ORIGINS OF THE SECOND AMENDMENT:
The Creation of the Constitutional Rights of Militia and of Keeping and Bearing Arms

DISSERTATION

Presented in Partial Fulfillment of the Requirements for the Degree Doctor of Philosophy in the Graduate School of The Ohio State University

By

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* * * * *

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INTRODUCTION

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.

—Second Amendment (1789)

The Second Amendment to the Federal Constitution in recent years has become one focus of controversy over gun control, whether the federal government can constitutionally require citizens to register hand guns and other firearms and confiscate or prohibit ownership or use of certain categories of weapons. Opponents claim that the amendment does not allow federal regulation of any type of firearm. They contend that the common law principle of self-defense and the political right of revolution against tyrannical government are inherent in this second article of the Bill of Rights. The reference to militia, they claim, does not affect the civil right of arms bearing which they further claim has existed apart from military and law enforcement duties since medieval times. To them the first and second clauses are grammatically independent, lacking only a conjunction to make the dual nature of the Second Amendment clear. If rewritten, it would read, "Both a well regulated militia, being necessary to the security of a free State, and the right of the people to keep and bear arms, shall not be infringed." To advocates of gun control, on the other hand, the militia clause gives a military coloring to the entire amendment. Their version stresses
the grammatically relative nature of the first clause and its subordination to the second: "Because a well regulated militia is necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed." Since historically the phrase "to bear arms" has had the primary meaning of military service, and since the "militia" is a military institution for the defense of the states, gun control advocates argue that the Second Amendment applies only to military weapons which might be used by the modern National Guard, the institutional successor to the state militias. Therefore, hand guns may be constitutionally proscribed by the federal government without violating the right to bear arms in defense of state and nation. At issue from both points of view is the meaning and significance of the words and concepts in the amendment and the understanding of them by eighteenth-century Americans. Here is the weakness of both arguments. Neither has a clear view of eighteenth-century thought nor of the long-range development of concepts, though both touch on some aspects of them. Partly the fault lies in the concepts themselves which have lost much of their Revolutionary meaning, and in the fact that Americans in the 1780's did not agree on the meaning or significance of the Second Amendment. Much of the fault lies in the polemical and presentist nature of the arguments and their attempts to influence the formulation of public policy. To reach an understanding of the original meaning of the words and concepts and the original understanding of the Second Amendment, therefore, requires an examination of the origins of those words and concepts and an analysis of the process of passing and ratifying the amendment.¹
To Englishmen in Great Britain and the colonies and to Americans after Independence, each phrase used in the Second Amendment had a definite meaning in constitutional, institutional, and ideological terms. The oldest concept, that of the "militia," had a long and constitutionally complex history both as the institution by that name after its creation in the 1640's and as predecessor institutions which writers in the seventeenth and eighteenth centuries called "militia." In the widest sense each of these variations on "militia" played a major, even a predominant role in the creation of the Second Amendment.

To appreciate the significance of the "militia" in the 1780's therefore requires an examination of the medieval origins of the institution and ideas about military obligation. This review of medieval constitutional development will also dispel the myth that there existed a right to "bear" arms outside the obligations of military and law enforcement service which some writers have perpetuated. The meaning of "militia" also requires an examination of the evolution of the institution in the American colonies and the political crises which centered on that institution between colonies and crown. Because most historians dealing with the colonial militia have concentrated on its military and especially its wartime characteristics rather than its political and constitutional significance, a detailed treatment of the latter is necessary to show the full importance of the institution to Americans. Finally the ideological concept of militia helps explain American attitudes toward the militia as a constitutional right. The concept was the product of a long history of writings on the proper function, composition, and value of armed citizens, especially in republics.
Since the end of the Roman empire, writers had glorified the "citizen soldier" who fought for love of country rather than money or individual glory and who, through his twin capacities as citizen and as soldier, insured the continuance of liberty in government and society. The classical tradition came into conjunction with the English militia tradition in the writings of James Harrington and his intellectual descendants in the second half of the seventeenth century, precisely in the context of two other developments which influenced Americans in the 1780's.

In the American colonies in the late seventeenth century, the king attempted to impose the English institutional form of the militia on the American defense systems. Only after a series of constitutional crises over American charter rights and the authority of king and royal governors to modify colonial practices did the English model prevail, and then only in a modified version to meet American needs and objections. During the eighteenth century the American assemblies progressively weakened their governors' military powers, often to the detriment of the military efficiency of the militia during wartime. By the end of the colonial period, the concept of militia signified a particular set of institutional characteristics, of military power relationships among the various segments of government, and of military obligations of adult male colonists. Although the Revolution required drastic legal alteration of some of these characteristics, the traditional colonial systems reappeared during the War of Independence, greatly influencing both the advocates and opponents of the Second Amendment. Throughout this development, the ideological concepts of Harrington's descendants gave
Americans the language and assumptions with which to interpret the actions of the crown toward American governments and militias. By the 1760's colonists had a coherent system of ideas relating to militia and military power in general, as well as governmental power.

The second concept in the amendment, the right to "keep arms," grew out of the concept of militia and the ideological concept of arms in late seventeenth-century England. James II attempted early in his reign to abolish the militia, later to neglect its training and to appoint Catholic officers to command it, and finally to disarm Anglican opponents of his rule. In each case James's actions threatened to eliminate the military potential of his opponents. In 1689 after James was deposed, members of Parliament included in the Declaration and Bill of Rights provisions concerning militia and arms. They declared that the king had violated English statutes by allowing Catholics to hold military office, that disarming Anglicans without Parliamentary consent violated a fundamental right of Englishmen not to be taxed without their own or the consent of their representatives. Therefore, the Bill of Rights provided that "protestants" could "have arms" for "their defence" ("common defence" in the version of the House of Commons) according to their social rank and to the dictates of Parliament. In the 1760's and 1770's Americans looked back to this achievement of the Glorious Revolution for precedent and inspiration for creating the American rights of arms keeping and arms bearing.

The third concept, the right to "bear arms," was entirely an American innovation based upon English precedent and inference from the right to keep arms as well as Revolutionary military activity in the
1770's. In order to overcome legal difficulties with using the colonial militia against the crown, Patriots created a "new militia." It was this institution which Americans defended in their Bills of Rights in 1776. George III and Parliament had declared that anyone who participated in the new militia was guilty of treason. Americans defended themselves by declaring that they had a right to serve in the militia and to bear arms in defense of themselves and their states. Massachusetts added the right to keep arms to its enunciation of the right to bear arms, explicitly bringing together English and American concepts.

When the Federal Constitution was ratified in 1787 and 1788, many Americans feared that the new government with the power to raise and support armies would overwhelm the state governments and destroy the liberties of individual citizens. Nationalists since the War of Independence had advocated reforming the militia systems of the states into a national militia under national control, modelled on the militia reform scheme which Parliament had adopted in 1757 which placed the militia in a subordinate and auxiliary position to the royal army. Ideological writings had taught many Americans the need to balance the power of the army with the power of the militia to protect liberty. Since liberty and power were natural opponents, the loss of the means to protect the one led inevitably to the victory of the other. Congress had disbanded the Continental Army in 1783 at the end of the war partly as a result of their discovery of the Newburgh Conspiracy to seize control of the government in order to settle the grievances of officers and to gain their back wages and future pensions. Nationalists, however, continued to advocate militia reform, and in the Constitution
they gave Congress the potential for thoroughgoing reform. Their opponents in the states demanded as a condition of their ratification the inclusion of a Bill of Rights to define individual freedoms. They naturally looked to the English Bill of Rights for the right to keep arms, to the American state bills in the 1770's for the rights of militia and of arms bearing, and to the ideology of militia for the general justification of the role of militia as a balance to the army. The Second Amendment thus was written with the language of the experience of the past century of constitutional crises, based on the assumptions of a particular political theory of government. The entire constitutional history of the militia and its predecessor institutions in England and America, the development of the right to keep arms in England, and the enunciation of the right to bear arms and the right of the militia in America provided the original meaning of the Second Amendment to its initiators.

The Second Amendment, however, carried another, contradictory meaning which grew out of the political irrelevance and inapplicability of the anti-army assumptions of its initiators to the political system of the new Constitution. As Gordon Wood has convincingly demonstrated, the Constitution marked a profound departure from the understanding of politics in 1776. The fundamental concepts of sovereignty, representation, and political power had been greatly modified by the experience of independence and the necessities of creating a national government. The states in 1787 stood in a different relationship to the federal government than the colonies did to King and Parliament. Sovereignty, political theorists found, resided in the people, not in an agency of
government such as Congress or the state legislatures. Government represented people in all its functions, executive, legislative, and judicial. People controlled power, in theory, not vice versa. Therefore, the militia no longer embodied the interests of the "people" against the "executive" interests of the army. The states no longer represented the interests of the people while Congress represented the interests of the states as entities in themselves. Both Congress and the states were concerned with individual interests; each was responsible to the same constituents. Likewise, the states no longer existed as the sole fount of popular sovereignty nor as the sole defender of their liberties. Under the Constitution, state and federal governments shared such attributes of sovereignty which the people delegated to them. Theoretically, therefore, one part of this constitutional system, whether state or militia, could not legitimately oppose another, whether Congress, President, or army. Thus, as soon as the Second Amendment was ratified, it lost its original meaning (in the understanding of its proponents) in favor of another meaning which has clung to it since 1789.²

Although the political language and assumptions of the Second Amendment were anachronistic and irrelevant to the new federal system, the words "militia" and the "right to keep and bear arms" remained. Shorn of their older constitutional and ideological significance, they continued to express the point of view of fear of federal oppression and despotism. As the militia deteriorated in the century after the Militia Act of 1792 implemented the militia provisions of the Constitution, the concepts lost their close association with each other.
This evolution and transformation of the Second Amendment should be a caution against efforts to use the original understanding of constitutional concepts as guides for contemporary political decisions. The twentieth century has so generally lost the sense of the concepts of the eighteenth century as to make them anachronistic even in the most ideal circumstances. To impose them on the debate over gun control with its emotional elements further distorts them from historical accuracy. Although both sides in this controversy have touched on parts of the truth, both have also twisted and misconstrued the original meaning.

