian republic of Oceana. Smith, however, thought that compulsory military service in sophisticated commercial societies—which was only achieved “by means of a very rigorous police”—went against the “interest, genius and inclinations of the people.” The second option was to maintain “a certain number of citizens in the constant practice and training of military exercises,” and thereby “render the trade of a soldier a particular trade, separate and distinct from all others.” If a state chose “the first of those two expedients, its military force is said to consist in a militia; if to the second, it is said to consist in a standing army.”<sup>74</sup> Since national defense (and presumably professional law enforcement) depended upon a “division of labor” that was responsive to the interests of those who pursued that trade, the best type of military force was a standing army.

According to Smith, a citizen militia was inherently inefficient because “the character of the labourer, artificer, or tradesmen, predominated over that of the soldier.” A militiaman’s primary interests were tied first and foremost to his trade, which was his major means of economic support. A professional soldier, on the other hand, was supported economically by the state in exchange for his full-time training,

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<sup>74</sup>Ibid., 2:698.

apprenticeship, and acquired expertise in the martial arts, and consequently viewed his particular “trade” no differently than any other craftsman did his. For those who pursued the military as their profession, the particular interest “of the soldier predominated over every other,” thus leaving the common defense to those who were more skillful (and presumably more interested and dedicated) in performing that particular trade. For the militiaman, soldiering was a secondary, if not “part-time” interest that did not provide him with a full-time livelihood. Harrington, of course, argued that a citizen’s true interest in soldiering was a measure of his economic independence, his right to fight his own battles, and his responsibility to protect his property. Nonetheless, Smith apparently agreed with Harrington on one point: “A militia of any kind, it must be observed, however, which has served for several successive campaigns in the field, becomes in every respect a standing army”—or in Harrington’s lexicon, “a marching army.” Even so, Smith made another point in the above regard that was more appropriate to his own place and time: “Should the war in America drag out through another campaign, the American militia may become in every respect a match for [Great Britain’s] standing army.”<sup>75</sup> He of course had no idea when he wrote those words American’s had forsaken the militia and favored a Continental Army. “A militia,” nonetheless, “in whatever manner it may be either disciplined or exercised, must always be much inferior to a well disciplined and well exercised standing army.” For Adam Smith, the total integration of the individual into the military profession made the “career-soldier” vastly superior to the “citizen-soldier”—

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<sup>75</sup>Ibid., 2:698-700.

especially if that citizen was obliged by a wealthy state to be a soldier when he had more immediate interests at heart.

Smith's approval of military professionalism represented much more than a simple rejection of the Radical Whig's traditional fear of standing armies in peacetime. He also endorsed a commercial society organized upon a division of labor that promoted special interests—including a special interest among military professionals. Such a society and such special interests, of course, were anathemas to all "neo-Harringtonian" theorists who quite literally grounded armed citizenship on an agrarian landscape, and insisted that there should be "no difference between the citizen, the soldier, and the husbandman." Such men were true conservatives who were afraid of uncertain change and sought comfort in a knowable past. To Smith, change meant progress. As a true progressive, he did not see the evolution from "rude" to "complex" social states, or the analogous advancement of specialization and professionalism, as stark signposts of declining moral virtue or impending political disaster. For him, those developments marked the progression of society toward a more useful utilization of human and material resources that would serve the best interests and common good of every citizen.

Nevertheless, Smith could hardly justify a standing army in an eighteenth-century context without considering its assumed threat to civil liberties and a balanced constitution. He did so in one paragraph with the same reasoning he employed to discredit militia proficiency—namely, self-interest. As the following lines point out, Smith also had something interesting to say about popular rebellions:

Men of republican principles have been jealous of a standing army as dangerous to liberty. It certainly is so, whenever the interest of the general and that

of the principal officers are not necessarily connected with the support of the constitution of the state. The standing army of Caesar destroyed the Roman republic. The standing army of Cromwell turned the long parliament out of doors. But where the sovereign is himself the general, and the principal nobility and gentry of the country the chief officers of the army; where the military force is placed under the command of those who have the greatest interest in the support of civil authority, because they have themselves the greatest share of that authority, a standing army can never be dangerous to liberty. On the contrary, it may in some cases be favourable to liberty. The security which it gives to the sovereign renders unnecessary that troublesome jealousy, which, in some modern republics, seems to watch over the minutest actions, and to be at all times ready to disturb the peace of every citizen. Where the security of the magistrate, though supported by the principal people of the country, is endangered by every popular discontent; where a small tumult is capable of bringing about in a few hours a great revolution, the whole authority of government must be employed to suppress and punish every murmur and complaint against it. To a sovereign, on the contrary who feels himself supported, not only by the natural aristocracy of the country, but by a well-regulated standing army, the rudest, the most groundless, and the most licentious remonstrances can give little disturbance. He can safely pardon or neglect them, and his consciousness of his own superiority naturally disposes him to do so. That degree of liberty which approaches to licentiousness can be tolerated only in countries where the sovereign is secured by a well-regulated standing army. It is in such countries only, that the publick safety does not require, that the sovereign should be trusted with any discretionary power, for suppressing even the impertinent wantonness of this licentious liberty.<sup>76</sup>

Three points stand out from this important paragraph.

First, where the power of the sword is commanded by those who have the greatest interest in supporting the civil constitution *because they have the greatest authority under that constitution*, then a standing army can never be dangerous to civil liberty. If we were to erase the italicized words from that statement, then we would have something much closer to Smith's aim: a unification of civil society's and the military's interests—or civilian control of the military that would ensure unity of interests *because those who have greatest authority will not be tempted to use the army to sustain or perpetuate that authority*.

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<sup>76</sup>Ibid., 2:706-07.

Second, Smith obviously places little trust in the “licentious liberty” of the people, which is prone to “popular discontent,” “revolution,” and “the rudest, the most groundless, and the most licentious remonstrances.” Without question, popular democracy had not made any notable advances over the course of a century—even by the most progressive of liberals.

Finally, Smith maintained that as long as “the natural aristocracy” and a “well-regulated standing army supported the “sovereign,” popular discontent could be “safely” pardoned or even ignored. If that arrangement seems familiar, then this chapter has perhaps been useful. Aside from the “natural” adjective, the aristocracy and army were precisely the two pillars that Harrington said were necessary to support a sovereign monarch. When a monarch lost both—as Charles I did—civil war erupted between Englishmen. At the time Smith wrote, King George III had lost Virginia’s “natural aristocracy.” The question yet to be determined was quite evident: Could the British sovereign put down “popular discontent” with his standing army?

The more immediate question before us, however, is this: How did all of these conflicting perceptions, ideas, and theories about citizen militias and standing armies relate to the practical realities of exercising military power in Virginia?

## CHAPTER 3

### THE POWER OF THE SWORD IN VIRGINIA REALITY, 1648-1699

“Masters have arms. Servants not trusted with them.”

—Governor Thomas Culpeper  
1681

#### Contextual Contrasts

One might assume James Harrington’s republican ideology was tailor-made for Virginia’s landed gentry. Such a presumption, however, does not hold up under examination. In fact, there were a number of reasons why his political theory was ill suited to Virginia realities. In the first place, Harrington framed his arguments without giving the slightest thought or consideration to the particular political situation or constitutional circumstances of colonial Virginians. Then again, Virginia’s gentry were not overly concerned with Harrington’s major motivations and motives either. For one thing, they were not republicans struggling to create a kingless republic in far-off North America—at least not yet. They remained loyal to whoever sat on the English throne regardless of their religion or absolute sovereignty to rule. Nor did they experience the full ramifications of a republican police state under a military regime. In truth, Virginians rebuked the Civil War and Commonwealth Era; celebrated the Restoration; and were largely ambivalent about the Exclusion Crisis and Glorious Revolution. Moreover, Articles Six and Seven of the English Bill of Rights produced no significant political or constitutional consequences in Virginia for almost one hundred years. Yet ironically, the landed gentry in far-off Virginia already enjoyed all the armed political power that Harrington’s ideology hoped to obtain for English gentlemen at home—control over their county militias (local autonomy), the authority to

raise and disband armed forces (legislative supremacy); and the right to select the class of armed manpower that would police and defend the colony. An obvious question comes immediately to mind: How did Virginia gentlemen gain so much armed political power for themselves without firing a shot or requiring a theoretical blueprint?

The short answer is that armed political power was theirs for the taking; they never had to struggle or compete for it with political rivals. There were no aristocratic nobles or House of Lords in Virginia; the only ruling class was provincial planters who controlled their own House of Commons. In addition, the crown expected and encouraged colonial Virginians to police and defend themselves unhindered by centralized interference. The royal governors, in turn, cooperated with the gentry in all military matters; they had no independent executive power (either politically or fiscally) to raise their own troops for external or internal security. While governors had the legal authority to prorogue the House of Burgesses and veto legislation, they never had the armed power to purge elected lawmakers at gunpoint. If anything, lawmakers and executives shared the same interests, concerns, and objectives: provide for the colony's common defense and ensure domestic tranquility so that the profitable production of tobacco could proceed unhindered and uninterrupted. This is not to say that struggles for political power never occurred between executives and legislatures. The major point, however, is that those contests never escalated into armed political violence.

Nor was the gentry's political power challenged from below with armed rebellions and insurrections. The only arguable exception was Bacon's Rebellion, which

was largely the gentry's own fault. In effect, a passive legislature had given a domineering executive too much control over the sword, which was ultimately contested by "the people" through a popular demagogue. It was the first and last time the House of Burgesses ever experienced an episode equivalent to Pride's Purge. For Virginia's landed elite, the lesson was well learned and never forgotten: the best way to prevent armed despotism from either above (executive tyranny) or below (popular anarchy) was "to keep" the power of sword in their hegemonic hands, and visibly "bear" it at their strapped sides for everyone to see.

There was one final reason why Virginia's landed gentry enjoyed so much control over the sword—they never raised it against each other as warring political factions. Apparently, Virginia's rulers understood two aspects of armed political power that their English counterparts finally comprehended after four decades of bitter and bloody conflict: keep guns out of domestic politics, and do not use them to foment political insurrections or civil wars. No wonder Articles Six and Seven of the English Bill of Rights seemed wholly irrelevant to Virginians—at least until they discovered that Great Britain's sword was, in fact, double-edged. Only then did they come to realize that their own Declaration of Rights and subsequent Second Amendment might be safe shields against those who might likewise use arms (and armies) to perpetuate their political power. The question is how did Virginia's gentry actually use their swords in the meantime? Or if framed from another angle, what past experiences shaped their future attitudes toward armed political power?

If any seventeenth-century Englishman understood that a militia was "necessary" to homeland security, it was a Virginia colonist who was aggressively taking,

settling, and defending territory for his King, Country, and family on a formidable frontier. If any Englishman had practical experience as a militiaman, it was a Virginian fighting for survival in that thoroughly hostile and dangerous environment. In a very real sense, ordinary Virginians did not need a philosopher like Thomas Hobbes to remind them that life in their New World setting was often “solitary, poor, nasty, brutish, and short.”<sup>1</sup> Nor did they require the services of a republican theorist like James Harrington, who basically argued that militias only worked in agrarian republics, and that permanent soldiers were always the paid pawns of kings. Even so, Virginians could easily ignore Harrington’s gospel for a more immediate (and important) reason—they were far more informed and knowledgeable than he ever was about the practical problems associated with making a militia a truly viable institution. What is more, the lessons they learned did not come from any theoretical treatise, but from the hard knocks of tomahawks. Virginians, in short, formed their attitudes about the power of the sword based upon practical reality and functional necessity. Those down-to-earth beliefs, moreover, were always subject to change in their evolving environment.

For the first eighty years of its existence, Virginia was under the titular authority of Stuart monarchs, broken by one brief interregnum. During those eight decades, two generations of Virginians had turned a precarious military outpost into a permanent and prosperous colony. That remarkable feat was accomplished with little assistance (or interference) from England save for the occasional influx of arms and manpower. As the colony evolved over time, so did its military requirements and institu-

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<sup>1</sup>Thomas Hobbes, *Leviathan* (London: 1651; reprint, “Everyman’s Library,” New York: Dutton Press, 1950), chap. xi, 104.

tions. In the beginning, Virginians were hostile invaders surrounded by potential enemies and under constant threat of attack. After subduing the indigenous tribes, Virginians became conquerors threatened by “external” invasions by other Native Americans along their frontier flanks, as well as European intruders who infrequently attacked their coast (especially the Dutch).

Under those “original” conditions and circumstances, Virginia was truly a colony “in arms,” whereby military defense was the responsibility of the entire community. Lacking both the fiscal and manpower resources to establish a professional army, Virginians collectively organized themselves into serviceable armed alternatives—militias. In their particular place and time, Virginians used their militias primarily as an essential means for survival—not as an expression of constitutional rights and liberties. Unlike Oceana’s “select” militias composed exclusively of land-owning “masters” who held political power and rights as citizens, Virginia’s “universal” forces embodied every source of manpower that was available—including white servants, black slaves, and even Native American allies. For the most part, armed Virginians were not “citizen”-soldiers, but rather soldier-“laborers.” In that specific sense and situation, every gun and every man was vitally important. It was also vitally important that those arms and men were “well regulated” in order to be effective. Accordingly, every early “gun” law enacted in early Virginia reflected the obligatory responsibilities—not the requisite entitlements—of the colony’s armed men. Common defense, in sum, held precedence over all other matters, and men were required by law to keep and bear arms. In fact, they had no real choice. If they refused to do so or ran away, they suffered fiscal fines and physical punishments.

Nevertheless, Virginia's "original" militias experienced a remarkable two-fold transformation between 1660 and 1700. While parliamentarians and monarchs were still struggling for constitutional control over armed political power in England, Virginians began to rely exclusively upon small "standing forces" of armed men for their external security. By the last quarter of the seventeenth century, the traditional militia ceased to be Virginia's primary sword of war. Rather than repelling invasions, militias were now enforcing laws and suppressing insurrections. Instead of fighting foreign foes, militiamen were now performing the tasks of armed policemen to control other Virginians. The seeds of the militia's military decline and rise as a constabulary force sprouted and grew right along with Virginia's own development into a thriving colony. As a political institution, the militia's transformation reflected the demographic, social, and economic changes that were occurring toward the end of Virginia's first century. As most colonial scholars recognize, Bacon's Rebellion was a major manifestation of those significant transformations. However, that armed insurrection was also a dramatic milestone in the militia's transition from a military to a police force. As such, it opens an entirely new window for viewing the changing climate and landscape of armed political power in colonial Virginia.

In brief and re-evaluated recap, the rebellion began due to an isolated raid (not an invasion) by a small band of Native Americans across the buffer zone between Indian territory and most of Virginia's Tidewater population, which Governor Berkeley formally demarcated in an attempt to segregate the two races. Berkeley also intended to establish a defense perimeter along that buffer zone by building forts at the head of the major rivers. That major change in military policy reflected a significant new re-

ality: Virginians no longer needed to be a community “in arms” because they were no longer threatened with collective extinction by hostile enemies (recall that the “raiders” initially stole a few pigs, not a vast number of lives). Many Virginians, however, had not changed their old attitudes toward Native Americans in accordance with that shift in military policy. Bacon—a newcomer to Virginia—used that traditional mindset to challenge the Governor’s executive authority. The militia, however, took no active part whatsoever in the struggle for armed political power between the Governor and the Rebel (nor did the House of Burgesses). Militiamen refused to play political policemen for Berkeley by putting down the insurrection. Gentry militia commanders, on the other hand, had to be forcibly coerced into swearing allegiance to Bacon. When Bacon took his “rabble” army far afield to decimate an innocent tribe, Berkeley took Jamestown. Bacon then scampered back from the frontier to re-take the capital. In the meantime, an Indian war party (no longer raiding robbers) killed eight people along the Chickahominy River only twenty-three miles from Jamestown. Bacon then hurried back to the buffer zone on a retaliatory expedition. After three weeks in the field, his army killed ten Indians, which included seven women and children. Many of his troops became so “tired, Murmuring, impatient, half starved, dissatisfied,” and generally mutinous that Bacon had to disband over half of his force.<sup>2</sup> Berkeley seized the opportunity provided by Bacon’s absence to re-seize the capital. Bacon, in turn, again rushed back; re-captured Jamestown; and in a fit of frustration, burned it to the ground. As a result, his popular support likewise turned to ashes and

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<sup>2</sup>*Narratives*, 126-28.

blew away—as did most of his men, except for a mixed band of landless freemen, servants, and slaves, who were condemned as social and political outlaws.

The seesaw battle between securing the frontier as well as the center of government clearly demonstrated that one military force could not be in two places, or serve two crucial functions, at the same time. Ironically, Berkeley's military policy was the correct choice for Virginia's new military reality: establish a permanent defensive perimeter guarded by permanent forces. However, that alternative course of action was beyond the practical capabilities of the local militias, which by custom and law did not range beyond their immediate counties or remain mustered for extensive periods of time. In addition, the rebellion also pointed out that Virginians were no longer threatened by external enemies alone, but also by armed adversaries from within. Perhaps the local militias could be adapted to respond to that new reality: rather than serving primarily a military force, they might suppress insurrections as a police force. Such an institutional transition, however, would also require two additional transformations: a change in public attitudes, and a modification in manpower requirements. Altering traditional beliefs, as it turned out, was not especially difficult. Recruiting men who were willing to serve for long stretches in remote garrisons, however, was an entirely different matter. Such extended guard duty would require manpower that did not subsist solely upon land, but had to be paid wages for their livelihood. At bottom, landowners would have to hire non-landowners to protect them against external attacks. Moreover, Virginians would have to embody those hired troops as permanent "standing" forces. That practice was not what James Harrington had preached. According to his ideology, relying upon paid, permanent, pro-

fessional soldiers had extremely adverse consequences: *dependence* upon the central government for local defense; *a transfer of rights and responsibilities* vested in property ownership; and *an acceptance of dependent relationships* rather than the political independence that was the “birthright” of economically self-reliant citizens. In effect, master-servant relationships—as well as civic responsibilities—would be turned completely upside down.

However, that would only be the case in terms of external security. Indeed, the gentry had the power to be just as selective in providing manpower for internal security. In fact, it was imperative that landowning “masters” had a viable armed agency to police their landless “servants” (and slaves) if they continued their rebellious ways. It was precisely at this juncture—and in that functional capacity—that Harrington’s theoretical militias found practical expression in colonial Virginia. The paradoxes are truly profound. While Harrington argued that militias must provide external security, Virginians would use their militias almost solely for internal security. While Harrington argued that citizen “masters” must serve as part-time soldiers, Virginians would hire non-citizen “servants” as permanent soldiers. Even so, the parallels between theory and reality are equally remarkable. For all practical purposes, Virginia’s landed gentry controlled armed political power through local autonomy and legislative supremacy. Moreover, they never allowed—or trusted—their standing military forces to enforce laws, suppress insurrections, or otherwise act as domestic police forces. As a result, Virginians had no reason (or cause) to share the fundamental conviction that propelled Harrington’s entire ideology—a deep distrust of any constitutional arrangement that put the swords of justice (police power) and war

(military power) in the hands of rulers who might exercise that armed authority independently of the ruled. The only time the General Assembly's armed authority was undermined in the seventeenth century was during Bacon's Rebellion. Any future threat to its primacy in the armed affairs of the colony would not go unchallenged. For Second Amendment historians, there is no better evidence of Virginia's legislative authority over the sword than the laws enacted by the House of Burgesses between 1676 and 1748.

### Arms and Men Under Virginia Law

Less than a year after Bacon's Rebellion was finally settled, marauding Indians massacred a family on an isolated homestead. A few weeks later the tribesmen reappeared at the head of the James River, causing widespread panic. Rather than "standing" their ground and assuming a posture of individual self-defense, frontier denizens opted for safety in numbers and centralized protection by fleeing toward a denser population and pleading to government authorities for help. Responding to the situation, Governor Jeffreys immediately set out with "some of my owne Redcoats, and a considerable number of Horse" from the lower counties to exact retribution upon the "perfidious Heathen."<sup>3</sup> Despite the timely and responsible reaction, the counter-offensive mission was a total failure. The tribal terrorists had withdrawn northward just as swiftly and completely vanished. Virginians quickly realized that they were now confronted with a new native enemy; the Seneca, which was the name Virginians commonly gave to the Five Tribes of the Iroquois.<sup>4</sup> Unlike the once po-

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<sup>3</sup>Jeffreys to Sir Henry Coventry, August 1678, Coventry Papers, LXXVIII, 293-94.

tent Powhatan Confederacy—whom Virginians successfully defeated and dislodged by strategically attacking their villages and crops in a series of localized “feed fights”—the home bases of the Iroquois Confederation lay two hundred miles away in western Pennsylvania and northern New York. The decidedly more “foreign” Seneca presented a new set of threats and challenges. Traditional counter-offensives by local militiamen were obviously unsuccessful, if not wholly impracticable. In order to effectively respond to the new situation—and thus ensure homeland security at the frontier—Virginians would have to adopt entirely new military methods, means, and measures.

The strategic and tactical options available to Virginians were limited; they could either make peace with the Seneca through negotiations, or adopt a defense stance by maintaining a permanent security force on their vulnerable perimeter. Diplomatic parleys took time and promised no immediate protection. Unlike Pennsylvania’s Quakers—who relied exclusively upon diplomacy and never organized militias until the French and Indian War—many Virginians were reluctant to put complete faith and trust in peaceful solutions. Of course after decades of bitter and bloody warfare over their territory and homeland security, many Native Americans probably shared the same beliefs when it came to Virginians. All the same, the House of Burgesses made a momentous decision in the spring of 1679 by enacting a significant statute: every forty tithables in the colony were required by law to “fitt and sett forth one able and sufficient man and horse . . . well and completely armed with a case of good pistols, carbine or short gunn and a sword.” Each group of “forties” (or

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<sup>4</sup>The Five Tribes were the Mohawk, Oneida, Onondaga, Cayuga, and Seneca—names that are most familiar to upstate New Yorkers.

“finders”) was also obliged to supply their “ranger” with ammunition and provisions for an initial four months and every four months thereafter. The troopers were to be paid a fixed monthly wage by tax assessments in their home counties. Unlike former militia laws, no stipulation was made compelling the “forties” to work the land of the man they selected in exchange for his extended duty away from hearth and home—assuming, of course, that the allotted ranger was in fact a housekeeper or freeholder. Since the 350 horsemen were to be stationed at four “garrison houses” or barracks (not forts) at the heads of the James, Mattaponi, Rappahannock, and Potomac Rivers, we can reasonably presume that few rode off leaving families and homesteads behind them.<sup>5</sup> Like most laws, this particular act would be tweaked and modified in response to practical necessities and political realities over the next two decades. Even so, the intended purpose of the legislation remained fundamentally unchanged: Virginia’s militias were deliberately bypassed as a military means for ensuring external security. In addition, one man out of every forty now provided the common defense of all Virginians.

The first alteration in the ranger law was largely due to a lack a public support—not that “the people” were upset that someone else was fulfilling their responsibilities as armed citizens, but because they had to foot the bill for that individual indulgence. After the first four months, the “forties” failed to resupply the rangers, who quite naturally negated their end of the bargain by riding “home.” On 8 June 1680, the Burgesses revised the law by reducing the number rangers to twenty men per garrison. While the troopers were still to be paid by county assessments, more

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<sup>5</sup>Hening, *Statutes*, 2:433-40.

affluent planters were now assigned the task of providing provisions. Harrington might have smiled knowing that wealthier “masters” were shouldering more of the burdens and responsibilities for defense except for one detail: unlike the poorer “forties,” the richer planters were to be reimbursed by the provincial government. In addition, acting lieutenant governor Sir Henry Chicheley was authorized to replace half of Virginia’s rangers with British regulars left over after Bacon’s Rebellion.<sup>6</sup> No doubt the lawmakers assumed King Charles II would pay for his own royal troops, and thus further reduce the tax burden on their tight-fisted constituents. By mid-summer Chicheley reported that forty-eight “Country Soldiers” and thirty-two “Red-coats” currently manned the front-line perimeter—a sizeable reduction from the original 350 rangers.<sup>7</sup> Fortunately, those 80 “standing” soldiers were all that was “necessary” to Virginia’s external security for the next two years thanks to the Senecas, who did not press their initial guerrilla attacks. Internal security, however, was proving to be an entirely different matter.

The greatest threat to domestic order within the colony always arose from the same source—its labor force. As long as Virginians continued to conquer territory from the Native Americans (which they always managed to do), they remained richly endowed with one capital resource—land. Much of that land—as well as the economic independence and political power that Harrington astutely attached to it—belonged to the landed gentry. The one commodity the gentry lacked, however, was

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<sup>6</sup>Ibid., 2:469-71.

<sup>7</sup>Henry R. McIlwaine et al. eds., *Executive Journals of the Council of Colonial Virginia, 1680-1754* (Richmond, VA: Virginia State Library, 1925-66), 1:6, 10-12. Hereafter cited as McIlwaine, *Executive Journals of the Council*.

cheap manpower to turn their abundant land into equally abundant profits through labor-intensive tobacco production. The solution seemed relatively simple: import labor in the form of white indentured servants from England and black slaves from Africa. Like any other purchased commodity, the preferred choice was indentured servants because they were cheaper to obtain and seemed more durable—at least until a “natural” reproductive increase among the Africans took hold and ultimately “out-resourced” white manpower. The initial preference of servants over slaves was reflected in a type of “state of the colony message” presented by Governor Berkeley in 1671. Berkeley reported that Virginia’s total population was 48,000. Of that figure, 2,000 were black slaves, and 6,000 were indentured servants. He also recorded that during the previous seven years only two or three shiploads of Africans had entered the colony. On the other hand, some 1,500 servants were arriving from England each year.<sup>8</sup> Just ten years later the colony’s Secretary, Nicholas Spencer, revised that estimate; the total labor force had now risen to fifteen thousand servants and three thousand slaves.<sup>9</sup> As those figures suggest, there was a large workforce on hand; one that promised to be highly productive as long as it was obedient, hard working, and “happy.” Not everyone, however, was whistling while they worked. Virginia’s gentry soon realized that they were being inundated by a “giddy multitude” that was capable of harvesting more trouble than tobacco.<sup>10</sup>

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<sup>8</sup>“Inquiries to the Governor of Virginia” in Hening, *Statutes*, 2:515.

<sup>9</sup>“Letters from Virginia,” July 25 and 26, 1681, in *Calendar of State Papers, Colonial Series, 1681-1685*, 157.

<sup>10</sup>The House of Burgesses first used the term “giddy multitude” to describe the servants, slaves, and landless freemen who followed Nathaniel Bacon during the rebellion. See Henry R. McIlwaine, ed., *Journals of the House of Burgesses of Virginia*

Much of the problem stemmed from the fact that the gentry were paying pences for pounds of working flesh. Although they complained loudly to the contrary, they were getting just what they bargained for in return. Most of the indentured servants that came to Virginia during the Restoration were England's working poor who hoped to get a new start in a New World. After completing their seven years of required "service," they had Harringtonian expectations: freedom from servitude, the opportunity to acquire land, economic independence from others, and presumably political power as well. Virginia, however, was no Oceana; reality rarely matched their dreams. While Virginia was rich in land, it was owned and controlled by the rich who were not eager to share it with agrarian competitors. Even the customary system of headrights—which was intended to encourage settlement—was slanted toward the wealthy. Under its provisions, fifty acres of land were granted each person coming to settle in Virginia (like the Cavalier gentry and nobles) or for bringing in someone else (like indentured servants). Yet everyone knew the system was riddled with fraud and corruption—including Virginia's Attorney General, Edward Randolph, who noted that obtaining false headrights was a common practice, but did not particularly trouble or hurt anyone because land was so abundant.<sup>11</sup> By the end of the seventeenth century, some wealthy planters were securing headrights by bringing in African slaves, which was also contrary to the intent of the law.

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*1659/60-1693* (Richmond, VA: Virginia State Library, 1914), 73. Hereafter cited as *Journals of the House*.

<sup>11</sup>Edward Randolph to the Board of Trade, 31 August 1696, *Calendar of State Papers, Colonial Series, 1696-1697*, 88-90.

Moreover, continued ownership of fifty acre headrights was predicated upon three stipulations: that the land be settled within three years; that an annual rent of two shillings, or “quitrent,” be paid to the King; and that, if on the frontier, the owner “kept” four able-bodied men, well-armed men upon it.<sup>12</sup> The last condition has interesting implications. For one, it reverses, reduces, and ultimately “privatizes” the required ratio of forty landowners to “find” one well-armed man to “range” the frontier for collective security. For another, it infers that the one-headright owner must be considerably wealthier than the combined “forties” to afford no less than four armed guards for his personal property. At any rate, most of the gentry “Land lopers” who claimed thousands of acres never cultivated it, paid their quitrents, or kept armed men on their private frontier property. What is more, the options left to former servants were few, far between, and not exactly “neo-Harringtonian” in concept: they could hire themselves out as wage laborers; become tenants and rent farms from “landed lords” (landlords); or seek land either on the most extreme fringes of the frontier or in neighboring colonies. Scholar T. H. Breen succinctly summarizes the path most “freedmen” took:

Since before 1680 remote lands meant constant danger from the Indians, many ex-servants chose to work for wages or rent land in secure areas rather than settle on the frontier. It has been estimated that no more than six percent of this group ever became independent planters. Landless laborers more often became overseers on the plantations, supervising servants and slaves whose condition differed little from their own.<sup>13</sup>

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<sup>12</sup>Morton, *Colonial Virginia*, 1:362.

<sup>13</sup> T. H. Breen, “A Changing Labor Force and Race Relations in Virginia 1660-1710,” *Journal of Social History* 7 (1973): 6. The term “Land lopers” comes from William Sherwood’s 1676 account of Bacon’s Rebellion entitled “Virginias Deplored Condition;” cited and quoted in Breen, “A Changing Labor Force,” 6. Hereafter cited as Breen, “A Changing Labor Force.” Also see Morton, *Colonial Virginia*, 1:362-63.

Such harsh realities and shattered dreams could produce frustration and discontent among those who came to Virginia of their own “free” will. However, other white servants (and all black slaves) had no choice whatsoever in working the land of Virginia’s gentry.

As scholars have long recognized, many indentured servants literally came to Virginia either by hook or by crook—they were either kidnapped by “spirits” (greedy labor contractors) and thus “spirited” out of England against their will, or they were criminals on the lam. That motley assortment also included vagabonds and political prisoners.<sup>14</sup> Virginia’s gentry were also well aware of the kidnappings (many were children and youths) and petitioned King Charles II not only to police that despicable practice, but also to prevent the influx of “felons condemned to death, sturdy beggars, gypsies, and other incorrigible rogues: poor and idle debauched persons.”<sup>15</sup> Most of these servants had no desire to be in Virginia and vented their desperation and discontent by mostly running away or occasionally striking their masters, which only resulted in new laws, harsh punishments, and sterner order.<sup>16</sup> Such strict policing not only increased the servants’ exasperation, but also decreased their chances of escape down to one risky—and rather hopeless—alternative: armed insurrection.

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<sup>14</sup>A. Roger Ekirch, “Bound for America: A Profile of British Convicts Transported to the Colonies, 1718-1775.” *William and Mary Quarterly*, 3<sup>rd</sup> Ser., 42 (April 1985): 184-200.

<sup>15</sup>W. Noel Sainsbury, “Abstracts,” Virginia State Library, printed in *Virginia Magazine of History and Biography* 18 (1910): 418-22. Hereafter abbreviated as *VMHB*.

<sup>16</sup>Hening, *Statutes*, 1:538; 2:26, 35, 277-279.

The first recorded servant rebellion erupted in York County in 1661, apparently sparked by complaints concerning “corn and water” diets and much “hard usage.” The leader of the uprising, Isaac Friend, initially proposed petitioning King Charles II for a redress of their grievances, but dropped the notion when another servant reminded him that getting such a letter out of Virginia was next to impossible. Since they could not gain satisfaction by their masters’ system, the servants decided to overthrow it. According to subsequent testimony, Friend announced that his 40 men should collectively band together and “get Armes & [that] he would be the first & have them cry as they went along, ‘who would be for Liberty, and free from bondage,’ & that there would be enough [other servants] come to them & they would goe through the Countrey and kill those that made any opposition, & that they would either be free or die for it.” The proposed “freedom march” through Virginia—which neither James Harrington nor Algernon Sydney would likely approve of—was stopped dead in its tracks by an anonymous whistle-blower. Even so, Friend swore that he never intended to let armed actions speak louder than his highly charged words. The York County Court (and local gentry) issued two judgments: they ordered Friend’s master to keep a closer watch over his treacherous-talking trouble-maker, and issued a warning to all other gentlemen to remain vigilant for “like dangerous discourses” in the future.<sup>17</sup> Nonetheless, the talk—and danger—was hardly over.

Another armed revolt was discovered in adjacent York, Middlesex, and Gloucester counties in 1663, which alarmed many more gentlemen and to far greater heights. In this episode, the rebels were a group of 30 veterans from Cromwell’s

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<sup>17</sup>“Records of the York County Court,” *William and Mary Quarterly*, 1<sup>st</sup> ser., XI (1902): 34-37.

army who were transported to Virginia as political prisoners and serving the sentences as indentured laborers. According to Robert Beverley's 1705 *History and Present State of Virginia*, these "Oliverian Soldiers" had "form'd a villainous Plot to destroy their Masters, and afterwards to set up for themselves."<sup>18</sup> Their plan was apparently quite detailed. First they would capture the home of Councilor Willis and seize all of his arms and drum. Indeed, the homes of many wealthy planters and political elites were "castles" in every sense of that word, being public armories of stock-piled weapons for militia use as well as private abodes. Next they would march on to other gentlemen's houses collecting more servants and arms, and killing anyone who resisted their military campaign. Once organized in force, they would then proceed to Jamestown, confront the Governor, and demand their freedom. If their request was denied, the soldier-rebels planned to leave Virginia altogether and settle elsewhere. However another indentured servant named Berkenhead, who informed the local authorities, ultimately foiled the plot. An extremely grateful House of Burgesses—apparently the matter had gone far beyond the jurisdiction of any local county court—rewarded Berkenhead with his freedom as well as five thousand pounds of tobacco valued at £200. In addition, the lawmakers issued a resolution: "*Resolved*, that the 13<sup>th</sup> of September be annually kept holy, being the day those villains intended to put the plot into execution." They also passed a law that forbid servants from leaving home without special permits, and likewise urged county courts to make their own

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<sup>18</sup>Robert Beverley, Jr., *The History and Present State of Virginia* [1705], ed., Louis B. Wright (Chapel Hill: The University of North Carolina Press, 1947), 69. Hereafter cited as Beverley, *History of Virginia*.

ordinances banning servant meetings and gatherings.<sup>19</sup> Nonetheless, provincial authorities were so upset by the whole affair that they greatly exaggerated its particulars to King Charles II; so much so, in fact, that the monarch instantly ordered the construction of a fort to protect his royal governor from further armed assaults by unruly servants.<sup>20</sup>

Even so, the gentry had good reason to view white servants as a dangerous and untrustworthy labor force that required their constant surveillance. Moreover, the steady flow of undesirable “jail birds” into colony continued abated—at least according to the complaints lodged by York, Middlesex, and Gloucester county officials. In response to those protests, the General Court at Jamestown issued the following order on 20 April 1670: “that it shall not be permitted to any person tradeing hither to bring in and land any *jaile birds* or such others, who for notorious offences have deserved to dye in England, from and after the twentieth day of January next, upon paine of being forced to keepe them on board, and carry them to some other country, where they may be better secured.”<sup>21</sup> Where that “other country” might be was anybody’s guess, but probably made no difference as long as it was far from Virginia. At any rate, Bacon’s Rebellion lay seven years ahead. After that experience, Virginia’s gentry realized that surveillance and immigration restrictions were not enough to prevent armed insurgencies—not only by white servants, but also by black slaves. In “An act for preventing Negroes Insurrections” in 1680, the House of Burgesses declared, “it

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<sup>19</sup>Hening, *Statutes*, 2:204, 191, 195. Contemporary accounts of the plot are available in *VMHB* 15 (1907): 38-41.

<sup>20</sup>Beverley, *History of Virginia*, 70.

<sup>21</sup>Hening, *Statutes*, 2:509-510.

shall not be lawfull for any negroe or other slave to carry or arme himselfe with any club, staffe, gunn, word or any other weapon of defence or offence.”<sup>22</sup> However, the gentry also continually insisted that the king’s troops should police their workforce for them. As late as 1681, five years after Bacon was dead and buried, Virginia’s rulers urged Charles II to keep his troops at their disposal to “prevent or suppress any Insurrection that may otherwise happen during the necessitous unsettled condition of the Colonie.”<sup>23</sup> Yet they eventually realized another readily available armed agency was at hand; an indigenous police force that they could command and control as they saw fit—their local militias. Moreover, the landed gentry were perfectly willing to use that instrument to enforce their laws and suppress insurrections after 1681.

On May 1, 1682, Lieutenant Governor Chicheley was informed that a “plant cutting” insurrection had broken out in Gloucester County that was quickly spreading among other older counties. The revolt’s cause was clear: the assembly, which was always dominated by affluent planters, had failed to enact legislation limiting the production of tobacco in an effort to raise its devastatingly low price. Consequently, many small farmers literally took matters into their own hands by cutting down young plants throughout the middle peninsula. Chicheley immediately ordered Colonel Mathew Kemp, a rich planter and Council member, to disperse the rioters with his Gloucester militiamen, but with a vital proviso. Colonel/Councilor Kemp was to muster only with “soe many of them as may, in this juncture, bee admitted to arms.”<sup>24</sup>

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<sup>22</sup>Hening, *Statutes*, 2:481.

<sup>23</sup>Report to the King, 31 October 1681, *VMHB* 25 (1917): 371.

<sup>24</sup>Chicheley to the King, May 8, 1682, Colonial Office Papers 5/1356, p. 66; cited and quoted in Shea, *Virginia Militia*, 126.

Without question, the conflict of interest between small and large planters prompted Virginia's gentry-rulers to arm the more prosperous and presumably more reliable property owners. Militia commanders in adjacent counties were also ordered to keep mounted patrols on constant watch to prevent further destruction (horse owners were typically well-to-do planters). Colonel Kemp's "select" militiamen rounded up twenty-two cutters, but released all but two on promises of good behavior. Despite the daylight patrols, the riot continued throughout that summer under the cover of darkness. Moreover, it was spreading into New Kent and Middlesex Counties. The Governor of Maryland, Lord Baltimore, became so concerned that he placed armed guards along the Potomac border to keep the cutters from "invading" that neighboring colony.

When Virginia's absentee Governor, Lord Thomas Culpeper, returned from England, he was furious that the cutters had been pardoned. According to historian Richard Morton, "Culpeper and the Council now declared that the cutting up of tobacco plants by force of arms was treason, and had two of chief plant cutters hanged (one before the courthouse in Gloucester County) as an example to the people."<sup>25</sup> Nevertheless, it is worth noting that the only "arms" the cutters bore during that "treasonous" episode were their bare hands and hoes. There is not one contemporary account—or any other shred of documented evidence—that mentions or even suggests the use of privately-owned firearms or other weapons during the entire "rebellion." All the same, Governor Culpeper's harsh "example" evidently worked—at least in the short term. As scholar T. H. Breen summarizes:

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<sup>25</sup>Morton, *Colonial Virginia*, 304, 308. Quote at 308.

After 1682 the character of social violence changed in Virginia. Never again would the ‘giddy multitude’—indentured servants, black slaves and poor free-men—make common cause against the colony’s ruling planters. In fact, the plant-cutting riots were the last major disturbance in which white laborers of any sort took part. Over the next two decades, white men came to regard blacks—and blacks alone—as the chief threat to Virginia’s tranquility.<sup>26</sup>

Professor Breen chiefly attributes the easing of tensions between white masters and servants to rising tobacco prices, the increasing availability of land, and the changing character of Virginia’s labor force from white servants to black slaves. However, I would also propose a more forceful factor that eased the anxiety of Virginia’s ruling elite: their firm control over the local militias, which had performed a rapid about-face into armed institutions responsible for the security of property and the maintenance of civil order. The gentry’s command and control obviously included the selection of armed militiamen who would serve as colonial policemen. In sum, the changing character of Virginia’s labor force also included a change in the colony’s armed manpower that now functioned in two separate capacities—as permanent military forces for external security, and as readily available police forces for domestic “tranquility.”

A fascinating indication of that “division” of armed “labor” comes to us from Governor Culpeper in 1681; a full year before the plant-cutting riots broke out. In 1679 King Charles II specifically instructed Culpeper to “take care that all Planters and Christian Servants be well and fitly provided with Arms.” Perchance the king had forgotten his previous 1663 order to build a servant-proof fort, or perhaps he now considered “Christian Servants” to be reliable keepers and bearers of arms. In any case, Culpeper was a closer observer of Virginia reality and knew full well that the

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<sup>26</sup>Breen, “A Changing Labor Force,” 13.

king's order was impractical, if not dangerous. The Governor scribbled this significant note next to Charles's directive in 1681: "Masters have arms. Servants not trusted with them."<sup>27</sup> While there is no evidence that Culpeper ever read Harrington's *Oceana*, the similarity between abstract theory and actual practice is truly remarkable except for one crucial variation: gentry "masters" were indeed keeping, bearing, and controlling arms as policemen in their local militias; however, they also were relying primarily upon "servant-soldiers" to bear arms in combat against external enemies. The division of manpower and armed capabilities based upon economic and political classes is truly noteworthy. It goes a long way in explaining why "standing soldiers" did not serve as militia policemen in Virginia—not because of any English theory (which no Virginian as yet acknowledged), but because of Virginia reality. Moreover, the social and political stability that eventually developed between all whites—which Professor Breen and many other Virginia scholars have aptly verified—also contributed to the gradual decline of Virginia's militia as constabulary force; except, of course, during times of real (or imagined) slave insurrections when it was every white Virginian's right and responsibility to keep and bear arms regardless of his class.

One final point merits consideration. Professor Breen and other historians have both noted and studied the "curious disappearance" of the "giddy multitude" during the last quarter of the seventeenth century.<sup>28</sup> They also have attributed that fascinating vanishing act to an amalgamation of agrarian interests, economic oppor-

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<sup>27</sup>Colonial Office Papers, 1/47, no. 106; cited and quoted in *ibid.*

<sup>28</sup>Breen, "A Changing Labor Force," 4.

tunities, and racial attitudes. However, I would also suggest another reason why many white members of the “giddy multitude” so curiously (if not conveniently) disappeared—they had gone “missing in action” while serving as soldiers on distant frontiers and in foreign expeditions. Indeed, it was the poor, the landless, the indebted, the non-voters, and those, in sum, who were most expendable that defended Virginia from 1676 to 1776. In reality, Virginia’s agrarian aristocrats enjoyed economic privileges and political power unknown to most post-feudal English gentlemen. While slaves did the farming, ex-servants did the fighting. The evidence that supports that contention lies in the laws the landed gentry enacted after the last major insurgency of its labor force prior to the American Revolution.

One month after the plant-cutting rebellion broke out, the Redcoats that still remained in Virginia after Bacon’s Rebellion were finally disbanded. As previously related, the regulars’ last assignment was to provide frontier defense. Their departure meant that the cost of maintaining the garrison houses at full strength would increase. One of the first acts of the November 1682 General Assembly was to replace the June 1680 law with a new one. The barracks at the heads of the major rivers were to be dismantled. Each of the four frontier counties—Stafford, Rappahannock, New Kent, and Henrico—were to raise one company of twenty mounted rangers, “well furnished with horses and all other accouterments.” Each company was to be assigned a responsible “housekeeper” who would “command, lead, traine, conduct and exercise” his twenty men. Aside from mustering and drilling once a month, the companies were to “range and scout about the frontiers” of their home counties at least once

every two weeks. However, they were not to engage in any fights with foreign tribesmen unless they “shall obstinately persist to commit acts of hostility.” Significantly, all eighty rangers would live at home and thus would not be housed, fed, and clothed at public expense. They would still be paid an annual salary, but from a poll tax raised by the provincial government rather than the frontier counties.<sup>29</sup> Robert Beverley summed up the intended purpose of the law in his *History of Virginia* by noting that these “small Parties of Light Horse . . . might afford to serve at easier Rates, and yet do the Business more effectually.”<sup>30</sup>

Beverley had explained the reasoning but not the ramifications of the new law. In effect, the lawmakers had rejected permanent military forces and re-instated the formally defunct trainbands for external security. But in doing so, they placed the burden of defending the entire colony upon the shoulders of four frontier counties and eighty landowners or tenant farmers who could feed, clothe, and house themselves. Of course the possibility exists that those same men might have been farm laborers, especially since they were to be commanded by a “housekeeper.” In either case, those men were not supposed to fight hostile natives unless they “obstinately persisted” in being hostile. Therefore the “Business” they were to perform “more effectually” was probably policing raiding robbers and not repelling full-scale invasions. In fact, the lawmakers could “afford” those “easier Rates” of protection because a delegation of Virginians had brokered a truce with the Seneca in July 1679 that was still being honored by both sides. The new law, in sum, reflected a more fundamental

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<sup>29</sup>Hening, *Statutes*, 2:498-501.

<sup>30</sup>Beverley, *History of Virginia*, 95.

pattern of political reasoning: the General Assembly was dismantling its permanent military forces in peacetime. The only problem was that no one knew how long that peace would last.

A new royal governor arrived in 1684, Lord Francis Howard, Baron of Effingham. As far as military matters were concerned, Effingham apparently had two thoughts in mind: preserve the peace, but be prepared for war. The new executive was thoroughly dissatisfied with the “unsettled condition” in which the legislature had managed external security. In his view, the small ranger-trainbands were no defense against attacks and the provincial militias were in a state of disarray. He urged the first session of the House of Burgesses to better organize the colony’s forces so that they would be more “serviceable in securing the Country.”<sup>31</sup> The legislature responded by enacting two new laws. First it “encouraged” all white freemen to purchase their own arms and ammunition “for the defence of this his majesties country” and that all such weapons were “free and exempted from being imprest or taken from him or them.” Apparently those who previously had their firearms “impressed” for the colony’s defense never got them back. Consequently, all troopers were also obliged to purchase their own arms rather than impress privately owned weapons; those without arms were to obtain them by 25 March 1686 or “forfeit two hundred pounds of tobacco to his majesty.” In addition, all private firearms were exempted from seizure due to fiscal “distresse, attachment or execution.”<sup>32</sup> Nevertheless, the real intent of this law was not merely to solicit and sanction the private ownership of

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<sup>31</sup>Effingham to the House of Burgesses, 19 April 1684, in Baron Howard of Effingham Papers (Library of Congress), II. Hereafter cited as Effingham Papers.

<sup>32</sup>Hening, *Statutes*, 3:13-14.

weapons for both collective and individual self-defense, but also to protect public arms that were customarily distributed among the militias in emergencies. While encouraging individual ownership of arms would obviously lessen the drain on the public resources and expenditures for defense, the gentry also wanted to ensure that collective weapons were available to put down insurrections by that armed populace.

In fact, the gentry were actually segregating private and public arms under the new law. The justices in Rappahannock County, for example, immediately drew up an unconditional order that required all persons having public weapons to deliver them up or be fined six hundred pounds of tobacco for every case of pistols, three hundred pounds for every musket, and two hundred pounds for every carbine they held back. The peremptory act was posted on the courthouse door and read from the county's pulpits.<sup>33</sup> Such ordinances, however, did not apply to the most prominent (and wealthier) citizens who could be trusted with "keeping" public stores of arms. For instance, Councilor/Colonel John Page not only kept brass guns, mortar pieces, carbines, "grenados," bandoleers, drums, daggers, halberds, spikes, muskets, pikes, swords, saltpeter, and shot at his residence, but also employed an armed guard for their protection.<sup>34</sup> Considering the fact that "*Oliverian* Soldiers" planned to raid the armory of another councilor back in 1663, the paid guard was probably a wise precaution. Moreover, past experience demonstrated that public arms were not always safe in public buildings. Initially, the Assembly ordered the large supply of arms and

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<sup>33</sup>Rappahannock County Records, Orders 1 October 1684; cited in Philip Alexander Bruce, *Institutional History of Virginia in the Seventeenth Century*, 2 vols. (New York: G. P. Putnam's Sons, 1910), 2:43. Hereafter cited as Bruce, *Institutional History*.

<sup>34</sup>Colonial Entry Book, 1685-90, page 65; cited in *ibid*.

ammunition that was sent to the colony with the regiment of regulars in 1676 to be stored in a public magazine at Middle Plantation.<sup>35</sup> The English soldiers guarded those arms until their lack of pay threatened a general mutiny and likely seizure of the armory. To preclude that possibility, the Council proposed that the magazine's precious contents be placed in the private custody of the "most considerable and loyal gentlemen" in the Virginia.<sup>36</sup> That is precisely where "public" arms and munitions were kept until gentry officials were once again confident that centralized storage facilities could be adequately guarded against mischief and mayhem. For Virginia's ruling elite, gun control was the only sensible solution to keep the lower orders from pushing boundaries of what little freedom they possessed.

The second 1684 law addressed the manpower that would bear arms. A slightly larger and more expensive "standing force" of 120 troopers was created to replace the small ranger-trainbands. The men were still to be quartered in their own or other private homes, but "as near together as possible" to ensure cohesion and quicker responses. They were also required to patrol the frontier at least once a week instead of twice a month. In addition, the regular militias were to be mustered once a year as regiments, and every three months as companies. Even so, the most significant aspect of this revised legislation was that regular militiamen were officially referred to as "auxiliaries" for the much smaller and more permanent frontier forces. This was the first time in their history that Virginians considered their traditional mi-

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<sup>35</sup>Hening, *Statutes*, 2:404.

<sup>36</sup>Council Minutes, 3 August 1680, Colonial Entry Book, vol. 1xxx; cited and quoted in Bruce, *Institutional History*, 2:41.

litias as anything less than the primary means of defending their colony from external attacks.<sup>37</sup>

While the legislature was sharpening the colony's sword and making it more "serviceable," the executive was pursuing measures so that it would not be used. Effingham had sailed off to New York that summer to escape Virginia's deadly heat and humidity.<sup>38</sup> While there, he forged a formal peace treaty with the Five Iroquois Tribes who promised to stop raiding into Virginia and halt their attacks on subject tribes. Ironically, the local natives had become so debilitated as fighting men that they relied almost exclusively upon Virginia's sword for protection. All the same, the 1684 Albany treaty marked the end of serious Anglo-Indian conflicts along the frontier. The hatchet was at last buried—at least for the remainder of the seventeenth century.<sup>39</sup>

With peace well in hand, Effingham returned to Virginia to resume his efforts at remodeling the militia and bolstering the colony's defenses. The Assembly was unwilling to assist with either project. The lawmakers saw no need to waste money on the military spending during peacetime and disbanded the rangers. Despite Effingham's continued insistence, the frontier remained unguarded for more than five

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<sup>37</sup>Hening, *Statutes*, 3:17-22.

<sup>38</sup>Lord Howard suffered tremendous personal tragedies due to Virginia's climate and attendant plagues. During the summer of 1686, the Governor lost his wife, two pages and five other servants; his eldest daughter, who set sail for England with her mother's body, likewise died of a fever before the ship arrived. See Morton, *Colonial Virginia*, 1: 324.

<sup>39</sup>*Ibid.*, 314-15.

years.<sup>40</sup> The legislature also refused to enact militia reforms, causing the governor and council to inform King James II that the assembly was blocking their efforts “to forme the Militia, as In tyme of danger to render it usefull for the defence of the country against our wild Indian Enimies, or other forreigne Enimies and alsoe to make it as u[s]efull to unruly home spirits.”<sup>41</sup> As far as most Virginians were concerned, the only “immediate” threat to their lives and property was the 1682 plant-cutting revolt. What was the sense in drilling with guns when there was more immediate (and hopefully profitable) work to be done tilling with hoes? Apparently King James II felt the same way because Effingham spent the rest of his tenure remodeling the militia solely on his own authority as the colony’s supreme military commander.<sup>42</sup> What resulted from his incessant efforts was quite remarkable.

Historian William L. Shea persuasively argues that Governor Effingham brought Virginia’s militia in near perfect march-step with England’s militia system by the time of the Glorious Revolution. In Professor Shea’s words: “By 1689 the militia was better organized than at any time since Berkeley’s day, but it was far smaller and as much or more a constabulary force as a combat force. It resembled its English

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<sup>40</sup>Hening, *Statutes*, 3:38; also see McIlwaine, *Journals of the House*, 281.

<sup>41</sup>Effingham to the King, 22 February 1686/7, Colonial Office Series 5/1357, 125-26; cited and quoted in Shea, *Virginia Militia*, 129.

<sup>42</sup>Lord Howard was the only Catholic appointed Governor in Virginia. On 6 February 1685, Charles II died and was succeeded by his brother James, Duke of York. Virginians did not learn of the succession until 7 May 1686. James II kept colonial officials in office and instructed Effingham to allow freedom of discussion and voting in the Council and to protect the people from arbitrary rule (see *VMHB* 19 [1911]: 337-347). But like every monarch before and after him, James granted his Virginia executive much discretion in ensuring external and internal security as long as those efforts likewise secured the uninterrupted production and export of tobacco.

counterpart in form and function more closely than ever before. Just how effective it might have been in a civil or military crisis will never be known because it was not tested, though Effingham seems to have been quite pleased with it.”<sup>43</sup> What the governor managed to do was pare down the active militia to just under half of its former strength—from eighty-five hundred men in 1680 to forty-three hundred in 1689. He also made sure that those less numerous militiamen were “for the most part Completely Equipt” with arms as opposed to the “scarce one half” that were armed in 1680.<sup>44</sup> In essence, Effingham solved the arms shortage and concerns over political instability from below by a simple exclusionary expedient: he limited militia service to the relatively prosperous men who owned land and arms. The ultimate upshot, as Professor Shea aptly notes, was “an English-style ‘bourgeois militia’ . . . on American soil.”<sup>45</sup> Moreover, Effingham was not the only one who was pleased with that result.

The armed “bourgeoisie,” for one, evidently took a measure pride in their selective status by acquiring “Military ornaments” for their select units. The Middlesex County Court ordered Colonel Christopher Robinson to obtain from England one set of colors and staff each for their cavalry troop and foot company; two brass trumpets, with silver mouthpieces and hung in black and white silk; two drums with six spare heads, four pairs of drum sticks, and two belts. The court also gave Robinson seven

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<sup>43</sup>Shea, *Virginia Militia*, 131.

<sup>44</sup>Comparative estimates are from “A Copie of a Letter from Major Generall Smith to the 20 Colonels in Virginia touching the Militia,” 20 November 1680, Colonial Office Papers 1/46, f. 112, and Effingham to the lords commissioners fro trade and plantations, 28 May 1689, Colonial Office Papers 5/1358, p.1; cited in Shea, *Virginia Militia*, 130.

<sup>45</sup>*Ibid.*

thousand pounds of tobacco for these “articles of war.” Northumberland County granted Captains Lee, Kenner, and Brereton three thousand pounds of tobacco each for the collective purchase of a cornet, two trumpets, drum colors, and halberds. Even the frontier court of Rappahannock County ordered Colonel William Lloyd to procure from England no less than four trumpets, two colors for the troopers and two for the infantry, plus four decorated drums for their backwoods militiamen. On the other hand, the justices of Westmoreland County preferred “to stick to their guns” and directed their militia captains to purchase from abroad thirty muskets, thirty pairs of pistols with holsters, thirty swords, and thirty cartridge boxes.<sup>46</sup>

Aside from acquiring the trappings of armed “professionalism,” the middle-class men were also to be paid like specialized soldiers, which was another break with past practice. Prior to the plant-cutting riot in 1682, Colonel George Lyddall and Captain John Foster petitioned the General Assembly for an appropriation for their “extraordinary services” during an imminent Indian raid. Instead of rewarding their self-sacrifice with remuneration, the Burgesses rebuked their self-seeking with this remark: “Militia officers and soldiers ought, in case of sudden invasion, inroad, or incursion of any Indian enemy or others, to defend their counties without any allowance from the public for the same.” However, the Assembly reversed that parsimonious decision in 1686. Now every trooper actively engaged in armed service would receive fifteen pounds of tobacco, or one shilling for himself and sixpence for his horse per month, while every infantryman would earn ten pounds of tobacco, or one

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<sup>46</sup>Middlesex County Records, Orders 12 December 1687; Northumberland County Records, 1678-98, p. 446; Rappahannock County Records, 1686-92, p. 62; Westmoreland County Records, Orders 28 March 1688; all cited in Bruce, *Institutional History*, 44-45.

shilling for their marching feet and gun-bearing arms. Officers, of course, received much more for their leadership and brains: for troopers, one hundred pounds of tobacco to captains, sixty to lieutenants, fifty to cornets, and thirty to corporals; for officers of foot, the stipend was ten pounds less for each corresponding grade.<sup>47</sup> While those rates were hardly constituted a living wage, they at least gave additional recognition to the fact that a certain class of armed manpower was providing a necessary service above and beyond the responsibilities of good citizenship.

As far as the wealthier planters were concerned, Effingham's reforms were also viewed as a welcomed change. In the words of William Fitzhugh, "a full number with a Soldier like appearance, is far more suitable and commendable, than a far greater number presenting themselves in a field with Clubs and staves, rather like a Rabble Rout than a well disciplined Militia."<sup>48</sup> Fitzhugh's somewhat ostentatious observation brings two points to mind. First, Effingham had basically negated the 1684 law promoting the purchase of arms by all Virginians, but nevertheless fulfilled the intent of the legislators; that is, to "field" militiamen with weapons other than "Clubs and staves." Second, that the "Rabble" was no longer capable of a "Rout," much less a riot or rebellion. While there is no record of how the unarmed lower class reacted to Effingham's reforms, Professor Shea's assessment is probably accurate: "undoubt-

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<sup>47</sup>Compare Minutes of the Assembly, 10 April 1682, to Minutes of the Assembly, 3 November 1686, Colonial Entry Book, 1682-95, p. 140, 252, 350; cited in Bruce, *Institutional History*, 12-13.

<sup>48</sup>William Fitzhugh to Nicholas Spencer, 16 February 1687/8, in Richard B. Davis, ed., *William Fitzhugh and His Chesapeake World, 1676-1701: The Fitzhugh Letters and Other Documents* (Chapel Hill: The University of North Carolina Press, 1963), 238.

edly a good many, like their English cousins, were glad to be rid of an occasionally burdensome responsibility.”<sup>49</sup>

One final item deserves consideration. Even though Effingham reformed the militia under his own executive authority, he did not usurp the local autonomy of the county courts, or the legislative power of the General Assembly, or the political influence and concerns of the landed elite. If anything, the executive and legislature remained within their prescribed constitutional boundaries as far as armed political power was concerned. Certainly no Virginian gentlemen believed his rights were endangered by the newly organized militia, which, as Effingham noted, was “in great Disorder, or indeed in no order at all” when he first arrived in 1683, “Yet now I hope it is [as] good as ever, that I shall be prepared against any Insurrection or Invasion.”<sup>50</sup> While the counties clearly had more reliable armed forces at hand to suppress insurrections, Effingham’s successors had far less confidence that they could repel invasions.

Lord Howard went home to England in February 1688. Due to his deteriorating health, he never returned to Virginia. Acting Governor Nathaniel Bacon, Sr., on 26 April 1689, officially proclaimed the accession of King William and Queen Mary. While Effingham retained his title as Governor, Captain Francis Nicholson was appointed as the resident Lieutenant Governor of Virginia by the new monarchs—despite the fact that he was enraged by the Glorious Revolution and initially refused

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<sup>49</sup>Shea, *Virginia Militia*, 131.

<sup>50</sup>Effingham to Lord Sunderland, 22 May 1688, Effingham Papers, II; cited and quoted in Shea, *Virginia Militia*, 131.

to recognize them as legitimate sovereigns. Nonetheless, Nicholson was an experienced professional soldier and colonial administrator whose services were badly needed. Indeed, with William's accession to the throne England also got William's eight-year War of the League of Augsburg against Louis XIV of France (known in America as King William's War). Therefore Nicholson's appointment as a trained soldier was both appropriate and timely. Upon his arrival in mid-1690, the new lieutenant governor immediately inspected Virginia's frontier defenses. Unlike Lord Howard, Nicholson was not at all pleased with what he discovered.

Much to his dismay, Nicholson found "the Militia was not in Such Condition as it ought;" in particular, he was concerned that a large number of freemen were unarmed, untrained, and not enrolled in the militia. As a veteran military officer, Nicholson was well aware that numbers often determined the outcomes of battles. As President of the Council, he resurrected the 1684 statute encouraging the individual purchase and possession of weapons. As Governor, he also appealed to the lords commissioners of trade to send a large shipment of arms and ammunition so that "poore and Indigent" Virginians could actively participate as armed citizens in the defense of their colony.<sup>51</sup> Nevertheless, his attempts to arm more Virginians failed miserably, due largely to an apathetic response by impoverished Virginians and English lords alike. Moreover, those who numbered among Virginia's ruling elite were not especially enthralled with the prospect of re-arming "giddy multitude."

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<sup>51</sup>Nicholson to lords commissioners of trade and plantations, 20 August 1690, Colonial Office Papers 5/1358, pp. 20, 42-43; cited and quoted in Shea, *Virginia Militia*, 132; McIlwaine, *Executive Journals of the Council*, 1: 11-14, 117-18, 120-21, 132-34, 141-42.

Even so, the gentry were sufficiently concerned by a possible attack by either the French or Indians that they passed another law that basically reinstated the former four companies of rangers at the heads of major rivers, but on a much smaller scale. This time there would be only “one lieutenant, eleven troopers, and two Indians” per “company.” In addition, the legislature gave Nicholson (“with the advice of the Councill”) emergency executive powers “to raise, levy and muster soe many and such a number of men, horses, arms and ammunition, for the better defence” of the colony in an hour of crisis. However, they also attached a critical proviso: the lieutenant governor and council members were required “at all times to disband and discharge” the forces they so raised when it was “most conducing to the advantage of this dominion.”<sup>52</sup> Since the law was only good for one year, it had to be renewed by four additional acts that extended over another four years, by which time King William’s War had formally ended with the Treaty of Ryswick (20 September 1697).<sup>53</sup> During that entire six-year period (1691-97), the only “standing” forces guarding the frontier were small bands of mounted rangers.

That shocking reality was awaiting Sir Edmond Andros when he took over the reigns of governorship from Nicholson in the autumn of 1692. When Effingham resigned his royal commission as Governor, King William appointed Andros in his place and transferred Nicholson—who had served under Sir Edmund in the consolidated Dominion of New England—to Maryland. Like Nicholson, Andros was a veteran soldier and administrator. He also inspected the frontier shortly after his arrival

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<sup>52</sup>Hening, *Statutes*, 3:82-84.

<sup>53</sup>*Ibid.*, 3:98-101; 108-116; 120; 127.

and was equally disconcerted over Virginia's defenses. However, his initial military concerns were different. Instead of trying to re-arm and re-enlist poor freemen into militias—which he undoubtedly learned from his predecessor was an exercise in futility—Andros focused upon shoring up the coastal fortifications against French naval assaults, constructing a public magazine at Jamestown, and cajoling the House of Burgesses to send financial aid to New York. On the last point, the Burgesses refused to offer assistance to New Yorkers against the French and Indians that were menacing their borders. In justifying their stance, the Assembly listed several particulars: New York was not so badly handicapped that it could not defend itself; moreover, New York was not an outer defensive line for Virginia as some asserted; in fact, a major threat to Virginia were the very Indians that were friendly to New Yorkers (the Seneca); finally, the legislators argued that they had their own frontier and coast to defend and could ill-afford sending money and men to shield New Yorkers when Virginians needed just as much (if not more) protection. That particular issue would perennially plague the administrations of Andros and his successor.<sup>54</sup> Even so, the lawmakers were essentially right. Virginia's unlocked backdoor was bound to cause trouble—and demand the governor's undivided attention—sooner or later.

King William's War finally "came" to Virginia in the summer of 1694 when an unidentified band of Indians killed a lone settler near the falls of the James River. After experiencing a full decade of relative peace, that rather innocuous incident threw the frontier counties into a panic. Since Andros and the Council had emergency "war powers" under the perennially renewed act of 1691, they initially re-

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<sup>54</sup>McIlwaine, *Journals of the House, 1659/60-1693*, 482-483; Morton, *Colonial Virginia*, 1:345, 349.

sponded to the western terror and turmoil by raising thirty-six additional frontier rangers and advising militia commanders in the area to be vigilant and valiant. Despite those preliminary precautions, another settler was murdered by “strange sculking Indians” the next year; raising the total causality figures to two.<sup>55</sup> Historian William Shea best summarizes the Governor’s subsequent actions:

Andros attempted to rally the colonists by example and exhortation and then took the dramatic step of reincorporating the poorer freemen into the active militia. He apparently concluded that in time of war it was vital to expose these people to at least rudimentary military training, regardless of whether they had the proper equipment and how they were viewed by the more established planters. Exactly how this reorganization was carried out is not known, though it appears most of the newcomers were formed into separate troops and companies which the governor aptly described as being ‘unsuiteably (and not well) Armed.’ By 1696 or 1697 the enlarged provincial militia consisted of eighty-three hundred men organized into forty troops of horse and eighty-three companies of foot. In numbers, if nothing else, the militia was a formidable force once more.<sup>56</sup>

Professor Shea’s thumbnail sketch and brief analysis raises some interesting, yet largely unanswerable questions.

In the first place, we have to assume that Andros took his “dramatic step of reincorporating the poorer freemen into the active militia” under his emergency executive authority granted by the House of Burgesses under the renewed 1691 act.

Clearly the veteran soldier and commander-in-chief was attempting to turn Virginia into a “colony in arms” during wartime—even though the isolated deaths of two settlers by raiding Indians hardly suggests that Virginia was under a full scale assault or invasion by foreign enemies. As Professor Shea aptly notes, there is no documented

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<sup>55</sup>Andros to William Blathwayt, 20 July, 12 September 1694, and 10 August 1695, in William Blathwayt Papers, Research Center, Colonial Williamsburg Foundation, Williamsburg, Virginia. Cited and quoted in Shea, *Virginia Militia*, 133, 134.

<sup>56</sup>Shea, *Virginia Militia*, 133-134.

evidence as to how the local militias were restructured or re-manned with poorer freemen; nor is there any record as to how the Burgesses reacted to that reformation—either favorably with revamped militia laws, or unfavorably with petitions to higher English authorities, such as the King. In fact, the only available evidence that a militia “reorganization” ever took place comes from one single source: “Answers of Sir Edmund Andros to the Queries of the Council of Trade and Plantations” dated 20 August 1697.<sup>57</sup>

As the title of that document suggests, it was based upon the opinion of one man—Andros himself—who was being criticized from two sides at the time: the Board of Trade for not sending reports and carrying out the King’s instructions; and Virginia Councilor James Blair, who listed among his numerous charges against Andros that he had neglected the militia and rangers due to “a fall he had from his horse, which they say has burst him,” and thus rendered the old and enfeebled governor incapable of serving as a proper commander-in-chief of the colony’s armed forces.<sup>58</sup> Blair’s indictment was undoubtedly biased and fallacious, but nevertheless contributed to the Governor’s resignation in May 1698. Yet by the same token, consideration also must be given to the possibility that Andros provided an equally unrealistic assessment of the militia’s reorganization and “formidable” numbers.

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<sup>57</sup>That document is in the Colonial Office Papers 5/1359, pp. 41, 118; it is the only cited reference Shea relies upon in the previously quoted passage.

<sup>58</sup>King William replaced the Lords of Trade and Plantations with the Board of Trade in May 1696. The Board of Trade was replaced in 1782 by a separate Department of State. For the Blair/Andros dispute, see Morton, *Colonial Virginia*, 1: 350-355; Blair quote at page 354.

Unfortunately, no equivalent estimates or official records exist for the total number of militiamen on county muster rolls in 1696 or 1697. The official census taken six years later, however, is available. According to those 1703 figures, Virginia's total white population at the turn of the century was 60,606 "souls." Of that number, 25,023 were counted as "tithables," or adult male taxpayers who owned landed property. Within the existing twenty-five counties, there were 9,522 total militiamen that were subdivided into numbers of "Horse" (2,363) and "Foot" (7,159).<sup>59</sup> That figure exceeds Andros's 1697 estimate of 8500 militiamen by almost exactly one thousand men, an increase that might be attributed to six additional years of population growth. Even so, the census also tells us that only 38% of the white men who owned taxable property (and only 15.7% of the total white population) were actively enlisted as militiamen. While that percentage of available armed men was probably adequate to suppress insurrections or otherwise ensure domestic order as a police force, it does not suggest that Virginia was a "colony in arms" during King William's War—which ended on 20 September 1697 with the Treaty of Ryswick; just two months after Andros informed the Board of Trade of the militia's reorganization and "formidable" strength. Nor do those census figures imply that poor freedmen or white servants were any component part of the enlisted militiamen—at least not "officially." In fact, the only "non-tithables" recorded in the 1703 census were white "women and children." What is more, the census is totally devoid of any figures relating to black slaves. In short, there are no recorded statistics on the "giddy multitude" whatsoever. Therefore one can assume that Virginia's sword remained as it had

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<sup>59</sup>The 1703 Census is conveniently reprinted in Morton, *Colonial Virginia*, 1:370.

been under Governor Effingham—a select “bourgeois militia” whose core manpower was composed exclusively of landowning “masters.” In other words, Governor Andros was fairly accurate in estimating the total number of active militiamen, but in reality had failed to incorporate poorer white freedmen and servants according to his “reorganization” plan.

One could also assume that Virginia’s armed manpower requirements in 1797 largely coincided with James Harrington’s political theory—landowning “masters” were keeping and bearing arms as citizen-soldiers to the exclusion of non-landowning “servants.” Indeed, it would support John Trenchard’s “neo-Harrington” argument that “there was no difference between the Citizen, the Souldier, and the Husbandman.” Moreover, the colony’s landed gentry were exercising local autonomy over their militias at the county level, as well as sufficient armed political power in the legislature to either “make” or “break” any proposed military policies by royal executives. In fact, the House of Burgesses was quite comfortable—and confident—to raise and disband “standing” frontier forces as it saw fit. Consequently (and correspondingly), Virginia’s ruling elite had no reason to share the core conviction that informed the “anti-army” ideology—a deep distrust of any constitutional configuration that put the swords of justice (police power) and war (military power) in the hands of rulers who could exercise that armed authority independently of the ruled (or without the active consent and participation of “the people”).

All the same, some additional facts come to light when the 1703 census figures are analyzed on a county-by-county basis. For one, there was considerable variation in the percentage of militiamen serving in each county. Five counties had

50% or more tithables serving as militiamen. The adjacent counties of Isle of Wright and Nansemond had the highest percentage (58%), followed by Norfolk (53%), and then Northampton and Northumberland (both at 50%). Each of those five counties shared one geo-political point in common: they all fronted the Chesapeake Bay; none of them were along or even close to the western frontier. Therefore one might reasonably assume that their militiamen were chiefly concerned with repelling naval assaults and sea-born invasions rather than inland attacks by Native Americans or French land forces. On average, most of the frontier counties mustered only 40% of their taxpayers for militia service. On the other hand, the lowest percentages came from the oldest and most established counties on the Middle Peninsula. Ironically, the fewest militiamen lived in the adjoining counties of Gloucester (23%) and Middlesex (25%)—the precise “epicenters” of the riots and rebellions caused by the “giddy multitude” between 1663 and 1682. What also makes Gloucester’s low enlistment figure interesting is that it not only lies directly across the Bay from Northampton, but also has one of the most extensive (and thus vulnerable) coastlines of any eastern county. Even more significantly, it boasted the largest number of inhabitants (5,834)—and more landowning tithables (2, 628)—than any other Virginia county in 1703.<sup>60</sup>

If one rules out gross statistical error and indigenous eccentricities, only two logical deductions can be drawn the fact that only 594 “masters” were on Glouces-

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<sup>60</sup>Middlesex County, in contrast, ranked 22<sup>nd</sup> in total population and 21<sup>st</sup> in tithables among the twenty-five counties. Nevertheless, its 199 militiamen represented a 2% increase over Gloucester’s manpower ratio. The lowest ranking county in terms of population and tithables was Elizabeth City, which still mustered 40% of its white taxpayers, or 196 “masters.”

ter's muster roll: either 75% of the county's landowners and householders did not keep individual arms, or they were uninterested in bearing them as collective citizens for homeland security. Both conclusions can be boiled down to two stark suppositions: complacency and indifference. Such apathy among husbandmen would most likely cause atrophy in their militia. Indeed, Daniel Defoe's rebuttal argument might be more on the mark in terms of military duty and citizenship in Virginia: "War is become a Science, and Arms an Employment." Without question, landowning Virginians were hiring (and firing) permanent troops to "range" the frontier in their stead. Even so, many property owners still expected their militias to perform a vital function as constabulary rather than combat forces. Then again, just over 60% of all Virginia taxpayers were not actively participating in their militias at all.

For all intents and purposes, Virginia's "masters" and militias were "standing" somewhere between John Trenchard's "neo-Harringtonian" beliefs and Daniel Defoe's "professionalism" in 1797. The next question to consider similarly stands before us: What direction were those armed citizens and institutions headed for in the eighteenth century—toward increasing apathy and atrophy, or greater awareness and advancement?

## CHAPTER 4

### VIRGINIA'S MILITIA, 1700-1750: APATHY AND ATROPHY

“The Militia of this Colony is perfectly useless without Arms or ammunition, and by an unaccountable infatuation, no arguments I have used can prevail upon these people to make their Militia more Serviceable, or to fall into any other measures for the Defence of their Country.”

—Governor Alexander Spotswood  
15 October 1712<sup>1</sup>

Sir Edmund Andros resigned as Governor of Virginia in May 1698. King William re-appointed Francis Nicholson as the colony's chief executive, but this time with the title and privileges of a full governor. In October of that year, the Statehouse at Jamestown burned to the ground. On 10 May 1700, the House of Burgesses convened its first session at Williamsburg, the new capitol named in honor of King William. During the next four years, the General Assembly met at the College of William and Mary, until the new Statehouse was completed.<sup>2</sup> King William died on 8 March 1702 and was succeeded by Queen Anne. Two months later, England entered the War of the Spanish Succession against Louis XIV of France for putting his grandson on the throne of Spain. Consequently, Virginians entered the eighteenth century with a new Governor, a new Capitol, a new monarch, and a new dynastic war.

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<sup>1</sup>Spotswood to the Council of Trade, in R. A. Brock, ed., *The Official Letters of Alexander Spotswood, Lieutenant-Governor of the Colony of Virginia, 1710-1722, Now First Printed from the Manuscript in the Collections of the Virginia Historical Society* (Richmond: The Virginia Historical Society, 1882-85), 2:2. Hereafter cited as Spotswood, *Official Letters*.

<sup>2</sup>The foundation for the College was laid on 8 August 1695. Due to a lack of funds, the new Statehouse foundation was not laid until 8 August 1701. The Statehouse was nearly completed when it was first occupied in April 1704.

One month after the General Assembly opened its inaugural session in Williamsburg, an unidentified band of Indians murdered a man, woman, and six children in northern Stafford County. For the first time in its eighty-one history, the House of Burgesses did not issue a retaliatory response to the attack.<sup>3</sup> The ostensible lack of concern might be attributed to one key factor: the unfortunate family had ventured beyond the point where the government could protect them with military force.

Under Governor Berkeley, a boundary line was drawn between Native Americans and Virginians. By the 1690s, settlers were beginning to claim land beyond the buffer zone. In 1691, the General Assembly contracted surveyors to mark the border and voided all land grants made ahead of those lines. The lawmakers also ordered the construction of a twenty-five foot wide road to further denote the limits of settlement.<sup>4</sup> In establishing geographical boundaries, Virginia's native rulers were also defining the limits of their control over land and governance of people. That policy reflected an attitude that became more pronounced as the eighteenth century progressed: insular provincialism. That provincial outlook and insular mindset likewise shaped the contours of military policy—as well as the primary function of Virginia's militia—in a notable manner.

Between 1700 and 1750, Virginia's indigenous rulers exhibited a self-assured confidence that a defined frontier provided adequate protection against external attacks, and thus a corresponding complacency toward armed preparedness. That apa-

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<sup>3</sup>William P. Palmer, et al., eds., *Calendar of Virginia State Papers and Other Manuscripts Preserved at the Capital in Richmond* (Richmond: R. F. Walker, 1875-1893), 1:69-70. Hereafter cited as Palmer, *Calendar*.

<sup>4</sup>Hening, *Statutes*, 3:82-85.

thetic attitude was reinforced by the fact that Virginians experienced far fewer “invasions” by native tribes. Consequently, the militia was called upon less often for military defense. In fact, the ruling gentry became far more concerned with internal insurrections by an ever-expanding slave population and a corresponding reliance upon the militia as a domestic police force. That particular task, however, required less manpower and infrequent mobilization, which resulted in the atrophy of the militia as an armed institution. Apathy toward external defense on the part of the provincial legislature (Burgesses/Council) clashed with the military ambitions and imperialistic attitudes of chief executives (royal governors) during this period. The political conflict over military policy manifested itself in a remarkable way—utilizing the anti-army ideology to remove chief magistrates from office.

This chapter explores and examines those thematic trends. The way Virginians responded to Queen Anne’s War set the initial stage for those military points of view and corresponding developments, which became more entrenched over time.

#### Queen Anne’s War, 1702-1713

The possibility of another war with France was hardly unexpected. In fact, Governor Nicholson requested funds from the House of Burgesses for coastal and land defenses six months before the formal declaration of war on 4 May 1702. Although the lawmakers refused military appropriations, the chief executive was granted full authority to impress arms and provisions in case of an emergency. No mention was made concerning the “emergency” manpower that would bear those arms or use the provisions.<sup>5</sup> Evidently the legislature was assuming a “wait and see”

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<sup>5</sup>McIlwaine, *Journals of the House, 1695-1702*, 304, 306-07.

posture since there was, as yet, no actual outbreak of hostilities. The executive, however, believed in armed preparedness. Nicholson was so eager about exercising the militia that the Burgesses asked him to spare “the people” from frequent, if not frivolous, musters. Although the Governor duly complied, his unfeigned martial ardor soon got him into trouble with a powerful Council member.<sup>6</sup>

A fortnight before Christmas 1701, the grammar school boys at William and Mary locked out their teachers in an effort to force Councilor James Blair, the College’s President, into releasing the students on an early holiday vacation—a prank the boys previously pulled with success. On that prior occasion, the boys also intimidated their masters with “powder, guns, pistols, swords, and other arms.” The second escapade turned out differently. After trying in vain to gain entrance to the classroom, President Blair ordered two servants to break down the door. The boys fired at them with powder (no bullets). Because Nicholson had provided money for “victuals and drink,” Blair suspected that he had incited the boys to riot. Blair wrote English officials inferring the Governor not only encouraged the boys to rebel against school authorities, but also provided them with powder and shot in hopes they would shoot the president. Nicholson, the boys, and their schoolmasters vehemently denied Blair’s insinuations.<sup>7</sup> Nevertheless, Blair and the rest of Council spent the next three years trying to get Nicholson recalled for mismanagement and malfeasance. Nichol-

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<sup>6</sup>McIlwaine, *Journals of the House, 1702-1712*, 80.

<sup>7</sup>Documents of the episode published in *VMHB* 8 (1900): 143-46, 260-64, and 370-381.

son countered that the councilors were corrupt and “had got their estates by cheating the people.”<sup>8</sup>

Although Virginia’s ruling elite had no constitutional right to choose their royal executives, they had sufficient political clout to remove them from office for misadministration. Moreover, they knew what sort of charges would raise eyebrows back in England—especially against a military man who presumed to rule in a military manner. Blair charged Nicholson with raising a standing army from “all the servants [just] as Cromwell took the apprentices of London into his army, and indeed he [Nicholson] has upon many occasions to my knowledge preached up the doctrine that all the servants are kidnapped and have a good action against their masters.” Blair claimed the Governor boasted that once he got “an army well fleshed in blood and accustomed to booty there would be no disbanding of them again if they were commanded by a man that understood his business” far better than Nathaniel Bacon, who “was a fool and understood not his business.”<sup>9</sup> Councilor Blair was obviously well read in Radical Whig ideology.

Blair struck that thematic chord in hopes it would resonate with desirable effect back in England. Yet in large measure, Nicholson was adhering to the instructions issued by the Board of Trade: ensure Virginia’s planters and their Christian servants were adequately armed and trained for possible attacks by the French and Indians. Those directions were no different from the orders Governor Thomas Culpepper

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<sup>8</sup>The various charges brought against Nicholson by members of the Council are in *VMHB* 3 (1895): 373-82, quote at 376; also see William Stevens Perry, ed., *Historical Collections Relating to the American Colonial Church*, vol. 1, *Virginia* (Hartford, CT: n.p., 1870), 98. Hereafter cited as Perry, *Historical Collections*.

<sup>9</sup>Perry, *Historical Collections*, 1:107, 109-10.

received from King Charles II in 1679. But with Bacon's Rebellion still fresh in many gentlemen's memories, Culpepper wisely chose to disregard his instructions with a reflective explanation penned in the margin. Nicholson's error was to follow his orders more obtusely, regardless of the political circumstances or consequences. Indeed, his entire focus centered upon foreign rather than domestic threats, despite the expressed concerns of the House of Burgesses:

The Christian Servants in this Country for the most part consists of the Worser Sort of the people of *Europe* And since the Peace [of Ryswick] hath been concluded Such Numbers of *Irish* and other Nations have been brought in of which a great many have been Soldiers in the late Warrs That according to our present Circumstances we can hardly governe them and if they were fitted with Armes and had the Opertunity of meeting together by Musters We have just reason to feare they may rise upon us.<sup>10</sup>

Nicholson received similar dreads and demurrals from the Council two years later when he once again proposed that servants should bear arms against possible invasions.<sup>11</sup> The Governor also sought the Council's approval to reorganize the local militias into more effective fighting forces by requiring every county to select one-fifth of their "young, brisk, fit, and able" militiamen for active duty in elite companies. In addition, the selected soldiers would be allowed to choose their own officers, which might not have included the usual gentlemen.<sup>12</sup>

Councilor Blair would have none of it. In his opinion, the "select" soldiers were not just the "youngest and briskest" but "the most indigent men of the Country." Their chosen officers, moreover, would be of the same class and character. "Now I

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<sup>10</sup>McIlwaine, *Journals of the House, 1695-1702*, 188. Original emphasis.

<sup>11</sup>McIlwaine, *Executive Journals of the Council*, 2:184.

<sup>12</sup>*Ibid.*, 2:174.

could not but think with terror,” Blair forewarned, “how quickly an indigent army under such indigent officers with the help of the Servants and Bankrupts and other men in uneasy and discontented circumstances . . . so well arm’d and Countenanced by a shew of authority could make all the rest of Virginia submit.”<sup>13</sup> Backed by his “indigent army,” Blair charged that Nicholson intended to “Govern the Country without Assemblies” just like Cromwell. If that was not enough to put a Whig’s wig askew, Blair also alleged that Nicholson expressed contempt for English constitutionalism with the words, “Magna Charta, Magna F——a,” and swore to hang his political opponents with that sacred document knotted about their necks.<sup>14</sup> As far as Blair and the Council were concerned, the evidence against Nicholson justified a neo-Harringtonian indictment: the subversion of English liberty by a strong-armed executive bent on undermining legislative supremacy with a standing army.

Blair left for England in 1703 to present six affidavits against Nicholson to Queen Anne, who referred the petitions to the Board of Trade. The House of Burgesses, in turn, passed six resolutions by a vote of twenty-seven to seventeen in Nicholson’s defense.<sup>15</sup> Much to Blair’s chagrin, the great majority of the clergy also sided with Nicholson. As Commissary, Blair represented the Bishop of London in that titled role and was responsible for the conduct of Anglican ministers in Virginia. It was the first such appointment made in the colonies.<sup>16</sup>

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<sup>13</sup>Perry, *Historical Collections*, 111.

<sup>14</sup>*Ibid.*, 106, 109.

<sup>15</sup>McIlwaine, *Journals of the House, 1702-1712*, 107-08.

<sup>16</sup>Morton, *Colonial Virginia*, 1:338.

The available evidence concerning the Blair/Nicholson feud suggests that the Councilor was re-enacting the Earl of Shaftesbury's original 1676 role twenty-five years later on a Virginia stage. Like Shaftesbury, Blair was defending his provincial "House of Lords" (the Council) against an ill-tempered executive who appeared determined to rule with a "standing army" rather than his "nobility." Like the politically savvy Earl, Blair deliberately raised the specter of a military dictatorship to gain political power at the expense of his rivals, including "Cavalier" Burgesses in Virginia's "House of Commons." While that strategy (and ideology) did not lead to a "Glorious Revolution" in the Old Dominion, the ultimate outcome was nevertheless the same: the ousting of a royal executive. Even so, the political ploy nearly cost Blair his Commissary commission.

When Blair left London after his two-year absence to witness Nicholson's dismissal, the Anglican ministers wrote a document declaring Blair had returned contrary to the Queen's orders, and asked whether they should therefore "withdraw and suspend for a season" their "usual respects and obedience" to him. The clergy also condemned Blair's depositions as being totally "frivolous, scandalous, false and malicious." The leader of the group, Reverend Solomon Whateley, wrote Blair a personal letter stating his aversion that "Mr. Commissary Blair should take upon himself the making and unmaking of our Governors."<sup>17</sup>

Reverend Whateley's umbrage was an accurate assessment of Blair's motives. Nonetheless, the Councilor's strategic use of "anti-standing army" rhetoric marks the first time that particular political theory was used by a colonial politician against a

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<sup>17</sup>Perry, *Historical Collections*, 154-178.

royal executive. It did not really matter that the specific charge against Governor Nicholson was untrue; that he was raising an “indigent army” from the lower ranks to overthrow Virginia’s ruling class. Truth be told, his idea of selectively employing the “youngest and briskest” militiamen was no different than James Harrington’s notion of a “marching army” in *Oceana*. What did matter was the presumed potency of “neo-Harringtonian” thought in the colonial context of Virginia politics—and that a Virginia politician recognized that potent potential as early as 1702.

Queen Anne revoked Nicholson’s commission in March 1705 and appointed Edward Nott as Lieutenant Governor. Nott, however, became the first royal governor to die in Virginia when he succumbed to a fever just one year after he arrived. Despite Nott’s short tenure, the General Assembly he convened passed three homeland security laws: “An act for settling the Militia,” “An act for security and defence of the country in times of danger,” and “An act concerning Servants and Slaves.”

The 1706 Militia Act repealed all prior legislation concerning the organization, arming, and training of Virginia’s armed manpower. For the first time ever, militiamen were classified by age (“all male persons whatsoever, from sixteen to sixty years of age”) and by exemptions. Councilors, the speaker of the house, the attorney general, justices of the peace, governmental clerks, constables, schoolmasters, ministers, overseers of four or more slaves, and millers were all exempted from militia musters. However, government officials were required to keep “at their respective places of abode a troopers horse, furniture, arms and ammunition.” Moreover, “in case of any rebellion or invasion,” they were “obliged” to “serve in such stations as are suitable to gentlemen, under the direction of the colonel or chief officer of the

county where he or they shall reside.”<sup>18</sup> Ordinary militiamen were likewise required to provide and keep personal arms and ammunition at their “place of abode”; if they failed to comply after an 18-month grace period, they were fined one hundred pounds of tobacco. The penalty for not responding to “an incursion, invasion, insurrection or rebellion, or other alarm or surprise” was either a fine of “ten pounds current money, or suffer three months imprisonment, without bail or mainprise.” The least rigorous penalty was a fifty-pound tobacco fine for “disobedience or mutiny” during musters.<sup>19</sup> Evidently the lawmakers were far more concerned with getting enough men to show up for actual alarms rather than how they behaved during drills.

The act for “security and defence” gave the governor, “full power to levy, raise, arm and muster such a number of forces out of the militia of this colony as shall be thought requisite and needful for repelling the invasion or suppressing the insurrection.” Significantly, the executive was required to “discharge and disband” those forces when “the cause of danger ceases for which they were raised.” Militiamen were compensated under two provisos: first, citizen-soldiers would be paid only if they brought their own arms and ammunition; second, if they served on active duty for four days or less, they would receive no pay whatsoever.<sup>20</sup> This was the closest Virginians came to realizing the militiaman ideal (or ideology)—a citizen bringing his own gun to repel invasions or crush rebellions without pay (unless the emergency lasted longer than four days).

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<sup>18</sup>Hening, *Statutes*, 4:335-340.

<sup>19</sup>*Ibid.*, 4:339.

<sup>20</sup>Hening, *Statutes*, 4:362-367.

As far as internal security was concerned, the Burgesses—unlike Councilor Blair—were less concerned with revolts by the “giddy multitude.” Even though the “act concerning Servants and Slaves” was quite extensive, it was primarily concerned with the proper treatment of white servants. For example, masters could not perform “immoderate correction”—such as whipping a white servant “naked”—without an order from a justice of the peace. Nor could masters “put away” or sell sick and lame servants, but instead had to support them during their remaining indentures. Furthermore, masters were required to give every male servant “one well fixed musket or fuzee, of the value of twenty shillings, at least,” along with ten bushels of Indian corn and thirty shillings in money or equivalent goods when their indenture was up. While no evidence exists that might explain why a gun was attached to freedom from servitude (as opposed to Harrington’s correlation with landowning economic independence), one may nevertheless venture two reasonable guesses: either a gun was considered necessary for individual self-defense, especially if former servants settled on the hostile frontier; or perhaps this was a way to arm poorer whites as a manpower resource for collective defense against invasions and insurrections. In either case, the ruling gentry no longer feared an armed uprising by servants—largely because their numbers (and related “danger”) had diminished significantly after 1680. Conversely, the ever-increasing number of black slaves were not permitted to “go armed with gun, sword, club, staff, or other weapon” under the new law.<sup>21</sup>

In sum, the 1705-06 legislature granted the executive emergency use of the militia for external defense against French invasions and internal insurrections by

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<sup>21</sup>Ibid., 3:459.

black slaves. There was only one problem: Virginia had no chief executive to execute those laws. Queen Anne appointed Lieutenant Colonel Robert Hunter to succeed Nott. Unfortunately, a French privateer captured Hunter while enroute to his new post. Council President Edmund Jennings served as acting governor for the next four years, but Jennings never summoned the legislature (or called out the militia) during his “inactive” tenure. In the meantime, the “act for security and defence of the country in times of danger” expired. In truth, Virginians paid little attention to the fact that they were at war with France during the first eight years of Queen Anne’s War. That indifference was about to change with the arrival of Lieutenant Governor Alexander Spotswood.

Alexander Spotswood, the son of an army physician, was born in a military outpost in Tangier, North Africa, in 1676. The Interregnum Parliament executed his grandfather, a distinguished lawyer, for his pronounced loyalty to King Charles I. Spotswood was wounded at Blenheim and captured at Oudenarde during the early battles of Queen Anne’s War. He brought to his twelve-year administration not only the mindset of a veteran soldier, but also an imperialistic attitude toward Native Americans, the French, and the neighboring colonies. Virginians, on the other hand, viewed Indian, foreign, and intercolonial relations from an insular, provincial perspective. The question was how much military latitude the legislature would extend to their wartime chief executive.

In his first speech before the General Assembly, Spotswood strongly recommended strengthening the colony’s defenses against invasion, improving the militia, and prohibiting gatherings among slaves. The last proposal stemmed from an Easter

Day insurrection plot in James City, Surrey, and Isle of Wright Counties prior to Spotswood's arrival. Although a newcomer, Spotswood warned that the "Last April Court may shew that we are not to depend on either their stupidity, or that babel of languages among them; freedom wears a cap which can without a tongue, call together those who long to shake off the fetters of slavery."<sup>22</sup> The General Court hardly needed the governor's advice on how to prevent slave insurrections. Two of the rebellious leaders—an Indian slave known as Salvadore, and an African slave named Scipio—were convicted of high treason and executed. As a grim reminder for other would-be insurrectionists, the court ordered the bodies of the two rebels quartered; the heads and other parts "set up" in designated counties for public viewing. Salvadore's head was conspicuously displayed in Williamsburg.<sup>23</sup> Rather than rely upon an ounce of prevention in a law against slave gatherings, the Court evidently thought a pound of dismembered flesh was the better remedy.

Maintaining internal security against slave uprisings was not Spotswood's only concern, however. To beef up external security against French and Indian attacks, the legislature enacted a "ranger law" during its October session. Spotswood was "impowered" to appoint lieutenants who "shall choose out and list eleven able bodyed men" for ranger duty. This particular law, however, broke with past precedent with these words: "But if such lieutenant cannot find a sufficient number of able bodyed men . . . to serve voluntarily under him, then and in such case it shall and may be lawfull for the commander in chief of the militia in the same county . . . to order

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<sup>22</sup>McIlwaine, *Journals of the House, 1702-1712*, 240.

<sup>23</sup>The account of the Easter Day insurrection is in McIlwaine, *Executive Journals of the Council*, 3:234-36, and 242-43.

and impress out of the militia of that county, so many able bodyed men . . . as shall make up the number of eleven.”<sup>24</sup> This marks the first “draft” legislation in Virginia history.

Even so, the lawmakers were quite chary about conscripting landowners and voters for military service. Consequently, the law offered several generous inducements that would either lessen the burden of armed citizenship, or alleviate it altogether by encouraging eleven men to volunteer who needed steady wages. As Salvadore’s story suggests, captured Indians were sold into slavery. Rangers were promised a commission for every Indian they captured and turned over to the county sheriffs. In addition to that “incentive bonus,” every ranger was paid “three thousand pounds of tobacco” a year “out of the public levy” and was exempted from paying “county and parish levys during their continuance in the said service.” There was one downside “relateing to the ranging service”: anyone “refusing or willfully neglecting” to perform their armed duties would forfeit all pay as well as “suffer one month’s imprisonment without bail or mainprize.” Finally, the lawmakers declared “That this act shall continue and be in force for one year from the end of this session of assembly, and for no longer time.”<sup>25</sup> As it so happened, the law expired just when Spotswood needed it the most.

In September 1711, the Tuscaroras massacred two hundred North Carolina colonists along Virginia’s southern border. Unlike the distant Seneca, the Tuscaroras posed a more immediate danger to Virginia’s security because of their closer prox-

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<sup>24</sup>Hening, *Statutes*, 4:9-10.

<sup>25</sup>*Ibid.*, 4:10-12.

imity and larger numbers. Whereas the nine tributary tribes in Virginia totaled 250 warriors between them, the Tuscaroras had two thousand warriors. The North Carolinians appealed for military assistance in the fall of 1712, but Virginia's lawmakers refused to raise money or manpower for the collective cause.<sup>26</sup> In the executive's assessment, "the Mob of this Country, having tried their Strength in the late Election and finding themselves able to carry whom they please, have generally chosen representatives of their own Class, who as their principal Recommendation have declared their resolution to raise no Tax on the people, let the occasion be what it will." Nor did it seem likely that Harrington's theory concerning the relationship between land ownership, voting rights, and active participation in citizen militias would rise to the occasion—at least not from Spotswood's assessment:

The Militia of this Colony is perfectly useless without Arms or ammunition, and by an unaccountable infatuation, no arguments I have used can prevail on these people to make their Militia more Serviceable, or to fall into any other measures for the Defence of their Country. The fear of Enemys by Sea, (except that of pyrates,) are now happily removed by the peace . . . : but the Insurrections of our own Negroes, or the Invasions of the Indians, are no less to be dreaded, while the people are so stupidly averse to the only means they have left to protect themselves Against either of these Events.<sup>27</sup>

As a professional soldier, Spotswood could not account for the militia's unserviceable condition, or fathom why "the people" were so foolishly apathetic about homeland security. Virginians, of course, were pragmatic provincials; they saw no immediate threat to their own safety and security. After all, Queen Anne's War was over and the Tuscaroras were North Carolina's problem.

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<sup>26</sup>Spotswood, *Official Letters*, 1:126-27, 167, 169.

<sup>27</sup>Spotswood to the Council of Trade, 15 October 1712, *Official Letters*, 2:1-2.

Fortunately, the beleaguered Carolinians did not have to rely upon self-interested Virginians. Carolina militiamen managed to defeat the Tuscaroras with the assistance of Indian allies. In fact, they drove the marauders right into their neighbor's lap. The Tuscaroras now began murdering Virginians all along the southern border throughout that summer. Spotswood described his military response to the Earl of Dartmouth in September 1713:

I have order'd out several partys in search of them, but to no purpose, the people being unwilling to march from their homes, and not one Offcier to be found in the whole Colony that have been in any employment or Action in an Army, upon whose Conduct or Experience they might rely in case of meeting an Enemy. So that I am oblig'd to undertake an Expedition in person with an intention either to force these Indians to a Peace or drive them to some further distance from our Frontiers. . . . But neither the disposition nor Circumstances of the Country are capable of great efforts, Whereof I intend only to take with me 200 Voluntiers out of those Countys that are most apprehensive of the danger, (for the people in the remotest parts are very little inclin'd to adventure themselves,) this, with the Assistance of our own Tributary Indians, I hope will be sufficient.<sup>28</sup>

Spotswood's best-laid plans soon went awry, which he explained to the Board of Trade a mere two months later:

I had made the necessary preparations of Tents and Provisions, and gone my Self into those parts to review the Militia in Order to list Voluntiers for this Service, their Warmth was so much abated that I could not engage near the number I propos'd, (which was only 200,) to follow me out. I found [it] then high time to endeavor to accomplish that by Peace, which the disposition of the people would not enable me to do by a War. To this purpose I sent out a detachment of 50 of our Trib'y Indians under the Command of two of ye Traders, with Orders to find out the Tuscaruros in their retirement, and to sound their Inclinations toward peace.<sup>29</sup>

The little company of "Indian-soldiers"—who plainly were not Virginia militiamen—found the enemy tribesmen in a "very miserable condition, without any habitation or

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<sup>28</sup>Spotswood to Lord Dartmouth, 14 September 1713, *Official Letters*, 2:34.

<sup>29</sup>Spotswood to the Lords Commissioners of Trade, 16 November 1713, *Official Letters*, 2:41-42.

provision of Corne for their Subsistence.” Paradoxically, the Tuscarora “army” was unable “to feed its belly” off the land. The starving warriors not only surrendered, but asked permission to remain in Virginia as a peaceful tributary tribe. Moreover, they promised to deliver up the culprits who committed the 1711 massacre.<sup>30</sup>

That fortuitous outcome gave Spotswood inspiration for an idea. Rather than rely upon the unreliable militia for external security, he would consolidate the tributary tribes into three reservations and use their warriors to guard Virginia’s frontier. In addition, a fort would be constructed within each reservation manned by twelve rangers who would patrol the frontier alongside their Indian allies to prevent intrusions by “foreign” tribes.<sup>31</sup> The House of Burgesses had no problem whatsoever in turning Spotswood’s proposed plan into statutory law during its November 1714 session.<sup>32</sup> Ironically, Indian “militiamen” now protected Virginia’s border against other armed Indians with the “standing” support of only 24 rangers—but at a greatly reduced cost to the taxpayers and citizens of Virginia. No record exists as to who those white rangers were, but they certainly were not “drafted” militiamen. In fact, the “settled militia” did not perform any military service at any time during Queen Anne’s War.

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<sup>30</sup>Spotswood, *Official Letters*, 2:41-42, 53-54; McIlwaine, *Executive Journals of the Council*, 3:350, 357-58; Morton, *Colonial Virginia*, 2:431-33.

<sup>31</sup>McIlwaine, *Executive Journals of the Council*, 3:363, 364.

<sup>32</sup>The acts of the November 1714 session are found in McIlwaine, *Journals of the House, 1712-1726*, 115-117, rather than in Hening’s *Statutes*. Spotswood also described the new legislation to the Board of Trade. See Spotswood, *Official Letters*, 2:93-103.

One month before the House approved Spotswood's defensive policy, news reached Williamsburg of Queen Anne's death and that King George I had acceded to the English throne.<sup>33</sup> Perhaps the most lasting legacy of the Queen's reign in Virginia—as well as her eleven year war with France—was “a considerable quantity of arms and ammunition for the service of this colony,” which the “late sovereign . . . by her grace and bounty, was pleased to bestow” prior to her death. In order to prevent the weapons and powder from being “imbezzled” by devious Virginians or “spoilt” by foul weather, the Assembly passed “An act for erecting a Magazine,” which resulted in a brick structure that still stands today in Williamsburg.<sup>34</sup> The Queen's gracious gift of guns soon came in handy.

In late spring 1715, the Yamasee Indians began a war of white extermination in South Carolina. Spotswood called an emergency Assembly to aid the desperate South Carolinians. In the meantime, the Governor and Council sent 160 of the Queen's muskets and 118 men by ship to Charleston on their own authority.<sup>35</sup> The expectation was that the Burgesses would provide additional support through fiscal appropriations. The House authorized only £250 for the relief of their southern neighbors, which was tacked on as a rider to a bill repealing an unpopular Tobacco Law. Spotswood was furious. He called the Burgesses into the Council Chamber and reprimanded them in a long speech. The Governor pointed out their lackluster efforts

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<sup>33</sup>None of Queen Anne's seventeen children survived her; therefore, the line of succession went to the Protestant House of Hanover.

<sup>34</sup>Hening, *Statutes*, 4:55-57.

<sup>35</sup>Spotswood, *Letters*, 2:111-12, 120-23, 125-26; McIlwaine, *Executive Journals of the Council*, 3:399, 402, 404, 406, 411-12.

to aid an endangered neighbor, such as passing a “trivial bill to excuse a few of the Carolina volunteers from paying this years levy.” But the Assembly’s miserly ingratitude toward the troops was only part of the problem. “And more strange,” Spotswood added, “is your caution of enabling me to defend your country, when you have rejected a claim of nine shillings for the forage of three horses, which I sent to draw canon to the frontiers.”<sup>36</sup> Without question, the legislature had firm fiscal control over the colony’s military forces. Fortunately, South Carolina’s Governor Craven prevented his colony from being wiped out. Unfortunately, Spotswood’s insistence on military preparedness had adverse political consequences.

Spotswood unhappily got on the wrong side of two extremely influential Virginians: Council members James Blair and Colonel William Byrd II. The dispute with Blair first erupted when the Governor refused to confirm his appointment as a parish minister.<sup>37</sup> Trouble with Byrd began when the Councilor tried to buy the office of lieutenant governor before Spotswood received his royal appointment. According to Byrd’s telling, “the Duke of Marlborough declared that no one but soldiers should have the government of a plantation, so I was disappointed.”<sup>38</sup> Blair, of course, already had a reputation for “making and unmaking Governors.” He now joined forces with co-Councilor Byrd in presenting fifteen charges against Spots-

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<sup>36</sup>McIlwaine, *Journals of the House, 1712-1726*, 169. Spotswood’s entire speech runs from pages 166 to 170.

<sup>37</sup>Richard L. Morton, best tells the somewhat involved story of the Spotswood/Blair feud in *Colonial Virginia*, 2:465-471.

<sup>38</sup>William Byrd II, *The Secret Diary of William Byrd of Westover, 1709-1712*, ed. Louis B. Wright and Marion Tinling (Richmond, VA: The Dietz Press, 1941), 159.

wood, which Byrd delivered to London in 1716 while serving as special agent for the House of Burgesses. The eleventh indictment is particularly noteworthy because it charged Spotswood with creating “a Standing Militia” of “3,000 foot and 1,500 horse” that was equated to “raising a standing Army at the yearly Charge of 600,000 lbs. of Tobacco, to the Entire ruin of the Country, and a means for him [Spotswood] to govern Arbitrarily and by Martial Law.” The indictment also alleged that Spotswood posted militia Adjutants in every county “to huff and bully ye people.”<sup>39</sup> Once again, Blair used the “anti-army” ideology to smear a political opponent for purely personal reasons—which was the only “practical” effect that abstract theory had in early eighteenth-century Virginia.

Spotswood’s rebuttal is equally significant. He explained that his “Project for the better Regulation of the Militia was no more than what is agreeable to the Constitution of Great Britain.” Indeed, if anyone was assuming an “unconstitutional” stance, it was Virginia’s wealthiest landowners who were ducking their responsibilities as armed citizens:

For, according to the present constitution of the Militia here, no Man of an Estate is under any Obligation to Muster, and even ye Servants or Overseers of the Rich are likewise exempted; the whole Burthen lyes upon the poorest sort of people, who are to subsist by their Labour; these are Finable if they don’t provide themselves with Arms, Ammunition and Accoutrements, and appear at Muster five times in a Year; but an officer may appear without Arms, who may absent himself from Duty as often as he pleases without being liable to any Fine at all; nay, And if it be his interest to ingratiate himself with the Men, he will not Command them out, and then the Soldier, not being summoned to march, is not liable to be fined any more than the Offcier.<sup>40</sup>

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<sup>39</sup>Spotswood to the Lords Commissioners of Trade and Plantations, 7 February 1716, *Official Letters*, 2:209. The letter is twenty-eight pages long (page 190 to 218).

<sup>40</sup>*Ibid.*, 200-211.

Virginia was obviously no *Oceana*, where the largest share of armed rights and responsibilities were allotted to the most economically “independent” citizens. Spotswood had a more realistic “model” in mind.

Military historian John W. Shy notes that Spotswood’s proposed plan struck “a certain similarity to the modern American Reserve and National Guard” in that the reformed militia “would comprise only one-third of the available military manpower, but would be paid by a tax on the other two-thirds who would be excused from service.”<sup>41</sup> Spotswood estimated that the tax on “the Man which stayed at home” would only amount to “Seven pounds of Tobacco [per] Muster,” or 70 total pounds annually. The Governor posited that, “there is scarce one man serving in the Militia now who would not be content to pay more than Thrice as much for being [allowed] to follow his own business instead of traveling 20 or 30 Miles to [attend] a Muster.” Yet “It is true,” he admitted, “that by my Scheme Persons of Estates would not come off so easily as they do now.” Indeed, the rich would be forced to contribute “to the Arming as well as Paying the Men who were to be train’d up for the defence of their Estates.”<sup>42</sup> In that respect, Spotswood’s argument shared common ground with neo-Harringtonian rhetoric.

Nonetheless, wealthy Virginians were not the only ones at fault. “I cannot but pity,” Spotswood further disclosed, “the simplicity of the Vulgar here, who, at every offer of a Governor to make their Militia usefull, (tho’ the Regulation be never so much in their favor,) are set on to cry out against him as if he was to introduce a

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<sup>41</sup>John W. Shy, “A New Look at Colonial Militia,” *William and Mary Quarterly*, 3<sup>rd</sup> Ser., 20 (April 1963): footnote 13 at page 180.

<sup>42</sup>Spotswood, *Official Letters*, 2:211.

Standing Army, Arbitrary Power, burthensome Taxes, &c. And as for their Abettors, who chose rather to risk their whole Country than to be brought to Club for its defence, I wish they or their Posterity may not have cause to Repent of their present Folly When an Enemy shall happen to be at their Doors.” Even so, Spotswood had little faith that their apathy would change: “For tho’ I will allow the Virginians to be capable of being made as good a Militia as any in the World, Yet I do take them to be at this time the worst in the King’s Dominions, and I do think it’s not in the power of a Governor to make them Serviceable under the present constitution of the Law.”<sup>43</sup>

One would assume the apathy and atrophy that made Virginia’s militia “the worst in the King’s Dominions” would leave the political and constitutional gates wide open for a “Standing Army” and “Arbitrary Power” to march through. Indeed, James Harrington’s entire political theory rested squarely upon the shoulders of active citizenship, not apathetic citizens. The best Spotswood could hope for in 1716, however, was that two-thirds of the population would financially support the third that actually defended their lives and property. Considering the fact that a “few” have always fought and died for the “many” throughout American history, his armed manpower ratio recognized a harsh reality: Virginians were not “a people in arms.” Even so, Spotswood dismissed the possibility of despotic rule with a standing army by employing a “numbers argument” James Madison likewise used in the *Federalist Papers*. As Spotswood posed it, “That 3,000 Foot and 1,500 Horse should be more a Standing Army or a greater means for me to govern Arbitrarily than 11,000 Foot and 4,000 Horse, of w’ch the Militia now consists, is surprising to every Body’s under-

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<sup>43</sup>Ibid., 2:212.

standing but the Querist's [or future Anti-Federalist's] own. That these 15,000 men, mustering each five times in a year, should be less Men, mustering ten times in a year, is no less strange, unless the Querist has found out a new kind of Arithmetick, or that he looks upon the Labour of those People who are now obliged to Muster to be of no value."<sup>44</sup> In other words, less active citizens far outnumbered more active soldiers and could easily prevent those "few" from ruling the "many" with the sword. But as Spotswood well knew (as did George Washington much later), the actual "value" of a militiaman's "Labour" in combat was questionable.

Lastly, Spotswood dismissed the absurd notion that militia adjutants would "huff and Bully the People." "This, I am sure, was never intended as any part of their Office in my Scheme, nor am I apt to believe the House of Burgesses, to whom it was referred, would readily have given 'em such an authority." Spotswood hit upon a crucial point; whatever military power the adjutants exercised was derived from civil authority. In fact, the executive's entire "Militia Scheme" fully recognized—and duly accepted—legislative supremacy, as evidenced in his concluding sentence: "However, if, in the above mentioned Scheme there appeared any thing disagreeable to the Inclinations or Interest of the People, I was far from pressing them to it, Seeing it is evident from my Message to the House of Burgesses that I left it to them to adapt it to the Circumstances of the Country."<sup>45</sup> That was precisely what Spotswood did; he "left it" to the elected surrogates of "the people" to decide whether the militia

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<sup>44</sup>Ibid., 211.

<sup>45</sup>Ibid., 212.

should be reformed. After presumably giving due consideration to “the Inclinations and Interests of the people,” the lawmakers never instituted the Governor’s “Scheme.”

Even so, that Scheme merits our own consideration. In many ways, Spotswood comes across as a *practical* “neo-Harringtonian” rather than a *politicized* one like James Blair. In truth, the executive was adhering to the three core principles within Article Thirteen of Virginia’s future Declaration of Rights far more than his critics would lead us (or British officials) to believe. Spotswood correctly observed that the militia was *not* providing the proper, natural, or safest defense for Virginia because “the people” had become apathetic about keeping and bearing arms. In fact, the executive and legislature *both* agreed on a military policy that placed primary responsibility for Virginia’s defense against Indian invasions on Indian “militiamen” and 24 white ranger “officers.” Spotswood’s militia “Scheme” attempted to correct that absurd paradox by creating a “marching army” of enthusiastic youth just as Harrington proposed in *Oceana*—a “standing army” that was hardly dangerous to liberty because it was composed of the same citizen-soldiers who were liable for militia duty. Like Harrington, he also believed that wealthy citizens should shoulder their just share of armed accountability. Finally, the executive upheld the principle that “the military should be kept under strict subordination to, and governed by, the civil power” by not imposing his plan on Virginians without their consent, but rather left it up to their elected representatives to enact whatever militia laws accorded with the “Inclinations and Interests of the people.” As we shall soon see, Virginia’s lawmak-

ers did their duty; they passed laws that reflected the *disinclination* and *disinterest* of the people to bear arms as soldiers.

Even though the Governor never aspired to become a military dictator as alleged, he was nevertheless recalled six years later. According to Spotswood's biographer, the Board of Trade eventually removed him from office because he became too much of a "landed" gentleman—and thus too much of a Virginian.<sup>46</sup> However, Virginia's militia system did experience a reformation of sorts, but one that had nothing to do with the constitutional tenets of neo-Harringtonians.

#### Virginia's Militia Policemen

The anti-army ideology was predicated upon the fear that professional soldiers would be used to enforce oppressive laws, police the people with armed force, punish sedition, and eradicate liberty. While militias were championed as the foils of armies and the guardians of liberty, not much was said or written about their role in upholding law and order. Even so, Virginians began using their militias more for social control and even less for military defense in the 1720s. In that respect, militias were indeed "necessary" to Virginia's *internal* security, but in a manner that mirrored what full-time soldiers were not supposed to do—enforce oppressive laws, police people with armed force, punish sedition, and eradicate the liberty of a certain segment of the population. The major point (and argument) of this segment is that using armed force to coerce and control people is always justified by those who hold the reins of eco-

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<sup>46</sup>Leonidas Dodson, *Alexander Spotswood, Governor of Colonial Virginia, 1710-1722* (Philadelphia: University of Pennsylvania Press, 1932), 281-82.

conomic and political power—or as James Harrington phrased it, “masters” should be armed; “servants” (and slaves) should be disarmed.

England’s first Prime Minister, Sir Robert Walpole, replaced Spotswood with Major Hugh Drysdale in 1722. Just before Drysdale arrived, another slave insurrection was uncovered. Since the only witnesses against the plotters were other Negroes, “and those not Christians,” Attorney General John Randolph ruled that there was insufficient evidence for an indictment of high treason, and thus no legal justification for the death penalty. Drysdale’s first Assembly accordingly passed a statute that resolved Randolph’s legal dilemma—“Negros, Mulattos, and Indians, not being christians,” were allowed to give evidence in capital crimes against slaves; but if they gave “false testimony,” they would have “one ear nailed to the pillory, and there stand for the space of one hour, and then the said ear to be cut off.” The procedure would be repeated with the other ear, followed by “thirty-nine lashes, well laid on, on his or her bare back, at the common whipping post.”<sup>47</sup> Hardly a “witness protection program,” the law was aimed at obtaining truthful testimony from “unchristian” witnesses. It was also a felony under the new law for more than five slaves to gather together at any one place without their master’s or overseer’s permission unless they were “repairing to or meeting at church to attend divine service.” In addition, “no negro, mulatto, or Indian whatsoever; (except as is hereafter excepted,) shall hereafter presume to keep, or carry any gun, powder, shot, or any club, or other weapon whatsoever,”

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<sup>47</sup>Ibid., 4:127.

and authorized the seizure of all such arms along with a “well laid on” whipping up to thirty-nine lashes.

The parenthetical “except as is hereafter excepted” was significant:

*Provided nevertheless*, That every free negro, mulatto, or Indian, being a house-keeper, or listed in the militia, may be permitted to keep one gun, powder, and shot; and that those who are not house-keepers, nor listed in the militia aforesaid, who are now possessed of any gun, powder, or shot, or any weapon, offensive or defensive, may sell and dispose thereof, at any time before the last day of October next ensuing. And that all negros, mulattos, or Indians, bond or free, living at any frontier plantation, be permitted to keep and use guns, powder, and shot, or other weapons, offensive or defensive; having first obtained a license for the same, from some justice of the peace of the county wherein such plantation lie; the said license to be had and obtained, upon application of such free negros, mulattos, or Indians, or of the owner or owners of such as are slaves; anything herein contained to the contrary thereof, in any wise, not withstanding.<sup>48</sup>

Clearly, *free* “negros, mulattos, or Indians” were allowed the right of citizenship “to keep and use guns”—for either *offensive* or *defensive* purposes, which might be interpreted as a “collective” and “individual” right respectively—but only if they were a “house-keeper,” “listed in the militia,” or lived on a frontier plantation and obtained a license. Otherwise, they were barred from owning guns. By “house-keeper,” the lawmakers meant tenants who owned no land; otherwise they would have used the common legal term “freeholder.” That legal delineation makes greater sense in light of an additional provision within this same act: “no free negro, mulatto, or Indian whatsoever, shall vote.”<sup>49</sup> In this way, free males of color possessed “gun rights” that were attached to a type of “segregated” citizenship—not to “full” economic and political citizenship defined by land ownership and voting rights. Even so, a new militia law negated the “listed in the militia” rationale for possessing arms.

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<sup>48</sup>Hening, *Statutes*, 4:131.

<sup>49</sup>*Ibid.*, 4:133.

The 1723 Militia Act began with this preamble: “Whereas a due regulation of the Militia is absolutely necessary for the defence of this country, and the act now in force, doth not sufficiently provide for the same, *Be it therefore enacted . . .*” Note the similarity between the first phrase and the Second Amendment’s “Militia Clause.” The inadequate act referred to was passed almost two decades earlier in 1706. A comparison between the two acts does not reveal much “re-settling” or “better Regulation,” however, except in terms of “all free Negroes, Mulattos, and Indians.” Under the new militia law, freemen of color were “obliged to attend and march with militia, and to do the duty of pioneers, or other such servile labour as they shall be directed to perform” during “any invasion, insurrection, or rebellion.” In effect, they could legally bear axes, shovels, and picks but no guns. Freemen of color were thus confronted with a classic “Catch-22” situation: they could own arms and ammunition for militia service, but were required to serve in the militia in an unarmed capacity. Despite that inconsistency, one fact stands out: freemen of color could not stay home during invasions or insurrections; they had to march alongside white militiamen who were armed.<sup>50</sup> The implication is quite clear: they would be policed while serving as militiamen.

After suffering from a prolonged illness, Hugh Drysdale became the second Virginia governor to die in office. Lieutenant Governor William Gooch succeeded Drysdale on 8 September 1727.<sup>51</sup> Major Gooch had served with distinction during

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<sup>50</sup>The 1723 Militia Act is in Hening, *Statutes*, 4:118-126.

<sup>51</sup>George Hamilton, Earl of Orkney, was Virginia’s absentee governor from 1705 until his death in 1737. William Anne Kepple, Lord Albemarle, succeeded Hamilton as another absentee governor until 1754.

Queen Anne's War; indeed, he had been in every battle in which the Duke of Marlborough had fought. He would occupy the Governor's Palace at Williamsburg for twenty-two years, thus becoming the longest serving chief executive in Virginia's history. In the words of one historian, Gooch's "administration was one of the most harmonious and successful of the Colonial Period."<sup>52</sup> Much of that uninterrupted "harmony" was due to little outside interference by the British government under Prime Minister Sir Robert Walpole from 1722-1742. Sir Robert, in turn, left the management of colonial affairs to the Duke of Newcastle, who inaugurated an era of "salutary neglect" that lasted up to the Seven Years' War. During much of that period, Virginia's militia experienced its own form of "salutary neglect."

During the first year of Gooch's administration, England and Spain fought an undeclared naval war against one another.<sup>53</sup> Even though the quasi-war ended the following year (1728), the General Assembly took the precaution of creating "An Act for making more effectual provision against Invasions and Insurrections." The lawmakers were concerned with three threats: Spanish invasions by sea; Indian "incursions" by land; and internal insurrections by "negros, and others." The last menace caused the greatest alarm. Rather than breaking up gatherings by "Negroes, or other slaves," militiamen now arrested them on the spot. Moreover, the new "Invasions and Insurrections" law created an entirely new militia assignment—slave patrolling.<sup>54</sup>

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<sup>52</sup>Morton, *Colonial Virginia*, 2:501.

<sup>53</sup>McIlwaine, *Executive Journals of the Council*, 4:170-71, 183; William Gooch Papers, Public Record Office, Colonial Office [British], typed transcripts in the Virginia Historical Society library (Richmond, VA), pages 146-47. Hereafter cited as Gooch Papers, (VHS), page.

<sup>54</sup> Hening, *Statutes*, 4:197-203.

In time, slave patrolling evolved into a militiaman's primary duty—sound evidence that white Virginians were not opposed to using military force to assure civil order.

The above act was to remain “in force” for a “space of five years”—or until February 1732. While the law was basically a dead letter during the quasi-war with Spain, it came in handy in 1730 when Colonel Alexander Spotswood returned to Virginia. The former governor had gone to England to patent his vast colonial landholdings without having to pay royal quitrents. For some unknown (and unaccountable) reason, a false rumor spread among the slave population that the ex-governor had brought a command from King George II freeing all “Christian Negro slaves,” and that Virginia's slave owners were suppressing the royal order. In frustration, the slaves planned two rebellions. The first insurrection was to take place in Norfolk and Princess Anne Counties, but was uncovered and halted without incident. Another revolt arose six weeks later when two hundred slaves gathered on a Sunday while their masters attended church. The plot was again foiled, but this time four leaders were tried and executed. Governor Gooch issued a proclamation reminding the slaves that they were governed under the 1723 “slave” law. Even more significantly, militias began patrolling the roads and slave quarters in the threatened counties under the 1727 revision to that same law.<sup>55</sup> This marks the first recorded occasion when local militias actively policed slaves for domestic security. It would not be the last.

White Virginians had sufficient reason to fear their black slaves. Governor Gooch reported to the Board of Trade in 1743 that Virginia's total population was

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<sup>55</sup>Gooch to the Board of Trade, 14 September 1730, 12 February 1731, Gooch Papers (VHS), 204, 212; Gooch's proclamation, Gooch Papers (VHS), 206-09; McIlwaine, *Journals of the House, 1727-1740*, 63, 267; McIlwaine, *Executive Journals of the Council*, 4:228.

130,000, of which 42,000 were “Negro” and 88,000 were white—almost a two to one ratio.<sup>56</sup> Moreover, the importation of slaves had grown considerably during the previous two decades. According to Richard Morton’s research, exactly 1,671 slaves arrived in one year alone (June 1725 to June 1726). Moreover, “From March 25, 1718, to March 25, 1727, traders brought 11,051 slaves to Virginia.”<sup>57</sup> In an early attempt to stem the tide of incoming slaves, the Assembly passed a law in 1723 that placed a forty-shilling duty on every imported slave, only to have it voided by the Privy Council. Gooch approved a similar act in 1728 that met the same fate.<sup>58</sup> Not until 1778—two years after the Declaration of Independence—would Virginia lawmakers finally halt the importation of black slaves.<sup>59</sup> The influx of black slaves, however, was but one reason to be concerned about homeland security.

Another cause for anxiety was the increasing number of indentured convicts that were coming to Virginia from England. According to recent scholarship, 50,000 British convicts were transported to Virginia and Maryland between 1718 and 1775—18,600 of those criminals came from London alone; on average, 326 criminals each year.<sup>60</sup> However, not all of England’s forced refugees were indentured convicts. For example, 112 “rebel prisoners” captured during a Scottish revolt in 1715 were

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<sup>56</sup>Report to the Board of Trade, 22 August 1743, Gooch Papers (VHS), 736.

<sup>57</sup>Morton, *Colonial Virginia*, 2:492.

<sup>58</sup>Hening, *Statutes*, 4:118 and 182 respectively.

<sup>59</sup>*Ibid.*, 9:471-472

<sup>60</sup>Bernard Bailyn, *Voyagers to the West: A Passage in the Peopling of America on the Eve of the American Revolution* (New York: Vintage Books, 1986), 294-95; A. Roger Ekirch, “Bound for America: A Profile of British Convicts Transported to the Colonies, 1718-1775,” *William and Mary Quarterly* 42 (April 1985): 188.

transported to Yorktown in January 1717. Only twenty-nine of the prisoners of war were listed as serving seven-year indentures.<sup>61</sup> All the same, Virginians tried to prevent traders in human flesh from turning their colony into a dumping ground for Great Britain's social and political undesirables. Much like the General Court's 1670 order prohibiting "jaile birds," the General Assembly enacted a law in 1722 "for the better government of convicts transported."<sup>62</sup> Like the legislation that imposed a duty on imported slaves, the Privy Council voided the statute in 1724. Not all Virginians opposed the new wave of convicts, however. As always, there was a profitable market for cheap, coerced labor, the chief purchasers being large landowners setting up successive plantations on the frontier, and mine owners. Yet as one scholar notes, "Transportation was intended to serve British, not colonial, needs."<sup>63</sup> Even though they were usually dispatched to the fringes of settled society, the convicts nevertheless caused their fair share of domestic turmoil.

The year before Gooch became Governor, William Byrd II painted a serene portrait of Virginia social life in a letter to the Earl of Orrery: "We have neither public robbers nor private, which your Lordship will think very strange, when we have often needy Governors, and pilfering convicts sent amongst us. . . . We can rest securely in our beds with all our doors and windows open, and yet find every thing ex-

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<sup>61</sup>The list of prisoners is in Palmer, *Calendar*, 1:185-88.

<sup>62</sup>Only the title of the act is in Hening, *Statutes*, 4:106. See Fairfax Harrison, "When the Convicts Came," *Virginia Magazine of History and Biography* 30 (1922): 251-52. Hereafter cited as Harrison, "Convicts."

<sup>63</sup>A. Roger Ekirch, "Bound for America: A Profile of British Convicts Transported to the Colonies, 1718-1775," *William and Mary Quarterly* 42 (April 1985): 200.

actly in place the next morning.”<sup>64</sup> Byrd’s reference to “needy Governors” was directed at his former political rival, Governor Spotswood, who had imported indentured Germans to labor in his iron mine. Even so, other elite gentlemen were not waking up and finding “every thing in place.” Less than two years later, a “pernicious crew of transported felons” robbed and burned Colonel Thomas Lee’s mansion in Westmoreland County to the ground. By 1730 the ratio between rising crime and imported convicts reached perilous proportions, prompting lawmakers to institute the death penalty for arson and stealing goods valued above twenty shillings.<sup>65</sup> Governor Gooch judged the statute “a very necessary law in a country which is so much crowded with convicts.”<sup>66</sup> In sponsoring Thomas Lee for Councilor in 1732, Gooch remarked that most of the criminals were located in Lee’s neck of the woods—the frontier counties of the Northern Neck—which the Governor appraised as “a part of the country remote from the seat of government, where the common people are generally of a more turbulent and unruly disposition than anywhere else, and are not like to become better by being the place of all this Dominion where most of the transported convicts are sold and settled.”<sup>67</sup> King George III would make a similar assessment years later; except the “Northern Neck criminals” he had in mind were the offspring of elite gentlemen like Thomas Lee.

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<sup>64</sup>Byrd to Orrery, 5 July 1726, *Virginia Magazine of History and Biography* 32 (1924): 27.

<sup>65</sup>Hening, *Statutes*, 4:271-73.

<sup>66</sup>Gooch to the Board of Trade, 23 July 1730, Gooch Papers (VHS), 1:169; Harrison, “Convicts,” 250-260.

<sup>67</sup>Gooch to the Board of Trade, 5 October 1732, *Calendar of State Papers, Colonial Series, America and the West Indies, 1732*, 231.

While black slaves were patrolled and policed by local militias, local sheriffs were responsible for arresting and jailing disobedient whites. Apparently, they were performing their police duties quite well—perhaps too well. The Assembly passed an act in 1738 that changed jury trial procedures for capital crimes due to “the great increase of offenders,” which was not only “very burdensome and expensive to the public,” but also “grievous to many of his majesty’s good subjects, who live in the remote countys, and are summoned to serve as jury-men at said trials.” Since transported convicts committed “most of the felonies, and other capital offences,” the lawmakers decided a jury of “by-standers” who happened to present on Court Days could try them.<sup>68</sup> Not only was militia duty considered “burdensome” and “grievous” for Virginia’s citizens, so too was jury duty.

Abiding by the “inclinations and interests” of Virginia’s voters, legislators ensured that the jury and militia obligations of citizenship were less onerous and objectionable. Certainly periodic patrolling of unarmed slaves was less challenging (and perilous) than the long-term patrolling of armed Indians on the frontier. Nor were citizen-soldiers called upon to confront dangerous arsonists and robbers. In fact, the ruling elite devised a much better solution for the criminal element in their midst.

#### The War of Jenkins’s Ear, 1739-1741

The smoldering feud between England and Spain over maritime trade erupted into an armed conflict known as the War of Jenkins’s Ear. The war arose from British attempts to circumvent the commercial provisions of Peace of Utrecht, which ended Queen Anne’s War. The treaty limited British trade with Spain’s colonies in

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<sup>68</sup>Hening, *Statutes*, 5:24-26.

America. Dissatisfied with those restrictions, British merchants resorted to smuggling. In 1731 a British smuggler, Robert Jenkins, was compelled to surrender his cargo (along with one of his ears) to the crew of a Spanish coast guard vessel. Further outrages against British seamen enflamed anti-Spanish sentiment in Walpole's Parliament, and obliged the peace-prone prime minister to declare war in 1739. Since the conflict was largely confined to the New World, Virginia was likewise "obliged" to prepare for war. In what was now a customary pattern in times of crisis, Virginians paid closer attention to their militias. In particular, the General Assembly pulled out Virginia's sword; inspected it for signs of corrosion; polished it with a few minor revisions; and then promptly re-sheathed it.

Nevertheless, the Militia Act of 1738 is significant for several reasons—most especially because it figured prominently during Virginia's Second Convention in 1775. More immediately, it added a new exemption to the ever-expanding list; "the people commonly called Quakers" were now excused from militia service, marking the first time that a military deferment was made for religious beliefs. Everyone exempted from militia duty had to provide an armed substitute, but the lawmakers notably qualified the surrogate's qualifications—"one able-bodied man, not being a convict." The law also cleared up the confusion over whether or not "free mulattos, negros, or Indians" were supposed to bear weapons as militiamen. It did so with four succinct words—[they] "shall appear without arms."<sup>69</sup>

There was one more important revision written into the 1738 act. In 1727, the militia was assigned the *temporary* task of patrolling slaves during actual "Invasions

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<sup>69</sup>Hening, *Statutes*, 5:16-17.

and Insurrections.” That additional assignment was now made a *permanent* duty under the new militia statute. Three points stand out from the revised text. First, militiamen were required to “muster” during church services, a time when slaves were known to gather and plot revolts. Second, armed patrollers were a “select” unit within every county militia; composed of four handpicked men and one appointed officer. Third, those militiamen were not only authorized “to patrol” unlawful assemblies of slaves, but also “servants, or other disorderly persons.”<sup>70</sup> This specific statute, in sum, created a specialized police unit among militiamen that patrolled and arrested anyone who was “disorderly,” regardless of their race or color. Those policemen were not only regularly paid, but also given preferential treatment: “such patrollers shall be exempted from attendance at private musters, and from the payment of all public, county, and parish levies, for their own persons, for those years in which they shall be employed in that service.”<sup>71</sup>

Which brings us to a vital question: How, exactly, were “regular” militiamen “better trained”? The short answer is not very much—even though that was the stated purpose of the statute in view of the impending war with Spain. As before, County Lieutenants were obliged to hold a general muster once a year, the only difference being that a certain calendar month was now specified (“in the month of September, every year”). That was all the new law had to say about “better training.” There was, however, one notable change in terms of “better discipline.” For the first time ever, corporal punishment was imposed upon any militiaman who refused “to perform the

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<sup>70</sup>Ibid., 5:19.

<sup>71</sup>Ibid.

commands of his office, or behave himself refractorily or mutinously.” For the first offense, the unruly soldier was “to be tied neck and heels, for any time, not exceeding five minutes.” For the second offense, the disobedient soldier was to be committed “to the county goal, there to remain for any time not exceeding ten days.” No punishments were imposed upon “mutinous” officers, however.<sup>72</sup> All the same, that was the extent of Virginia’s military preparedness on the eve of war. In contrast, the lawmakers had taken far greater care to ensure militiamen duly functioned as policemen for internal security—and rewarded them in kind. But when the British government decided to use colonial troops against the Spanish provinces in 1740, the legislators realized they needed soldiers as well as policemen.

Great Britain’s military strategy was to launch an assault against Spain’s Cartagena fortress in the West Indies with British ships and colonial troops. Virginia’s former Governor, Alexander Spotswood, received a royal commission as commander of the “American Regiment”—three thousand expeditionary troops recruited among the North American colonists.<sup>73</sup> Governor Gooch was tasked with raising Virginia’s quota of four hundred men. But when Spotswood died of natural causes at Annapolis, Maryland, on 7 June 1740, his military titles—and enormous responsibilities—fell into Gooch’s lap with an unexpected thump.<sup>74</sup> Virginia’s chief executive would need all the help he could get from his General Assembly.

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<sup>72</sup>Ibid., 18.

<sup>73</sup>E. Alfred Jones, “The American Regiment in the Cartagena Expedition,” *Virginia Magazine of History and Biography* 30 (1922): 1-20.

<sup>74</sup>Letters of 2 April, 2 May, 26 May, 6 June, and 11 October 1740, Gooch Papers (VHS), 586, 588, 591-92.

Gooch called two emergency sessions to put the colony on a war footing; one on 22 May just before he assumed over-all command, and another on 21 August. Before the August session met, Gooch departed for New York to raise volunteer quotas from the northern colonies, and to arrange the rendezvous of the combined expeditionary force at the Virginia capes by mid-September for transport to Cartagena.<sup>75</sup> As always, the legislature was left to its own devices to raise the power of Virginia's military sword—or find the manpower and money for war—which likewise ensured that the military remained subordinate to civil authority (as well it should). The Assembly accordingly enacted four wartime measures, which meant they would be repealed by a proclamation of peace.

The first concerned the militia. The preamble declared that, “the militia of this colony should be kept under stricter discipline, more frequently trained and exercised, and better armed” for one highly significant purpose—“the better to enable them to contend with regular troops.” For the first time ever, Virginians deliberately pitted their provincial militias against a professional army—but not in the true sense of the anti-standing army ideology. But to make militiamen adept for combat against “regular troops,” the lawmakers had to correct two glaring deficiencies: a lack of arms and insufficient training. As to the first fault, the treasurer was authorized “to issue and apply the sum of two thousand pounds, in providing arms for the militia of this colony.” As to inadequate training, the law now required companies to “muster, train, and exercise” every two months instead of the customary three, and that a gen-

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<sup>75</sup>McIlwaine, *Journals of the House, 1727-1740*, 391-92, 433-34, 437; Letters of 14 June and 8 July, Gooch Papers (VHS), 594-95.

eral muster be held bi-annually rather than once a year—a grand total of three extra training days.<sup>76</sup>

To raise money, encourage enlistments, and prevent desertions, the Assembly penned one all-encompassing act subject to the King’s approval. Since the lawmakers intended on imposing a duty on imported slaves to raise revenue—which the British government had previously rejected—they pleaded their case on two grounds. First, the tax would fall on the “buyers of slaves,” and thus in “no ways [be] burthensome to the traders.” Second, they tied the levy to wartime necessity: to support “the intended expedition against the Spaniards”; to procure “arms for the poorer sort of inhabitants of this colony”; and to provide for “the relief and maintenance” of those “maimed or disabled in the said intended expedition,” as well as “the widows and children of such others of them as shall happen to be killed.” This was the first occasion when funds were earmarked for the social ramifications of political violence (war). The expectation was that such inducements would prevent desertion, which would be harshly punished in any case. Indeed, a soldier who was captured and convicted of desertion would be sold “to the highest bidder, for ready money, as a servant, for the space of five years.” Unless the ruling elite truly intended to sell free-born citizens into servitude if they deserted, this provision implies that another class of men would voluntarily enlist. After deducting twenty shillings for court costs and rewarding the person who apprehended the deserter, the remaining money from the

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<sup>76</sup>“*An Act, for the better security of the Country in the present time of Danger,*” in Hening, *Statutes*, 5:90-91.

sale would go toward “the uses before mentioned” (supplies for the expedition, arms for less affluent militiamen, and “survivor benefits”).<sup>77</sup>

The third law provided a legal and political remedy for the social problem posed by the influx of British convicts. The chain of causation (and rationalization) went something like this: The legislature had to find four hundred men for the Cartagena Expedition. Under common law practice, militiamen could not be transported out of colony for combat duty. That meant the required quota of troops had to be raised from volunteers, draftees, or both. Virginia voters rarely volunteered and refused to be drafted. The lawmakers therefore came up with a plan that would figuratively and in all likelihood, literally kill two “*jaile birds*” with one stone—or more precisely, with one well-aimed statute.

More specifically, an influential Tidewater lawyer named Edward Barradall—who just happened to be Virginia’s Attorney General—devised the overall legal scheme.<sup>78</sup> The statute began by recognizing “that there are in every county, within this colony, able-bodied persons, fit to serve his majesty, who follow no lawful calling or employment.” The law therefore empowered “justices of the peace of every county” to command “all sheriffs, under sheriffs and constables” to search out persons who had no “lawful and sufficient support and maintenance” and impress them “as soldiers” for the Cartagena Expedition. This was the first wartime draft in Virginia’s history, with county justices serving as “local draft boards.” It was also the

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<sup>77</sup>“*An Act, for laying an additional Duty upon Slaves, to be paid by the Buyer, for encouraging persons to enlist in his Majesty’s service: And for preventing desertion.*” Hening, *Statutes*, 5:92-94.

<sup>78</sup>Harrison, “Convicts,” 256.

first time the Virginia legislature ever raised an army. The correlation between “draft” and “army” should not be lost upon us. It stands in marked contrast to militiamen who ostensibly had a “free-born right” to be politically violent because they were self-employed agrarians (tobacco planters). Moreover, Virginia’s politicians took special care to exempt from the draft any person “who hath any vote in the election of a burgess or burgesses.” They also recognized “property” rights: “an indented or bought servant” was also excused.<sup>79</sup>

This particular law raises several points of interest. First, the House was actually raising an “indigent army” that Governor Spotswood was previously charged with creating. The chief difference between the two armies, apparently, was this: Spotswood’s “army” was viewed as a permanent force, or a “Standing Militia” of miscreants; the legislature’s army, on the other hand, was a wartime force deployed well beyond Virginia’s territorial borders. Second, rather than sustain their army upon the land, the legislators decided to “feed” their soldiers by taxing “consumer luxuries” (imported slaves). Third, the lawmakers took pains to segregate their army from the militia—primarily through the ballot. As a result, a militia muster could still be viewed as an untainted symbol of armed autonomy wedded to voting rights—a “good old principle” of republicanism. Unfortunately, no evidence exists to inform us whether Attorney General Barradall was sufficiently well read—or sophisticated enough—to marry political expediency with Harrington’s political theory. Nonetheless, Virginia’s ruling gentry had an army of social dregs at their command that could never pose a danger to their political liberty.

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<sup>79</sup>Hening, *Statutes*, 5:94-96.

The last law penned by the Assembly extended the time limits on the 1738 “act against Invasion and Insurrections” for an additional three years. The lawmakers also noted that the prior statute made no provisions for punishing mutinous militia officers; or penalized militiamen who failed or refused to answer actual alarms. They corrected that oversight with a progressive monetary fine per officer grade, and a flat ten-pound penalty for unresponsive citizen-soldiers.<sup>80</sup> Considering the fact that non-citizens were bound for Cartagena against their will, the penalties imposed for not making personal sacrifices at home were surely just.

“Gooch’s American Regiment” set sail in October 1740 for Jamaica to rendezvous with Rear Admiral Edward Vernon’s fleet and 5,000 British regulars commanded by General Thomas Wentworth. The combined force reached Cartagena on 4 March 1741. The ensuing five-week assault was a total debacle. Men died by the score from combat, or more commonly from disease. “Even after the fleet at last put out to sea,” as military historian Douglas Leach relates, “the wholesale mortality continued, so that when the American contingent eventually was released to go home it was a tragically small remnant of the thousands who originally had gone so confidently off to war.”<sup>81</sup> Governor Gooch, for one, was severely wounded when a twenty-four pound canon ball passed between his lower legs. He never fully recovered from his combat injury, or the tropical fever he contracted during the cam-

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<sup>80</sup>Hening, *Statutes*, 5:99-100.

<sup>81</sup>Douglas Edward Leach, *Arms for Empire: A Military History of the British Colonies in North America, 1607-1763* (New York: The Macmillan Company, 1973), 218. Hereafter cited as Leach, *Arms for Empire*.

paign.<sup>82</sup> Virginia militiamen, in contrast, saw no combat or suffered any casualties during the war; in fact, some had a rather jolly time manning the home front.

The only recorded wartime episode involving the militia concerned a contested election in 1740—just when the colony’s “rogues and ruffians” were bound for Cartagena. According to an investigation by the House committee on elections, a Gloucester County militia captain “mustered up” his men on Election Day—along with forty gallons of cider and twenty gallons of punch. Rather than performing a “sober” exercise of firearms and the franchise according to James Harrington’s theoretical standards, the captain and his favored candidate, Beverley Whiting, used the liquor and armed men to secure favorable votes. The House committee annulled Whiting’s political victory on the muster field, and the militia captain surrendered up an official apology for his impolitic behavior. This was not an isolated incident. Two years later, Landon Carter lodged a formal complaint that William Fautleroy had stolen the election from him in Richmond County because “several of the [militia] company were merry with liquor.” The full House, however, overruled the election committee in that particular case because candidate Fautleroy did not personally treat the militiamen or encourage them to sway voters.<sup>83</sup>

In Harrington’s theoretical formulation, voting was the civil manifestation of the political power wielded by arms-bearing citizens. However, citizens were not supposed to use the political power of their firearms to manipulate the franchise. Ac-

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<sup>82</sup>Letters from Gooch to his brother, 12 June 1741, 25 February 1742, 31 June 1744, Gooch Papers (VHS), 662-63.

<sup>83</sup>McIlwaine, *Journals of the House, 1727-1740*, 425-27; McIlwaine, *Journals of the House, 1742-1749*, 34, 50-53.

According to Harrington, private power was a prerequisite for public power, and the ability to exercise both depended upon the possession of an inheritable freehold in land. White Virginians were entitled to vote by law—or legally exercised public political power—because they owned land.<sup>84</sup> However, economic independence also conferred the right and responsibility to bear arms in a public capacity as militiamen for homeland security. Voting power was not supposed to be a means to transfer (or substitute) that military obligation to individuals who were dependent upon others for their livelihood. Indeed, such persons were not citizens and therefore should never serve as soldiers. While Virginians applied that conceptual standard to servants, slaves, and free persons of color within their militias, they were also predisposed to raise an “indigent army” for military service beyond their territorial borders. Most of the armed men who were shipped off to Cartagena could not vote for the lawmakers who conscripted them so cavalierly. Clearly, they were politically, economically, and socially expendable. Neo-Harringtonian ideologues argued that armies composed of such social dregs posed a danger to political stability, balanced constitutions, and the survival of free institutions. Ironically, Virginians raised their “indigent army” to rid themselves of those undesirables, and thus ensured social and political stability at home.

In reality, maintaining internal security—or enforcing civil order—was becoming the primary function of Virginia’s militiamen rather than providing military defense against foreign enemies. That trend was repeated and reinforced during King

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<sup>84</sup>Voter qualifications were clarified by an act passed in August 1736: ownership of one hundred acres of land, or twenty-five acres with “a house and plantation” in the county of residence. See Hening, *Statutes*, 4:475.

George's War (1744-1748), the third North American conflict between France and Great Britain, in which Virginians took no active part—except for Captain Beverley Robinson's little “expeditionary army” of 136 officers and men, who departed Virginia in June 1746 on an unsuccessful campaign to conquer Canada.<sup>85</sup> As before, few (if any) of those soldiers were full-fledged citizens; nor were they militiamen. After all, Canada was not Virginia; nor was France posing a clear and present danger to Virginia's homeland security. That tranquil state of military affairs would change dramatically, however, during the fourth struggle with France, which became intimately familiar to Virginians and commonly known as the “French and Indian War.”

The next question that concerns us, therefore, is this: Would Virginia's citizen-soldiers be prepared—and willing—to fight France and its Native American allies on their home turf, or would the pattern of apathy and atrophy persist? A Second Amendment scholar could easily rephrase that question into two parts: Was a well-regulated militia really necessary to Virginia's security during the French and Indian War, and how did Virginians exercise their right to keep and bear arms?

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<sup>85</sup>Hening, *Statutes*, 5:401-04; Mellwaine, *Journals of the House, 1741-1749*, 225-27; Gooch Papers (VHS), 838, 841.

## CHAPTER 5

### THE RIGHT *NOT* TO BEAR ARMS: VIRGINIA'S CITIZEN-SOLDIERS AT WAR, 1754-1763

“You may, with almost equal success, attempt to raise the dead to life again, as the [militia] force of this county.”

—Major George Washington  
Report on the Frederick Militia  
January 1754<sup>1</sup>

As previously related, English armies—and by extension, the armed political power of Great Britain—played a minimal role over the course of Virginia's one-hundred-and-fifty-year history. Moreover, very few Virginians did much fighting during the first half of the eighteenth century because there were no major invasions or insurrections that required the citizenry to take up arms.<sup>2</sup> As far as the Native Americans were concerned, the nearest tribes of any consequence lived some three to four hundred miles away from the colony's settled regions.<sup>3</sup> That demographic fact inaugurated an era in which large tracts of land were granted to wealthy Virginians. Governor William Gooch not only continued that policy, but also defended it to the Board of Trade. Blue Ridge counties like Spotsylvania, “where the greatest tracts have been granted and possessed,” he argued, “[had] given encouragement to the meaner sort of people to seat themselves as

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<sup>1</sup>George Washington quoted in Douglas Southall Freeman, *George Washington, A Biography*, 7 vols. (New York: Scribner, 1948-57), 1:331. Hereafter cited as Freeman, *Washington*.

<sup>2</sup>Jack P. Greene, *The Quest for Power: The Lower Houses of Assembly in the Southern Royal Colonies, 1689-1776* (Chapel Hill: The University of North Carolina Press, 1963), 303. Hereafter cited as Greene, *Quest for Power*.

<sup>3</sup>Percy Scot Flippin, “William Gooch: Successful Royal Governor of Virginia,” *WMQ*, 2<sup>nd</sup> ser., 6 (January 1926): 10. Hereafter cited as Flippin, “William Gooch.”

it were under the shade and protection of the greater.”<sup>4</sup> Then again, “greater” Virginians discovered an effective way to rid the colony of the “meaner sort” during the War of Jenkins’ Ear: round up, conscript, and ship out all “idle fellows” for the Cartagena Expedition.

Like the previous colonial wars against the French, the Virginia militia took no active part in the armed contest with Spain, which was probably just as well since its proficiency as a fighting force was questionable. That certainly was the opinion for one contemporary observer who, in 1744, described Virginia’s citizen-soldiers this way:

Your Ears are constantly astonished at the Number of Colonels, Majors, and Captains that you hear mentioned: In short, the whole Country seems at first to you a Retreat of Heroes; but, alas! to behold the Musters of their Militia, would induce a Man to Nauseate a Sash and hold a Sword forever in Derision. Diversity of Weapons and Dresses, Unsizeableness of the Men, and Want of the least Grain of Discipline in their Officers or them, make the whole Scene little better than Dryden has expressed it . . . “And raw in the fields the rude militia swarms; . . . Of seeming arms, they make a short essay, then hasten to get drunk the bus’ness of the day.”<sup>5</sup>

One would naturally assume that sorry military state of affairs would have drastically changed a decade later when the French and Indian War literally broke out in Virginia’s backyard. Such was not the case, however—at least not in terms of Virginia’s militia. Instead the “Great War for Empire”<sup>6</sup> marked the first time in England’s history that a full-scale army was dispatched to North America to defend colonials from foreign

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<sup>4</sup>Gooch to the Board of Trade, 6 November 1728, Gooch Papers (VHS), 75-78.

<sup>5</sup>“Observations in Several Voyages and Travels in America,” from the *London Magazine* for July 1744, reprinted in *WMQ*, 1<sup>st</sup> ser., 15 (January 1907): 147-48.

<sup>6</sup>Historian Lawrence Henry Gipson originally coined the term “Great War for the Empire” in his minted (and magisterial) 10-volume work, *The British Empire Before the American Revolution* (Caldwell, ID: The Caxton Printers, 1936-70). (Hereafter cited as Gipson, *British Empire*.) Since this study focuses primarily Virginia’s experiences during that global conflict, it uses “French and Indian War” throughout.

aggression. That army would remain “standing” in the colonies until 1783, when another army of Patriots forcibly removed it. Just as significantly, the French and Indian War witnessed the first time in Virginia’s history that a European-style army was raised from the colony’s citizen-soldiers. The character, composition, and circumstances of those two allied armies provide considerable—but largely forgotten—insight to the words “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.” In fact, the French and Indian War actually turned the meaning of those words upside down: A well regulated militia was *not* necessary to Virginia’s security, because militiamen exercised their “right” *not* to bear arms. This chapter argues and explains that important theme.

### Virginians Prepare for War

The French and Indian War began in 1754 as an “undeclared” armed conflict between Virginia and France in the southwestern corner of present-day Pennsylvania then known as the “Ohio Country.” As in all wars, manpower was needed to do the fighting, money was needed to support that armed labor force, and some sort of justification was needed to raise the men and money without resorting to naked coercion. Justification for armed hostilities was questionable at the outset. Neither the French nor the Indians began the war, nor was it Great Britain’s intention to initiate armed aggression in the region. Instead, it was the expansionist drives of a wealthy group of Northern Neck land speculators, known collectively as the Ohio Company, which ignited an armed conflagration not only of fires and swords, but also of torches and tomahawks.<sup>7</sup> But of all the men who

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<sup>7</sup>The history and background of the Ohio Company is available from the following secondary sources: Kenneth P. Bailey, *The Ohio Company of Virginia and the Westward Movement, 1748-1792: A Chapter in the History of the Colonial Frontier* (Glendale: CA:

were actively involved in furthering the fortunes of the Ohio Company (and if necessary, using arms to assure profits), none was more important than Virginia's new chief executive, Governor Robert Dinwiddie.

Dinwiddie received his royal appointment as Virginia's lieutenant governor on 4 July 1751.<sup>8</sup> However, he was first appointed as a member of the Ohio Company on 27 March 1750, some fifteen months earlier.<sup>9</sup> We will never know for certain if Dinwiddie's aggressive imperialism was motivated primarily by a desire for personal profit. Nevertheless, we do know Dinwiddie affirmed upon his arrival that he had "the Success and Prosperity of the Ohio Company much at Heart."<sup>10</sup> He likewise wrote the British Secretary for the Southern Department in 1754, just before the outbreak of war, that "the Settling and securing the Lands in the interior Parts of this Cont't, particularly those on the back of this Dom'n, has been much in my Thoughts ever since my arrival at my Gov't."<sup>11</sup> We also know some of the Governor's contemporaries—such as South Carolina's Governor James Glenn, as well as prominent Virginians like George Washington—were

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Arthur H. Clark Co., 1939), hereafter cited as Bailey, *Ohio Compnay*; Alfred P. James, *The Ohio Company, Its Inner History* (Pittsburgh: University of Pittsburgh Press, 1959); Thomas Perkins Abernethy, *Western Lands and the American Revolution* (New York: Russell & Russell, 1959); and Kate Mason Rowland, *The Life of George Mason, 1725-1792*, 2 vols. (New York: G. P. Putnam's Sons, 1892).

<sup>8</sup>Morton, *Colonial Virginia*, 2:597-600.

<sup>9</sup> Lois Mulkearn, comp. and ed., *George Mercer Papers Relating to the Ohio Company of Virginia* (Pittsburgh: University of Pittsburgh Press, 1954), 5.

<sup>10</sup>Dinwiddie to Thomas Cresap, 23 January 1752, in Robert A. Brock, ed., *The Official Records of Robert Dinwiddie, Lieutenant-Governor of the Colony of Virginia, 1751-58, Now First Printed from the Manuscript in the Collections of the Virginia Historical Society* (Richmond, 1883), 1:17-18. Hereafter cited as Brock, *Dinwiddie Papers*.

<sup>11</sup>Dinwiddie to Lord Holderness, 12 March 1754, in Brock, *Dinwiddie Papers*, 1:94.

openly suspicious of his motives.<sup>12</sup> Then again, Dinwiddie had his share of defenders, including a number of noted Virginia historians who have promoted his probity and vouched for his veracity.<sup>13</sup> Yet as another scholar soundly summarizes, a keen personal interest in the Ohio Company endowed the Governor with “a peculiar, if sincere view of what was required for the public good.”<sup>14</sup> In any case, the executive’s use of armed force coincided perfectly with the Ohio Company’s forceful agenda.

Under its original 1749 land grant, the Company was to settle one hundred families on the land within seven years, and build and garrison a fort for their protection. As soon as those initial requirements were met, the Company could acquire an additional 300,000 adjoining acres under the same conditions. It is important to emphasize, however, that the corporate stockholders proposed the fort and armed garrison themselves in their original petition. The Board of Trade and Privy Council merely endorsed—rather than imposed—those stipulations. Historically, Virginians were rather ambivalent about maintaining permanent forts and troops on the frontier at public expense. Now a small group of private investors offered to take on the responsibility of protecting people and property with its own armed force. In modern parlance, this was “privatization” of military defense by a corporation.

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<sup>12</sup>Dinwiddie to the Earl of Halifax, 25 October 1754, in Brock, *Dinwiddie Papers*, 1:276; Washington to John Campbell, the Earl of Loudoun, 10 January 1757, in W. W. Abbot et al., eds., *The Papers of George Washington: Colonial Series* (Charlottesville: The University of Virginia Press, 1983-), 4:79-80. Hereafter cited as Abbot, *Washington Papers*.

<sup>13</sup>Dinwiddie to Governor Glen, 5 August 1754, in Brock, *Dinwiddie Papers*, 1:276; Morton, *Colonial Virginia*, 2:602; Bailey, *Ohio Company*, 147-49.

<sup>14</sup>Patrice Louis-Rene Higonnet, “The Origins of the Seven Years’ War,” *Journal of Modern History* 40 (March 1968): 60-61.

The French, for their part, responded quickly—and in kind—to the Ohio Company’s aggressive intrusion. They began building their own chain of four forts starting at Lake Erie and continuing southward. The fourth link was scheduled for construction in 1754. Strategically, it was the key that opened (or locked) the door to the Ohio Country. Predictably, it was to be named after the current governor of Canada, the Marquis de Duquesne. The best location for Fort Duquesne was also unsurprising. Troubled waters were converging at the same spot: the fabled “Three Rivers” around modern-day Pittsburgh.

For his part, Dinwiddie called his first General Assembly in February 1752. In his opening address, the new Governor made it clear that the contest with the French and Indians for control of the interior would be the dominating theme of his administration. He warned the Assembly that the French were inciting the Indians to seize the “interior parts of America, the back of our frontier Settlements to the Westward.” The Governor strongly recommended that the legislators actively pursue good diplomatic relations with the tribesmen and strengthen Virginia’s military capabilities by reforming the militia. Dinwiddie was sure the lawmakers “own good Sense” would “soon discover what bad Consequences” were in store from French belligerence.<sup>15</sup> The legislators “good Sense” apparently told them that the French threat was not pronounced. The legislature limited its response to passing an act that exempted all persons “being protestants” who settled beyond the trans-Allegheny region from paying all public, county, and parish taxes for

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<sup>15</sup>Dinwiddie’s address to the General Assembly, February 1752, in Brock, *Dinwiddie Papers*, 1:26.

ten years.<sup>16</sup> Indian diplomacy and militia reforms were simply ignored by the lawmakers.<sup>17</sup>

Unlike his four immediate predecessors, Robert Dinwiddie was not a governor-soldier. Even so, it did not require the trained-eye of a military professional to see that the colony's militia system was in poor shape. Relying upon his constitutional powers as Virginia's commander in chief, Dinwiddie undertook a reform program on his own initiative in November 1752. Dinwiddie divided the colony into four "militia districts," each under the authority of a militia adjutant responsible for bringing local units up "to a more regular discipline." The most significant aspect of this rather minor reformation, however, was that it launched George Washington on a famous military career as adjutant of Virginia's southern district. This was also the first opportunity Washington had to observe the militia at close hand.<sup>18</sup> The young officer was not impressed. In fact, Washington rarely held America's militiamen in high regard throughout his professional calling, as many respected biographers and military historians have consistently pointed out.

Informed by Dinwiddie that the French were building forts in the Ohio Country, Whitehall agreed with his advice that it might be necessary "to repel force with force." On August 28, 1753, the Secretary of State for the Southern Department, Lord Holderness, sent a special set of royal papers to Virginia's Governor. Holderness informed Dinwiddie that thirty pieces of artillery were on their way to Virginia to bolster the colony's defenses. The Secretary also issued these orders:

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<sup>16</sup>Hening, *Statutes*, 6:258.

<sup>17</sup>McIlwaine, *Journals of the House, 1752-1758*, 4-5, 99-100.

<sup>18</sup>McIlwaine, *Executive Journals of the Council*, 5:117, 412; Freeman, *Washington*, 1:266, 268.

You are warranted by the king's instructions to repel any hostile attempt by force of arms; and you will easily understand, that it is his majesty's determination, that you should defend to the utmost of your power, all his possessions within your government, against any invader. But at the same time, as it is the king's resolution, not to be the aggressor, I am, in his majesty's name, most strictly to enjoin you, not to make use of the force under your command, excepting within the undoubted limits of his majesty's province. . . .