A study of the original understanding is necessary in order to cut through this distortion and inaccuracy and to put the concepts, language, and assumptions of the eighteenth century into historical perspective. To do so requires an examination of the development of the concepts and institutions of the Second Amendment, especially the militia, the key concept and institution. Little work has been done on the legal, constitutional, and ideological aspects of the militia in either England or America. Most studies have dealt almost exclusively with the military characteristics, particularly in wartime. Because of this dearth of analysis, Chapters One, Three, Four, Five, Eight, and part of Ten deal in considerable detail with the constitutional history of the militia. Part of Chapter Two and most of Chapter Six deal with the ideological concept of militia which influenced American perceptions. The remaining chapters trace the constitutional development of the right to keep arms and the right to bear arms in England and America.
NOTES


3 Important studies dealing with the ideological concept of the
PART ONE

ORIGINS OF THE MILITIA AND THE RIGHT TO KEEP ARMS

The Glorious Revolution created the right to keep arms in reaction to James II's policy of neglecting the militia in favor of his army and of disarming the Anglican opponents of his rule. First enunciated in the Declaration of Rights and embodied in the statutory Bill of Rights in 1689, the right to keep arms grew out of the long-standing English concern for protecting the sanctity of property from the arbitrary power of the crown. It also arose from a commitment to the traditional and constitutional forces of the counties, whether in their mode as posse comitatus, as Trained Bands, or as militia. The ideology of militia and arms, derived from the writings of the Classical Republicans, synthesized by James Harrington, and modified by the "Country" opponents of the "Court" faction in the 1670's and 1680's, provided additional influences for establishing the right to keep arms. These political and ideological activities had an additional significance. They affected the institutional, constitutional, and political concepts and practices of American colonists and revolutionaries in the following century, providing the starting point and partial justification for their creation of the right to bear arms in 1776 and 1789.
CHAPTER ONE

Origins of the English Militia,
1181 - 1663

There be in Ireland, as elsewhere, two Militias; one are the Justices of the Peace . . . ; also the Sheriffs Militia of his Servants and Bailiffs, and Posse Comitatus. . . . There is also a Protestant Militia, of about 24000 Men.

—Sir William Petty (1672)\(^1\)

The "militia," defined by statutory law as the military forces established in each English county and town, was a creation of the seventeenth century. The word had been introduced at the end of Elizabeth's reign but originally connoted any military organization, or even the art of war. Not until the short-lived Militia Ordinance of 1648 and the Restoration militia statute of 1661 did "militia" become explicitly associated with the county forces apart from the national forces of the King's "army." Since contemporaries and recent historians have tended to use the term in both its specific and its generic modes, without distinction, it is necessary to clarify the institutional evolution. Constitutional rights, by one definition, rest on the claim to privileges or immunities based upon established legal practice. The origins of the constitutional rights of service in the militia and of keeping arms lay in medieval statutory and common law and in the legal obligations and privileges associated with the county forces. Englishmen after 1661 referred to both an "old" and
a "new" militia, to distinguish between the medieval and the Restora-
tion institutions, and drew important generalizations from the differ-
ences for political and ideological purposes. The military practices
which American colonists adopted before the Restoration, and the ideal
which the crown attempted to impose upon colonial forces after that,
were both based on the various institutional models discussed in this
chapter. Finally, because several constitutional crises in England and
the colonies arose over the proper locus of power to command the
"militia" and the proper composition of the military establishment, it
is also necessary to examine the ways in which Englishmen perceived
the institutions and their role in society.

Since the reign of King Alfred, four institutions had performed
functions similar to those of the statutory "militia" of the English
Restoration. The Anglo-Saxon and Anglo-Norman fyrd provided the legal
and institutional basis upon which later military obligation was based.
The medieval posse comitatus, designed primarily as a law enforcement
agency in each shire, conveyed the obligation of universal adult male
police and military service to seventeenth-century England and America.
The colonists applied the obligation to both military service and to
military training while Englishmen differentiated between them. Only
a limited number of men participated in the English trained bands, from
their inception in 1573 to their replacement by the militia in 1661,
and in the English militia after 1661. Military obligation for men not
members of these organizations was met, with and without compulsion,
through the English army. The posse has continued its legal existence
as the sheriffs' emergency force in England and America to the present.
The Anglo-Saxon *fyrd* grew out of an older Germanic tradition of military obligation of free adult males. The word was used in two senses, both as any army or group of soldiers and as the general body of manpower available for military service. C. W. Hollister in his study of Anglo-Saxon military practices calls the two aspects the "select *fyrd*" and the "great *fyrd." The former, composed of warriors and household retainers, owed allegiance to the king based on land tenure and personal obligation. The latter owed personal obligation only, part of the general allegiance to tribe, clan, or nation named the *Trinoda Necessitas* by seventeenth-century lawyers: repair and maintenance of bridges (*brycg-bōt*) and of fortresses (*burh-bōt*), and military service (*fyrd-faru*). This service did not distinguish between strictly military and law enforcement duties, requiring every able-bodied free male over fifteen upon proper summons to attend the king, armed and provisioned, to put down insurrections or fight invading Danes or Normans. From the earliest times the king could not use this obligation indefinitely. The needs of the agricultural society limited service to one or two months annually. This restriction, of course, did not apply to household retainers and other warriors in the king's pay.\(^3\)

This limitation also did not apply to local service within each shire. Every adult, male and female, was required by custom and law to raise the alarm and apprehend lawbreakers, whether local felons or invading soldiers. Defense of hearth and home merged imperceptibly with defense of community and nation. Defined in later centuries by statute, the duties of "hue and cry" had changed little since Anglo-Saxon times, requiring pursuit with horns, knives, bows, and arrows, the same
weapons used by those in the king's service. The great fyrd therefore represented the ultimate sanction of society, the means to use both legal and military force at all levels.\footnote{\textsuperscript{4}}

The great fyrd with its non-tenural, customary obligation, survived the Norman Conquest. After William's feudal army defeated the select fyrd, the great fyrd offered little resistance. The latter soon came to augment royal forces during invasion threats and rebellions, with little charge to the crown since the soldiers were not paid for such service, but was rarely called on. To enhance their control of these county forces, kings granted lands at serjeantry tenure to supporters who, with the county sheriff, commanded the fyrd.\footnote{\textsuperscript{5}} The medieval sheriff, the crown's direct agent in each shire, controlled all forces within his jurisdiction and assumed responsibility for all affairs fiscal, judicial, and administrative. Until divested of much of this power after the thirteenth century, he combined civil and military authority in his own hands. When the feudal levy, based upon military obligation arising from land tenure, began to lose its military effectiveness in the twelfth century, the non-feudal nature of the great fyrd became extremely important to the crown. In 1181 Henry II redefined the nature and extent of personal military obligation and allegiance in the Assize of Arms.

The Assize of Arms, a decree from the crown, emphasized the responsibility of each free man to provide himself with certain types and quantities of weapons at his own expense, based upon his income and personal wealth, not his land holdings. In addition, each subject was required to be faithful to the crown and "bear these arms in his service
according to his order for the protection of the lord king and his realm." Henry II specified neither military nor law enforcement duties, but it is clear that both were inferred from the document in later times. Significantly, arms bearing appears in the context of community and national defense, with no reference to individual self-defense. The right of each subject to protect his or her own life and limbs was already well established in Anglo-Saxon and Anglo-Norman custom and law, requiring no special royal edict.6

Unlike the assize, the 1195 requirement for men to subscribe to a general oath to keep the peace and support the king did lead to the creation of a new institution and a newly defined obligation. Helen Cam has identified the need to enforce this oath as the origins of the posse comitatus. Designed to lessen the increasing incidence of lawlessness and insurrection, the oath required all men upon the raising of hue and cry to pursue fugitives pro toto posse suo, with all available power, presumably including the whole manpower of the shire if necessary. The posse comitatus, literally in medieval Latin the power of the county or country, answered the summons of sheriff or constable for both police and military service within the shire.7

Because the assize had been issued and the oath promulgated before 1215, sixteenth- and especially seventeenth-century lawyers defined them as part of the common law of England, to distinguish such legal actions from statutory law which originated, by definition, with Magna Carta. Although both had been the products of royal initiative, they were considered part of the customary law in existence since "time immemorial," part of the "Ancient Constitution" of the realm. Weapons
requirements and the posse therefore took on the characteristics of fundamental law, alterable only with the consent of Parliament. This legal fiction assumed greatest importance in the seventeenth century. The great controlling law of medieval military and police obligation came into being with the Statute of Winchester of 1285. During the thirteenth century the crown had reissued the Assize of Arms repeatedly as well as issuing decrees for the enforcement of the customary duty of watch and ward in towns and cities. The posse comitatus was increasingly employed in suppressing general lawlessness and roaming bands of armed soldiers after the Barional Wars. Under the two Statutes of Westminster, sheriffs received explicit authority to use the posse to destroy illegal castles (1275) and to help them execute certain writs (1285). The Statute of Winchester was intended simply to consolidate and give added emphasis to these earlier legal actions. Primarily a police document, it commanded subjects to preserve the peace and threatened to fine any community which failed to capture suspected felons. It required towns, "as it hath been used in times past," to establish night guards and day watches during the spring and summer months. It demanded that cleared areas on each side of public highways be widened. Finally, and most importantly, it stipulated that "every man," free or not, between sixteen and sixty years be assessed for arms and armor based on the amount of land and goods he possessed (not tenurial obligation) "to keep the peace after the ancient assize." Hue and cry responsibilities were reemphasized, and constables were to be chosen "to make view of armor" to insure compliance with the law. The statute remained in effect until the nineteenth century, giving it
the force of fundamental law, in its basic obligations, in England and the American colonies. ⁹