“Undoubtedly,” Dinwiddie & Company were certain that Virginia's territorial limits included the Ohio Country. All the same, Holderness offered two specific examples in which the use of armed force was justified. First, if Dinwiddie was “interrupted” in building the Company's fort, he was to consider that obstructionism as “an hostile act. — And this is one case, in which you are authorized to repel force by force.” The second case would involve “persons not subjects to his majesty” who were erecting their own forts and subsequently refused Dinwiddie's commands to halt such construction.<sup>19</sup>

Armed with those instructions, Dinwiddie took two steps in the fall of 1753. First, the Governor and executive Council decided to send the commander of the garrison at Fort Le Boeuf (now Waterford, Pennsylvania) a formal demand for the withdrawal of all French forces. The man selected to deliver that warning was Major George Washington, who had willingly volunteered for the job. The twenty-one-year-old militia adjutant departed Williamsburg on 31 October for the long, midwinter journey. He returned to the capital on 16 January 1754 with predictable, but no less bad news: the French were not only determined to remain in the Ohio Country, but also planned to enlarge their sphere of influence (and military control) as soon as the snow melted that spring. This was precisely the “smoking gun” Dinwiddie needed to start a war with France.

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<sup>19</sup>Holderness to Dinwiddie, 28 August 1753, in Bailey, *Ohio Company*, 202-203, n.486.

In the meantime, the Governor took his second step by convening a second General Assembly on 1 November 1753. Dinwiddie made a plea for defense appropriations and new laws strengthening the militia. The lawmakers responded by renewing the old 1748 “invasions and insurrections” act, which was about to expire. While that specific statute granted the executive emergency powers to raise the militia in times of immediate crisis, it did not allow those forces to go beyond the borders of Virginia. As historian Richard Morton aptly notes, “There was serious doubt in the minds of the authorities in Williamsburg whether the upper Ohio Valley was in the Old Dominion.”<sup>20</sup> In any case, the lawmakers said nothing at all about the 1738 Militia Act that was still in effect (not that its provisions were really relevant anyway); nor did they appropriate any funds for defense.<sup>21</sup> However when Washington returned the following month with his report from Fort Le Boeuf, Dinwiddie called an emergency session of the legislature to obtain financing for an expedition against the French. The Assembly was scheduled to convene on 14 February 1754. As far as raising armed men was concerned, Dinwiddie thought he had them well in hand as well. He could not have been more wrong.

The Governor began raising an expeditionary force before the legislature met. Washington was instructed on 21 January 1754 to train one hundred militiamen from Augusta and Frederick Counties for the spring campaign. As Dinwiddie explained to Thomas Lord Fairfax, the county lieutenant of Frederick, “with advice of the Council, I think proper to send immediately out 200 men to protect those sent by the Ohio Comp<sup>’</sup>a [sic] to build a Fort.” He expected Lord Fairfax, a fellow Ohio Company investor, to

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<sup>20</sup>Morton, *Colonial Virginia*, 2:643.

<sup>21</sup>McIlwaine, *Journals of the House, 1752-1758*, 104-05, 115-16; Hening, *Statutes*, 6:113 (original law), 350 (extension).

raise fifty men.<sup>22</sup> Dinwiddie also wrote Colonel James Patton of the Augusta militia expressing confidence that his fifty men would eagerly volunteer for the expedition because the daily pay of fifteen pounds of tobacco was “so very good.” But if the wages were not inducement enough, Patton was to draft “by ballot” the required manpower.<sup>23</sup> Dinwiddie was clearly using his emergency power under the renewed “invasions and insurrections” act to raise one hundred militiamen to defend the Ohio Country (and the Ohio Company’s fort). Another 100 men were to be raised by Captain William Trent, a Pennsylvania Indian trader. Trent was to gather up frontiersmen who were ready for a little adventure and some steady pay and immediately join the Ohio Company’s construction party.

Dinwiddie’s goal to raise 100 militiamen from Frederick and Augusta was an abject failure. As Richard Morton summarizes,

The militia of the frontier county of Frederick hardly existed even on paper, the county lieutenant was uncooperative, and the citizens defiant. Lord Fairfax, who was to have raised fifty recruits for Washington to lead to Alexandria, admitted to Dinwiddie that the draft had been a failure; and Washington reported, ‘You may, with almost equal success, attempt to raise the dead to life again, as the force of this country.’ From Augusta came similar reports. The county had suffered from an Indian raid the summer before. Under those circumstances, the men on the frontier were unwilling to leave their families in their lonely cabins.<sup>24</sup>

The reason for the militia’s apathetic response is easily explained. Under the 1748 “invasion and insurrection” law, Virginia’s citizen-soldiers could only defend “places within this dominion.”<sup>25</sup> An “expedition” into the far-off Ohio Country was obviously pressing

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<sup>22</sup>Dinwiddie to Thomas Lord Fairfax, January 1754, in Brock, *Dinwiddie Papers*, 1:49.

<sup>23</sup>Dinwiddie to Patton, January 1754, in *ibid.*, 50-51.

<sup>24</sup>Morton, *Colonial Virginia*, 2:643.

<sup>25</sup>Hening, *Statutes*, 6:113.

the geographic envelope of what constituted the “dominion” of the Old Dominion. As James Titus, the foremost scholar on French and Indian War in Virginia, relates,

the people of Virginia were simply unpersuaded that the presence of Frenchmen in a remote valley beyond the Alleghenies presented a serious threat either to their colony or to themselves as individuals. And they were notably suspicious of those who contended that French menace did exist.<sup>26</sup>

Dinwiddie was wise enough to know that he could not legally coerce men into fighting “his” war—aside from drafting them “by ballot.” Yet even then, no militiaman was willing to stick his fingers into that Pandora’s box and draw the short straw. Ultimately, the entire war effort was in the hands of Virginia’s lawmakers. What they did—or chose not to do—during the emergency session on 14 February epitomized a constituted authority and political power the executive could only possess if he became a tyrant. The question was whether the lawmakers would become collective tyrants in an unpopular, if not unnecessary, war?

When the 14 February 1754 “emergency” session opened, Dinwiddie formally presented Washington’s Le Boeuf report and added his own estimate of the French “threat.” Like any pro-war politician, the chief executive played two high-trump cards: paranoia and patriotism. He painted a lurid picture of helpless frontier families facing a merciless “Crowd of [French and Indian] Miscreants.” He asked the members to consider their duty, honor, and country “at this critical juncture”; “to assert the Honour and Dignity of our Sovereign”; and to make their “efforts equal to the occasion”; after all,

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<sup>26</sup>James Titus, *The Old Dominion at War: Society, Politics, and Warfare in Late Colonial Virginia* (Columbia, SC: University of South Carolina Press, 1991), 22. Hereafter cited as Titus, *Old Dominion at War*.

“the safety and welfare of Virginia” were at stake.<sup>27</sup> The next day, apparently in a somber mood, the House dispassionately pledged that they would uphold “the Duty we owe our King and Country.”<sup>28</sup> Of course if the House majority had been of the same militant mind (or political faction) as the chief executive, they might have been more “patriotic.”

Without question, the House was not enthralled with the “duty” that lay before them: raising money for a questionable war. Burgess Landon Carter confided in his diary “it was so disagreeable a Subject that much art was used to get one penny for the defence of the Country.”<sup>29</sup> That legislative “art” ultimately resulted in an appropriation of £10,000 for Dinwiddie’s expedition. That money, however, came with a crucial “string” attached: a rider creating a board of directors to supervise the expenditure of the public’s funds. The bill required all civil officials and military officers purchasing provisions, paying soldier salaries, or otherwise spending money for war-related purposes to submit written accounts to the board, which had “the sole Power of adjust’g and liquidat’g such Acc’ts.” The select board had fourteen directors (ten from the House, four from the Council), which became popularly known as the “Country Committee.” The committee, in turn, was required to report its proceedings to the General Assembly.<sup>30</sup>

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<sup>27</sup>Message of Governor Dinwiddie to the council and burgesses, 14 February 1754, in Brock, *Dinwiddie Papers*, 1:73-76; McIlwaine, *Journals of the House, 1752-1758*, 175-77.

<sup>28</sup>Address of the burgesses to Governor Dinwiddie, 15 February 1754, in Brock, *Dinwiddie Papers*, 1:78.

<sup>29</sup>Jack P. Greene, ed., *The Diary of Colonel Landon Carter of Sabine Hall, 1752-1778* (Charlottesville: University of Virginia Press, 1965), 1:123. Hereafter cited as Greene, *Carter Diary*.

<sup>30</sup>Hening, *Statutes*, 6:417-20.

Dinwiddie officially condemned the appropriations committee as “an Alteration of a fundamental part of the Constitution” because it deprived the King’s Governor of “his undoubted [right] of directing the Application of all Monies rais’d for the Defence and security of the Country.” His private estimate of the Burgesses was equally pointed: “I am sorry to find them,” Dinwiddie wrote, “very much is a republican way of thinking.”<sup>31</sup> In effect, the legislature had checked the chief executive’s authority to make war by parrying “his” sword with “their” purse. In one scholar’s estimate, “The last thing they intended to do was to give an unpopular governor carte blanche to start a war that, for all they knew, would be no more than a pretext to expand the scope of the prerogative in Virginia government while enriching himself and his Ohio Company cronies at public expense.”<sup>32</sup> Nonetheless, a measure of irony and insight can be derived from Dinwiddie’s charge that Virginians had “Altered” English constitutional principles.

The irony stems from the fact that the House did not “fundamentally” alter or abolish existing constitutional law, which was grounded on “a republican way of thinking” following the English Civil War (1742-1749) and Glorious Revolution (1688-1689). While Parliament eventually recognized King William III’s executive control over armed Englishmen, it nevertheless retained its military influence over fiscal appropriations through Article Six of the Bill of Rights. As a result, parliamentarians were able to keep the dogs of war on a short legal leash. Furthermore, the House of Burgesses had previously created an appropriations committee in 1746 during King George’s War for the ex-

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<sup>31</sup>Dinwiddie to the Board of Trade, 10 May 1754; Dinwiddie to John Hanbury, 12 March 1754, in Brock, *Dinwiddie Papers*, 1:161, 100-101, respectively.

<sup>32</sup>Anderson, *Crucible of War*, 46.

pedition to Canada.<sup>33</sup> Nevertheless, Virginians were not consciously acting out the part of parliamentary mimics in 1746 or 1754—an important insight that is provided by two Virginia scholars.

As Jack P. Greene points out, the 1746 military appropriations committee was created largely because poor health had prevented Governor Gooch—who was much respected (and trusted) by the House and Council—from personally supervising defense spending for the Canada Expedition.<sup>34</sup> Governor Dinwiddie, of course, did not enjoy the same measure of esteem and confidence. Indeed as Professor Titus notes, “There is, however, little direct evidence that the burgesses’ action was inspired by an ideological concern for establishing legislative supremacy over the military: their creation of the “Country Committee” seems to have been motivated primarily by their personal distrust of Dinwiddie.”<sup>35</sup> In sum, political personalities, practical politics, and wartime contingencies took precedence over abstract ideas and constitutional legalities within England’s oldest colonial possession. While the legislature was obviously keeping a watchful eye on how the taxpayers’ money was being spent, they had no reason to fear that the executive might use that war chest to raise a standing army. While Governor Dinwiddie fumed that his executive authority was bound by the purse strings of a presumptuous legislature, he nevertheless signed the £10,000 appropriation bill because he had only one political objective in mind: to coerce Frenchmen with military force, not Virginia’s lawmakers.

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<sup>33</sup>Hening, *Statutes*, 5:401-04.

<sup>34</sup>Greene, *Quest for Power*, 103, 304.

<sup>35</sup>Titus, *Old Dominion at War*, 41.

Even so, Dinwiddie was forced to abandon the notion of raising men from Virginia's militia, especially after his unsuccessful attempt to enact a new militia law. Although it was customary procedure for the lower house to originate all bills, the Council sent down "An Act for the Regulation of the Militia" during the emergency session. The House considered that legislation twice in a committee of the whole then formed a special committee to prepare its own bill, which was adopted with the Council's approval.<sup>36</sup> The "new" law amended the standing 1738 statute, but in only one particular area: it strengthened the slave patrolling duties of militiamen. Specifically, those selected "to patrol and visit all negroe quarters, and other places suspected of entertaining unlawful assemblies of slaves, servants, or other disorderly persons" would receive handsome rewards for performing internal police work: "ten pounds of tobacco for every twenty four hours they shall so patrole"; excusal from attending "private musters"; and exemption from paying all public taxes "for those years in which they shall be employed in that service."<sup>37</sup> An even greater incentive for militiamen to stay at home was hardly what Dinwiddie desired. He would have to find armed manpower elsewhere.

Dinwiddie issued a call for three hundred volunteers for his campaign against the French. According to one scholar, "This force comprised the nucleus of what soon became known as the Virginia Regiment, the most important element in the Old Dominion's military structure during the French and Indian War."<sup>38</sup> Indeed, the militia—which Dinwiddie described only four months earlier as "our chief Dependence, for the protec-

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<sup>36</sup>McIlwaine, *Journals of the House, 1752-1758*, 181-83.

<sup>37</sup>Hening, *Statutes*, 6:421-22.

<sup>38</sup>Titus, *Old Dominion at War*, 41.

tion of our Lives and Fortunes”<sup>39</sup>—would play no major military role during the French and Indian War. Instead the armed political burden of protecting the “Lives and Fortunes” of Virginians would rest entirely on the shoulders of “provincial” recruits and British “redcoats.”

In summary, a “well regulated Militia” would *not* be “necessary” to Virginia’s “security” during the French and Indian War except under the following conditions: slaves, servants, and “other disorderly persons” unlawfully “assembled”; a major insurrection erupted among the populace; or the French and Indians actually “invaded” what militiamen considered to be Virginia’s “dominion.” None of those situations ever occurred. As always, an immediate threat had to be present before militiamen exercised their right to bear arms. Governor Dinwiddie recognized that truth in early 1756 when he wrote, “Our Militia consists of at least 36,000 Men, but [they are] chiefly Free-holders, who insist on y’r Privileges not to enlist or serve but on imminent danger.”<sup>40</sup> In truth, those “Free-holders” believed their chief executive—in cahoots with a private company—was attempting to “infringe” upon their armed “Privileges” by manipulating (if not manufacturing) a dubious threat in a problematic region that was of questionable interest to Virginia’s homeland security. Even though its effectiveness as a fighting force had atrophied as colonial life became more settled and secure, the militia’s “mentality” nevertheless remained acute—especially toward the proper use of organized political violence. In particular, a militiaman’s notions about war were shaped primarily by his keen sense of localism and the idea that he only kept and bore arms—both individually and

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<sup>39</sup>Dinwiddie to the House of Burgesses, November 1753, in Brock, *Dinwiddie Papers*, 1:41.

<sup>40</sup>Dinwiddie to Lord Halifax, 24 February 1756, in *ibid.*, 2:346.

institutionally—to defend his family and home against armed aggression. Those notions were at odds with Dinwiddie’s attempt to use the militia for an offensive campaign in a remote region. Deliberate armed aggression in the Ohio Country was not defending a Virginian’s “Country” from imminent danger.<sup>41</sup> Consequently, Virginia’s militiamen exercised their right *not* to bear arms.

Virginia’s chief executive thought otherwise. He believed a quick and successful campaign against the French was not only in the best interest of all Virginians, but also would ensure their continued security. What the Governor failed to consider, however, was that his aggressive military policy might trigger a protracted war that really would put Virginia’s homeland security at risk.

In a broader historical sense, Virginia’s apathetic militiamen might have prevented (or at least prolonged) the outbreak of the French and Indian War by withholding their armed manpower from Dinwiddie’s Ohio Country expedition. Nevertheless, the elected representatives of those same “Free-holders”—despite their “disagreeableness” over the “subject” of “defence”—gave Dinwiddie another form of military power he desperately needed: the money to hire other sources of armed manpower. However, the Cartagena Expedition had depleted the colony of convicts, “idle fellows,” and other expendable cannon fodder. Moreover, the ranks of Virginia’s “bourgeois militia” were

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<sup>41</sup>Colonial and military scholars have long recognized the defensive rather than offensive traditions and traits of the “militia mentality.” See Titus, *Old Dominion at War*, 32-33; Douglas Edward Leach, *Arms for Empire*, 21; Daniel J. Boorstin, *The Americans: The Colonial Experience* (New York: Random House, 1958), 351-57; John E. Ferling, *A Wilderness of Miseries: War and Warriors in Early America* (Westport, CT: Greenwood Press, 1980), 16; Don Higginbotham, *The War of American Independence: Military Attitudes, Policies, and Practice, 1763-1789* (Boston: Northeastern University Press, 1983), 7, 10-11; Richard H. Koln, *Eagle and Sword: The Beginnings of the Military Establishment in America* (New York: The Free Press, 1975), 7-9.

composed almost entirely of middle-class yeoman and officered by upper-class gentlemen. The potential problem that lay before Governor Dinwiddie was plain: what segment of Virginia's society would volunteer for Virginia's Regiment?

Dinwiddie presumably resolved that uncertainty by issuing a proclamation. As an "Encouragem't to the People to enlist with Spirit," Dinwiddie promised a share in the 200,000 acres of Ohio Company land. In addition to the land bounty, Dinwiddie sweetened the enlistee's pot with a monetary bonus of one pistole in advance of their regular pay.<sup>42</sup> On one level, one could reasonably argue that the Governor was trying to recoup his political standing by making common cause with his soldiers; indeed, both would be fighting for exactly the same thing—land on the upper Ohio River. Dinwiddie, of course, would not be the last commander in chief to pander so overtly to the "Spirit" of his troops during an unpopular war. Even so, the proclamation expressed another executive position that was far more important: the Governor fully expected that the Virginia Regiment would be composed of a certain social and economic class; men who dreamed of owning land or needed quick cash. Indeed, those were precisely the men who joined up.

Our attention now turns to the men who were necessary to Virginia's security, and actually exercised their right to bear arms as soldiers.

### The Virginia Regiment

The "citizen-soldiers" who served in the ranks of the Virginia Regiment were called provincial troops. There were two highly significant points of contrast between Virginia's provincial army and militia. First, provincial troops were never used to control

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<sup>42</sup>Dinwiddie to the Earl of Holderness, 12 March 1754, in Brock, *Dinwiddie Papers*, 1:96. Dinwiddie's proclamation was later enacted into a formal law; see Hening, *Statutes*, 7:661-62.

or coerce the civilian population. Second, the Virginia Regiment was not a permanent institution; it was raised in response to a specific military threat and existed only as long as that danger lasted. Otherwise, a provincial soldier occupied a position somewhere between a British regular and a Virginia militiaman as far as organization, terms of employment, and conditions of service were concerned. Those terms and conditions, however, were very important to the individual man who kept and bore a weapon as a provincial soldier, a militiaman, or a British regular.

Under the standing 1738 militia statute, “all free persons, above the age of one and twenty years” were *required* to be listed on the muster rolls of their home counties; however, the law also listed specific exemptions. In one scholar’s estimate, those numerous exemptions excused as many as eight thousand Virginians from militia duty by 1749.<sup>43</sup> Nevertheless, the law further stated that those so excused were “required to send one able-bodied man, not being a convict, or a man and horse,” to every militia muster.<sup>44</sup> In crucial contrast, no man was compelled to serve in the Virginia Regiment—at least not initially. When originally organized, that armed force was composed entirely of volunteers who freely chose to bear arms with the understanding that they would be paid for that “privilege.” Indeed, Dinwiddie fully expected that those “300 Men rais’d voluntarily will do more Service than 800 Men of the Militia forc’d on Service.”<sup>45</sup> A Virginia volun-

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<sup>43</sup>Flippin, “William Gooch,” 4.

<sup>44</sup>Hening, *Statutes*, 5:16-17

<sup>45</sup>Dinwiddie to Holderness, 12 March 1754, in Brock, *Dinwiddie Papers*, 1:94.

teer was obligated to perform that “Service” for a period that normally lasted from nine months to one year.<sup>46</sup> On the other hand, a militiaman could not “retire” from his armed obligations until age sixty, but he was only required to muster five days a year. In addition, the 1748 “invasions and insurrections” act limited a militiaman’s active duty during actual emergencies to only two days since a longer period would necessitate a fifteen pound tobacco pay rate per day. In fact, the salary differentials between provincial soldiers and militiamen were considerable—and perhaps bear witness to the “value” placed on men’s lives.

Officers in the Virginia Regiment received much higher salaries than their militia counterparts: about 50 percent more for ensigns graduated up to 75 percent for colonels. That wage disparity can be attributed to three factors: more continuous “active” duty required; the greater responsibilities attached to that service; and that the less obvious fact that the two officer corps reflected different degrees of economic “independence” among Virginia’s gentry. County militias were always officered by men from the richest Virginia families. According to James Harrington’s theory, the wealthiest citizens had a greater responsibility to actively participate in the militia because they had more land, more economic independence, more political power, and thus more at stake. And yet the fifteen men the Governor personally appointed to lead the Regiment were not the wealthiest or most politically influential men in Virginia. There is no reason to believe, however, that Dinwiddie deliberately slighted Virginia’s rich and powerful in making his

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<sup>46</sup>Hening, *Statutes*, 6:438-440; 7:44-46; 7:163-69. As Professor Titus additionally explains: “The military supply bills that authorized the enlistment of men in provincial service were not always explicit about the duration of such enlistments. If not otherwise stated, soldiers presumably were expected to serve during the period a particular bill was in force. Most supply bills had a legislative life of one year.” Quoted from Titus, *Old Dominion at War*, p. 162, n. 78.

selections. If anything, he needed their financial backing, political support, and active leadership during the war. Instead, he apparently chose his commanders based upon martial experience and enthusiasm. Taken as whole, these men represented a new development: the assumption of military command by a lower (and younger) echelon of Virginia's gentry. Even so, Virginia's upper-class leadership had no reason to fear that this cadre of ambitious officers might usurp civil power in a military coup.

While the Regiment's officer corps received much higher wages than their militia counterparts, the situation was dramatically reversed among common soldiers. Militia privates were paid almost twice as much as provincial troops. The fifteen pounds of tobacco a militiaman received per day was equivalent to 1 shilling 3 pence. In contrast, the paper currency salary of a volunteer in the Virginia Regiment was equal to only 8 pence per day.<sup>47</sup> In even greater contrast, one scholar has estimated that the average daily wages of unskilled laborers in late colonial America were between 2 and 3 shillings.<sup>48</sup> Nonetheless, the lower daily wages of a soldier were "better" than an unskilled worker in two major respects. First, a hired laborer in agrarian Virginia could not count on steady employment that lasted nine months or a year at a stretch. Indeed, he was oftentimes unemployed for weeks or even months at a time. Second, his wages were not "found"; that is, all living expenses such as food, shelter, and clothes were borne by the worker rather than the employer, which made it very difficult to set aside any "extra" money to buy land of his own someday—especially if he had a family to care for. Not only was a "sol-

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<sup>47</sup>Pay rate tables of all ranks for the militia and Virginia Regiment are available in Titus, *Old Dominion at War*, footnote 86, page 163.

<sup>48</sup>Jackson Turner Main, *The Social Structure of Revolutionary America* (Princeton, NJ: Princeton University Press, 1965), 130.

dier-laborer” offered a land bounty for enlisting, his food, shelter, and clothes came with the job. Indeed, a man bearing a gun instead of a hoe in the Virginia Regiment did not need a financial adviser to tell him that he could put his daily 8 pence directly in his back pocket for some future use. Consequently, most of the men who signed up for the Ohio Country expedition were probably unemployed laborers. That likelihood is strongly supported by Washington’s testimony that “the generality of those” enlisting in March 1754 were “loose, Idle Persons . . . quite destitute of House, and Home.” He further observed that many had no shoes while “other’s want Stockings, some are without Shirts, and not a few . . . have Scarce a Coat, or Waistcoat, to their Backs.”<sup>49</sup> Even so, a soldier’s line of work came with three hazards not shared by the average agrarian laborer: he might be shot by a Frenchman or scalped by an Indian; his wages might not be paid as contractually promised; and instead of merely being let go or “fired,” he could be physically punished by military “masters” for not performing the job at hand.

The British Army, on the other hand, was a full-time, highly disciplined, professional institution whose century-old traditions had been evolving ever since the English Civil War. Nevertheless, the most basic component of that organization was the same as the Virginia Regiment—the common foot soldier. A British redcoat also volunteered to serve his “King and Country” for found wages, although that “free choice” oftentimes was narrowed down between a barracks and a prison, the wiles of gin proffered by wily recruiters, or (like colonial Virginians) a lack of alternative job opportunities. Thus for the most part, the rank-and-file were recruited from the lower classes, especially the un

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<sup>49</sup>Washington to Dinwiddie, 9 March 1754, in Abbot, *Washington Papers*, 1:73-74.

employed “drifters and losers” who had the least amount of economic independence.<sup>50</sup>

Then again, a British recruit—unlike a volunteer in the Virginia Regiment—was obliged to serve continuously until age sixty when he joined up, which also influenced one’s options (but usually in the opposite direction). In addition, a lifetime career in the British Army entailed “regimented” training and strict obedience.

While military discipline is the cement that holds any organized armed force together, it was actually the most significant facet that separated the Virginia militia from the Virginia Regiment, and both, in turn, from the British Army. As military historians well know, the punishments a British regular received during the French and Indian War were incredibly severe. In the words of one scholar, “Only a person made callous by long military experience could have failed to be horrified by the calculated, ceremonial, prolonged savagery” that awaited a disorderly or disobedient redcoat. One British regular, for example, received 900 lashes for stealing a keg of beer. Another soldier was sentenced to 1,000 lashes for stealing money from an officer. After receiving his first installment of several hundred lashes, the culprit was confined for recovery. Rather than await the next round of whipping, he hanged himself the next morning. On another occasion, two Highlanders were similarly condemned to 1,000 lashes each. As the first was being ferociously flogged, the other reportedly “Drew his Knif and Cut His own throat to Escape the whip.”<sup>51</sup> Provincial troops were often first-hand witnesses to such episodes of “calculated sadism,” including the “remarkable spectacle” that took place on 24 August

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<sup>50</sup>Douglas Edward Leach, *Roots of Conflict: British Armed Forces and Colonial Americans, 1677-1763* (Chapel Hill: The University of North Carolina Press, 1986), 108. Hereafter cited as Leach, *Roots of Conflict*.

<sup>51</sup>*Ibid.*, 112.

1758 at Lake George. The method of punishment meted out to two British regulars at that time was known as “picketing”—which gave a whole different military meaning to that word in terms of “job related actions,” if not employee/management relationships. In this instance, each of the two offenders was suspended from a tree limb by one arm with the other arm and leg tied together. Planted in the ground directly below each man was a pointed stake. If the suspended soldier attempted to ease the excruciating strain on his arm, the only recourse was to stand on the pointed stake with his bare free foot. To ensure that option was ultimately taken, the punishment lasted a full hour.<sup>52</sup> Of course if a British soldier tried to use his feet another way—such as running away—the penalties (and options) were even harsher: death, either by hanging, or by firing squad.

By way of contrast, the severest form of corporal punishment a Virginia militiaman could ever experience—which was introduced for the very first time under the 1738 Militia Act—was “to be tied neck and heels, for any time, not exceeding five minutes” for the first occasion offenses of refusing “to perform the commands of his officer,” or behaving “refractorily or mutinously” at general musters. If the citizen-soldier committed those transgressions a second time, he was to be committed “to the county goal, there to remain for any time not exceeding ten days”—an indication of just how “mild” the first rebuke was considered to be.<sup>53</sup> As far as the volunteers in the Virginia Regiment were concerned, it was uncertain whether they were under any military law at all when

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<sup>52</sup>Ibid., page 188, footnote 10. For a contemporary description of “picketing,” see Francis Grose, *Military Antiquities Respecting a History of the English Army from the Conquest to the Present Time* (London: 1786-88), 1:200.

<sup>53</sup>Hening, *Statutes*, 5:18. “Tying neck and heels,” meant lashing a rope around the neck of the culprit, trailing it down his back, and then securing it tightly around his ankles. The punishment was extremely painful and potentially fatal if applied for a long time, which was why it was limited to no more than five minutes.

the war began. During their first campaign, Washington tried to compensate for the lack of a provincial military code by instilling, as he later put it, “Notion’s into the Soldiers (who at that time knew no better) that they were Govern’d by the [British] Articles of War.”<sup>54</sup> But such “Notion’s” did not sit well with Virginia’s soldiers, even though they were recruited from the poor, the unemployed, and the unlucky just like their British counterparts—those “inferior” redcoats who presumably deserved harsh treatment and hard discipline from their “superior” officers. Instead, most provincial soldiers during the French and Indian War would have agreed with a popular English saying, from a slightly later period, that ran this way: “A messmate before a shipmate, a shipmate before a stranger, a stranger before a dog, and a dog before a soldier.”<sup>55</sup> A lower class white Virginian certainly did not see himself as a dog—or, for that matter, as anyone’s slave—even though he hired himself out as a soldier for steady wages like other Englishmen in the Empire.

Indeed, an estimated 91,000 redcoat recruits served in North America, the West Indies, and Germany during the Seven Years’ War. In fact so many soldiers were serving abroad that less than ten thousand were available to defend the home isles.<sup>56</sup> Rather than drafting manpower for homeland defense (which was fraught with the same election perils for British politicians as it was for Virginia’s rulers), or importing German Hessians

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<sup>54</sup>Washington to the Earl of Loudoun, 10 January 1757, in Abbot, *Washington Papers*, 4:84.

<sup>55</sup>Henry Belcher, *The First American Civil War; First Period, 1775-1778, with chapters on the Continental or Revolutionary Army and on the Forces of the Crown* (London: Macmillan, 1911), 1:258; cited and quoted in Higginbotham, *War of American Independence*, 123.

<sup>56</sup>Anderson, *Crucible of War*, 309.

and Hanoverians to defend Englishmen (which was an even worse political scenario), parliamentarians tried to follow a different path: after nearly a century, they resurrected England's defunct militia system by enacting a new Militia Act in 1757. Initially eager to arm 100,000 Englishmen, the Commons and Lords realistically settled on a 32,000-man territorial force—four thousand fewer citizen-soldiers than Dinwiddie's estimate of Virginia's militia strength. Two years later, they actually managed to muster 18,491 militiamen to serve as an armed auxiliary to the regular—and far more permanent—army. Among that number, as Fred Anderson parenthetically notes, was “the pudgy, bookish Edward Gibbon, whose service as a captain in the south battalion of the Hampshire militia would prove invaluable to history, if not necessarily indispensable to the defense of the realm.”<sup>57</sup>

Much like their Virginia counterparts, moreover, Britain's “new” militiamen only performed internal police work; but instead of patrolling “slaves, servants, and other disorderly persons,” they kept their guns trained on French prisoners of war. Even though a “home-guard” soldier did not face the same hazards and hardships as a roving redcoat, the foremost scholar on the English militia nevertheless tells us “that for the most part the gentry declined to serve as officers and the common people were most unwilling to serve in the ranks. Compulsion was of course available to fill the latter, but the making of lists of those liable to serve was the signal for widespread rioting, especially in the eastern half of the country.” The reason for that disenchantment and discontent is also clear to Professor Western: “whereas the burden of the old militia had fallen on the landowners, that

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<sup>57</sup>Ibid., 173.

of the new would fall mainly on the poor.”<sup>58</sup> Apparently, the only “bourgeois militia” that still mustered within the British realm was an ocean away. Most of Virginia’s “middle” landowners, however, preferred to pass the responsibility for external security onto the shoulders of the poor.

In most respects, it seemed as though Virginia’s social and political expendables had no rights whatsoever when it came to keeping and bearing arms. The Virginia Regiment was ill paid, ill fed, and ill equipped throughout the entire 1754 campaign. In fact, the only item a hired recruit had that was of any real value was his issued gun—which, in a way, was worth more than he was since a soldier was required by law to return it to his superiors or else waste away in jail. Then again, they were not usually trusted with weapons in the first place. The men, of course, thought otherwise. If anyone deserved the political protections afforded by a “Bill of Rights”, it was a soldier serving in the Virginia Regiment in the summer of 1754—especially a textual statement that might have read thus: “A well regulated provincial regiment, being necessary to the security of Virginia against the French and Indians, the rights of non-voting soldiers to keep and bear arms, shall not be taken for granted or abused.” After all, middle-class militiamen who owned land and voted certainly had political “rights” they could claim as their own—they could stay comfortably at home and patrol unarmed slaves with little or no risk of endangering their lives or livelihoods.

It is also important to note that Virginia’s ruling elite did not “infringe” upon the rights of middle-class militiamen through legal coercion, such as enacting a draft law with stiff penalties and harsh punishments that would compel citizens into becoming sol-

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<sup>58</sup>J. R. Western, “The Making of the New Militia, 1755-9,” chapter in *The English Militia*, 127-161, passim. Quoted passages at pages 140-41.

diers. The reason why is equally obvious: it might be politically dangerous to employ legal coercion against men who were armed and enfranchised. Indeed, forcing such a populace to become politically violent for war could provoke another form of political violence—armed rebellion against the ruling elite. Of course if that same populace chose to use their ballots rather than bullets, the same desired outcome would be achieved non-violently—ousting politicians who made and enforced unpopular laws. With those reasons in mind, the ruling gentry sanctioned both the creation of the Virginia Regiment, and selecting manpower among those who were socially, economically, and politically dispossessed. As a result, the Virginia Regiment became an institutional surrogate for the colony’s militia, and provincial troops the hired substitutes of taxpaying militiamen.<sup>59</sup>

Yet aside from choosing not to join up in the first place, a provincial soldier had one additional “right” he could “freely” exercise (at least in 1754)—he could simply quit the Regiment altogether. In July 1754, the original Virginia Regiment numbered 293 officers and men. After Washington’s defeat at Fort Necessity, that figure had dropped to 186. By September, less than 100 men were available for duty. In an effort to prevent further desertions, Dinwiddie tried to provide the men with some form of useful employment; one company guarded the frontier in Augusta County; the remainder of the regiment constructed a fort at Wills Creek. In order to sustain the troops through their winter work, the Governor proposed a diet of “Ind’n Meal, w’ch is a hearty Food and comes much cheaper than Flour.”<sup>60</sup> Yet as historian James Titus posits, “The governor’s sug-

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<sup>59</sup>Under current state and federal codes, all male American citizens are “unorganized” militiamen. Since most taxpaying citizens do not regard the soldiers who voluntarily serve in the armed services as being the hired mercenaries of a particular political regime, that same institutional and manpower relationship still exists today.

<sup>60</sup>Dinwiddie to Carlyle, 11 September 1754, in Brock, *Dinwiddie Papers*, 1:318-19.

gestion had a significance that transcended economics: as the ragged and neglected veterans of Fort Necessity were no doubt aware, in eighteenth-century Virginia, Indian meal was the humble fare customarily reserved for slaves.”<sup>61</sup> The implication is clear: if a lower-class white Virginian needed a rationalization not to serve his political and military “masters,” none was more persuasive than to be treated like a slave. In any case, the original 300-man Regiment was rapidly dwindling into non-existence.

But before a single British regular set foot in the Old Dominion, Virginians made one more attempt to raise their own money and men in 1754. As Dinwiddie informed his British superiors, he could not legally “oblige” local militiamen “to march out of the Countries of Virginia” against the French.<sup>62</sup> He therefore asked Virginia’s lawmakers to consider two options: enact a law that would either impress vagrants, or conscript every tenth man in the militia for service in the Virginia Regiment. Dinwiddie personally favored the latter option, which if anyone really thought about it, would have come closer to Harrington’s political theory—especially if younger men were chosen for a “marching army” while older militiamen remained “standing” at home. Dinwiddie’s preference would also impart more “universal” responsibilities for bearing arms within Virginia’s class-structured society. While the Burgesses agreed that compulsory rather than voluntary manpower was required, they nevertheless opted for a more “selective service” approach.<sup>63</sup>

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<sup>61</sup>Titus, *Old Dominion at War*, 57.

<sup>62</sup>Dinwiddie to the Earl of Halifax (President of the Board of Trade), 25 October 1754; Dinwiddie to Thomas Robinson (Secretary of State), 16 November 1754, in Brock, *Dinwiddie Papers*, 1367, 405.

<sup>63</sup>McIlwaine, *Journals of the House, 1752-1758*, 222.

The draft law of October 1754 closely resembled the “Vagrant Act” enacted for the Cartagena Expedition almost fifteen years earlier. Mandatory service was limited to Virginians “who have no visible Way of getting an honest Livelihood.” Once again, the most dependent men would be forced to protect the lives and property of those who were independent (landowners) and held a larger measure of political power (voters). Moreover, the October “act for raising levies and recruits” specifically (and selectively) exempted “any person to serve as a soldier, who hath any vote in the election of a Burgess,” thus foisting the unpleasant and unwanted burden of keeping and bearing arms against the French on those who were politically powerless—or at least had no political “right”—to check the power of those who would forcibly shove them in harm’s way through legal coercion.<sup>64</sup>

Nevertheless, the attempt to conscript “provincial” soldiers before the arrival of British regulars was fraught with political consequences. Dinwiddie initially planned on raising two thousand volunteers and vagrants for a joint campaign with the British Army in 1755 with the October draft law. That same month he cut his 2,000-man recruiting goal in half. By mid-December, he revised that target down to eight hundred troops. By January 1755, only five hundred volunteers and vagrants had enlisted or been conscripted. The reason why is clear: Virginians refused to be drafted. Attempts to enforce the draft edict resulted in full-blown riots in two Virginia towns. The first uprising occurred in Petersburg in mid-November 1754 when “the Com’n People” used force to “prev’t . . . enlisting.” Moreover, “some of the Mobb” physically assaulted the recruiting officer without any intervention by the civil authorities. A similar episode took place in

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<sup>64</sup>The October 1754 draft law is in Hening, *Statutes*, 6:438-40.

Fredericksburg in early December. In that instance, the civil authorities went so far as to “encourage their Insolence in the breach of the Peace and Prejudice to his M[ajest]y’s Service.” Dinwiddie became so concerned that he issued a decree requiring all draftees to be marched “immediately” to the backcountry and thus away from centers of unrest.<sup>65</sup> In any case, unpopular recruiters managed to scrape up some 800 volunteers and vagrants by February 1755. Those armed Virginians would soon be integrated with British regulars for active duty. The local militias, on the other hand, remained intact in principle, but largely inert in practice. The arrival of British Army, however, would present new challenges and changes.

#### Great Britain’s Armed Intervention

When Whitehall realized that Virginians could never halt French expansion into the Ohio Country on their own—and that intercolonial political and military cooperation was basically non-existent—the Cabinet Council prepared an elaborate plan of operations to defend Britain’s beleaguered provinces. The design called for appointing a commander in chief for all British forces in North America (General Edward Braddock), dispatching two regiments of regular troops, and procuring additional men, money, and military supplies from the colonies. Since there had yet been no official declaration of war, the British objectives were limited to removing the French from the territory in Virginia, New York, and Nova Scotia. The initial campaign, however, would begin in Virginia.

In November 1754, Parliament extended the provisions of the British Mutiny Act to the King’s troops who would be serving in the colonies. In addition, the British law-

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<sup>65</sup>Dinwiddie to Captain Robert Stewart, 26 November and 4 December 1754; Dinwiddie to Captains George Mercer, Andrew Waggener, and Robert Stewart, 15 January 1755, in Brock, *Dinwiddie Papers*, 1:414, 462.

makers decreed that provincial soldiers would be subject to the same military law—and thus the same strict discipline and harsh punishments provided by that act—whenever they served jointly with British regulars. The Mutiny Act—which authorized the existence of the Britain’s standing army and regulated its discipline—was initially passed in 1689 by the same Parliament that created the English Bill of Rights. The Act had been renewed on annual basis ever since the Glorious Revolution and would remain in effect throughout the eighteenth century.<sup>66</sup> That same month, Parliament voted a million pounds for the army and navy and an additional fifty thousand for raising two new royal regiments composed of colonials and to pay Braddock’s officers. Britain’s national debt in 1754 stood at £75 million; by the time the war ended in 1763, that figure would almost double to £133 million.

All of those decisions proved unfavorable to Virginia’s best interests. They would not be soon forgotten—or forgiven. Nor would the military debacle known as “Braddock’s Defeat.”

On the morning of 9 July 1755, Lieutenant Colonel Thomas Gage led an advance “flying column” into the massacre generally remembered as the Battle of the Monongahela or “Braddock’s Defeat.” When the three-hour slaughter finally ended, 430 men lay dead or dying and 484 were wounded. Over half of the officers were killed, including General Braddock. Only thirty Virginians survived the battle. French casualties in comparison amounted to twenty-three dead and sixteen wounded.<sup>67</sup> Command passed on to Colonel Thomas Dunbar, who beat an ignominious retreat out of the Ohio Country. In

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<sup>66</sup>Charles M. Clode, *The Military Forces of the Crown; Their Administration and Government* (London: J. Murray, 1869), 1:181.

<sup>67</sup>Anderson, *Crucible of War*, 105.

fact, Dunbar quit Virginia altogether and marched into Philadelphia, where the troops were put into winter quarters in the middle of August. The only men left behind to guard Virginia's frontier against the French and Indians were about 400 sick and wounded regulars and 170 provincials. Large-scale desertions quickly thinned the surviving defenders further, with many "thinking the Colo[nel] had left them to be destroy'd by the Enemy."<sup>68</sup>

Virginia's frontier was now exposed to attack. In fact, Williamsburg received reports that thirty-five settlers had been murdered by Indian war parties immediately after Braddock's defeat. Refugees began fleeing back toward more populated areas in droves. By October, a provincial officer enroute to Winchester reported that "it was difficulty he passd [sic] the [Blue] Ridge for the Crowds of People who were flying, as if every moment was death."<sup>69</sup> What originally began as a "little private war" to grab far-off land suddenly turned into a struggle to defend and hold on to territory within Virginia's established borders.

The long-term consequences of Braddock's defeat, moreover, were not at all favorable to Virginia's already precarious situation. The main theater of war shifted northward and remained there until Canada fell in 1760. Aside from the Forbes campaign against Fort Duquesne in 1758, Virginia took no active part in the decisive battles that ultimately determined the political future of the North American colonies. As far as British strategists were concerned, the Old Dominion was a military backwater. British

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<sup>68</sup>Dinwiddie to St. Clair, 11 August 1755; Dinwiddie to Fox, 20 August 1755; Dinwiddie to Sharpe, 25 August 1755; all in Brock, *Dinwiddie Papers*, 2:147, 170.

<sup>69</sup>Washington to Mary Ball Washington, 18 July 1755; Washington to Dinwiddie, 18 July 1755, and 11 October 1755 (quote); all in Abbot, *Washington Papers*, 1:336, 339, 342 n.10, and 2:105 respectively.

redcoats would never return to Virginia during the rest of the war. Even though Virginia's leadership had requested and welcomed armed intervention by army regulars, the "Old Standers"—or rather those who could still stand—had been in Virginia only four months. They left behind bitterness, recrimination, and a sense of panic. By midsummer of 1755, Virginians faced a troubling prospect that they had complacently and conceitedly ignored for quite some time—from now on they would have to defend themselves against a real threat of invasion.

### Arming Virginians for Self-Defense

The predicament Virginians found themselves in during the summer of 1755 provides a measure of irony that should not be lost upon Second Amendment scholars. In theory, the militia was the armed backbone of the colony's homeland security, the primary political institution that could be depended upon to protect and defend "the people" against internal and external dangers because it was composed of responsible and politically active citizens who became soldiers and policemen during political emergencies. Yet after decades of apathy and atrophy, that armed appendage had become arthritic and almost anecdotal. Moreover, when an imperialistic chief executive became allied with an assertive land company and tried to protect territory that was presumably within the colony's original charter, militiamen refused to bear arms. As they saw it, the "cause" was not worth fighting for because it was nothing less than armed aggression motivated by the self-interest of a few rather than self-defense by the many. In order to fight that little private war, the executive—with the financial support of the legislature—raised a little private army (the Virginia Regiment). Due to the political self-interest of the ruling elite, that little army was composed entirely of the colony's "scruff and scrum," men who were

economically disadvantaged and politically disenfranchised. Because that amateur armed force failed to defend the Ohio Country, Virginians invited professional soldiers over to do the job for them—Great Britain’s permanent army. When that “standing” force stumbled and then ran away, Virginians were left not only with the prospect of an imminent invasion, but also with a rusty and brittle sword for self-defense—the militia. The two-fold question for Second Amendment historians to consider is this: Were Virginians willing to scrape off years of atrophy and atrophy and make the militia truly “necessary to the security” of their colony, and which individuals among “the people” had “the right to keep and bear arms” for collective self-defense?

The General Assembly gathered in the Council chamber on Tuesday, 5 August 1755, to hear the Governor’s somewhat chastened message. Dinwiddie pointed out that the struggle now “is to preserve to us, and our posterity, the most invaluable, and by all mankind esteemed, the most dear and most desirable of all human treasures, *religious and civil liberty*.” In order to better defend those liberties, the executive asked the legislature to provide more money and men for the colony’s little army, and to enact a new militia law that would oblige every citizen that was capable of bearing arms to be properly trained and disciplined to serve his “Country.” Nonetheless, the real armed backbone of the colony’s defense would not be the traditional militia, but rather a remodeled Virginia Regiment that was larger, better trained, and more disciplined.

Virginia’s “new model” army was redesigned to fight a protracted war with soldiers who could remain “on duty” for long periods of time. Since their economic livelihoods were derived from seasonal farming, armed agrarians (militiamen) could never be depended upon to perform protracted service. As before, the lawmakers hoped that the

larger regiment—a force of not over twelve hundred men—would be raised solely from voluntary enlistments. There was, however, one moderate rub: if not enough men volunteered after ninety days, the law sanctioned a draft of unmarried militiamen. Even so, a bachelor could still avoid involuntary military service in one of two ways: he could either hire a substitute or pay a ten-pound fine, which a “middling” man could easily afford if he wanted to escape conscription. Consequently, only a poorer man actually faced the possibility of being drafted. If such a man (or anyone else) refused to join up under legal coercion, there was always additional coercion; he would be thrown in jail, “there to remain until he shall agree to enter into said service.” However, the revised regiment differed from the original in one significant respect: no enlistment bonuses were offered to entice volunteers.<sup>70</sup>

The August 1755 Militia Act, in contrast, was not as “all encompassing” as its fourteen pages of text would lead one to believe. In effect, the new statute—which “repealed and made void” the old 1738 Act, but was only in effect “during the term of two years, and no longer”—made a few “wartime” procedural changes without substantially altering the structure of the militia system. In truth, the militia under the 1755 act was exactly the same as it was in 1738. Of course if that “traditional” institution was to remain in existence, the lawmakers had to renew the August 1755 law.<sup>71</sup> For whatever reason, Virginia’s militia was not settled or established on a permanent basis by law, but was subject to perpetual renewal. In that respect, local militias shared something in common with the provincial army—neither one was a “standing” armed force that Virginia’s chief

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<sup>70</sup>Hening, *Statutes*, 6:521-30.

<sup>71</sup>*Ibid.*, 6:530-44.

executive could always count on being “present and accounted for.” Instead, both armed institutions owed their continued existence to laws enacted by the legislature.

A major reason why military defense was relegated to provincial soldiers rather than militiamen stemmed from fears that black slaves would take advantage of the military crisis and revolt against their white masters. Governor Dinwiddie, for one, was just as anxious about insurrections as he was about invasions—especially after hearing that a slave conspiracy was afoot in Lancaster County during mid-July 1755. Even though the rumored revolt proved false, Dinwiddie expressed concern that “The Villany of the Negroes on any Emergency of Gov’t is w[ha]t I always fear’d.” That fear remained strong almost a year later when he advised the War Office that “We dare not venture to part with any of our White Men any distance, as we must have a watchful eye over our Negro Slaves, who are upwards of 100,000.” He likewise advised John Campbell, Earl of Loudoun—the new British commander in chief in America and Governor General of Virginia—that colony’s slave population “alarms our People much and [they] are aff[rai]d of bad consequences if the Militia are order’d to any great Distance from the pres’t Settlements.”<sup>72</sup> The legislature shared the executive’s anxiety by tightening up slave patrolling under the new Militia Act, and including the “five-mile” marching restriction in both the August and October invasions and insurrections statutes.<sup>73</sup> Consequently, the militia served as a constabulary force to police slaves while the army repelled enemy attacks. Mobilizing manpower to perform that more isolated (and hazardous) military chore,

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<sup>72</sup>Dinwiddie to Charles Carter, 18 July 1755; Dinwiddie to Henry Fox, 24 May 1756; Dinwiddie to Lord Loudoun, 9 August 1756; in Brock, *Dinwiddie Papers*, 2:102, 414-15, and 474 respectively.

<sup>73</sup>See Hening, *Statutes*, 6:543 and 548 respectively.

however, proved problematic, especially given the “inducements” offered for enlisting: low pay, harsh discipline, and the risk of losing one’s life or limb while those who owned land and voted stayed safely at home.

Recruiting officers began scouring the Virginia countryside immediately after the August 1755 legislation was passed. In September, Colonel Washington issued a directive that set specific recruiting quotas and standards. All white males between the ages of sixteen and fifty were considered eligible for service provided they stood at least five feet four inches tall. Shorter recruits were acceptable, however, as long as they were “well made, strong, and active.” In effect, the only men that were categorically unqualified for provincial service—or did not pass the regiment’s “size rolls”—were those who had “old Sores upon their legs, or who are subject to Fits.”<sup>74</sup> But in truth, recruiters did not turn the lame and the halt away, as evidenced by Captain Peter Hog’s recruiting report in May 1756. After a five-week search, Hog managed to scrape up only two men. He noted that one recruit was prone to daily “Convulsive Fitts,” while the other was “a Soft sort of Fellow & dull of hearing.”<sup>75</sup> An examination of twenty-two size rolls in Washington’s unpublished papers compiled by Professor Titus reveals that physical disabilities—ranging from “Lame in his Left leg” to “one Eye out”—were not uncommon. Indeed, Titus’s conclusion is instructive: “Sprinkled among the provincials—quite literally—were the lame, the halt, and the near blind.”<sup>76</sup>

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<sup>74</sup>“General Instructions for the Recruiting Officers of the Virginia Regiment,” in Abbot, *Washington Papers*, 2:13-14.

<sup>75</sup>Hog to Washington, 14 May 1756, in *ibid.*, 3:131-33.

<sup>76</sup>Titus, *Old Dominion at War*, 89.

In any case, regimental officers had other means at their disposal to net more able-bodied men. Ensign Denis McCarty, for one, obtained his 1755 quota “by forcibly taking, confining, and torturing those, who would not voluntarily enlist.”<sup>77</sup> When Washington chastised the overly energetic ensign, he ruefully remarked “it is next to an impossibility to get a man where you have been.”<sup>78</sup> Indeed, the pickings were becoming so slim in Virginia that Captain Christopher Gist ventured into Maryland in order to obtain his quota. But when Gist resorted to trickery and deceit, Governor Horatio Sharpe quickly lodged a formal complaint to Washington, who, in turn, excused Gist’s devious methods as “nothing more than one of those little subterfuges which, from the disagreeable nature of the Recruiting Service, has, at some junctures been considered necessary.”<sup>79</sup> Nevertheless, “those little subterfuges” were not altogether successful. By the spring of 1757, Washington reported that the Virginia Regiment numbered 699 men—or only 55 percent of its originally authorized strength of twelve hundred soldiers—which the commanding officer described, in large part, as “dastardly draughts.”<sup>80</sup>

The subject of “draughts” raises an key question: Were many bachelor militiamen drafted into Virginia Regiment? The plain and simple answer is no. The evidence that supports that conclusion comes from two sources. The first is Dinwiddie’s report to the

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<sup>77</sup>McCarty’s misdeeds recorded from Dinwiddie to Washington, 10 December 1755; Dinwiddie to McCarty, 10 December 1755; in Brock, *Dinwiddie Papers*, 2:561-62.

<sup>78</sup>Washington to McCarty, 22 November 1755, in Abbot, *Washington Papers*, 2:176-77.

<sup>79</sup>The exchange of opinions between Governor Sharpe and Washington is in Abbot, *Washington Papers*, 4:438-19.

<sup>80</sup>Washington to Dinwiddie, 29 April 1757; and 17 September 1757; in *ibid.*, 4:145, 406.

Board of Trade on 23 February 1756, in which he stated that “some draughts out of the counties” had been “refractory.” The Governor then explained why with these words:

From the number of our inhabitants it may be suggested that we may easily raise a pretty little army, but the case is otherways, for most of the people are freeholders, in course have votes for choosing Assemblymen, on which they strenuously insist on their privileges. And thereto the want of a martial spirit, which I must say, I never was among people that have so little regard to their own safety, or the protection of their religious and civil rights.<sup>81</sup>

Dinwiddie’s observation makes greater sense when one realizes that the legislature made forced conscription of unmarried militiamen a gubernatorial option rather than an enforceable mandate.

The second—and more convincing evidence—is the actual social composition of the Virginia Regiment derived from the surviving size rolls. Aside from recording the height (or “size”) of an individual soldier, the rolls provide four additional categories of information: age, place of birth, place of residence, and occupation. Professor Titus has examined, tabulated, and conveniently reproduced those categories for our benefit and use. His findings reveal several significant facts about the men who kept and bore arms in the Virginia Regiment during the French and Indian War.<sup>82</sup> First, about two-thirds of the colony’s provincial troops were men in their twenties. Second, over 50 percent of the men who served in 1756-1757 were not born in Virginia; most (over 47 percent in each year) were European immigrants, while 9 percent were born in other colonies. Third, the

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<sup>81</sup>Dinwiddie to the Board of Trade, 23 February 1756, in Brock, *Dinwiddie Papers*, 2:334, 345.

<sup>82</sup>The original size rolls of the Virginia Regiment for the years 1756 and 1757 are in the George Washington Papers (MSS, Library of Congress, Washington, D.C.), series 4, 4: items 103-4, 424-35, 452, 461, 463, 710, 731, 756, 759, 778. The resulting tables by category are in Titus, *Old Dominion at War*, 82-87.

vast majority of provincial soldiers resided in the Tidewater region (38 and 40 percent each year)—the area least threatened by an invading Frenchmen or hostile Indian. The exposed frontier counties, in contrast, accounted for only 9 and 23 percent of the recruits in 1756 and 1757 respectively. While the number of “frontiersmen” more than doubled during this period, another prominent fact nevertheless looms large: most of the colony’s landless poor were concentrated in the older and more settled regions; which brings us to the fourth factor—the “civilian” occupations of Virginia’s soldiers. Approximately 35 percent of the recruits described themselves as “farmers” or “planters” in both years. Almost 60 percent claimed non-agricultural jobs as their source of livelihood in civilian life. Among that group, close to 70 percent identified themselves as artisans; the three leading occupations were carpenters, shoemakers, and tailors. Over 5 percent listed no occupation whatsoever in 1756; in 1757, the “unemployment” figure rose to almost 9 percent. As this collective data divulges, Virginia’s soldiers were typically the “Tradesmen and inferior Planters” that Dinwiddie described as the “lowest Class of our People” when he first arrived in Virginia.<sup>83</sup>

The conclusions to be drawn are clear. For military historians like Professor Titus, “The pattern that emerges is this: Virginia’s provincial army was heavily seeded with men from the lower end of the socioeconomic scale, a large number of them were immigrants, some had never lived in Virginia, and few were Negro-Indian half bloods, mulattoes, or blacks.”<sup>84</sup> For Second Amendment scholars, “the people” who had “the right to keep and bear arms” were socially and politically expendable; in fact, many might not

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<sup>83</sup>“Message of the Governor to the Council and Burgesses,” March 1752, in Brock, *Dinwiddie Papers*, 1:30-31.

<sup>84</sup>Titus, *Old Dominion at War*, 88.

even be considered as “true” Virginians. On the other hand, the Virginia Regiment was not created as a permanent “standing” army, nor was it deliberately designed to replace the militia or function as a domestic police force. In truth, Virginians originally constituted their army with only one purpose in mind: to protect Virginians against foreign enemies. Thanks to the timely intervention of Prime Minister William Pitt, Virginia’s army was able to perform that task.

On 30 December 1757, Pitt informed the colonial governors of the appointment of Major James Abercromby as the new commander in chief of the King George’s forces in North America. Pitt also declared that the British government would reimburse “the Levying, Cloathing, & Pay” of all provincial troops for the remainder of the war.<sup>85</sup> In the opinion of historian John Shy, that timely infusion of fiscal encouragement was of crucial constitutional importance: “Thus the apparent threat of Cromwellian military rule to colonial liberties was, for the moment, averted.” Professor Shy is referring to the fact that Lord Loudoun had bullied many northern legislatures for money and men as Britain’s Commanding General in North America.<sup>86</sup> But the threat of a military dictatorship never existed in Virginia; a colony where Loudoun never stepped foot or took much interest, even though he was the Old Dominion’s Governor General. In addition, control over Virginia’s own sword was never at risk; as the Virginia statute books attest, the House of

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<sup>85</sup>Pitt’s crucial circular letter of 30 December 1757 is in Gertrude Selwyn Kimball, ed., *Correspondence of William Pitt When Secretary of State with Colonial Governors and Military and Naval Commissioners in America* (New York: The Macmillan Company, 1906), 1:140-43. Hereafter cited as Kimball, *Pitt Correspondence*.

<sup>86</sup>John Shy, *Toward Lexington: The Role of the British Army in the Coming of the American Revolution* (Princeton: Princeton University Press, 1965), 36. Shy acknowledges that his appraisal is a restatement of “the thesis elaborated” by Stanley M. Pargellis in *Lord Loudoun in North America* (New Haven: Yale University Press, 1933). See Shy’s note 104, same page. Hereafter cited as Shy, *Toward Lexington*.

Burgesses exercised supreme authority over the militia and provincial army through fiscal appropriations and regulatory laws. In truth, the only Virginians who experienced armed political coercion were those forced to take up arms by their own government.

What Great Britain's promised subsidy actually forestalled was the further need to coerce those less fortunate individuals with political and judicial power, and thus "averted, for the moment," the threat to their individual "liberties"—or at least the manner in which those "naturally free men" were recruited for Virginia's army. Armed with Pitt's subsidy, Virginia's lawmakers abandoned compulsory service for men who were socially, economically, and politically expendable. Instead, the Assembly decided to raise two regiments by offering volunteers a £10 enlistment bounty and the promise of a discharge by 1 December 1758. That ten-pound bounty approximated half of the annual cash income of a small planter who would miss the autumn harvest if he chose to volunteer, but would be back home with his family for Christmas.<sup>87</sup> Virginia's lawmakers expected the bounty would provide the "means to compleat [the army] with greater dispatch and better men."<sup>88</sup> They were right. By the end of May, Washington's First Virginia Regiment numbered 950 troops, while William Byrd's Second Regiment stood at 900 volunteers. As one military scholar notes, "No contrast could be better drawn between the Virginia Regiment paid for—and conscripted—by Virginians, and the Virginia

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<sup>87</sup>Hening, *Statutes*, 7:163-170; McIlwaine, *Journals of the House, 1752-1758*, 495-506. The relative value of ten pounds is from Aubrey C. Land, "Economic Behavior in a Planting Society: The Eighteenth Century Chesapeake," *Journal of Southern History* 33 (November 1967): 483.

<sup>88</sup>Blair's closing comments to the Assembly, in McIlwaine, *Journals of the House, 1752-1758*, 506; Blair to Pitt, 29 June 1758, in Kimball, *Pitt Correspondence*, 1:289-91.

Regiment purchased—and recruited—by British sterling.”<sup>89</sup> More specifically, the bounty-volunteer system gave men on the mudsill of Virginia society the liberty to sell or withhold their armed labor with mutually agreed stipulations. That contracted rather than conscripted relationship gave poorer men the opportunity to determine for themselves whether a rich man’s cause (Ohio Country land) was worth their prolonged service, and perhaps their permanent sacrifice. For the first time in their lives, the “lesser sort” could legally exercise a measure of political power in Virginia through armed political power—not by overthrowing the ruling gentry as armed insurgents, but by keeping and bearing arms as provincial soldiers.

To be sure, some Second Amendment scholars would argue that those landless, non-voting men were actually economically dependent “servants” who were easily bought and controlled by their “masters.” As such, they were not “free” citizens exercising their political rights as soldiers, but merely hired mercenaries who owed their livelihoods and loyalty to whoever paid them the most for a degrading (and dangerous) job no one else wanted to do. Indeed, many recruits were not even Virginians, but recent immigrants from foreign countries and neighboring colonies. Militiamen, on the other hand, exercised political power in Virginia because they owned property (land) and thus could vote. They were not entitled to vote merely because they owned guns. Their political right to keep and bear arms was based strictly upon their economic independence and legal standing as citizens—not as manpower hired to perform armed labor for wages. Virginia’s large landowners and lawmakers upheld the privileged political and economic

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<sup>89</sup>Titus, *Old Dominion at War*, 122.

status of militiamen by not coercing them to fight, or enforcing “savage discipline” upon them.

Nevertheless, the reason why Virginia’s militias received preferential treatment had nothing to do with constitutional concerns over raising and maintaining an army or that militiamen were better defenders of liberty. In truth, the Virginia Regiment proved to be a far more effective and dependable armed force for fighting a prolonged war to protect the lives and property of Virginia’s citizens. Instead, it had everything to do with motivating public opinion behind sustained political violence, and mobilizing the necessary manpower to perpetrate it. For military historians like James Titus, “The point is this:

as one conjures with the behavior of those the colony tried to conscript, one senses that draft resistance in the Old Dominion was rooted in the fact that, although not full members of the political nation, the ‘lesser sort’ nevertheless shared in the basic values and ideas of a common political culture. Poor Virginians may not have know much about the natural rights theories of John Locke or the libertarian contentions of John Trenchard and Thomas Gordon, but . . . they understood and prized the meaning of personal freedom. Ultimately, then, the problem was not so much that poor Virginians did not want to be soldiers as it was that they did not want to be forced. Virginia’s leaders eventually acknowledged that reality themselves—indeed, they bowed before it—when they turned from compulsion to bribery and replaced conscripts with mercenaries. In so doing, they also revealed something about the fragile nature of government and the boundaries of political deference in mid-eighteenth-century Virginia.<sup>90</sup>

For Second Amendment scholars, the point is this: the political culture in mid-eighteenth-century Virginia exhibited a “fragile” affinity to the “libertarian contentions” that militias—and armed property owners and voters—were the best guardians of personal freedom. The following chapters examine why that culture changed so dramatically.

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<sup>90</sup>Titus, *Old Dominion at War*, 141.

## CHAPTER 6

### VIRGINIA'S AMBIGUOUS SWORD, 1764-1774

Resolved, That any Person who shall, by Speaking, or Writing, assert or maintain, That any Person or Persons, other than the General Assembly of this Colony . . . have any Right or Authority to lay or impose any Tax whatever on the Inhabitants thereof, shall be Deemed, AN ENEMY TO THIS HIS MAJESTY'S COLONY.

—Patrick Henry  
Seventh Stamp Act Resolve  
30 May 1765<sup>1</sup>

The primary political objective of Virginians from 1764 to 1774 was to gain full recognition of their constitutional right to govern themselves within the British Empire without fomenting armed rebellion against King George III. Rather than resorting to arms to defend their sovereignty, Virginians hunkered down for a long war of words, firing off volleys of petitions, remonstrances, resolves, and pamphlets. Rather than organizing armed forces, they formed boycott associations. Nonetheless, the thought of employing more potent political weapons was never very far from their minds. But even if Virginians had tried to raise their sword in defense of their sovereignty—and there were a handful of men who wanted to do just that from the very beginning—there were several mitigating factors that kept that blade sheathed.

In the first place, rebellion against the king was an act of treason under the British constitution and punishable by death. The men who sat in the House of Burgesses were lawmakers, not lawbreakers. They could hardly argue that their sovereignty was being unconstitutionally abridged and then use an unconstitutional means to correct that wrong. In fact, Virginia's political elite likewise viewed rebellions as treasonous acts, and

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<sup>1</sup>*Maryland Gazette*, 4 July 1765.

promptly crushed insurrections against their hegemonic rule. Secondly, the struggle for political sovereignty began as a contest between two rival legislatures (Parliament and the House of Burgesses) over the power of the purse (internal and external taxation) rather than control over the sword. While Virginians argued that imposing taxes without their consent was unconstitutional, they did not challenge the fundamental reason why they were being taxed—to maintain a peacetime army in North America for their own defense and protection. In fact, neither side proposed the most logical solution to the issue at hand: replace Britain’s professional army with trained provincial forces, thus negating the need for British imposed taxes. Indeed, if Virginians claimed self-autonomy, they should defend themselves with their own military forces. Yet as past history (and practical experience) clearly demonstrated, militiamen were unwilling to exercise their right to keep and bear arms for extended duty beyond their local counties. That meant provincial regiments would have to be raised, armed, supplied, and paid to replace Britain’s standing army, which would not only increase Virginia’s own postwar deficits, but also raise the possibility of internal turmoil over mobilizing massive manpower for such a “peace-keeping” mission. In truth, Virginia could never raise such a large-scale army on its own; it would have to rely upon mustered manpower (and collective cooperation) from the other colonies, which had never been successful in the past. The only recourse was to debate parliamentary taxation solely as a matter of constitutional principle and totally ignore its political purpose. Accordingly, Virginians never mustered up the anti-army ideology in their constitutional arguments over taxation because they had no intention of substituting Britain’s standing army with their own militias or even a handful of rangers. Moreover, Virginians recognized that Parliament had the constitutional authority to raise

and disband standing armies. They were not going to challenge or condemn that “right” when they had exercised that same legislative authority for decades.

Parliament, of course, had no constitutional authority to execute or enforce its laws. Nor could it exercise direct command over the military. Those same restrictions likewise applied to the House of Burgesses. In truth, both legislative bodies relied upon the same chief magistrate to execute and enforce their laws, as well as direct and command the military forces they chose to raise—King George III, and by extension, his appointed ministers, military commanders, and colonial governors. That constitutional separation of armed political power leads to a third point: if Virginia was ever going to raise its sword in armed rebellion, that armed force would have to be totally independent of the crown; otherwise the Virginia legislature would have to commit another unconstitutional act: assume extralegal executive control over the military and turn it against its lawful commander in chief—King George III. If Virginians were going to remain true to their constitutional principles, they would have to create an independent military force to defend their sovereignty as an independent state. Some Virginians saw that truth from the very beginning, but it took a decade for the majority to own up to it. Moreover, ensuring continued sovereignty over the sword was the primary reason Virginians later argued against the military provisions within the federal constitution. Even so, Virginia’s power over the sword (internal police and external defense) did not become a major issue until 1774. Significantly, it was at that precise moment that the radical Whig indictment against standing armies became useful to Virginia’s political agenda.

All the same, the decade leading up to that turning point is equally important to this study because it introduced a new dimension to the power of Virginia’s sword.

Whereas previous periods were marked by atrophy and apathy, the pre-revolutionary era was distinguished by ambiguity. That uncertainty was manifested in several ways: the use of extralegal armed force to police persons who were judged enemies of the state; in determining when the people of a sovereign state were justified in using open force against a supreme power; and by the remarkable fact that by 1773 Virginia's militia no longer legally existed. The purpose of this chapter is to examine and explain those developments, and evaluate their significance with respect to Virginia's security, and the right of Virginians to keep and bear arms. The argument presented here is that Virginia's ambiguous sword reflected an ambivalence toward armed political power (and political violence) that conflicts with the general assumptions of many Second Amendment scholars—that pre-revolutionary Americans had become indoctrinated with the anti-standing army ideology, and thus were ready, willing, and able to defend their constitutional rights and liberties with armed force. That was hardly the case in Virginia between 1764 and 1774.

Much of that ambiguity and ambivalence can be attributed to a political conflict among the ruling gentry that pitted a conservative and moderate majority, who actively sought a peaceful reconciliation with Great Britain, against a handful of radicals that were eager to use military and police power to preserve Virginia's sovereignty. The distinction and divergence between conservative "doves" and radical "war hawks" was instrumental in determining when and how armed force would be used. The earliest demonstration of that internal disagreement occurred during the Stamp Act crisis.<sup>2</sup>

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<sup>2</sup>The best single volume on the resistance movement throughout Colonial America is Pauline Maier, *From Resistance to Revolution: Colonial radicals and the development of American opposition to Britain, 1765-1776* (New York: W. W. Norton & Company, 1991).

### Internal Police and the Stamp Act

George Grenville, first minister and Chancellor of the Exchequer, inaugurated Great Britain's reform movement on 9 March 1764 in the House of Commons by proposing a tax on all colonial administrative transactions. By taxing stamped documents, Grenville hoped to defray the annual expense of maintaining 10,000 troops in North America, which was estimated at more than £220,000.<sup>3</sup> At the request of General Thomas Gage, Parliament also passed a Quartering Act, directing colonial assemblies to provide barracks and supplies and thus further assist in maintaining British troops stationed within their borders.

The House of Burgesses first learned of Grenville's tax proposal on 7 November 1764—four months before the bill was voted on by Parliament. In an attempt to head off the legislation, House Speaker John Robinson appointed a special committee to pen an address to the King, a memorial to the Lords, and a remonstrance to the Commons protesting the tax on constitutional grounds.<sup>4</sup> The petitions proved to be an exercise in futility, however, because the King, Lords, and Commons never read them. Although British subjects had the "right" to petition the government, there was no intrinsic guarantee that their grievances would be redressed. In fact, the committee's efforts had the opposite effect—it aggravated Parliament that a provincial assembly presumed to question its central

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<sup>3</sup>*Journals of the House of Commons*, XXVII, 167; XXIX, 432, 681, 760; cited and quoted in Edmund S. Morgan and Helen M. Morgan, *The Stamp Act Crisis: Prologue to Revolution* (Chapel Hill: The University of North Carolina Press, 1953; reprinted by same publisher with a new "Preface" by Edmund S. Morgan, 1995), 21-22 (page references are to reprint edition). Hereafter cited as Morgan and Morgan, *Stamp Act*.

<sup>4</sup>The legislative history of the petitions is in John Pendleton Kennedy, ed., *Journals of the House of Burgesses of Virginia, 1761-1765* (Richmond, VA: The Colonial Press, E. Waddey Company, 1907), 240, 254, 257, 279, 299-304. The revised text is at pages 302-4.

authority. Even so, Parliament expected the colonies would ultimately acquiesce to being taxed. As one scholar notes, “This assessment did not, however, comprehend the individual psyche of one Patrick Henry, soon to be elected to the Burgesses from Hanover County.”<sup>5</sup>

Actually, Henry was sworn in as the delegate from Louisa County on 20 May 1765. This was the first public office he ever held. On 29 May, Henry introduced his famous “Stamp Act Resolutions” before a sparse House quorum (39 out of 116 delegates). The neophyte politician not only challenged Parliament’s authority, but also dared the older conservatives to take a more defiant stance that bordered on rebellion. When Henry allegedly raised the specter of regicide by comparing King George III to Julius Caesar and American colonists to Brutus, Caesar’s assassin, Speaker Robinson leapt from his chair shouting “Treason! Treason!” and then professed his shame that not one member had the integrity to challenge such impudence. Henry had tested the political waters and got scalded (or at least scolded). He apologized for his effrontery, swore undying loyalty to King George III, and attributed his passionate outburst solely to an interest in his “Country’s Dying liberty” (meaning Virginia).<sup>6</sup> This would not be the last time Henry exhibited zealotry rather than rationality in his oratory.

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<sup>5</sup>Editorial comment by Robert Scribner in William J. Van Schreeven, comp., Robert L. Scribner, ed., *Revolutionary Virginia: The Road to Independence*, vol. 1, *Forming Thunderclouds and the First Convention, 1763-1774: A Documentary Record* (Charlottesville, University Press of Virginia, 1973), 15. Hereafter cited as Van Schreeven and Scribner, *Revolutionary Virginia*, 1: (page).

<sup>6</sup>The episode is related in Henry Mayer, *A Son of Thunder: Patrick Henry and the American Republic* (Charlottesville: The University Press of Virginia, 1991), 86-87. Hereafter cited as Mayer, *Son of Thunder*.

Although only four of Henry's resolves were officially recorded in the House journal (a fifth passed by one vote, but was later expunged), seven were "leaked" to the *Maryland Gazette*. The Sixth authorized outright disobedience to any law passed by Parliament that imposed taxes on Virginians. The Seventh endorsed active resistance and implied the use of political intimidation, coercion, and even armed force against any "ENEMY" who spoke or wrote in favor of Parliament's power over Virginia's purse. Those two resolves became key ingredients in the political recipe followed by other colonies during the Stamp Act crisis: disobedience to the law and policing those who obeyed it. In time, British officials would be condemned for using military force to execute laws and enforce obedience. Henry's Seventh Resolve reminds us that radical Virginians were not opposed to using armed force themselves to police people they viewed as internal enemies.

Although Virginians were the first to suggest that political violence might be appropriate and necessary, they stopped short of physically injuring their political enemies. The fate of Colonel George Mercer provides a good example of the "passive"—but no less effective—aspects of Virginia's virulence. Mercer had served his king and colony admirably during the French and Indian War. As George Washington's aide-de-camp, he was wounded at Fort Mifflin in 1754. Between 1754 and 1760, Mercer advanced from lieutenant to captain of the 1<sup>st</sup> Virginia Regiment, then was promoted to lieutenant colonel of the 2<sup>nd</sup> Regiment under Colonel William Byrd III. Byrd, the progeny of one of the most prosperous and prominent gentry families in the Old Dominion, was soon promoted to overall commander of the Virginia forces when a disgruntled Washington resigned that post. Good connections—both politically and militarily—were indispensable in eight-

eenth-century Virginia. Mercer was next “fated” to become a Frederick County burgess from 1761 to 1765, but spent the last two of those years in London as a lobbyist for the Ohio Company in which his cousin, George Mason, was a major shareholder. Mercer’s rise to fame and fortune, however, soon plummeted.<sup>7</sup>

Mercer returned to Williamsburg as the appointed distributor of stamps for both Virginia and Maryland on 30 October, two days before the Act was to go into effect. While the discredited seals ultimately failed to stick to colonial paper, dishonor and disgrace quickly adhered to Mercer. An angry crowd greeted him before he reached his lodgings and demanded his immediate resignation. Mercer requested time to consult with his friends. Governor Fauquier stepped in before the crowd seized Mercer, and escorted him to the Governor’s mansion. Even though Mercer resigned the next day, he was later burned in effigy at the Westmoreland County courthouse—an act for which Mercer’s family held one man largely responsible: local grandee and political firebrand, Richard Henry Lee, who dressed himself as a hangman and symbolically “executed” Mercer with his torch. Ironically, Lee actively sought the stamp collector post himself before realizing the depth of popular opposition to the act. Lee clearly sniffed the political winds and cleverly put them at his back. Perhaps the most Lee ever suffered for his misplaced ambitions—aside from being tagged with the scurrilous nickname “Bob Booty” because he doggedly barked for bigger political bones—lies in the fact that he never attained high public offices within Virginia. Although Lee always coveted the

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<sup>7</sup>The best chronicle of Mercer’s life is provided by Alfred Procter James, *George Mercer of the Ohio Company; a study in frustration* (Pittsburgh: The University of Pittsburgh Press, 1963).

powerful position of Speaker of the House, his later fame chiefly came from detached duties in Philadelphia as a delegate to the First and Second Continental Congresses.<sup>8</sup>

Mercer, on the other hand, was forced to flee Virginia just four weeks after he arrived. Branded as a loyalist, he sought “asylum” in London while his family gained prominence as patriots. He traded his Ohio Company stock in 1770 for a share in a rival corporate venture, an act openly denounced by his cousin, George Mason. Mercer soon lost all interest in Virginia affairs, if not his mind because of them. He died in April 1784 while undergoing treatment for mental illness.<sup>9</sup> If nothing else, this is a truly sad personal tale. Yet it also illustrates the darkened recesses of a privileged family’s closet, especially when kinsmen wore opposing political stripes. Upon his immediate return to England, however, Mercer lucidly testified before the House of Commons that the unpopular Stamp Act only could be enforced in Virginia with military force and therefore should be repealed. British officials refused to take such a drastic step to enforce the rule of law. Some Virginians, however, organized themselves into a paramilitary force to coerce their fellow citizens in an extralegal manner.

During the evening of 27 February 1766, 115 men gathered at the village of Leedstown in Westmoreland County where they ascribed to and signed six resolutions penned by Richard Henry Lee. Now known as “Associators,” the signers represented nearly all of the leading families of Westmoreland and its neighboring counties. The pre-

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<sup>8</sup> Lee’s colorful background and political character is explored in Oliver P. Chitwood, *Richard Henry Lee: Statesman of the Revolution* (Morgantown, WV: West Virginia University Library, 1967), 7-52.

<sup>9</sup>George Mercer’s brief biographical sketch is from Sandra Ryan Dresbeck, comp., “Biographical-Geographical Glossary,” in Robert A. Rutland, ed., *The Papers of George Mason, 1725-1792*, 3 vols. (Chapel Hill: University of North Carolina Press, 1970), 1:lxxvii-lxxix. Hereafter cited as Rutland, *Mason Papers*.

amble stated their reason for collectively “associating”: “Rouzed by Danger and alarm’d at Attempts foreign & domestic [to] reduce the People of this Country to a State of abject and detestable slavery by destroying that free and happy constitution of Government under which they have hitherto lived, —We who subscribe this Paper have associated & do bind ourselves to each other . . . to stand by, and with our Lives & Fortunes to support, maintain and defend each other in the Observation and Execution of these following Articles.”

First, we declare all due Allegiance and Obedience to our lawful Sovereign George the Third King of Great Britain. And we determine to the utmost of our Power to pre-serve the Laws, the Peace and good order of this Colony as far as is consistent with the Preservation of our Constitutional Rights and Liberty.

Although many of these gentry squires were militia officers and were no doubt armed (including militia Captain Lee), they were not acting in an official capacity as an organized militia “to preserve the Laws, the Peace and good order” of the Old Dominion; nor were fomenting armed rebellion against George III to defend their “Constitutional Rights and Liberty.” Instead, their true objectives were spelled out in the next two resolves:

2dly As we know it to be the Birthright Privilege of every British Subject (and of the people of Virginia as being such) founded on Reason, Law, and Compact, That he cannot be legally tryed but by his peers, and that he cannot be taxed but by Consent of a Parliament in which he is represented by Persons chosen by the People and who themselves pay a part of the Tax they impose on others. If therefore any Person or Persons, shall attempt by any Action or Proceeding to deprive this Colony of those fundamental Rights we will immediately regard him or them as the most dangerous Enemy of the Community, and we will go to any Extremity not only to prevent the Success of such Attempts but to stigmatize and punish the Offender.

3dly As the Stamp Act does absolutely direct the Property of the People to be taken from them without their Consent express’d by their Representatives, and as in many cases it deprives the British American Subject of his Right to Tryal by Jury; we do determine, at every Hazard and paying no Regard to Danger or to Death, we will exert every Faculty to prevent the Execution of the said Stamp Act in any Instance whatsoever within this Colony. And every abandoned Wretch who shall be so lost to Virtue and Publick Good, as wickedly to contribute to the introduction, or fixture of

the Stamp Act in this Colony, by using Stamp Paper, or by any other Means we will with the utmost Expedition convince all such Profligates, that immediate danger and disgrace shall attend their prostitute Purpose.