Increasingly after the thirteenth century the sheriff lost military and police power to the constable and later to commissioners of array. The Statute of Winchester enhanced the importance of the constable by assigning the office increasing local responsibilities. Sheriffs generally had become too powerful, sometimes challenging the authority of the crown, making the constable an ideal counterweight. Constables assumed the largest proportion of physical law enforcement in the hundred, the chief territorial subdivision of the county. While the posse comitatus received fewer and fewer peacetime summons, the posse hundredi, commanded by the constable, effectively performed duties of hue and cry without assistance from the county. In military affairs the sheriff lost exclusive authority to the Commission of Array. He remained president of the commission but could not act alone. The members organized and supervised the county forces, arrayed men for military operations, compiled muster rolls of eligible men, and supervised the constables' inspection of arms. Again, no new obligation was established but simply an intermediate supervisory body to ensure compliance with the law. ¹⁰

The fourteenth century brought about important modifications in the definition of local military obligation, Parliament reacting strongly against Edward III's financial and military exactions during the early part of the Hundred Years' War. Resentment had built up during the preceding reigns. Edward I had turned to the Statute of Winchester and the use of paid troops to compensate for the decline of feudal military
power. Edward II had attempted to increase arms rates, community assessments for pay and provision of local soldiers ("coat and conduct" money), and the length and nature of obligatory service. Parliament grudgingly approved these actions, at the same time accepting petitions of grievance from various communities. When Edward III pushed financial and military obligations beyond these limits, therefore, Parliament imposed four major restrictions on royal use of local forces. In exchange for war appropriations, he agreed to abide by the weapons rate of the Statute of Winchester, use county forces outside their shires only in cases of invasion, limit the mustering authority of the Commission of Array, and curtail the use of impressment of men and supplies. Thirteen years later in 1340 Parliament successfully declared that any individuals serving outside the realm must be paid by the crown rather than by local communities. Reconfirmation of the first two limitations at mid-century insured that these expedients became permanent characteristics of the local forces. Thereafter the posse comitatus and soldiers arrayed from it were constitutionally limited to defensive operations within the realm, acting as reserve forces to crown-paid armies, legally the posse regni, the power of the realm. Emphasis shifted from personal military service by wealthy subjects to their "finding" other men to serve for pay in their place. This new expedient eased the financial pressures of the crown and communities by shifting the burden of military expense onto men willing to pay for substitutes. The men who actually served, however, probably did not notice the difference.11
The fourteenth century also brought about an important clarification of legal restrictions on weapons. As a result of lawless and violent actions of soldiers returning from the French wars and of bands of armed men roaming the countryside, Edward III and the Parliament enacted the Statute of Northampton in 1328 to prohibit anyone from using arms "in affray of the Peace" or carrying weapons "in Fairs, Markets, nor in the Presence of the Justices or other Ministers" of the crown upon penalty of prosecution for felony and sometimes treason. While every man was under obligation to keep and present weapons for inspection, none could carry them or use them in public except during military and police operations. Like the preceding statutes, this one retained its validity for centuries and assumed the characteristic of fundamental law.12

By the middle of the fourteenth century, the medieval institution of posse comitatus had become well established as a means for local military and law enforcement duties. Every person, upon summons, was required to assist in executing writs and keeping the peace, for as Sir Edward Coke later observed, "the Sheriffe cannot doe all himselfe." Each adult male had to possess certain weapons and body armor and to use them or "find" substitutes for strictly military service. Men could be compelled to serve at their own expense inside the shire, outside at community expense during invasions, but only outside the realm in the king's pay. Technically all members of this posse regni were volunteers who had accepted royal money, but often acceptance was anything but voluntary. As feudal military obligation continued to decay, the importance of local forces increased. Likewise
the rise of paid troops, the stipendiariorum militum of the crown, led to the eclipse of the posse. Local forces had lost virtually all their effectiveness by 1500 except for a brief revival during the Wars of the Roses.\textsuperscript{13}

Michael Roberts has called the century after 1560 a period of European "military revolution" during which procedures, tactics, and organization rapidly improved and "modernized." The French monarchy had already taken a long stride toward creating a permanently embodied army and forcing other European states to emulate its success. Such institutional pressures and those from domestic unrest and instability helped transform the undifferentiated medieval posse into a more specialized military institution.\textsuperscript{14} Military reformers in England throughout the sixteenth century criticized the defenselessness of the realm and advocated sweeping improvements. The transformation of medieval local forces was one part of the Tudor "revolution of government" which centralized political and administrative institutions and increased royal power. In military affairs Henry VIII created the Yeomen of the Guard as a small but permanent soldiery at his direct disposal, encouraged archery as a means to revive county forces, and reissued the Statute of Winchester in 1511 to increase the supply of arms in the kingdom.\textsuperscript{15}

One of the most important innovations of the Tudors, however, was the county lieutenancy. Edward VI established the office of the Lord Lieutenant in 1549. Previously no legal machinery had existed to control rioting and widespread violence. The posse frequently broke down because its members failed to obey the sheriff, and posses from
neighboring shires could not be called unless violence became general. Because rioting involved neither simple felony nor outright rebellion, Edward and Parliament enacted a statute to make certain forms of rioting treasonable offenses and specifically to empower lieutenants to suppress "any commotion, rebellion or unlawful assembly" in their counties with aid from other local officials. Originally a temporary officer, the county lieutenant assumed an important position in each shire by the end of Elizabeth's reign in 1603. Each was a nobleman of large estate and personal influence in local affairs. Many were simultaneously privy councillors, doubly under direct royal command. Deputy lieutenants assumed great importance by handling the day to day affairs of the office. This post was filled by the gentry, many of whom were justices of the peace at the same time, like their superiors officers under double responsibility. These officers therefore combined civil and military power and gradually superseded the commissioners of array as the primary military authority in the shire and the sheriff and constable as the primary law enforcement officers for cases of riots and other large-scale disturbances.

The other means of transforming the medieval county forces into an effective military institution involved the muster (or inspection) of arms. In 1557 Mary abandoned the Winchester arming schedule for a new rate structure to modernize weapons and raise money for the crown. Muster ing became an important means to ensure compliance with the law. The "Act for the taking of musters" in 1558 marked a real attempt to enforce military obligation. Yet not everyone mustered. Prelates,
peers actively serving in the House of Lords, privy councillors, and all their servants neither attended musters nor served in military operations. Minor clergymen, judges, and certain court officers also did not have to muster but retained their obligation to serve. Under the law, local communities lost the privileges of separate musters and organizations, causing them to object. Parliament allowed some of the old privileges, but opposition increased in later years when a training requirement was added to the burden of increased musters.

In 1573 the Privy Council ordered the county lieutenants and commissioners of array to select a proportion of local men for military training in units soon called Trained Bands. These units survived the Armada crisis and the early Stuart monarchs to provide the foundation for the earliest colonial military forces and the Militia of the seventeenth-century in England. This innovation required a change in muster requirements. Previously arms inspections had been held about once every three years, providing a social as well as a military occasion. After 1573, training usually took place at "special," "private," or "particular" musters about ten days annually, separate from the "general" muster. The former, an innovation of prerogative, became a crown and sometimes a community expense; the latter, a common law obligation, remained an individual charge.19

As with the posse comitatus, trained bands performed both military and law enforcement duties. The institutions co-existed, but with the posse becoming more and more neglected. It had performed so poorly in attempts to suppress the Rebellion of the Earls in 1569 that no further effort was made for its revival. Lindsay Boynton cites a "deep-seated
apprehension" among English officials and the upper classes about arming the "people at large." The Statute of Northampton remained in effect, beginning to be construed as a prohibition on carrying weapons by the lowest orders, not the wealthy. To reinforce this law, the Privy Council ordered lieutenants in 1560 to prevent ex-soldiers from "liv[ing] out of employment, idly or suspiciously, [and] carry[ing] arms about with them." 20

At first the Privy Council encouraged prosperous landowners and others wealthy enough to purchase the necessary arms and take time to train to become members of the trained bands, and sought to insure their loyalty by requiring subscription to oaths of allegiance and supremacy. Eventually membership became abused. During wartime, untrained men swelled the ranks in order to avoid impressment for overseas service. Wealthy men, rarely conscripted in any case and able to hire substitutes, left the trained bands. Lacking statutory authority, the lieutenants could not force men to join. 21

Trained bands rested on the precarious footing of prerogative orders from the Privy Council to the lieutenants. No question was asked about the king's right to raise or command military forces, including those of the shires. Opposition centered on the attempt to increase military obligation beyond statutory and common law limits. To common lawyers, trained bands had no legal existence. William Lambarde, for instance, did not even describe the new institution in his handbook for constables although he clearly defined the posse comitatus in its common law status. Opposition took the form of refusals to train, to serve as officers, and to pay royal officials such as mustermasters sent to
exercise the bands, and provost marshals. Counties considered these men unnecessary and too expensive. The issue did not become critical, however, until the 1630's.22