In combination, the two resolves stated with far more precision the intended purpose of Patrick Henry's Seventh Resolve. This was no mere coincidence. Throughout the Revolutionary and Early National Periods, Richard Henry Lee was Patrick Henry's political confidant and collaborator, if not his right-hand man.

The fourth and fifth resolves explained how the "Associators" would accomplish their mission. Specifically, they would immediately assemble if anyone tried to abide by the Stamp Act, and "repair" to a rendezvous "as near the Scene of Action" as possible (4<sup>th</sup>). In addition, each "Associator" was to muster up as many of his comrades as he possibly could (5<sup>th</sup>). The last resolve, however, is especially notable:

6thly If any Attempt shall be made upon the Liberty or Property of any Associator for any Action or Thing to be done in Consequence of this Agreement, we do most solemnly bind ourselves by the sacred Engagements above enter'd into, at the utmost risk of our Lives and Fortunes to restore such Associate to his Liberty, and to protect him in the enjoyment of his Property.<sup>10</sup>

This "all for one, and one for all" clause is fascinating because it recognizes that the "Associators" might be policed themselves as vigilantes—or have their individual "Liberty" imprisoned and personal "Property" confiscated as punishment for their actions. However, this resolution does not tell us what authority might police their extralegal activities.

One would assume British officials, such as Lieutenant Governor Fauquier or General Gage, would take corrective action. Yet we should also recall that the House of Burgesses never endorsed Henry's Seventh Resolve. Moreover, Speaker Robinson condemned his oratory as "Treason." Lee was well aware of those facts. He also understood

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<sup>10</sup>"Resolutions of the Westmoreland Association in Defiance of the Stamp Act," 27 February 1766, in Van Schreeven and Scribner, *Revolutionary Virginia*, 1:23-24.

that the “Westmoreland Association” was an extralegal, paramilitary force acting solely under his assumed authority. In fact, it had to be organized unconventionally (and unconstitutionally) because only Governor Fauquier had the legal prerogative to call out the traditional militia—not Patrick Henry or Richard Henry Lee. The only favorable factor that might deflect legal retaliation was the collective influence of the 115 “gentlemen” who signed on as “Associators.” Significantly, that prestigious list included William Grayson, who would also “associate” with Lee in 1789 when both men became Virginia’s first United States senators. At any rate, the sixth resolve was most likely an assurance that the “Associators” would “bind” together against *any* civil authority that judged they were enforcing their own laws (resolves) with illicit force (which they were). Whether or not that “mutual protection clause” was necessary to their individual and collective security ultimately depended on how they actually conducted themselves—which was immediately forthcoming.

The next day, 28 February, “the whole Company” marched down to the village of Hobbs Hole in Essex County, where more men joined them so that their total number reached the “Amount of Four Hundred.” Their single objective was Archibald Ritchie, a Scottish merchant who declared his intention to use stamps to clear his grain ship that was bound for the West Indies. However, Ritchie had since changed his mind on that score before the Association was raised. Nonetheless, the massed men were formed up into two lines under the direction of Militia Captain Lee, and a committee was dispatched to Ritchie’s house with the purpose of informing him that he was to publicly read and sign a prepared declaration. His request that another committee be appointed “to reason with him upon the Subject” was denied. Instead Ritchie was told he would be stripped to

the waist, dragged to the public pillory at the tail of a cart, and left there for an hour to reconsider his position. If Ritchie still refused to comply, he would be escorted to Leedstown, his destiny “there to be determined on, as would seem Expedient to the Friends of Liberty.” Although he complained that the terms of his humiliation were “too severe,” Ritchie nevertheless removed his hat and read aloud a prepared confession that his selfish intent to use stamps for personal profit demonstrated a lack of concern for the public good, and pledged never to do so again. While it is unlikely that a loaded gun was pointed at his head, Ritchie’s two arms were no match for the 400 pairs of fists that surrounded him. With his signature likewise secured, the “Associators” dispersed and headed for home or the nearest tavern.<sup>11</sup>

No doubt the vigilantes fully intended “to stand by” in eager anticipation of another opportunity to execute their resolutions. A repeat performance was not in the offing, however—at least not for an “independent company” of gentlemen known as “Associators.” On 2 May 1766, the *Virginia Gazette* bannered the “Great and Glorious News” that Parliament had repealed the Stamp Act.<sup>12</sup> Even so, the Westmoreland Association had a significance that transcended its single exploit and brief existence. It set a precedent for mobilizing armed manpower at the grass-roots level to police domestic enemies and possibly fight “foreign” ones as well. To be sure, those functions were legally assigned to Virginia’s established militia, but therein lay the rub. Even though the Virginia legislature clearly exercised control over the sword through fiscal, regulatory, and disci-

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<sup>11</sup>This episode is taken from John C. Matthews, “Two Men on a Tax: Richard Henry Lee, Archibald Ritchie, and the Stamp Act,” *The Old Dominion: Essays for Thomas Perkins Abernethy*, ed. Darrent Rutman (Charlottesville: The University of Virginia Press, 1964), 96-108; Van Schreeven and Scribner, *Revolutionary Virginia*, 1:22-23.

<sup>12</sup>*Virginia Gazette* (Purdie), 2 May 1766.

plinary statutes, militias were *British* forces in a *British* colony commanded by *British* executives, just as they were in England. If self-autonomous Virginians were to resist British policies with armed force, they required self-autonomous military and police forces that were independent of imperial executives. The Westmoreland “Associators” demonstrated that mobilizing such an extralegal armed force for political violence was a real possibility. Just as importantly, that “original” manpower was raised voluntarily among the wealthiest and most politically influential men in Northern Virginia; thus demonstrating the assumption of civic and military responsibilities by upper-class example rather than top-down exhortation or compulsion. In sum, Lee’s “Associators” took the first significant step on the path toward armed autonomy. But much like Cromwell’s New Model Army in 1649, the Westmoreland Association was an autonomous armed force in search of a sovereign state that could sustain it politically and constitutionally. Since the “Associators” lacked state sponsored support, Lee wrote the sixth resolve with the understanding that the “Associators” would have to rely solely upon each other while acting as privatized policemen. Significantly, Lee justified the use of extralegal armed force as a means of self-defense against “Attempts foreign & domestic [to] reduce the People of this Country to a State of abject and detestable slavery.” Oddly enough, a Virginian who opposed the extralegal use of armed force explored the next logical step the Westmoreland Association might take—armed rebellion.

#### Exploring the Right to Rebel

Militia Colonel Richard Bland had, in the view of one contemporary, “something of the look of musty old Parchments which he handleth & studieth much”<sup>13</sup>—a fitting

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<sup>13</sup>*Virginia Magazine of History and Biography*, 15 (1907-8): 356.

description for a man who was considered to be the foremost authority on Virginia history. For the past twenty-four years, Bland represented the constituents of Prince George County and had chaired more committees than any other lawmaker in the House of Burgesses. He was also a staunch conservative who “worshipped at the shrine of the status quo.” Dick Bland strove to prevent a political rupture with Great Britain, and opposed Patrick Henry—who was only six years old when Bland first entered the House—on those very grounds.<sup>14</sup> Even so, he made the “original” case that Virginia was a sovereign state and had the “natural” right to govern itself within the British Empire.

Bland contended that it was impossible to find “Directions in fixing the proper Connexion between the Colonies and the Mother Kingdom” from “the civil Constitution of *England*.” The only “Recourse,” therefore, was “the Law of Nature, and those Rights of Mankind which flow from it.” As Bland explained,

Men in a state of Nature are absolutely free and independent of one another as to sovereign Jurisdiction, but when they enter into a Society, and by their own Consent become members of it, they must submit to the Laws of the Society according to which they agree to be governed. . . . But though they must submit to the Laws, so long as they remain Members of the Society, yet they retain so much of their natural Freedom as to have a Right to retire from the Society, to renounce the Benefits of it, to enter into another Society, and to settle in another Country; for their Engagements to the Society, and their Submission to the publick Authority of the State, do not oblige them to continue in it longer than they find it will conduce to their Happiness, which they have a natural Right to promote. This natural Right remains with every Man, and he cannot justly be deprived of it by any civil authority. . . . Now when Men exercise this Right, and withdraw themselves from their Country, they recover their natural Freedom and Independence: The Jurisdiction and Sovereignty of the State they have quitted ceases; and if they unite, and by common Consent take Possession of a New Country, and form themselves into a political Society, they become a sovereign State, independent of the State from which they separated.<sup>15</sup>

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<sup>14</sup>Van Schreeven and Scribner, *Revolutionary Virginia*, 1:25. For greater insight into the measure of the man, see chapter X, “Richard Bland,” in Clinton Rossiter’s *Seed-time of the Republic: The Origin of the American Tradition of Political Liberty* (New York: Harcourt, Brace and Company, 1953).

After examining the charter history of the Old Dominion, Bland concluded that Virginia was “a distinct State, independent, as to their *internal* Government, of the original Kingdom, but united with her, as to their *external* Polity, in the closest and most intimate LEAGUE AND AMITY.”<sup>16</sup>

One crucial question remained unanswered, however: What recourse did Virginians have if Parliament abrogated their civil and natural rights within their “political society”—the sovereign state of Virginia? That question was relevant not only to the “LEAGUE” Virginians formed within the British Empire, but also to the constitutional compact they subsequently ratified in 1788. Some modern scholars, moreover, contend that the Second Amendment sanctions a constitutional right to rebel against the federal government. Bland’s “original” thoughts on armed resistance are therefore instructive on that point.

Bland delineated two different scenarios—and courses of action—for the two categories of rights (natural and civil). He began by noting, “The Colonies are subordinate to the Authority of Parliament; subordinate I mean in Degree, but not absolutely so:

For if by a Vote of the *British* Senate the Colonists were to be delivered up to the Rule of a *French* or *Turkish* Tyranny, they may refuse Obedience to such a Vote, and may oppose the Execution of it by Force. Great is the Power of Parliament, but, great as it is, it cannot, constitutionally, deprive the People of their *natural* Rights; nor, in Virtue of the same principle, can it deprive them of their *civil* rights, which are founded in Compact, without their own Consent. There is, I confess, a considerable Difference between these two Cases as to the Right of Resistance: In the first, if the Colonists should be dismembered from the Nation by Act of Parliament, and abandoned to an-other Power, they have a natural Right to defend their Liberties by open Force, and may lawfully resist; and, if they are able, repel the Power to whose Authority they are abandoned. But in the other, if they are deprived of their civil Rights, if great and manifest Oppressions are imposed upon them by the State on which they

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<sup>15</sup>“An Inquiry by Colonel Richard Bland,” circa 14 March 1766, in Schreeven and Scribner, *Revolutionary Virginia*, 1:32-33, 35.

<sup>16</sup>*Ibid.*, 38. Bland’s emphasis.

are dependent, their Remedy is to lay their Complaints at the Foot of the Throne, and to suffer patiently rather than disturb the publick Peace, which nothing but a Denial of Justice can excuse them in breaking. But if Justice should be denied, if the most humble and dutiful Representations should be rejected, nay not even deigned to be received, what is to be done?<sup>17</sup>

Dick Bland did not answer that question. The ultimate choices, however, were implied—either “abandon” that oppressive alliance in an act of “self-dismemberment”; or fight back with “open Force” that would undoubtedly “disturb the publick Peace,” but was justified because “Justice” itself had been “denied” under the civil compact. Significantly, neither option was predicated upon constitutionalism, or a black-letter “right” to rebel. Moreover, Virginians would exercise those options collectively as a sovereign state, not as individuals thrown back into a state of nature. Bland, of course, hoped neither course of action would be necessary: “May the interests of *Great Britain* and her Colonies be ever united so as that whilst they are retained in a legal and just Dependence no unnatural or unlimited Rule may be exercised over them; but that they may enjoy the Freedom, and other Benefits of the *British* Constitution, to the latest Page in History!”<sup>18</sup> Yet when Bland died in 1776, an entirely new page of Anglo-American history was being written.

#### Virginia’s Defunct Militia

Norborne Berkeley, Baron de Botetourt, arrived in Virginia on 25 October 1768 as the first full-fledged governor of Virginia in sixty-three years, and the first nobleman to assume that office in seventy-nine. Although generally revered by Virginia’s gentry (he was, after all, a Lord), Botetourt dissolved the House of Burgesses on 17 May 1769 in

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<sup>17</sup>Ibid., 41-42. Bland’s emphasis.

<sup>18</sup>Ibid., 43-44. Bland’s emphasis.

response to their resolves against the Townshend Duties. That one executive act marked the beginning of extralegal governance in Virginia. Of the 116 former burgesses, ninety-four walked down the street to the Raleigh Tavern; assembled in the Apollo Room; and signed a “Nonimportation Association,” which was the handiwork of the two Fairfax County delegates—George Washington and George Mason. Back in April, Washington wrote Mason of his disgust with British politicians who perpetually ignored their petitions. Like Bland, Washington wondered what else could be done. He informed Mason that no one “should scruple, or hesitate a moment to use arms in the defence of liberty,” but nevertheless advised that “Arms . . . should be the last resource; the dernier resort. Addresses to the Throne, and remonstrances to parliament, we have already, it is said, proved the inefficacy of; how far their attention to our rights and privileges is to be awakened or alarmed by starving their Trade and manufactures, remains to be tried.”<sup>19</sup> Mason penned a scheme for combating Britain’s latest tax reforms with boycotts rather than bullets.

The British government, however, was not pleased and vented its displeasure on Boston, Massachusetts, where nonimportation was most actively pursued. One thousand British troops were stationed in Boston by the end of 1768, and military coercion against nonimporters loomed as a real prospect. However, most of the British departed in the aftermath of the infamous “Boston Massacre” on 5 March 1770.<sup>20</sup> Ultimately, the British

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<sup>19</sup>Washington to George Mason, 5 April 1769, in Rutland, *Mason Papers*), 1:96.

<sup>20</sup>John Adams served as defense attorney for the British regulars who killed five of the rioters. Eight soldiers and their commanding officer were acquitted of murder charges. Nevertheless, two enlisted men were convicted of manslaughter and, after claiming benefit of clergy, were branded on the thumb. Adams’s summation on “justifiable, excusable, and felonious homicide” is in the *Adams Papers* at the Library of Con-

ministry's resolve faltered due to troubles at home as much as the boycott's blow to the economy. On 12 April 1770, Parliament repealed all of the Townshend duties except on tea, and quietly let the 1765 Quartering Act expire.

When George Mason learned that a tax remained on tea, he tried to beef up Virginia's Nonimportation Association, which had not been very successful. The major problem was that the first association was voluntary, and not many Virginians volunteered. Mason devised a new Association on 22 June 1770. A five-man committee was organized in each county to keep wavering neighbors in line. Unlike Lee's "Westmoreland Association," however, Mason emphasized moral suasion rather than physical intimidation. The committees were instructed to convene themselves "in a civil manner," advise importers of their error, "and in case of refusal, without any manner of violence, inform them of the consequences." Although the "consequences" were not spelled out, they plainly involved non-violent ostracization, or "social boycotts."<sup>21</sup> In any case, the militia was not called upon to enforce the extralegal boycott. This was a vitally important decision; it allowed Virginians to maintain the higher moral (and constitutional) ground by not resorting to military force to police the population.

In fact, Virginia's militia was a relatively inert organization throughout the post-war period. Even so, the House of Burgesses kept the militia legally alive by renewing the standing 1757 Militia Act, but without making any major revisions. During the Stamp Act crisis, the old statute was extended an additional four years and was due to expire at the end of 1771. In July of that year, the House renewed it for another two

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gress. For a fuller analysis of that incident, see Hiller B. Zobel, *The Boston Massacre* (New York: W. W. Norton, 1970).

<sup>21</sup>Van Schreeven and Scribner, *Revolutionary Virginia*, 1:80.

years with a new expiration date of 20 July 1773.<sup>22</sup> That law was passed with the executive approval of Council President John Blair, Sr., the acting governor following Lord Botetourt's untimely death in 1770. Virginia's new full governor, John Murray, fourth Earl of Dunmore and Viscount Fincastle, took his oath of office on 25 September 1771. But then a very strange—and totally unprecedented—phenomenon occurred. The burgesses allowed the long-standing “act for the better regulating and disciplining the militia” to expire on 20 July 1773. For the first time in its history, Virginia had no legal militia. Consequently, the militia was no longer “necessary” to Virginia's security, and Virginians had no lawful right to keep and bear arms as citizen-soldiers or military policemen.

The challenge, of course, is to unravel the mystery of Virginia's vanishing militia. Perhaps the most pertinent question to ask is this: Did Virginia's lawmakers *deliberately* allow the militia act (and the militia) to expire? If it was intentional, we might presume Virginians were using that ploy to assume authority over their armed manpower independently of the king's command and control. The short answer to that pivotal question is no. The much longer explanation follows.

The General Assembly convened on Thursday, 4 March 1773, to investigate and remedy a matter of “great moment”—the forging of Virginia's paper currency by a counterfeiting ring in Pittsylvania County.<sup>23</sup> However, Governor Dunmore ended the emergency session the following Monday before the lawmakers could address other pressing

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<sup>22</sup>Hening, *Statutes*, 8:241-45, 503.

<sup>23</sup>Kennedy, *Journals of the House, 1773-1776*, 6-7, 13, 22.

matters—such as renewing the militia statute.<sup>24</sup> Another assembly was to meet the following June, but the date was changed three times. In fact, the House did not reconvene until 5 May 1774. Consequently, Virginia was without a militia for eleven months, which resulted in some rather interesting—and decidedly ambiguous—developments.

Trouble had been brewing on Virginia's frontier since the summer of 1773 and percolated from two sources: the rising hostility of Shawnee Indians in the area, and land-grabbing Pennsylvanians who laid claim to Fort Pitt and the surrounding region. Governor Dunmore, who was apparently just as land hungry as Governor Dinwiddie, encouraged Virginia settlers to usurp Pennsylvania's authority. The frontiersmen happily complied by capturing Fort Pitt that winter, renaming it Fort Dunmore. In early 1774, the Shawnees went on the warpath; provoked by Virginians and Pennsylvanians alike, each hoping the tribe would decimate the other. "An Indian war is inevitable," reported the *Virginia Gazette* in late May, "but whether the Indians or the white people are most to blame we cannot determine, the accounts being so extremely complicated."<sup>25</sup> Dunmore asked the legislature to authorize an expedition against the Shawnees and issued a proclamation calling upon the western militias "to repel any insult whatsoever." He declared that the Pennsylvania government was impeding "his Majesty's Government . . . under my administration," and then added that there was "danger of annoyance from the Indians also." Clearly, Dunmore's major objective was to wage a border war against Pennsylvania since the Shawnees only posed an additional "annoyance." When the British secretary of the colonies, Lord Dartmouth, received Dunmore's declaration in July, he wrote

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<sup>24</sup>Ibid., 28, 31, 36, 42.

<sup>25</sup>*Virginia Gazette* (Rind), 26 May 1774.

back, “I must observe to your Lordship that your Proclamation . . . implies too strongly the Necessity of exerting a Military Force, and breaths too much a Spirit of Hostility, that ought not to be encouraged in Matters of Civil Dispute between the Subjects of the same State.”<sup>26</sup> Needless to say, the “State” Dartmouth had in mind was Great Britain.

The “Military Force” Dunmore hoped to raise had two components: a provincial army for the proposed expedition, and the western militias. Rather than raising a provincial army for a campaign against Pennsylvania, the May assembly urged Dunmore to fix a temporary boundary between the two rival colonies. Given the equally strained relationship between Virginia and Great Britain, the legislators probably had two thoughts in mind: first, the colonies needed to cooperate with each other, not make war among themselves; second, the lawmakers were wary of putting an army under the direct control of their royal executive. Unfortunately, there is no recorded evidence to support either contention. Nevertheless, the political climate must be considered in the decision not to give Dunmore the army he requested. On the other hand, the May assembly did urge the Governor to use his full executive powers to protect the frontier from Indian attacks. However, there was no legal way to meet that Indian threat with the second armed component—the western militias. While an “invasions and insurrections” law was still on the statute books authorizing the governor to call up the militia in emergencies, there was as yet no “lawful” militia in Virginia. The Committee of Propositions and Grievances was in the process of reviving and revising the 1755 Militia Act when another set of events intervened and brought that impending legislation to an abrupt halt.

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<sup>26</sup>Dunmore and Dartmouth quoted and cited in John E. Selby, *The Revolution in Virginia, 1775-1783* (Williamsburg, VA: The Colonial Williamsburg Foundation, 1988), 17. Hereafter cited as Selby, *Revolution*.

While the Shawnees were endangering the lives of Virginians, another band of “Indians” had gone on the “warpath” in Boston, Massachusetts. During the night of 16 December 1773, some thirty Patriots disguised as Mohawk Indians boarded three cargo ships, broke open 342 chests of tea, and dumped the contents into Boston Harbor. British officials—including King George III—were outraged by the wanton destruction of property, which was worth a hefty \$1,000,000 in today’s currency. Boston’s little “tea party” quickly boiled over into a titanic tempest.

On 19 May, the *Virginia Gazette* published the alarming news that Parliament had passed the Boston Port Bill—the first of several “Coercive Acts”—in retaliation for the destruction of the East India Company’s tea.<sup>27</sup> On 24 May, the burgesses passed a resolution that deplored “the hostile Invasion of the City of Boston . . . whose Commerce and Harbour are on the 1st Day of June next, to be stopped by an armed Force.” Significantly, the British had resorted to “armed Force” to disrupt “Commerce,” whereas Virginians did not take that same course of action to enforce their boycott. If they had, the expiring militia might have been more forcefully revived. In any case, the lawmakers called for “a Day of Fasting, Humiliation, and Prayer, devoutly to implore the divine Interposition for averting the heavy Calamity, which threatens Destruction to our civil Rights, and the Evils of civil War. . . .”<sup>28</sup> Note here that the Burgesses answered the question Dick Bland posed but left open to conjecture: that an infringement of “civil Rights” might lead to “civil War”—an unconstitutional armed conflict that “naturally” presumes the civil compact is a dead letter.

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<sup>27</sup>“An Epitome of the Boston Bill,” *Virginia Gazette* (Purdie and Dixon), 19 May 1774.

<sup>28</sup>Van Schreeven and Scribner, *Revolutionary Virginia*, 1:94-95.

When Governor Dunmore read the “Fasting” proclamation on 26 May, he dissolved the Assembly, thus halting any further legislative enactments—including the militia law in committee.<sup>29</sup> Now Virginia’s chief executive was in the rather ambiguous situation of being authorized to mobilize the militia, but not knowing if any citizen-soldiers would respond. Moreover, it was questionable whether he could discipline them if they refused to muster, or whether the prorogued House would pay any of the officers and men who did serve. Everything depended upon whether or not “the people” would exercise what was now their “natural” (extralegal) “right” to keep and bear arms in defense of themselves and their homeland against a foreign enemy.

The militia was not the only institution left in limbo; the county courts also began to close due to another act that had expired while the May assembly sat—the so-called “Fee Bill” for county clerks, sheriffs, coroners, and surveyors. The law had been renewed or amended ten times and was in committee for another overhaul when the May session was dissolved. Legal proceedings were shut down along with the courts: creditors could not sue debtors; wills were unrecorded; deeds were unregistered; and criminals were untried.<sup>30</sup> In a panic over the court closures (but not the defunct militia), the Council pleaded with the Governor to issue writs for the election of a new House of Burgesses. Dunmore conceded on 17 June and set the date for a General Assembly on 11 August. Most Virginians, however, did not trust Dunmore or his election proclamation, assuming he would continue to prorogue the legislature given the situation in Boston. As it turned out, the suspicion was justified—the House of Burgesses did not reconvene until 1 June

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<sup>29</sup>Kennedy, *Journals of the House, 1773-1776*, 132.

<sup>30</sup>Hening, *Statutes*, 5:326-44, 8:515-16; Kennedy, *Journals of the House, 1773-1776*, 85, 90.

1775, which proved to be the very last session of that venerable institution. Nevertheless, the former burgesses took advantage of Dunmore's call for new elections. After receiving a letter from the Boston committee on 29 May requesting assistance in organizing joint economic retaliation against the Coercive Acts, House Speaker Peyton Randolph issued a significant summons: a Virginia convention would be held on 1 August among the newly elected delegates.

Governor Dunmore was either unconcerned about the upcoming convention, or decided to wag the dog of war to detract attention from its proceedings. Assuming personal command over what would be known as "Dunmore's War," the Governor called out the western militia and departed Williamsburg on 10 July for the frontier. He returned five months later as a conquering hero, thanks to the valiant exploits of the officers and soldiers who answered his call to arms. In a legal and military sense, those citizen-soldiers had formed themselves into an "all-volunteer frontier army." The northern wing was drawn from the militias of Frederick, Hampshire, and Berkeley Counties. Some twelve hundred men rendezvoused at Fort Dunmore under the Governor's command. The southern wing numbered around fifteen hundred troops from the counties of Augusta, Botetourt, and Fincastle, and was reinforced by "independent companies" from Dunmore, Culpeper, and Bedford Counties. The contingent assembled at present-day Lewisburg, West Virginia, under Colonel Andrew Lewis, an experienced veteran of the French and Indian War. It is significant to note that those 2,700 officers and men exceeded the combined strength of the two Virginia Regiments raised during the French and Indian War. Then again, none of the men who volunteered for "Dunmore's War" expected that conflict to last eight years; in fact, they served less than six months. More-

over, this was a non-ideological and apolitical war; it was a conflict against Indians over land, not a struggle over constitutional principles or rights. Indeed, no one was the least concerned that the militia was dead and an army was very much alive.

In brief summary, Colonel Lewis defeated the Shawnees at the Battle of Point Pleasant on 10 October 1774 with a loss of eighty-one Virginians killed, including his younger brother Charles, commander the Augusta County “regiment” and hailed as “the idol of the army.” The wounded and missing numbered 140. Shawnee casualties were estimated from 231 to “not short of three hundred.” Dunmore’s “division” captured the Shawnee capital at Pickaway Plains on 17 October. Chief Cornstalk agreed to “The Terms of our Reconciliation” on the twentieth, which ultimately resulted in a peace treaty in 1775 that included all of the tribes in the Ohio Country. The treaty lasted three years and essentially freed up valuable manpower for service in the Continental Army. All the same, the officers and soldiers who took up arms during Dunmore’s War would not be paid until July 1775. Their reward for services rendered, moreover, would come in the form of an extralegal “ordinance” passed by Virginia’s Third Convention.<sup>31</sup>

In truth, the “traditional” militia that had defended the Old Dominion for 150 years expired on 20 June 1774, along with the law that regulated, disciplined, and paid it. The House of Burgesses never renewed its lawful existence. Ironically, Virginia’s “quasi-militia” force fought its last battle as a “quasi-army.” In effect, James Harrington’s “marching army” had become a reality for one brief moment—not in a model republic as he theorized, but in a British colony that was defending its territorial sovereignty within

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<sup>31</sup>Van Schreeven and Scribner, *Revolutionary Virginia*, 1:105-08; Virgil A. Lewis, *History of the Battle of Point Pleasant* . . . (Charleston, WV: The Tribune Printing Company, 1909); Reuben Gold Thwaites and Louise Phelps Kellogg, eds., *Documentary History of Dunmore’s War* . . . (Madison, WS: Wisconsin Historical Society, 1905).

the British Empire. In addition, Virginia's "traditional" legislature likewise passed away on 24 June 1775. Ironically, its last act appointed commissioners to finalize Dunmore's peace treaty with Ohio County tribesmen; a crucial accord that was achieved by citizens who chose to be soldiers without a legal mandate from their elected representatives. The paradoxes—and ambiguities—of this "story" should not be lost on Second Amendment scholars. While a well-regulated militia was no longer "necessary" to Virginia's security, Virginians still exercised their right to keep and bear arms. They did so voluntarily in an army, which for the first time ever, was actually "composed of the body of the people" rather than social and political outcasts who were "expendable."

#### Virginia's First Convention

While Dunmore and Virginia's citizen-soldiers were fighting on the frontier, the dissolved delegates were staging their own campaign. Most of the former delegates were re-elected for two legislatures: the upcoming convention, and a future session of the House. Since the convention would be acting as a de facto legislature, Virginia's ruling elite sought the sense of the people on the events unfolding in Massachusetts, and more importantly, their views on what should be done. Of the sixty-five constituencies represented in 1774, thirty-one sets of resolutions and instructions still exist. Despite some differences of opinion on the propriety of Bostonians destroying private property, all were in accord that the punishment far exceeded the crime and that economic retaliation was justified. However, two particular points stand out: first, the constitutional right to representative self-government was being denied; second, the military was enforcing unconstitutional laws. The residents of New Kent County, for example, issued these resolutions:

Resolved, that the Right to impose Taxes or Duties to be paid by the Inhabitants of this Dominion, for any Purpose whatever, is peculiar and essential to the General Assembly, in whom the legislative Authority of the Colony is vested, and that Taxation and Representation are inseparable.

Resolved, that the late cruel, unjust, and sanguinary Acts of Parliament, to be executed by military Force and Ships of War upon our Sister Colony of the Massachusetts Bay, and Town of Boston, is a strong Evidence of the corrupt Influence obtained by the British Ministry in Parliament, and a convincing Proof of their fixed Intention to deprive the Colonies of their constitutional Rights and Liberties.<sup>32</sup>

Note that the last resolve blames one agency for the usurpation of civil government by the military: “the corrupt Influence obtained by the British Ministry in Parliament.” None of the county resolves held King George III responsible. Indeed, the Fairfax County Resolves—the longest and most detailed of all the resolutions and instructions—had this to say about the chief magistrate:

Resolved, That there is a premeditated design and System, formed and pursued by the British Ministry, to Introduce an Arbitrary Government into his Majesty’s American Dominions; to which end they are Artfully prejudicing our Sovereign; and Inflaming the minds of our Fellow Subjects in Great Britain, by propagating the most malevolent falsehood; particularly that there is an Intention in the American Colonies, to set up for Independent States. . . .

Clearly, the British king and people are as much the victims of designing ministers, as are the colonists. Significantly, the Fairfax freeholders also called for a congress of “deputies from all the Colonies to concert a General & uniform plan, for the Defense and preservation of our Common rights.” The meaning of “Defense” was implied in another resolve, which asserted that if the colonies were reduced “to a State of desperation . . . there can be but one Appeal”—the force of arms.<sup>33</sup>

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<sup>32</sup>Van Schreeven and Scribner, *Revolutionary Virginia*, 1:147-48.

<sup>33</sup>*Ibid.*, 1:129,130-133, 136.

Armed with instructions from the voters, the First Virginia Convention was held in Williamsburg from 1-6 August. There is no surviving convention journal. What is available is one hearsay account by South Carolina's Thomas Lynch (who attended one session). According to Lynch, George Washington delivered a "most eloquent Speech," in which he declared "I will raise 1000 Men, subsist them at my own Expence, and march my self at their Head for the Relief of Boston."<sup>34</sup> If true, Washington now advocated "the denier resort"—taking up arms—which he was willing to do at his own "Expence" since there was no militia he could command. The First Convention, however, was not prepared to take that ultimate step. Instead it focused on three tasks: electing seven delegates for First Continental Congress; writing articles of association banning the export and import of certain items; and devising instructions for the congressional deputies. The seven delegates were Peyton Randolph, Richard Henry Lee, Patrick Henry, George Washington, Richard Bland, Benjamin Harrison, and Edmund Pendleton. Randolph's nephew later wrote that each man was chosen for a specific purpose: "that Randolph should preside in Congress, that Lee and Henry should display the different kinds of eloquence for which they were renowned, that Washington should command the army, if an army should be raised, that Bland should open the treasures of ancient colonial learning, that Harrison should utter plain truths, and that Pendleton should be the penman for the business."<sup>35</sup>

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<sup>34</sup>Washington's words were recorded by John Adams in Lyman H. Butterfield, et al, eds., *The Adams Papers*, ser. I, *Diaries: Diary and Autobiography of John Adams*, 4 vols. (Cambridge: Belknap Press of Harvard University Press, 1961), 2:117.

<sup>35</sup>Edmund Randolph, *History of Virginia*, 206.

As far as the congressional delegation instructions are concerned, the last two paragraphs stand out:

The Proclamation issued by General Gage, in the Government of the Province of Massachusetts Bay, declaring it Treason for the Inhabitants of that Province to assemble themselves to consider their Grievances and form Associations for their common Conduct on the Occasion, and requiring the Civil Magistrates and Officers to apprehend all Such Persons to be tried for their supposed Offences, is the most alarming Process that ever appeared in a British Government. . . .

That if the said General Gage conceives he is empowered to act in this Manner, as the Commander in Chief of his Majesty's Forces in America, this odious and illegal Proclamation must be considered as a plain and full Declaration that this despotick Viceroy will be bound by no Law, nor regard the constitutional Rights of his Majesty's Subjects, whenever they interfere with the Plan he has formed for oppressing the good people of Massachusetts Bay; and therefore, that the executing, or attempting to execute, such Proclamation, will justify Resistance and Reprisal.<sup>36</sup>

It is important to note that while those words describe a possible attempt by a “despotick Viceroy” to rule Massachusetts under a military dictatorship, there is no language that equates that “most alarming process” with the Radical Whig indictment of standing armies. Furthermore, the adjective “Armed” was omitted from the words “Resistance and Reprisal.”

Equally significant were the unofficial resolves two delegates received from Thomas Jefferson, later published as a tract entitled *A Summary View of the Rights of British America*. Jefferson hoped the First Congress would adopt his resolutions. He sent one copy to Peyton Randolph, who would surely preside, and another to Patrick Henry, who would certainly present them persuasively. When Jefferson's resolutions were not submitted, he blamed Henry. “Whether Mr. Henry disapproved of the ground taken,” Jefferson wrote years later, “or was too lazy to read it (for he was the laziest man in reading I ever knew) I never learned; but he communicated it to nobody.” Nonethe-

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<sup>36</sup>Van Schreeven and Scribner, *Revolutionary Virginia*, 1:238-39.

less, *A Summary View* is generally recognized as Jefferson's rehearsal for the Declaration of Independence. For our purposes, its significance lies in what Jefferson had to say about state sovereignty, executive power, and the sword.

Jefferson notably declared that an executive "is no more than the chief officer of the people, appointed by the laws, and circumscribed with definite powers, to assist in working the great machine of government, erected for their use, and consequently subject to their superintendence." He also examined the French and Indian War from a colonial perspective: that "these states never supposed, that by calling in her [Great Britain's] aid, they thereby submitted themselves to her sovereignty. Had such terms been proposed, they would have rejected them with disdain, and trusted for better to the moderation of their enemies, or to a vigorous exertion of their own force."<sup>37</sup> As related in the previous chapter, however, Virginia did not mobilize "a vigorous exertion" of its "own force" before Great Britain fiscally intervened. Nevertheless, Jefferson offered this crucial commentary concerning the sword and state sovereignty:

That in order to enforce the arbitrary measures before complained of, his majesty has from time to time sent among us large bodies of armed forces, not made up of the people here, nor raised by the authority of our laws. Did his majesty possess such a right as this, it might swallow up all of our other rights whenever he should think proper. But his majesty has no right to land a single armed man on our shores, and those whom he sends here are liable to our laws made for the suppression and punishment of riots, routs, and unlawful assemblies; or are hostile bodies, invading us in defiance of law. . . . Every state must judge for itself the number of armed men which they may safely trust among them, of whom they are to consist, and under what restrictions they shall be laid.

To render these proceedings still more criminal against our laws, instead of subjecting the military to the civil powers, his majesty has expressly made the civil subordinate to the military. But can his majesty thus put down all law under his feet?

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<sup>37</sup>Jefferson, *A Summary View of the Right of British America. Set Forth in Some Resolutions Intended for the Inspection of the Present Delegates of the People of Virginia* (Williamsburg: Clementina Rind, n.d. [1774]); reprinted in Van Schreeven and Scribner, *Revolutionary Virginia*, 1:243-44.

Can he erect a power superior to that which erected himself? He has done it indeed by force; but let him remember that force cannot give right.<sup>38</sup>

It will be to our great advantage to remember those paragraphs within the context of the Virginia Ratification Convention in 1788. Unfortunately, Jefferson did not attend that convention, and thus never presented what is perhaps the best summary statement of what Virginians feared most about military power under the federal constitution, and why they argued for an amendment that would preserve their sovereignty over the sword. Instead it was left to Patrick Henry, a man perhaps “to lazy read” what Jefferson wrote, but who nevertheless tried to “communicate” his fundamental argument. What the Second Amendment’s language actually conveyed, however, is an entirely different matter. Even so, the above paragraph is the best “American version” of James Harrington’s political theory shorn of its “original” agrarian-republic idealism (which is extremely ironic in Jefferson’s case), as well as the inherent dangers of a standing army.

Indeed, one of the notable aspects of *A Summary View*—as well as the surviving county instructions and resolves—is that Virginians did not employ the “neo-Harringtonian” anti-army ideology in arguing their position. To be sure, there are references aplenty to enforcing unconstitutional laws with military force, the subordination of civil authority to the military, and corrupt ministers conspiring to upset the constitutional balance, which were major themes of Radical Whig ideologues. Nevertheless, there is no mention whatsoever of the innate dangers of standing armies, or militias functioning as their foils. Clearly, the “anti-army” ideology remained dormant in Virginia. In my assessment, the reason why is abundantly clear: most Virginians were not yet ready to place blame on King George III—the supreme commander-in-chief of the British Army. To

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<sup>38</sup>Ibid., 1:255.

condemn the King's Army would also censure the King. The "conservative" Convention was willing to criticize General Gage as a "despotick Viceroy," but not the King. Jefferson, however, *did* indict the King, and quite forcefully: "his majesty has no right to land a single armed man on our shores, and those whom he sends here are liable to our laws." Even so, Jefferson's more radical "View" was not adopted, and he blamed a "fellow" radical (Henry) for that "slight" rather than Randolph, a known conservative. The major point (and argument) is this: the anti-army ideology would never become an effective or useful rationalization for armed rebellion in Virginia until Virginians viewed the royal executive as an enemy who was waging war against them with the power of his sword. After all, that same ideological indictment brought on the English Civil War and Glorious Revolution. The First Continental Congress, however, was about to introduce its own version of the "anti-army" language into the war of words.

### The First Continental Congress

The First Congress is largely known for creating the Continental Association in response to the Coercive Acts. To enforce that joint boycott, Congress called for a committee "in every county, city, and town, by those who are qualified to vote for representatives in the legislature, whose business it shall be attentively to observe the conduct of all persons touching this association." The committees would publish the names of offenders in local newspapers, "break off all dealings" with violators, and brand them as "the enemies of American liberty."<sup>39</sup> No doubt Congress expected the committees to use the tactics of social ostracism rather than armed coercion. But there were two additional

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<sup>39</sup>Worthington C. Ford, et al, eds., *Journals of the Continental Congress, 1774-1776*, 34 vols. (Washington, D. C., 1904-37), 1:75-80. Hereafter cited as Ford, *Journals of Congress*.

themes that ran throughout the proceedings from 5 September to 26 October 1774: state sovereignty and the sword. Those key factors were also instrumental in forging the Second Amendment, and in a similar context.

On 16 September, Paul Revere arrived in Philadelphia with the recently adopted Suffolk Resolves. One resolution declared the people of Suffolk should elect their own militia officers and immediately learn the art of war. This was Suffolk's way of forming an armed force independent of British authority. The crucial twelfth resolve asserted, "we are determined to act merely upon the defensive, so long as such conduct may be vindicated by reason and the principles of self-preservation." In this sense, Suffolk reached the brink of armed rebellion while offering a justification based on "reason" and "self-preservation." Despite concerns that Suffolk had basically issued a declaration of war, the "inflammatory" resolutions were ratified two days later. Congress was not endorsing armed hostilities, however. As historian Jack Rakove explains, the "central intent" of the Suffolk Resolves was "to defy the Government Act without alienating the support of the other colonies." To that end, the Resolves tried to "circumvent and nullify the authority of the new administration" while avoiding direct conflict with Gage's army.

Even more important, by this act of ratification most delegates probably hoped to restrain the conduct of resistance in Massachusetts within the lines drawn by the Suffolk Resolves themselves. Only if Gage used force to carry out his policies would the people be justified in taking stronger measures; even then they remained bound to act 'merely upon the defensive.'<sup>40</sup>

Professor Rakove's apt appraisal can be viewed from other directions.

In effect, this was the beginning of America's devotion to the idea that military preparedness is only justified for self-defense, not an excuse to commit armed aggression.

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<sup>40</sup>Jack N. Rakove, *The Beginnings of National Politics: An Interpretive History of the Continental Congress* (New York: Alfred A. Knopf, 1979), 46-47.

Suffolk's twelfth resolve also provides insight into the Second Amendment "insurrection theory": the people have a right to keep and bear arms—or to be militarily prepared—in case they are attacked by the federal government's standing army. Even so, disagreement subsequently arose over how much of a "defensive posture" was absolutely necessary.

Sovereignty and the sword assumed center stage on 28 September when Joseph Galloway, the conservative Speaker of the Pennsylvania House, presented a "Plan of Union." Galloway argued that the colonies had prospered and were secure from foreign threats within the British Empire. That peace and prosperity, however, were threatened by two dangers. First, Great Britain had reached a point where it could no longer tolerate colonial obstinacy. Another embargo would likely result in an Anglo-American war that would be disastrous for the colonies. Galloway stressed that it was highly unlikely the colonists could win such a war on their own. They lacked a trained army and experienced officers, and were not accustomed to cooperating with one another as the French and Indian War plainly proved. In Galloway's view, the colonists' only hope of victory was a military alliance with either France or Spain. But if they did win the war, the colonies would be under the thumb of arbitrary monarchs that were far more despotic than King George III. If they lost, which Galloway believed was more likely, the colonists faced severe reprisals that would make the Coerce Acts seem trivial by comparison.

The second danger to peace and prosperity was civil discord. Insurgency was aflame, Galloway warned, fanned by radical rhetoric that merely incited lower-class mobs bent on destroying the property of the wealthy. Without mentioning Gage's army, Galloway argued that London was too far away to lend assistance in suppressing such insurgencies. Nor did he believe the colonies could aid each other in quelling internal

turmoil. The colonies were “so many perfect and independent societies.” Each “by its own internal legislators . . . [could] regulate its own internal police, within its particular circle of territory. But here it is confined.” They could not collectively police other “circles” because they were “destitute of any political connection, or supreme authority, to compel them to act in concert for common safety.”<sup>41</sup>

Galloway’s Plan of Union would constitute an “American national government” composed of a unicameral legislature in which each colony was equally represented with a crown-appointed “president-general” acting as executive magistrate and commander in chief. The national legislature was empowered to enact laws “for regulating and administering all the general police and affairs of the colonies” and, in times of war, to pass “bills for granting aid to the crown.” In addition, the “American Branch” of Parliament retained its political power to preserve the “security of the colonies” by “acting for their general protection.” In sum, the American legislature was supremely sovereign when it came to raising money and armed men for national defense. Parliament and the crown could not force the colonies to contribute to any war effort that was not in their best interests or for “their general protection.”<sup>42</sup> Aside from that last vital point, Galloway’s Plan foreshadowed the military clauses in the federal Constitution.

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<sup>41</sup>The actual text of Galloway’s speech has not survived. However, much of what he said was published in a pamphlet immediately after Congress adjourned, *A Candid Examination of the Mutual Claim of Great Britain and the Colonies* (New York, 1775). That tract is reprinted in Merrill Jensen, *Tracts of the American Revolution* (Indianapolis, IN: Hackett Publishing Company, 2003), and is referenced here at pages 377-78, 384, 387, and 389.

<sup>42</sup>Galloway’s Plan of Union is in Worthington C. Ford, et al, eds., *Journals of the Continental Congress, 1774-1776*, 34 vols. (Washington, D. C., 1904-37), 1:43-48. Hereafter cited as Ford, *Journals of Congress*.

Galloway was striving for a compromise that would avert a civil war; not only with Great Britain, but also between colonial classes. However, there were two major “losers” in Galloway’s scheme: Parliament, which would have to share legislative power with the American assembly; and the individual colonies, which retained control over their “internal police,” but were subordinate to the national legislature in matters involving national defense. Predictably, Galloway’s “Union” sparked heated debate—especially over the surrender of state sovereignty.

At the forefront of the opposition was Patrick Henry, forever the champion of Virginia’s sovereignty. Henry argued that if Congress adopted that form of government “We shall liberate our Constituents from a corrupt House of Commons, but thro[w] them into the Arms of an American Legislature that may be bribed by that Nation which avows in the face of the World, that Bribery is a Part of her System of Government.” Richard Henry Lee chimed in that the plan “would make such changes in the Legislatures of the Colonies that I could not agree to it without consulting my Constituents.” As historian Merrill Jensen points out, Lee offered “the typical reply of any eighteenth-century politician who wanted to avoid taking a stand or to delay consideration of an issue.”<sup>43</sup> New York’s John Jay, who supported the plan, called Lee’s bluff and asked him to explain what rights and liberties would be sacrificed. Lee sat in muted silence, a rare occurrence for the vocal rabble-rouser.<sup>44</sup> Professor Jensen summarizes the fate that awaited this first attempt to create a “federal” union (albeit it within the British Empire):

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<sup>43</sup>Merrill Jensen, *The Founding of a Nation: A History of the American Revolution, 1763-1776* (New York: Oxford University Press, 1968; reprint, Indianapolis, IN: Hackett Publishing Company, 2004), 499 (page references are to reprint edition).

<sup>44</sup>John Adams, Notes of Debates, 28 September 1774, in Smith, *Delegate Letters*, 1:109-12, 117-18.

When the journals of Congress were published in November, all mention of the plan and the votes upon it were omitted. It was left for an outraged Joseph Galloway to present the plan of union to the American people in a pamphlet he published shortly thereafter.<sup>45</sup>

As future “Anti-federalists,” Henry and Lee hoped the same destiny could be exacted upon the “federal plan” proposed by later “nationalists.”

A significant debate over armed preparedness began on 1 October when New York’s James Duane proposed that the provincial assemblies provide “Requisitions for raising Supplies of Men and Money” as long as those requests were “consistent with constitutional liberty” and “found necessary” for the common defense. Duane’s resolution was designed to negate the “military defense” rationale used by the British officials to justify colonial taxation. Richard Henry Lee moved “to extend [Duane’s motion], To raising also, a Militia & Arming them, for Our defense.” Lee presented a formal amendment the following Monday, recommending, “that a militia be forthwith appointed and well disciplined” in every colony, “And that they be well provided with Ammunition and Proper Arms.” Lee argued that since the revenue acts were earmarked for colonial defense, every colony should prove that it was “able, willing, and under Providence determined to protect Defend and Secure itself.” The Virginian held that Congress should take the lead by formally advising the colonies to take appropriate measures to strengthen, discipline, and arm their militias—which was ironic since Virginia no longer had a militia. Then again, he might have intended to correct that situation via a congressional mandate.<sup>46</sup>

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<sup>45</sup>Jensen, *The Founding of a Nation*, 500.

<sup>46</sup>Smith, *Delegate Letters*, 1:141.

In any case, Lee was saying militias were now necessary to the security every sovereign colony, and that those armed institutions should be militarily proficient. From what we know about “militia history” in Virginia, Lee was writing a brand new chapter. What he did not say was that the most immediate threat to colonial security was Gage’s standing army. The subversive intent of Lee’s revision was obvious to everyone, however; the colonies should sharpen their swords for a war against Great Britain.

Lee deliberately lit a political powder keg. John Rutledge of South Carolina retorted that the amendment amounted to “a Declaration of Warr, which if intended, no other Measure ought to be taken up.” Virginia’s Benjamin Harrison spoke “plain” (as he was chosen to do): Lee’s measure “will tend only to irritate, whereas Our Business is to reconcile.” Patrick Henry, of course, rose in Lee’s defense. He favored the motion because “a preparation for Warr is Necessary to obtain peace,” but then subtly switched gears. “America is not Now in a State of Peace,” he asserted. “All the Bulwarks of our Safety, of Our Constitution, are thrown down, and we are Now in a State of Nature.” What if the continental association fails, Henry rhetorically asked, and immediately answered: “In that case, Arms are Necessary, & if then, it is Necessary Now.” Indeed, “Arms are a Resource to which we shall be forced; a Resource afforded Us by God & Nature . . . [so] why in the Name of both are We to hesitate providing them Now whilst in Our power?”<sup>47</sup>

Henry and Lee were a radical minority in Congress. Conservatives mounted a weak counter-attack over rules of procedure, but then the moderates entered the fray. They proposed a watered-down version of Lee’s motion that passed unanimously—at

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<sup>47</sup>Ibid., 1:138-41.

least on a colony basis. Lee, for one, voted against his “amended” amendment within the Virginia delegation. The revised resolution asserted militias were “adequate” for colonial defense, “if put on a proper footing”—which should be attended to immediately. However “in case of war,” the colonies were also authorized to provide “any further forces that may be necessary.”<sup>48</sup> That last point left the door wide open for a future Continental Army to march through. George Washington, for one, was probably pleased that armed forces other than militias were deemed “necessary”—although he sat in silence throughout the debates. Nevertheless, the significance of Lee’s “amended amendment” cannot be over-emphasized. Like Joseph Galloway’s Plan of Union, the revised militia resolution prefigured the major revisions Virginia’s suggested “military” amendment to the Constitution underwent, which resulted in the Second Amendment. Indeed, the only substantive factor missing in the congressional debates (as well as the Second Amendment) was the theoretical nemesis of state supported militias—a professional standing army. Nevertheless, the power of that particular sword would receive its fair share of attention in short order.

On 14 October the First Continental Congress passed a “Declaration of Resolves.” When the text was later printed in New York, the title page read “The Bill of Rights.” According to scholar Bernard Schwartz, “the document was an American equivalent of the [English] Bill of Rights of 1689. This was apparently the first specific use of the term in connection with an American document.” As Professor Schwartz further notes, “The Declaration and Resolves of the First Continental Congress was the direct precursor of the Declaration of Rights contained in the Revolutionary State Constitutions, starting

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<sup>48</sup>Ford, *Journals of Congress*, 1:53-4; Silas Deane Diary, 3 October 1774, in Smith, *Delegate Letters*, 1:138-39.

with the Virginia Declaration of Rights of 1776.”<sup>49</sup> The ninth right declared “That the keeping a Standing army in these colonies, in times of peace, without the consent of the legislature of that colony, in which such army is kept, is against law.” Clearly, the delegates adopted Article Six of the English Bill of Rights and applied its constitutional checks within a colonial context: Parliament could not “keep” a standing army within any sovereign colony “without the consent of the legislature of that colony.”<sup>50</sup>

It should be noted that keeping a standing army in the colonies was not associated with any specific act—such as enforcing an unconstitutional law or policing “the people”—but nevertheless was considered to be “against law.” In fact, the congressional Declaration never condemned a standing army as a direct threat to constitutional rights and freedoms—even “in time of peace.” What *is* considered to be “against law” is keeping that armed force in any colony “without the consent of the legislature of that colony.” As long as the representatives of the people sanctioned the presence of a standing army within their borders and among the population, then that military force was constitutionally legitimate. In my opinion, it is unfortunate that the Second Amendment was not written with that “principle” in mind. Not only would it have conformed more closely with the Third Amendment—“No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law”—but also alleviated most (if not all) fears that “the people” and the states might be policed, oppressed, or attacked by the federal sword, thus presenting little (or

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<sup>49</sup>Bernard Schwartz, *The Bill of Rights: A Documentary History* (New York: Chelsea House Publishers, 1971), 1:214-15. Hereafter cited as Schwartz, *Bill of Rights*.

<sup>50</sup>The “Declaration and Resolves” is in Ford, *Journals of Congress, 1774-1789*, 1:63-74. It is conveniently reprinted in Schwartz, *Bill of Rights*, 1:215-19.

no) pretext to mount an armed rebellion in self-defense. Of course, it is also a shame that British officials did not recognize that “right” either.

In any case, we do not find the congressional delegates in 1774 adhering to John Trenchard’s 1697 maxim that “A Standing Army is inconsistent with A Free Government, and absolutely destructive to the Constitution of the English Monarchy.” The reason why is relatively simple, but largely overlooked: Radical Whigs in England persistently disregarded the concept of popular consent; Radical Whigs in America persistently regarded it as the foundation of self-government. Moreover, there was only one governing body that literally “represented” popular consent in colonial America—the legislative assemblies. As long as those individual legislatures remained sovereign—or could freely govern the power of the purse and sword—then Virginians, Pennsylvanians, New Yorkers, and all other colonial citizens were also sovereign.

As far as executive power was concerned, Thomas Jefferson succinctly stated the magistrate’s role in the opening paragraph of *A Summary View*: “he is no more than the chief officer of the people, appointed by the laws, and circumscribed with definite powers, to assist in working the great machine of government, erected for their use, and consequently subject to their superintendance.” The chief executive, in short, executes and enforces the laws of the people—and exercises the power of the sword to protect them—only with their consent and oversight. The major question most colonists did not dare to ask (or chose to ignore) was this: Would King George III use the sword Parliament placed in his hands—the British Army—to make war on his colonial subjects? Patrick Henry and Richard Henry Lee not only dared to ask that question at the First Continental

Congress, but answered it as well. The major question in their minds was this: Were Virginians adequately prepared to defend themselves against Great Britain's military might?

In October 1774, the answer was ambiguous—as was Virginia's sword. The following chapter details how Virginians resolved that ambiguity (as well as their ambivalence), which ultimately resulted in forging a new sovereign sword in Virginia.

## CHAPTER 7

### PREPARING FOR WAR: THE SECOND VIRGINIA CONVENTION, MARCH 1775

Resolved . . . that a well regulated militia, composed of gentlemen, freeholders, and other freemen, is the natural strength and sta[b]le security of a free government.

—Fairfax County Committee  
17 January 1775<sup>1</sup>

*“There is no longer any room for hope. If we wish to be free, we must fight!—I repeat it, sir, we must fight! An appeal to arms and to the God of Hosts, is all that is left us.”*

—Patrick Henry  
Second Virginia Convention  
23 March 1775<sup>2</sup>

Patrick Henry had declared on the opening day at the First Continental Congress that “By the oppression of Parliament, all government is dissolved.” He then turned to the presiding president, Peyton Randolph, and solemnly added, “We are in a state of nature, sir.”<sup>3</sup> That state, as all enlightened men of the time knew, was one in which a man preserved his life and property by his own strength and cunning—or else bowed before another man’s greater strength and cunning. To avoid living in that nasty, brutal, and dangerous state, men formed social compacts and consented to be ruled by governments, preferably the sort that afforded equal protection and justice to all. Nevertheless, educated gentlemen also knew that any form of government could evolve into a monster with its own strength and cunning that might oppress the many and pervert justice in favor of a

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<sup>1</sup>*Virginia Gazette* (Pinkney), 2 February 1775.

<sup>2</sup>William Wirt Henry, *Patrick Henry: Life, Correspondence, and Speeches*, 3 vols. (New York: Charles Scribner’s Sons, 1891), 1:261-62. Hereafter cited as W. W. Henry, *Patrick Henry*.

<sup>3</sup>Robert Douthat Meade, *Patrick Henry*, 2 vols. (Philadelphia: Lippincott Press, 1957-69), 1:324. Hereafter cited as Meade, *Henry*.

few. If the many failed to control that beast through peaceable means, the only other alternative was to kill it, briefly return to the state of nature, form another social compact, and create a new government. In theory, natural law afforded the perfect philosophical justification for revolution; at the same time, it pointed toward a prudential (if not providential) end. Men did not require a black-letter law to legitimize that natural right; it was part of the unwritten law of man's political nature. The trick was to write man-made laws that would protect men from each other without surrendering all of their natural-born freedom. Deliberately leaving the state of nature to be killed or enslaved by another man was both illogical and unnatural.

When Patrick Henry turned to fellow Virginian Peyton Randolph and said, "We are in a state of nature, sir," he might have been referring to their particular social compact at that precise moment. In truth, Virginia had no legal means to protect its citizens or afford them justice. The militia no longer existed and the county courts were closed. Then again, Virginians had not exactly returned to a pristine state of nature, but more precisely existed in an "extra-legal state" within the British Empire. Nevertheless, Henry insisted that "All the Bulwarks of our Safety, of Our Constitution, are thrown down, and we are Now in a State of Nature." According to Radical Whig ideology, one of those constitutional "Bulwarks of Safety" was the militia. Henry also declared, "Arms are a Resource to which we shall be forced; a Resource afforded Us by God & Nature," and pointedly asked, "why in the Name of both are We to hesitate providing them Now whilst in Our power?"<sup>4</sup>

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<sup>4</sup>Smith, *Delegate Letters*, 1:141.

In large measure, those words were a rehearsal for Henry's famous "Liberty or Death" speech at the Second Virginia Convention, where Virginia's political leadership made the crucial decision to no longer "hesitate," but summon their "Resources" for an armed conflict with Great Britain. However, that resolve was largely predetermined at the local county level before the convention ever convened. In fact, the real importance of the Second Convention was that it legitimized those local efforts on a colony-wide basis. The purpose of this chapter is to relate those initial armed preparations and "resources," and explain their relationship and significance to a well-regulated militia as a necessary component of Virginia's homeland security, as well as how Virginians exercised their right to keep and bear arms. The major theme (and argument) is that practical experience did not always compliment constitutional principles or republican ideology, but often conveyed an entirely different meaning in terms of exercising and controlling armed political power. For the most part, Second Amendment scholars have overlooked that meaning.

#### Committees of Safety and "Independent" Companies

The eleventh article of the Continental Association mandated that a committee be organized "in every county, city, and town" throughout the colonies to implement and enforce the congressional boycott against British trade.<sup>5</sup> During the months of November and December 1774, Virginians were busy organizing committees of "safety," whose chief function was to regulate importation and exportation and publicly condemn blatant and clandestine violations of the embargo. The first record of a committee acting in compliance with the Continental Association occurred in Caroline County on 10 Novem-

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<sup>5</sup>Ford, *Journals of Congress*, 1:79.

ber 1774, with congressional delegate Edmund Pendleton serving as moderator. On 17 November, Henrico County elected the first committee that specifically mentioned the Continental Association.<sup>6</sup> Thirty-three counties and three towns (Williamsburg, Norfolk, Fredericksburg) formed committees by the end of 1774. Thirteen more followed suit the next year, including Richard Henry Lee's Westmoreland County, which organized its committee of safety "according to the direction of the continental congress" on 31 January 1775.<sup>7</sup> Those forty-six counties constituted three-fourths of the sixty-two counties in Virginia. Those without recorded committees were mostly on the frontier; the major exception being Norfolk in the Tidewater, although Norfolk borough boasted a committee until Governor Dunmore's military forces occupied the town in late 1775.<sup>8</sup>

Predictably, the committees of safety were chaired and composed of the wealthiest and most politically powerful men in the counties. Aside from regulating trade and policing boycott violators, the committeemen also suppressed and punished all verbal criticisms directed at the Association—and those who enforced it—as inimical to American liberty. In one scholar's estimate,

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<sup>6</sup>William J. Van Schreeven, comp., Robert L. Scribner, ed., *Revolutionary Virginia: The Road to Independence*, vol. 2, *The Committees and the Second Convention, 1773-1775: A Documentary Record* (Charlottesville, The University Press of Virginia, 1975), 109. Hereafter cited as Van Schreeven and Scribner, *Revolutionary Virginia*, 2: (page).

<sup>7</sup>*Virginia Gazette* (Pinkney), 9 February 1775.

<sup>8</sup>Larry Bowman, "The Virginia County Committees of Safety, 1774-1776," *Virginia Magazine of History and Biography* 79 (July, 1971): 322-24. Hereafter cited as Bowman, "Committees of Safety." Professor Bowman notes that "Records of only six of the county committees are known to exist and few of them are complete. These are for the counties of Caroline, Cumberland, Fincastle, Isle of Wright, Southampton, and Westmoreland." However, "activity on the part of other committees can be found in the Virginia newspapers and other sources." See footnote 10 at page 323.

The county committees made no pretense of upholding freedom of speech. They condemned any expression contrary to the Patriot point of view, and if the culprit would not retract, he was punished. It is rather ironic that in the struggle for freedom which America was waging, the Patriots restricted freedom of thought and expression.<sup>9</sup>

Written communication was likewise suppressed. “Mail suspected of being seditious was opened and read.” To preclude espionage, travelers and other strangers were closely watched and interrogated as to their objectives. The committees also served as a “morals police,” censuring and disciplining gaming and other “extravagant” behavior “to accentuate the solemnity of America’s effort to bring redress of her grievances.”<sup>10</sup> Yet in performing all of those internal police functions, the committees of safety refrained from using armed force—particularly military force—to enforce the embargo or otherwise regulate civilian behavior. To do so would have made Virginia’s gentry guilty of the same “unconstitutional crime” as British officials—enforcing civilian obedience with military troops. That prudential sense of constitutional propriety, however, did not mean the county committees were “above” the power of the sword. In fact, they were the first governing bodies to assume extra-legal control over Virginia’s most valuable “resource” for war—armed manpower.

Between September 1774 and June 1775, twenty-four counties and three towns (Williamsburg, Stephensburg, Winchester) organized “Independent Companies” of armed men on their own initiative. For example, the Spotsylvania County Committee forwarded an “Association, Subscription, and Defense” plan to the colonial committee on 15 December 1774. In that document, the Spotsylvania Committee “Resolved that it be recommended to the people of this County to raise Independent Companies of publick

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<sup>9</sup>Ibid., 329.

<sup>10</sup>Ibid., 331-32.

spirited Gentlemen to be ready on all occasions to defend this County. . . .” In addition, an eight-man subcommittee of former militia officers was appointed to “draw up proper Regulations for the forming of such Companies to be laid before the next month meeting.” The committee also resolved to raise voluntary appropriations “to defray the expense” of procuring gunpowder and ammunition for its company.<sup>11</sup> As Professor Robert Scribner aptly notes: “The work of the Spotsylvania committee on this day is significant. That work may not have been the first, but it is the first of which there is record, whereby a Virginia committee, though it only ‘recommended,’ in fact assumed command of the armed forces of a county.”<sup>12</sup>

This was an unprecedented development. As the word “Independent” signifies, these were sovereign military forces with complete freedom from authority—not *all* authority, but specifically the command and control of British authorities. Indeed, committees of safety supervised the county companies as they were created. This was a considerable—if not crucial—point. Placing these armed forces under the direction of local committees of safety sustained the constitutional principle that military power must be strictly subordinate to civil authority. “In addition,” as one scholar notes, “the members of the company itself were required to vote on any action to be taken, making the officers little more than figureheads in a military sense and chairmen in civil sense.”<sup>13</sup> Every company also elected their own officers; the committees of safety did not appoint them.

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<sup>11</sup>Van Schreeven and Scribner, *Revolutionary Virginia*, 2:196-97.

<sup>12</sup>Editorial note 3, page 199, in *ibid.*

<sup>13</sup>William E. White, “The Independent Companies of Virginia, 1774-1775,” *Virginia Magazine of History and Biography* 86 (April, 1978): 151-52.

Those “military voting rights” were predicated upon property ownership, the same criteria for choosing leaders in the civil sphere.

Each company drew up agreements—or “associations”—to which the members signed their names. Much like Richard Henry Lee’s “Westmoreland Association” eight years before, these “military compacts” typically outlined the purposes of the company and the guidelines under which it operated. Fairfax was, apparently, the first county to form an independent company on 21 September 1774. The “Fairfax Militia Association” was largely the work of one man—George Mason; acting chairman of Virginia’s boycott committee in George Washington’s absence, and before Congress passed the continental embargo. In the opening paragraph of the “Militia Association,” Mason explained the reasons why it was being organized:

In this Time of extreme Danger, with the Indian Enemy in our Country, and threat’ned with the Destruction of our Civil-rights, & Liberty, and all that is dear to British Subjects & Freemen; we the Subscribers, taking into our serious consideration the present alarming Situation of all the British Colonies upon this Continent as well as our own, being sensible of the Expediency of putting the Militia of this Colony upon a more respectable Footing, & hoping to excite others by our Example, have voluntarily freely & cordially entered into the following Association; which we, each of us for ourselves respectively, solemnly promise, & pledge our Honours to each other, and to our Country to perform.<sup>14</sup>

The “Indian Enemy” was the Shawnee who had not yet been defeated by Dunmore’s “voluntary army.” Clearly, Mason was using that particular “Danger”—as well as the threat to “Civil-rights & Liberty” ostensibly posed by Gage’s standing army—as a pretext for creating an extra-legal military force. Significantly, Mason made no explicit mention of using that armed force to enforce Virginia’s nonimportation association (or the Continental Association later on). For all intents and purposes, this was a military force to de-

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<sup>14</sup>“Fairfax County Militia Association,” in Rutland, *Mason Papers*, 1:210-11.

fend Virginia against foreign aggression; not a militarized police force to maintain law and order or otherwise ensure domestic security—except, of course, for suppressing insurrections.

As previously argued, Virginia’s militia functioned best as a domestic police force to crush insurrections by servants and slaves. It was far less serviceable as a fighting force during war. Indeed, the general population had rarely been called upon to fight and oftentimes refused to do so. Obviously, Mason was “sensible of the Expediency of putting [Virginia’s] Militia upon a more respectable Footing”—not only for possible combat against British regulars, but also because that armed body was lying prone in a legal coffin. However, the “independent Company” created by the “Fairfax Militia Association” was nothing like the traditional militia in major respects. Note Mason’s emphasis on the “voluntarily freely & cordially” terms of the Association, as well as the “pledge of our Honours to each other” (much like the vows Richard Henry Lee’s “Associators” made in 1766). The militia, in contrast, was an inclusive and mandatory institution in which all freeholders between the ages of sixteen and fifty were enrolled by law and penalized for non-participation. Just as notable is the fact that Mason’s “Subscribers” hoped “to excite others” by their “Example.” In truth, the independent companies were an early effort by Virginia’s radical leaders to mobilize the masses for war by setting their own elite example.

As we have seen in previous chapters, mobilizing armed manpower for political violence was never a sure bet in Virginia. The impending war with Great Britain promised to be no different. In the aftermath of the Boston Port Act, a Northern Neck denizen recorded, “The lower Class of People here are in a tumult on the account of Reports from

Boston, many of them expect to be press'd & compell'd to go and fight the Britains!"<sup>15</sup> If Virginia's ruling elite learned any lesson from the French and Indian War, it was that "the people" refused to be shoved down the path of armed hostilities without their consent or best interests in mind. Indeed, William Lee advised his "war hawk" brother, Richard Henry, on that very score: "In every Colony incessant pains should be used to engage the yeomanry or people at large in the same spirit of opposition with the principal men, and by degrees lead them on to the last point [even though] you will no doubt find many obstructions from the slavish principles of some. . . . It is the part of the leaders to engage the people, step by step, till they have advanced too far to retract."<sup>16</sup> The first crucial "step," apparently, was to mobilize public opinion rather than calling up compulsory public service in any armed organization—including the independent companies.

One of the more significant aspects of the "original" independent companies was that membership was largely limited to the wealthy elite. The "First Independent Company" of Dunmore County, for example, declared that its members were "gentlemen of the first fortune and character."<sup>17</sup> Subscribers in Albemarle County vowed to serve by

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<sup>15</sup>Entry on 31 May 1774 in *Journal and Letters of Phillip Vickers Fithian, 1773-1774: A Plantation Tutor of the Old Dominion*, ed. Hunter Dickenson Farish (Williamsburg, VA: Colonial Williamsburg, Incorporated, 1957), 111.

<sup>16</sup>William Lee to R. H. Lee, 10 September 1774, in Worthington C. Ford, ed., *Letters of William Lee, 1766-1783*, 3 vols. (Brooklyn, NY: Historical Printing Club, 1891), 1: 90-91.

<sup>17</sup>"The First Independent Company of Dunmore," *Virginia Magazine of History and Biography* 44 (April 1936): 102-104; "Declaration of Subscribers to the First Independent Company of Dunmore County," [n.d], Dunmore County Committee of Safety Papers (Virginia Historical Society, Richmond); cited and quoted in Michael A. McDonnell, "Popular Mobilization and Political Culture in Revolutionary Virginia: The Failure of the Minutemen and the Revolution from Below," *Journal of American History* 85 (December 1998): 953. Hereafter cited as McDonnell, "Popular Mobilization."

“the words of Gentlemen.”<sup>18</sup> Moreover, George Mason later boasted that his own Fairfax Company “consisted entirely of Gentlemen.”<sup>19</sup> Certainly the “material” requirements for enlisting in Mason’s “outfit” were “tailored-made” for the rich. Every member promised to provide their own uniforms of “Blue, turn’d up with Buff; with plain yellow metal Buttons, Buff Waist Coat & Breeches, & white Stockings”—clothing that was generally unobtainable by Virginia’s lower or even middle classes. Gentlemen-soldiers were also required to arm themselves with “a good Fire-lock & Bayonet” and “Tomahawk,” as well as stockpile a large supply of ammunition that included six pounds of gunpowder, twenty pounds of lead, and fifty gun flints, “at the least”—a “private arsenal” that likewise exceeded the personal finances of most citizens. Active membership was further restricted by the fact that only “one hundred men” could enlist, which was hardly mass mobilization.<sup>20</sup> As the leading scholar on the independent company movement tells us, these armed associations of elite “gentlemen” were “exclusive, and amenable to their own sense of propriety,” and decidedly “not designed for the ‘common’ sort.” In summary, “the units resembled elite gentlemen’s clubs, rather than formal military units.”<sup>21</sup>

“Gentlemen Companies” clearly stood apart from the old militia system in that they were truly voluntary, highly exclusive, and radically egalitarian in terms of electing their own officers and deciding what “action” they would perform. Nonetheless, the in-

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<sup>18</sup>Robert A. Brock, ed., “Papers, Military and Political, 1775-1778, of George Gilmer, M.D., of ‘Pen Park,’ Albemarle County, Virginia,” Virginia Historical Society, *Collections*, new series, VI (Richmond: VA, 1887), 82. Hereafter cited as Brock, “Gilmer Papers.”

<sup>19</sup>Mason to [Mr. Brent?], 2 October 1778, in Rutland, *Mason Papers*, 1:434.

<sup>20</sup>“Fairfax County Militia Association,” in Rutland, *Mason Papers*, 1:211.

<sup>21</sup>McDonnell, “Popular Mobilization,” 952-55.

dependent companies did share some common ground with Virginia's traditional militias. In the first place, squire-soldiers promised to become "Masters of the Military Exercise"—or well regulated—through "our utmost Endeavors, as well as the Musters of the said Company." Like militiamen, they also kept and bore arms for the same purpose:

that we will always hold ourselves in Readiness, in Case of Necessity, hostile Invasion, or real Danger of the Community of which we are Members, to defend to the utmost of our Power, the legal prerogatives of our Sovereign King George the third, and the just Rights & Privileges of our Country, our Posterity & ourselves upon the Principles of the British Constitution.<sup>22</sup>

Although an "independent" military force that had no formal connection to any "official" governing agency, this was no armed band of political misfits or thugs, but rather a select group of men who dedicated themselves to protect the "Community" (of which they were members), and to defend—and note the selective use of words here, as well as the descending order of precedence—the *legal* prerogatives of King George III, and the *just* "Rights and Privileges" of their "Country" (Virginia), their posterity, and themselves according to "the Principles of the British Constitution."

Even so, exclusive "gentlemen's clubs" were not precisely what James Harrington had in mind when he envisioned rich republican citizens shouldering a larger share of armed responsibilities in Oceana. Indeed, it was absurd to think that Virginia's wealthy elite would ever stand alone as the frontline of defense against enemy attacks. In fact, Mason declared that his "Militia Association" served another purpose: "to provide a fund of officers; that in case of absolute necessity, the people might be better enabled to act in defence of their invaded liberty."<sup>23</sup> Then again, gentlemen like George Mason hoped upper-class companies would "excite others by Example" and "infuse a martial spirit of

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<sup>22</sup>"Fairfax County Militia Association," in Rutland, *Mason Papers*, 1:211.

emulation.” For all intents and purposes, the independent companies were an early attempt at the county level to replace the legally defunct militia system with an armed organization that any honorable and self-respecting Virginian would be proud to be a member of. But were the ruling elite successful in that endeavor?

Professor Michael McDonnell has studied county companies at length. In his estimation, “the ubiquity of the independent company ‘movement’ and its significance has been exaggerated, beginning with patriot contemporaries who wished to swell the ranks, at least on paper, for propaganda reasons, and also by loyalists and royal officials who feared the threat of the volunteer companies.”<sup>24</sup> Young James Madison was an exuberant “patriot,” but not prone to proliferate political propaganda.

Madison wrote an interesting letter in late November 1774 to his former Princeton college chum, William Bradford, Jr. of Pennsylvania. “Jemmy” Madison’s best friends were like his favorite books, few and well chosen. He often shared his innermost thoughts and opinions with “Billey” Bradford. The Pennsylvanian was a well-informed correspondent. Not only were his father and older brother the Philadelphia publishers of *The Pennsylvania Journal and the Weekly Advertiser*, they also were the official printers for the First Continental Congress. The winds of war, however, disrupted the leisure of letter writing as each young man was blown into different fields: Madison joined up as a raw recruit in Virginia politics, eventually becoming a commanding leader (physically, he was too short and frail for military service); Bradford enlisted as a private in the Con-

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<sup>23</sup>George Mason, “Remarks on Annual Elections for the Fairfax Independent Company,” [17-16 April 1775], in Rutland, *Mason Papers*, 1:229.

<sup>24</sup>Michael A. McDonnell, “The Politics of Mobilization in Revolutionary Virginia: Military Culture and Political and Social Relations, 1774-1783” (D. Phil. Thesis, University of Oxford, 1995), 19. Hereafter cited as McDonnell, “Politics of Mobilization.”

tinental Army and ultimately rose to the rank of colonel. But in the autumn of 1774, the young friends were preoccupied with how their respective provinces were responding to Congress's modest suggestion that the colonies prepare their homeland defenses.

"In many counties," Madison informed Bradford, "independent companies are forming and voluntarily subjecting themselves to military discipline that they may be expert & prepared against a time of Need. I hope it will be a general thing *thro'ought* this province," Madison enthused. "Such firm and provident steps will either intimidate our enemies or enable us to defy them." Madison's wishful expectation did not come to pass. Only a handful of counties had independent companies five months later, and "Jemmy's" own County of Orange was not yet among them. However, he also exposed the incentive that eventually increased the number of independent companies "in many counties":

If America & Britain should come to an hostile rupture I am afraid an Insurrection among the slaves may & will be promoted. In one of our Counties lately a few of those unhappy wretches met together & chose a leader who was to conduct them when the English troops should arrive—which they foolishly thought would be very soon & that by revolting to them they should be rewarded with their freedom. Their Intentions were soon discovered & proper precautions taken to prevent the Infection. It is prudent such attempts should be concealed as well as suppressed.<sup>25</sup>

Bradford's response to Madison's "insurrection anxiety" is equally interesting:

Your fear with regard to an insurrection being excited among the slaves seems too well founded. A letter from a Gentleman in England was read yesterday in the Coffeehouse, which mentioned the design of administration to pass an act (in case of rupture) declaring ["]all Slaves & Servants free that would take arms against the Americans." By this you see such a scheme is thought on & talked of; but I cannot believe the Spirit of the English would ever allow them publickly to adopt so slavish a way of Conquering.<sup>26</sup>

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<sup>25</sup>Madison to Bradford, 26 November 1774, in William T. Hutchinson and William M. E. Rachal, et al., eds., *The Papers of James Madison*, 17 vols. (Chicago: The University Press of Chicago, 1962), 1:129. Hereafter cited as Hutchinson and Rachal, *Madison Papers*. Original italics.

<sup>26</sup>*Ibid.*, 132.

The threat of arming “Slaves & Servants” proved to be a crucial catalyst in motivating “free” Virginians to take up arms, as it was during Bacon’s Rebellion. In fact, the danger of a domestic insurrection eventually propelled Virginians down the path of armed rebellion against Great Britain, which poses a paradox for Second Amendment “insurrection theorists”—Virginians became armed rebels in order to prevent rebellion.<sup>27</sup> A few radicals, however, were itching to fight regardless of the circumstances or provocation.

Patrick Henry was at the forefront of the independent company movement in his own Hanover County. When Hanover’s squires asked him about the work of congress upon his return, Henry bluntly replied, “No accommodation will take place—hostilities will *soon* commence—and a desperate and bloody touch it will be.”<sup>28</sup> That was not the sort of political forecast prominent planters wanted to hear. “Our Patrick,” one Hanoverian observed, can “certainly be very uncivil” toward British authority. He is “in these times a very useful man, a notable American, very stern & steady in his country’s cause & yet at the same time such a fool that I verily believe it w’d puzzle even a king to buy

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<sup>27</sup>Recent scholarship by Woody Holton makes a convincing case that Virginia’s wealthy elite was “forced” by lower-class whites and black slaves into becoming revolutionaries to prevent anarchy at home. However, I disagree with one aspect of his argument: that conflicts over mobilizing armed manpower for war signaled an agrarian insurgency from below. As Holton admits himself, the regular army was “filled quickly, for the army promised poor farmers a living wage,” while “the most powerful force” that kept “smallholders” from becoming soldiers was the “enormous demand on their time.” A major argument of this study is that the ruling elite oftentimes became “desperate” because “smallholders and poor whites” *refused* to bear arms under unfavorable terms and conditions, and thus effectively challenged upper-class authority without resorting to armed political violence. See Holton, *Forced Founders: Indians, Debtors, Slaves, & the Making of the American Revolution in Virginia* (Chapel Hill: University of North Carolina Press, 1999), 167, 169.

<sup>28</sup>W. W. Henry, *Patrick Henry*, 1:207-08. Original italics.

him off.”<sup>29</sup> As history continually demonstrates, fools oftentimes start wars. Henry argued forcefully at the First Congress that the colonists should prepare for armed hostilities; making it clear that he placed his faith in bayonets rather than boycotts to settle the score with Great Britain. It should therefore come as no surprise that he used his political prestige—and popular base of support—to hone Hanover County’s sword for war.