Opposition to royal use of military obligation increased under the Stuarts. When James I acceded to the throne in 1603, Mary's arming statute was not renewed. Because it had rescinded the weapons schedule of the Statute of Winchester, confusion arose over the extent of individual obligation. The crown assumed that its military prerogative included the power to set any arming assessment rates it chose and that the subjects would obey, if only on the basis of having previously obeyed. As with the trained band requirements, however, prerogative command without statutory regulation proved difficult to enforce, especially when the crown pressed for compliance during the war scares of 1613 and after the beginning of the Thirty Years' War in 1618. A new generation of military reformers attacked the unpreparedness of county forces and trained bands. Private individuals established associations known as "Military Gardens" to improve themselves in military affairs. In 1621 the House of Commons debated a bill to systematize training and to bring the county forces generally under statutory regulation and to standardize firearms. When the bill failed, the Privy Council took action on royal authority to accomplish the same thing.23

The Privy Council also acted in the 1620's to create an "Exact Militia" by improving the trained bands. In this sense the term "militia" referred to the county forces as the whole military system of England, not as an auxiliary to a royal army. Instructions for
mustering, training, and use of weapons were sent to every county. Some inland counties and others such as Somerset, however, made little attempt to comply. Others resisted innovation. To prevent any question arising concerning the legal status of the arming provisions of the Statute of Winchester, the king, through parliament, invalidated them in 1625. The crown then took over the task of defining and enforcing military obligation based on the king's legal authority as commander of all the military forces of the realm.24

England's entrance into warfare with France in 1627 set up the complex of issues which led directly to the Petition of Right the next year. Among military actions, Charles I established a council of war to supervise English forces and encouraged the revival the the Military Gardens. Since 1606 Catholics had been ordered to be disarmed, less to prevent internal dissension than to provide weapons for the army. The greatest challenges to domestic stability came from war finances, from the quartering of troops on private property, and from the presence of large numbers of demobilized and demoralized soldiers returning from the military disasters at Cadiz and Rhe. To finance the war, Charles had turned to the expedients of forced loans from individuals and communities and of excessive demands for communities to supply coat and conduct money and other charges. The fact that these taxes were collected by prerogative rather than common law officials, by lieutenants, deputy lieutenants, commissioners of array, and justices of the peace rather than sheriffs and constables, made the situation worse. Charles also demanded that householders billet his troops; and he imposed martial law on soldiers and civilians alike,
especially "dissolute persons joining with" the soldiers, "as should commit any murder, robbery, felony, mutiny, or other outrage or misdemeanour whatsoever." Punishment included death without jury trial or other common law procedures. Officers of the county forces, the provost marshals, enforced the law along with special commissioners who could try suspects by "summary course and order." These actions, related to the prerogative of military command and the county trained bands, tended to bring royal military innovation into question.25

Parliament protested vigorously. A legislative resolution, the Petition of Right of 1628 expressed the nation's grievances against the king for violating law and custom. Although Charles reluctantly agreed to the petition, his officers almost immediately returned to their previous activities. Provost marshals continued to apprehend vagrants and unemployed men and try them by martial law. Deputy lieutenants and captains of the trained bands used a newly delegated power to assess their neighbors for arms and equipment arbitrarily, with no set schedule of rates. After Charles began his eleven years of "personal rule" without calling a parliament, he appointed eighty-four mustermasters at county expense to train the county forces. He intended to transform the trained bands into a "Perfect Militia" capable of fighting a modern war at minimal expense to the crown. Thereafter, all men from sixteen to sixty in each shire became eligible for membership in the bands, thus widening the obligation beyond military arms to military training which itself was increased. Within a short time, the plan failed. Amateur officers and bureaucrats did not perform their duties effectively, and the counties failed to raise sufficient
money to pay the mustermasters and trained bands. As a result, the trained bands remained filled with men of little military ability and interest who simply sought to escape conscription for war service.  

In 1637 the case of shipmoney pointed up many of the general difficulties which accompanied personal rule in military affairs and many of the assumptions underlying the military prerogative of the crown. At issue was the imposition of taxes on the nation which previously had applied only to certain port towns. John Hampden, a common lawyer and former member of Parliament, refused to pay; his case soon came before the Court of Exchequer. During arguments concerning the legitimacy of the tax, Hampden's lawyers admitted that the power of military command, "the suprema potestas, is inherent in his majesty." One of his attorneys, Robert Holbourne, looked back to medieval law: "There is no doubt," he argued, "but the subject, on the statute of Winchester, ought to be ready with arms, and in his county to make defence; and upon occasion he ought to go out of his county."  

The other defense attorney, Oliver St. John, expanded the point.

Neither . . . is his majesty armed only with his primitive prerogative of Generalissimo and Commander in Chief, that none can advance towards the enemy, until he gives the signal, nor in other manner than according to his direction, but also with all other powers requisite for the full execution of all things incident to so high a place, as well in times of danger as of actual war. The sheriff of each county, who is but his majesty's deputy, he hath the posse comitatus; and therefore it must needs follow, that the posse regni is in himself.  

Counsel for the crown, of course, emphasized royal prerogative more forcefully, claiming absolute power to regulate, maintain, and support military forces, common and statutory law and local custom
notwithstanding. In contention was the concept of fundamental law. Was there some body of law which the king could not legitimately ignore? Yes, claimed Holbourne: "A law once made, over-ruleth all practice afterwards. And as a law is law before practice, so it is law after practice." Unfortunately, his efforts to prove that financial exactions came under this interpretation failed. Hampden's case as a whole thus collapsed. The court ruled that royal prerogative to judge defense needs and demand compliance with military obligation also included the right to demand financial aids from the nation to support military and naval defense.²⁹

Financial exactions on such a small scale, however, could not satisfy the crown's needs. Therefore, when war erupted in Scotland in 1639, Charles found it necessary to call Parliament in 1640 and to bring personal rule to an end. Although he dissolved this "Short Parliament" for seeking redress of grievances, a second Scottish war forced him to summon another. The two wars had demonstrated the weakness of the trained bands which were filled with untrained, indifferent soldiers and the inability of the crown to enforce military obligation without the legal and moral support of a statute. The "Long Parliament" which met in the wake of these military disasters also insisted upon airing their grievances before considering Charles's demand for money to raise an army to crush a large-scale Irish rebellion. By August 1641 suspicions and rumors of plots against Parliament convinced the House of Commons to examine the whole question of military authority. It appointed a committee to determine the nature and extent of power "fit to be placed, and in what Persons, for commanding of the
Trained Bands and Ammunition of the Kingdom." This resolution, according to S. R. Gardiner, provided the genesis of Parliament's later usurpation of royal military prerogative.\textsuperscript{30}

Parliament reached the famed Militia Ordinance of 1642 and civil war by the path of expediency. Charles had begun transferring gunpowder to the Tower of London, centralizing its storage rather than leaving it in the hands of the county trained bands. Commons felt itself so threatened by such actions and the possibility of physical disruption of its proceedings that it established a private guard, a clear breach of the military prerogative of directing all military forces in the kingdom; it also began discussions on disarming Catholics and preparing the trained bands for action. Charles peremptorily dismissed the guard and appointed another. Since members of the Commons feared the loyalty of this new guard, they proposed a bill "for the putting the Kingdom into a posture of defence, and for the Commanding of the armes thereof." In their Grand Remonstrance on December 1, Commons protested among other abuses the crown's monopolizing of gunpowder and its disarming of some of the trained bands because both actions rendered the nation defenseless.\textsuperscript{31}

On December 7, 1641, Commons proposed a different, more extreme defense bill, intended to force the House of Lords to approve Commons' restrictions on the royal power of military conscription. Charles had previously sought statutory authority to impress men for the Irish expedition. Commons opposed it on principle and applied the medieval limitations on compulsory service outside the county. Since the request concerned a case of rebellion, not of invasion of the realm,
the medieval statute applied; by this means, reasoned the members, Parliament might force the crown to recognize some degree of statutory regulation and definition of its military prerogative. The Lords, however, opposed the tactic and threatened to kill the bill. This action induced the Commons to pass a radical proposal designed to frighten the Lords. It proposed to appoint a military field commander with extraordinary and independent power in fiscal and military matters beyond the reach of the local authority of the peers. This first "militia bill," however, did not go into effect. Rather, events during the following month led directly to the actual Militia Ordinance.32

On January 4 Charles ordered the arrest of five opposition leaders in the House of Commons. This increased the members' agitation and led to their petition for the king to appoint commanders of the trained bands whom Parliament could trust. On January 31 they sent to the Lords a proposal for orders to be sent to the county lieutenants and a list of acceptable commanders to be sent to the king. When Charles refused to accept the proposed joint administration of military affairs, Commons acted alone. On February 28 it resolved that royal refusal to prepare the country for war would "hazard the Peace and Safety of all his Kingdoms" unless Parliament itself provided "some speedy Remedy." Again he balked; again they resolved, this time that the town trained bands which had begun to prepare for action by Parliamentary recommendation were not guilty of treason. The men involved, the Commons claimed, had acted on Parliament's "Declaration and Direction" and with "what is justifiable by the Laws of
this Kingdom." The law, claimed the resolution, required "the Authority and Consent of Parliament" in order to grant "the Power of raising, ordering, and disposing, the Militia" to any chartered corporation. Thus, reasoned the members, with such consent the towns could implement the authority legally. Given this invasion of prerogative, nothing stood in the way of a formal declaration of the military power of Parliament.33