According to the recollections of Charles Dabney, a member of Hanover’s committee of safety, Henry issued his own “notice” that the militia should gather at a local tavern, where he would “communicate something to them of great importance.” Apparently, a “considerable number of the younger part of the militia attended.” Henry “addressed them in a very animated speech,” recommending the formation of a volunteer company. Accordingly, “A number of those present immediately enrolled themselves on the list of volunteers.”<sup>30</sup> Regrettably, there is no hard evidence to tell us what social and economic class those young men belonged to, or how many joined up. Yet in Professor McDonnell’s estimation, “We might imagine that far from being a universal county-wide show of support or even sympathy, the group that pledged support to Henry was an intimate one,” and thus “composed perhaps” of Henry’s “friends and neighbors” (and “perhaps” class). In any case, there is sufficient evidence to suggest that mobilizing lower-class manpower by upper-class example was not achieving the desired results. In my studied appraisal, the best overall indication that “gentlemen” were not setting a universal “example” for “others” to follow was their renewed attention toward—and a crucial re-

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<sup>29</sup>Roger Atkinson to Samuel Pleasants, 1 October 1774, *Virginia Magazine of History and Biography* 15 (1907): 356.

<sup>30</sup>Charles Dabney to William Wirt, 21 December 1805, in W. W. Henry, *Patrick Henry*, 1:251-52.

consideration of—the traditional militia as “the natural strength and only stable security of a free government.”

### The Militia Reconsidered

Governor Dunmore returned to Williamsburg on 4 December 1774 and discovered the political climate had changed during his five-month absence. On Christmas Eve, he wrote these terse words to the Colonial Secretary, the Earl of Dartmouth: “Every county . . . is now arming a Company of men, whom they call an Independent Company, for the avowed purpose of protecting their Committees, and to be employed against Government, if occasion require.”<sup>31</sup> While the governor exaggerated the fact that “Every County” had formed an armed “Company” (in truth, most had not), he was basically correct in one important particular: extra-legal governments at the county level were gradually assuming control over extra-legal military forces. Dunmore also learned of an explosive event that occurred in far-off New Hampshire on 14 December 1774—just two days short of the first anniversary of the Boston Tea Party. A force of four hundred men led by militia Major John Sullivan had stormed Fort William and Mary at Portsmouth, imprisoned the garrison, and carried off all the gunpowder. Everyone knew the motivation behind the attack. Secretary Dartmouth had written a circular letter to all North American governors two months earlier—on 19 October 1774—informing them that King George III had signed a proclamation that very day prohibiting the exportation of “Gunpowder, or any sort of arms or ammunition” from Great Britain to the colonies. Virginia’s reading public was likewise informed of the King’s effort at commercial arms

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<sup>31</sup>Dunmore to Dartmouth, 24 December 1775, in Force, *American Archives*, 1:1062.

control via the Williamsburg press on 8 December. From that day forward, gunpowder became a precious commodity, a form of personal and public property worth fighting for.<sup>32</sup>

Naturally, Dunmore was concerned Virginians would pursue New Hampshire's militant lead. However, the Old Dominion was hardly a "colony in arms" as the calendar flipped from 1774 to 1775, which was not surprising considering the fact that its sword had long been dulled by apathy, rusted with atrophy, and made brittle with ambiguity. All the same, Virginia did follow a specific example set by another colony that was much closer to home. That crucial model, moreover, would have far greater Second Amendment repercussions than purloined gunpowder.

On 12 December 1774, the Maryland Committee of Correspondence issued the following "historic" resolution:

Resolved *unanimously*, That a well regulated militia, composed of the gentlemen, freeholders, and other freemen, is the natural strength and only stable security of a free government, and that such militia will relieve the mother country from any expence in our protection and defence; will obviate the pretence of any necessity for taxing us on that account, and render it unnecessary to keep any standing army (ever dangerous to liberty) in this province; And therefore it is recommended to such of the said inhabitants of this province as are from sixteen to fifty years of age, to form themselves into companies of sixty-eight men. . . .<sup>33</sup>

The three-fold historical significance of Maryland's resolution cannot be overemphasized.

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<sup>32</sup>Robert L. Scribner and Brent Tarter, comps., eds., *Revolutionary Virginia: The Road to Independence*, vol. 3, *The Breaking Storm and the Third Convention, 1775: A Documentary Record* (Charlottesville: The University Press of Virginia, 1977), 3:301, note 2. Hereafter cited as Scribner and Tarter, *Revolutionary Virginia*, 3:(page). Lord Dartmouth's circular letter was published on 8 December 1775 as a supplement to the *Virginia Gazette* (Purdie and Dixon).

<sup>33</sup>*Maryland Gazette* (Annapolis), 15 December 1774; reprinted in Van Schreeven and Scribner, *Revolutionary Virginia*, 2:185-88. Original italics.

In the first place, this is the first recorded document in which most of the words found in the “militia clause” of the Second Amendment were originally used—specifically, “a well regulated militia . . . is the natural strength and only stable security of a free government.” Second, the Maryland resolve tells us precisely why a “well regulated militia” is vital to the “stable security of a free government”—and in language that not only echoes Richard Henry Lee’s rationalizations at the First Continental Congress, but also the anti-army ideology espoused by Radical Whigs in England: “such militia” will “relieve” Great Britain “from any expence” in protecting and defending Marylanders; will preclude the necessity of taxing them on that account; “and render it unnecessary to keep any standing army (ever dangerous to liberty) in this province.” Those important words and ideas would soon cross the Potomac River and take firm hold in neighboring Fairfax County.

Lastly—but no less importantly—this crucial resolve was issued by the authority “of the delegates appointed by the several counties of the Province of Maryland,” and officially passed along by Maryland’s centralized Committee of Correspondence; it was not the work of any individual county or parish acting self-autonomously by assuming command and control over its localized armed forces. In effect, Maryland had taken control of its sword at its extra-legal center rather than in the form of a local “grassroots movement” as Virginians were apparently doing. Then again, Maryland’s lawmakers had never relinquished that centralized authority by letting their militia statutes expire. To be sure, the work of the county committees of safety “was of the utmost importance in the transition from the colonial to the commonwealth period”—as Virginia scholar

Charles Ramsdell Lingley rightly notes in his classic study.<sup>34</sup> Nevertheless, just as the thirteen distinct colonies were attempting to form a unified center for mutual defense, Virginia's gentry ultimately confronted the same challenge within their own province, or else faced the prospect of sixty-two counties assuming autonomous control over at least as many "independent companies" of armed men.

On 17 January 1775, the Fairfax County Committee of Safety issued "A Call to Arms for Defense." Washington had returned from Philadelphia and was sitting chairman at the meeting that endorsed the proposal. However, the work was once again the product of George Mason's singular efforts. This document represents the first recorded instance in which Fairfax County not only moved to arm itself, but also arrogated the power to levy and collect a tax for its own defense—just as Spotsylvania had done the month before. But of even greater importance—especially in the long term—was this resolution: "That this Committee do concur in opinion with the Provincial Committee of the Province of *Maryland*, that a well regulated Militia, composed of gentlemen, freeholders, and other freemen, is the natural strength and only stable security of a free Government, and that such Militia will relieve our mother country from any expense in our protection and defence, will obviate the pretense of a necessity for taxing us on that account, and render it unnecessary to keep Standing Armies among us—ever dangerous to liberty. . . ."<sup>35</sup>

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<sup>34</sup>Charles Ramsdell Lingley, *The Transition in Virginia from Colony to Commonwealth* (New York: Columbia University, Longmans, Green & Co., agents, 1910; reprint, New York: AMS Press, 1967), 97-98. Hereafter cited as Lingley, *Transition in Virginia*.

<sup>35</sup>Fairfax County Committee "Call to Arms for Defense," 17 January 1775, *Virginia Gazette* (Pinkney), 2 February 1775, reprinted in Van Schreeven and Scribner, *Revolutionary Virginia*, 2:242-243.

Without question, the Fairfax resolve was nearly a verbatim copy of the resolution adopted by the Maryland Committee on 12 December 1774. It seems equally certain that Mason had access to the 15 December issue of the Annapolis *Maryland Gazette* in which that resolution first appeared. It is also likely he read that newspaper account while visiting his gravely ill mother-in-law, Sarah Edgar Eilbeck. Mrs. Eilbeck lived in Charles County, Maryland, and was suffering from breast cancer, which was remedied by a radical mastectomy in February. As a result, Mason spent considerable time in Maryland between December 1774 and February 1775. Such are the contingencies in men's private lives that can influence public affairs and even shape the contours of history.

In any case, this was the first time that the textual substance of the Second Amendment's "militia clause" was written by a Virginian and presented in an official format. It also marks the formal introduction of the anti-army ideology into Virginia's documented literature, which had been conspicuously absent up to that point.

Another significant (yet overlooked) aspect of this document is the fact that the Fairfax Committee acknowledged and endorsed the opinions and recommendations of two extra-legal colonial legislatures—"the Provincial Committee of the Province of *Maryland*," and "the Provincial Congress of the *Massachusetts Bay*" (which was preparing its militias per the Suffolk Resolves)—but never mentioned or recognized its own colonial convention or committee. The reason why is easily explained. Virginian's ruling gentry realized that a power vacuum had existed in Williamsburg for quite some time—the House of Burgesses was prorogued, the Council was inept, and the Governor was off writing chapters of war and peace on the frontier. The de facto legislature, the First Virginia Convention, had adjourned and would not reconstitute itself for seven

months. The Virginia Committee of Correspondence, in the meantime, was content to leave enforcement of the Continental Association and armed preparations at the local level as directed by the First Congress. It never issued any instructions or resolves. Small wonder that counties like Fairfax were gradually assuming control over the powers of the purse and sword.

A major question remained unanswered, however: Should the counties continue to organize independent companies, or try to resurrect their dead militias? That question was apparently coming to head in Fairfax County; more specifically in the mind of George Mason—the man who “originated” the independent company movement, but was now reconsidering the attributes of a well-regulated militia.

The Fairfax Committee of Safety issued a “Militia Plan for Embodying the People” on 6 February 1775. Significantly, Mason’s new Plan encouraged more popular participation than the former “Gentlemen’s” Militia Association. The “Plan for Embodying the People” called upon “all the able-bodied Freemen from eighteen to fifty Years of Age” to enlist. Rather than obtain an expensive uniform of “Buff & Blue,” they would wear “painted Hunting-Shirts and Indian Boots, or Caps, as shall be found most convenient.” In addition, less affluent citizens would furnish themselves with one pound of gunpowder (rather than six), four pounds of lead (as opposed to twenty), and a dozen “Gun-Flints” (versus fifty). However, the “terms” of enlistment remained exactly the same as they were for “gentlemen”—not only would common soldiers enlist “freely & voluntarily,” but also choose their own officers at annual elections, as well as master “the Military Exercise & Discipline.”<sup>36</sup>

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<sup>36</sup>The Fairfax County Militia Plan “for Embodying the People” is in Rutland, *Mason Papers*, 1:215-16.

The February Militia Plan also included text from the Fairfax Militia Association formed on 21 September 1774, which has escaped the attention of most scholars. The last two sentences of the February Militia Plan are nearly a verbatim replication of the next to last paragraph in September Association—except for one crucial omission. As previously noted, the Association concluded with this pledge: “to defend to the utmost of our Power, the legal prerogatives of our Sovereign King George the third, and the just Rights & Privileges of our Country, our Posterity & ourselves upon the Principles of the British Constitution.” The Militia Plan, on the other hand, ended with these words: “to defend & preserve to the utmost of our Power, our Religion, the Laws of our Country, & the just Rights and Privileges of our fellow-Subjects, our Posterity, & ourselves, upon the Principles of the English Constitution.” The “legal prerogatives” of King George III have been deliberately deleted and replaced by presumably higher “sovereign” authorities—“our Religion” and “the Laws of our Country.” This was a significant change and obviously predated similar ideas expressed in more renowned documents—specifically *Common Sense* and The Declaration of Independence. In effect, Mason had lopped off the “head” in constitutional chain of military command.

The Fairfax Militia Plan also added crucial language that is usually ignored. After detailing how “the people” should be “embodied” into a “well regulated” militia force, Mason added these hyphenated words: “—Which Regulation & Establishment is to be preserved & continued until a regular and proper Militia Law for the Defence of the Country shall be enacted by the Legislature of this Colony.”<sup>37</sup> This was also a crucial change; recognition was now given to a “higher” centralized authority instead of a local

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<sup>37</sup>Ibid., 1:216.

governing agency to re-forge Virginia's sword on a colony-wide basis. In effect, Mason had transferred control over the sword to Virginia's own legislative body (or "Parliament") with the stroke of a quill.

In summary, George Mason declared "that a well regulated Militia, composed of gentlemen, freeholders, and other freemen"—not an "independent company" manned solely by gentlemen—"is the natural strength and only stable security of a free Government," or was now fully recognized as the sovereign sword of self-governing Virginians. Since free Virginians were armed with their own sovereign sword, the "mother country" was no longer obliged to protect and defend Virginians, or incur "any expense" in that endeavor. Consequently, there was no "necessity" to tax Virginians "on that account," nor was it necessary "to keep Standing Armies among" Virginians, which were "ever dangerous to liberty"—primarily because those forces could be used to enforce obedience and submission at gunpoint, as opposed to freely given compliance or conformity by popular consent. As far as the rights of Virginians to keep and bear arms were concerned, they entailed certain terms and conditions: voting citizenship based upon property ownership; the power to enlist their services "freely & voluntarily"; and the authority to elect their own officers. Moreover, Virginia's sovereign sword would be regulated and governed by Virginia's "Legislature," which represented the best interests and will of the people—not King George III or Parliament. The only substantive issue Mason failed to address was what "Legislature of this Colony" would enact "a regular and proper Militia Law for the Defence of the Country" (meaning Virginia, and Virginia only)—the old House of Burgesses, or a new extra-legal convention?

## Virginia's Second Convention

Governor Dunmore had received instructions on 5 October 1774 not to convene the General Assembly “until His Majesty’s further pleasure be known,” which was not yet forthcoming. Consequently, he issued a proclamation on 19 January that prorogued the next session until “the first *Thursday*,” or the fourth day, “in May next.” That same day, House Speaker Peyton Randolph issued a summons for a special election of delegates for a Second Virginia Convention.<sup>38</sup> It was imperative another convention met before May so it could elect delegates for the Second Continental Congress, which was scheduled to assemble on 10 May 1775 barring a redress of grievances. Ironically, the king, lords, and commons convened that same day (19 January) to deliberate on colonial affairs. The resulting decisions were predictable but no less disconcerting; not only were the first congress’s grievances ignored, a second gathering was prohibited. The King and Parliament’s responses were published in the *Maryland Gazette* on 2 February 1775. Four days later, George Mason wrote George Washington, “I suppose you have seen the King’s Speech, & the Addresses of both Houses in the last Maryland Paper; from the Style in which they speak of the Americans, I think we have little Hopes of a speedy Redress of Grievances; but on the Contrary we may expect to see coercive & vindictive Measures still pursued. It seems as if the King either had not receiv’d or was determined to take no Notice of the Proceedings of the Congress.”<sup>39</sup> That same day, Mason deleted the “legal prerogatives” of King George III from his “Militia Plan.”

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<sup>38</sup>*Virginia Gazette* (Pinkney), 19 January 1775.

<sup>39</sup>Mason to Washington, 6 February 1775, in Rutland, *Mason Papers*, 1:214.

Elections for the Second Convention were scheduled on 20 February. Randolph directed that the convention be held in Richmond since Dunmore was back in Williamsburg and in communication with London. It was anyone's guess whether or not he would summon a troop ship from the north and thereby "dismiss" Virginia's "Rump" legislature at gunpoint as Cromwell had done over a century ago. Throughout that election month, several committees reported their efforts to form independent companies and procure gunpowder and ammunition.

The Second Convention was in session from 20-27 March or exactly one week, thus proving to be the second shortest of the five held (the first lasted only six days). George Washington and Richard Henry Lee carried Mason's Militia Plan to the Second Convention for possible endorsement or enactment. Although the delegates at the Second Convention never passed any militia statutes, what they had to say about "a regular and proper Militia Law" is nonetheless significant.

The first three days were devoted to reviewing and adopting the resolutions of the First Continental Congress; a mere formality since the county committees were already enforcing the Continental Association and ostensibly preparing their "militias." The latter chore, of course, was problematic because legal militias no longer existed in Virginia. That unique dilemma finally came to head on the fourth day of the convention.

On Thursday 23 March, Patrick Henry proposed two resolutions. The first contained two sections. The first part was familiar in both its text and lineage: "a well regulated Militia composed of Gentlemen and yeomen is the natural Strength and only Security of a free Government: that such a Militia in this Colony would forever render it unnecessary for the Mother Country to keep among us for the purpose of our Defence any

standing Army of mercenary Forces, always subversive of the Quiet, and dangerous to the Liberties of the People; and would obviate the Pretext of taxing us for their Support.” The anti-army ideology had now hit full stride in Virginia via George Mason. Note that a “well regulated Militia” is the “*only* Security of a free Government,” and that a “standing Army of mercenary Forces” is “*always* subversive . . . and dangerous.” Also worthy of special attention is this phrase: “that such a Militia in this Colony would *forever* render it unnecessary for the Mother Country to keep among us for the purpose of our Defence any standing Army of mercenary Forces.” Understanding the history and past performance of Virginia’s militia as we do, “such a Militia” was exceptional. Surely there were enough combat-tested veterans in the gallery who knew better—including George Washington. Then again, perhaps this particular generation of “Gentlemen and Yeomen” could achieve what past generations had failed to do.

The second part of Henry’s first resolution exploded like a bombshell—even though its fuse was a generally accepted statement of fact:

That the Establishment of such a Militia is at this Time peculiarly necessary by the State of our Laws for the protection and Defence of the Country, some of which are already expired and others will shortly do so; and that the known Remissness of Government in calling us together in a Legislative Capacity renders it too insecure in this time of Danger and Distress to rely; that Opportunity will be given of renewing them in General Assembly, or making any provision to secure our inestimable Rights & Liberties from those further Violations with which they are threatened.<sup>40</sup>

This particular paragraph was all Patrick Henry; it does not appear anywhere else in any recorded committee meeting, resolution, instruction, or personal correspondence. One wishes he would have been more direct in his chosen language, but the implication is nevertheless the same. Henry was advocating that the Second Convention should act not

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<sup>40</sup>Van Schreeven and Scribner, *Revolutionary Virginia*, 2:366.

only in a “Legislative Capacity,” but also as a “Government.” Even though the immediate justification for that revolutionary step was the “Establishment of such a Militia” (or military defense), the ultimate objective was “to secure our inestimable Rights & Liberties from those further Violations with which they are threatened.” Like most political zealots, Henry laid the blame for the sorry “State of our Laws for the protection and Defence of the Country” (Virginia) solely in someone else’s lap: in this particular case, Governor Dunmore, the royal executive, for “not calling *us* together in a Legislative Capacity.” He totally ignored the fact that the legislature had ample opportunity to renew the 1757 Militia Law, but failed to do so due to their preoccupation with creating a committee of intercolonial correspondence in March 1773 following the *Gaspée* Affair.

Henry’s second resolve was short, a logical extension of the first, directly to the point, but no less politically volatile: “Resolved therefore that this Colony be immediately put into a posture of Defence,” and that a committee be appointed “to prepare a Plan for embodying, arming and disciplining such a number of Men as may be sufficient for that purpose.”<sup>41</sup> Richard Henry Lee quickly jumped up and seconded both resolves—as was becoming *his* particular habit. An “animated debate” then ensued for the better part of that momentous day.

The usual known conservatives—Pendleton, Bland, and Harrison—repeated the arguments they made at the First Continental Congress against Lee’s “amended” militia amendment; in brief, the time had not yet come to take up arms against Great Britain. More specifically, Pendleton predicted the Ministry would not resort to naked force to enforce the Coercive Acts, but would rather play a long, drawn-out commercial chess

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<sup>41</sup>Ibid.

game, in which case the better colonial strategy was demonstrated fortitude rather than a show of force. Henry had heard it all before, and quite enough of it. He rose and delivered one of the most celebrated orations in American political history—the “Liberty or Death” speech.

Henry began by blasting all “illusions of hope” for a peaceful reconciliation with Great Britain. Instead of relying upon such delusions and false expectations, Henry notably proclaimed, “I have but one lamp by which my feet are guided, and that is the lamp of experience. I know of no way of judging the future but by the past.” Experience clearly demonstrated that a “martial array” had been dispatched to force the colonists into submission. To “indulge” further in “the fond hope of peace and reconciliation” was “in vain.” “*There is no longer any room for hope,*” Henry declared. “If we wish to be free, we must fight!—I repeat it, sir, we must fight! An appeal to arms and to the God of Hosts, is all that is left us.” There simply was no other choice. “Gentlemen may cry peace, peace, but there is no peace.” War was inevitable. “Let it come!” Henry belted. Confronting his audience, he posed a question paraphrased by future war hawks perched on the perilous edge of brinkmanship: “Is life so dear, or peace so sweet, as to be purchased at the price of chains and slavery?” Lifting his head and arms to the church ceiling, he shouted, “Forbid it, Almighty God!” Henry then fixed his black-eyed stare on the elder conservatives and coldly vowed, “I know not what course others may take, but as for me—give me liberty or give me death,” and promptly plunged a make-believe dagger into his heart. And so Virginia’s very own Cato publicly martyred himself rather than submit to the tyranny of Great Britain’s Caesar (King George III). Young Edward Carrington, clerk of the Cumberland County Committee and a “gentlemen company”

enlistee, stood outside where he watched Henry through an open window. Finding his voice after the stirring oration, Carrington sighed, “Let me be buried at this spot!” His wish was granted when he died in 1810.<sup>42</sup> Not everyone inside was similarly enthralled, however.

After some likely seat shifting, debate resumed. The conservatives held fast to two related points: preparing for war would become a self-fulfilling prophecy and provoke a conflict in which outright victory was not predetermined. Dick Lee offered his own brand of biblical scripture by reminding the delegates that the race was neither to swift, nor the battle to strong, but for those who were doubly armed with guns and a just cause. Even Thomas Jefferson, who disliked addressing large groups, “argued closely, profoundly, and warmly” in support of Henry’s position. A turning point occurred, however, when a portly young merchant and militia officer from York County, Thomas Nelson, Jr., shocked the moderates and conservatives alike when “he called God to witness that if any British troops should be landed within the county of which he was the lieutenant, he would wait for no orders and would obey none which should forbid him to summon his militia and repel the invaders at the water edge.”<sup>43</sup> According to scholar Robert Scribner, a rumor then began circulating “that if Henry could not have the half-loaf of his resolutions, he would bid for the whole, by moving that the convention seize the entire

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<sup>42</sup>William Wirt reconstructed Henry’s oration years later from interviews with surviving contemporaries who were present at the time—one of the earliest examples of “oral history.” See William Wirt, *The Life of Patrick Henry* (New York: M’Elrath & Bangs, 1831), 141-42; David A. McCants, “The Authenticity of Williams Wirt’s Version of Patrick Henry’s ‘Liberty Or Death’ Speech,” *Virginia Magazine of History and Biography* 87 (1979): 387-404; W. W. Henry, *Patrick Henry*, 1:254-72; Mayer, *Son of Thunder*, 244-46.

<sup>43</sup>Randolph, *History of Virginia*, 213.

apparatus of government, appoint the magistrates, and undertake the levying and collecting of taxes.”<sup>44</sup> Clearly the power of the sword would be included, which was the real issue at hand.

Faced with that grim prospect and recognizing the sincerity of Nelson’s remarks, the conservatives shifted ground and tried to weaken Henry’s resolves. The convention’s clerk, John Tazewell recorded: “Amendment proposed to 2d. Resolution respecting the Arming of the Militia—Instead of, ‘Resolved therefore that this Colony be immediately put into a posture of Defence &c.’ the Entry be, ‘Resolved therefore, *as the Opinion of this Convention*, that This Colony *ought to be* put into a posture of Defence &c.”<sup>45</sup> The ploy was palpable; as an advisory statement, the amendment might precluded appointing a committee “to prepare a Plan for embodying, arming and disciplining such a Number of Men” for militia service. The revision failed and the entire question was put to a vote. Out of 118 delegates, Henry’s un-revised resolutions passed by a close, five-vote margin. Virginians would prepare for war as a collective colony rather than individual counties.

President Randolph appointed a twelve-member committee to draw up a “Militia Plan.” In keeping with House procedures, Randolph named Henry chairman for successfully moving the resolutions, and Richard Henry Lee vice-chairman for seconding them. Thomas Jefferson joined them, presumably because he had “argued closely, profoundly, and warmly” in favor of the measures. Randolph also appointed four conservatives who had opposed the proposals: Treasurer Robert Carter Nicholas, Benjamin Harrison, Lemuel Riddick, and Edmund Pendleton. In appointing the remainder of the committee,

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<sup>44</sup>Scribner’s editorial note in Van Schreeven and Scribner, *Revolutionary Virginia*, 2:369; citing James Parker to Charles Steuart, 6 April 1775, Charles Steuart Papers.

<sup>45</sup>Ibid.

Randolph sagely switched from politics to practicalities. He named four distinguished soldiers to the committee—Colonels George Washington, Adam Stephen, Andrew Lewis, and William Christian—as well as Isaac Zane, Jr., owner of the Marlboro Iron Works and leading Virginia supplier of pig and bar iron to Great Britain. Zane was plainly a good man to have on the committee since iron was critical not only in constructing men’s wills, but also their “arms.” Like most ruling elites, he was also colonel of his county militia. All the same, it was Peyton Randolph who held the honorary title of “Father of his Country” (meaning Virginia). He not only was a shrewd politician, but also a fair-minded man—a rare quality in a man who wielded so much political power. His appointments to this all-important committee reflected his wisdom and impartiality.

Washington was clearly a Henry supporter—at least in terms of sharpening Virginia’s sword if the boycott proved to be a blunted lance. Conveniently—but not coincidentally—he brought Mason’s Militia Plan “for Embodying the People” to Richmond. Consequently, the committee’s work was largely done for them. The members simply reinvented Mason’s wheel by adding one or two extra spokes. The original manuscript of the committee’s “Plan” is in Jefferson’s hand. It was presented on the sixth day of the Convention, 25 March 1775, and passed unanimously with little recorded debate—which is interesting considering the fact that the proposal was premised upon a major legal error.

The “Plan” opened with this statement: “The Committee propose that it be strongly recommended to the Colony diligently to put in Execution the Militia Law passed in the Year 1738 intituled [sic] An Act &c. which has become in force by the Ex-

piration of all subsequent Militia Laws.”<sup>46</sup> That simply was not true—as we know from tracing the legal history of Virginia’s militia for over a century. The 1757 Militia Act—the one that expired in 1773—declared “That all and every other act and acts, and every clause and article therein contained for the settlement and regulation of the militia . . . is hereby repealed and made void to all intents and purposes whatsoever.” Clearly, “the Militia Law passed in the Year 1738” was void—presumably because it was no longer in step with the times. “Be that as it may, the committee was no more than recommending that the statute be used as the model for training and arming volunteer companies—itsself a silent commentary on how little the art and science of war had advanced in nearly four decades.”<sup>47</sup> I would revise that rumination by Professor Scribner to reflect one of my core arguments: that rather “moldy” model for training and arming Virginia citizens shows just how little the militia had advanced in nearly four decades due to apathy, atrophy, and ambivalence—hardly a healthy “commentary” on an armed force that Patrick Henry called the “*natural* Strength and *only* Security of a free Government.” In fact, the committeemen admitted as much in their next statement to the assembled convention, which was truly significant in several respects:

The Committee are further of the Opinion that, as from the Expiration of the above mentioned latter Laws, and various other Causes, the legal and necessary disciplining of the Militia has been much neglected and a proper Provision of Arms and Ammunition has not been made, to the evident Danger of the Community in Case of Invasion or Insurrection, that it be recommended to the Inhabitants of the several Counties of this Colony that they form one or more volunteer Companies of Infantry and Troops of Horse in each County and be in constant training and Rediness to act on any Emergency.<sup>48</sup>

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<sup>46</sup>Van Schreeven and Scribner, *Revolutionary Virginia*, 2:374.

<sup>47</sup>Scribner’s editorial note in Van Schreeven and Scribner, *Revolutionary Virginia*, 2:379.

<sup>48</sup>Van Schreeven and Scribner, *Revolutionary Virginia*, 2:374-75.

As argued here, the “various other Causes” that resulted in the “Militia” being “much neglected” was basically one—an inveterate lack of interest in keeping Virginia’s sword sharp. As always, “the evident Danger of Invasion or Insurrection” was a wake-up call for napping atrophy and apathy. But what was new in this statement was the implicit legalization of “one or more volunteer Companies of Infantry and Troops of Horse in each County.” To be sure, this was only a “recommendation” and not a black-letter law enacted by the House of Burgesses. However, it effectively carried the same legal weight in its extra-legal ramifications. A centralized representative body (the Second Convention) now officially sanctioned what the counties were doing under their own “civil authority”—raising voluntary manpower for homeland security. What the Convention did next was give centralized direction as to how those citizen-soldiers should be properly organized, well regulated, and armed.

The committee “Plan” specifically “recommended” that Tidewater counties form “troops of Horse”; all other counties in the Piedmont and the mountainous west were to “pay a more particular Attention to the forming a good Infantry.” The frontier was obviously viewed as Virginia’s most vulnerable point; that infantry should be posted along the western border to hold the high ground; and that cavalry reinforcements would race to the rescue. The “Plan” then detailed how the infantry and horse should be armed, equipped, and commanded. As to the “infantry,” thirteen key words stand out that relate to the future Second Amendment—“That every man be provided with a good Rifle if to be had.”

At the 1788 Virginia Ratifying Convention, Patrick Henry declared, “The great object is, that every man be armed.” The two phrases are similar and seem to express a

shared meaning. In 1775 Henry was chairman of the committee that presented a “Plan for embodying, arming and disciplining” Virginia’s manpower. In 1788 Henry was against a constitutional “plan” that he believed would undermine that earlier objective—as the following full quotation attests: “The great object is, that every man be armed. But can the people afford to pay for double sets of arms, &c.? Every one who is able may have a gun. But we have learned, by experience, that, necessary as it is to have arms, and though our Assembly has, by a succession of laws for many years, endeavored to have the militia completely armed, it is still far from being the case. When this power is given up to Congress without limitation or bounds, how will your militia be armed?”<sup>49</sup> At the Second Convention, Chairman Henry thought he had devised a “plan” that answered the question “how will your militia be armed?” Twelve years later, apparently, a “completely armed” militia was “still far from being the case” in Virginia.

It is important “to keep and bear” Henry’s future question in mind—“When this *power* is given up to Congress without limitation or bounds, how will your *militia* be armed?” The future constitutional answer—and a core argument of this dissertation—was this: “the right of the people to keep and bear Arms, shall not be infringed.” The irony in relation to the Second Convention’s “extra-legal power” also merits reflection and remembrance.

The next section of the proposed plan recommended that County Committees of Safety “collect from their Constituents” enough money “to purchase half a pound of Gunpowder, one pound of Lead, necessary Flints and Cartridge paper, for every Tithable

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<sup>49</sup>Jonathan Elliot, ed., *The Debates in the several State Conventions on the adoption of the Federal Constitution . . . in 1787*, 5 vols. (New York: Burt Franklin, 1888; reprint, New York: Ayer Company, Publishers, Inc., 1987), 3:386 (page references are to reprint edition). Hereafter cited as Elliot, *Virginia Debates*.

person in the County;” that the county committees “immediately take effectual Measures” to procure those munitions and store them “in such Place or Places as they may think best.” The next sentence was challenged from the convention floor: “And it is earnestly recommended to each Individual to pay such proportion of the Money necessary for these purposes as by the respective Committees shall be judged requisite.” One would assume that some delegates took exception to the fact that the County Committees were authorized to assume legislative power over the purse. Yet as Robert Scribner relates, the issue was far more complicated than that:

John Tazewell wrote the sentence on a separate piece of paper, thus suggesting that the sentence survived a motion to delete. But there is every appearance that before the vote was taken the debate was carried on with renewed warmth and ranged beyond the subject to which the last sentence itself is limited. For laying the paper endwise, Tazewell jotted down the pros and cons of the argument: ‘System makes a breach in Constitution—To defend it rather—Approves the plan of Ind. Companies—if right why not say so?—Freeman shd. speak freely—Umbrage—Appears to Levy Mens Horses—How will it appear to his Majesty?—This plan will produce Union of Discipline—Measures respecting us already determined.’<sup>50</sup>

Evidently, the conservatives were using an unconstitutional power over the purse pretext to restrain an equally unconstitutional assumption of power over the sword. However, the Convention quickly deflated “purse” criticisms by appointing a three-man General Committee to oversee the expenditure of bucks for bullets. Moreover, the committeemen were Treasurer Robert Carter Nicholas, Council President Thomas Nelson, Sr., and sixty-two-year-old Thomas Whiting of Gloucester County, a long-time Tidewater burgess whose grandfather served as Councilor and Treasurer—thoroughbred conservatives to a man.

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<sup>50</sup>Scribner editorial note in Van Schreeven and Scribner, *Revolutionary Virginia*, 2:379.

That, in its entirety, was the “Plan for embodying, arming and disciplining such a Number of Men” so that Virginia would “be immediately put into a posture of Defence” as unanimously passed by the Second Virginia Convention on Saturday, 25 March 1775.<sup>51</sup> The result was not a statute passed by legitimate lawmakers, but a political program for homeland security crafted by men chosen by the people and who acted in their best interests. In summary, the General Assembly—if and when it next met—was to enact a new militia law. Until then, the old 1738 statute was considered in effect. Even so, the counties were authorized to raise companies of volunteers and procure arms and ammunition for those forces rather than pay due attention to their “much neglected” militias. As Clerk Tazewell’s abbreviated penmanship attests, the delegates were not speaking “freely” (or openly) about their real motives and intentions—to channel all of their “armed resources” into *independent* forces rather than “lawful” militias under the constitutional command of a British chief executive. That was the true significance of the convention’s labors in terms of military power. On occasion, Second Amendment scholars have to read “between the lines” to discover the “original meanings” they seek.

The Second Convention did other important political work on behalf of the people that day as well. The delegates *unanimously* resolved “that the most cordial Thanks of the People of this Colony are a Tribute justly due to our worthy Governor Lord Dunmore, for his truly noble, wise and spirited Conduct on the late Expedition against our Indian Enemy—a Conduct which at once evinces his Excellency’s Attention to the true Interests of this Colony, and a zeal in the executive Department, which no Dangers can divert or Difficulties hinder from atcheiving [sic] the most important Services to the People who

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<sup>51</sup>The “Plan” as passed is in Van Schreeven and Scribner, *Revolutionary Virginia*, 2:374-75.

have the happiness to live under his Administration.”<sup>52</sup> Edmund Randolph expressed indignation years later that the convention “should pollute itself by an unfelt eulogium on Dunmore” and called the resolution a “glaring sacrifice of sincerity.”<sup>53</sup> Patrick Henry (among others) was no doubt peeved that the phrase “a Zeal in the executive Department” basically negated his phrase “the known Remissness of Government” just two days earlier (second resolution on 23 March). Without question the commendation was doubly ironic. Dunmore could not accept praise of his martial conduct from an extra-legal convention, a body that justly recognized a military victory by a commander in chief in the field, then barred his executive control over “independent” militiamen. Another resolve passed that day likewise related to “Dunmore’s War” and was also doubly ironic. It read:

Resolved unanimously, that the Thanks of this Convention be presented to the Gentlemen Officers & Soldiers, who lately so nobly defended this Colony from the Savage Enemy on our Frontier & by their Bravery, not only procured Success to our Arms, but must have convinced the Enemy it will be their true Interest to preserve the Peace on the Terms stipulated by Excellency Lord Dunmore. That we sincerely condole with the Relations and Acquaintance[s] of those brave Men who so nobly fell in Battle, on that mournful Event; and assure all who have rendered such important Services to this Colony, that so soon as Opportunity permits, we will most cheerfully do every thing on our part to make them ample Satisfaction.<sup>54</sup>

Ironically, that well deserved gratitude and praise was heaped upon an all-volunteer army commanded by a royal executive—a “right” to bear arms that was freely given, but at great cost. Ironically, “every thing” that the delegates would “most cheerfully do” for the families of those killed had to wait until they legitimately sat as an assembly of “burgesses.”

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<sup>52</sup>Ibid., 2:376.

<sup>53</sup>Randolph, *History of Virginia*, 214.

<sup>54</sup>Ibid.

The last resolution passed on that final day was one of the most important measures the Second Convention instituted during the eight days it was in session. Virginia scholar Charles Ramsdell Lingley best explains that last resolve, as well as summarizes its vital significance:

The counties were advised to choose delegates to represent them in convention for one year. Several things combined to make this an important advance. In the first place the president of the convention was the speaker of the House of Burgesses; the colonial treasurer had become treasurer of the convention; the members of the two bodies were practically identical. And now members were to be chosen to the convention for a definite term of office. Finally the royal government was destined to fall to pieces within a few months. Such an occurrence left the colony without any governing body except the convention. What could be more natural than that the convention, already indistinguishable from the legal legislature except that it had no royal sanction, should step in and become actually the legislature of the colony?<sup>55</sup>

Of course the only other vital governing mechanism absent was an executive magistrate to execute and enforce the convention's laws and command the armed forces—unless that legislature decided to abandon the cherished “political balance” that was the foundation of English constitutionalism by enforcing its own laws and assuming direct command over the sword.

It would be up to Virginia's Third Convention to make that momentous decision just five months later—on Thursday, 17 August 1775. On 21 August, that same “legislative convention” would enact “An ordinance for raising & embodying a sufficient Force for the Defence & protection of this Colony.” For the first time in its 168-year history, the Old Dominion would have absolute sovereignty over its own sword. Virginians were not about to relinquish that political power without a fight—whether it was against the British Empire or any other centralized form of consolidated of government.

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<sup>55</sup>Lingley, *Transition in Virginia*, 136.

The following chapter describes the explosive events leading up to the “emancipation” of Virginia’s sword. Ironically, it was inextricably linked to the threatened emancipation of black slaves.

## CHAPTER 8

### VIRGINIA'S SOVEREIGN SWORD: CIVIL POWER AND THE THIRD CONVENTION

“The Sanguine are for rash Measures without consideration, the Flegmatic to avoid that extreme are afraid to move at all, while a third Class take the middle way and endeavor by tempering the first sort to a Steddy, tho’ Active Point of Defense.”

—Edmund Pendleton  
15 June 1775<sup>1</sup>

“The Minute-Plan I think is a wise one, & will in a short time furnish 8,000 good Troops, ready for Action, & composed of men in whose Hands the Sword may be safely trusted.”

—George Mason  
14 October 1775<sup>2</sup>

The purpose of this chapter is to examine the events and circumstances that resulted in the Third Virginia Convention, as well as explain the significance of that meeting with respect to the Second Amendment. The major theme throughout is that strict subordination of the military to civil authority was a predominant factor in forging Virginia’s sovereign sword. In fact, that republican principle was instrumental in bringing about the demise of the “independent companies” and instituting an entirely different form of armed manpower in their stead—the “Minutemen.”

#### Gunpowder, Slaves, and Military Power

Patrick Henry rode off to Hanover on 27 March flushed with his great victory at the Second Convention. His rhetorical skills and committee work had achieved at Rich-

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<sup>1</sup>Pendleton to Joseph Chew, 15 June 1775, in David John Mays, ed., *The Letters and Papers of Edmund Pendleton, 1734-1803*, 2 vols. (Charlottesville: The University Press of Virginia, 1967), 1:110. Hereafter cited as Mays, *Pendleton Papers*.

<sup>2</sup>Mason to George Washington, 14 October 1775, in Rutland, *Mason Papers*, 1:255-56.

mond what he had failed to obtain in Philadelphia—a full-fledged commitment to prepare Virginia for armed resistance. He could now focus his attention on preparing his home county for military action before assuming his duties as a congressional delegate to the Second Continental Congress. Indeed, there is scant documented evidence that Hanover’s independent company had been very active following Henry’s “recruitment” speech in mid-November of 1774. Henry’s lack of personal participation, however, is understandable; his wife, Sarah Shelton Henry, was gravely ill, suffering from a prolonged dependency and subject to fits of lunacy. She died a month before the Second Convention convened. At the end of March, Henry was “buoyant with success and spoiling for a fight.”<sup>3</sup> In three weeks time, Henry would have his “fight.”

In the meantime, other counties were acting slowly on the Second Convention’s “recommendations” to form “volunteer Companies” and raise money for ammunition. By most accounts, Fairfax County was leading the pack in Virginia’s arms race. George Mason boasted in 1778 that the “first independent company formed in Virginia, and indeed on the Continent” was constituted from his “Militia Plan.”<sup>4</sup> Some aspects of that scheme, however, did not proceed so smoothly or quickly. Under the Fairfax Plan, Washington and Mason were charged with procuring gunpowder for the “Independent Militia Company,” which Washington commanded. Both men used their own money in the form of personal loans to purchase the powder, which they had some difficulty recouping from parsimonious Fairfax taxpayers. Mason’s eldest son, George, took on that odious duty as the designated collector of the pounds and pence. In a letter to Washing-

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<sup>3</sup>Mayer, *Son of Thunder*, 230-31, 240, 248.

<sup>4</sup>Mason To [Mr.—Brent?], 2 October 1778, Rutland, *Mason Papers*, 1:434.

ton two weeks before the Second Convention met, Mason described in no uncertain terms how the communal spirit of fiscal self-sacrifice was proceeding at that particular point and time:

We make but a poor Hand of collecting; very few pay, tho' every Body promises, except Mr. Hartshorn, of Alexandria; who flatly refused: his Conscience I suppose wou'd not suffer him to be concern'd in paying for the Instruments of Death.<sup>5</sup>

“Mr. Hartshorn” was not only a wealthy merchant, but also a Quaker—which best explains his “Conscience” in refusing to ante up for lethal ammunition. Nonetheless, he was also a member of the Fairfax Committee of Safety, which supervised the arming of the county’s volunteers.<sup>6</sup> Apparently, enlisting manpower proved just as difficult as procuring money and munitions.

Under the terms of its Association, the Fairfax Company was to elect its officers as soon as fifty men joined up. Those elections were not held until sometime between 17 and 26 April 1775, seven months after the unit was initially formed; suggesting that the Second Convention’s stamp of approval caused a “flurry” of volunteerism, if only in Fairfax County. At those elections, George Mason presented a formal “Address.” Mason’s speech is important because it reveals his thoughts on military power in connection with two political theories: the “anti-army” ideology, and “natural rights.” Those attitudes were re-expressed in his draft of Virginia’s Declaration of Rights, and thus merit the following attention:

This company is essentially different from a common collection of mercenary soldiers. It was formed upon the liberal sentiments of public good, for the great and useful purposes of defending our country, and preserving those inestimable rights which we inherit from our ancestors; it was intended in these times of danger, to rouse the attention of the public, to introduce the use of arms and discipline, to infuse

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<sup>5</sup>Mason to George Washington, 9 March 1775, in *ibid.*, 1:225.

<sup>6</sup>For Hartshorn, see Rutland’s editorial note in *ibid.*, 1:226.

a martial spirit of emulation, and to provide a fund of officers; that in case of absolute necessity, the people might be better enabled to act in defence of their invaded liberty. Upon this generous and public-spirited plan, gentlemen of the first fortune and character among us have become members of the Fairfax Independent Company, have submitted to stand in the ranks as common soldiers, and to pay due obedience to the officers of their own choice. . . .

This was “Good Old Whig” ideology; just the sort of speech a rich republican would have given at a militia muster on election day in Oceana—except for its “intended” purpose: “to *introduce* the use of arms and discipline, and *infuse* a martial spirit of emulation,” both of which were obviously lacking among Virginia’s lower class property-owners and citizens. Even so, this was no “company” of “mercenary soldiers,” but gentlemen-volunteers of “first fortune” (property) and “character” (virtue).

However, Mason then shifted ideological gears as evidenced in this important excerpt:

We came equals into this world, and equals shall we go out of it. All men are by nature born equally free and independent. To protect the weaker from the injuries and insults of the stronger were societies first formed; when men entered into compacts to give up some of their natural rights, that by union and mutual assistance they might secure the rest; but they gave up no more than the nature of thing required. Every society, all government, and every kind of civil compact therefore, is or ought to be, calculated for the general good and safety of the community. Every power, every authority vested in particular men is, or ought to be, ultimately directed to this sole end; and whenever any power or authority whatever extends further, or is of longer duration than is in its nature necessary for these purposes, it may be called government, but it is in fact oppression.

Mason later incorporated that “natural rights theory” in Virginia’s Declaration of Rights, as did Thomas Jefferson in the Declaration of Independence. It formed the core creed of American constitutionalism. As far as the future Second Amendment is concerned, this phrase stands out: “Every power, every authority vested in particular men is, or ought to be, ultimately directed” toward a “sole end”—“the general good and safety of the community.” One of those “powers,” of course, was the power of the sword; if that power

extended beyond the “general good and safety of the community,” or was exercised for a longer period than was necessary to fulfill those “purposes,” then it breached the “civil compact” (government) and devolved into “oppression.” Article Thirteen in Virginia’s Declaration subsequently ensured that military and police power would not be used as a means to oppress the people.

Mason also clarified the proper means to control the power of the sword in the following paragraph, and emphasized the core principle of republicanism in the process:

To prevent these fatal effects, and to restore mankind to its native rights hath been the study of some of the best men that this world ever produced; and the most effectual means that human wisdom hath ever been able to devise, is frequently appealing to the body of the people, to those constituent members from whom authority originated, for their approbation or dissent. Whenever this is neglected or evaded, or the free voice of the people is suppressed or corrupted; or whenever any military establishment or authority is not, by some certain mode of rotation, dissolved into and blended with that mass from which it was taken, inevitable destruction to the state follows. . . . In all our associations; in all our agreements let us never lose sight of this fundamental maxim—that all power was originally lodged in, and consequently is derived from, the people. We should wear it as a breastplate, and buckle it on as our armour.

In this passage, Mason offers his “meaning” on “the right to keep and bear arms.” As before, all power—including military and police power—“was originally lodged in, and consequently is derived from, the people.” Moreover, “the most effectual means” ever devised by “human wisdom” to correct the “fatal effects” that resulted from an excess of power and abuse of authority was a frequent appeal to “the people” for “their approbation or dissent.” In other words, popular consent precluded a resort to armed political violence (insurrections). However, if the “free voice of the people” was neglected, evaded, suppressed or corrupted—or if “any military establishment or authority” was no longer composed of “mass from which it was taken” and therefore independent of the peoples’ will—then the “state” would inevitably be destroyed, as would the civil compact that cre-

ated that polity. Mason made it perfectly clear that the “profession” of arms was anathema: “By investing our officers with a power for life, or for an unlimited time, we are acting diametrically contrary to the principles of liberty for which we profess to contend, and establishing a precedent which may prove fatal.<sup>7</sup> This was decidedly “anti-standing army” ideology.

Mason was not alone in addressing an assembly of armed men in April 1775. On the eleventh, the Albemarle County Committee issued two “Resolutions respecting Independent Military Companies.” The first resolve stated, “that the companies when raised should not be led to duty without the voice of the committee.” The second declared “that every person that inlists shall be obliged to go after the determination of the Committee, unless he gives sufficient proof by two witnesses of his Inability.”<sup>8</sup> The intent of those resolves is plain: Albemarle’s armed manpower was subordinate to the civil power exercised by the Committee of Safety. One week later (18 April), twenty-three squires stepped forward and signed an “Agreement of Gentlemen Volunteers.” Their “terms of Inlisting” began with this statement: “We the subscribers volunteers in the Independent Companies for the county of Albemarle, do most Solemnly bind ourselves by the sacred ties of virtue, Honor & love to our Country, to be at all times ready to execute the command of the committee, in defence of the rights of America (unless incapacitated) . . . .” The gentlemen-soldiers also obliged themselves “to obey the commands of the officers

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<sup>7</sup>Mason, “Remarks on Annual Elections for the Fairfax Independent Company,” in Rutland, *Mason Papers*, 1:229-232, passim.

<sup>8</sup> Robert L. Scribner and Brent Tarter, comps., eds., *Revolutionary Virginia: The Road to Independence*, vol. 3, *The Breaking Storm and the Third Convention, 1775: A Documentary Record* (Charlottesville: The University Press of Virginia, 1977), 3:39-40. Hereafter cited as Scribner and Tarter, *Revolutionary Virginia*, 3:(specific page reference).

by ourselves elected from the Inlisted Volunteers, to Muster four times in the year or oftener If necessary.<sup>9</sup>

One of the lieutenants elected that day was thirty-two-year-old George Gilmer, who promptly gave an address to his troops. Like Mason's address, Lieutenant Gilmer's is instructive in terms of its "ideological" projections. Unlike Mason, Gilmer leaned more toward the Moderate Whig point of view—particularly in terms of military "professionalism":

We are also, Gentl., directed by the Convention to practice the Exercise appointed by his Majesty [in] 1764. There may be [some] who think the military antics & ceremonies altogether useless, others who may disapprove of some particular parts of these evolutions; but, Gentlemen, as it is an impracticable matter to please or satisfy the whim & inclination of everyone, it is most righteous that we Should endeavor to make ourselves masters of this exercise & thereby comply with the recommendation of the Convention which will be better than to gratify any of our private dispositions. . . .

My Good Soldiers, let me beg [you] to look on this matter with a serious eye & to make yourselves masters of every art of war with the quickest dispatch.

Note in particular Gilmer's plea that individualism—or the "whims, inclinations, and private dispositions" of each and every soldier—is "impracticable" in a military "company" that requires cohesion and conformity to be effective in battle. Moreover, Gilmer concluded his address with words that clearly indicated his desire to lead by "professional" example:

Gentln., you behold me before you with my Tomahawk girt about me, & tho I am but too sensible of my awkwardness, yet your esteem shall animate me to its proper use. & give me liberty now, Soldiers, so plight my honour to you that my abilities shall not only be exerted to make myself Master of the necessary parade of war but of the really usefull branches of that Intricate Science. & I do now dedicate my Arms, life, & fortune to the protection of my Country & the service of the first Company of Independents for the County of Albemar[le.] with this firm resolve—never to bury the Tomahawk until liberty shall be fixed on an immoveable basis thro the whole Continent.<sup>10</sup>

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<sup>9</sup>Ibid., 3:48-49.

Gilmer openly acknowledged his awkwardness and amateurism as a tomahawk toting “rookie,” but nonetheless pledged to master the “Intricate Science” of arms that Daniel Defoe promoted in the previous century. We also discover an extraordinary enthusiasm to take up arms that was atypical in preceding generations of Virginia militiamen—even among “Gentlemen-Soldiers.” Granted, that martial spirit—at least in this specific instance—was evidenced among just twenty-three men in one Piedmont county. It was yet to be seen how contagious that depth of devotion would be, or if the proper “civil authorities” could keep that *rage militaire* under control. In fact, the Albemarle Volunteers broke their vow to “execute the command of the committee” a mere two weeks later when Governor Dunmore confiscated the colony’s gunpowder cache and threatened to emancipate and arm black slaves.

As Professor Woody Holton recently observed, “The powder magazine incident is one of those chestnuts of Virginia history. It is significant because it was the first time since Bacon’s Rebellion in 1676 that a large number of Virginians had taken up arms to attack a royal governor, and even more because it served to ‘widen the unhappy breach between Great Britain and her colonies,’ as the soldiers encamped at Fredericksburg declared.”<sup>11</sup> For the purposes of this study, that “chestnut” will be re-roasted in terms of the Second Amendment, focusing in particular on why and how Virginians exercised their right to keep and bear arms during that episode, as well as the ultimate consequences of that action.

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<sup>10</sup>Ibid., 3:50-52, passim.

<sup>11</sup>Holton, *Forced Founders*, 148; quotation from “Fredericksburg encampment,” 29 April 1775, in Scribner and Tarter, *Revolutionary Virginia*, 3:71.

To begin, Virginians took up arms against their chief executive for two interrelated reasons: Dunmore had “disarmed” white Virginians, leaving them defenseless against a slave insurrection, which he then threatened to instigate. At bottom, “the people” were incensed that their “right to keep and bear arms” for the purpose of crushing insurrections had been “infringed.” As Edmund Randolph declared years later, confiscating the powder was “not far removed from assassination.” In his estimate, Dunmore intentionally “designed, by disarming the people, to weaken the means of opposing an insurrection of the slaves . . . for a protection against whom in part the magazine was first built.”<sup>12</sup> However, the General Assembly act that created “one good substantial house of brick, which shall be called the magazine,” conceded an unequivocal—and highly significant—point: “In which magazine, all the arms, gun-powder, and ammunition, now in this colony, *belonging to the king*, or which shall at any time hereafter be, belonging to his majesty, his heirs or successors, in this colony, may be lodged and kept.” In addition, it was the “lawful” authority of either “the lieutenant-governor, or the governor, or the commander in chief of this dominion . . . to constitute and appoint a person to look after the magazine, and the ammunition lodged therein.”<sup>13</sup> Legally, the gunpowder did not belong to “the people” but to King George III, and it was Governor Dunmore’s responsibility to care for and control it.

On the other hand, George Mason had declared just days earlier that “Every society, all government, and every kind of civil compact therefore, is our ought to be, calculated for the general good and safety of the community,” and that “Every power, every

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<sup>12</sup>Randolph, *History of Virginia*, 219.

<sup>13</sup>“An act for erecting a Magazine,” in Hening, *Statutes*, 4:55-57. My emphasis.

authority vested in particular men is, or ought to be, ultimately directed to this sole end”—which included the military power and command authority “vested” in kings and governors. Consequently, Dunmore had breached the “civil compact” by committing an act that was not intended “for the general good and safety of the community.” Mason also maintained “the most effectual means” devised by “human wisdom” to “prevent” such an abuse of power and authority was an appeal to the people for their “approbation or dissent.” Clearly, the chief executive deliberately “neglected, or evaded the free voice of the people” when he removed the gunpowder on his own volition—and with good reason, if only in the Governor’s judgment.

Everyone knew Dunmore’s real motive for removing the gunpowder. Although the Governor claimed he was protecting it from rebellious blacks, he was actually keeping it out of the hands of rebellious whites. Dunmore informed Britain’s secretary of state for the colonies that the Second Convention had recently approved a “Plan for embodying, arming and disciplining the Militia,” and recommended “raising a body of armed Men in all the counties” that was not his to command. In truth, the Second Convention fundamentally altered the relationship between royal chief executives and the military forces of Virginia. Indeed, the Governor was losing his authority over an indispensable resource—arms bearing manpower. However, arms bearing men needed another resource to be effective (or dangerous)—munitions. Hence, Dunmore considered it “prudent to remove some Gunpowder which was in a Magazine in this place, where it lay exposed to any attempt that might be made to seize it, and I had reason to believe the people intended to take that step.”<sup>14</sup> His assumption that Virginians would even consider

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<sup>14</sup>Dunmore to Dartmouth, 1 May 1775, in Kennedy, *Journals of the House, 1773-1776*, xvii-xviii. Also see Public Record Office, Colonial Office Series Group 5, Class

such a drastic “step” was significant. Dunmore realized that imposing the king’s embargo on munitions now required an equally drastic measure: outright confiscation. His Massachusetts counterpart, governor and North America military commander General Thomas Gage, had reached the same conclusion just two days earlier. For both men, it seemed the only alternative to forestall an armed insurrection in the colonies.

Without question, the governor’s sudden seizure resonated like a shotgun blast, and accordingly inflicted irreparable injury to the political sinews that once held Virginia and Great Britain together. Yet by the same token, that explosive episode was also double-triggered. Dunmore’s edgy finger was not the only one that pulled a charged lever; Virginians had an itchy hand in the affair as well. In fact, Edmund Pendleton wrote a revealing letter to George Washington on the very day Dunmore removed the gunpowder, but before Pendleton was aware the Governor had done so. Pendleton penned: “We have a loose Report that the Governor has taken the Key of the Magazine, and that a sloop with a Company of Marines was lying in each of the Creeks, which it was supposed were to take the Arms and Ammunition from thence. Some of our Independents [independent companies] had a strong inclination to go immediately and secure the Arms and Ammunition.”<sup>15</sup> But rather than seizing the munitions outright, the citizens of Williamsburg instead kept “strong patrols on foot” to guard the magazine for about week. But after several nights of patrolling from dusk to dawn, the town guard grew “negligent” and fi-

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1373, folio 63; Virginia Colonial Records Project microfilm, Colonial Williamsburg Foundation, Williamsburg, VA.

<sup>15</sup>Pendleton to Washington, 21 April 1775, in Mays, *Pendleton Papers*, 1:102.

nally disbanded on Thursday, 20 April, thus providing Dunmore with an opportunity to grab the gunpowder.<sup>16</sup>

The day Dunmore seized the gunpowder, an armed crowd gathered on the town common intent on forcing him to return it, but were persuaded to disperse after the town council, House Speaker Peyton Randolph, and Treasurer Robert Carter Nicholas met with Dunmore. “Considering [themselves] as guardians of the city,” the delegation asked the Governor “upon what motives and for what particular purpose the powder has been carried off in such manner” and that it “be immediately returned to the magazine.”<sup>17</sup> Dunmore’s response was promptly published in the *Virginia Gazette*: “hearing of an insurrection in a neighboring county, he had removed the powder from the magazine, where he did not think it secure, to a place where it would be in perfect security; and that, upon his word of honor, whenever it was wanted on any insurrection, it should be delivered in half an hour.” The Governor also stated “He was surprised to hear the people were under arms on this occasion, and that he should not think it prudent to put powder into their hands in such a situation.”<sup>18</sup> Among those “under arms” was Williamsburg’s “independent company” commanded by Captains William Finney and George Nicholas (the Treasurer’s eldest son). In any case, the explosive situation was basically defused.

But on Sunday, 23 April, Dunmore reignited the crisis with his hot temper. Apparently still simmering over Friday’s episode, the Governor exploded his anger before

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<sup>16</sup>Scribner and Tarter, *Revolutionary Virginia*, 3:57, note 2.

<sup>17</sup>“Municipal Common Hall to Governor Dunmore,” 21 April 1775, in Scribner and Tarter, *Revolutionary Virginia*, 3:54-55.

<sup>18</sup>Dunmore’s “Oral Reply,” *Virginia Gazette* (Pinkney), 20 April 1775, in Scribner and Tarter, *Revolutionary Virginia*, 3:55.

Dr. William Pasteur, who was visiting a patient at the Palace. According to Pasteur's testimony before a House committee, Dunmore "swore by the living God that if a Grain of Powder was burnt at" his naval officers, "or if any Injury and insult was offered to himself, . . . he would declare Freedom to the Slaves, and reduce the City of *Williamsburg* to Ashes. His Lordship then mentioned setting up the Royal Standard [a formal declaration of war], but did not say that he would actually do it, but said he believed, if he did he should have a Majority of white People and all the Slaves on the side of Government, that he had once fought for the *Virginians* [against the Shawnee], and that, by GOD, he would let them see that he could fight against them, and declared that in a short Time, he could depopulate the whole Country." So there would be no mistaking his intentions, Dunmore told Dr. Pasteur to "immediately communicate" his words "to the Speaker and other Gentlemen of the Town."<sup>19</sup> Moreover, he ordered the arrest of Captains Finney and Nicholas; thereby precluding another armed demonstration by Williamsburg's newly formed independent company. Once again, however, cooler heads diffused the explosive state of affairs. For the moment, Speaker Randolph and the other town "Gentlemen" simply ignored Dunmore's bombast.<sup>20</sup> Even so, Dunmore's foolish outburst did precipitate an armed uprising, not by rebellious slaves but by a popular politician (and slave owner) who harbored military ambitions.

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<sup>19</sup>"Report of the Committee on the Causes of the Late Disturbances," in Kennedy, *Journals of the House, 1773-1776*, 231.

<sup>20</sup>Primary sources on the gunpowder incident include: Alexander Purdie's *Virginia Gazette* (Williamsburg), 21 April 1775, supplement; John Dixon and William Hunter's *Virginia Gazette* (Williamsburg), 22 April 1775; "Report of the committee on the causes of the late disturbances," in Kennedy, *Journals of the House, 1773-1776*, 213-37; and Edmund Randolph, *History of Virginia*, 219-20. For secondary sources see: Mayer, *Son of Thunder*, 249-261; Lingley, *The Transition in Virginia*, 66-69; H. J. Eckenrode, *The*

Upon learning of the powder raid on Monday, 24 April, alarmists outside the capital began marshalling over six hundred armed volunteers around Fredericksburg. Their intention was to march into a now peaceful Williamsburg and defend the city. According to Michael McDonnell's research, most of these swarming recruits "were no longer predominantly gentry but more a cross section of lower to middling farmers."<sup>21</sup> The primary incentive behind the outpouring of martial fervor among "non-gentlemen" was that Dunmore's removal of the gunpowder suspiciously coincided with the same action taken by General Gage in Massachusetts; thus giving the distinct impression that a ministerial plot was afoot to disarm the colonists. Moreover, Dunmore's threat to emancipate and arm Virginia's slaves heightened those conspiratorial fears. However, it should also be noted that these citizens were volunteering to be soldiers in response to an immediate crisis that most likely would be resolved quickly; they were not signing up for a prolonged war. In fact, volunteers could vote on what "action" they would take, and thus determine how long they would be away from their farms.

All the same, Peyton Randolph—in collaboration with Edmund Pendleton and Richard Henry Lee—assured the massing volunteers that Williamsburg was safe and secure. A letter was hastily dispatched to Fredericksburg on Thursday, 24 April, which explicated the whole episode. "The Inhabitants were so much exasperated" upon learning the gunpowder had been removed, Randolph explained, "that they flew to their Arms;

This incensed the Governor a good deal and from every thing we can learn was the principal Reason why his Answer was not more explicit and favorable. His Excellency has repeatedly assured several Respectable Gentlemen that his only motive in Removing the Powder was to secure it, as there had been an alarm from the County of

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*Revolution in Virginia* (Boston: Houghton Mifflin Company, 1916), 49-53; Selby, *Revolution in Virginia*, 1-6, and Holton, *Forced Founders*, 143-152.

<sup>21</sup>McDonnell, "Mobilization and Popular Culture," 956.

Surry [of a slave revolt], which at first seem'd too well founded, 'tho it afterwards proved Groundless; besides what he has said in his Public Answer, he has given private assurances to Several Gentlemen, that the Powder shall be Return'd to the Magazine, 'tho he has not condescended to fix the Day for its Return.

Randolph then put himself in Dunmore's shoes: "The Governor considers his Honor as at Stake; he thinks that he acted for the best and will not be *compell'd* to what we have abundant Reason to believe he would cheerfully do, were he left to himself." An honorable man himself, Randolph wanted to give Dunmore every opportunity to act appropriately without pointing a loaded gun at his head. He also offered some sober advice for Virginia's armed citizens: "If we then may be permitted to advise, it is our opinion and most earnest request that Matters may be quieted for the present at least; we are firmly persuaded that perfect Tranquility will be speedily Returned; By pursuing this Course we foresee no Hazard or even inconvenience that can ensue; whereas we are apprehensive, and this we think on good Grounds, that violent measures may produce effects, which God only knows the consequences of."<sup>22</sup>

For most of the colony's ruling class, civil order and control had to be maintained. Of equal importance, military power must remain subordinate to civil authority; which meant the people's elected representatives should decide when political violence was necessary—not the people "out of doors." To be sure, military power was embodied in "that mass from which it was taken"—as George Mason made clear in his address to the Fairfax Company. However, the people were also obliged to uphold their end of the civil compact by allowing themselves to be governed by their elected officials. In other

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<sup>22</sup>Peyton Randolph to Mann Page, Jr., Lewis Willis, and Benjamin Grymes, Jr., Esquires," 27 April 1775, in Scribner and Tarter, *Revolutionary Virginia*, 3:63-64. Original emphasis.

words, the right of the people to keep and bear arms was part of the civil compact and subject to civil limitations.

Despite hearing the momentous news of Lexington and Concord before Randolph's letter arrived, the armed force at Fredericksburg voted to disband on April 29 in deference to Virginia's political leadership, while "at the same time justly dreading the horrors of a civil war . . . and therefore preferring peaceable measures whilst the best hope of reconciliation remains. . . ." Nonetheless, the assembled companies also pledged "to each other to be in readiness, at a moment's warning, to re-assemble, and, by force of arms to defend the laws, the liberty, and rights of this, or any other sister colony, from unjust and wicked invasion."<sup>23</sup>

Farther north in Alexandria, another delegate to Congress—Colonel George Washington—received offers to command the Independent Companies from Spotsylvania, Prince William, and Albemarle Counties. But like Randolph, Pendleton, and Lee, he urged the men to go home. In one biographer's estimate, moderates like Washington were of the same opinion: "Clearly they believed this was not the issue upon which to base armed resistance. Hotheads might talk of defending Virginia's honor."<sup>24</sup> In this particular "crisis," the emotive forces of patriotism and zealotry did not justify violence and bloodshed—at least not in the more rational perspective of one Virginian who had actually felt the sting of battle.

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<sup>23</sup>Spotsylvania Council "Pledge of Readiness at a Moment's Warning," 29 April 1775, in Scribner and Tarter, *Revolutionary Virginia*, 3:70-71.

<sup>24</sup>Paul K. Longmore, *The Invention of George Washington*, (Charlottesville: The University Press of Virginia, 1999), 157.

Yet the passions of other Virginians refused to be cooled. The men of Albemarle's Independent Company—which allegedly included “private” Thomas Jefferson—voted to ignore the Fredericksburg example and march on the capital. The “Proceedings” on 29 April record:

No committee could be had, members not attending. All present but John Coles and David Rodes voted for a march, on which it was the opinion of the Comp’y that they ought to be drum’d out of the company, as an example of that kind, from people of such conspicuous characters in the Country, might be of dangerous consequence.<sup>25</sup>

Coles and Rodes were not listed among the original 23 volunteers on 18 April. Even so, it is difficult to reconcile the “opinion of the Comp’y” that they should be drummed out for “flying” before a non-existent enemy. In truth, both men had “exercised” their right to bear arms as citizens and property owners with their ballots—which was ostensibly on par with James Harrington’s republican philosophy. In any case, the company was not supposed to take military matters in their own hands—even if “no committee could be had” to grant authorization.

Nonetheless, volunteers from Orange County—which included diminutive but stouthearted Jemmy Madison—soon joined them (but with committee approval). In addition, Hanover County’s own preeminent political organizer, Patrick Henry, also picked up the gunpowder gauntlet—and his gun.<sup>26</sup>

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<sup>25</sup>Albemarle County, “Proceedings of the Independent Company of Volunteers,” in Scribner and Tarter, *Revolutionary Virginia*, 3:69-70.

<sup>26</sup>On Jefferson and Madison’s participation, see E. C. Branchi, trans., “Memoirs of the Life and Voyages of Doctor Philip Mazzei,” *William and Mary Quarterly*, 2<sup>n</sup>d Ser., 9 (July 1929): 172-3.

Italian émigré Doctor Philip Mazzei (1730-1816) was a correspondent and close friend of Jefferson’s who took an active part in supporting Virginia’s cause for independence. In 1788, he published the first history of the American Revolution written in French, and was eighty years old when he penned his memoirs in Italian (1810). Mazzei claimed that he and Jefferson were “privates” while “Mr. Jefferson’s assistant manager

Patrick Henry, like the other delegates, was due to report to Philadelphia on 10 May for the Second Continental Congress. Aside from historian Dick Bland (who sat and observed this bit of history in the making), Randolph, Lee, Pendleton, Harrison, and Washington actively counseled moderation. As usual, Henry went his own way. He was elated that Dunmore had seized the gunpowder. No doubt the event would rout atrophy and rally the apathetic in Virginia. Indeed, he considered it “a fortunate circumstance, which would rouse the people from North to South” into taking a more militant stance against Great Britain.<sup>27</sup> Predictably, he inspired a wholesale rejection of Randolph’s appeal in Hanover County. “Tell them of the robbery of the magazine, and that the next step will be to disarm them, and they will be ready to fly to arms to defend themselves,” Henry envisioned with delight.<sup>28</sup> The added news from Boston only clinched his conviction that a conspiracy was afoot to disarm the colonials—although there is no evidence that Gage and Dunmore were acting cooperatively, just contingently and coincidentally.

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was our sergeant.” As he recalled, “The soldiers wanted Jefferson to be an officer, but he, as a member of the Convention, was engaged in a matter of greater importance.” However, Dumas Malone (Jefferson’s chief biographer) disagrees with Mazzei’s “inaccurate” depiction. Indeed, Jefferson was twice commissioned County Lieutenant of the Albemarle militia: first in 1770 by Dunmore’s popular predecessor, Governor Botetourt; and by the Committee of Safety in September 1775. Jefferson’s rank on both occasions was full Colonel. It is highly unlikely any “Virginia Colonel” would demote himself to a lowly private—no matter how “virtuous” the political cause (or how “egalitarian” his politics). See Dumas Malone, *Jefferson in His Time*, Vol. 1, *Jefferson the Virginian* (Boston: Little Brown & Company, 1948), 140, 198, 210-11.

Also according to Mazzei’s recollections, “At the beginning of hostilities, we had no rifles. We had to use hunting pieces. . . .” Mazzei owned three such weapons. He kept one for himself and “gave” the others to his trusted (but plainly less prosperous) servants. During the war, Doctor Mazzei acted as Virginia’s purchasing agent in Europe and thereby obtained much needed military arms and fiscal loans.

<sup>27</sup>Henry quoted by George Dabney to William Wirt, 14 May 1809, in Patrick Henry Papers, Library of Congress.

<sup>28</sup>W. W. Henry, *Patrick Henry*, 1:279.

More realistically, Henry understood that Dunmore's pledge to return the gunpowder was fallacious. After sniffing the popular breeze, he figured a reprisal was in order; some show of armed bravado that would embarrass Virginia's pompous governor (and perhaps make him a military hero). For once in his life, Henry had an opportunity to let his martial actions speak louder than his combative words. Unfortunately, he acted more like a bully than a champion. Even worse, he broke a fundamental republican tenet: the military must remain strictly subordinate to civil power.

Henry assumed command of the volunteers from Hanover, Albemarle, Orange, and King William Counties. Before reaching the capital, he sent out sixteen men to procure £330 in sterling (the estimated value of the gunpowder) from colony's royal Receiver General, Richard Corbin, and, or failing that, take Corbin prisoner and bring him to Doncastle's Ordinary in New Kent County, sixteen miles outside Williamsburg. Henry's patent purpose was to force Corbin to pay for the purloined powder with King George's tax revenues. Happily for Richard Corbin, he was in a Council meeting at Williamsburg assessing the gathering armed forces. After the kidnap and extortion plan failed, Henry set out for the New Kent rendezvous with his "army" numbering "150 men and upwards, all well accoutred," of "very martial appearance," and "all men of property."<sup>29</sup> With Henry's "army" approaching, the New Kent Committee of Safety quickly responded by issuing several resolutions. The last two resolves were prefaced with this significant sentence: "It appearing to this committee, that a body of armed men, from the county of Hanover, have marched through this county [and, in fact, encamped there], in order to

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<sup>29</sup>William Wirt, *Sketches of the Life and Character of Patrick Henry*, 9<sup>th</sup> ed., (Philadelphia: Desilver, Thomas & Company, 1836), 158. Hereafter cited as Wirt, *Sketches of Henry*.

make reprisals upon the King's property, to replace the gunpowder taken from the magazine." Accordingly, the committee resolved "that such proceedings make it particularly necessary for the inhabitants of this county to prepare for their defence, against *any* dangers that may ensue in consequence of it, by keeping their arms in best order, and the greatest readiness, to act on any occasion"; and last "that it be recommended to the inhabitants of this county immediately to form a company of volunteers, to be assembled at the lower part of this county, ready to act on *any* emergency, as may be found necessary."<sup>30</sup> Obviously, New Kent had not formed its own independent company up to this point. It is equally clear that apathy and atrophy were now dislodged by anxiety and action. Indeed, I concur with the assessment of Professors Scribner and Tarter that there is "a hint that Henry's 'proceedings' had been as nerve-racking to the committee as would have been an enemy invasion, and that prudence dictated the presence of a force to counter one's friends should they on some future occasion get out of hand."<sup>31</sup> In other words, the possibility existed that New Kent's citizens might exercise their right to keep and bear arms for the purpose of policing other white Virginians who were abusing that very same right.

On that same day (3 May), Lord Dunmore issued a proclamation justifying his conduct "with a view of undeceiving the deluded" that were led by the "wicked designs" of others "under the specious appearance of defending their liberties." Significantly, Dunmore declared, "Although I consider myself, under the authority of the crown, the

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<sup>30</sup>New Kent County Committee Resolves, 3 May 1775, *Virginia Gazette* (Purdie), 19 May 1775, supplement. Reprinted in Scribner and Tarter, *Revolutionary Virginia*, 3:84-85. My emphasis.

<sup>31</sup>Scribner and Tarter editorial note, *Revolutionary Virginia*, 3:87.

only constitutional judge, in what manner the munitions, provided for the protection of the people of this government, is to be disposed of for that end,” he nevertheless (and less significantly) thought it necessary to explain that “an intended insurrection of the slaves, who had been seen in large numbers, in the night time, about the magazine,” was his sole “inducement” for removing the gunpowder. He then pledged that “whenever the present ferment shall subside, and it shall become necessary to put arms into the hands of the militia, for the defence of the people against a foreign enemy or intestine insurgents, I shall be as ready as on a late occasion to exert my best abilities in the service of the country.” But “In the meantime,” the governor emphasized, “it is indispensably necessary to maintain order and the authority of the laws. . . .” Indeed, “nothing can justify men, without proper authority, in a rapid recurrence to arms, nothing excuse resistance to the executive power in the due enforcement of the law. . . .”<sup>32</sup>

That was a fairly concise “constitutional” assessment of the relationship between “executive power,” law “enforcement,” and military power “for the protection of the people.” No doubt George Mason would have agreed—except on one crucial point: executive power must also be subservient to the higher authority of law; it cannot act—as the New Kent Committee pointed out in one of its resolves—“in an ill advised and arbitrary” manner that would “endanger the safety of his Majesty’s loyal subjects of this colony.” Then again, a “deluded” people, under the “wicked designs” of popular demagogues, were not above the law either. That very same day, Mayor Dixon sent messengers to Captain Henry in an effort to dissuade him from “invading” the capital with his

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<sup>32</sup>Dunmore’s Proclamation, 3 May 1775, *Virginia Gazette* (Pinkney), 4 May 1775. Reprinted in Scribner and Tarter, *Revolutionary Virginia*, 3:80-82.

“army.” As if history was repeating itself ninety-nine later, Virginia appeared on the verge of “Henry’s Rebellion.”

In this particular case, history did not repeat itself. On 4 May Corbin’s son-in-law, Carter Braxton, tried to moderate the anxious situation by offering Henry a £330 bill of exchange for the powder. Braxton, a future signer of the Declaration of Independence, was linked politically with high-ranking moderates (especially Edmund Pendleton) who supported all avenues of appeasement not only with King George III, but also with Patrick Henry. Braxton had just come from Caroline County where he witnessed Pendleton, Harrison, and Randolph dissuade the local independent company from marching on Williamsburg. Braxton likewise hoped to halt Henry “upon the strength of this precedent.” Henry, however, was a man who preferred to set his own precedents, not follow those of others—especially if they were appeasers. Henry flatly rejected Braxton’s offer. “Much mortified” by the rebuff, Braxton asked Henry why he “should be refused as indorser for so small a sum.” Henry coldly replied that he doubted Braxton’s “political attachments, not his ability to pay;” he would only accept money from “any responsible character of known attachment” to Whig principles—an ironic display of self-righteousness from someone who had assumed military power and was dictating terms to civil authorities.<sup>33</sup> All the same, Henry accepted a promissory note the next day, personally delivered and signed by Council President (and Virginia’s Secretary) Thomas “Secy” Nelson, Senior. Although the elderly Nelson was a political conservative by status and temperament, *his* “Whig” credentials were apparently acceptable.

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<sup>33</sup>Wirt, *Sketches of Henry*, 159; Mayer, *Son of Thunder*, 256; citing and quoting “Samuel Meredith’s narrative” in George Morgan, *The True Patrick Henry* (Philadelphia: J. B. Lippincott, 1907), 205-07.

On the same day he took receipt of the money, Henry wrote Treasurer Robert Carter Nicholas with another “fiscal proposition”:

The affair of the powder is now settled, so as to produce satisfaction to me, and I earnestly wish to the colony in general. The people here have it in charge from the Hanover committee to tender their service to you, as a public officer, for the purpose of escorting the public treasury to any place in this colony where the money would be judged more safe than in the city of Williamsburg. The reprisal now made by the Hanover volunteers, though accomplished in a manner least liable to the imputation of violent extremity, may possibly be the cause of future injury to the treasury. If therefore you apprehend the least danger, a sufficient guard is at your service. I beg the return of the bearer may be instant, because the men wish to know the destination.<sup>34</sup>

Three points are worth noting here. First, Captain Henry was now subordinating his armed force to civil authorities; permission was granted by the Hanover Committee to tender the service of its “people” to “a public officer” (Treasurer Nicholas). Second, Henry was aware that his military “reprisal” had consequences; it might “be the cause of future injury to the treasury.” Third, there is a strong suggestion that Henry’s volunteers were growing impatient and possibly weary (even though they had been in the field less than a week); they wanted to know their next “destination” (perhaps home) in an “instant.” After all, “the affair of the powder” was “now settled”; it was time for the short-term soldier to become a full-time citizen again. Treasurer Nicholas pointed them in that direction. His response to Henry’s proposition was brief; he found “no apprehension of the necessity or propriety of the proffered service.”<sup>35</sup>

The reaction to Henry’s military escapade was mixed. Governor Dunmore, of course, was not pleased. He issued a “Proclamation” charging all Virginians to have

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<sup>34</sup>“Patrick Henry to Robert Carter Nicholas: A Statement,” 4 May 1775, in Scribner and Tarter, *Revolutionary Virginia*, 3:88.