On March 5, 1642, therefore, Parliament passed the Militia Ordinance which authorized the two houses to assume complete control of appointing and commissioning lieutenants throughout the realm, without royal consent. To insure a degree of legitimacy by establishing the fiction of shared military authority and to attempt to avoid civil war, Parliament sent the ordinance to Charles for his approval. He refused; late the next month he presented a counterproposal which proved unacceptable. The Militia Ordinance therefore went into effect on May 3. Its preface contained the fundamental justification for Parliamentary action: Commons had been opposed by "a most dangerous and desperate Design" which required members to defend themselves and the nation as a whole. Commons reiterated their position in the resolution which implemented the ordinance. Charles's refusal "to give his Consent" to the sharing of military power had prompted Parliament "to settle the Militia," an action clearly "warranted by the fundamental Laws of the Land" and absolutely "necessary for the Peace and Safety of this Kingdom." Besides, the actual power granted to the new lieutenants did not exceed their powers "for the Space of above Fifteen Years together" granted by the king himself "without the Consent
of his People, or Authority of Law." The Militia Ordinance and the controversy surrounding it led directly to civil war by causing the final breach between king and parliament over the proper distribution of political and military power.34

During the remainder of 1642 both Parliamentary and Crown polemists sought to prove the legitimacy of their respective actions. Within this debate, which of course involved issues extending far beyond the merits of the ordinance, the concept of militia took on added meaning. Never before had the word been subjected to scrutiny on such a large scale. Bulstrode Whitelock, for instance, told his colleagues in the House of Commons in 1642,

I do heartily wish, that this Great Word, this New Word, the Militia, this Harsh Word, might never have come within these Walls; ... I take the meaning of those Gentlemen, who introduced this Word, to be, the Power of the Sword, Potestas Gladii, which is a great and necessary power, and properly belonging to the magistrate.35

Henry Parker, in his Observations upon some of his Majesties late Answers and Expresses, argued that the so called "new Militia" introduced by the ordinance was none other than the old system of lieutenants and trained bands "with very little variation." Especially the new appointments had created no new "aristocrasie" but simply displaced "some few popishly inclined" officers. In fact, he claimed, Parliament had not actually usurped any power properly belonging to the crown. "The same Allegiance is performed," he concluded, "the same Supremacy of power confessed to be now in the King over the Militia, as has ever been."36 John March's Argument or Debate in Law which directly addressed the validity of the ordinance agreed that Parliament had
inherent power to act alone because Charles had failed in his duty.
One anonymous pamphlet exclaimed that power over military affairs was
of such critical importance that exclusive command of all the county
and royal forces might prove positively dangerous. Liberty and proper-
ty, the pamphlet continued, were "but imaginary things" unless proper
restrictions were placed on military power. "If the Militia," the
sum of this military power, "be for the King," it concluded, "let us
burne the Statutes we have already, and save labour of making more."37

Perhaps the most balanced statements concerning the military
power of Parliament and of the contemporary definition of militia came
from two common lawyers in 1646 and 1647. John Selden emphasized that
the "power of the militia is either the legislative or the executory
power." Historically, he claimed, Parliament had shared in levying
forces and managing warfare by enforcing military obligation. No one
should have absolute control; when Henry II had attempted it, his
"trick caught not the people." Their refusal to be
called out against their duty to the Kingdom ... [observed Selden] taught a doctrine which is not yet
repealed, viz., that which is not according to their
Faith to the KIngdome is not according to their
Faith to the King and therefore they could find it
in their hearts to set still at home when they were
called to war.38

Nathaniel Bacon went farther in defining the wide nature of the power
of "militia." He argued that

The word Militia is a general notion, sufficient
enough for a name or title, but not to define the
thing. I take it for nothing else, but the Govern-
ment of the Commonwealth, when it is in anger, or
War, or in order thereunto. It consisteth in the
raising, arming, ordering and paying of the
Soldiery.39
Thus, the word "militia" had come to represent the entire military potential of the nation. Since only the county forces constituted the legitimate common law means of raising and employing armed power, the term increasingly carried the connotation of the local trained bands. After passage of the Militia Ordinance of 1648 and those of the 1650's this connotation became the permanent but not the exclusive meaning.

The Militia Ordinance of 1648 marked the beginning of a new phase of the institutional development of the county forces. The first civil war had ended in 1646. Charles still retained enough power to refuse Parliament's Newcastle Proposals which included a plan for legislative command of the "militia" for twenty years. In 1647 the Parliamentary army, seeking arrears in pay, refused to be disbanded and seized the king to prevent his agreement with the legislature detrimental to the army. Charles then successively refused an army plan for ten years' legislative command and four bills from Parliament, including its old twenty-year plan. War erupted again in 1648. By year's end Commons had enacted the new ordinance. It abolished the Lieutenancy in favor of a system of Commissioners of Militia with discretionary power to assess inhabitants for arms, munitions, and supplies, to require men to serve in horse or foot "companies" (no longer "trained bands"), and to disarm Catholics and disaffected Protestants. All officers had to prove loyalty by subscribing to the Solemn League and Covenant. Other aspects of organization and practice in this act characterized succeeding legislation and the development of the militia institution in England for the next century and, to a lesser degree, the colonies until the 1680's. It was selective. Not all men were required to serve or
or provide arms, though all were eligible. Officers and men were selected on the basis of their loyalty. Poor men, at first, were generally excluded. The ordinance distinguished between the county forces (the "militia") and the standing forces (the "army") for the first time in English law. The restraints upon the army, however, lasted only two weeks until Colonel Thomas Pride, at the head of a detachment of soldiers, purged the Long Parliament of its ninety-six Presbyterian members.40

The distinction which the ordinance made between "militia" and "army" was first brought to public notice in the anonymously written pamphlet, The Peaceable Militia, published earlier in 1648. It avoided the controversy over command of the militia which other authors had taken up and concentrated on the question of militia power itself. In the process he established all the classic arguments against the dangers of standing armies to society and government which were repeated time after time by polemicists on both sides of the Atlantic for the next two centuries. The author identified the "New Model Army" of the first civil war as the chief example of the controversy between local and national military forces. This army of volunteers and conscripted men supported Parliament against the crown. Counties had been assigned quotas of men, with cavalry troopers who supplied their own horses and weapons belonging to a higher social class and receiving higher pay than the infantry. Early in the conflict Councils of War consulted with commanders on operational decisions and later gained political importance as organs for expressing the opinions of the soldiers. When the war ended, the author declared, the army refused to be disbanded,
making it dangerous because under "establish'd Law," no "constant Army and Forces" could be maintained except the garrisons along the threatened frontiers of Wales and Scotland. Although permanent, these latter forces were small and did not constitute "a standing Army" which could only be supported at "a Publack constant charge, which must of necessity oppress the people." Soldiers without a visible enemy, the pamphlet warned prophetically, "(like water when it leaves running, and stands), . . . will corrupt." Military leaders, having the "time, meanes, and opportunity," would use force of arms to make "what Lawes they please" and like the Roman army's assuming power to choose emperors, would create conflicting interests and internal instability in government and society. Far superior were the old laws governing military obligation. Under them the king could raise volunteers for war service under contracts enforceable by common law. Martial law, compulsory quartering, and illegal fiscal exactions would not be necessary. Neither king nor parliament should control both purse and sword. If one of these must have such power, better the king. A perpetual parliament, like the Long Parliament, was too liable to "private Faction, Ambition, Revenge, or Covetousnesse" and to misuse of its authority. Exclusive control of military forces unregulated by established law, what another writer called "the old legall way," indeed did prove disastrous.41

The diminutive "Rump Parliament" remaining after Pride's Purge rescinded the Militia Ordinance and governed on the basis of the power of the New Model Army and its commander Oliver Cromwell. Not until July 1650 did it enact a new ordinance for the "Setling of the Militia" Power over the county forces, the old trained bands, was settled in
another body of commissioners authorized to charge men for horses, arms, and personal service; to disarm Catholics and others; to arrest and examine suspected conspirators; and to take loyalty oaths from officers. Unlike the earlier law, this one was intended not to supply men to the army or create local defense forces but to keep the peace by suppressing conspiracies and insurrections in the countryside. This experiment, too, was short-lived.42

In 1653 Cromwell eliminated the Council of State erected by the Rump and declared himself Protector. The Instrument of Government vested jointly in Protector and Parliament power over "the militia and forces," but the county forces were not revived for two more years because they had proved inefficient and difficult to control. Financial limitations on the size of the army, the unsuitableness of standing forces for executing law, and the increase in local disturbances led in 1655 to the establishment of the Major Generals and constabulary troops to support them. This resulting "new militia" comprised mostly cavalry, about eighty to one hundred per county, raised in the manner of the 1648 and 1650 ordinances. The rule of the Major Generals was a time of arbitrary local government and law enforcement. The new militia proved arrogant and disputatious. Ultimately the inability of civil and military officers to cooperate led to the failure of the experiment. One important legacy survived, the model of local forces efficiently organized into small, compact units, capable of rapid movement, divorced from local control and responsive to commands from centralized authority. This model, in slightly modified forms, appeared several times in the next century and a half in England and America as
an alternative to the modified model of the trained bands as a substitute in the eighteenth century for the moribund militia.43

During Cromwell's final years, serious objections were raised in polemical literature against his use of the army and the new militia. William Prynne, for example, originally an opponent of the 1642 Militia Ordinance, published a series of pamphlets attacking the army. In 1658 his *Eight Military Aphorismes* defined a mercenary as any soldier in constant pay and argued that such employment was destructive to liberty. He proposed returning to an older form of military obligation akin to the feudal knight's service rather than keep an army in peacetime. Better the old trained bands, "formerly reputed the *Nations* chief Security," than mercenaries maintained by forced taxes. England's real Interest, Protection, Safety [he concluded] resides (next to God) in the *Nobilities*, *Gentriess*, and *Peoples* united voluntary, unmercenary defence and protection of themselves in and by their own persons, with their own Arms, Servants, Sons, Tenants, Retainers.44

James Harrington also attacked the army and defended the right of universal participation in defense, but his work constitutes a special case of ideological development of the concepts of militia and arms, an extended treatment of which is found in Chapter Two.

The final years of the Interregnum found military affairs firmly in executive hands, even after Cromwell's death in 1658. Following his son's incompetent management of political affairs, England restored Charles II to the crown in May 1660. The preliminary task of the Restoration was to settle the institutions, practices, and domestic life of the nation after almost two decades and civil war and chaos.
Institutional settlement came easier than domestic tranquillity because England continued to be beset by internal dissension and foreign war. Within this context the debate over the proper distribution of military power resumed and the institutional definition of militia was clarified.

The Convention Parliament meeting in 1660 proclaimed the Restoration but rejected crown proposals to create a small, semi-permanent standing force of local troops (a Cromwellian mounted militia) directly under royal control. The Cavalier Parliament in 1661 was no more willing to divorce county forces from the control of local magistrates. The Privy Council had already begun to regulate local forces to put down local disturbances, but Charles realized he could not risk alienating Parliament. The solution turned on compromise, recognition of overall royal command, creation of newly organized local militia, and retention of immediate control in the shires.45

The Militia Act of 1661 brought to an end controversy over military command begun two decades earlier. It formally declared the king to have as his "undoubted right" "within all his Majesties realms and dominions, the sole supreme government, command and disposition of the militia, and of all forces by sea and land, and of all forts and places of strength." Parliament surrendered all claim to such command ("both, or either of the houses of parliament cannot, nor ought to pretend to the same") and to any right of rebellion ("nor can, nor lawfully may arise, or levy any war offensive or defensive against his Majesty, his heirs or lawful successors"). In addition, militiamen had to subscribe to an oath of non-resistance to civil and military officers appointed by the crown. Finally, the medieval restriction on militia use was
renewed, prohibiting the king from compelling "any of the subjects of this realm" to serve outside the kingdom except according to law. 46

The Militia Acts of 1662 and 1663 provided organizational detail, substantially altering the old model of county forces. Parliament refused once more to accept a royal proposal for a temporary Cromwellian 1200-man standing local forces designed to suppress local insurrections and plots and refused to allow the use of martial law in peacetime. Henceforth county forces consisted of militia companies (officially replacing the trained bands except in London). The number of troops in each county was based on the proportion of landed and wealthy inhabitants which varied over time, not upon a fixed quota system commonly used in computing other county charges. Individual obligation for supplying weapons and equipment, however, followed the traditional mode of the medieval assize and statutes, being based on amount of income and property. Personal service was no longer universally required. Some men provided weapons, while those too poor to do so served in the ranks using those weapons. Those wealthy enough could hire substitutes. Those doing so often served and lieutenants and deputy lieutenants, so did not totally escape liability. New under these acts was explicit statutory authority for training as well as mustering men; no statute had previously sanctioned that obligation. Discipline now came under the common law jurisdiction of the county courts, and thus securely in local hands. The great controversies over martial law thus came to an end. Finally, militia officers had to secure proper warrants and civil assistance from constables in order to search for and confiscate arms of people suspected of being "dangerous to the peace," but the practice
did receive Parliamentary approval. The 1663 act supplemented these regulations. It increased fines for non-compliance in providing arms, and established the number of training days at twelve annually and the number of days in royal service at fourteen, all at county expense. During actual or threatened invasion, the king could only use these troops beyond the fourteen days at his own expense.\textsuperscript{47}

In addition to the militia, Parliament allowed Charles to maintain a small number of permanent guards and garrisons at his own expense. It initially set no limit on their numbers but later regulated these standing forces by statute. By the mid-1660's, therefore, England had a dual system of militia and army, an arrangement which continued thereafter to characterize its defenses.\textsuperscript{48}

By 1663, therefore, the institution of militia had assumed the form characteristic for the next century. Since the time of the medieval posse comitatus, the county forces had retained certain functions and structural attributes while gaining new ones and losing others. As shown in the accompanying table, the militia of the Restoration differed from the posse and trained bands before and during the civil wars in several distinct ways. For instance, every adult male no longer had to perform personal service or provide military weapons. Organization and command differed somewhat although the king and Privy Council still retained ultimate responsibility. Militiamen had to repel invasions and suppress insurrections, but not until the eighteenth century did the courts clarify the legality of using militia or the army to disrupt riots and other unlawful assemblies.\textsuperscript{49}. The nature of military obligation changed from that of common law to prerogative to statutory
regulation. The militia of the late seventeenth century thus represented both a culmination of earlier developments and a new departure.

| TABLE 1: Structure, Function, and Obligations of the English County Forces 1191 - 1663 |
|---------------------------------|-----------------|-----------------|-----------------|-----------------|-----------------|
| Posse Comitatus 1191-1663       | Trained Bands 1573-1642 | Trained Bands 1642-1655 | "New Militia" 1655-1660 | Militia 1663ff |
| Liability:                      | Universal        | Universal        | Selective       | Selective       | Selective       |
| Arms                            | Universal        | Selective        | Selective       | Selective       | Selective       |
| Service Training                | None             | Selective        | Selective       | Voluntary       | Selective       |
| Obedience:                      |                 |                 |                 |                 |                 |
| Common Law Statute              | x               | x               | x               | x               | x               |
| Prerogative Statute             |                 |                 |                 |                 |                 |
| Command:                        |                 |                 |                 |                 |                 |
| King                            | x               | x               | x               | x               | x               |
| Parliament                      |                 |                 |                 |                 |                 |
| County                          | Sheriff         | Lieutenant      | Lieutenant      | Major General   | Lieutenant      |
| Primary Functions:              |                 |                 |                 |                 |                 |
| Invasions                       | x               | x               | x               | x               | x               |
| Rebellions                      | x               | x               | x               | x               | x               |
| Law Enforcement                 | x               |                 |                 |                 |                 |
| Organization:                   |                 |                 |                 |                 |                 |
| Units:                          |                 |                 |                 |                 |                 |
| County                          | x               | x               | x               | x               | x               |
| Company                         |                 |                 |                 |                 |                 |
| Type:                           |                 |                 |                 |                 |                 |
| Infantry                        | x               | x               | x               | x               | x               |
| Cavalry                         |                 |                 |                 |                 | x               |

* Also, the Commissioners of Militia
NOTES


obligation arising from the Assize, see Powicke, Military Obligation, pp. 48-50; Hollister, Military Organization, pp. 258-260; Beeler, Warfare, pp. 190-191, 312-313.


11 Powicke, Military Obligation, pp. 118, 123, 137; Cam, Hundred, p. 192. 1 Edw. III, st. 2, c. 5 (SR, I, 255): "the King will that no Man from henceforth shall be charged to arm himself, otherwise than he was wont in the Time of his Progenitors Kings of England; (2) and that no Man be compelled to go out of his Shire but where Necessity requireth, and sudain coming of strange Enemies into the Realm; and then it shall be done as hath been used in Times past for the Defence of the Realm." An Historical and Political Discourse of the Laws & Government,
Ed. by Nathaniel Bacon (London, 1689), pt. II, p. 61: "probably the Invasion must be actual." Charles M. Clode, The Military Forces of the Crown (2 vols., London, 1869), I, 346-347. Cam. Hundred, p. 192. 1 Edw. III, st. 2, c. 7 (SR, I, 301): "the men of arms, hOBlers, and archers, chosen to go in the King's service out of England shall be at the King's wages from the day that they depart out the counties where they were chosen till their return." Coke, Institutes, III, 149. 1 Edw. III, st. 2, c. 15.

25 Edw. III, st. 8, c. 8 (SR, I, 321); 4 Hen. IV, c. 13 (SR, I, 434-435). Statute of Northampton, 2 Edw. III, c. 3 (SR, I, 257); "no Man great nor small, of what Condition soever he be, except the King's Servants in his Presence, and his Ministers in executing of the King's Precepts, or of their office, and such as be in their Company assisting them, and also upon a Cry made for Arms to keep the Peace, . . . be so hardy to come before the King's Justices, or other of the King's Ministers doing their Office with Force and Arms, (2) nor bring no Force in affray of the Peace, (3) nor to go nor ride armed by Night nor by Day, in Fairs, Markets, nor in the Presence of the Justices or other Ministers, nor in no Part elsewhere, upon Pain to forfeit their Armour to the King, and their Bodies to Prison at the King's Pleasure," as quoted in Danby Pickering, ed., The Statutes at Large (23 vols., Cambridge, 1762-65), I, 422. Coke, Institutes, III, 161-162. W. L. Melville Lee, A History of Police in England (London, 1901), p. 36. J. G. Bellamy, The Law of Treason in England in the Later Middle Ages (Cambridge, 1970), p. 105. Carl Bakal, The Right to Bear Arms (New York, 1966), pp. 149-150.


Holdsworth, History of English Law, VIII, 327: 1 Mary, sess. 2, c. 12 (1553); 1 Eliz. I, c. 16 (1558): the statute expired upon Elizabeth's death in 1603. Defense responsibilities of the Privy Council
are described in "Mr. Faunt's Discourse touching the office of Principal Secretary of Estate, etc.," in J. R. Tanner, ed., Constitutional Documents of the Reign of James I (Cambridge, 1930), pp. 121-122. Boynton, Elizabethan Militia, passim; Thomson, Lords Lieutenants, pp. 149-150 and passim; Holdsworth, History of English Law, IV, 76-77n.


26 Boynton, Elizabethan Militia, pp. 244-297 passim. Willcox, Gloucestershire, p. 85. "Instructions for Musters and Arms" (27 July


28 Ibid., p. 860.

29 Ibid., pp. 1000-1001.


33 Journals of Commons, II, 459-460, 463.


36 Henry Parker, Observations upon some of his Majesties late Answers and Expresses ([London, 1642]), pp. 35-37.


1251-1252 (rescinding act). Western, *English Militia*, p. 6, calls this act "the true parent of all subsequent militia legislation."