<sup>35</sup>Nicholas quoted and cited in Selby, *Revolution in Virginia*, 5.

nothing to do with Patrick Henry. Although the Governor did not denounce Henry as a “Rebel,” the following charges provide an eighteenth-century perspective on “armed political terrorism”:

Whereas I have been informed, from undoubted Authority, that a certain *Patrick Henry*, of the County of *Hanover*, and a Number of deluded Followers, have taken up Arms, chosen their officers, and styling themselves an Independent Company, have marched out of their County, encamped, and put themselves in a Posture of War, and have written and dispatched Letters to divers Parts of the Country, exciting the People to join in these outrageous and rebellious Practices, to the great Terror of all his Majesty’s faithful Subjects, and in open Defiance of Law and Government; and have committed other Acts of Violence, particularly in extorting from his Majesty’s Receiver General the Sum of 330 *l.* under Pretense of replacing the Powder I thought proper to order from the Magazine. . . .<sup>36</sup>

When legal expert Edmund Pendleton read the proclamation in Philadelphia, he accurately judged it “Waste Paper, a mere Subject of Ridicule.”<sup>37</sup>

Thirteen county committees recorded public praise for Henry’s exploits, such as the Orange County Committee on 9 May, whose members included James Madison, Jr. Interesting enough, the title of their report was “An Endorsement of Violence and Reprisal.”<sup>38</sup> On 11 May, “Jemmy” Madison met Henry at Port Royal before his departure for Philadelphia (escorted by the Hanover Company). Madison saluted Henry, then read a short, prepared address by the Orange County Committee. “We take this occasion,” Madison concluded, “to give it as our opinion, that the blow struck in the Massachusetts

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<sup>36</sup>Dunmore’s “Proclamation,” 6 May 1775, *Virginia Gazette* (Dixon and Hunter), 13 May 1775. Reprinted in Scribner and Tarter, *Revolutionary Virginia*, 3:100-101.

<sup>37</sup>Pendleton to William Woodford, 30 May 1775, in Mays, *Pendleton Papers*, 1:103.

<sup>38</sup>Orange County Committee, 9 May 1775, *Virginia Gazette* (Purdie), 19 May 1775, in Scribner and Tarter, *Revolutionary Virginia*, 3:112-13. The twelve other county committees issuing praise were: Albemarle, Louisa (8 May); Caroline, Culpeper, Hanover, Spotsylvania (9 May); Prince William (22 May); Loudoun (26 May); James City (6 June); Frederick, Prince Edward (19 June); and Fincastle (10 July).

government is a hostile attack on this and every other colony, and a sufficient warrant to use violence and reprisal, in all cases where it may be expedient for our security and welfare.” Madison then handed Henry a letter to deliver to “Billey” Bradford in Philadelphia. In that letter, Madison noted that while delegates Randolph, Pendleton, Lee, and Washington had counseled moderation, Henry alone had stood up to Dunmore, which “gained him great honor in the most spirited parts of the Country.” However, “The Gentlemen below [meaning the planters along the lower York and James Rivers] whose property will be exposed in case of a civil war in this Colony were extremely alarmed lest Government should be provoked to make reprisals. Indeed some of them discovered a pusillanimity [sic] little comporting with their professions or the name of Virginian.”<sup>39</sup> That appraisal and praise can be accredited to youthful passion and perhaps hero-worship. Over the course of time and other events, Madison bid farewell to Henry while standing on an opposite political platform. Indeed, there would be no “salutes” when they faced each other at the Ratifying Convention in 1788.

As Madison duly noted, not every one looked upon Henry or his actions so favorably. A few, like Braxton and Nicholas, wanted him censured at the next convention, which caused Henry enough concern to ask Francis Lightfoot Lee to defend him when it next met since he expected to be still in Philadelphia.<sup>40</sup> Contrary to Madison, Jefferson defended the elite gentry by stating, “the utmost efforts of the more intelligent people have been requisite and exerted to moderate the almost ungovernable fury of the people.”

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<sup>39</sup>“Address to Patrick Henry,” Port Royal, 11 May 1775, in Hutchinson and Rachal, *Madison Papers*, 1: 147; Madison to Bradford, 9 May 1775, in *ibid.*, 1:144-45.

<sup>40</sup>Henry to Francis Lightfoot Lee, 8 May 1775, in W. W. Henry, *Patrick Henry*, 1:287-89.

In Jefferson's opinion, Dunmore's life was spared only by "the intercessions of the principal people" that persuaded the rowdy volunteers "to return to their habitations."<sup>41</sup> Edmund Pendleton perhaps summarized the full range of views and sentiments best:

The Sanguine are for rash Measures without consideration, the Flegmatic to avoid that extreme are afraid to move at all, while a third Class take the middle way and endeavor by tempering the first sort and brining the latter into action to draw all together to a Steddy, tho' Active Point of defence; but till this is done, it is natural to suppose the extremes will be blaming each other, and perhaps in terms not the most decent. . . .<sup>42</sup>

However, a loyalist observer offered the most perceptive insight when he recorded that the popular uproar to challenge Dunmore with armed force had thrown the ruling gentry into "a terrible panic"—especially when they discovered it was "more difficult to extinguish a flame than kindle it."<sup>43</sup> Indeed, it was always "difficult" to ignite martial spirits, generate military training and discipline, or even manipulate militiamen into keeping and bearing military arms. Suddenly, men of military age were all afire, and Virginia's ruling gentry had little control over how high—or in what direction—those armed flames shot.

The irony, of course, was that those armed men were not really militiamen; they were "independent" volunteers who were acting autonomously—and far more democratically—than any Virginia militiaman ever did. Indeed, they were choosing their own popular leaders—like Patrick Henry—and deciding for themselves whether to march or not; as well as where, how long, and for what purpose. Those were extremely favorable

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<sup>41</sup>From a passage struck out in a letter from Jefferson to William Small, 7 May 1775, in Julian P. Boyd, et al., eds., *The Papers of Thomas Jefferson* (Princeton, NJ: Princeton University Press, 1950-), 1:166n-67n.

<sup>42</sup>Pendleton to Joseph Chew, 15 June 1775, in Mays, *Pendleton Papers*, 1:110.

<sup>43</sup>James Parker to Charles Steuart, 6 May 1775, in "Letters from Virginia, 1774-1781," *Virginia Magazine of History and Biography* 3 (March 1906): 159.

terms and conditions of service for any man—no matter how much or how little property he owned. There was, of course, one major problem: they were also acting independently, offensively, and not only contrary to the wishes of Virginia’s congressional deputies (except for Henry), but also beyond the restraints of most county committees. In “constitutional” words, the “independent companies” were not strictly subordinate to civil power or authority. In Second Amendment words, the independent companies were becoming a “nuisance” (if not an outright threat) to Virginia’s internal security, and the “right” of the people to keep and bear arms seemed absolutely “uninfringeable.” In military terms, there was little command and even less control. In law enforcement terms, there not much law and hardly any order. As one Williamsburg denizen lamentably summarized: “There is great Confusion in this Colony at present & many of the People seem to have shut their Eyes & to be led blindfolded by a few hot Headed designing men, whose proceedings evidently tend to overturn the Constitution.”<sup>44</sup>

As a result of the gunpowder incident and the danger of a slave insurrection, small farmers in Virginia displayed their willingness to defend their liberties with armed force, but only when those threats were perceived as real and imminent. Just as importantly, they did so according to terms and conditions that met with their approval: in the main, voluntarily and consensually. However, if Virginians actually intended to abide by the “Constitution”—as they continually insisted they were doing—then a re-evaluation of their military establishment was called for to achieve a “balance” between rallying popular support behind armed political violence and ensuring that violence remained under proper control. What that basically entailed was a thorough reorganization of Virginia’s

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<sup>44</sup>Edward Stabler to Israel Pemberton, 16 May 1775, cited and quoted in McDonnell, “The Politics of Mobilization,” 37. Stabler and Pemberton were both Quakers.

armed manpower and a re-assertion of control over the “Independent” companies, which ironically were becoming too autonomous as armed institutions of political power. That problem was a top priority at the Third Convention. The ostensible solution was the fabled “Minuteman.”

### Virginia’s Minutemen

Michael McDonnell, the leading scholar on the “independent movement,” writes that those armed associations had become “unwieldy, dangerous, and potentially subversive” in Virginia. “Armed bands of men were taking the law into their own hands and radicalizing the resistance movement. Ultimately, the gentry feared the social chaos that might accompany open and uncontrolled warfare.”<sup>45</sup> As Professor Woody Holton additionally informs us, “Restraining the independent companies was one of the principal goals of the third Virginia Convention, which gathered in Richmond on July 17, 1775.”<sup>46</sup> Although largely (if not totally) overlooked by Second Amendment scholars, that effort and gathering are significant with respect to the “militia clause,” the “right to bear arms clause,” and the “Civic Rights Paradigm,” which maintains that Second Amendment rights and responsibilities were personified by the quintessential “Minuteman ideal.” As argued here, many of the ideals (and much of the idealism) associated with those interpretive schools were not thriving in Virginia on the eve of the American Revolution.

Ironically, George Mason—the man who was at the forefront of creating the independent company movement—devised a law that did more than merely “restrain” those autonomous armed forces; in truth, they were permanently abolished. On the third

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<sup>45</sup>McDonnell, “Mobilization and Popular Culture,” 960

<sup>46</sup>Holton, *Forced Founders*, 166.

day of the convention, the delegates resolved “That a sufficient armed Force be immediately raised and embodied, under proper Officers for the Defence and protection of this Colony.” A thirteen-member committee was appointed to prepare and bring in an Ordinance pursuant to the said Resolution.”<sup>47</sup> The word “Ordinance” was significant. Since the House of Burgesses was still considered a constitutional entity, the extra-legal convention could not pass an “act” without acknowledging that it was committing a usurpation of legislative authority. Although an “ordinance” held statutory force, its use as a legal synonym presumably eased the anxieties of legal doctrinaires. As Mason explained, “Every Ordinance goes thro all the Formalities of a Bill in the House of Burgesses has three readings &c. before it is passed, & in every respect wears the Face of Law. Resolves or Recommendations being no longer trusted in Matters of Importance.”<sup>48</sup> That was the crucial difference between the Second and Third Conventions—“Resolves or Recommendations” were no longer the order (or ordinance) of the day. In fact, the Third Convention marked the beginning of Virginia’s “Interregnum.”

After nearly eleven months, Dunmore finally summoned the General Assembly into session on 1 June with one specific purpose in mind: to consider Lord Frederick North’s “Proposition for Conciliating the Differences with America”—more popular known as “the Olive Branch” proposal.<sup>49</sup> Dunmore called the House members in the Council Chamber that afternoon and observed that “a Number” of the burgesses were dressed “in the habits of the Men Intituled [sic] American Troops, wearing a Shirt of

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<sup>47</sup>Proceedings, 19 July 1775, in Scribner and Tarter, *Revolutionary Virginia*, 3:319.

<sup>48</sup>Mason to Martin Cockburn, 22 August 1775, in Rutland, *Mason Papers*, 1:252.

<sup>49</sup>Dunmore’s General Assembly Convocation Proclamation, 12 May 1775, *Virginia Gazette* (Dixon and Hunter), 13 May 1775.

Coarse Linnen or Canvas over their Cloaths and a Tomahak by their Sides.” He addressed the delegates on the benevolent provisions of North’s Olive Branch, which proposed that each colony “make provision, according to the conditions, circumstances, and situation of such colony, for contributing their proportion to the *common defence*,” as well as levy their own revenue “for the *support of civil government, and the administration of justice*,” which was what Dick Lee suggested at the First Congress. The rub was that military appropriations would be “*disposable by Parliament*” and the taxes for administering government and justice “*shall be approved by his Majesty, and the two Houses of Parliament*,” which was totally unacceptable.<sup>50</sup> The only other subject broached by the Governor was a recommendation that the House “fall upon Means of paying the Officers and private Men” who had served during the war with the Shawnee (“Dunmore’s War”).<sup>51</sup> Just one week later, Dunmore and his family left Williamsburg and boarded the H.M.S. *Fowley* moored off Yorktown. Dunmore refused to return to the capital until he was assured of his safety, which meant disbanding all independent companies within the city and immediate area. Sensing that the Governor’s departure and sea borne headquarters were signals of an impending invasion, approximately two hundred volunteers gathered in Williamsburg.<sup>52</sup>

The House of Burgesses spent the next three weeks trying to persuade the chief executive to return to the capital and resume normal governance. Dunmore replied the legislature should come to him and conduct business at Yorktown. Instead the burgesses

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<sup>50</sup>Olive Branch as printed in the *Virginia Gazette* (Purdie), 28 April 1775, supplement. Original italics.

<sup>51</sup>Kennedy, *Journal of the House, 1773-1776*, 174-75.

<sup>52</sup>*Ibid.*, 187-88, 193-95, 201, 214, 224, 261, 271.

transmitted formal requests, including a supply requisition for two thousand stands of arms, five tons of powder, and twenty pounds of lead to restock the magazine. They even asked permission to distribute Dunmore's collection of arms at the Palace to the independent companies. Dunmore naturally refused, stating that "Army Powder and other Military Stores" would be placed in the magazine only when the "legal executive Power of Government" had been "restored." Dick Bland allegedly exploded that the Governor should be hanged. Treasurer Bob Nicholas made arrangements with a smuggler to slip in five thousands pound of gunpowder from the West Indies. Meanwhile, the burgesses were losing control over the troops. When Dunmore rejected the House request for the Palace arms, a group of soldiers led by Theodorick Bland, James Monroe, Benjamin Harrison, Jr., and the treasurer's son, George Nicholas, broke into the mansion on 24 June just as House was gaveling its adjournment. The raiders removed over two hundred pistols, muskets, and swords and carried them to the magazine where Bland handed them out to anyone who needed a weapon. Ironically, the last two official acts of the House of Burgesses that day concerned "Dunmore's War." The lawmakers appointed commissioners "to ratify the Treaty of Peace with the Ohio Indians." A committee was also selected to "examine, state, and settle the Accounts of pay of the Militia" during the war and to "report the same to the General Assembly"—an body that would never meet again. The House also expressed its "deepest concern" that it did not have the opportunity to make "the most ample Provision" for the suffering widows and fatherless children of Dunmore's War. The last journal entry read, "*And then the House adjourned until Thursday, the twelfth day of October next, at ten of the Clock in the Morning.*"<sup>53</sup> The

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<sup>53</sup>Ibid., 253-62, 273-274, 276, 279-83. Original italics. Selby, *Revolution in Virginia*, 45-46.

House of Burgesses did not reconvene on 12 October, or on any other occasion. In truth, the oldest legislative assembly in North America ceased to exist.

As far as Virginia's ruling elite was concerned, Dunmore's unwarranted flight, obstinate refusal to return to the capital, and general lack of cooperation in governing the colony all pointed in the same direction and resulted in one conclusion: the governor had, in effect, abdicated royal executive power in Virginia. Whether or not they realized it, Virginia's "parliamentarians" faced a similar situation as their English counterparts almost a century before during the reign of King James II. In time, their "Convention Parliament" would likewise create a Declaration of Rights, but one that would be attached to a brand new Constitution. Nor would they ask another royal monarch to perform the functions of magistracy. In that sense, Virginia's lawmakers were also akin to the Rump Parliament during the English Civil War, except they had not yet "killed" King George III. Nevertheless, the common task that lay before them was clear: Virginians had to erect a new government and with a "surrogate" executive. It was also clear the substitute executive had to exercise delegated powers when the legislature was not in session. To preclude the perils of a one-man dictatorship, the executive should be plural, limited in tenure, regulated, and held accountable for its actions; otherwise Virginians would be merely trading one absolute authority for another. It was equally obvious that Virginia's interim executive and legislature must be defended, just as the people of Virginia had to be defended. That meant Virginians had to forge a new sword that was subject to their command and control alone. To be sure, the independent companies were a start in that direction, but something more effective—and controllable—was now required to wage what everyone knew had finally come: civil war. Consequently, the "Military Ordi-

nance” passed by the Third Convention actually *magnified* the *constitutional* significance of strictly subordinating military forces to the *legitimate* power of civil authorities acting in both a legislative and executive capacity. George Mason, for one, was astutely (and acutely) aware of that significance.

Mason revealed in a private letter the workings and intended purposes of what (in modern parlance) was Virginia’s “Armed Forces Committee.” What follows is significant and should be carefully considered:

The committee (of which I am a member) appointed to prepare an ordinance for raising an armed force for the defence and protection of this colony, meet every morning at seven o’clock, sit till the Convention meets, which seldom rises before five in the afternoon, and immediately after dinner and a little refreshment sits again till nine or ten at night. This is hard duty, and yet we have hitherto made but little progress, and I think shall not be able to bring in the ordinance till late next week, if then. This will not be wondered at when the extent and importance of the business before us is reflected on—to raise forces for immediate service—to new-model the whole militia—to render about one-fifth of it fit for the field at the shortest warning—to melt down all the volunteer and independent companies into this great establishment—to provide arms, ammunition, &c., —and to point out ways and means of raising money, these are difficulties indeed! Besides tempering the powers of a Committee of Safety to superintend the execution. Such are the great outlines of the plans in contemplation. I think I may venture to assert (though nothing is yet fixed on) that in whatever way the troops are raised, or the militia regulated, the staff officers only will be appointed by Convention, and the appointment of all the others devolve upon the county committees. If the is parceled into different districts for raising a battalion in each, I have proposed that the committees of each county in the district appoint deputies of their own members for the purpose; so that every county may have an equal share in the choice of officers for the battalion, which seems to be generally approved.<sup>54</sup>

The Committee of Safety Mason referred to (of which he was also a member) was the de facto executive authority in Interregnum Virginia, whose powers had to be “tempered” while executing the colony’s armed forces—an extremely vital point. The plural executive’s subordination to the convention was made clear in that “the said committee of

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<sup>54</sup>Mason to Cockburn, 24 July 1775, in Rutland, *Mason Papers*, 1:241. Mason misjudged the timing of the ordinance by three weeks. It was finally submitted for the convention’s approval on 21 August.

safety shall cause all their proceedings and transactions to be fairly entered in a book, or books, . . . which shall be laid before the next convention; to whom the said committee shall be accountable for their conduct touching the premises, in every respect whatever.” In addition, anyone who received a “pecuniary appointment” from the crown or held “any military office whatever” was “disqualified from sitting or voting in the committee of safety.”<sup>55</sup> In that way, Virginia’s extra-legal executive was separated from the two recognized sources of political power that could undermine or usurp the convention’s “supreme” authority to act as a legislative body—the British ministry and Virginia’s military. The constitutional concern was that there be a clear separation of civil and military realms of power; that the military sphere be subservient to the civil sphere, and in no way influence or corrupt its decisions on military matters. If church and state separation issues trouble us today, Virginians were far more anxious about the dangers of combining civil and military powers. We should also recall that the “anti-army” ideology “originated” in a contest over military power between a legislature (Parliament) and a chief executive (King Charles I).

Equally crucial is Mason’s attention and concern over the appointment of officers. We must keep in mind that the power of appointments—both at the local committee level and within the centralized convention—was a vital means of retaining civil control over the military, thereby ensuring some rogue officer did not assume command over the armed forces for his own nefarious purposes. In sum, civilian control over the military was a preeminent matter for Mason and the committee—so much so that their “contemplated plan” eradicated the “rights” of ordinary soldiers to elect their own officers.

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<sup>55</sup>“An ordinance appointing a Committee of Safety,” in Hening, *Statutes*, 9:49-53.

We should also recall that Virginia still had no militia law in effect. The Third Convention would finally rectify that ambiguity; indeed, the ordinance committee intended “to new-model the whole militia,” much as English parliamentarians tried to do during their Interregnum. However, that planned reconstruction would not follow a Radical Whig blueprint. Indeed, only “about one-fifth” of the universal militia—the fabled, yet highly selective “Minutemen”—would be rendered “fit for the field at the shortest warning” while the vast majority of militiamen were relegated to a “reserve” status; merely a reservoir of armed manpower serving in an auxiliary capacity. Finally Mason (who was the “brains” and real workhorse of the committee), planned to “melt down all the volunteer and independent companies into this [one] great establishment”—which, as Professors Holton and McDonnell aptly argue, was aimed at regaining civil control over Virginia’s “self-directed” armed men. What Mason’s correspondence does not tell us, however, is that the Convention began raising a “standing army” before the Ordinance Committee “new-modeled” the militia.

Between 10 and 16 June, the Second Congress raced ahead of the Old Dominion by enacting a series of measures that created a Continental Army. Fifteen thousand soldiers would be raised—10,000 stationed in Massachusetts, the remainder in New York—and two million dollars in continental currency would be issued to pay and provide for the troops. Congress also approved a governing set of articles of war for the armed forces. On 14 June, Congress created six companies of “expert riflemen,” of which two companies were allotted to Virginia. The next day, Congress appointed George Washington commander in chief of the fledgling Continental Army. Washington was in desperate need of reinforcements after the Battle of Bunker Hill on 17 July—the same day

the Third Convention began. Armed manpower was fast becoming an issue of paramount importance not only in Virginia, but “nationally” as well. Perhaps hoping the all-important *ordinance* would be hammered together soon, the delegates issued the following *resolve* as a “stop-gap” measure: “Resolved, that the Committee of each County in this Colony except the Counties of Accomack & Northampton . . . proceed immediately to enlist a Company of fifty Regulars in each County to be marched as soon as enlisted to such place of Rendezvous as shall be hereafter appointed by this Convention.” The two excepted counties were on the Eastern Shore, and could not “Rendezvous” without leaving that area undefended. Nevertheless, the Convention authorized a 3,000-man army divided into three regiments of “regulars.” The significance of that fact with respect to “anti-army” ideology should not be overlooked—the Convention was raising an army *before* a “legal” militia was reinstated.

The next day’s vote on who would command Virginia’s regiments is yet another example of putting the military caisson (army) before the statutory horse (ordinance). As historian John E. Selby adds, “The most violent factionalism flared over the election of officers for the new army.”<sup>56</sup> Indeed, whoever commanded the First Virginia Regiment was commanding officer of all the armed forces by default (including the Minutemen and militia reserves); second and third commanders followed in succession. Mason related the election results in a private letter. Without offering much in the way of detail, he wrote, “A great push was made for Colo. Mercer of Fredericksburg to the 1<sup>st</sup>. Regiment; but he lost it by a few Votes, upon the Question between him and Mr. Henry; tho’ he had

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<sup>56</sup>Selby, *Revolution in Virginia*, 50.

a majority upon the Ballot.”<sup>57</sup> The “Question” between the candidates was that Henry had no military experience while Mercer was a veteran soldier. Washington’s reaction was not favorable: “I think by countrymen made a capital mistake, when they took Henry out of the senate to place him in the field; and the pity it is, that he does not see this, and remove any difficulty by a voluntary resignation.”<sup>58</sup> That observation provides additional meaning to “military versus civil power” issue: popular politicians should not assume they are equally gifted leaders in other fields of political battle.

In his private correspondence on the elections, Mason also revealed these notable personal thoughts on the Convention’s “resolve” to raise a force of regulars:

As it is proposed that a Company of fifty Men for the *standing Army* shall be raised in each County, my Son George may perhaps have a Mind to enter into the Service; in which Case, pray tell him that it will be very contrary to my Inclination, & that I advise him by all Means against it. When the Plan for the Minute-Men is completed, if he has a Mind to enter into that I shall have no Objection: *as I look upon it to be the true natural, and safest Defence of this, or any other free Country; & as such, wish to see it encouraged to the utmost.* I shou’d have wrote to him but that it was uncertain whether he was at Home, or at the Springs.<sup>59</sup>

We can see that Mason was profoundly influenced by the anti-army ideology—especially with respect to his own son. And let us not mistake Mason’s complaint here; he was ultimately concerned about “the true natural, and safest Defence of [Virginia], or any other free Country”; not his son’s self-preservation (although like any father, Mason would have preferred it if George Junior did not die defending his “Country”—especially if he was sacrificed uselessly). In any case, Mason also confided his “fear” that the “3,000

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<sup>57</sup>Mason to Cockburn, 5 August 1775, in Rutland, *Mason Papers*, 1:245-46.

<sup>58</sup>Washington to Joseph Reed, 7 March 1776, in Fitzpatrick, *Washington Writings*, 4:381.

<sup>59</sup>Mason to Cockburn, 5 August 1775, in Rutland, *Mason Papers*, 1:245-46. My emphasis.

Men . . . as a Body of standing Troops, to be forthwith raise, & form'd into three Regiments” would result in “running the Country to an Expence it will not be able to bear.”<sup>60</sup>

Four days later, Dick Bland, chairman of the ordinance committee, advised the Convention of an “Amendment” to their work in progress: there was “To be one thousand & 20 men only” in Virginia’s regular army.<sup>61</sup>

That news came as bit of surprise to just about everyone, including archconservatives like Robert Carter Nicholas. Indeed, Mason later informed Washington that, “Our Friend the Treasurer [Bob Nicholas] was the warmest Man in the Convention for immediately [sic] raising a standing Army of not less than 4000 men, upon constant Pay.”<sup>62</sup> Radicals were apparently of the same mind. James Madison, for one, told William Bradford that “Our convention is now sitting, and I believe intends to strike a considerable sum of money & to raise 3 or 4,000 men as an Army to be in immediate pay. The independents, who I suppose will be three times that number will also have their pay commence as soon as they are called into action. The preparations for War are every where going on in a most vigorous manner.”<sup>63</sup> No doubt Patrick Henry hoped he would command a large army as well. The committee’s “Amendment” dashed those expectations. As far as George Mason is concerned, I endorse Professor Selby’s assessment: “Concerning the raising of an army, he regarded a militia as ‘the true natural, and safest Defence of

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<sup>60</sup>Ibid.

<sup>61</sup>“Proceedings of the Eighteenth Day of Session,” 9 August 1775, in Scribner and Tarter, *Revolutionary Virginia*, 3:409.

<sup>62</sup>Mason to Washington, 14 October 1775, in Rutland, *Mason Papers*, 2:255.

<sup>63</sup>Madison to Bradford, 28 July 1775, in Hutchinson and Rachal, *Madison Papers*, 1:160.

this, or any other free Country,' but he conceded the wisdom of having a small core of regulars that citizen reserves could augment when needed. Mason's gravest concern was that in the excitement the Convention would authorize more troops than necessary and bankrupt the colony."<sup>64</sup> I would only add this: the expectation was that Virginia's army—no matter its size—would be called north to reinforce the Continental Army and not remain "standing" at home for any length of time. Thus as a matter of pragmatic economics and political circumstances (not abstract principles), Virginia would have only two regiments of five hundred men each.

The "Armed Forces Ordinance" was finally completed and adopted on 21 August. Three types of armed forces were created—regulars, minutemen, and a militia reserve.

Troops for the two regular regiments were to be raised from fifteen "districts" (four counties per district, on average), each district supplying one company of sixty-eight soldiers who volunteered for a one-year tour of duty. The Eastern Shore (Accomack and Northampton Counties) formed a sixteenth district, but was exempted due its exposed position, which necessitated reserving all of its available manpower for "self-defense." Regulars were paid, equipped, and armed at public expense. Pensions were additionally authorized: "if any person enlisted by virtue of this ordinance shall be so maimed or disabled as to be rendered incapable of maintaining himself, he shall, upon his discharge, be supported at the expense of the publick." Civil control over Virginia's Army was absolutely essential. The district committees were tasked "to review the said company," ensure that "able and proper men" were "regularly enlisted, according to the terms and conditions prescribed by this ordinance," and present a "certificate . . . to the

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<sup>64</sup>Selby, *Revolution in Virginia*, 51.

general committee of safety.” More importantly, “the officers and soldiers under such command, shall in all things, . . . be under the controul, and subject to the order, of the general committee of safety.”<sup>65</sup> As Professor Woody Holton summarizes, “The one thousand places in the regular army were filled quickly, for the army promised poor farmers a living wage at a time when nonexportation prevented them from selling their produce. The minutemen battalions were another matter.”<sup>66</sup>

The core component of Virginia’s newly-forged, sovereign sword were the “minute-men.” The ordinance declared, “that certain portions of the militia throughout the whole colony should be regularly enlisted, under the denomination of minute-men, and more strictly trained to proper discipline than hath been hitherto customary, and that to this end, that the whole colony should be divided into proper and convenient districts.” This is a vital statement. As we have seen throughout the previous chapters of Virginia “militia history”—and as this particular ordinance additionally attests—the militia was not “customarily” or “strictly trained to a proper discipline.” Moreover, a major theme of this chapter is that the independent company “replacement” for that defunct institution was likewise “disorderly,” and that the Third Convention hoped to direct the armed fervor (and furor) of Virginia’s yeomanry into a less autonomous agency. Under the “minute-men” section, each of the fifteen districts was required to “immediately enlist one battalion, consisting of five hundred men rank and file, from the ages of sixteen to fifty, to be divided into ten companies of fifty men each” under the overall command of a colonel.

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<sup>65</sup>Hening, *Statutes*, 9:9-16. No manuscript or draft of the bill creating Virginia’s armed forces is known to exist. The entire ordinance is printed in *Statutes at Large*, IX, 9-35.

<sup>66</sup>Holton, *Forced Founders*, 167.

The Eastern Shore District was to raise “one regiment, consisting of six hundred and eighty men.” Note the total complement: 8,180 minutemen versus 1,020 regular soldiers. The battalion and company officers—including the top field grades—were appointed at the local “district” level. The district committees then forwarded verified certificates of commissions and enlistments to the general committee of safety.

A minuteman was paid the same as a regular soldier, and also “furnished with proper arms at the publick expense, and until such can be provided shall bring into service the best gun that he can procure.” However, a minuteman was additionally “provided at the expense of the public . . . one hunting shirt and pair of leggings.” Here we see a prime example of “preferential” treatment; a regular soldier’s uniform was not specified, nor was he given a “clothing allowance” unless he was poor. This provision clearly, purposely, and literally delineates a minuteman from a regular soldier, if only in “outward” appearance. The training requirements for these “select militiamen” were equally notable and truly unprecedented. The minutemen were to train “immediately” for twenty consecutive days and thereafter for four days every month (“except December, January, and February”) and twelve days twice annually—a total of 60 days of annual training after the initial 20 days. As their name implies, they were to be ready for instantaneous duty “in case of any invasion or insurrection.” Since the minutemen were required to march anywhere in the colony in times of danger, they were given an additional day’s pay for every twenty miles traveled, “and the same for returning home,” as a bonus. They also received “sixpence per day in lieu of provisions.” It is interesting to note—particularly with respect to the future Third Amendment—that the general committee of safety was “empowered to provide proper winter quarters for the regular soldiers and the

minute-men when called into actual service, as they may see occasion, and issue warrants from time to time for the payment of the same.” As one might suspect, this was a costly band of armed men.

Nevertheless, an important reason why the minutemen were originally formed can be ascertained from this key sentence: “That the several volunteer companies, raised in pursuance of the resolutions of a former convention [the Second], shall be disbanded, as soon as the [minuteman] battalions in the several districts where the said volunteer companies respectively reside are fully and completely embodied.” No doubt Mason expected those enthusiastic (and rambunctious) independent company volunteers would join up as minutemen and get properly trained (well regulated) as never before.

There was one notable aspect that fused minutemen with regulars within this ordinance—fines and penalties. Indeed, “every soldier or minute-man failing to appear [in an emergency], and not bringing with him his arms, shall forfeit and pay the sum of five pounds.” If any minuteman or regular should “refuse to obey the commands of his superior officer, or behave himself mutinously or refractorily, or shall in other manner transgress the rules of good order and decency, every such offender shall or may be confined, for any time not exceeding twenty four hours, or fined, in any sum not exceeding one month’s pay.”<sup>67</sup> A separate ordinance was passed detailing a lengthy list of crimes and punishments for both regular troops and minutemen during actual combat, which included death.

In large measure, the “Minutemen” were a hybrid of regular soldiers and militiamen and thus represent a melding of two political philosophies: the “professionalism” of

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<sup>67</sup>Eleven pages in the ordinance were devoted to the “minute-men.” See Hening, *Statutes*, 9:16-27.

an army (more highly trained and disciplined), yet composed of common farmers (property owners) rather than the “lower sort”—those deemed economically, politically, and socially expendable, who typically fought wars in eighteenth-century Virginia (as we have seen). Mason, of course, thought his “Minute-Plan” was “a wise one” and assured Washington it would provide Virginia with reliable soldiers “in whose Hands the Sword may be safely trusted.”<sup>68</sup> That particular point was of no small importance—not only in terms of ripened political philosophy, but also recent political experience (the magazine episode and “independent” response). But did Virginia’s political and economic middle-class “elect” to exercise their right to keep and bear arms as Minutemen? The answer to that crucial question (and the major argument presented here) effectively undermines the basic assumptions of “Insurrection Theorists,” “Individual,” “Collective,” and “Civic” right scholars, as well as the “anti-army” ideology—which, after all, maintained that a truly “well regulated” armed force composed of “the body of the people” was militarily superior, and politically less dangerous, than any professional army raised from the “scruff and scrum” of society.

In his seminal journal article, Professor Michael McDonnell explains “The minute service was, in effect, a conservative reaction—perhaps a counterrevolution—to the disorder of the egalitarian and uncontrollable independent companies.” Indeed, Virginia’s ruling gentry “ignored the popular will” and imposed terms and conditions that epitomized “proper principles of hierarchy, command, subordination, and discipline.”<sup>69</sup> That conservative response, as McDonnell argues, was motivated primarily by upper-class

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<sup>68</sup>Mason to Washington, 14 October 1775, in Rutland, *Mason Papers*, 1:255.

<sup>69</sup>McDonnell, “Mobilization and Popular Culture,” 963.

fears that their ruling hegemony and political deference was being challenged and undermined “from below.” He also provides irrefutable evidence that Virginia’s yeomanry refused to “mobilize” (or keep and bear arms) as Minutemen because they rejected the restoration of order and control by the ruling elite. Indeed, “Class differences were prevalent” in the most of their “complaints.”<sup>70</sup>

In his valuable study, Professor Woody Holton likewise supplies convincing proof that “All over the province, farmers refused to join the minute battalions.” As Holton explains, “The minuteman battalions were unattractive to smallholders for precisely the same reason that they appealed to gentlemen: their purpose . . . was to replace the democracy of the independent volunteer companies with ‘proper subordination,’ thus revealing an “emerging class consciousness.” Moreover, the minuteman battalions “actually provoked still more dissent,” particularly between lower-class soldiers and upper-class officers. “Perhaps the gravest conflict between officers and common soldiers” occurred when the Third Convention reconvened in December 1775 (commonly referred to as the Fourth Convention). On that occasion, “the gentry-dominated convention repudiated the only gentleman that was extremely popular among the soldiers—Patrick Henry.” The convention persuaded Congress to pass Henry over for a Continental commission. Rather than accept his demotion (or uphold his republican virtue and principles by serving unselfishly for the “cause”), Henry sullenly resigned, causing many soldiers in his

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<sup>70</sup>Ibid., 967.

regiment to protest “in a tumultuous manner” and demand discharges. This near-mutiny from below “unnerved Virginia gentlemen.”<sup>71</sup>

Professor McDonnell and Holton are “New-Progressive” scholars. As such, they both offer valuable insight into the class conflicts that disrupted Virginia’s political and social culture prior to and during the American Revolution. They are not primarily concerned with constitutional conflicts, and have even less (if any) interest in the Second Amendment. Nevertheless, their arguments and evidence are relevant to this Virginia case study, which focuses on the constitutional restraints imposed on armed political power and violence in a free republic.

In the first place, the class-consciousness and conflict evidence undermines the “Insurrection Theory,” which erroneously transposes the ostensibly “classless” political and social culture of modern America into an eighteenth-century context. The “strict subordination” of military power to civil power was a constitutional means to check two excessive extremes: the armed autonomy of minority rule, typified in the eighteenth-century by despotic executives and magistrates (monarchs, “protectorates,” and ministers) governing under a military dictatorship or police state; and the armed autonomy of majority rule, exemplified by lawless mobs and popular anarchy. Moreover, lower-class Virginians demonstrated their class-consciousness most effectively by refusing to serve as Minutemen rather than pointing their weapons at the ruling gentry. Even the “mutiny” in Henry’s army regiment was conducted as a collective demand to be discharged. In sum, armed political violence was neither desired nor resorted to among Virginians.

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<sup>71</sup>Holton, *Forced Founders*, 167-170.

Second, equating “ordered liberty” with the quintessential “Minuteman Ideal” undermines the “Civic Rights” interpretation. Clearly, Virginians refused to serve in the minuteman battalions. The Fourth Convention of December-January 1775-1776 noted the failure to recruit manpower under the August ordinance, and passed legislation removing officers that “failed to make up their companies, and shall not complete the same within thirty days after the passing of this ordinance,” while at the same time quadrupling the size of the regular army.<sup>72</sup> The Fifth Convention of May-July 1776 made provision for the return of all minutemen to the ranks of the reserve militia “where any company hath not been raised.”<sup>73</sup> Finally, the new General Assembly of October 1776 decreed by statute that “all minute battalions, companies, and parts of companies, throughout this state shall be totally dissolved and discharged, and the said minutemen shall thereafter be considered as militia . . . .”<sup>74</sup> Thus the minutemen—an armed “phenomenon” that lasted only fifteen months—were officially (and forever) returned to the ranks of the militia reserve. Clearly, Mason’s minuteman plan was an abject failure, largely because Virginians refused to keep and bear their private and public arms in that armed “institution.”

Third, the fact that Virginians refused to keep and bear arms more often than not undermines the basic assumption of “Individual Rights” scholars that the Second Amendment guaranteed a right that was steadfastly cherished in Revolutionary (if not Colonial) America. In fact, Virginians preferred to ignore the military and police duties attached to that “right” (as do Individual Rights scholars), and frequently hoped the

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<sup>72</sup>Hening, *Statutes*, 9:86-89.

<sup>73</sup>*Ibid.*, 9:140.

<sup>74</sup>Hening, *Statutes*, 9:198.

“state” would do the same in time of war—or at the very least, not force (draft) citizens into exercising their armed rights.

Fourth, the emphasis of the “Collective Right” school on the “militia clause” is discredited by the fact that the “traditional” militia in Virginia was never “new-modeled,” but actually slipped to the lowest peg among all armed forces. Indeed, the Third Convention ordinance began the “militia section” with this pronouncement: “And whereas by the expiration of several of our militia laws, and the act of our general assembly making provision against invasions and insurrections, which there is little prospect of having revived in any reasonable time, it is judged necessary, in the present time of danger, that the remainder of the militia not included in the minute-men should be armed, accoutred, trained, and disciplined, in the best manner the circumstances of the country will admit of.” The “remainder of the militia” was clearly a basic reservoir—or reserve—of armed manpower that would serve as an auxiliary to the regular regiments and minuteman battalions. Much of the section dealing with the militia replicates old militia laws previously examined, especially in terms of exemptions, fines, and slaving patrolling. Unlike “select” minutemen, “universal” militiamen were required to provide their own arms and ammunition unless they were “so poor as not to be able to purchase the arms aforesaid,” in which case, “such arms, by order of the committee of the county” would be procured “at the expense of the publick.” That was about all that was said with respect to Virginia’s “reserve” forces. The entire “Militia” segment—both in terms of the ordinance’s break-down, as well as its armed role in Virginia’s defense—was about half as long as the “Minute-men” section.<sup>75</sup> In sum, the militia was becoming increasingly *unnecessary*

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<sup>75</sup>Ibid., 9:27-34.

to Virginia's common defense and internal security (slave insurrections excepted), and thus *less* of a justification to keep and bear arms either "collectively" or "individually" (even though the "state" still mandated that requirement, but with little reprisal for non-compliance). In fact, a regular army was becoming far more indispensable for military defense, which brings us to the final, if not core, Second Amendment "meaning"—the "anti-army ideology."

The fact that Virginia's new military establishment was based primarily upon "semi-professional" minutemen and "professional" regulars that were armed and paid by the state clearly emasculates the fundamental canons and convictions of Radical Whig theorists—especially since those armed forces were created by an extra-legal government at critical time when Virginians believed their lives and liberties were most threatened and thus in need of an effective defense. Just as significantly, the traditional, "universal" militia was not "re-modeled" into a better organized, trained, and disciplined fighting force, but instead was relegated to a "reserve" status; in effect, a large pool of "stand-by" manpower that, at best, could be called upon on a contingent rather than continuous basis. In sum, the ideological concept of the militia as "the proper, natural, safest,"—and as Patrick Henry chirped at the Second Convention—"the *only* security of a free Government" was invalidated by the harsher truths derived from practical experience and political crisis. So too was the Radical Whig argument that a professional army of hired mercenaries is "*forever* dangerous and subversive of free Government."

Radical Whig notions of the agrarian "citizen-soldier"—and his right to keep and bear arms as a property owner—were likewise sorely tested and found wanting. This becomes particularly clear with respect to "The most powerful force keeping smallholders

out of the minute battalions,” which as Professor Holton astutely tells us, “was its enormous demand on their time.”<sup>76</sup> Indeed, the “One great Objection” to the minute service related by the Accomack County Committee was that it “Arises from the time of Encampment being Such that it must unavoidably break in upon their Whole years Business while they are only Allowed pay for the actual time of Duty.”<sup>77</sup> Similarly, the small farmers in Northern Virginia protested against the new military establishment by expressing their preference to “go and Fight the Battle at once, and not be Shilly Shally, in this way, until all the Poor people are ruined.”<sup>78</sup> What Second Amendment scholars overlook in accepting the Radical Whig ideology as a reflection of reality (and by focusing so intently on “guns”), is that the most valuable “resource” in eighteenth-century Virginia (if not all colonial America) was manpower—in particular, its productive capacity as labor. In truth, the armed responsibilities of citizenship oftentimes *conflicted* with agrarian property ownership and agricultural production. Ironically, acquisitive individualism (and universal self-interest) did much to undermine “armed individualism exercised collectively,” thus paving the way for a new “ideological reality” of specialization and professionalism as argued by Moderate Whigs. Moreover, the time constraints imposed upon wage laborers only exacerbated the problem of organizing, training, and disciplining productive citizens into proficient soldiers.

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<sup>76</sup>Holton, *Forced Founders*, 169.

<sup>77</sup>Accomack County Committee of Safety to the Fourth Virginia Convention, 30 November 1775, in “Virginia Legislative Papers,” *Virginia Magazine of History and Biography* 14 (January 1907): 258. For additional complaints that the minute service infringed upon farming, see *ibid.*, 17 (October 1907): 381, and 18 (January 1910): 26-27.

<sup>78</sup>Quoted and cited in McDonnell, “Mobilization and Political Culture,” 966.

All the same, there were other “republican” principles within the Radical Whig ideology that remained intact (if not timeless); in particular, the idea that military power must be strictly subordinate to civil power. Just as significantly, the closing declaration on the Third Convention’s final day included a “variation” on Radical Whig ideology that Virginians had practiced for decades:

. . . on the one hand, we are determined to defend our lives and properties, and maintain our just rights and privileges, at every, even the extremest hazard, so, on the other, *it is our fixed and unalterable resolution to disband such forces as may be raised in this colony whenever our dangers are removed. . .*<sup>79</sup>

The purpose of the following chapter is to discover what other reflections (or variations) of reality the “anti-army” ideology held for Virginians. More specifically, I attempt to answer one major, thematic question: What was the “original meaning” and intended purpose of Article Thirteen in Virginia’s Declaration of Rights? More plainly posed, why did George Mason include it?

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<sup>79</sup>“Proceedings of the Thirty-third Day of Session,” 26 August 1775, in Scribner and Tarter, *Revolutionary Virginia*, 3:502. My emphasis.

## CHAPTER 9

### ARTICLE THIRTEEN: EXPERIENCE VERSUS IDEOLOGY

That a well-regulated Militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free State; that Standing Armies, in time of peace, should be avoided as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power.

—Article Thirteen  
Virginia Declaration of Rights  
12 June 1776<sup>1</sup>

“The Jealousies of a standing Army, and the Evils to be apprehended from one, are remote; and in my judgment . . . not at all to be dreaded; but the consequences of wanting one . . . is certain, and inevitable Ruin; for if I was called upon to declare upon Oath, whether the Militia have been most serviceable or hurtful upon the whole, I should subscribe to the latter . . . .”<sup>2</sup>

—George Washington  
24 September 1776

The objective of this chapter is to determine why George Mason included Article Thirteen in Virginia’s Declaration of Rights, which necessarily includes discovering the “original meaning” he attached to those words, as well as their intended purpose. Understanding Article Thirteen is absolutely vital because it subsequently formed the basis of “Virginia’s Version” of the Second Amendment, which was then revised by Congress into its recognized textual arrangement. However, Article Thirteen’s “original” significance was its inclusion within Virginia’s Declaration.

In the words of a distinguished constitutional scholar, “The Virginia Declaration of Rights of 1776 is the first true Bill of Rights in the modern American sense, since it is

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<sup>1</sup>Force, *American Archives*, 6:1561.

<sup>2</sup>George Washington to the Continental Congress, 24 Sep. 1776, in Fitzpatrick, ed., *Washington Writings*, 6:116.

the first protection for the rights of the individual to be contained in a Constitution adopted by the people acting through an elected convention.”<sup>3</sup> Never before in recorded history were fundamental political principles or guarantees of specific individual rights set down that were beyond the reach of government. Not even that most esteemed antecedent—England’s Bill of Rights, which Parliament enacted as a legislative statute in 1689—can make the same legal claim as being a truly “organic” constitutional document. The Virginia Declaration of Rights, in contrast, was superior to all bills and statutes; thus beyond the purview of any future legislative, executive, or even judicial branch whose more proper business was to check and balance each other, while the rules and rights of the people restricted the power of all three. While the three great documents of English liberty (Magna Carta, the Petition of Right, and the Bill of Rights) were concerned solely with restraining executive power, the sovereign state of Virginia took the unparalleled step of restricting its own legislature as well. It is also highly significant that Virginia’s Declaration of Rights *preceded* Virginia’s Constitution, or “plan of government” that would establish the structures, procedures, and powers by which the people and territory of the Old Dominion would be governed. It was not part of Virginia’s “original” Constitution or any of the others that followed.<sup>4</sup> The Virginia Declaration stood on its own accord. As Edmund Randolph, Virginia’s first Attorney General of under the new “plan of government,” tells us:

In the formation of this bill of rights two objects were contemplated: one, that the legislature should not in their acts violate any of those canons; the other, that in all the

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<sup>3</sup>Schwartz, *Bill of Rights*, 1:231.

<sup>4</sup>Virginia has had six different Constitutions since it became a sovereign state (written in 1776, 1830, 1851, 1864, 1870, and 1902). The Constitution of 1902 has gone through two major revisions (in 1928 and 1971), and two limited revisions (in 1948 and 1956).

revolutions of time, of human opinion, and of government, a perpetual standard should be erected, around which the people might rally and by a notorious record be for-ever admonished to be watchful, firm, and virtuous.

The cornerstone being thus laid, a constitution delegating portions of power to different organs under certain modifications was of course to be raised upon it.<sup>5</sup>

Accordingly, it made no difference whatsoever what “plan of government” was constituted as long as it was erected on that “cornerstone” and did not infringe upon those pre-contracted terms and conditions called “rights.” Moreover, the Declaration of Rights was not concerned in the least with *amending* Virginia’s subsequent constitution, nor was it created in response to that “plan of government”—which was precisely the case with the federal Bill of Rights. As a result, the Virginia Declaration was written with more clarity, precision, and purity than the federal Bill of Rights. As such, it is arguably the most unambiguous statement of rights and political principles within the entire canon of American constitutionalism.

Virginia’s Declaration set down nine contractual rules by which the government could not oppress or make war on the people (as the British legislature, executive, and judiciary were presently doing). The seven rights enumerated safeguarded natural as well as political liberties of citizens in relation to the powers that would govern them—which, as Randolph more pithily phrased it, was “the fencing of society by the institution of government.”<sup>6</sup> However, the people also had the power and authority to change those contracted principles, rules, and rights by which they were governed, as well as surrender them, if they so desired. Finally, the Virginia Declaration of Rights was intended solely

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<sup>5</sup>Randolph, *History of Virginia*, 255. We can forgive Randolph for referring to the document as a “bill” rather than a “declaration.”

<sup>6</sup>*Ibid.*, 252. For the breakdown of the nine principles and seven rights within the Declaration, see Schwartz, *Bill of Rights*, 1:233.

for Virginians. It was not written for Pennsylvanians, Marylanders, or any one else. Nor could any outside government infringe upon the declared rights of Virginians. Indeed, this was a sovereign Declaration of Rights contracted by a sovereign people in their sovereign state.

In sum, Virginia's Declaration of Rights set the standards by which Virginians would govern themselves, as well as the natural and political rights they still retained under the governing compact they created. Even though individuals surrendered a large measure of freedom when they left the state of nature and voluntarily "fenced" themselves in under a form of government, there were certain natural freedoms that remained sacrosanct and certain stipulations that could not be abrogated.

Without question, Virginia's Declaration of Rights was virtually all George Mason's work. By Mason's own admission, only two articles were formally adopted by the convention that he could not claim as his own (Articles 10 and 14). Article Thirteen was certainly written by Mason, but was not included in his original draft of ten points that he termed "the Basis and Foundation of Government."<sup>7</sup> It was added, along with seven others, in the committee's second draft.<sup>8</sup> We do not know whether Mason or another committee member suggested its inclusion.<sup>9</sup> However, there are certain facts that we do

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<sup>7</sup>Mason to Richard Henry Lee, 18 May 1776, in Rutland, *Mason Papers*, 1:276.

<sup>8</sup>The complete work of the drafting committee (amendments, additions, deletions, etc. to Mason's original ten proposals) is in Brent Tarter and Robert L. Scribner, comps., eds., *Revolutionary Virginia: The Road to Independence*, vol. 7, Part One, *Independence and the Fifth Convention, 1776: A Documentary Record* (Charlottesville: The University Press of Virginia, 1983), 276-77. Hereafter cited as Tarter and Scribner *Revolutionary Virginia*, 7/1: (specific page reference). Alexander Purdie printed the committee report in a handbill, while Dixon and Hunter published it in their *Virginia Gazette* on 1 June 1776.

<sup>9</sup>Rutland, *Mason Papers*, 1:286. The article as Mason originally wrote it is at page 284.

know. In the committee draft of the Declaration, Article Thirteen (as eventually numbered) stood as Article Fifteen, and the entire Declaration was submitted to the Convention on Monday, 27 May. The eighteen articles were read “and ordered to be committed to a Committee of the whole Convention for review and revision. The committee of the whole initially reviewed the draft articles on 29 May; but due to other pressing matters, did not finally address and amend the Declaration until 10 June. Consideration and approval of proposed revisions were completed the next day (11 June). As a result of those revisions, Article Thirteen moved up from fifteenth position in the draft. The final Declaration was read before the Convention on 12 June and was passed and transcribed into the official convention record.<sup>10</sup> Throughout the entire process, not one word of Mason’s original version of Article Thirteen was debated or changed. The text reads as follows:

That a well regulated Militia, composed of the Body of the People, trained to Arms, is the proper, natural, and safe Defence of a free State; that Standing Armies, in time of peace, should be avoided as dangerous to liberty; and that, in all Cases, the Military should be under strict subordination to, and governed by, the Civil power.<sup>11</sup>

Article Thirteen is written with clarity, brevity, and conciseness. One must exercise an extreme degree of imagination and creativity to interpret the “meaning” of those words any differently than as written. As we can see, this article is dedicated to stating three fundamental principles of a free republic (“State”) concerning the “Military.” Sig-

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<sup>10</sup>The approved Declaration of Rights, along with the committee of the whole’s amendments are in Brent Tarter and Robert L. Scribner, comps., eds., *Revolutionary Virginia: The Road to Independence*, vol. 7, Part 2, *Independence and the Fifth Convention, 1776: A Documentary Record* (Charlottesville: The University of Virginia Press, 1983), 449-50, 454-56. Hereafter cited as Tarter and Scribner, *Revolutionary Virginia*, 7/2: (page).

<sup>11</sup>*Ibid.*, 450. I have inserted the commas as the article appears in Mason’s draft for ease of reading, but retained the capitalization as the article was written at the convention. Aside from periods at the end, there was punctuation at all in any of the articles recorded by the convention.

nificantly, no political or natural “right” is delineated in the article. However, it does set down certain standards or rules that check the coercive power of the sword, and thereby safeguards political and natural rights enumerated elsewhere from armed oppression.

The first standard is that a specified type of “Militia”—one that is “well-regulated,” and “composed of the Body of the People trained to Arms”—“is the proper, natural, and safe Defence of a free State.” The second primary rule is that “Standing Armies” should be “avoided” if at all possible “in time of peace” because they are inherently “dangerous to liberty.” The third basic rule clearly assumes priority because it applies “in all Cases” when the power of the sword is exercised under any “plan of government” during either peace or wartime, and whether as a militia or standing army (again, “in all Cases”). The crucial criterion here is that “the Military should be under strict subordination to, and governed by, the civil power.” While a navy is never mentioned, it is obviously a form of “Military” power and therefore equally subordinate to “Civil power.” Even so, armed vessels cannot police or make war upon a population as effectively as armed soldiers.<sup>12</sup> The foundation of Article Thirteen was that armies should not enforce laws or punish sedition.

Employing Attorney General Randolph’s understanding of the matter, the three “canons” set down in Article Thirteen could not be “violated” by Virginia’s legislature. They were also “erected” so that “the people might rally around” them, “and by a notori-

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<sup>12</sup>The Fourth Convention created Virginia’s navy on 11 January 1776 in “An Ordinance for Raising an Addition Number Forces for the Defence and Protection of This Colony, and for Other Purposes Therein Mentioned,” by empowering the Committee of Safety “to provide from time to time such and so many armed vessels as they may judge necessary for the protection of the several rivers in this colony.” See Hening, *Statutes*, 9:83; Dean C. Allard, “The Potomac Navy of 1776,” *Virginia Magazine of History and Biography* 84 (October 1976): 411-30.

ous record be forever admonished to be watchful, firm, and virtuous.” Randolph also informs us that “the thirteenth” article in particular, “preferring militia to standing armies,” was the outgrowth of “historical experience.”<sup>13</sup> The political lessons learned from history and experience were, apparently, quite important to this generation of Virginians. Indeed, as Patrick Henry notably declared at the Second Convention in 1774: “I have but one lamp by which my feet are guided, and that is the lamp of experience. I know of no way of judging the future but by the past.”<sup>14</sup> What shone brightest, and guided Henry the most, was the light of recent history and contemporary experience. The same held true for Thomas Jefferson.

One of the coincidences of history is that Jefferson submitted his own draft Constitution for Virginia the very day the Fifth Convention approved the Declaration of Rights (12 June). Congress also appointed a committee to draft the Articles of Confederation that same day as well. The preamble to Jefferson’s constitution was essentially a rehearsal for his often ignored indictment against King George III in the Declaration of Independence, which was proclaimed just three weeks in the “future.” Jefferson pointedly condemned the king’s coercive military actions:

[by keeping among us], in times of peace, standing armies & ships of war;  
[by affectin]g to render the military independent of & superior to the civil power;  
by combining with others to subject us to a foreign jurisdiction, giving his assent to  
their pretended acts of legislation for quartering large bodies of troops among us;  
by plundering our seas, ravaging our coasts, burning our towns and destroying the  
lives of our people;  
by inciting insurrection of our fellow subjects with the allurements of forfeiture &  
confiscatio[n:]  
by prompting our Negroes to rise in arms against us;

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<sup>13</sup>Randolph, *History of Virginia*, 254.

<sup>14</sup>William Wirt, *The Life of Patrick Henry* (New York: M’Elrath & Bangs, 1831), 141.

by endeavoring to bring on in the inhabitants of our frontiers the merciless Indian savages, whose known rule of warfare is an undistinguished destruction of all ages, sexes, & conditions of existence;  
by transporting at this time a large army of foreign mercenaries [to compleat] the works of death, desolation, & tyranny already begun with circum[stances] of cruelty & perfidy so unworthy the head of a civilized nation;<sup>15</sup>

Unmistakably, Jefferson's first two charges coincided with Mason's last two canons in Article Thirteen. The concurrence is important because both men, working and thinking independently of each on separate documents, held common constitutional ground: that violating those specific military standards and rules was unconstitutional. In Jefferson's document, the ultimate result of those transgressions was clear: they gave King George III the means (a peacetime army) and the opportunity (military power "independent of and superior to civil power") to make war on Virginians; which, in turn, not only justified their right to resist that armed aggression with equal armed force, but also to effect their political independence from that coercive rule, and create a new governing compact among themselves. Significantly, the King's efforts to incite insurrections among white Virginians as well as their black slaves were likewise considered acts of war against the people, who likewise had a right to crush those insurrections in self-defense—a legitimate act of armed resistance that was not an illicit insurrection, but counteracted such rebellions.

It is also important to note that Jefferson's indictments were leveled against the chief executive (King George III) rather than the legislature (Parliament). We should recall that the "anti-standing army" ideology, and Article VI of the English Bill of Rights—

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<sup>15</sup>"Draft of a Constitution, by Thomas Jefferson," 12 June 1776, in Tarter and Scribner, *Revolutionary Virginia*, 7/2:457-58. The brackets replace torn words, syllables, and symbols from the original manuscript as reprinted in the *Richmond Enquirer* on 20 June 1806 from a verbatim copy supplied by George Wythe. See footnote 2 in *ibid.*, 7/2:466.

which was the “Adam’s rib” of the military’s subordination to civil power—were both directed at executive magistrates who misused the power of the sword. In addition, the “Executive” (“to be called the Administrator”) was, in large measure, stripped of military power in Jefferson’s proposed Constitution. Specifically, “he shall not possess the prerogatives . . . of declaring war or peace;” or “of raising or introducing armed forces, building armed vessels, forts, or strong holds.” The armed political power the executive *did* possess was appointing “Officers civil and military.” Yet even then, those appointments were subject to veto by the “Privy council, saving however to the Legislature a power of transferring to any other person the appointment of such officers or of any of them.” In sum, the chief executive exercised limited command but no control over Virginia’s armed forces. Ultimate control over the sword rested with “the people” as represented in their political body—the legislature. Accordingly, military power could only be exercised with their freely given consent and in their best interest. Using the sword independently of “the people” was unconstitutional. The same held true under Virginia’s new Constitution.

The Fifth Convention adopted the Constitution on 29 June. The preamble replicated Thomas Jefferson’s model and included all the indictments on the misuse of military power as previously discussed. However, George Mason was the primary architect of its main body. Supreme authority belonged to the legislature, now called the House of Delegates, which represented the popular sovereignty of the people of Virginia. Suffrage requirements remained the same as they had been since 1736; free white males over twenty-one who owned one hundred acres of unimproved land for at least one year in the county where they voted, or twenty-five acres on which a house or plantation was built,

or a lot and house in an incorporated city. Voters elected House delegates and Senators annually. Delegates were required to live in the county they represented. The Senate could not initiate any legislation or veto money bills, but had the authority to approve or reject all other laws. Virginians created as little need for a chief executive as possible based on recent experience. The legislature's function was to enact all laws and set governing policy; the executive's function was to enforce those laws and implement policies.

The executive was composed of a governor and an eight-member Privy Council, which essentially served as a plural executive. Both were elected annually by joint ballot of both houses. Despite Patrick Henry's strenuous objections, the governor had no veto power over any law passed by the legislature. Henry was elected Governor the same day the Constitution was adopted by defeating Thomas Nelson, Sr., former President of the old Council, sixty votes to forty-five. The Privy Council was elected the same day as well. The executive's autonomous power over the sword was strictly limited: "The Governor may embody the Militia with the advice of the [P]rivy Council and when embodied shall alone have the direction of the Militia *under the laws of the Country*."<sup>16</sup> Thus the chief executive could not exercise the power of the sword on his own volition, nor could he command military and police forces (militias) contrary to the laws set down by the legislature. The Constitution made no mention whatsoever concerning the Virginia's nine regular regiments or tiny navy. However, the powers and authority of the Committee of Safety were transferred to the new Governor and Privy Council by an ordinance on 5 July 1776, the last day of the Fifth Convention.<sup>17</sup> The convention delegates, already

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<sup>16</sup>"Proceedings of the Forty-seventh Day of Session," 29 June 1776, in Tarter and Scribner, *Revolutionary Virginia*, 7/2:649-654. Quote at pages 652-53. My emphasis.

<sup>17</sup>Hening, *Statutes*, 9:121.

recently elected by Virginia voters, became the first representatives in the new House of Delegates.

As Edmund Randolph noted, the Declaration of Rights was directed at proscribing the power of the legislature, the supreme governing authority in Virginia. The House of Delegates had total control over Virginia's armed forces. It had the power to raise, regulate, and disband armies and militias, and ultimate approval over all officer appointments. In addition, the chief executive directed those forces according to the rules set down by the legislature. Article Thirteen proclaimed three standards that the House of Delegates and Senate should abide by. First, that in times of war or domestic emergencies, they should rely primarily upon a well-regulated militia, composed of all Virginia citizens that were trained to arms, because that armed force was the proper, natural, and safest defense of Virginia, a free state. Second, the legislature should "avoid" raising or maintaining a standing army in time of peace because it was "dangerous to liberty." The danger was that if the people were policed or otherwise coerced by a standing army, they were not free. Third, the legislature was told that they should strictly subordinate and govern the military under their civil power "in all cases," or not relinquish firm control over the sword to any individual or group. The people, in turn, had the constitutional right and responsibility to be "watchful, firm, and virtuous" and "rally around" those standards if the legislature violated them, as Randolph noted. That was the original purpose of Article Thirteen.

Article Thirteen was predicated upon "historical experience": to ensure that no individual, group, or governing body had the power to use military force as King George III had done in Jefferson's list of indictments. As such, it afforded greater protections

against military rule than Article VI of the English Bill of Rights, which declared: “That the raising or keeping of a standing army within this kingdom in time of peace, *unless it be with consent of Parliament*, is against law.”<sup>18</sup> [Emphasis supplied.] Parliament’s “consent” was given through fiscal appropriations to support military forces, thus preventing monarchs from raising standing armies independently of that elected body. However, Article VI did not alter or amend the fact that “the sole supreme government, command and disposition of the militia and of all forces by sea and land . . . is and . . . ever was the undoubted right of his Majesty . . . .”<sup>19</sup> Nonetheless, it laid the foundation for the constitutional distinction between executive command and legislative control, which subordinated military power to civil power. Even so, “Neo-Harringtonians” professed “little faith” in the constitutional protections afforded under Article VI. In their view, Parliament’s power over the purse was no match for the King’s command over the sword; therefore, standing armies should be disallowed altogether, with or without Parliament’s consent. Conversely, Article Thirteen pointedly declared that the Virginia legislature should “avoid” using its authority to raise standing armies in peace, and that the military must always remain “strictly” subordinate to civil power. In effect, Article Thirteen alleviated Radical Whig anxieties and buttressed Moderate Whig confidence that the legislature could check the armed political power of chief executives.

Similarly, Jefferson did not charge Parliament with committing military transgressions in his preamble or the Declaration of Independence because only King George III had “sole supreme government” over the sword—even though the constitutional crisis

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<sup>18</sup>Schwartz, *Bill of Rights*, 1:43.

<sup>19</sup>Militia Act of 1661, in *Statutes of the Realm*, 5:308-09.

within the British Empire initially began as a contest over legislative supremacy between colonial assemblies and Parliament over the power of the purse (taxation) to maintain a standing army in North America. In addition, colonial legislatures had no control whatsoever over his majesty's Army or Navy—even though Jefferson made the following claim two years earlier in his *Summary View*:

his majesty has from time to time sent among us large bodies of armed forces, not made up of the people here, nor raised by the authority of our laws. Did his majesty possess such a right as this, it might swallow up all of our other rights whenever he should think proper. But his majesty has no right to land a single armed man on our shores, and those whom he sends here are liable to our laws made for the suppression and punishment of riots, routs, and unlawful assemblies; or are hostile bodies, invading us in defiance of law. . . . To render these proceedings still more criminal against our laws, instead of subjecting the military to the civil powers, his majesty has expressly made the civil subordinate to the military. But can his majesty thus put down all law under his feet? Can he erect a power superior to that which erected himself? He has done it indeed by force; but let him remember that force cannot give right.<sup>20</sup>

It is important to note that Jefferson held the military “liable” to—not above—colonial laws that policed the civil population; specifically, “the suppression and punishment of riots, routs, and unlawful assemblies.” Moreover, the British Army was “not made up of the people here”—or as Article Thirteen articulated, “composed of the body of the people”—nor was that armed force “raised by the authority of [Virginia’s] laws.” Indeed, Jefferson emphasized the importance of “subjecting the military to the civil powers,” which, as we have seen, was an influence the House of Burgesses perpetually exercised under various laws and in numerous contests with Governors throughout Virginia’s history. Even the de facto Third Convention subordinated the “independent” companies to extra-legal civil authority. However, Article VI—and by extension, Parliament—had

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<sup>20</sup>Jefferson, *A Summary View of the Right of British America. Set Forth in Some Resolutions Intended for the Inspection of the Present Delegates of the People of Virginia* (Williamsburg: Clementina Rind, n.d. [1774]); reprinted in Van Schreeven and Scribner, *Revolutionary Virginia*, 1:255. Hereafter cited as Jefferson, *Summary View*.

failed to prevent the King from using his military forces to police and coerce his colonial subjects. Edmund Pendleton certainly recognized that harsh reality when he poetically lamented: “Oh Britain how has thou suffered thy renowned Arms to be degraded, by employing them in the cause of Tyranny and Oppression, when Virtue and liberty was the Shield and Spear which made them Formidable!”<sup>21</sup> Therefore, the purpose of Article Thirteen was to guarantee that “Tyranny and Oppression” would never similarly “degrade” Virginia’s “Arms.” Indeed, the sovereign sword in *that* particular “Commonwealth” would be “Formidable,” but never despotic.

Finally, Jefferson dedicated the last section of his draft Constitution to “Rights Private and Public”—his own “Declaration of Rights” that was contained within the body of his proposed Constitution. In that significant section, he declared one “public” right concerning the military: “There shall be no standing army but in time of actual war.” It is here that Jefferson employed Radical Whig theory to its fullest extent—but within an American context—by totally excluding the “consent” or authority of Virginia’s legislature to raise a peacetime army. Up to 1776, standing armies were feared as independent tools of oppression in the hands of kings (chief magistrates). Certainly under Virginia’s Constitution, the magistrate was relegated to the position Jefferson pointedly described in *A Summary View*: “no more than the chief officer of the people, appointed by the laws, and circumscribed with definite powers, to assist in working the great machine of government, erected for their use, and consequently subject to their superintendence.”<sup>22</sup>

From 1776 on, legislatures were supreme and fully controlled the sword in kingless re-

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<sup>21</sup>Edmund Pendleton to Richard Henry Lee, 20 April 1776, in Mays, *Pendleton Papers*, 1:164.

<sup>22</sup>Jefferson, *Summary View*, 1:243.

publics. The people, through their “declared rights,” held that power in check. Mason, however, was slightly less restrictive than Jefferson; in Article Thirteen, “Standing Armies, in time of peace, should be *avoided* as dangerous to liberty” by Virginia’s supreme legislature; therefore a window was left slightly ajar that could be “raised” fully into a peacetime army. Nevertheless, the “danger” of a peacetime army was the same for both Mason and Jefferson: it was an armed instrument that could be aimed internally to police the population—most likely by a rogue executive in cahoots with a thoroughly corrupt legislature. Neither man challenged the political propriety (or constitutionality) of raising a standing army during wartime for precisely the opposite reason: on those occasions, military power was fully engaged in combating external enemies, protecting the people, and defending liberty. After performing those military tasks, however, armies were to be permanently disbanded.

Jefferson also declared one “private” right concerning personal arms, which had absolutely nothing to do with military power. It read: “No freeman shall be debarred the use of arms {within his own lands or tenements}.” The brackets and inserted words are Jefferson’s own. His intention was that the Fifth Convention could deliberate, debate, and replace that text with other language.<sup>23</sup> In any case, his “Declaration of Rights” made no mention whatsoever about militias or the rights of armed citizen-soldiers. Article Thirteen, however, plainly did so within the “militia principle.”

The most intriguing standard set down in Article Thirteen is the first: “That a well-regulated Militia, composed of the Body of the People, trained to Arms, is the natural, proper, and safe Defence of a free State.” As explicated above, the “standing army”

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<sup>23</sup>“Draft of a Constitution, by Thomas Jefferson,” 12 June 1776, in Tarter and Scribner, *Revolutionary Virginia*, 7/2:463, 468-69.

and “military subordination” rules derived their meanings from English constitutional law, history, political theory, and even more importantly, from Virginia’s “historical experience.” The “militia principle,” on the other hand, apparently derived its meaning solely from English political theory—the Radical Whig indictment against standing armies. We have traced the lineage of the “militia principle’s” words with respect to the man who penned them, George Mason, and therefore understand his personal preferences (if not prejudices) in favor of militias. We also know Mason first employed that language only eighteen months earlier—on 17 January 1775 in “A Call to Arms for Defense” issued by the Fairfax County Committee of Safety. Therefore, the “militia principle” was a relatively “new” idea in Virginia, at least in terms of its formal adoption and application. We likewise know the ideological “meaning” attached to the “militia principle” according to anti-army theorists in England. Just as importantly, we know the experiential “meaning” of Virginia’s militia, as well as how and why Virginians exercised their right to keep and bear arms across a broad class spectrum—as freeholding-soldiers, as unpropertied-soldiers, and as gentlemen-soldiers. What we have discovered is that Virginia’s “historical experience” never measured up to that political theory.

In Virginia reality, the militia system was largely exemplified by apathy and atrophy for almost a century until it finally degenerated into legal non-existence in 1773. When the prospect of war with Great Britain became immediate in 1774-1775, Virginians faced the hard truth of building a military establishment from nothing. The only convenient guideline was a repealed militia law that was four decades old. Mason certainly knew all of this to be true; after all, he was instrumental in restructuring Virginia’s armed forces. Two years earlier, Mason was so “sensible of the Expediency of putting the Mili-

tia of this Colony upon a more respectable Footing” that he created an entirely new armed force—the Fairfax Independent Company.<sup>24</sup> That force, however, was not “composed of the body of the people, trained to arms,” but selectively organized among wealthy “gentlemen.” One year later, Mason “melted down” the Independent Companies into yet another new armed force—“Minuteman Battalions”—which were a cross between army regulars (which Mason also included in his “Plan”) and militiamen (which Mason relegated to reserve status). Yet by the time Mason wrote Article Thirteen, only one contingent had popular backing—the provincial army.

Mason wrote Washington in October 1775 that his “minute-plan” was a “wise one.” One month later, veteran Fielding Lewis told the General the new service was failing because “the young Gentlemen [are] not setting a good example of inlisting.”<sup>25</sup> George Gilmer of Albemarle County, who spoke so enthusiastically as an officer in a “gentleman company” in early 1775, had this to say about Mason’s plan: “I know not from what cause, but every denomination of the people seem backward; the [Third] Convention have altered the name Volunteers to that of Minute Men, and behold! What a wondrous effect it has had. Out of three hundred Volunteers there are how many Minute Men? So few that I am afraid to name them.” As Gilmer aptly noted, the old pattern of atrophy and apathy had returned: “We were once all fire, now most of us are become inanimate and indifferent.”<sup>26</sup> Without question, most gentlemen and yeomen had no interest in joining Mason’s “minutemen.”

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<sup>24</sup>“Fairfax County Militia Association,” in Rutland, *Mason Papers*, 1:210-11.

<sup>25</sup>Fielding Lewis to George Washington, 14 November 1775, *Pennsylvania Magazine of History and Biography* 53 (January 1929), 93.

Some political conservatives, particularly Robert Carter Nicholas, wanted a large regular army. That desire had popular support as well. In November 1775, the Northampton County Committee of Safety dispatched these sentiments to Edmund Randolph, President of the Second Continental Congress:

At the last Convention held in this Colony a number of minute Companies were directed to be raised in this District but have never been completed, people in general being averse to the minute Service. None of our People have ever been in actual Service and therefore have no Officers of Experience, on whom they can rely;—great Pains have been taken to debauch their Minds and to keep them totally pacific. . . . Many Gentlemen here, in short, almost every Man of Considerable Property is well affected to the American Cause, but many forbear openly to declare their Sentiments or take an active part till they can see some force ready to assist them and afford a reasonable Expectation of succeeding. In such a case we have reason to believe that some Companies of regulars might be instantly raised in these two Counties of Northampton and Accomack and that the greatest Part of the Malitia might be drawn into Service in Case of alarm. But as matters at present stand this Committee have very little Authority. . . . We have, in this critical and alarming State . . . thought it most proper to lay this information before your honourabl. Board, not only as it is a matter of Continental Concern, but as troops (in case you should judge it necessary to send any here) can be drawn much quicker and with more safety from the Northward than from the Western Shore of Virginia. Until some active Step is taken this Committee must silently put up with several Enormities; but when they can be properly assisted or supported your honourable Board may rely upon their acting with Zeal and Unanimity, and we hope if any Troops are sent, such directions may be given, that it may appear that this Committee possesses the Confidence of your Body, and have acquitted themselves in the best manner their dangerous and critical Situation will admit of.<sup>27</sup>

Several vital points stand out from this extraordinary appeal. First is the fact that a local committee decided to forward its military concerns to a higher and more centralized governing body rather than Virginia's executive Committee of Safety. The reason for that "leap" of authority is quite apparent: Congress directed the Continental Army and the Northampton committee—feeling isolated, exposed, and vulnerable to attack—

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<sup>26</sup>“Address to the Inhabitants of Albemarle,” fall 1775, in Brock, “Gilmer Papers,” 122-23.

wanted the Continental Army to provide them with armed protection. Second is the fact that “Gentlemen of Considerable Property” were not about to “declare their Sentiments or take an active part” in any war with Great Britain until they were assured that “some” sort of military “force” would in fact come to their aid, and thus “afford a reasonable Expectation” that the cause of liberty would succeed. Unlike George Mason, who expected “gentlemen” to set a martial example for the lower classes to follow, men of “Considerable Property” on the Eastern Shore were less “prompt” in lending support unless backed by bayonets. Third, and most importantly, the general population in Northampton was “averse to the minute Service” and that the local committee preferred raising companies of regular soldiers “instantly” with the local “malitia” serving as an auxiliary force “drawn into Service in Case of alarm.” Here we find a most remarkable—and practical—application of the both the “pro” and “anti-army” ideologies, but without any apparent conscious awareness of them. Mason, of course, was alert to both theories and tried to “new-model” the best attributes of armies and militias within a minuteman component. We can reasonably assume the people in Northampton did not like his concept because it required increased training, more discipline, and above all a greater commitment (more time and self-sacrifice). Instead they preferred the “occasional” call-up of citizen-soldiers during actual alarms, coupled with the full-time preparedness (and protection) provided by regular (and regularly paid) troops. In large measure, the Fourth Convention answered Northampton’s prayers by adding seven more regiments and swelling the

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<sup>27</sup>“Committee of Northampton County, Virginia to the honourable The President of The Congress at Philadelphia,” 25 November 1775, in Scribner and Tarter, *Revolutionary Virginia*, 4:467-69.

army's ranks to 5,958 troops.<sup>28</sup> In fact, the delegates *had* to raise a larger standing army because Congress was not about to sacrifice Boston, New York, or Philadelphia by sending *its* most valuable armed resource—the fulltime soldiers of the Continental Army—to keep Norfolk in patriot hands, which was only recently recaptured from Dunmore's loyalist forces, and garrisoned by one small regiment. If Virginia wanted to remain sovereign, that “Country” would have to rely upon a provincial army to serve as its sword and shield against British invasions and loyalist insurrections.

Furthermore, civil and military leaders at the national level clearly favored professional armies over proletarian militias. Indeed by the time the Fifth Virginia Convention met, the Second Continental Congress had by-passed the colonial militia system altogether, created a regular army, and chose a Virginian to command it. Three months after Article Thirteen was approved, General George Washington divulged his views on the militia/standing army dichotomy in the following excerpted statement to Congress (recall Washington began his military career in 1754 as a militia adjutant under Governor Dinwiddie):

To place any dependence upon Militia is, assuredly resting upon a broken staff. Men just dragged from the tender Scenes of domestick life; unaccustomed to the din of Arms; totally unacquainted with every kind of Military skill, which being followed by a want of confidence in themselves, when opposed to Troops regularly train'd, disciplined, and appointed, superior in knowledge, and superior in Arms, makes them timid, and ready to fly from their own shadows . . . .

On the other hand:

The Jealousies of a standing Army, and the Evils to be apprehended from one, are remote; and in my judgment . . . not at all to be dreaded; but the consequences of wanting one . . . is certain, and inevitable Ruin; for if I was called upon to declare upon

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<sup>28</sup>Hening, *Statutes*, 9:75-77, 85-87.

Oath, whether the Militia have been most serviceable or hurtful upon the whole, I should subscribe to the latter . . . .<sup>29</sup>

For Washington, the lessons learned from hard experience were more valuable than those taught by theorists. Moreover, his comparison between a standing army and militia was validated by the realities of prolonged warfare.

Mason certainly realized the militia was moribund and tried to “new model” it, but without much success. And yet Radical Whig theory told him a viable militia was the “only stable security of a free government.”<sup>30</sup> So what are we to deduce from the fact that Article Thirteen held the militia up as a “perpetual standard” for “the people” to “rally around” and “be forever watchful, firm, and virtuous” despite the glaring contradiction between abstract theory and actual practice? Are we to conclude that Mason’s faith in that armed institution—and Patrick Henry’s argument that it was “only” means to protect the political freedom and power of white Virginians—were not based on “historical experience” but rather on a political ideology inherited from seventeenth-century England?

Those are not easy questions to answer. In fact, few (if any) Second Amendment scholars have tackled or even posed them. Instead, they accept Radical Whig ideology as an unquestioned “article” of their own combined scholarship, yet disagree as to whether or not it was “practiced” as an individual, collective, or civic right. Moreover, if the only conclusion to be drawn is that Virginia’s history and practical experience were *not* significant or contributing factors in creating Article Thirteen; that it was solely Mason’s knowledge and unqualified acceptance of Radical Whig ideology that accounts for the

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<sup>29</sup> George Washington to the Continental Congress, 24 Sep. 1776, in Fitzpatrick, ed., *Washington Writings*, 6:106-116, *passim*.

“militia clause”; that despite professions they were guided by the lamp of experience, it was actually the lantern of ideology that shone brightest for Virginians; then the basic assumptions of this study are false—indeed, the historical survey of Virginia’s militia and how Virginians kept and bore arms reveals nothing of constitutional consequence and thus has no relevant relationship to either Article Thirteen or the Second Amendment. Though logical, that answer is not the major theme of this dissertation or the basic argument of this chapter.