42 Firth and Rait, eds., *Acts and Ordinances*, II, 397-402.


48 Schwoerer, "*No Standing Armies!*", pp. 76-77.

CHAPTER TWO

Origins of the Ideology of Militia and Arms and the Right to Keep Arms, 1656 - 1689

Those who possess arms are the persons who enjoy constitutional rights.

---Aristotle<sup>1</sup>

The only Ancient and true Strength of the Nation, the Legal Militia.

---A Letter from a Parliament Man (1675)<sup>2</sup>

The subjects which are protestants, may have arms for their defence suitable to their conditions and as allowed by law.

---Bill of Rights (1689)<sup>3</sup>

The right to keep arms made its first constitutional appearance in the Declaration of Rights and the ensuing Bill of Rights in 1689. In the context of its enunciation were juxtaposed the arbitrary disarming of Protestant opponents of the crown, deliberate neglect of militia training, and appointment of Catholics, Dissenters, and Whigs who supported James II to positions as county lieutenants and deputy lieutenants. Country members of the House of Commons sought to repair this damage to the military potential of the country gentlemen initially by demanding the return of confiscated weapons and by declaring that Protestants had the right to keep arms for their common defense. Compromise in both Commons and Lords diluted the guarantee to its final conditional form shown above. The right to keep arms was based upon...
the fundamental right of Englishmen not to be deprived of their property without Parliamentary consent. The wording imposed by the Lords obscured but did not eliminate the explicit military emphasis of the Commons version. The ideology of the armed citizen freeholder, moreover, seems to have had more direct influence on the form of the guarantee than did the Opposition ideology of militia, though both played an important role in its enunciation and both contributed greatly to the later American understanding of the right to keep arms.

The complicating and confusing element in the controversy over arms was the militia. As shown in Chapter One, the county forces had been transformed during the seventeenth century, and a new "militia" created. The problem of 1689 lay precisely in this transformation. The arms guarantee of the Bill of Rights solved some difficulties but not others. On the institutional level, the questions of unlawful confiscation of weapons and of arbitrary military control by the crown could be and were resolved politically, by declaration and by statute. On the ideological level, however, the concept of militia emphasized by writers especially after 1675 could not be equated with the existing or any practical future institutional definition of the English militia. The failure to resolve this dilemma had long-range consequences, both for the further development of the anti-army ideology of the eighteenth-century Commonwealthmen and for the dual image of the militia which American revolutionaries later perceived.

Not one but several ideologies of militia and arms existed in English and American thought. The two of importance in the context of the Glorious Revolution represented, in one sense, two separate and
competing views of the function of arms. In another sense, the second absorbed the first and used the strength of its arguments for its own purposes. The first had classical origins, the image of the citizen soldier and of military power as the basis of all states. Originally a Greek conception, postulated by Plato and Aristotle, it survived the Middle Ages to be revived by Machiavelli. He, in turn, transmitted it, along with the whole body of Classical Republican and Civic Humanist ideology, to seventeenth-century England through James Harrington. The notion that the possession of arms and land as the bases of the political rights of citizenship had great theoretical appeal; and since it paralleled in some important ways the institutional practices of the English posse comitatus and the nearly universal military obligation and widespread landholding of the American colonies, it had added relevance. Although the second ideology subsumed the first after 1675, several things suggest that the older ideas retained much of their integrity. The gap of fifteen years between the publication of Harrington's work and the appearance of the militia arguments, the obvious polemical character of the new writings, and the omission of practically all references to the military experience of the Interregnum point to the different approach and goals of the ideology. Finally, the Bill of Rights made no reference to the militia in its guarantee of arms.4

The second ideology of militia had polemical origins, emphasizing the theoretical counterpoise which existed between the institutions of militia and army. As J. G. A. Pocock has argued, "Country" opponents of the "Court" after 1675 adopted and transformed Harrington's political theories into polemical instruments to criticize the crown. They also
accepted the contention that there existed an "Ancient Constitution" with internal mechanisms of political balance among the elements of government and society. Thus, to balance the unconstitutional power of the army required the constitutional power of the county forces, the "militia" of the seventeenth century. Here Pocock's interpretation weakens. The Country opposition could not equate the institution of militia with the ideal of the armed citizenry they had borrowed from Harrington. In fact, the concept of militia had no single definition, but encompassed several shadings of meaning, allowing advocates of both the polemical militia and the classical citizen soldier to use the concept for their own purposes. In England the classical concept of arms seems to have had greater influence in the formulation of the Bill of Rights since it provided a guarantee of arms, not of militia. After 1690, however, the concept of militia occupied a prominent place in the general ideology of the Commonwealthmen. In America, looking ahead to the eighteenth century, some writers accepted one idea, some the other, while some held the two in uneasy juxtaposition. The constitutions of 1776, for example, split about evenly in guaranteeing the militia and the right of arms, while the Federal Constitution of 1787 and the Bill of Rights of 1789 combined the two concepts. Thus, the origins of the concept of militia lay in two separate though interrelated developments of the late seventeenth century leading to the enunciation of the right to keep arms in 1689.5

The idea of the citizen soldier arose from classical roots. Plato argued that every man, woman, and older child must be trained to participate in military defense. He moved to this very wide definition of
military obligation when he realized that the special body of highly trained "guardians" which he had originally advocated would be too small to protect the society. Aristotle also recognized the political and military difficulties which a warrior class presented. Military practices, he had discovered, often determined the political form of the state. The first step toward tyranny, for example, was the disarming of the people and the establishing of foreign mercenary troops to guard the tyrant. Other dangerous practices included those advocated by Hippodamus and by Aristocrates. The former allowed farmers and artisans to be citizens but forbade their participation in military duties. The latter forbade poor men to keep arms but demanded that rich men do so. Aristotle recognized that the ancient Greeks generally had allowed military service itself to determine citizenship. In the oldest city states, service had been performed solely by cavalrymen, thus denying political rights to the bulk of the inhabitants who had neither the ability nor the money to serve in this manner. As the territory of the states increased and the need for footsoldiers rose, more men became citizens. "Democracy" came to imply states with broad membership of citizen soldiers. Aristotle argued that the possession of arms, the means of defense, not the mere fact of military service, conferred the rights of citizenship. The best state, therefore, was a "polity" or democracy in which "those who have arms" were citizens. In such societies, the one consistent form of excellence was "the military kind." Aristotle's military ideas permeated medieval thought and the later writings of the Humanists. His conclusion, therefore, that "the defense forces" of a democracy "are the most sovereign body under this
constitution, and those who possess arms are the persons who enjoy constitutional rights," carried tremendous significance.⁷

Other classical writers had also been concerned with the nature and composition of military forces. Perhaps the most important of these, based on his medieval and early modern reputation, was Flavius Vegetius. From late imperial Rome, he looked back with nostalgia to the military practices of the Roman republic and brought together in his book, *Epitome rei militaris*, descriptions of organization, tactics, warriors, and generals. He hoped to revive the decayed imperial army into one resembling its republican predecessor, but his ideas had greater influence centuries after his death. Like Aristotle, Vegetius favored a broadly based force of citizens. The only alternative he saw to a debauched, untrustworthy army raised in the cities was to create "the force of the armie" from "the common rude sorte" of men coming "Out of the countrey." "Warriour & husbandman," he observed, "were all one," the greatest example being Cincinnatus himself, the prototype of the citizen soldier. Men sometimes had to be taken from the cities, Vegetius admitted, but those "alwayes . . . fittest for the warres" came from the farm.⁸

Medieval authors transmitted much of this military wisdom to the early modern world. Although Machiavelli, for example, used classical writings as the source of his military ideals, he also was influenced by a large body of commentary on military affairs in medieval Italy. C. C. Bayley has traced the survival of the classical tradition from Roman authors to Leonardo Bruni, who produced his *De Militia* in 1422, and from Bruni to Machiavelli a century later. Especially important in that
tradition was the emphasis upon citizen soldiers and hostility to the use of foreign mercenaries. St. Thomas, for example, emphasized the duty of individuals to sacrifice their lives and possessions for the good of the community. Egidio Colonna, who helped St. Thomas with completing his last work, placed his mentor's general concept in an explicitly military one. He cited the Biblical celebration of the effectiveness of small groups of trained citizens against large foreign armies and stressed the need for men from every social order to participate in societal defense. Bayley also traces the tradition through such unlikely figures as Petrarch and Boccaccio. Bruni's work summed up these previous ideas, analyzed in Aristotelian terms the constitutional development of Florence, and argued for the elimination of mercenaries from Italian politics. Machiavelli's work, in turn, fit into and raised the level of this polemical tradition.9

Niccolo Machiavelli played a significant part in synthesizing, developing, and transmitting the ideologies of Civic Humanism and Classical Republicanism to England. Both movements arose during the European Renaissance as part of the general reawakening of learning and of the attempt to recover uncorrupted classical texts. The former advocated patriotism and loyalty to one's state, emphasizing the necessity for "virtue" in public affairs; the latter argued for the emulation of the institutions and practices of republican Rome so that modern states could achieve comparable greatness. Machiavelli's Discourses, Art of War, and, to a lesser degree, The Prince contain specific recommendations for adapting ancient military tradition. Though he directed his remarks to sixteenth-century Florence, the ideals exerted powerful
influence in England. Elizabethan military reformers, for example, had frankly advocated similar modifications in county forces and had republished Machiavelli's works. Englishmen during and after the Commonwealth also found much of value.  