It is my contention that George Mason included the “militia principle” not because of what the militia was in mid-1776, or what it had been throughout Virginia’s history, but because of what it *had* to be: an armed institution that would prove Virginians were virtuous enough to fight for—and ultimately win—their political independence against Great Britain’s mighty, but despotic, military forces. Indeed, Virginia militiamen would prevail in that struggle because *they* were more virtuous than British regulars, and the proof of their superior virtue was that they fought as citizen-soldiers in militias, not as hired thugs and underlings in armies. In other words, Mason employed the Radical Whig ideology in its broadest, yet most genuine sense: as a body of ideas that had the power to direct the political actions of Virginians toward a set goal (independence) and mobilize public opinion (and armed manpower) behind an agenda to achieve that political objective (war). Mason was setting an immediate standard for Virginians to “rally around” in Article Thirteen; they were virtuous citizen-soldiers fighting for freedom and defending

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<sup>30</sup>Fairfax County Committee of Safety Proceedings, 17 January 1775, in Rutland, *Mason Papers*, 1:212.

their rights. Indeed, Radical Whigs in England argued that the only way to defend freedom was with freemen,<sup>31</sup> or to put “the Sword in the hands of the Subject,”<sup>32</sup> and “by making the Militia to consist of the same Persons as have the Property.”<sup>33</sup> To admit openly at the outset of the war that Virginians could not rely upon their militias—or that property-owners refused to defend their freedom as citizen-soldiers—would have “meant” that armed resistance in the name of freedom was unjustified. Not all Virginians believed that to be true, however; nor did they have faith in the premise “that a well-regulated militia was the proper, natural, or safe defense of a free state”—especially in time of war. In fact, Mason was asking a lot from a political theory that argued the militia versus standing army dichotomy in such absolutist language.

“The crux of the [anti-army] controversy,” as constitutional scholar John Phillip Reid reminds us, “was not whether militias could defend the nation from foreign invasion as competently as standing armies. Everyone granted professional soldiers had the advantage in warfare.” The heart of the matter

was whether or not a people policed by standing armies could be free. This question lay at the core of constitutional fears during the prerevolutionary era, and it was not new. If regular troops were employed to enforce law or punish sedition, it had been said in the 1690s, “the Lords, Gentlemen, and Freeholders of *England*, are not fit to be trusted with our own Laws, Lives, Libertys, and Estates.”<sup>34</sup>

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<sup>31</sup>John Toland, *Militia Reform'd, or an Easy Scheme of Furnishing England with a Constant Land-Force* (London, 1697), 18-25.

<sup>32</sup>Andrew Fletcher, *Discourse of Government England with Relation to Militias* (London, 1698), 8.

<sup>33</sup>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), 4.

<sup>34</sup>John Phillip Reid, *In Defiance of the Law: The Standing-Army Controversy, the Two Constitutions, and the Coming of the American Revolution* (Chapel Hill: University of North Carolina Press, 1981), 103. Hereafter cited as Reid, *In Defiance of the Law*.

That was the true of a “danger” of standing army. As John Trenchard said, a professional army serving as a police force made government “violent” and “against Nature.” Such an exercise of military force could not “possibly continue” within a free state where “the Constitution must either break the Army, or the Army will destroy the Constitution.”<sup>35</sup> The militia, on the hand, was composed of the body of people, and it was judged ‘impossible to make use of the people for oppressing the liberties of the people.’ Not only could the militia enforce laws and suppress insurrections as effectively as a standing army, “but to use the militia, the people, for police would insure better laws. The reason was that ‘where laws are to be executed by the militia, the government must take care to enact no laws, but such as are agreeable to the majority of the people.’”<sup>36</sup>

I agree with Professor Reid’s argument up to a point. Certainly, the historical survey of Virginia’s militia clearly demonstrates that it was increasingly used in a police capacity over time, and was both capable and dependable in performing that task (especially at crushing insurrections by slaves and servants). Not once do we find provincial regulars acting as military policemen. Certainly in that respect, there was an experiential and historical basis for favoring militias over standing armies. However, I disagree with Professor Reid’s appraisal that “Everyone granted professional soldiers had the advantage in warfare.” Indeed, a major thrust of the Radical Whig ideology was *reform*; to “new model” the militia into a more proficient and effective fighting force so it could eliminate any and all dependency on a professional army for homeland security. In fact, militia

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<sup>35</sup>Trenchard, *An Argument Shewing*, 4.

<sup>36</sup>Reid, *In Defiance of the Law*, 104; quoting “Speech of Lord Bathurst,” Lords Debates of 9 March 1739, *Parliamentary History* 10:545-50.

reform was crucial to all Radical Whigs from James Harrington to James Burgh and, of course, to George Mason. To a man, they knew the “historical experience” of English militias did not measure up to their ideological standards in terms of military defense, which explains why they had to look elsewhere “in history” for examples to support their arguments; in particular, the ancient republic of Rome. However, it is wrong to assume that Virginia’s history and experience had little or no causative influence on the formulation of the “militia clause” in Article Thirteen or the subsequent Second Amendment.

Virginia’s pre-revolutionary militia was a product of its history, a gradual, evolutionary process of degeneration and decay that has been explored and explained in this study. As we have seen, random attempts to reform that traditional institution through various militia laws not only were largely unsuccessful, but also were motivated by political crises (Indian invasions, foreign wars, and domestic insurrections), not by Radical Whig ideology. And yet the revolutionary generation did not merely inherit a decrepit militia system, they contributed to its legal demise, and then furthered its decline into an auxiliary, reserve force. The reality was that military service had been relegated to vagrants, criminals, and other expendables; men who owned no property, could not vote, or otherwise had little or no stake in society. The rhetoric said military service was the right and responsibility of gentlemen and middle-class freeholders. According to Radical Whig theory, a reformed militia was supposed to convert rhetoric into a new reality. By the time Article Thirteen was written, however, the only “serviceable” factor available was the rhetoric. Reality remained unchanged, as did the militia.

In his seminal article entitled “Rhetoric and Reality in the American Revolution,” Gordon Wood offered this astute observation: the “purposes of men, especially in a revo-

lution, are so numerous, so varied, and so contradictory that their complex interaction produces results that no one intended or could even foresee.”<sup>37</sup> That apt assessment is valid with respect to Article Thirteen (as well as the Second Amendment). George Mason’s unconditional acceptance of the anti-army rhetoric that citizen-soldiers—not professional soldiers—were the only source of manpower “in whose hands the sword may safely trusted” did not serve his intended purposes very well. Instead, his convictions exposed the contradictions between rhetoric and reality, encouraged the complex interactions of competing ideologies, and produced unintended results. The crux of the problem in Article Thirteen was Mason’s extraordinary faith that “a well-regulated militia, composed of the body of the people, trained to arms” could win a war against Great Britain. That conviction was not based on empirical fact, but ideological necessity. Despite the militia’s past or present condition, Virginia’s citizen-soldiers remained virtuous. The concept of the virtuous citizen-soldier was based upon a fundamental (but flawed) presumption: the man who possesses property and the right to vote is more willing to make ultimate sacrifices to defend his freedoms than the man who has nothing and only takes up arms for pay or out of fear of being punished. Virginians simply could not fight a war for political independence by hiring economic dependents (vagrants and the propertyless).

Even so, a truly viable political ideology is supposed to make factual experience adaptable to abstract ideas, and ideas adaptable to experience with a certain purpose in mind: to create a convincing worldview that provides meaningful explanations for new or evolving political circumstances. If that ideology has no meaningful relationship to ex-

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<sup>37</sup>Gordon S. Wood, “Rhetoric and Reality in the American Revolution,” *William and Mary Quarterly*, 3<sup>rd</sup> Ser., 23 (January 1966): 16.

perience or current circumstance, its power to direct the political actions of people is greatly diminished (if not totally extinguished). To a greater or lesser extent, the “peace-time army” and “military subordination” standards were supported by past history and especially recent experience (Gage’s army and Henry’s independent companies, respectively). Virginians also had “historical experience” raising armies composed of their social refuse. The “militia standard,” however, was a different matter. Mason could hardly ignore the fact that Virginians resorted to armies because militiamen refused to keep and bear arms during wars; his objective was to translate the pro-militia ideology into practice (the minuteman ideal) and thus transform prior experience. Yet in large measure, the anti-army/pro-militia language trapped Mason; it did not offer him any alternative other than a bourgeois militia. Indeed, it was the only armed vehicle in which a virtuous Virginia citizen could serve as a virtuous soldier to defend his property and freedom. The “standard” Mason hoped the people would “rally around” was a well-regulated militia composed of virtuous citizens trained to arms—in effect, a miniature republic of freeholders that reflected the larger sovereign (and virtuous) polity called the Commonwealth of Virginia. However, Mason’s ideological vision was deceptive. He could not transform an abstract ideal into practical reality with the stroke of his pen; there simply were not enough virtuous citizens at hand to bear arms or shoulder their armed responsibilities. Ironically, the individual self-interest that Radical Whigs attributed to citizen-soldiers (property ownership and voting rights) largely undermined armed participation in reality. Moreover, the un-propertied refused to carry the load for their “betters” unless it was under terms and conditions that satisfied *their* self-interests. Indeed, if poor men were go-

ing to fight in the place of rich men, they would insure their armed labor was appropriately compensated.

All the same, the “militia clause” in Article Thirteen also related to “historical experience” in terms of its primary constitutional objective: to prevent using the military as a police force to oppress white Virginians as Jefferson related in *A Summary View* and the preamble of Virginia’s first Constitution. In essence, Radical Whigs like Mason were willing to sacrifice a measure of military defense (the proficiency and professionalism afforded by a standing army) in exchange for greater internal security (that only militias were available to enforce laws and punish sedition). In that formulation, Radical Whigs were primarily concerned with the experiences and realities of armed political violence in the domestic sphere that threatened civil liberties. Moderate Whigs like Washington agreed that standing armies should not be employed as domestic police forces, but were more concerned with military defense. In their view, a professional military establishment could be effectively kept in check without sacrificing external security.

Even a Radical Whig like Thomas Paine was more of a realist than an ideologue when it came to practicing military principles. He knew Americans were embarking upon a civil war with Great Britain in 1776, not mounting an armed insurrection over taxes. As Paine put the matter in *Common Sense*:

the taking up of arms, merely to enforce the repeal of a pecuniary law, seems as unwarrantable by the divine law, and as repugnant to human feelings, as the taking up arms to enforce obedience thereto. The object, on either side, doth not justify the means; for the lives of men are too valuable to be cast away on such trifles. It is the violence which is done and threatened to our persons; the destruction of our property by an armed force; the invasion of our country by fire and sword, which conscientiously qualifies the use of arms: and the instant in which such mode of defense became necessary, all subjection to Britain ought to have ceased; and the independence

of America should have been considered as dating its era from, and published by, *the first musket that was fired against her*.<sup>38</sup>

Nevertheless, raising the sword to combat the sword—even in political self-defensive—was inherently dangerous. As Paine cautioned, the armed political power of the people should be exercised wisely:

I shall conclude these remarks, with the following timely and well-intended hints. We ought to reflect, that there are three different ways by which an independency may hereafter be effected; and that *one* of those *three*, will, one day or other, be the fate of America, viz. By the legal voice of the people in Congress; by a military power; or by a mob: It may not always happen that our soldiers are citizens, and the multitude a body of reasonable men; virtue, as I have already remarked, is not hereditary, neither is it perpetual. Should an independency be brought about by the first of those means, we have every opportunity and every encouragement before us, to form the noblest, purest constitution on the face of the earth. We have it in our power to begin the world over again.<sup>39</sup>

In other words, Americans had to be careful not to substitute a military dictatorship or armed anarchy in the place of a tyrannical monarch. Indeed, it would be absurd to replace one armed thug with another, or become armed thugs themselves. For Paine, civil war was a means to an end—political and constitutional stability—not an end in itself.

Even so, Paine had no doubt the Continental Army was a “People’s Army” composed of republican citizens and soldiers. In fact, he joined that “standing army” in August 1776, voluntarily enlisting in the Pennsylvania Division of the “Flying Camp,” a body of troops that could be sent anywhere in the country (unlike militiamen). But after only four months of campaigning, he wrote *The American Crisis* on a drumhead while

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<sup>38</sup>Thomas Paine, *Common Sense*, in Philip S. Foner, comp., ed., *The Life and Major Writings of Thomas Paine* (New York: Citadel Press, 1948; reprint, New York: Carol Publishing Group, 1993), 45 (page references are to the reprint edition). Paine’s emphasis.

<sup>39</sup>*Ibid.* Emphases are Paine’s.

accompanying Washington's forces on the retreat across New Jersey. As Paine now knew from experience, the "virtue" of an American citizen-soldier was decidedly not "hereditary or perpetual":

These are the times that try men's souls. The summer soldier and sunshine patriot will, in this crisis, shrink away from the service of their country; but he that stands it *now*, deserves the love and thanks of man and woman. Tyranny, like hell, is not easily conquered; yet we have this consolation with us, that the harder the conflict, the more glorious the triumph.<sup>40</sup>

For a time, Paine's words shamed apathy and shook atrophy. Unfortunately, seven more years of war lay ahead. Ultimately, it was the army soldier who stood the test and thus deserved "the love and thanks" of the men that stayed at home and the women who were happy they did.

Like Paine, George Mason hoped he could revitalize—and mobilize—the armed virtue of Virginia's citizen-soldiers with Article Thirteen's "militia clause" *despite* the experiences of the past. Fortunately, the experiences that lay in the future—the harsh realities of the Revolutionary War—proved that a virtuous militia was not *absolutely* "necessary" to defeat Great Britain's armed forces, at least over the long haul. However, the militia was effective at policing pockets of loyalist resistance, repelling privateers, and preventing insurrections by slaves and servants. Militiamen also responded rapidly and effectively to a British raid on Norfolk in 1779; the 1780 invasion by General Alexander Leslie; and the 1781 raids by Lieutenant Colonel Banastre Tarleton and General Benedict Arnold. During Leslie's invasion, for example, Edmund Pendleton wrote James Madison that the "Militia march on this occasion with great alacrity and even ardor."<sup>41</sup> At the time

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<sup>40</sup>Paine, *The American Crisis*, in Foner, *Writings of Paine*, 50. Paine's emphasis.

<sup>41</sup>Pendleton to Madison, 30 October 1780, in Hutchinson and Rachal, *Madison Papers*, 1:320.

of Arnold's raid, Governor Thomas Jefferson reported, "the spirit of opposition among the people was as universal and ardent as could have been wish'd. There was no restraint on the numbers which embodied but the want of arms."<sup>42</sup> Clearly, ordinary Virginians were virtuous enough to fight for the patriot cause against real threats to homeland security for brief, intense periods; thus validating, in some measure, their military competency according to Radical Whigs. Nonetheless, the real forte of Virginia's militia throughout the war was its long-lasting reliability and proficiency as a "home front" police force.

Ironically, the Continental Army also legitimized the "anti-army" ideology, in some measure, when it triumphantly disbanded and its commanding general resigned. Indeed, Washington was the epitome of a republican citizen-soldier—even though he served at the head of an army instead of a militia. Significantly, that "republican army" did not degenerate into the military despotism of Cromwellian England. Even so, the "anti-army" ideology did not survive the war unscathed. Indeed, the virtue of the citizen-soldier oftentimes was absent without leave, while the professional-soldier stood, fought, and oftentimes received a medal for valor (not virtue). Indeed, the Moderate Whig ideology emerged from the Revolutionary War as the more convincing worldview for Virginians such as Washington and Madison. Even George Mason realized that pristine virtue was no fit replacement for professional discipline. But like other "Antifederalists," Mason's loss of faith in armed virtue did not lessen his conviction that standing armies in peacetime were dangerous to liberty—despite the assurances of "Federalists" that *America's* military could never police "the people."

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<sup>42</sup>Jefferson to Samuel Huntington, 26 February 1781, in Boyd, *Jefferson Papers*, 5:12.

In summary, Virginia's "historical experience" had largely discredited the Radical Whig rhetoric concerning militias even before the Revolutionary War fully began, as evidence by the immediate raising of standing armies to win that conflict. Moreover, the realities of war also helped to validate the Moderate Whig position that militiamen were poor substitutes for a professionally trained and disciplined troops. However, that same wartime experience in Virginia also partially rehabilitated the status of the militia. Even though the Continental Army was deliberately disbanded at the end of hostilities, the Radical Whig conviction that a national peacetime army posed a danger to individual liberty (and possibly state sovereignty, as well) did not diminish. Consequently, the post-war stage was set for a final constitutional battle between those two ideological traditions.

The next two chapters record that ideological struggle and its constitutional compromise—the Second Amendment.

## CHAPTER 10

### FORGING THE FEDERAL SWORD

“It may be laid down as a primary position, and the basis of our system, that every Citizen who enjoys the protection of a free Government, owes not only a proportion of his property, but even his personal services to the defense of it, and consequently that the Citizens of America (with a few legal and official exceptions) from 18 to 50 years of Age should be borne of the Militia Rolls, provided with uniform Arms, and [be] so far accustomed to the use of them, that the Total strength of the Country might be called forth at a Short Notice on any very interesting Emergency.”

—George Washington

“Sentiments on a Peace Establishment”  
2 May 1783<sup>1</sup>

Virginians retained a firm grip on their sword throughout the Revolutionary War. Just as importantly, the principles within Article Thirteen were upheld. On 14 October 1774 the First Continental Congress approved a “Declaration of Rights” for all thirteen colonies. One of the ten articles in Congress’s “Declaration” affirmed that “standing armies in time of peace” were “against law” unless raised by “the consent of the legislature of that colony, in which such army is kept.”<sup>2</sup> On 15 November 1777, the Second Continental Congress passed the Articles of Confederation, which became the nation’s first constitution when Maryland ratified them on 1 March 1781. Article One created a “confederacy” of “The United States of America.” Article Two was highly significant:

Each State retains its sovereignty, freedom and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.

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<sup>1</sup>“Sentiments on a Peace Establishment,” Washington to Hamilton, 2 May 1783, in Fitzpatrick, *Washington Writings*, 26:391.

<sup>2</sup>*Extracts from the Proceedings of the Continental Congress* (Philadelphia, 1774), 6. Quoted and cited in Robert Allen Rutland, *The Birth of the Bill of Rights, 1776-1791* (Boston: Northeastern University Press, 1983), 27.

Article Three explained the purpose of the confederacy:

The said states hereby severally enter into a firm league of friendship with each other for their common defense, the security of their liberties and their mutual and general welfare; binding themselves to assist each other against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever.<sup>3</sup>

But in forming that “league of friendship with each other for their common defense,” the states gave up a certain measure of sovereignty in terms of armed political power. For instance, the states were prohibited from engaging in any war without the consent of Congress “unless such State be actually invaded by enemies,” or they received intelligence of an impending Indian attack “and the danger is so imminent as not to admit of a delay till . . . Congress assembled, can be consulted.” On the other hand, the state legislatures retained control over officer commissions below the rank of colonel for all regular land forces raised by any state “for the common defense.” Congress also had “the sole and exclusive right and power of determining on peace and war,” but could “never engage in a war . . . nor appoint a commander in chief of the army or navy, unless nine states assent to the same.” Finally, no state could maintain “vessels of war . . . in time of peace, “nor shall any body of forces be kept up by any state, in time of peace, except such number only as, in the judgment of the United States, in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such State.” By those terms, the former 1774 “declared right” of a colony to maintain a standing army in peace with the consent of its own legislature was assumed by the Confederation Congress,

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<sup>3</sup>Ford, *Journals of the Continental Congress*, 9:907.

which now had the sole authority to maintain a peacetime force for garrison duty. Nevertheless, this was hardly a fiat to create a large standing army within any sovereign state.<sup>4</sup>

Furthermore, when Congress proclaimed the cessation of hostilities on 11 April 1783, it immediately began to disband the Continental Army. The last regiment was discharged on 2 June 1784, leaving only “twenty-five privates to guard the stores at Fort Pitt and fifty-five to guard the stores at West Point, with a proportionate number of officers,” none of which were to be above the rank of captain. Congress concluded that “resolve” by declaring, “Standing armies in time of peace are inconsistent with the principles of republican governments.”<sup>5</sup> Even so, the Continental Army remained true to the core principles of republicanism—and reaffirmed the subordination of the military to civil authority—throughout the Revolutionary War, even though it was sorely tested from 1777 on by a lack of fiscal support and public encouragement by civilians. As two noted military scholars aptly point out: “Paradoxically, this same hardcore group of regulars, so damned by so many patriots (and feared by ideologues as the antithesis of the republican ideal of the militia) set the highest example of selfless behavior in Revolutionary America.”<sup>6</sup> The casualty figures among the soldiers and sailors who actually fought during the war proved that point: 25,674 estimated dead; 7,174 were killed in combat, roughly 10,000 died from disease, and 8,500 prisoners who did not survive their captivity. An-

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<sup>4</sup>Ibid., 9:910-25.

<sup>5</sup>Ibid., 27:524.

<sup>6</sup>James Kirby Martin and Mark Edward Lender, *A Respectable Army: The Military Origins of the Republic, 1763-1789*, The American History Series, eds. John Hope Franklin and Abraham S. Eisenstadt (Arlington Heights, IL: Harlan Davidson, Inc., 1982), 194.

other 8,241 were wounded, while 1,426 were reported missing.<sup>7</sup> No one could claim those sacrifices were made to satisfy the ambitions of a few power-hungry men rather than the cause of liberty.

All the same, the day after the Continental Army was permanently disbanded, the Confederation Congress created the first national peacetime military force in American history. In its 3 June 1784 resolve, Congress “recommended” that Pennsylvania, New Jersey, New York and Connecticut raise seven hundred men from their militias to police the frontiers. The troops were to be enlisted for twelve months duty, organized as the 1<sup>st</sup> Regiment, and served under the authority of Henry Knox, the nation’s first Secretary of War (now Defense).<sup>8</sup> However, it was highly significant that Congress asked those four states to raise volunteers from their militias, especially since the sovereign states retained control over that crucial component of military power under the Articles of Confederation—in fact, they were *required* to do so with this mandate:

every State shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred, and shall provide, and constantly have ready for use, in public stores, a due number of field pieces and tents, and proper quantity of arms, ammunition and camp equipage.<sup>9</sup>

Virginians, of course, had no intention of allowing their militia to expire in peacetime as they had done in 1773. In fact, it is highly unlikely that Virginia—or any other sovereign state—would have signed the Articles if it was required to disband its own homeland forces after the war. But even though Virginia surrendered some sovereignty in joining

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<sup>7</sup>Howard H. Peckham, ed., *The Toll of Independence: Engagements and Battle Casualties of the American Revolution* (Chicago: University of Chicago Press, 1974), 130.

<sup>8</sup>Ford, *Journals of the Continental Congress*, 27:538-40.

<sup>9</sup>*Ibid.*, 9:909.

this first national compact of confederation, the “plan of government” Congress constructed in the Articles of Confederation was in perfect harmony with Article Thirteen of its Declaration of Rights. A “well regulated militia” remained “the proper, natural and safe defence” of the sovereign state of Virginia; “standing armies in time of peace” were both “avoided” and declared “dangerous to liberty”; and “the military” was certainly “under strict subordination to, and governed by, the civil power” of both Congress and Virginia’s House of Delegates.

In addition, the tiny peacetime force the Confederation Congress wanted to raise was hardly an army at all—even though it was the “progenitor and lineal ancestor” of today’s enormous military establishment. As historian Richard Kohn further explains, it was “a compromise force: not under state control, and enlisted for service out-of-state, so clearly not militia; not wholly under Confederation authority, not long-service regulars, and furnished obviously at the pleasure of the states, so certainly not a standing army.” In truth, “The Confederation’s ‘army’ was unique, undefinable, and as its history subsequently showed, the bastard child of quarrelsome, uncertain congressional parents.”<sup>10</sup>

Those “quarrelsome parents” included Alexander Hamilton of New York, Virginia’s Richard Henry Lee, and Elbridge Gerry of Massachusetts. Those three men were part of a congressional committee appointed on 4 April 1783—before hostilities with Great Britain were formally declared at an end—to devise some sort of policy measures that would ensure postwar national security. Clearly, armed forces were required to protect and police the vast western territory—the most valuable natural resource the new

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<sup>10</sup>Richard H. Kohn, *Eagle and Sword: The Federalists and the Creation of the Military Establishment in America, 1783-1802* (New York: The Free Press, 1975), 60. Hereafter cited as Kohn, *Eagle and Sword*.

nation possessed (aside from human labor). Ironically, post-revolutionary Americans now faced the same predicament that confronted British officials after the Great War for Empire—refereeing the aggressive competition for land between speculators, squatters, states, and Indians. In addition, the British still posed a threat by maintaining a chain of forts in the Great Lakes region, just as the French had on the eve of the French and Indian War. America needed a permanent constabulary force to protect the region and keep the peace, which put them squarely on the horns of a dilemma: either rely upon a permanent frontier army (which was anathema both politically and ideologically), or employ full-time militiamen (which was a true oxymoron). It was precisely this predicament of creating a viable military establishment for national homeland security that resulted in the Second Amendment.

The congressional committee charged with this problem was chaired by Hamilton and dominated by “nationalists,” men who believed that a national army was the most effective means to protect the nation state. As a group, the nationalists were not afraid of military power as long as it remained subordinate to civil authority. Nevertheless, these men were well aware that a standing army remained a source of political and ideological opprobrium. Hamilton immediately wrote the one man who might propose a military solution: Virginia’s George Washington. Hamilton asked Washington to come up with “general plan” that included “such institutions . . . as may be best adapted to . . . security,” “economy,” and “the principals of our governments.”<sup>11</sup> Although Washington appreciated the value of professional military force, he likewise understood the ideological

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<sup>11</sup>Hamilton to Washington, 9 April 1783, in Harold C. Syrett, et al., eds., *The Papers of Alexander Hamilton*, 27 vols. (New York: Columbia University Press, 1961-1982), 3:322. Cited and Quoted in Kohn, *Eagle and Sword*, 42.

restraints—and inherent political dangers—attached to it. In fact, he told Hamilton the day the committee was appointed that “The Army is a dangerous instrument to play with.”<sup>12</sup> Yet in responding to Hamilton’s request, Washington judged that “Altho’ a *large* standing Army in time of Peace hath ever been considered dangerous to the liberties of a Country, yet a few Troops, under certain circumstances, are not only safe, but indispensably necessary. Fortunate for us, our relative situation requires but few.”<sup>13</sup>

On 2 May, the retired general sent Hamilton his “Sentiments on a Peace Establishment,” which recommended a small regular force of 2,631 troops garrisoned in four forts to protect the frontier and police domestic turmoil. A thoroughly reorganized militia—wherein all arms, equipment, discipline, and training would conform to uniform standards set by Congress and supervised by a national inspector general—would support that core cadre of regulars. Washington described the composition and caliber of that homeland security force in no uncertain terms:

It may be laid down as a primary position, and the basis of our system, that every Citizen who enjoys the protection of a free Government, owes not only a proportion of his property, but even his personal services to the defense of it, and consequently that the Citizens of America (with a few legal and official exceptions) from 18 to 50 years of Age should be borne of the Militia Rolls, provided with uniform Arms, and [be] so far accustomed to the use of them, that the Total strength of the Country might be called forth at a Short Notice on any very interesting Emergency.<sup>14</sup>

In sum, the militia was to realize what it purportedly stood for but perpetually failed to achieve: the compulsory obligations and armed duties of citizenship in a republican polity. To be sure, Washington was renowned for his numerous wartime strictures on the

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<sup>12</sup>Washington to Hamilton, 4 April 1783, in *ibid.*, 3:315-16.

<sup>13</sup>“Sentiments on a Peace Establishment,” enclosed in Washington to Hamilton, 2 May 1783, in Fitzpatrick, *Washington Writings*, 26:375. Washington’s emphasis.

<sup>14</sup>*Ibid.*, 26:391.

militia's shabby and disgraceful performance in combat. Nevertheless, he remained willing to place the ultimate burden of national defense where it properly belonged—squarely on the shoulders of the nation's citizen-soldiers, of which he was one. Indeed, when Washington accepted his appointment as Commanding General of the Continental Army in 1775, he assured civil authorities of that very fact: "When we assumed the Soldier, we did not lay aside the Citizen."<sup>15</sup>

Even so, "classing" was a crucial component of Washington's recommended militia reforms. While every white male between the ages of 18 and 50 was obligated to serve, a select group of 18 to 25-year-olds—who had a "Natural fondness for Military parade" and comprised the "Van and flower of the American forces, ever ready for Action and zealous to be employed whenever it may be necessary in the service of their Country"—were to be selected out for more rigorous training and duty, thus providing "original meaning" to the idea of "selective service."<sup>16</sup> This "select militia" should remind us of the old English "train bands," as well as James Harrington's "marching armies." Washington even advocated companies of "minutemen" that would voluntarily enlist for several years, were chosen either by lot or organized as an elite unit, and stood ready for any sudden emergency, thus incorporating the favored scheme of his Fairfax Militia compatriot, George Mason. Yet the major thrust of Washington's proposed military "Settlement" was reform: specialized units, increased training, enforced discipline, standardized arms, and accountability through inspections—in a word, uniformity.

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<sup>15</sup>George Washington, letter to the New York Provincial Congress, 26 June 1775, in Force, *American Archives*, 2:1282.

<sup>16</sup>The entire "Peace Establishment" is in Fitzpatrick, *Washington Writings*, 26:374-398.

Washington's reforms underscore a central paradox within the anti-army/pro-militia ideology—when citizens became soldiers they were expected to perform like professional soldiers, not as professional citizens. Nevertheless, it was also clear that Washington's reforms could not be implemented without some degree of national control over the state militias, which would certainly raise conflicts over the balance of military power between the confederacy's central government and the sovereign states. Committeemen Richard Henry Lee and Elbridge Gerry championed the “great principles of free Government” and seventeenth-century constitutionalism. Through their obstructionist efforts, the committee compromised on a “bastard” military force. Lee later summarized his sentiments in a letter to James Monroe:

As to the protection of our own frontiers, it would seem best to leave it to the people themselves, as hath ever been the case. . . . This will always secure to us a hardy set of men on the frontiers. . . . Whereas, if they are protected by regulars, security will necessarily produce inattention to arms, and the whole of our people becoming disused to War, render the Curse of a standing Army Necessary.<sup>17</sup>

Gerry essentially repeated the same argument to the Massachusetts Assembly: “If a regular Army is admitted, will not the Militia be neglected, and gradually dwindle into Contempt? [A]nd where then are We to look for Defence of our Rights and Liberties?”<sup>18</sup>

That line of reasoning seemed rather contrived and circuitous, however. Indeed, one could argue the opposite case: if militiamen actually attended to their arms and were not “disused to War,” then a standing army would likewise “be neglected” and remain what it was—a subject of “Contempt.” In any case, Gerry emphatically summed up his estimate

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<sup>17</sup>Lee to Monroe, 5 January 1784, in James C. Ballagh, ed., *Letters of Richard Henry Lee* 2 vols. (New York: The Macmillan Company, 1911-1914), 2:288. Hereafter cited as Ballagh, *Lee Letters*.

<sup>18</sup>Gerry to the Massachusetts Assembly, 25 October 1784, in Edmund C. Burnett, ed., *Letters of Members of the Continental Congress* (Washington: 1921-1938), 7:604-05.

of the nationalists' agenda to John Adams: "How easy the transition from a republican to any other form of Government, however despotic. And how ridiculous to exchange a British Administration, for one that would be equally tyrannical, perhaps much more so!"<sup>19</sup> That of course was the crux of the postwar paradox; if the individual colonies had maintained their militias as effective homeland security forces at the end of the French and Indian War, there would have been no need for Great Britain's standing army to act as constabulary force on the frontier (or even come to Virginia's "rescue" when that war began). Now the independent states faced the same postwar security concerns as Whitehall did exactly two decades earlier. The nationalists, being military realists rather than ideological purists, recognized the need for a permanent and professional military establishment. The antinationalists, fearful of militarism and jealous guardians of state sovereignty, were willing to sacrifice national defense and military preparedness to preserve state sovereignty and the liberties of the people. As oftentimes happens, it would take a major political crisis to break the political stalemate.

That crisis erupted during the late summer of 1786 in western Massachusetts in the first armed uprising in the new nation's history. Burdened with heavy debts, increased taxation, and the refusal of their elected representatives to enact debtor-relief laws, disgruntled farmers mounted a full-scale rebellion against their state government. Daniel Shays, a former captain in the Continental Army who had been presented with an ornamental sword by General Lafayette for valor, led the estimated 1,500 insurgents. Since only about a third of the rebel agrarians were armed with guns, they attempted to seize the federal arsenal at Springfield. The Massachusetts government responded by

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<sup>19</sup>Gerry to Adams, 23 November 1783, Elbridge Gerry Papers, Library of Congress. Quoted and cited in Kohn, *Eagle and Sword*, 53.

mobilizing militia and volunteers from the eastern part of the state. Governor James Bowdoin also requested military assistance from the Continental Congress, which pledged to raise 1,300 troops, but was unable to obtain sufficient enlistments on such short notice. In any case, a national army was not needed. Due to inclement weather and lack of supplies, the rebellion faltered during the winter of 1786-1787. The state's forces swiftly dispersed the rebels and restored law and order. To preserve its civil authority, the Massachusetts legislature passed a Riot Act outlawing illegal assemblies in Shays's aftermath.<sup>20</sup> Perhaps summarizing the shocking effects of Shays's Rebellion for the entire nation, George Washington poignantly remarked: "I am mortified beyond expression that in the moment of our acknowledged independence we should by our conduct verify the predictions of our transatlantic foe, and render ourselves ridiculous and contemptible in the eyes of all Europe."<sup>21</sup>

For Washington, rebellion under a Constitution was an illicit means to affect change: "Precedents are dangerous things; let the reins of government then be braced and held with a steady hand, and every violation of the Constitution be reprehended: if defective, let it be amended, but not suffered to be trampled upon whilst it has an existence."<sup>22</sup>

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<sup>20</sup>For in-depth appraisals of the rebellion see: Richard D. Brown, "Shays's Rebellion and the Ratification of the Federal Constitution in Massachusetts," in Richard Beman, Stephen Botein, and Edward C. Carter II, eds., *Beyond Confederation: Origins of the Constitution and American National Identity* (Chapel Hill: University of North Carolina Press, 1987), 113-127; Robert A. Gross, ed., *In Debt to Shays: The Bicentennial of an Agrarian Rebellion* (Charlottesville: University of Virginia Press, 1993); David P. Szatmary, *Shay's Rebellion: The Making of an Agrarian Insurrection* (Amherst: University of Massachusetts Press, 1980).

<sup>21</sup>George Washington to David Humphreys, October 22, 1786, in Fitzpatrick, *Washington Writings*, 29:27.

<sup>22</sup>Washington to Henry Lee, October 31, 1786, in *ibid.*, 29:34-35.

Thomas Jefferson, on the other hand, was the only prominent statesman who endorsed Shays's Rebellion. He expressed his approval privately, however, not publicly. Writing to James Madison from Paris, Jefferson stated, "I hold it that a little rebellion now and then is a good thing, & as necessary in the political world as storms in the physical." Jefferson was even more blunt in another Paris communiqué:

What country before ever existed a century & half without a rebellion? & what country can preserve its liberties if their rulers are not warned from time to time that their people preserve the spirit of resistance? Let them take arms. The remedy is to set them right as to facts, pardon & pacify them. What signify a few lives lost in a century or two? The tree of liberty must be refreshed from time to time with the blood of patriots & tyrants. It is its natural manure.<sup>23</sup>

The vast majority of Jefferson's fellow citizens thought otherwise, however, and well they should. It was their blood that would serve as compost for this agrarian intellectual who fled Charlottesville (the wartime capital) during a British raid in 1781 while serving as Virginia's Governor and commander-in-chief. Brought up on impeachment charges for his conduct, but not officially censured, Jefferson never again held public office in Virginia.<sup>24</sup> In any case, armed rebellion under an elected government could only lead to one logical conclusion: Americans were wholly incapable of governing themselves without resorting to armed political violence—at least not under their current "plan."

The political ramifications of Shays's Rebellion were truly significant. Not only did it serve as a catalyst for convening the Constitutional Convention in Philadelphia that summer, it also set a crucial agenda. As Professor Kohn concisely explains:

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<sup>23</sup>See Thomas Jefferson to James Madison, January 30, 1787; Jefferson to William S. Smith, November 13, 1787. Both letters are in Thomas Jefferson, *Writings*, ed. Merrill D. Peterson (New York: Literary Classics of the United States, 1984), 882 and 911 respectively.

<sup>24</sup>Selby, *Revolution in Virginia*, 283-84, 315.

Like no other single event of the decade, Shays's Rebellion dramatized the military impotence of the United States. Suddenly, with an urgency lacking before, the need to suppress insurrection and to guarantee domestic order was injected into the debate over the military powers of the central government. . . . As the rebellion so spectacularly revealed, Congress possessed neither the authority to intervene, not even to protect federal property at the arsenal in Springfield, nor the machinery to use force independent of the states, which under the Articles of Confederation enlisted all soldiers for national service.<sup>25</sup>

One of the foremost issues that would be addressed at the Constitutional Convention was creating a viable and dependable sword for the central government. Indeed, historian Walter Millis directs our attention to a significant fact: "Though the point has not often been noticed, the Constitution was as much a military as a political and economic charter."<sup>26</sup> That "point," of course, makes perfect sense since all "plans of government" require two fundamental powers: the purse and the sword. Moreover, if the national government was going to expand its authority over those powers at the expense of the other sovereign governments within the American Confederacy, there was bound to be trouble. Indeed, the British Empire had likewise tried to exercise "supreme" governing authority over those same autonomous polities—and without success.

### The Constitutional Convention

The Philadelphia Convention has been referred to as a "miracle" because the fifty-five delegates managed to hammer out a lasting political compromise—a rarity in America's political culture.<sup>27</sup> Even so, two truly "miraculous" features of that historic event

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<sup>25</sup>Kohn, *Eagle and Sword*, 74-75.

<sup>26</sup>Walter Millis, *Arms and Men: A Study of American Military History* (New York: G. P. Putnam's Sons, 1956), 47.

<sup>27</sup>Catherine Drinker Bowen, *Miracle at Philadelphia: The Story of the Constitutional Convention, May to September 1787* (Boston: Little, Brown, 1966).

are often overlooked: how easily a national standing army was created, and how much centralized control was assumed over the militias of the sovereign states. Just as astounding are the men who proposed and promoted those unprecedented feats—Edmund Randolph and George Mason of Virginia—two of the three men who ultimately refused to sign the completed constitution. Indeed, the only unsurprising fact is that the third non-signer was Elbridge Gerry of Massachusetts—the one man who steadfastly opposed standing armies and the loss of state authority over militias. The remaining three members of the Virginia delegation—George Washington, James Madison, and John Blair—approved the constitution. Washington presided as President of the Convention and remained completely silent throughout the debates over military power (as did John Blair). Madison also contributed to the military discussions, and fortunately recorded what was said. The Convention was held behind closed doors, the delegates were sworn to secrecy, and its proceedings (“Madison’s Notes”) were not published until 1840. Consequently, no one at the Virginia Ratifying Convention knew the part Randolph and Mason played in creating a national army, or surrendering state sovereignty over the militia.

On 29 May 1787, Edmund Randolph “opened the main business” by first describing “the properties” a centralized government “ought to possess,” “the defects” of the present confederation, “the danger of our situation,” and then offered a “remedy.” Randolph declared that a national government ought to be secure “against foreign invasion; against dissensions between members of the Union, or seditions in particular states; to procure to the several States various blessings, which an isolated situation was incapable; to be able to defend itself against incroachment; [and last] to be paramount to the state constitutions.” Among the “defects” of the current constitution, he noted “that the confederation

produced no security against foreign invasion; congress not being permitted to prevent a war not support it by their own authority,” and more specifically, “that particular states might by their conduct provoke war without controul; and that neither militia nor draughts being fit for defence on such occasions, inlistments only could be successful, and these not executed without money.” Another flaw was “that the federal government could not check the quarrels between states, nor a rebellion in any, not having constitutional power nor means to interpose according to the exigency.” Moreover, “the federal government could not defend itself against the incroachments from the states.” In Randolph’s view, “the danger of our situation” was “the prospect of anarchy from the laxity of government every where.” Randolph’s prescribed cure was the “Virginia Plan” of government, which actually said very little about military power aside from granting the “National Legislature” the authority “to call forth the force of the Union against any member of the Union failing to fulfill its duty under the articles thereof.”<sup>28</sup> That, of course, meant the federal sword would police the individual states under a *Virginia* proposal.

The issue of using armed force against the states arose just once in the debates over the “Virginia Plan” during “a reconsideration of the clause giving the National legislature a negative on such laws of the States as might be contrary to the Articles of Union.” In seconding a motion by Charles Cotesworth Pinckney of South Carolina that the federal government should have a negative on states laws, Madison argued “the negative would render the use of force unnecessary” because the states would abide by that deter-

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<sup>28</sup>“Madison’s Notes,” in Winton U. Solberg, ed., *The Constitutional Convention and the Formation of the Union*, 2<sup>nd</sup>.ed., American Heritage Series (Urbana and Chicago: University of Illinois Press, 1990), 75-76.

mination. However, “in order to give the negative this efficacy, it must extend to all cases.” For Madison, “This prerogative of the General Govt. is the greatest principle that must controul the centrifugal tendency of the States; which, without it, will continually fly out of their proper orbits and destroy the order & harmony of the political system.” Hugh Williamson of South Carolina, however, argued “against giving a power that restrain the States from regulating their internal police.” Elbridge Gerry agreed. He “could not see the extent of such a power, and was against every power that was not necessary.” In addition, “He observed that the proposed negative would extend to the regulations of the Militia, a matter on which the existence of a State might depend. The National Legislature with such power may enslave the States. Such an idea as this will never be acceded to. . . .”<sup>29</sup>

The idea of actually using military force against the states arose when William Paterson introduced his “New Jersey Plan.” Paterson argued that “a small standing force” was needed to coerce the states in case they refused to obey federal laws. George Mason took exception to the notion of holding the union together with armed force. He also delineated the “only case” when the military could be used against citizens:

It was acknowledged by [Mr. Paterson] that his plan could not be enforced without military coercion. Does he consider the force of this concession [?] The most jarring elements of Nature; fire & water themselves are not more incompatible than such a mixture of civil liberty and military execution. Will the militia march from one State to another, in order to collect the arrears of taxes from the delinquent members of the Republic? Will they maintain an army for this purpose? Will not the Citizens of the invaded State assist one another till they rise as one Man, and shake of the Union altogether [?] Rebellion is the only case, in which the military force of the State can be properly exerted against its Citizens.<sup>30</sup>

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<sup>29</sup>Ibid., 117.

<sup>30</sup>Ibid., 160.

Clearly, Mason made a distinction between civil disobedience of federal laws by the states and an armed insurgency against the national government. Only in the latter case was it legitimate to use “military force” against the citizenry; it should never be used to execute or enforce civil laws. Indeed, if laws had to be backed with armed coercion rather than affable consent, they must be bad laws. Just as importantly, it conflicted with Article Thirteen, which restricted Virginia’s legislature from policing Virginia citizens with military force (except for the militia).

Hamilton and Madison, the foremost proponents for a strong national government, agreed that armed coercion was not a proper foundation for a republican form of government; nor would it hold the union together. “*Force*,” Hamilton reasoned, “may be understood [as] a *coertion of laws* or *coertion of arms*. But how can [military] force be exercised on the States collectively,” he asked. “It is impossible. It amounts to war between the parties.”<sup>31</sup> The solution for both Hamilton and Madison was to impose “*coertion of arms*” on “*the people*” rather than the states. As Professor Kohn explains,

Instead of bringing on civil war between sovereign entities, defiance would constitute a confrontation between individuals and the government, and thus become riot or rebellion, difficult problems to be sure, but well within the capability of the penal system and the courts, marshals, posse comitatus, militia, or at last regular forces. Force then became functional—and fundamental to the day-to-day operations of the state if only as a threat hovering in the background.<sup>32</sup>

Nevertheless, a day of reckoning would eventually come in 1861 when defiant “individuals” collectively banded together as rebellious states to defy the federal government and the reject the union these very men were trying to create.

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<sup>31</sup>Ibid., 142. Hamilton’s emphasis.

<sup>32</sup>Kohn, *Eagle and Sword*, 76.

## The Clauses and Causes of the National Sword

The framers spent the month of August forging a national sword. As Richard Kohn conveys: “There never existed the slightest doubt among the vast majority that the new government must be able to create a national military establishment. To assure supremacy over the states, the central authority might need its own forces, and enough authority over the militia to prevent a state from evading or checkmating the national will.”<sup>33</sup> The convention clearly favored regulars over militiamen during times of war and did not hesitate to grant Congress the authority to raise a permanent army for that purpose. Without question, the framers were determined to provide for national security against foreign foes with a standing army even if it jeopardized the chances of ratification. Indeed, as Madison fired point-blankly at the Virginia Ratifying Convention, “if they [armies] be necessary, the calamity must be submitted to.”<sup>34</sup> There was little doubt the Moderate Whig view prevailed in Philadelphia.

Three crucial clauses framed under Article 1, Section 8 of the new constitution created a consolidated sword. They did so by giving Congress the following military powers:

Clause 12:

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

Clause 15:

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

Clause 16:

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, reserving to

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<sup>33</sup>Ibid., 77.

<sup>34</sup>Elliot, *Virginia Debates*, 3:309

the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

Gerry, Mason, and Madison were the major voices heard during the debates on these military clauses at the Philadelphia Convention. From Madison's notes on Clause 12, Gerry "took notice that there was no check here agst. Standing armies in time of peace. The existing Congs. [under the Confederation] is so constructed that it cannot of itself maintain an army. This wd. not be the case under the new system." As always, Gerry "thought an army dangerous in time of peace, and could never consent to a power to keep up an indefinite number." George Mason, "being sensible that an absolute prohibition of standing armies in time of peace might be unsafe, and wishing at the same time to insert something pointing out and, guarding against the danger of them, moved to preface the clause [on organizing the militia] . . . with the words 'And that the liberties of the people may be better secured against the danger of standing armies in time of peace' Mr. Randolph 2ded. the motion." Madison was in favor of Mason's motion because "It did not restrain Congress from establishing a military force in time of peace if found necessary; and as armies in time of peace are allowed by all hands to be an evil, it is well to discountenance them by the Constitution, as far as will consist with the essential power of the Govt. on that head." Note what just transpired here: Mason, a Radical Whig, accepted a peacetime standing army; Madison, a Moderate Whig, acknowledged that a peacetime standing army was "evil" and should be restricted under the Constitution. This had all the earmarks of an ideological compromise between two ideological Virginians.

Nevertheless, Mason's motion to append exhortatory language against standing armies in Clause 16 (not Clause 12) was defeated 9 to 2; Georgia being the only state to side with the Virginia delegation on this "standing army" issue. However, Mason's addi-

tional proposal to limit army appropriations to two years was approved with no dissent on a roll call vote.<sup>35</sup> The Convention majority clearly felt that if the federal government was going to be responsible for the “common defense” of the entire nation, it should have every available resource at its disposal, including the armed manpower of professional soldiers during peacetime. Madison would circumspectly employ that line of reasoning in *Federalist* No. 41 on 19 January 1788. Alexander Hamilton, however, was far more aggressive in defending the creation of national standing army in *Federalist* Numbers 23 to 29 inclusive.<sup>36</sup> None of those arguments, however, were the least bit convincing to Virginia’s anti-nationalists. For the most part, they considered the *Federalist Papers* as political propaganda rather than political philosophy. Moreover, those writings had no influence whatsoever in creating the Second Amendment, or for that matter, any of the revisions contained in the Bill of Rights. In fact if the *Federalist Papers* had actually achieved their intended purpose, there would be no Bill of Rights. But what is truly remarkable about Clause 12 is how easily avowed republicans jettisoned one of the primary principles of Radical Whig republicanism—no peacetime standing armies *ever*.

There was even less debate on Clause 15, which empowered Congress to call out the militia to enforce federal laws, repel “first-strike” invasions, and crush domestic insurrections against the national and state governments. Apparently, this provision was considered the safest alternative—and the least politically explosive means—for ensuring

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<sup>35</sup>Max Farrand, ed., *Records of the Federal Convention of 1787*, 3 vols. (New Haven, CT: Yale University Press, 1911), 2:329, 509, 616. Hereafter cited as Farrand, *Records*.

<sup>36</sup>Alexander Hamilton, James Madison, and John Jay, *The Federalist*, Jacob E. Cooke, ed. (Hanover, NH: Wesleyan University Press, 1961), 268-78, 146-171, 176-180. Hamilton also specifically addressed the militia issue arising from Clause 16 in No. 29, *ibid.*, 181-87.

domestic security. Significantly, a standing army was not specifically tasked with enforcing the civil laws of the national government according to the textual language. The only problem—as everyone knew from actual experience—was that the “Militia” was not always properly organized, armed, trained, and disciplined to perform its military and police functions. Militia reforms—such as those recommended in 1783 by George Washington—had never gotten off the ground during the Confederation Period. The reason why was quite clear: the confederation government had absolutely no authority over what had always been an armed institution controlled exclusively by the colonies/states. That was precisely the reason for creating Clause 16—to reform the militia through centralized control and oversight. It should probably come as no surprise, therefore, that Clause 16 turned out to be the most hotly contested proposal of all. As we shall see from the ratification debates at Richmond, the Second Amendment’s “right of the people to keep and bear arms” clause was a direct result of the controversy generated by Clause 16.

There is also a tremendous irony attached to Clause 16; George Mason originally suggested it at the Philadelphia convention on 18 August. According to Madison’s notes, “Mr. Mason moved as an additional power ‘to make laws for the regulation and discipline of the Militia of the several States reserving to the States the appointment of the Officers.’ He considered uniformity as necessary in the regulation of the Militia throughout the Union.” As Madison recorded, Mason “hoped there would be no standing army in peace, unless it might be for a few garrisons. The Militia ought therefore to be the more effectually prepared for the public defence. Thirteen States will never concur in any one system, if the disciplining of the militia be left in their own hands. If they will not give

up the power over the whole, they probably will over a part, as a select militia.”<sup>37</sup> As we have learned from his “minute-men” ordinance, Mason was a strong advocate for “new-modeling” the militia into a more effective fighting force through highly trained “select” units, thus precluding the necessity of a professional (and permanent) army. Like everyone else, he was caught up in the “union euphoria” that motivated and propelled the entire Philadelphia project. As a result, he did not fully consider the impact his proposal would have on Virginia’s sovereign sword, which he had single-handedly “re-modeled” back in 1775. Mason would make up for that “dereliction of duty” at the Richmond Ratifying Convention. In any case, he had an opportunity to formulate his future arguments from anxieties more immediately expressed by some Philadelphia delegates.

“Mr. Ellsworth” of Connecticut, for example, “was for going as far in submitting the militia to the Genl Government as might be necessary, but thought the motion of Mr. Mason went too far.” For Oliver Ellsworth, “The whole authority over the Militia ought by no means to be taken away from the States whose consequence would pine away to nothing after such a sacrifice of power.” In sum, “It must be vain to ask the States to give the Militia out of their hands.” John Dickenson of Pennsylvania remarked, “We come now to a most important matter, that of the sword.” (One wonders if he was absent or asleep during the Clause 12 debate.) “His opinion was that the States never would nor ought to give up all authority over the Militia.” In the face of that onslaught, George Mason retreated. He reiterated his “idea of a select militia,” withdrew his original motion, and then moved that one tenth of all militiamen be formed into an elite, highly trained and disciplined body of troops. Madison tried to reinforce his fellow Virginian’s exposed

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<sup>37</sup>Farrand, *Records*, 2:330, 326.

flank by expressing his view that “the regulation of the militia naturally appertain[ed] to the authority charged with the public defence. It did not seem, in its nature, to be divisible between two distinct authorities [no military *imperium in imperio* here]. If the states would trust the general government with a power over the public treasure, they would, from the same consideration of necessity, grant it the direction of the public force.” Madison was spitting into the political wind, and if Mason hoped a mythical minuteman would arise as a “federalized,” gun-toting Lazarus, he was dead wrong—so was his motion.<sup>38</sup>

Ellsworth countered that a select militia was “impracticable; & if it were not it would be followed by a ruinous declension of the great body of the Militia.” Connecticut’s Roger Sherman “took notice that the States might want their Militia for defence against invasions and insurrections, and for enforcing obedience to their laws. They will not give up this point—In giving up that of taxation, they retain a concurrent power of raising money for their own use.” Gerry then stepped into the fray. He considered giving up the swords of the states “the last point remaining to be surrendered. If it be agreed by the Convention, the plan will have as black a mark as was set on Cain.” Mason “thought there was great weight” in Sherman’s remarks (and apparently less in Gerry’s). He offered an exception to his motion to read “of such part of the Militia as might be required by the States for their own use.” The revised motion passed easily.<sup>39</sup> After the day’s debate, Mason’s revised Clause 16 *should* have read thus: “to make laws for the regulation and discipline of the Militia of the several States, reserving to the States the appointment

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<sup>38</sup>Ibid., 2:330.

<sup>39</sup>Ibid.

of the Officers and such part of the Militia as might be required by the States for their own use.” Those words, however, would undergo a significant change in the drafting committee.

The drafting committee presented Clause 16 for review and debate on 23 August. The crucial clause now read: “To make laws for organizing, arming & disciplining the Militia, and for governing *such parts of them as may be employed in the service of the U.S.* reserving to the States respectively, the appointment of officers, and authority of training the militia according to the discipline prescribed.” Note how Mason’s “exception” was incorporated within this new language, which is highlighted. But even more importantly, note that Mason’s original attempt to reform the “regulation and discipline of the Militia” now includes the power of *arming* those state forces. This proved to be a crucial revision. If one must pinpoint one precise moment in American constitutional history when the Second Amendment was born, this is it (23 August 1787).

Only four men discussed the “original intent” of the national government’s authority “to arm” the militia that day: committee chairman Rufus King of Massachusetts; his fellow state delegate, Elbridge Gerry (which comes as no surprise); New Jersey’s Jonathan Dayton, and James Madison. George Mason was either dumbfounded or unperurbed. In any case, he sat in absolute silence.

According to Madison’s notes (and with his italics throughout), “Mr. King, by way of explanation, said that by *organizing* the Committee meant, proportioning the officers & men—by *arming*, specifying the kind and caliber of arms—& by *disciplining* prescribing the manual exercise evolutions &c.” Gerry shot back directly on target: “This power in the U—S as explained is making the States drill sergeants.” As far as he was

concerned, he would rather have “the Citizens of Massachusetts be disarmed, as to take the command from the States, and subject them to the Genl Legislature.” In short, “It would be regarded as a system of Despotism.” Madison offered a personal interpretation of the clause when he “observed that ‘arming’ as explained did not extend to furnishing arms; nor the term ‘disciplining’ to penalties & Courts martial for enforcing them.” Rufus King would not let that “textual reading” go unchallenged. “Mr. King added, to his former explanation that *arming* meant not only to provide for uniformity of arms, but included authority to regulate the modes of furnishing, either by the militia themselves, the State Governments, or the National Treasury: that *laws* for disciplining, must involve penalties and every thing necessary for enforcing penalties.”<sup>40</sup> At that point, Jonathan Dayton moved to amend the clause so that “organizing, arming & disciplining” would only apply to such parts of the state militias employed by the national government. Dayton’s motion was soundly defeated by 8 votes to 3 (Virginia voting with the majority). That particular surrender was another milestone in the Second Amendment’s “legislative history”; Dayton’s proposal might have alleviated later anxieties.

While only a minority seemed concerned that state militias were being taken over by the national government, the debates strangely departed from the issue of arms and focused instead upon discipline and officer appointments. After closely following what occurred from his notes, it was Madison himself who shifted the debate away from arms to discipline—perhaps deliberately. Here is the crucial passage in full:

Mr. Madison. The primary object is to secure an effectual discipline of the Militia. This will no more be done if left to the States separately than the requisitions have been hitherto paid by them. The States neglect their Militia now, and the more they are consolidated into one nation, the less each will rely on its own interior provisions for its safety & the less prepare its Militia for that purpose; in like manner as the Mili-

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<sup>40</sup>Farrand, *Records*, 2:384. Madison’s emphasis in his notes.

tia of a State would have been still more neglected than it has been if each County had been independently charged with the care of its Militia. The Discipline of the Militia is evidently a *National* concern, and ought to be provided for in the *National* Constitution.<sup>41</sup>

We have observed the history of the Virginia's militia for over a century. We can surely understand the truth of Madison's words. However, he never mentions arming the militia; only that "Discipline is evidently a *National* concern," and ought to be attended to by the national government.

All the same, old traditions—and traditional repositories of political power—die hard. Martin Luther of Maryland immediately declared his confidence "that the States would never give up the power over the Militia; and that, if they were to do so, the militia would be less attended to by the Genl. than by the State Governments." It was at this point that another Virginia squire galloped to the rescue, but dropped the Old Dominion's sword in his charge. Governor Edmund Randolph defended Madison's position, but in doing so shifted the focus away from the discipline issue to officer appointments. Here again is the full passage as recorded by Madison:

Mr. Randolph asked what danger there could be that the Militia could be brought into the field and made to commit suicide on themselves. This is a power that cannot from its nature be abused, unless indeed the whole mass should be corrupted. He was for trammeling the Genl Govt. whenever there was danger, but here there could be none—He urged this as an essential point; observing that the Militia were every where neglected by the State Legislatures, the members of which courted popularity too much to enforce a proper discipline. Leaving the appointment of officers to the States protects the people against every apprehension that could produce murmur.<sup>42</sup>

Randolph's pointed summation apparently did the trick. Clause 16 won the field. Despite the political jousting, the 9 to 2 vote was not even close. Only Connecticut and

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<sup>41</sup>Ibid. Madison's emphasis.

<sup>42</sup>Ibid.

Maryland voted to retain full control over their sovereign swords. Recall Randolph's remark that Article Thirteen was grounded upon "historical experience," which included its "militia clause." Apparently, Virginia's "well-regulated militia" was no longer the "proper, natural, and safe defense of a free state" (nor was anyone else's).

All the same, we might safely mark this moment as the demise of the Radical Whig ideology in America—at least in terms of a national military establishment, and within a budding national consciousness and collective identity. And yet men who still considered Virginia as their true "Country" would struggle to keep that "country" ideology alive.

Even so, Edmund Randolph hit upon a crucial point. Officer appointments *were* a key factor in retaining some measure of control over the state militias—especially considering the fact that elite Virginia gentlemen had always commanded the militia (both militarily and politically). Therefore it seems rather odd that James Madison—a man who was too short to meet George Mason's height requirements as a minuteman, but nonetheless held the rank of Colonel in the Orange County militia—would make a post-vote motion that the states could only appoint militia officers below the rank of general. That proposal triggered one last volley between the forces of nationalism and state sovereignty. "[A]bsolutely inadmissible," Roger Sherman blasted. "He said that if the people should be so far asleep as to allow the Most influential officers of the Militia to be appointed by the Genl. Government, every man of discernment would rouse them by sounding the alarm." One can picture Elbridge Gerry throwing his arms up in exasperation as he declared, "Let us at once destroy the State Govts have an Executive for life or hereditary, and a proper Senate, and then there would be some consistency in giving full powers

to the Genl Govt.” With less cynicism, Gerry “warned that the Convention” was “pushing the experiment too far. Some people will support a plan of vigorous Government at every risk,” he said, perhaps aiming a cold stare at Madison. “Others of a more democratic cast will oppose it with equal determination. And a Civil war may be produced by the conflict.” Madison could not let that leveled threat pass. His retort was the last statement on record concerning Clause 16. It also contained the best summary statement on the “original intentions” of men who argued and framed it that day:

As the greatest danger is that of disunion of the States, it is necessary to guard against it by sufficient powers to the Common Govt. and as the greatest danger to liberty is from large standing armies, it is best to prevent them by an effectual provision for a good Militia—<sup>43</sup>

Madison’s last effort on officer appointments indicated how intensely the nationalists wanted to shift control over the militia from the states to the central government. No doubt some nationalists—such as Alexander Hamilton—would have preferred to rely upon a professional army for national defense rather than a lethargic militia. Without question, some state sovereignty advocates preferred absolute control over their militias and no national army. Concurrent authority over the state militias was the logical (and most expedient) compromise between those two extremes. In devising a national military establishment, these men tried to crack an age-old chestnut: how to employ armed force to protect liberty without destroying it in the process. In his last words on the subject, Madison openly admitted, “large standing armies posed the greatest danger to liberty,” and to avoid the necessity of resorting to them the central government must impose regulated uniformity on the state militias. To be sure, Clause 12 gave the national government authority to raise armies for two years at a stretch, but the implication was that

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<sup>43</sup>Ibid.

those forces were necessary during times of war rather than peace. Moreover, Clause 15 “implied” that the militias were the primary police forces for law enforcement and suppressing sedition. Clearly, the framers deliberately gave the national government “sharp military teeth,” as Richard Kohn terms it, to defend the nation against foreign aggression, to protect minorities from “popular despotism” and majoritarian violence, and to crush rebellions arising from the “licentiousness of the people.” Professor Kohn also observes that the framers “rejected that basic tenet of English radical thought which separated the rulers and the ruled, power and liberty, into naturally warring camps.” They discarded that old ideology because they embraced a new truth: “the people and the government were one and the same,” and investing the national government with a sharp sword “preserved, rather than threatened, liberty.”<sup>44</sup>

Nevertheless, the framers were not blind to the fact that the military power granted under Clause 12 could pose dangers even in a self-governing republic. In one of the best summary statements available, Professor Kohn explains how the framers “originally intended” to control a “republican army” of soldier-citizens under the constitution:

Certainly risks were involved; armies still represented the ultimate in power. They grew large and their influence bloated, mostly in wartime; therefore the decision to enter into war was given to the legislature, the power to conduct it to the executive. Both would have to agree before an army awakened from its peacetime somnolence to become a potent influence on society. The Constitution also prevented any use of the army for internal subversion. Since the President commanded it, his use of the military to overthrow the government would constitute a coup against himself. Should he lose control of the army or threaten the people or the other branches, those branches, especially Congress, could hamstring the army through the appropriation power, the power to confirm appointments, or by legislation to disband the troops. Theoretically there was—and is—no way the military can take over the government without destroying the ability of that government to function. The government cannot be taken over, only replaced, and all legitimate instruments of authority rendered inoperative. As long as the Constitution exists, and is accepted, and any of the insti-

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<sup>44</sup>Kohn, *Eagle and Sword*, 80.

tutions through which it works—Congress, the courts, and the executive—function normally, no army can take over the United States.<sup>45</sup>

In sum, the framers all agreed on a crucial point: “in all cases, the military should be under strict subordination to, and governed by, the civil power.” Unfortunately, that specific phrase was never included in any of the constitution’s military clauses, or anywhere else in that founding document. It was, however, in Article Thirteen of Virginia’s Declaration Rights. In fact, whatever protections were attached to Clauses 12, 15, and 16 were all “implied” or “theoretically” assumed. There were no clear, concise, or certain statements within the Constitution guaranteeing that national military power would not be misused. Nor were there any assurances that the national institutions of governance—Congress, the courts, and the executive—would, in fact, “function normally” particularly during times of war or some other political crisis. Nor were there any guarantees “the people” would govern themselves unwisely or unjustly by electing fools, knaves, and would-be despots who could harm them over the course of two, four, or six year terms in office. Nor did anyone consider the possibility that a political faction could assume control over the three branches of government through elections and appointments and use the sword to oppress political rivals and dissenters.

All the same, two ineffectual efforts were made to include a Bill of Rights at the Constitutional Convention. Charles Cotesworth Pinkney submitted a set of “propositions” to the committee of detail on 20 August. Although there was no debate or consideration of Pinkney’s proposals, they included three military provisos that were grouped together in the following order: “No troops shall be kept up in time of peace, but by con-

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<sup>45</sup>Ibid., 80-81.

sent of the Legislature”; “The military shall always be subordinate to the Civil power, and no grants of money shall be made by the Legislature for supporting military Land forces, for more than one year at a time”: “No soldier shall be quartered in any House in time of peace without consent of the owner.”<sup>46</sup> During a debate on trial by jury on 12 September, Mason said “He wished the plan [Constitution] had been prefaced with a Bill of Rights, & would second a Motion if made for the purpose—It would give great quiet to the people; and with the aid of the State declarations, a bill might be prepared in a few hours.” Gerry so moved that a committee prepare a Bill of Rights, and Mason seconded as promised. However, Roger Sherman of Connecticut noted, “The Declarations of Rights [in the states] are not repealed by this Constitution; and being in force are sufficient.” Alexander Hamilton would use Sherman’s argument in *Federalist* No. 84 as one line of reasoning for defending the Convention’s decision not to include a Bill of Rights. Mason, however, rebutted Sherman by stating, “The Laws of the U.S. are to be paramount to State Bills of Rights,” and called for a vote on Gerry’s motion. The motion lost 10 votes to 0, with Massachusetts abstaining.<sup>47</sup> That same day, Mason wrote his “Objections to the Proposed Federal Constitution,” which he later disseminated in the press.<sup>48</sup> His first objection was that “There is no declaration rights,” and due to the Constitution’s Supremacy Clause, “the declarations of rights, in the separate states, are no security.” He also objected “There is no declaration of any kind for preserving the liberty of the press,

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<sup>46</sup>Farrand, *Records*, 2:340.

<sup>47</sup>*Ibid.*, 2:587.

<sup>48</sup>“George Mason’s Objections to the Proposed Federal Constitution, 1787,” in Paul Leicester Ford, *Pamphlets on the Constitution of the United States: published during its discussion by the people* (Brooklyn: 1888; reprint, New York: De Capo Press, 1968), 327-32 (page references are to reprint edition). Hereafter cited as Ford, *Pamphlets*.

the trial by jury in civil cases, nor against the danger of standing armies in time of peace.” The standard answer by nationalists to objections like Mason’s was that a Bill of Rights was unnecessary because the Constitution did not give the Federal Government any power over individual rights and liberties. It would be up to other men to blunt the sword that was forged at Philadelphia.

The debates and compromises over the sword—especially Clause 16—touched on the most fundamental issue that confronted the constitutional and subsequent ratifying conventions: the division of governing power between the states and central government. That issue was known at the time (and still is today) as “federalism.” Nationalists wanted to fuse decentralized political power (the purse and sword) into one strong, centralized government. They disingenuously labeled themselves as “Federalists” when in truth they were “consolidationists.” The men who opposed them valued state sovereignty (states’ rights) and sought to limit centralized power. They were tagged as “Antifederalists” when in truth they upheld the principle of federalism. From their contemporary perspective, the nationalist program—and the second constitution it created—represented a counter-revolution against the political independence that had been won from Great Britain during the Revolutionary War. Indeed, it appeared as though the new Congress, now armed with legislative supremacy, was nothing more than Parliament by another name. The single, executive head of state, an office not subject to selection by a popular plebiscite, seemed little different from an imperial magistrate, if not a monarch. In fact, Richard Henry Lee—one of the representatives in the Confederation Congress now charged with transmitting the new constitution to the states for ratification—wrote George Mason

that the document had been framed by “a coalition of Monarchy men, Military Men, Aristocrats, and Drones whose noise, impudence & zeal exceeds all belief.”<sup>49</sup> Dick Lee also tried to add a Bill of Rights in the Confederation Congress prior to ratification but was voted down. Lee published his criticisms anonymously under the title *Letters from the Federal Farmer*, which ran throughout October 1787.<sup>50</sup>

Lee, of course, had no idea what role Mason played in creating the constitution; he only knew that Mason (and Randolph) refused to sign it. A year after the Constitutional Convention met, and just days before the Virginia Ratifying Convention was set to convene, Mason wrote Thomas Jefferson a letter stating his reasons for absenting himself from the final vote. Mason not only explained himself, but also offered this additional insight:

Upon the most mature Consideration I was capable of, and from Motives of sincere Patriotism, I was under the Necessity of refusing my Signature, as one of the Virginia Delegates; and drew up some general Objections; which I intended to offer, by Way of Protest; but was discouraged from doing so, by the precipitate, & intemperate, not to say indecent Manner, in which the Business was conducted, during the last Week of the Convention, after the Patrons of this new plan found they had a decided majority in their Favour, which was obtained by a Compromise between the Eastern, and the two Southern States [South Carolina and Georgia], to permit the latter to continue the Importation of Slaves for twenty odd Years; a more favourite Object with them than the Liberty and Happiness of the People.

Mason enclosed a “Copy” of his “Objections,” the foremost being the lack of a declaration of rights. He added, however, that

There are many other things very objectionable in the proposed new Constitution; Particularly the almost unlimited Authority over the Militia of the several States; whereby, under Colour of regulating, they may disarm, or render useless the Militia, the more easily to govern by a standing Army; or they may harass the Militia, by such

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<sup>49</sup>Lee to Mason, 1 October 1787, in Ballagh, *Lee Letters*, 2:238.

<sup>50</sup>Ford, *Pamphlets*, 288-325.

rigid Regulations, and intolerable Burdens, as to make the People themselves desire its Abolition.<sup>51</sup>

Obviously, Mason did not confide that he was the one who opened that Pandora's box by originally motioning Clause 16 on 18 August 1787. We will never know if the debate over that critical clause was a turning point for Mason and Randolph (or merely an embarrassment), but they joined Gerry in rejecting the federal constitution nonetheless. In any case, they were not about to defend Clause 16 at Richmond. Elbridge Gerry may have been a cantankerous foe, but Patrick Henry was downright confrontational—and politically powerful at home.

In large measure, Mason had rehearsed the arguments he would employ against that cataclysmic clause in the above passage. He also advised Jefferson that “the convention of Virginia meets on the first Monday in June,” and that he was setting out for Richmond “this week “to attend it.” Mason then told him what that gathering portended:

From the best information I have had, the Members of the Virginia Convention are so equally divided upon the Subject, that no Man can, at present, form any certain Judgment of this issue. There seems to be a great Majority for Amendments; but many are for ratifying first, and amending afterwards. This Idea appears to me so utterly absurd, that I can not think any Man of Sense candid, in Proposing it.<sup>52</sup>

Ratifying before amending promised to be a hard sell in the Old Dominion.

Moreover, Radical Whig ideology would re-emerge with a vengeance to protect Virginians—and Virginia—from being “disarmed” of their sovereign sword.

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<sup>51</sup>Mason to Jefferson, 26 May 1788, in Rutland, *Mason Papers*, 3:1044-1045.

<sup>52</sup>*Ibid.*, 2:1046.

## CHAPTER 11

### CROSSED SWORDS: VIRGINIA'S RATIFYING CONVENTION, JUNE 1788

“My great objection to this government is, that it does not leave us the means of defending our rights, or of waging war against tyrants . . . . Have we the means of resisting disciplined armies, when our only defence, the militia, is put into the hands of Congress? . . . You cannot force them to receive their punishment: of what service would militia be to you, when, most probably, you will not have a single musket in the state? for, as arms are to be provided by Congress, they may or may not furnish them.”

—Patrick Henry  
Virginia Ratifying Convention  
Richmond, 1788<sup>1</sup>

Virginia's Ratifying Convention opened at Richmond on Monday, 2 June 1788.

The last time George Mason and Patrick Henry met in this city was during July-August of 1775 at the Third Virginia Convention. At that gathering, Henry was elected commander in chief of Virginia's army, minutemen, and militia—a three-component armed force created by an ordinance drafted by Mason. More than anyone else, those two men were responsible for creating Virginia's sovereign sword—one largely by political agitation, the other by legislative action. A year later, both men later served on the same committee that created Virginia's Declaration of Rights and Constitution at the Fifth Convention in Williamsburg. Between them, those two documents provided safeguards against the misuse of Virginia's sword, as well as procedures for how it would be implemented and used. The primary objective of both was clear, certain, and irrefutable: to prevent the commonwealth government of Virginia and its governors from subverting military power

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<sup>1</sup>Jonathan Elliot, ed., *The Debates in the several State Conventions on the adoption of the Federal Constitution as recommended by the General Convention at Philadelphia in 1787* . . . 5 Vols. (New York: Burt Franklin, 1888; reprint, New York: Ayer Company, Publishers, Inc., 1987), 3:49, 55 (page references are to reprint edition). Hereafter cited as Elliot, *Virginia Debates*.

to coerce or otherwise rule the people despotically. The underlining premise of those founding documents was equally evident and undeniable: the sword that was being safeguarded from abuse belonged to the sovereign state of Virginia. No other government or people had a similar right to hold or wield it for their own purposes. No one else had the responsibility to ensure that Virginia's sword would not become tainted or corrupted. It was a power of, by, and for Virginians to assure their mutual protection and self-preservation. Article Thirteen of Virginia's Declaration Rights ensured the power of the sword would not harm the sovereign people of Virginia.

When the Ratifying Convention convened, eight states had endorsed the Constitution; ten were required to put the new plan of government into effect. However, by the time the convention adjourned on Friday, 27 June, New Hampshire had voted to ratify (21 June). Virginia appeared to be the key, pivotal state. Indeed, everyone knew that acceptance or rejection by Virginia, then the largest and most important state, was absolutely crucial. The first two days of the convention were spent attending to organizational and procedural matters. Edmund Pendleton was elected President of the Convention, but most of the debates took place in the committee of the whole with George Wythe sitting in the chair. There were 168 delegates present. Providing protections against a strong central government with a Bill of Rights and recouping the basis of state sovereignty—autonomy over the purse and sword—were the major themes at Richmond. None seemed more frightening to Mason and Henry than losing control over Virginia's sovereign sword. After more than a century of enacting its own militia statutes and ordinances that raised, organized, armed, and disciplined four generations of militiamen, rangers, regular soldiers, and minutemen, the former colony and now sovereign state of

Virginia was expected to turn its military power over to a consolidated and centralized governing body called Congress. While that was certainly better than handing control over to some chief executive, it nevertheless conjured up raw memories of an omnipotent Parliament. The only armed realms of oversight left to the Virginia legislature were training its militia (according to centralized guidelines) and officer appointments (some consolation in terms of maintaining the loyalty of the militia). Could matters get any worse? Clearly so: not only was Virginia losing a firm grip on its sword, that same “supreme” Congress had given itself the power “to raise and support Armies” as well. Even more alarming was the fact that this “plan of government” was constructed without any preconditioned principles or rules to check and constrain military power. The only available methods to repair what had been done at this late date was to condemn that poorly designed structure, and then re-model it in accordance with set standards and with fundamental protections in place, such as a Bill of Rights—which should have been set down before hasty construction even began. At any rate, one of the worse building codes the framers followed was Clause 16.

Patrick Henry, for one, was fully prepared to cross the national sword with that of his sovereign state (which would become a mere dagger under the new constitution). Henry immediately got to the heart of the matter on 4 June—state sovereignty. “I have the highest veneration for those gentlemen” at Philadelphia, he began, “but, sir . . . “Who authorized them to speak the language of, *We, the people*, instead of, *We, the states*? States are the characteristics and the soul of a confederation. If the states be not the agents of this compact, it must be one great, consolidated, national government, of the people of all the states.” Moreover, “The people gave them no power to use their name.

That they exceeded their power is perfectly clear.” Then Henry struck a telling blow: “The federal Convention ought to have amended the old system; for this purpose they were solely delegated; the object of their mission extended to no other consideration.”<sup>2</sup> Perhaps this was Henry’s way of treading circumspectly on the work of “those gentlemen who formed the Convention,” but as usual, he stomped on toes—especially those of Edmund Randolph, the Governor of Virginia and a framer at Philadelphia.

Even though Randolph refused to sign the Constitution, he felt compelled to defend the convention from Henry’s attack. In the process, he became a nationalist. “I come hither,” he explained, “to repeat my earnest endeavors for a firm, energetic government; to enforce my objections to the Constitution, and to concur in any practical scheme of amendments; but I never will assent to any scheme that will operate a dissolution of the Union, or any measure which may lead to it.” For Randolph, “the only question” was deciding “between previous and subsequent amendments,” but only up to a point: “the Union is the anchor of our political salvation; and I will assent to the lopping of this limb (meaning his arm) before I assent to the dissolution of the Union.” Randolph detailed how that “Union” was threatened under a weak Confederation and then struck back at Henry: “The gentleman . . . inquires why we assumed the language of ‘We, the people.’ I ask, Why not? The government is for the people; and the misfortune was, that the people had no agency in the government before.” Randolph continued to spar with a few more questions before landing his verbal uppercut: “What harm is there in consulting the people on the construction of a government by which they are to be bound? Is it unfair? Is it unjust? If the government is to be binding on the people, are not the people the

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<sup>2</sup>Elliot, *Virginia Debates*, 3:22. Henry’s emphasis.

proper persons to examine its merits and defects? I take this to be one of the least and most trivial objections that will be made to the Constitution; it carries the answer with itself.”<sup>3</sup>

It was now George Mason’s turn to explain why he refused to sign the Constitution. For Mason, the major issue was not “whether the Constitution be good or bad,” but rather that it was designed for “a national government, and no longer a Confederation.” Mason claimed “The very idea of converting what was formerly a confederation to a consolidated government, is totally subversive of every principle which has hitherto governed us. This power is calculated to annihilate totally the state governments.” Even though Mason “solemnly” declared “that no man is a greater friend to a firm union of the American states than I am,” he preferred a united confederacy. Indeed, “my principal objection is, that the Confederation is converted to one general consolidated government, which, from my best judgment of it, . . . is one of the worse curses that can possible befall a nation.” He hoped “that a government may be framed which may suit us, by drawing a line between the general and state governments, and prevent that dangerous clashing of interest and power, which must, as it now stands, terminate in the destruction of one or the other.” Otherwise, Mason was “convinced that this government will terminate in the annihilation of the state governments . . .

the question then will be, whether a consolidated government can preserve the freedom and secure the rights of the people.

If such amendments be introduced as shall exclude danger, I shall most gladly put my hand to it [the Constitution]. When such amendments as shall, from the best information, secure the great essential rights of the people, shall be agreed to be gentlemen, I shall most heartily make the greatest concessions, and concur in any reasonable measure to obtain the desirable end of conciliation and unanimity. . . . I wish

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<sup>3</sup>Ibid., 22-29.

for such amendments, and such only, as are necessary to secure the dearest rights of the people.<sup>4</sup>

James Madison followed Mason as the last man to speak. His remarks were brief, non-specific, and conjectural: “Mr. Chairman, it would give me great pleasure to concur with my honorable colleague in any conciliatory plan.” Then came the inevitable “but”—“With respect to converting the confederation to a complete consolidation, I think no such consequence will follow from the Constitution, and that, with more attention, we shall see that he is mistaken.”<sup>5</sup> So ended the first day of opening arguments and rebuttals. The major issue was federalism, or retaining state sovereignty within a confederacy versus state “annihilation” under a consolidated government. Federalism proved to be the major theme throughout the convention.

The following day (5 June), Patrick Henry plowed federalism into fertile soil—the usurpation of Virginia’s sword. The seeds of the Second Amendment were about to be germinated. As was often the case whenever Henry spoke, his oration is long. The following excerpted passages demonstrate how he made that crucial correlation without subverting the context or betraying the meaning of his words.<sup>6</sup>

Henry began by conjoining the loss of sovereignty with the loss of rights and liberty:

I rose yesterday to ask a question which arose in my own mind. The question turns, sir, on that poor little thing—the expression, We, the *people*, instead of the *states*, of America. I need not take much pains to show that the principles of this system are extremely pernicious, impolitic, and dangerous. Here is a resolution as radical as that which separated us from Great Britain. It is radical in this transition; our

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<sup>4</sup>Ibid., 3:29-34.

<sup>5</sup>Ibid.

<sup>6</sup>The following passages from Henry’s lengthy speech are found in Elliot’s *Virginia Debates*, volume 3, pages 44-56, passim.

rights and privileges are endangered, and the sovereignty of the states will be relinquished: and cannot we plainly see that this is actually the case? Guard with jealous attention the public liberty. Suspect every one who approaches that jewel. Unfortunately, nothing will preserve it but downright force. Whenever you give up that force you are inevitably ruined. We are come hither to preserve the poor commonwealth of Virginia, if it can be possibly done: something must be done to preserve your liberty and mine.”

The “force” Henry had in mind to preserve Virginia’s sovereignty and individual liberty was the militia. He was well aware that the national government intended to use that “force” to put down domestic insurrections like Shay’s Rebellion under Clause 15 rather than resort to a standing army as its primary police force. However, Henry had to undermine that “original intent” by raising the possibility that the militia might become the tool of despotism. He did so in these passages:

I acknowledge that licentiousness is dangerous, and that it ought to be provided yet there is another thing it will as effectually do—it will oppress and ruin the people. There are sufficient guards placed against sedition and licentiousness; for when power is given to this government to suppress these, or for any other purpose, the language it assumes is clear, express, and unequivocal; but when this Constitution speaks of privileges, there is an ambiguity, sir, a fatal ambiguity—and ambiguity which is very astonishing. In some parts of the plan before you, the great rights of freemen are endangered; in other parts, absolutely taken away. But we are told that we need not fear; because those in power, being our representatives, will not abuse the powers we put in their hands. I am not well versed in history, but I will submit to your recollection, by the tyranny of rulers. I imagine, sir, you will find the balance on the side of tyranny.

Significantly, Henry’s “great objection” to the new plan of government was placing the state militias under the direct authority of Congress. And again here are his words:

My great objection to this government is, that it does not leave us the means of defending our rights, or of waging war against tyrants. It is urged by some gentlemen, that this new plan will bring us an acquisition of strength—an army, and the militia of the states. This is an idea extremely ridiculous; gentlemen cannot be earnest. This acquisition will trample on our fallen liberty. Have we the means of resisting disciplined armies, when our only defence, the militia, is put into the hands of Congress?<sup>7</sup>

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<sup>7</sup>Ibid., 3:49.

Note how Henry equates militias with “liberty” and armies with “tyranny”—the classic Radical Whig ideology, which was motivated by the political perils associated with consolidating the power of the sword in the hands of chief executives (monarchs). Article Six of the English Bill of Rights presumably removed those dangers by giving the legislature (Parliament) the ability to subordinate military power to civil authority. The three clauses in the Constitution ostensibly remained faithful to that principle by placing military power in the hands of the national legislature (Congress) rather than the chief executive. Henry had to refute the fundamental notion that a national legislature (Congress) was a safe repository for military power—thereby turning Article Six of the English Bill of Rights on its head. He also had to sidestep the accepted premise that the military must remain subordinate to civil power, which legitimized legislative rather than executive control. Henry performed that feat by arguing that there was no need for national defense against foreign aggression or domestic insurrections and therefore no need for a national sword. Henry dismissed those premises and rationalizations with these words: “Is there a disposition in the people of this country to revolt against the dominion of laws? Has there been a single tumult in Virginia? Have not the people of Virginia, when laboring under the severest pressure of accumulated distresses, manifested the most cordial acquiescence in the execution of the laws? Some minds are agitated by foreign alarms. Happily for us, there is no real danger from Europe; that country is engaged in more arduous business: from that quarter there is no cause of fear: you may sleep in safety forever for them. Where is the danger? We are told there are dangers, but those dangers are ideal; they cannot be demonstrated.”

Observe how Henry bases his conviction that there is no external or internal danger on “reality” rather than “rhetoric.” In addition, his general lack of “faith” in legislative controls over the sword is analogous with the arguments made by Radical Whig ideologues in England.

Nevertheless, Henry did perceive two demonstrable dangers within the proposed Constitution: the inability of citizens to effect peaceable, and if necessary, violent change. Having little faith in the power of the ballot box, Henry focused his attention upon the presumably “plain, easy way of getting amendments. When I come to contemplate this part, I suppose that I am mad, or that my countrymen are so. The way to amendment is, in my conception, shut.” Henry argued that it was, “supposable, possible, and probable” that “designing, bad men” would get elected to Congress and state legislatures, foil the super-majorities required to propose amendments, and thereby keep the “powers already in their possession. If amendments were proposed, he held that the states would have to “possess genius, intelligence, and integrity, approaching [the] miraculous” to ratify them. The better republican remedy, Henry argued, was Article Three of Virginia’s Declaration of Rights—that whenever government no longer exists “for the common benefit, protection, and security of the people, nation, or community,” then

a majority of the community hath an indubitable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.

This, sir, is the language of democracy—that a majority of the community have a right to alter government when found to be oppressive.

For Patrick Henry, the proper way to affect a political “revolution” in a democratic republic was by a popular majority acting in “such manner as shall be judged most condu-

cive to the public weal,” but not by supermajorities attempting constitutional amendments.

Henry was “amazed and inexpressibly astonished” that men were “willing to bind themselves and their posterity to be oppressed” by rejecting the principle of majority rule.<sup>8</sup> Nor did he express confidence in popular Conventions to “recall our delegated powers, and punish our servants for abusing the trust reposed in them,” which is interesting considering our prior knowledge of the five Virginia Conventions that met between 1775 and 1776. We also know that the major objectives of the Second, Third, and Fourth Conventions were to organize, arm, train, and discipline Virginia’s armed forces so Virginians could defend themselves against armed despotism by Great Britain’s standing army, while the Fifth Convention’s Declaration of Rights ensured Virginia’s own sword would not also be used to oppress the citizenry. Henry argues that such conventions would be impossible under the national Constitution:

O sir, we should have fine times, indeed, if, to punish tyrants, it were only sufficient to assemble the people! Your arms, wherewith you could defend yourselves, are gone; and you have no longer an aristocratical, no longer a democratical spirit. Did you ever read of any revolution in a nation, brought about by the punishment of those in power, inflicted by those who had no power at all? You read of a riot act in a country which is called one of the freest in the world [Great Britain], where a few neighbors cannot assemble without the risk of being shot by a hired soldiery, the engines of despotism. We may see such an act in America.<sup>9</sup>

Henry was inferring that a federal military force might perpetrate a “Boston Massacre” against political protestors. He had no idea how prescient his charge was; future generations Americans would “see such an act” on several occasions; the most recent being the murder of anti-war demonstrators by a federalized militia (the Ohio National Guard) at

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<sup>8</sup>Ibid., 3:47-49.

<sup>9</sup>Ibid., 3:50.

Kent State University on 4 May 1970. It is also important to note that Henry was referring to the loss of arms in two related ways: the inability of the people to defend themselves against armed oppression, and to mount a revolution “to punish tyrants.” From Henry’s perspective, possessing arms is a military and political means to wage defensive warfare against “a hired soldiery, the engines of despotism,” employed to shoot citizens, and then overthrow the despots who commanded and controlled those armed thugs.

Henry was perhaps exploiting James Burgh’s claim that “Those, who have the command of arms in a country . . . are masters of the state, and have it in their power to make what revolutions they please.”<sup>10</sup> Then again, Henry had a first-rate (and fairly recent) example close at hand: the American Revolution, along with a rationale for mounting it—the Declaration of Independence. However, possessing the moral justification to overthrow an armed tyrant was one thing; possessing the means to exercise that “natural right”—an independent armed force composed of the body of the people—was something else.

Henry then argued that the three military clauses in the Constitution would prevent citizens from either defending themselves against armed political violence or punishing tyrants with armed force. Note that Clause 16 receives particular mention and attention:

A standing army we shall have, also, to execute the execrable commands of tyranny; and how are you to punish them? Will you order them to be punished? Who shall obey these orders? Will your macebearer be a match for a disciplines regiment? What resistance could be made? The attempt would be madness. You will find all the strength of this country in the hands of your enemies; their garrisons will naturally be the strongest places in the country. Your militia is given up to Congress, also, in an-other part of this plan: they will therefore act as they think proper: all power will be in their own possession. You cannot force them to receive their punishment: of what ser-vice would militia be to you, when, most probably, you will not have a single musket in the state? for, as arms are to be provided by Congress, they may or may not furnish them.

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<sup>10</sup>James Burgh, *Political Disquisitions*, 2:345.

Let me here call your attention to that part which gives the Congress 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—reserving to the states, respectively, the appointment of officers, and the authority of training the militia according to the discipline prescribed by Congress.’ By this, sir, you see that their control over our last and best defence is unlimited. If they neglect or refuse to discipline or arm our militia, they will be useless: the states can do neither—this power being exclusively given to Congress. The power of appointing officers over men not disciplined or armed is ridiculous; so that this pretended little remains of power left to the states may, at the pleasure of Congress, be rendered nugatory. Our situation will be deplorable indeed: nor can we ever expect to get this government amended, since I have already shown that a very small minority may prevent it, and that small minority interested in the continuance of the oppression. . . . The application for amendments will therefore be fruitless. Sometimes, the oppressed have got loose by one of those bloody struggles that desolate a country; but a willing relinquishment of power is one of those things which human nature never was, nor ever will be, capable of.<sup>11</sup>

Significantly, this is the first statement Henry makes that Congress has the power and authority to disarm the militia if it so chooses. He also mentions a crucial corollary: the states have no right whatsoever to arm their own militias. It is also important to note that Henry claims the militia—supposedly composed of liberty-loving citizen-soldiers—would become the tool of despotism if left solely under the control of the Congress. From Henry’s perspective, everything under a consolidated form of government was corrupted: the ballot, majority rule, and the militia. Just as importantly, the best means to oppose corruption and punish oppression were militias under the sovereign control of the states—even though Virginia had raised a provincial army and relegated the militia to reserve status in its recent war against tyranny. Even so, this was the only time militias were equated with “the power to make revolutions.” During all subsequent debates, Congress’s “implied” power to disarm those sovereign forces was argued in terms of denigrating a state’s ability to defend itself against foreign attacks and domestic insurrections. Nonetheless, the vital issue of “disarming” Virginia’s militia would become the

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<sup>11</sup>Ibid., 51-56.

cause célèbre for creating the Second Amendment’s “the right of the people to keep and bear arms shall not be infringed” clause.

Without question, there were flaws in Henry’s arguments that would be pressed during the following two days by Edmund Randolph and Francis Corbin (the son of Richard Corbin, the Tory receiver general whom Henry “blackmailed” during the Magazine Episode). One of the more significant aspects of their rebuttals is how they related Adam Smith’s division of labor theory to agrarian Virginia. Governor Randolph offered this refutation the next day (6 June):

Suppose the American spirit in the fullest vigor in Virginia; what military preparation and exertions is she capable of making? The other states have upwards of 330,00 men capable of bearing arms: this will be a good army, or they can very easily raise a good army out of so great a number. Our militia amounts to 50,000: even stretching it to the improbable amount (urged by some) of 60,000,—in case of an attack, what defence can we make? Who are the militia? Can we depend solely upon these? I would pay the last tribute to the militia of my country: they performed some of the most gallant feats during the last war, and acted as nobly as men inured to other avocations could be expected to do: but, sir, it is dangerous to look to them as our sole protectors. Did ever militia defend a country?<sup>12</sup>

Knowing the “historical experience” of Virginia’s militia as we do, we can answer each of Randolph’s questions with the same hard kernels of “reality” he purposely projected.

Randolph then turned to the economic ramifications of having an agrarian state in arms. “The militia of our country will be wanted for agriculture. On this noblest of arts depend the virtue and very existence of a country; if it be neglected, every thing else must be in a state of ruin and decay. It must be neglected if those hands which ought to attend to it are occasionally called forth on military expeditions.”<sup>13</sup> Randolph had things turned

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<sup>12</sup>Ibid., 3:76.

<sup>13</sup>Ibid., 3:77.

around a bit, however; what was typically “neglected” in Virginia was cultivating arms, not tobacco. All the same, he was standing on solid Moderate Whig ground.

On 7 June, delegate Francis Corbin began his exposition by taking exception to Henry’s notion that a congressionally controlled Virginia militia “will be made the instruments of tyranny to deprive us of our liberty. Your militia, says he, will fight against you. Who are the militia? Are we not militia?” One can imagine that Corbin looked about him at this point and observed a room full of militia Colonels. He then pointedly asked, “Shall we fight against ourselves? No, sir; the idea is absurd,” he sharply answered. Like Randolph, Corbin noted the *disadvantages* of armed agrarianism:

If some of the community are exclusively inured to its defence, and the rest attend to agriculture, the consequence will be, that the arts of war and defence, and of cultivating the soil, will be understood. Agriculture will flourish, and military discipline will be perfect. If, on the contrary, our defence be solely intrusted to militia, ignorance of arms and negligence of farming will ensue: the former plan is, in every respect, more to the interest of the state. By it we shall have good farmers and soldiers; by the latter we shall have neither. If the inhabitants be called out on sudden emergencies of war, their crops, the means of their subsistence, may be destroyed by it.<sup>14</sup>

That “farming formulation,” of course, turned James Harrington’s armed agrarian republic on its head. More importantly, Corbin hit upon the very reason why Virginia’s yeomen refused to exercise their right to bear arms except during immediate emergencies and only for brief periods. As we have seen, that certainly was a more realistic appraisal of self-interested human nature, as well as the actual relevance and significance of having “economic independence.”

If we are to believe Thomas Jefferson’s estimation of Patrick Henry’s knowledge of literature, he never read *The Wealth of Nations*. However, he was apparently well

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<sup>14</sup>Ibid., 3:76-77, 112-13

aware of Adam Smith's "evil" thesis. Henry condemned Corbin's ideological blasphemy with these words:

There are certain political maxims which no free people ought ever to abandon—maxims of which the observance is essential to the security of happiness. It is impiously irritating the avenging hand of Heaven, when a people, who are in the full enjoyment of freedom, launch out into the wide ocean of human affairs, and desert those maxims which alone can preserve liberty. . . . We do not now admit the validity of maxims which we once delighted in. We have since adopted maxims of a different, but more refined nature—new maxims, which tend to the prostration of republicanism.<sup>15</sup>

Such is the timeless piety of an embattled conservative when confronted with new ideas and new truths for a new world. In any case, Henry changed tact and scored an excellent point. He argued that the Constitution was riddled with "implications" and inferences rather than clear, forthright statements concerning the limits of power and the protection of rights. "Implication is dangerous," he said, "because it is unbounded: if it be admitted at all, and no limits be prescribed, it admits of the utmost extension. . . . If we trust our dearest rights to implication, we shall be in a very unhappy situation." Henry offered a prime example that was surely relevant to his audience:

Implication, in England, has been a source of dissension. There has been a war of implication between the king and people. For a hundred years did the mother country struggle under the uncertainty of implication. The people insisted that their rights were implied; the monarch denied the doctrine. The Bill of Rights, in some degree, terminated the dispute. By a bold implication, they said they had a right to bind us in all cases whatsoever. This constructive power we opposed, and successfully. Thirteen or fourteen years ago, the most important thing that could be thought of was to exclude the possibility of construction and implication. These, sir, were then deemed perilous. The first thing that was thought of was a bill of rights. We were not satisfied with your constructive, argumentative rights.<sup>16</sup>

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<sup>15</sup>Ibid., 3:112.

<sup>16</sup>Ibid., 3:113.

Henry was exactly “right” about rights. It was extremely careless (even bordering on criminal) that the Constitutional Convention designed a plan of government without ever considering a blueprint or setting a cornerstone for that “construction.” Instead, Americans had to tack on “amendments” in order to keep political power and ambition in check. Patrick Henry, however, was particularly concerned with how the powerful and ambitious would use the “implications”—and “extensions”—of a peacetime sword (perhaps just as anxious conservatives were when Henry used the “independent companies” to extort money for munitions during the “Gunpowder Episode”).

Oddly enough, neither Randolph nor Corbin refuted Henry’s argument that Congress had the authority to disarm the state militias. Perhaps sensing an opening, Henry resumed his exhortation on 9 June that Virginia would become disarmed and defenseless:

They [Congress] are also to have magazines in each state. These depositories for arms, though within the state, will be free from the control of the legislature. Are we at last brought to such an humiliating and debasing degradation, that we cannot be trusted with arms for our own defense? . . . If our defence be the *real* object of having those arms, in whose hands can they be trusted with more propriety, or equal safety to us, as in our own hands?

One wonders if Henry was deliberately comparing Governor Dunmore’s control over a “magazine” with that of Congress. In any case, he was pushing the envelope of overstatement; but that was Henry’s nature when he commanded an argument no one dared to refute (at least not yet). Nonetheless, he also offered an interesting observation on arms possession in Virginia: “We have not one fourth of the arms that would be sufficient to defend ourselves. The power of arming the militia, and the means of purchasing arms, are taken from the states by the paramount powers of Congress. If Congress will not arm them, they will not be armed at all.”

Once again, Henry was prone to hyperbole here; Virginians could certainly purchase arms and ammunition if they so desired—unless Congress imposed a ban under the commerce clause. Nevertheless, Henry conceded a truth we discovered long ago from exploring Virginia’s statute books—not all militiamen owned private arms for military service. Henry was arguing from a position of weakness rather than strength because that was the reality. In fact, his whole line argument was that some governing agency had to furnish Virginia’s militiamen with arms. His personal preference, of course, was clear—the Virginia House of Delegates, not a centralized Congress. It is also curious that no one challenged him on that score by saying, “Don’t fret Pat, our boys already ‘keep’ their own guns.” At any rate, Henry summed up his argument that day with less exaggeration:

Congress, by the power of taxation, by that of raising an army, and by their control over the militia, have the sword in one hand, and the purse in the other. Shall we be safe without either? Congress have an unlimited power over both: they are entirely given up by us. Let him candidly tell me, where and when did freedom exist, when the sword and purse were given up from the people? Unless a miracle in human affairs interposed, no nation ever retained its liberty after the loss of the sword and purse. Can you prove, by any argumentative deduction, that it is possible to be safe without retaining one of these? If you give them up, you are gone.<sup>17</sup>

Henry’s words support one of the basic assumptions (and arguments) of this dissertation; that the Second Amendment was first and foremost about “the power of the sword”—at least in eighteenth-century Virginia (if not all America).

Another theme of this study—that Radical Whig rhetoric contradicted reality—is also supported by the testimony of another Virginian: a veteran soldier who was up to the challenge Henry had just thrown down; Washington’s close friend and follower, General Henry Lee. Forever known in his own right as “Light Horse Harry” (and secondly as Robert E. Lee’s father), Lee was a gallant cavalry officer who commanded “Lee’s Le-

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<sup>17</sup>Elliot, *Virginia Debates*, 3:168-69.

gion” during the war. Harry Lee rose to return Henry’s volley that the “militia alone ought to be depended upon for the defence of every free country”—a canon of Radical Whig ideology. Lee’s response deserves lengthy (but excerpted) attention—not so much for standing up to the “Liberty or Death” orator, but for what he has to say about militias and the meaning of Clause 16 from a Moderate Whig perspective.

There is not a gentleman in this house, (not even the gentleman himself,) . . . who admires the militia more than I do. Without vanity, I may say I have had different experience of their service from that of the honourable gentleman. It was my fortune to be a soldier of my country. In the discharge of my duty, I knew the worth of militia. I have seen them do feats that would do honor to the first veterans, and submitting to what would daunt German soldiers. . . .

Then came the inevitable “but”—“I have seen incontrovertible evidence that militia cannot always be relied upon.” Although Lee “could enumerate many instances,” he chose the Battle of Guildford, where “The greatest number of them fled,” thus abandoning “the regulars” and causing “the loss of the field.” In the professional opinion of that old soldier,

This plan provides for the public defence as it ought to do. Regulars are to be employed when necessary, and the service of the militia will always be made use of. This, sir, will promote agricultural Industry and skill, and military discipline and science.

I cannot understand the implication of the honorable gentleman, that, because Congress may arm the militia, the states cannot do it: nor do I understand the reverse of the proposition. The states are, by no part of the plan before you, precluded from arming and disciplining the militia, should Congress neglect it.<sup>18</sup>

At last, someone disputed the notion that the states had no authority to arm their own militias. As Clause 16 drafter Rufus King explained in committee, “*arming* meant not only to provide for uniformity of arms, but included authority to regulate the modes of furnishing, either by the militia themselves, the State Governments, or the National Treasury.”

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<sup>18</sup>Ibid., 3:178.

Clearly, the aim was to ensure the militias *were* armed—either by “the militia themselves” or the “State Governments”—as long as they adhered to procurement standards aimed at uniformity. If the state militias were unarmed, they would serve no useful purpose under Clause 15 (enforcing national laws, repelling invasions, or suppressing insurrections). In truth, the state militias were the *only* source of armed manpower the federal government could count on in an emergency, which was precisely why Congress wanted constitutional authority to “federalize” them.

All the same, Harry Lee soon turned to the real reason why the old militia versus anti-army shibboleths remained serviceable in the context of the eighteenth-century politics—suspicion, mistrust, and fear. In large measure, those are also the very reasons why men have kept and borne weapons throughout the ages. Harry Lee, however, put his finger on that reality in his own place and time by noting,

In the course of . . . some previous harangues, from the terms in which some of the Northern States were spoken of, one would have thought that the love of an American was in some degree criminal, as being incompatible with a proper degree of affection for a Virginian. The people of America, sir, are one people. I love the people of the north, not because they have adopted the Constitution, but because I fought with them as my countrymen, and because I consider them as such. Does it follow from hence that I have forgotten my attachment to my native state? In all local matters I shall be a Virginian: in those of a general nature, I shall not forget that I am an American.<sup>19</sup>

Lee’s “band of brothers” trumpet call fell on deaf ears. After all, he was arguing against men who never fired a gun in battle, but politicians who were more expert at shooting their mouths at the enemy. Besides, Patrick Henry had likewise declared, “I am not a Virginian, but an American” on the second day of the First Continental Congress. But that was way back in 1774—a millennium ago in terms of political rhetoric.

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<sup>19</sup>Ibid., 178-79.

Finally, George Mason spoke up on 11 June, but not on Clause 16. Mason's topics that day were mistrust and the need for a Bill of Rights. Although the following excerpted statements have nothing to do with military power, they serve to remind us why political rights remain salient today:

When the people of Virginia formed their government, they reserved certain great powers in the bill of rights. They would not trust their own citizens, who had a similarity of interest with themselves, and who had frequent and intimate communication with them. They would not trust their own fellow-citizens, I say, with the exercise of those great powers reserved in the bill of rights. Do we not, by this system, give up a great part of the rights, reserved in the bill of rights, to those who have no fellow-feeling for the people—to a government where the representatives will have no communication with the people? We wish only our rights to be secured. We wish to give the government sufficient energy, on real republican principles; but we wish to withhold such powers as are not absolutely necessary in themselves, but are extremely dangerous. We wish to shut the door against corruption in that place where it is most dangerous—to secure against the corruption of our own representatives.<sup>20</sup>

There it was. The real reason why George Mason wrote Virginia's Declaration of Rights and wanted the same protections under a national plan of government. The people—whether acting as citizens of a sovereign state or of this new consolidated consortium called the “United States”—oftentimes elected fools, knaves, and corrupt men to govern them. The height of all possible folly would be to put the power of sword in such untrustworthy hands without clearly stated protections in place. The new Constitution had given Congress both explicit and implied authority to wield a truly sharp sword, but did not protect the people in their sovereign states or as individual American citizens from being coerced or oppressed by that military power—even though it was plainly subordinate to civil power. Indeed, the whole point for having a bill of rights was that *all* civil power was corruptible—even at the state level. One daylong debate on that specific issue

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<sup>20</sup>Ibid., 3:265-66, 271-72.

would determine whether safeguards would be provided against the power of the national government's sword. This was the crucible in which the Second Amendment was forged.

### The Great Debate: Monday, 14 June 1788

Before we listen to what Virginia's political leadership had to say during this crucial session, a few items should be considered first. For one, the entire session is recorded in Volume Three of Jonathan Elliot's, *The Debates in the several State Conventions on the adoption of the Federal Constitution*, pages 378 to 410. I am only selecting excerpts from the lengthy speeches and arguments made that day. I recommend that those thirty-two pages be studied in their entirety by anyone who is seriously interested in the "original meaning" of the Second Amendment. As we read the following chosen passages, we should bear in mind that the positions taken were based on either a desire for a powerful national sword or an equally viable one in Virginia as a fundamental basis of sovereign government. Consequently, the major issue at hand was one of "military federalism," or national security versus state security. In addition, we should understand that these men were essentially trying to "interpret" the constitutional and political "implications" of Clause 16; to determine whether or not rights and liberties might be endangered and what unequivocal protections might be required. Finally, the main impetus behind the debate that day was a deep suspicion and mistrust of any plan of government that concentrated, or "consolidated," the power of sword in the hands of rulers who had a natural propensity to seek and perpetuate their political power. None of these men were anti-military or even anti-government. We certainly know from previous chapters that Patrick Henry and George Mason were not. What they were all against, however, was a militaristic government that had no respect for the civil procedures and principles of re-

publican governance, or the citizens who consented to be governed by them. Moreover, the idealized notion of “republican virtue” died on the battlefields of the Revolutionary War. It will not be remembered or memorialized on 14 June 1788.

The great debate began when delegate Green Clay asked, “why the Congress were to have power to provide for calling forth the militia, to put the laws of the Union into execution” (Clause 15). Madison somewhat testily responded that he “supposed the reasons of this power” were

“so obvious that they occur to most gentlemen. If resistance should be made to the execution of the laws, he said, it ought to be overcome. This could be done only in two ways—either by regular forces or by the people. By one or the other it must unquestionably be done. If insurrections should arise, or invasions should take place, the people ought unquestionably to be employed, to suppress and repel them, rather than a standing army. The best way to do these things was to put the militia on a good and sure footing, and enable the government to make use of their services when necessary” (Clause 16).

Note that Madison did not consider “regular forces” to be composed of “the people.” As Virginia’s history clearly demonstrates, provincial armies were typically recruited among the lower classes; men who owned no property, did not vote, and thus were not “true citizens.” Even a Moderate Whig like Madison did not view a standing army as a “people’s army.” Also recall that George Mason did not want his own son to join the army (which he created). The only armed institution that was considered “of, by, and for the people” was the militia—which perhaps explains its political resiliency. In any case, Mason countered that “It would be to use the militia to a very bad purpose, if any disturbance happened in New Hampshire, to call them from Georgia. This would harass the people so much that they would agree to abolish the use of the militia, and establish a standing army. I conceive the general government ought to have power over the militia, but it ought to have some bounds.” With respect to Clause 15, Mason proposed

“such an amendment as this—that the militia of any state should not be marched beyond the limits of the adjoining state; and if it be necessary to draw them from one end of the continent to the other, I wish such a check, as the consent of the state legislature, to be provided.”

Mason then turned to Clause 16. This was the first time he addressed it during the convention. Only two men knew he originally proposed that “causative clause” at Philadelphia—Madison and Randolph. This is what Mason had to say about “his” clause:

This power is necessary; but we ought to guard against danger. If ever they [Congress] attempt to harass and abuse the militia, they may abolish them, and raise a standing army in their stead. There are various ways of destroying the militia. A standing army may be perpetually established in their stead. I abominate and detest the idea of a government, where there is a standing army. The militia may be here destroyed by method which has been practiced in other parts of the world before; that is, by rendering them useless—by disarming them. Under various pretenses, Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has an exclusive right to arm them, &c. Here is a line of division drawn between them—the state and general governments. The power over the militia is divided between them. The national government has an exclusive right to provide for arming, organizing, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States. The state governments have the power of appointing officers, and of training the militia, according to the discipline prescribed by Congress, if they should think proper to prescribe any. Should the national government wish to render the militia useless, they may neglect them, and let them perish, in order to have a pretence of establishing a standing army.

No man has a greater regard for the military gentlemen than I have. I admire their intrepidity, perseverance, and valor. But when once a standing army is established in any country, the people lose their liberty. When, against a regular and disciplined army, yeomanry are the only defence,—yeomanry, unskillful and unarmed,—what chance is there for preserving freedom? Why should we not provide against the danger of having our militia, our real and natural strength, destroyed? The general government ought, at the same time, to have some such power. But we need not give them power to abolish our militia. If they neglect to arm them, and prescribe proper discipline, they will be of no use. I am not acquainted with the military profession. I beg to be excused for any errors I may commit with respect to it. But I stand on the general principles of freedom, whereon I dare to meet any one. *I wish that, in case the general government should neglect to arm and discipline the militia, there should be an ex-press declaration that the state governments might arm and discipline them.*

*With this single exception, I would agree to this part, as I am conscious the government ought to have the power.*<sup>21</sup>

The last two sentences are emphasized because George Mason had put “an express declaration” down on paper three days earlier. Among his collected papers is a list of twenty rights dated 11 June under the heading “That there be a Declaration or Bill of Rights, asserting and securing from Encroachment the essential and unalienable Rights of the People, in some Manner as the following.” In anticipation that the convention would approve a national bill of rights—whether submitted as a precondition of ratification as Virginia’s “Antifederalists” hoped, or after the fact—Mason had prepared a list of specific rights that could be debated and revised as soon as that decision was made. Mason’s “draft” declaration contained three military rights grouped together as numbers 17, 18, and 19. They read as follows:

17. That the People have a Right to keep & to bear Arms; that a well regulated Militia, composed of the Body of the People, trained to Arms, is the proper natural and safe Defence of a free State; that standing Armies in time of Peace are dangerous to Liberty, and therefore ought to be avoided, as far as the Circumstances and Protection of the Community will admit; and that in all Cases, the Military shou’d be under strict Subordination to and govern’d by the Civil Power.

18. That no Soldier in time of Peace ought to be quartered in any House without the Consent of the Owner: and in time of War, only by the Civil Magistrate in such manner as the Laws direct.

19. That any Person religiously scrupulous of bearing Arms ought to be exempted, upon payment of an Equivalent, to employ another to bear Arms in his Stead.<sup>22</sup>

To fully appreciate the significance of this “original” draft, we must jump ahead two weeks in the convention’s chronology.

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<sup>21</sup>Elliot, *Virginia Debates*, 3:378-80. My emphasis.

<sup>22</sup>Rutland, *Mason Papers*, 3:1071. The entire list is at pages 1068-1071.

On 25 June, two crucial questions came to a vote based upon the following proposed resolve:

That, previous to the ratification of the new Constitution of government recommended by the late federal Convention, a declaration of rights, asserting, and securing from encroachment, the great principles of civil and religious liberty, and the unalienable rights of the people, together with amendments to the most exceptional parts of the said Constitution of government, ought to be referred by this Convention to the other states in the American confederacy for their consideration,”—

The first question put was to refer a Declaration and Rights and other amendments prior to ratification, which failed by a vote of 88 to 80. Then, “the *main question*” was put that Convention should ratify the Constitution, which passed 89 to 79. However, a twenty-man committee was appointed “to prepare and report such amendments as by them shall be deemed necessary, to be recommended.” The committee was composed of eleven nationalists and nine state sovereignists, and included many names familiar to us: George Wythe, Benjamin Harrison, Patrick Henry, George Mason, James Madison, John Marshall, James Monroe, Meriwether Smith, John Blair, and Governor Edmund Randolph. The next day (26 June), the committee presented 20 articles as a Declaration of Rights, along with 20 structural amendments to the Constitution—a total of forty changes to a document that is allegedly etched in stone.<sup>23</sup>

Notably, Articles 17, 18, and 19 were precisely the same as those in Mason’s draft of 11 June except for one very small, insignificant change in Article 17—whereas Mason’s draft article read “That the People have a Right to keep & *to* bear Arms,” the committee’s final Article stated “That the people have a right to keep and bear arms,” the italicized “to” before “bear” being deleted. Otherwise, the textual language of the draft and final articles numbered 17, 18, and 19 were exactly the same. Clearly, the proposed

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<sup>23</sup>Elliot, *Virginia Debates*, 3:652-656, 657-661.

rights were entirely the work of George Mason—as was Virginia’s Declaration of Rights. It is also quite plain that Mason simply grafted the clause “That the people have a right to keep & to bear Arms” at the beginning of Article Thirteen in Virginia’s Declaration. Two immediate questions come to mind: Where did Mason get the phrase “to keep and to bear Arms”? Why did he attach it to Article Thirteen?

The first question is easily answered. The “right to bear arms” language first appeared in Pennsylvania’s 1776 Declaration of Rights. Article Twelve of that document read: “That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power.”<sup>24</sup> The words “to keep and to bear arms” were first used in the Massachusetts Declaration of Rights in 1780. Article Seventeen read: “The people have a right to keep and to bear arms for the common defence. And as in time of peace armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it.”<sup>25</sup> Except “for the common defence,” Mason’s clause replicates the Massachusetts text—“The people have a right to keep and to bear arms.”

As to the second question—Why did Mason attach that clause to Article Thirteen?—the answer (and argument) presented here is that it was intended to prevent Con-

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<sup>24</sup>Francis Newton Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws* 7 vols. (Washington: Government Printing Office, 1909), 5:3083.

<sup>25</sup>*Journal of the Convention for Framing a Constitution of Government for the State of Massachusetts Bay, 1779-1780* (Boston: Dutton and Wentworth, 1832), 225; reprinted in Schwartz, *The Bill of Rights*, 1:342-43.

gress from disarming the militia under Clause 16. This study has attempted to maintain a semblance of chronological purity in both its narrative and presentation of historical evidence. The above departure from that pattern is deemed “necessary” and appropriate so that the reader will appreciate more fully the subsequent arguments presented on 14 June concerning Congress’s “implied” power to disarm Virginia’s militia, which was allegedly “composed of the Body of the People.” Aside from Patrick Henry and perhaps a few other confidants, most delegates were probably unaware of Mason’s draft declaration. We are now just as “informed” as George Mason and Patrick Henry were, and can proceed with the narrative accordingly.

George Mason concluded his opening remarks on Clause 16 with these words: “If the clause stands as it is now, it will take from the state legislatures what divine Providence has given to every individual—the means of self-defence. Unless it be moderated in some degree, it will ruin us, and introduce a standing army.”<sup>26</sup> It is important to note that Mason maintained that the sovereign states had a right to be armed for political “self-defence” just as individuals did in a social sense. We now know, moreover, how Mason thought Clause 16 should be “moderated.”

James Madison was present when Clause 16 was proposed, debated, and drafted. If Madison believed George Mason had been disingenuous in presenting his “concerns,” he kept all traces of cynicism out of his immediate (and significant) rebuttal:

Mr. Chairman, I most cordially agree, with the honorable member last up [Mason], that a standing army is one of the greatest mischiefs that can possibly happen. It is a great recommendation for this system, that it provides against this evil more than any other system known to us, and, particularly, more than the old system of confederation. The most effectual way to render it unnecessary, is to give the general government full power to call forth the militia, and exert the whole natural strength of the Union, when necessary. Thus you will furnish the people with sure and certain pro-

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<sup>26</sup>Elliot, *Virginia Debates*, 3:381.

tection, without recurring to this evil; and the certainty of this protection from the whole will be a strong inducement to individual exertion. . . .

I cannot conceive that this Constitution, by giving the general government the power of arming the militia, takes it away from the state governments. The power is concurrent, and not exclusive. Have we not found, from experience, that, while the power of arming and governing the militia has been solely vested in the state legislatures, they were neglected and rendered unfit for immediate service? Every state neglected too much this most essential object. But the general government can do it more effectually. Have we not also found that the militia of one state were almost always insufficient to succor its harassed neighbor? Did all the states furnish their quotas of militia with sufficient promptitude? The assistance of one state will be of little avail to repel invasion. But the general head of the whole Union can do it with effect, if it be vested with power to use the aggregate strength of the Union. If the regulation of the militia were to be committed to the executive authority alone, there might be reason for providing restrictions. But, sir, it is the legislative authority that has this power. They must make a law for the purpose.<sup>27</sup>

Everything we have learned from the first eight chapters of this study validates Madison's arguments. The original purpose of Clause 16 was to reform the militia into a more uniform and effective fighting force. That same purpose was clearly stated in the preambles of Virginia's numerous militia statutes. But before state sovereignists had an opportunity to "interpret" Clause 16 to their own satisfaction, Clause 15 briefly interrupted.

Green Clay (an odd name choice considering the "true color" of the Old Dominion's landscape) expressed his fear that if "the militia were to be called forth to put the laws into execution," that this would "lead to the establishment of a military government." Clay "asked why this mode was preferred to the old, established custom of executing the laws." Madison answered (again, a bit peevishly), "that the power existed in all countries; that the militia might be called forth, for that purpose, under the laws of this state and every other state in the Union; that public force must be used when resistance to the laws required it, otherwise society itself must be destroyed; that the mode referred to by the gentleman [the noticeably uninformed Clay] might not be sufficient on every oc-

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<sup>27</sup>Ibid., 3:381-83.

casation, as the sheriff must be necessarily restricted to the *posse* of his own county. If the *posse* of one county were insufficient to overcome the resistance to the execution of the laws, this power must be resorted to. He did not, by any means, admit that the old mode was superseded by the introduction of the new one. And it was obvious to him, that, when the civil power was sufficient, this mode would never be put in practice.”<sup>28</sup>

Patrick Henry then stood and put Clause 16 back on the front burner. His usual lengthy remarks contain some of the most significant aspects on “the right to keep and bear arms” clause. Henry began with this notable preface:

Mr. Chairman, in my judgment the friends of the opposition have to act cautiously, We must make a firm stand before we decide. I was heard to say, a few days ago, that the sword and purse were the two great instruments of government; and I professed great repugnance at parting with the purse, without any control, to the proposed system of government. And now, when we proceed in this formidable compact, and come to the national defence, the sword, I am persuaded we ought to be still more cautious and circumspect; for I feel still more reluctance to surrender this most valuable of rights.

He then refuted Madison’s previous rationalizations point by point. As to the federal government’s goal in making the militia so “necessary” (well-regulated) that a standing army was “unnecessary,” Henry shot back:

This argument destroys itself. It demands a power, and denies the probability of its exercise. There are suspicions of power on one hand, and absolute and unlimited confidence on the other. I hope to be one of those who have a large share of suspicion. . . .

When Madison argued Congress had no other interest in mind than the common defense of the nation, Henry sharply replied:

Does he think you are to trust men who cannot have separate interests from the people? It is a novelty in the political world (as great a novelty as the system itself) to find rulers without private interests, and views of personal emoluments, and ambition. His supposition, that they will not depart from their duty, as having no interest to do

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<sup>28</sup>Ibid., 3:384.

so, is no satisfactory answer to my mind. This is no check. The government may be most intolerable and destructive, if this be our only security.

Henry had a more proper, natural, and safer “security” in mind to check centralized power and selfish ambition—Virginia’s militia. However,

I hope, before we part with this great bulwark, this noble palladium of safety, we shall have such checks interposed as will render us secure. The militia, sir, is our ultimate safety. We can have no security without it.

Lastly, Henry challenged Madison’s notion “that the power of arming and organizing the militia is concurrent” with a more personal rebuttal:

I am sure, and I trust in the candor of that gentleman [Madison], that he will recede from that opinion, when his recollection will be called to the particular clause which relates to it [Clause 16].<sup>29</sup>

Henry was dead wrong on that last point. Madison *and* Mason knew the “original meaning” of Clause 16. But as paradoxical as it may seem, that was the problem with written constitutions: mere words do not always convey the true purposes and genuine meaning of men—especially if brevity or economy of language is deemed important. Moreover, determined actions by armed men really do speak louder than humble words written on paper. Nevertheless, Patrick Henry and George Mason hoped to define the armed actions of the national government clearly and according to certain “republican maxims” so that the people of Virginia would know the limits of the political compact they were about to enter into, and more importantly, not have their freely given consent taken away by armed coercion and oppression. Ironically, the only known method for ensuring those protections was another written document called a “Bill of Rights.” Ultimately, men had to trust one another to some extent—otherwise a “social compact” was totally illogical.

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<sup>29</sup>Ibid., 3:384-86.

All the same, Henry continued to make his case with spoken words. The following two paragraphs are particularly important within the realm of Second Amendment scholarship because of two key sentences that are oftentimes taken out of context by “Individual Rights” advocates. Those sentences are: “The great object is, that every man be armed”; and “Every one who is able may have a gun.” For historians, the better performance is to let the actors speak their own lines as they strut across the stage of history.

Here are Henry’s:

As my worthy friend [Mason] said, there is a positive partition of power between the two governments. To Congress is given the power of ‘arming, organizing, and disciplining the militia, and governing such part of them as may be employed in the service of the United States.’ To state legislatures is given the power of ‘appointing the officers, and training the militia according to the discipline prescribed by Congress.’ I observed before, that, if the power be concurrent as to arming them, it is concurrent in other respects. If the states have the right of arming them, &c., concurrently, Congress has a concurrent power of appointing the officers, and training the militia. If Congress have that power, it is absurd. To admit this mutual concurrence of powers will carry you into endless absurdity—that Congress has nothing exclusive on the one hand, nor the states on the other. The rational explanation is, that Congress shall have exclusive power of appointing the officers, &c. Let me put it in another light.

May we not discipline and arm them, as well as Congress, if the power be concurrent? So that our militia shall have two sets of arms, double sets of regimentals, &c.; and thus, at a very great cost, we shall be doubly armed. *The great object is, that every man be armed.* But can the people afford to pay for double sets of arms, &c.? *Every one who is able may have a gun.* But we have learned, by experience, that, necessary as it is to have arms, and though our Assembly has, by a succession of laws for many years, endeavored to have the militia completely armed, it is still far from being the case. When this power is given up to Congress without limitation or bounds, how will your militia be armed? You trust to chance; for sure I am that that nation which shall trust its liberties in other hands cannot long exist. If gentlemen are serious when they suppose a concurrent power, where can be the impolicy to amend it? Or, in other words, to say that Congress shall not arm or discipline them, till the states shall have refused or neglected to do it? *This is my object.* I only wish to bring it to what they themselves say is implied. Implication is to be the foundation of our civil liberties; and when you speak of arming the militia by a concurrence of power, you use implication. But implication will not save you, when a strong army of veterans comes upon you. You would be laughed at by the whole world for trusting your safety implicitly to implication.<sup>30</sup>

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<sup>30</sup>Ibid., 3:386-87. My emphasis.

Henry was obviously grasping at straw men and hedging between extremes—either the militia would be totally disarmed by Congress, or doubly armed at great cost; either the states had no authority whatsoever to arm their militias, or when given that authority they did a poor job of exercising it through militia laws. It was almost as if Henry was making the nationalists’ case for them: the best bet was to let Congress uniformly arm the militias for national defense and homeland security. And yet those worrisome “implications” remained unknowable. Henry’s personal “object” was to remove those implications. Truth be told, insinuations and inferences *are* a rickety foundation for political liberty.

Henry concluded his long speech on this parting note: “If you have given up your militia, and Congress shall refuse to arm them, you have lost every thing. Your existence will be precarious, because you depend upon others, whose interests are not affected by your infelicity. If Congress are to arm us exclusively, the man of New Hampshire may vote for or against it, as well as the Virginian. The great distance and difference between the two places render it impossible that the people of that country can know or pursue what will promote our convenience. I therefore contend that, if Congress do not arm the militia, we ought to provide for it ourselves.”<sup>31</sup>

What is particularly fascinating about Henry’s final thoughts is the unstated, yet underlying “implication” that chattel slavery formed the basis of the “difference” between New Hampshire and Virginia; “that the people of that [northern] country” could never “know or pursue what will promote” the “convenience” of slave-owning Virginians; and that without an *armed* militia to perform to its traditional police function of slave patrolling, the “existence” of white Virginians might indeed become “precarious.” To be

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<sup>31</sup>Ibid., 3:388.

sure, slavery was never mentioned during the debates over the Constitution's military clauses. Moreover, Shays's Rebellion—an uprising by white northerners—had actually occurred. And yet historians are prone to ponder the unspoken motives and motivations of men and women long dead. If I were to step into Patrick Henry's brogans or Dick Lee's riding boots and stroll around a bit, I can imagine I would be quite concerned that a yet-to-be-elected Congress—a lawmaking body that might be controlled by northern “interests”—had the power to disarm an oppressive armed force that was commanded and controlled by “Virginia gentlemen” and “master squires” like myself. In any case, Henry *did* say that disarming the militias of the sovereign states could give rise to “a strong army of veterans” that might “come upon you” some day. Indeed, Richmond fell to the “veterans” of the Union Army seventy-seven years later. Even so, we will never know for certain if the “implication” of slavery was intended on Henry's part, or if it gave pause to nationalists who owned slaves and clearly wanted a strong national sword to crush all manner of insurrections—men like “Light Horse Harry” Lee, for example, who also proclaimed at the convention that “It was necessary to provide against licentiousness which is so natural to our climate. I dread more from the licentiousness of the people than from the bad government of rulers.”<sup>32</sup> What we *do* know for certain, however, is the final outcome of Virginia's Ratifying Convention.

As previously explained, a twenty-man committee reported a national Declaration Rights with 20 Articles on Friday, 27 June. Article Seventeen specifically addressed the three “Military Clauses” in the Constitution under Article 1, Section 8. “Virginia's Version” of a Second Amendment read as follows:

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<sup>32</sup>Elliot, *Debates*, 3:185.

That the people have a right to keep and bear arms; that a well-regulated militia, composed of the body of the people trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace, are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the community will admit; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power.

As logically and factually argued based upon the convention record—which is the most complete of any of the state Ratifying Conventions—the “right to keep and bear arms clause” was directed at Clause 16 with the intent of preventing Congress from disarming the state militias; the “militia clause” addressed Clause 15 by declaring that a militia was indeed “the proper, natural, and safe defence of a free state,” and therefore should not be taken over completely, or used indiscriminately, by the national government; the “standing army clause” was aimed at Clause 12, and reaffirmed the consensus of opinion that a permanent army was “dangerous to liberty” and should be “avoided” unless the “protection of the community” dictated otherwise; the “subordination clause” also related to Clause 15 from the debates over employing the militia to execute civil laws, which might give rise to a military regime. However, the “subordination clause” can also be viewed as addressing all three “Military Clauses” (“in all cases”) to prevent the military from overthrowing the national government (a nationalist perspective), or to inhibit Congress from creating a military regime that relied solely upon military force to enforce its laws (a state sovereignty perspective).

It is also important to note that the committee additionally reported 20 structural amendments to the national Constitution. These select proposals were intended to change the existing text of the Constitution. Three of those structural amendments (numbers 9, 10, and 11) were specifically designed to revise the wording in Clauses 12 and 16. Numbers 9 and 10 would modify the language of Clause 12, while number 11 would change

the text of Clause 16. Having already related the major “military” issues that arose during the convention debates, these structural amendments require no further interpretation or explication beyond their clearly worded purposes—to remove the “implied” power of the national sword and limit its “expansion.” They read as follows:

9<sup>th</sup>. That no standing army, or regular troops, shall be raised, or kept up, in time of peace, without the consent of two thirds of the members present, in both houses.

10<sup>th</sup>. That no soldier shall be enlisted for any longer term than four years, except in time of war, and then for no longer than the continuance of the war.

11<sup>th</sup>. That each state respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same. That the militia shall not be subject to martial law, except when in actual service, in time of war, invasion, or rebellion; and when not in actual service of the United States, shall be subject only to such fines, penalties, and punishments, as shall be directed or inflicted by the laws of its own state.<sup>33</sup>

None of those “textual” changes were incorporated in the Constitution. In truth, they never left Richmond, Virginia. The three “military articles” in the proposed Bill of Rights were remarkably influential, however.

The legislative history of the Bill of Rights has been thoroughly studied and is well known. This study does not add or detract from those findings and facts except in two particulars: to clarify the lineage of “right to keep and bear arms” clause and underscore its connection to Clause 16; and to stress the significance of “Virginia’s Version” of the Second Amendment. As Bernard Schwartz similarly emphasizes,

The Virginia-proposed Bill of Rights . . . are of crucial importance to the history of the federal Bill of Rights, both because they were the first state proposal for a specific Bill of Rights and because they were recommended by Virginia itself. Though Madison wrote to Washington in the heat of the Convention struggle with regard to the just-adopted recommendatory amendments, ‘several of them highly objectionable, but which could not be parried,’ when the time came for him to draft his amendments

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<sup>33</sup>Elliot, *Debates*, 3:660.

in the first Congress, he naturally chose as his model the Bill of Rights recommended by the Convention of which he had been an active member.<sup>34</sup>

Moreover, “every specific guarantee in the Virginia–proposed Bill of Rights later found a place in the federal Bill of Rights, except for Article 19, allowing conscientious objectors to hire substitutes (and even that was included in the amendments which Madison proposed to Congress.”<sup>35</sup> Our “great object,” of course, is to trace the legislative lineage of the Second Amendment.

We begin with Madison’s Article Five version that was passed by the House of Representatives on 20 August 1789 without any revisions. The “Military Article” Madison personally framed reads as follows:

5. 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 one religiously scrupulous of bearing arms shall be compelled to render military service in person.<sup>36</sup>

There is little doubt that Madison combined (and edited) Mason’s Articles into one. Note in particular, however, the changes to Virginia’s Article 17: the prohibition against peacetime standing armies has been removed completely, as well as the subordination of the military to civil power. Madison was the only delegate who attended every session at the Philadelphia Constitutional Convention. Most historians and constitutional scholars acknowledge that he was the “Father of the Constitution.” As his arguments at the Ratify-

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<sup>34</sup>Schwartz, *The Bill of Rights*, 2:765. Professor Schwartz also provides an excellent, in-depth “Legislative History” of the federal Bill of Rights that runs from pages 983 to 1203 (same volume).

<sup>35</sup>Ibid.

<sup>36</sup>*History of Congress Exhibiting a Classification of the Proceedings of the Senate and the House of Representatives from March 4, 1789 to March 3, 1793*, 155-59; reprinted in Schwartz, *The Bill of Rights*, 2:1122.

ing Convention further demonstrate, Madison had no intention of precluding the option of raising a peacetime army. He also maintained that vesting the power of the sword in Congress adequately subordinated the military to civil power. Consequently, the “standing army” and “subordination” clauses were deleted. In addition, Madison “tightened up” the language of the “militia clause” by replacing “proper, natural, and safe” with simply “the best.” He also deleted the redundant “trained to arms” with respect to “keep and bear arms.” Lastly, Madison deleted the requirement to hire a substitute imposed upon “any person religiously scrupulous” from Virginia’s Article 19. Madison was an adamant champion of religious freedom, and most likely considered the monetary equivalent as an unjust “penalty” imposed upon one’s religious convictions. As we know from prior chapters, the practice of hiring substitutes was first introduced in Virginia’s 1738 Militia Act to exempt “people commonly called Quakers.”<sup>37</sup> Recall that same militia law was “reinstated” after Virginia’s militia “legally” expired in 1773.

The House Bill of Rights then went to the Senate for consideration. The Senate conducted its proceedings behind closed doors in those days; as a result, there is no record of the debates on Article 5. What is known is that the Senate adopted Madison’s Article 5 on 4 September 1789 after first eliminating the House provision that exempted conscientious objectors from bearing arms. According to the Senate Journal, a motion was also made that day to “subjoin” the following text to Article 5:

That standing armies, in time of peace, being dangerous to liberty, should be avoided, as far as the circumstances and protection of the community will admit; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power; that no standing army or regular troops shall be raised in time of peace,

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<sup>37</sup>Hening, *Statutes*, 5:16.

without two-thirds of the members present in both houses, and that no soldier shall be enlisted for any longer term than the continuance of the war.<sup>38</sup>

That text obviously came straight from Virginia's structural amendments as well as Article 17 in the proposed Bill of Rights—and with good reason. Virginia's first national Senators were William Grayson, a staunch "Antifederalist" who served on the drafting committee with George Mason, and Richard Henry Lee, whose political "credentials" are well known to us by now. The motion, however, was defeated 9 Nays to 6 Yeas (the Senate was proportionately small at that time, and clearly suffered from absenteeism). House Article 5 was then amended by the Senate to read: "A well regulated militia being the best security of a free state, the right of the people to keep and bear arms shall not be infringed."<sup>39</sup>

The last Senate revision occurred on 9 September. A motion was made to insert the words "for the common defense" after bear arms, but failed. Another motion struck out the words "the best" and inserted "necessary to the," which was successful. The numeration was also changed from Article 5 to 4. The amendment now attained its final form:

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.

Article 4 emerged from the Conference Committee of both houses on 25 September 1789 without recorded debate. President Washington transmitted the fourteen amendments approved by Congress to the states for ratification on 2 October 1789. During the ratify-

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<sup>38</sup>*History of Congress Exhibiting a Classification of the Proceedings of the Senate and the House of Representatives from March 4, 1789 to March 3, 1793*, 163; reprinted in Schwartz, *Bill of Rights*, 2:1149.

<sup>39</sup>*Ibid.*

ing process, the first two amendments were rejected, thus elevating the Fourth Amendment to its current standing as the Second Amendment.

Virginia's House of Delegates received the Bill of Rights for ratification in early October 1789. At the time, it was anyone's guess how the final document would be received there, or if the required three-fourths of the states would adopt it. Some Virginians had little expectation that a "Federalist" Bill of Rights would be satisfactory. George Mason, for instance, opined that Madison was "the ostensible Patron of Amendments. Perhaps some Milk & Water Propositions may be made . . . by Way of th[r]owing out a Tub to the Whale; but of important & substantial Amendments, I have not the least Hope."<sup>40</sup> Certainly, his "Virginia Version" of the Second Amendment had been fairly well gutted at the congressional level (and largely by staunch nationalists). How would Mason and Patrick Henry react to the "National Version"? Was the Second Amendment truly an "important" and "substantial" revision to the United States Constitution? Did it adequately ensure that the federal government's sword would not be used as an instrument of oppression in a nation that was divided not only by the Mason-Dixon Line, but also culturally and politically? Or was it merely a "Milk & Water Proposition"?

Those final questions, along with a few other conclusions and thoughts, will be addressed next.

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<sup>40</sup>George Mason to John Mason, 31 July 1789, in Rutland, *Mason Papers*, 3:1164.

## CONCLUSION

### THE SECOND AMENDMENT IN PRINCIPLE AND PRACTICE

“If there is one basic element in our Constitution, it is civilian control of the military.”

—President Harry S. Truman  
1955<sup>1</sup>

“I will use the full power of the United States including whatever force may be necessary to prevent any obstruction of the law and to carry out the orders of the Federal Court.”

—President Dwight David Eisenhower  
23 September 1957<sup>2</sup>

On 16 November 1789—just a few weeks after the Virginia House of Delegates received the “federal” Bill of Rights for ratification—Richard Henry Lee closed a letter to Alexander Hamilton with this short statement: “The antifederal gentlemen in our assembly do not relish the amendments proposed by Congress to the constitution.”<sup>3</sup> No doubt there was reason enough not to “relish” the Second Amendment, which had been stripped down to bare-knuckled language, but hardly seemed to convey any real punch. One can imagine George Mason and Patrick Henry holding Article 17 from their proposed Bill of Rights in one hand, the Second Amendment in the other, and considering the full implications of this comparative contrast:

#### ARTICLE 17:

That the people have a right to keep and bear arms; that a well regulated militia, composed of the body of the people trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace, are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the community will admit; and that in all cases, the military should be under strict subordination to, and governed by, the civil power.

#### SECOND AMENDMENT:

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<sup>1</sup>Truman, *Memoirs* (1955), vol. II, *Years of Trial and Hope*.

<sup>2</sup>Eisenhower’s “Statement on Little Rock Central High School.”

<sup>3</sup>Harold C. Syrett, et al., eds., *The Papers of Alexander Hamilton*, (New York: Columbia University Press, 1961-1982), 5:517.

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.

One can also imagine them grumbling in disbelief (Mason), or shouting in righteous indignation (Henry), “What happened to all of my original intentions and meanings (?)(!)” The only glimmer of satisfaction either man could claim was a check on Clause 16— Congress could not disarm “the people” who composed Virginia’s well regulated militia. But as Senator William Grayson forewarned Patrick Henry, that was little, or perhaps no consolation at all:

With respect to amendments matters have turned out exactly as I apprehended from the extraordinary. doctrine of playing after the game: the lower house sent up amendments which held out a safeguard to personal liberty in many great instances, but this disgusted the Senate, and though we made every exertion to save them, they are so mutilated & gutted that in fact they are good for nothing, & I believe as many others do, that they will do more harm than benefit: The Virginia amendments were all brought into view, and regularly rejected.<sup>4</sup>

Antifederalist representative Thomas Tudor Tucker summed things up more bluntly to his brother, Virginia jurist St. George Tucker: “You will find our Amendments to the Constitution calculated merely to amuse, or rather to deceive.”<sup>5</sup>

The Second Amendment probably seemed like a joke or a deception. The swords of the sovereign states—their militias—were now relegated to the lowly status of being merely “necessary” to their security, not the proper, natural, safest, or even the best military and police forces. What was Congress (and Jemmy Madison) thinking of? That a standing army was the better choice for the Old Dominion? Of course not; according to Article 1, Section 10 of the Constitution, Virginia could not “keep Troops, or Ships of

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<sup>4</sup>Grayson to Henry, 29 September 1789, in Helen E. Veit, Kenneth R. Bowling, and Charlene Bangs Bickford, eds., *Creating the Bill of Rights: The Documentary Record from the First Federal Congress* (Baltimore: The Johns Hopkins University Press, 1991), 300.

War in time of Peace” “without the Consent of Congress.” Congress certainly could “raise and sustain” standing forces in time of peace, however. This “amendment” said absolutely nothing at about that, or even acknowledged that a standing army was dangerous to liberty. It was also totally mute about keeping the military strictly subordinate to, and governed by, civil power.

Was paper so short, and ink so dear, that protections had to be “implied” rather than plainly written for everyone to see and understand? Indeed, that was the real rub: Mason and Henry had tried to remove all manner of “implication” from the Constitution’s Military Clauses, and what did they get? —An implied right not to be policed by the military under a consolidated government that had “implied powers.” Without question, the Second Amendment was a bad bargain—the most poorly written, least principled, and generally worse right of the bunch. Its only saving grace was that it affirmed the right of the people to keep and bear arms as citizen-soldiers in their state militias. But what if Virginia’s citizens refused to become part-time soldiers, or no longer believed the militia was “necessary” to homeland security? Then the Second Amendment’s clauses would become nothing more than a *non sequitur*—giving the people the right to keep and bear arms with no affiliation whatsoever to its militia premise (or military power).

Of course this is all pure conjecture. We have no idea what thoughts went through Patrick Henry or George Mason’s heads when they first read the Second Amendment, or later pondered whether it was “important” and “substantial,” or just a “tub thrown to whale.”<sup>6</sup> Unfortunately, no documented record exists for the ratification process in Virginia. In fact, very little is known about the reception of the Bill of Rights

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<sup>5</sup>Thomas Tudor Tucker to St. George Tucker, 2 October 1789, *ibid.*

throughout America. As Professor Schwartz notes “Even the contemporary newspapers are virtually silent on the ratification debates in the states.”<sup>7</sup> However, we do know that those who did not “relish” the amendments Congress concocted successfully postponed Virginia’s ratification for over two years—until 15 December 1791. A few more details are available from personal correspondence during that period (but not from Mason or Henry). Specifically, the House was against Articles 11 and 12 but eventually “got over” its objections. The Senate, in turn, opposed Articles 11 and 12 as well as 3 and 8, but likewise resolved its concerns. It is important to note that Article 4 (the Second Amendment) was apparently unopposed. Again, it is regrettable that George Mason and Patrick Henry did not record their personal thoughts and opinions on the finalized Second Amendment. Nevertheless, there are strong indications in other letters that the entire Bill of Rights was viewed as unacceptable.<sup>8</sup> Ironically, foot-dragging Virginia became the required tenth state to ratify, thus finally putting the Bill of Rights into effect. Fifteen years had gone by since George Mason wrote the very first Declaration of Rights in 1776. In effect, the sovereign state of Virginia had written the first and last chapters in America’s early constitutional history. Another Virginian, Secretary of State Thomas Jefferson, wrote the conclusion to that narrative when he sent the “Official Notice of Ratification” of the Bill of Rights to the state governors on 1 March 1792.

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<sup>6</sup>Kenneth R. Bowling, “‘A Tub to the Whale’: The Founding Fathers and Adoption of the Federal Bill of Rights,” *Journal of the Early Republic* 8 (Fall 1988): 223-250.

<sup>7</sup>Schwartz, *Bill of Rights*, 2:1171.

<sup>8</sup>Henry Lee to Hamilton, 16 November 1789; Madison to President Washington, 20 November 1789; Randolph to President Washington, 26 November 1789, 6 December 1789; Madison to President Washington, 4 January 1790; all conveniently gathered in Schwartz, *Bill of Rights*, 2:1185-1193.

Nevertheless, one has the sense that Virginians took far greater pride in their constitutional achievements within their own sovereign state—and deservedly so. In terms of armed political power, Article Thirteen of Virginia’s Declaration of Rights was a masterpiece in stating clearly understood standards that would prevent any “plan of government” from subverting the power of the sword to serve its own ends or otherwise endanger the people’s liberty. Unfortunately, the same could not be said of the Second Amendment, as evidenced by the fact that it is no longer considered as a “military amendment” by modern-day scholars and citizens. Article Thirteen, in contrast, stood as enduring reminder that even though the sword is a basic foundation of all governments, it must be constrained and used prudently—even if it is controlled by supreme legislatures under Constitutions. In fact, Virginians have lived under five different “social compacts” since 1776, but only one “original” Declaration of Rights. That tradition was “revised” in 1969, however, when two Virginia legislators sponsored a proposal to incorporate specific Second Amendment language into Article Thirteen. From reading the House and Senate debates, it appears that the sponsors initiated that revision at the behest of pro-gun lobbyists following the passage of the 1968 Federal Gun Control Act. Their recorded intent, however, was to realign Article Thirteen with the Second Amendment so that Virginia’s Constitution would not be in derogation of the federal Constitution. When specifically questioned about “gun control,” both men flatly denied that the alteration would limit or adversely affect any existing legislative power to regulate or control the possession and use of firearms by the people of Virginia.<sup>9</sup> At any rate, the change was drafted

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<sup>9</sup>Excerpts from the House and Senate debates and additional background on the revision are in A. E. Dick Howard, *Commentaries on the Constitution of Virginia* 2 Vols. (Charlottesville: University Press of Virginia, 1974), 1:273-275.

and subsequently approved by Virginia's voters in a 1970 special ballot that included other revisions to Virginia's Constitution. Today's Article Thirteen reads as follows with the inserted text italicized:

That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, *therefore, the right of the people to keep and bear arms shall not be infringed*; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.

There is, of course, a tremendous irony here. Most likely none of the lawmakers or voters were aware that George Mason was instrumental in attaching almost the exact same language at the beginning of Article Thirteen in "Virginia's Version" of the Second Amendment. As we know, George Mason and Patrick Henry's "original intent" was to protect Virginia's militia from being disarmed by Congress under the military power granted under Clause 16. The intentions of the two lawmakers in 1769 are somewhat less clear, but certainly had nothing to do with keeping citizen-soldiers armed for military purposes—even though the nation was in the midst of the Vietnam War at the time. This serves as but one example of how far Virginians—and all Americans—have disassociated the "original" history of the Second Amendment with the power of the federal sword, which is perhaps understandable and even explainable.

In large measure, modern Americans can no longer associate with the historical experiences and political theories of men so long dead and often forgotten. Certainly the theory professed and propagated by Radical Whigs concerning standing armies and citizen militias were part of a worldview—and world—vastly different from the mind-set and global setting of today. Indeed, the specific argument that professional armies are "absolutely destructive" to republics, individual liberties, and balanced constitutions does

not provide a meaningful explanation for our present and developing circumstances as an armed nation; nor can it offer convincing solutions or legitimate alternatives to the current political problems and policies of national defense and homeland security; nor can it mobilize public opinion to take a different course of political action based upon un-lived experiences and unfelt attitudes. Such a “radical” theory, in sum, fails to realize the fundamental purposes and functions of a coherent ideological system.

Of course, the “ideological origins” of the Second Amendment is well-trampled ground among scholars who debate the root causes and purposes of that revision within the contemporary context of gun control. Since the Second Amendment has a “Militia Clause” that must be explained and understood to some extent, they have necessarily looked to the classical republican ideas articulated by a cadre of English political theorists during the seventeenth and eighteenth centuries that championed citizen militias and condemned professional standing armies. Yet also for the most part, Second Amendment scholars have done a poor job of reading that ideology through skeptical glasses, or critically analyzing the purposes, functions, and ability of those thoughts to arouse public opinion and effect useful political or constitutional reforms. Moreover, most Second Amendment scholars tend to pass along the words and phrases of those “Radical Whigs” as if they were shibboleths in every sense of that term: as a peculiarity of usage by pro or anti-gun groups; as mere Second Amendment catchwords and slogans; and as common sayings and beliefs that hold little real meaning or demonstrated truth.

The great paradox is that over the course of three generations of Radical Whigs, from James Harrington in 1656 to James Burgh in 1776, that same republican ideology was considered a shibboleth by many of their contemporaries: it was peculiar to a politi-

cal faction that had a particular agenda (resurrecting from the ashes of the Interregnum the phoenix of a “Real” English Commonwealth); it was replete with catchwords and slogans for smearing opponents; and it was a common belief system among “radicals” that offered little current meaning or truth for “moderate” Englishmen. In terms of revitalizing and reforming the militia, it was an abject failure as a functional political ideology in post-Civil War England. Moreover, those who preached it faced dire consequences for their political blasphemy: exile abroad, imprisonment at home, and even death. Yet to date, few (if any) professed Second Amendment scholars have had the intellectual “virtue” (or unbiased skepticism) to question whether the Radical Whig ideology was fundamentally flawed in any way; nor have they adequately examined the opposing ideology of Moderate Whigs, or considered the complex interaction of both theories in creating the Second Amendment. As always, the major focus is “gun control.”

The conclusion drawn in this study is that the Second Amendment was concerned with “military constitutionalism” and represented an ideological compromise between two competing theories and worldviews: one nationalist and moderately pro-army, the other state sovereignist and radically anti-army. The result of that constitutional conciliation was an “amendment” that did not change the federal military establishment created under Clauses 12, 15, and 16 in any fundamental (or even superficial) way, but nonetheless recognized and accepted two contractual propositions. First, that “A well regulated Militia” was “necessary to the security of a free State.” Second, that “the right of the people to keep and bear Arms, shall not be infringed.” Nationalists were hopeful the Second Amendment would alleviate the mistrust and fears of many sovereignists: that the “militia clause” duly recognized that the states needed their own swords (militias), and

that the “right to bear arms” clause contractually pledged the federal government would not disarm those state militias under the regulatory power granted under Clause 16. At bottom, the Second Amendment arose from, and necessarily addressed, a vital constitutional issue during the seventeenth and eighteenth centuries: sovereignty over the sword.

The power of the sword is literally double-edged and can cut two ways; it can protect citizens from foreign aggression or it can police them domestically. A peacetime standing army was considered dangerous for two reasons: the military could become a government unto itself (military rule by the military), and it could be used as an instrument to oppressively police and coerce the population. In general, Radical Whigs argued that militias were safer police forces because they were composed of the body of the people, and that citizen-soldiers would never oppress other citizens. They also argued that the military must never act independently of civil authority, but rather be strictly subordinate to, and governed by, civil power. Moderate Whigs were concerned that militias did not provide adequate protection against foreign aggression and argued that a professional military establishment would not pose a threat to civil liberty as long it was commanded and controlled by civil power, the implication being that civil authorities would not use the military as a domestic police force except in dire emergencies. However, those two conflicting political theories were also concerned with a broader constitutional question: who had sovereign authority over the sword?

Between the English Civil War and Glorious Revolution, sovereignty over the sword was fought out between the executive (kings) and the legislature (Parliament). Ultimately, the executive retained full command over the sword, but was controlled by the power of the legislature’s purse. Under Article VI of the English Bill of Rights, Parlia-

ment had no direct control over the military, but restricted the King's ability to raise armed forces in peacetime. Once legislative consent was given, however, the executive commanded those forces as he saw fit until the consent (and funds) were cut off, thus forcing the army to disband. Having little confidence in the constitutional protections of Article VI, the Radical Whig indictment against standing armies was actually aimed at executive power, or the ability of a despotic monarch to use the armed forces at his disposal as a domestic police force. Moderate Whigs, on the other hand, were confident Article VI effectively controlled the executive's command over the sword. As seen from the historical survey of colonial Virginia, similar confrontations between the executive (governors) and legislature (House of Burgesses) occurred on occasion. Moreover, Radical Whig ideology was known and used to curtail executive command over the military. In fact, the House of Burgesses always held firm regulatory control over the sword—except during Bacon's Rebellion. While a struggle over the purse caused a rupture between Parliament and the colonial assemblies, it was the abuses of the sword wielded by King George III that triggered a revolution (as the Declaration of Independence affirmed).

In the constitutional context of post-revolutionary America, executive power was severely limited and the state legislatures—representing the interests of “the people” and governing with their consent—were supremely sovereign over both the purse and the sword. Article Thirteen of Virginia's Declaration of Rights set down standards the state legislature was to abide by in exercising military power. It was based on Radical Whig precepts and designed to protect the sovereign people of Virginia from being oppressed by their own sword. However, the military clauses of the federal Constitution were per-

ceived as posing a threat to the people and polity of Virginia. The contest for control over the sword now pitted a national government against state governments, or Congress against the state assemblies. The question of executive versus legislative sovereignty was not an issue. The dominant concern was that the new Constitution had given Congress sovereign control over the state militias (except for officer appointments), would use that authority and power to disarm them, and thus leave the states completely defenseless from being either attacked or policed by a national standing army—even though state militias were supposed to enforce federal laws and suppress insurrections. Indeed, the nationalists realized the federal government required coercive armed force to preserve the union, but decided to rely upon federalized state militias to perform that task rather than a standing army. In addition, they decided to base the federal compact on “The People” rather than the states so that when armed coercion became necessary they would exercise that power on citizens rather than sovereign polities. All the same, the idea of a national identity, consciousness, and citizenship was something quite new for early Americans who still considered their state of residence as their “Country.”

The Second Amendment was designed to assure the citizens within those “Countries” that a militia was, in fact, still necessary to their security, and that the federal government’s sovereignty over that sword did not include the power to take it away. Consequently, “the people” in the states could still defend themselves against foreign and domestic enemies—including any “unprovoked” armed aggression by the federal government. However, Congress ultimately retained control over the state militias under Clauses 15 and 16. Moreover, the states could not raise or maintain any other military forces without Congress’s approval. Aside from the Second Amendment’s protections

(retain a militia that would not be disarmed), the only sovereign control the states had over their sword was officer appointments; the assumption being that the officers' first loyalty was to their state and not the federal government. Clearly, the states had lost considerable sovereignty over the sword. Now they would have to rely upon "collective" defense in a consolidated union as opposed to "individual" protection in a confederation of "independent" polities. Nevertheless, the issue of federal police power was still troubling. Indeed, many questions remained unanswered.

Did the Second Amendment offer Virginians a viable means to defend themselves against a federal army if it marched into Virginia to enforce federal laws or police the populace? Well perhaps so, but only if Virginians truly believed in the Radical Whig ideology that told them they were virtuous citizens and adroit soldiers who could defeat any professional army on earth. That ideology would also have to mobilize massive manpower for war, which it failed to do in 1776. Indeed, Virginians would have to ignore the lessons of past experience, a history that spoke volumes about apathy, atrophy, and ambiguity. Then again, ordinary Virginians might also exercise their right to keep and bear arms as they had in the past—by refusing to do so under mandated terms and conditions that conflicted with their self-interest and economic independence. In fact, the ideological ideal of the citizen-soldier was abandoned in every war Virginians fought during the eighteenth century, as evidenced by the provincial armies that were recruited among the "poor, the unemployed, and the unlucky."<sup>10</sup> Nor did Virginians agree to mili-

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<sup>10</sup>Titus, *Old Dominion at War*, 45.

tary conscription either; a reality that became more pronounced—and even more violently opposed—during the Revolutionary War.<sup>11</sup>

Did keeping and bearing arms confer a right of the people to alter or abolish the federal government by armed revolution? Not according to the articles of the United States Constitution. Moreover, a “Federalist” Congress deleted James Madison’s natural law preamble to the Bill of Rights that declared the people’s right “to reform or change their government, whenever it be found adverse or inadequate to the purposes of its institution”, as well as the affirmation “that all power is originally vested in, and consequently derived from the people.”<sup>12</sup> Clearly, nationalists and “unionists” aimed to thwart the armed political violence of insurrections (as did most white Virginians with respect to their servants and slaves). Only God, not any man-made law, sanctioned the right of revolution. Perhaps it was fortunate no one knew who fired the first shot on 19 April 1775. It certainly was more convenient (and constitutional) to believe a British Redcoat had started the American Revolution.

Was the Second Amendment solely a product of Radical Whig ideology? The answer, as argued in this dissertation, is that the Second Amendment was a compromise between two ideological perspectives: a political theory that championed militias and maligned standing armies; and a political philosophy that appreciated the intrinsic value of a professional military establishment, yet recognized its inherent dangers as well. Over the

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<sup>11</sup>See “Violent and Riotous Behavior: Military Mobilization and Popular Resistance, 1776-1780,” and “Muskets Loaded and Bayonets Fix’d’: Small Farmer Resistance to Military Mobilization, 1780-1781”; chapters in Michael A. McDonnell, “The Politics of Mobilization in Revolutionary Virginia: Military Culture and Political and Social Relations, 1774-1783” (Ph. D. Dissertation, University of Oxford, 1995), 68-115.

<sup>12</sup>Richard Henry Lee to Samuel Adams, 8 August 1789, in Ballagh, *Lee Letters*, 2:496.

course of Virginia's history (particularly during wars), militias became less necessary for military defense. However, they remained a safe and proficient police force for maintaining internal security. In that sense, the Radical Whig rhetoric squared with Virginia reality. While provincial armies were still considered dangerous to liberty, they became increasingly necessary to preserve it against foreign aggression. In that respect, Moderate Whig theory offered a more convincing worldview. And yet there was also a complex interaction between the two theories that produced an odd contradiction. The fact that citizen-soldiers in agrarian Virginia generally refused to keep and bear arms except during instant emergencies and for only brief periods (a negation of Radical Whig theory), compelled the raising of standing armies (another negation), which were recruited from the economically dependent lower classes (affirming that armies were composed of riff-raff, but negating the idea that "servants" should not be armed). That reality, in turn, demonstrated that military professionalism and specialization were viable and valid precepts (affirming the Moderate Whig theory). In an peculiar way, the reality that citizen-soldiers often refused to keep and bear arms in well-regulated militias provided the impetus for federal regulation under Clause 16, which ultimately resulted in guaranteeing that "the people" did, in fact, have a "right to keep and bear arms."

This study not only examined the "meaning" of political rhetoric during the seventeenth and eighteenth centuries, but also the "meaning" of reality—the "historical experience" of why and how militias were necessary to Virginia's security, as well as why and how Virginians kept and bore arms. Clearly, the framers at the Constitutional Convention learned the lessons of history and relied upon that experience in forging a federal sword. It is also clear that the Moderate Whig view prevailed in Philadelphia. Even

though Patrick Henry claimed that the “lamp of experience” was his only guide, it was the lantern of Radical Whig ideology that directed his path at Richmond (as well as George Mason’s). The reality both men chose to ignore was that the virtue of the citizen-soldier was killed in the Revolutionary War (if not the French and Indian War). In the end, it was the valor of the Continental soldier that survived. Nevertheless, Mason and Henry held the Radical Whig ground and won a partial victory in the battle over the Second Amendment. But like so many other Radical Whigs before them, their political theory failed to produce truly “important” or “substantial” reforms (or constitutional revisions).

And yet if one accepts other viable “truths”—that the nature of human existence in an ontological world remains unchanged; that the fundamental continuity between ancient and modern humankind is their unchanging political natures; that history relates and attempts to explain the relationship between change and continuity over time; and that even though the methods and means of exercising armed political power have been transformed through the ages, the ends, objects, and purposes of coercive force nevertheless remain constant—then one can also acknowledge that the heart and soul of a political ideology oftentimes transcends the particularities (and peculiarities) of any given people, polity, or period. Therefore, if we look beyond the anti-army/pro-militia dichotomy and focus instead upon the core political principle within that ideology—a deep distrust of any constitutional arrangement that put the swords of justice and war in the hands of chief executives and lawmakers who could exercise that armed political power independently of the people they govern, or without popular consent and control—then that ideology becomes timeless in both its political applicability and constitutional authenticity.

Such an ideology, in sum, can provide meaningful lessons and a timeless sense of direction for those who ascribe to republican forms of government.

In my appraisal, the Framers were grappling with a centuries-old riddle when they began their “experiment” in self-government: Just how far can one potentate, a few magistrates, or the common masses go with armed political power without turning that requisite coercion into arbitrary oppression? After all, *armed* political power was by its very nature *absolute* political power, and thus was fully capable of becoming not only absolutely corrupt, but also utterly coercive—no matter who had the constitutional right “to keep and bear” it. Moreover, striking a proper balance between political freedom and political control was no less a central paradox of governance in their day than it is in ours. Indeed, history and experience had taught the founding generation that an imbalance between political rights and political coercion could trigger tremendous political repercussions—even in a “good” empire that boasted the greatest constitutional liberties the world had ever known.

Those experiences and lessons are still worth remembering today. In my judgment, that is as good a reason as any to study—and understand—the historical “origins” of the Second Amendment.

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