Machiavelli believed that modern states could follow the Roman path to fame and power by taking the Roman example in military affairs. Moderns had most notably "deviate[d] from the Practice of the Ancients" in the area of "Military Discipline"—the art of war. Since the "foundation of all Governments consists in their Military Discipline," a modern republic must look to Rome for guidance or remain feeble and irresolute. Above all, he warned, states must avoid the use of mercenaries who fought only for pay, proved dangerous to society, and were not ready "to Die for you." Far better, and advocated by the ancients, were native troops. Roman history proved "that there is a necessity your Militia should be good, and that cannot be good, but by continual exercise, which you cannot be sure of unless it consists of your own Subjects." Gold cannot buy real loyalty; the "Sinews of War," he declared, "'tis not Money (as the common Opinion would have it) but good Soldiers" themselves, members of a well-disciplined army.  

Such an army consisted of citizens "according to the method of the Ancients," not hired troops such as the men-at-arms kept by the French crown. Machiavelli did not advocate the "confused and disorderly Army" which one Roman consul had led against the enemy, nor the modern "popular Multitude" which proved "unfit for the Wars . . . because every noise, rumour, or alarm, distracts them, and puts them to the Rout." Rather, "a compleat and perfect Militia" comprised the largest
possible number of rural husbandmen and field workers or, if necessary, smiths, carpenters, farriers, and stoncutters. More important than occupation per se was the moral virtue of the individual soldiers. To select the proper men required a delectus, a military conscription "to pick and cull the best men in the Province, and to have power to choose those who are unwilling as well as those who are willing to the War." Since "man is naturally wicked," Machiavelli observed, he "never does well but upon necessity," frequently requiring compulsion. Neither all conscripts nor all volunteers must compose an army. Choice could only be made after every man had been armed and trained, to determine those most suitable for service. This training took place on holidays to prevent disruption of the economy, to give men recreation, and to avoid idleness and dissipation. During wartime, soldiers received pay but returned to their occupations afterwards as Cincinnatus had. No one, noted Machiavelli, could be "so Frugal, no body so Humble, no body so Laborious, so obedient to the Magistrates, or respectful to their Superiors" as Cincinnatus and his comrades after their service.\textsuperscript{12}

A large, trained, virtuous army of citizens implied an armed people, an "inconvenience" or even a danger to some princes, but a positive good to republics. Arming and training aided the previously unarmed, weak, but united state as well as the armed but disunited one. By means of "this Order and Militia," Machiavelli declared,

Seditions are prevented, Unity established, Provinces united (but weak) continue their Union, and are freed of their weakness: Provinces disunited and mutinous, are reconciled and composed, and their ferocity which was employed formerly in disorders, is employed now to the advantage of the publick.
By thus turning factionalism outward, an armed people, disposed to "engage upon a principle of Honour," fought for the glory of the republic.13

Arms in republican society had other, civil advantages. Since "good Laws, and good Arms" provided the fundamental basis of all states whatever their forms, Machiavelli observed, "there cannot be Good Laws, where there are not Good Arms, and where the Arms are Good, there must be Good Laws." Another reciprocal relationship existed between laws and the customs of the people: "as good Customs cannot subsist without good Laws, so good Laws cannot be Executed without good Customs." Such customs resulted in part from military discipline, he wrote, because "men who are well disciplin'd, are as tender of breaking the Laws when they are Armed, as much as when they are disarmed."14

Machiavelli's work, at least as translated in the context of late seventeenth-century polemical controversy, neatly juxtaposed the concept of an armed republican society with the concept of "militia," whatever its institutional definition. Machiavelli had much to say about military forces, some of which corresponded to the county militia of post-Restoration England, some to the posse, some to a modified militia, and a great deal of which, as we shall see, to the defense forces of the American colonies. Basically he advocated that republics have virtually every man, especially those outside the cities, armed and trained for warfare. From these would be selected for campaigns soldiers who would afterwards return to their original occupations. This arming strengthened society, and since arms and laws provided the two bases of all states, they existed in a relationship of mutual
reinforcement. Although Machiavelli opposed the hiring of mercenaries in most cases, he did not postulate an armed people as a balance but as a total substitute. The concept of balance was supplied by his adapters after 1675. Perhaps the most significant aspect of his work lay in his emphasis upon arms. The citizen in arms did not necessarily follow any one prescribed institutional path. The later Commonwealthmen who translated his writings frequently used the word "militia" when Machiavelli meant no more than "military discipline" or a group of soldiers. Yet his general stress on the concept of the citizen soldier made the entire corpus of his work appealing to Englishmen; and the ambiguous translations made it possible for men of conflicting points of view about the value of arming and training the county forces to look to his work for support. This image of arms and "militia" entered English consciousness most effectively through the writings of James Harrington in the 1650's.

Harrington, like Machiavelli and Aristotle, assumed that arms or military strength provided one of the fundamental bases of every state. Therefore, his major political writings (Oceana; Prerogative of Popular Government; and The Art of Lawgiving) each reflected the vital role which arms must play in the successful survival of every society, particularly republics. Oceana, his utopian vision of a classical republican England, placed all military power in its citizens. J. G. A. Pocock has concluded that Harrington's greatest influence on England political thought was the identification of the freeholders (the militiamen-landholders of Oceana) with the polities, the citizens of Greece and Rome, thus making the whole corpus of classical, Classical Republican, and Machiavellian political writings relevant to the late
seventeenth century. Arms and land, Harrington argued, were inseparable, the basis of freedom from external domination:

for where the owner of the plough comes to have the sword too, he will use it in defence of his own, whence it hath happened that the people of Oceana, in proportion to their property, have been always free, and the genius of this nation hath ever had some resemblance with that of ancient Italy . . . where Rome came to make the greatest account of her rustic tribes and to call her consuls from the plough.

These characteristics identified the "Ancient Prudence" of republican Rome and the Biblical commonwealth of Israel.15

"Modern Prudence," on the other hand, was characterized by the use of arms to extinguish liberty. Starting with Julius Caesar and the destruction of the Roman republic, the power of the sword had become perverted.

The hand which holdeth this sword [observed Harrington] 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.

If the army feeds upon "the balance of property," it endangers the whole society, for without this balance, "the public sword is but a name or mere spitfrog." Since all government was founded either on land or arms (or some combination), to "overbalance" in either direction spelled societal disaster. The "most perfect model" of arms separate from land, dominating the state and suppressing its liberties, was the janissary establishment of Turkey. Generally, Harrington argued, "modern prudence is quite contrary unto the ancient; for whereas we, excusing the rich and arming the poor, become the vassals of our servants, they [the Romans], by excusing the poor and arming such as were rich
enough to be freemen, became lords of the earth." Oceana therefore armed all freemen.\textsuperscript{16}

The other extreme of arms, the mode most suited to republics, depended upon the citizens themselves. "Citizens in arms, as those upon the \textit{lexiarcha} in Athens, of the \textit{morai} in Lacedaemon, and the legions in Rome" provided Harrington with the "proper" means to defend Oceana. History proved it "impossible that a party should come to overbalance the people, having their arms in their own hands," because "men accustomed unto their arms and their liberties will never endure the yoke." Oceana, therefore, had "the vastest body of a well disciplined militia that is possible." Each man received education "in military as [in] civil discipline." Like Machiavelli, the "sole retriever" of ancient prudence for modern times, Harrington postulated a republic of citizen soldiers universally obligated to training and service upon call (and in rotation), virtuous, well-ordered, and warlike. He found his English model in the practice of knight's service in early feudal times, when military duty had its basis in the tenurial obligations of landholding, a system, however, which had become progressively weaker by the loss of land and military potential of the landholders. Harrington's vision thus was reactionary but altogether in keeping with the image of ancient prudence.\textsuperscript{17}

Oceana's citizens, but not their servants, were armed and trained for war. Men from eighteen to thirty years old made up the "marching armies," while their elders comprised "standing garrisons" for local and emergency defense. Following the Roman example, service in horse and foot companies depended on the value of the citizen's estate. Each unit
elected both its own officers and civil magistrates, cavalrymen choosing justices of the peace, infantrymen the constables. In this combination of "arms and councils . . . consisteth your whole commonwealth; whose councils . . . create her armies, and whose armies with . . . the ballot at once create and salute her councils." Civil and military obligation, thus combined, strengthened the state.  

Harrington's emphasis upon the armed citizen provides both the connecting link with, and the distinguishing characteristic from, the image of arms in the Opposition ideology which developed after 1675. Although Harrington wrote in the atmosphere of the military dictatorship of the Protectorate, he did not explicitly use in their institutional connotations the two military terms of "militia" and "standing army" then gaining currency and which played such a major role after the 1670's in the Country ideology. Rather than identifying the county forces and Cromwell's army with these concepts, he used them in their generic sense. The "marching army" of Oceana's youth, therefore, constituted the "standing army of the commonwealth, . . . not soldiers of fortune, not in body nor in pay, but citizens at their vocations or trades, and yet upon command on continual readiness." As for the militia, Harrington made no distinction between militia and army; thus he referred to "the militia of Israel," to Rome being strengthened "through her militia," and even to the "whole militia" of the Turkish janissaries. The polemicists of the later seventeenth century thus found no reinforcement from Harrington in this area.  

The polemicists of the 1670's and later did find much of value in Harrington's imagery of arms. Although much of this usage was also
generic and figurative, Harrington did not limit the connotation to weapons, since arms alone could not protect anything. Only weapons in the hands of trained and organized citizens fulfilled the classical and Machiavellian ideal. It is worth noting here the continuity of stress on citizens, not simply subjects or inhabitants. Oceana's servants were not armed and did not perform military service. Machiavelli's soldiers were citizens, that is, individuals who exercised civil rights of citizenship. Thus, it became possible for the Country polemicists and later American writers to exclude servants and unfree men and all women from military plans and from the right to keep or bear arms; such people simply did not qualify for citizenship. The Opposition ideology absorbed Harrington's and Machiavelli's imagery and applied it to the institution of militia in substitution for the standing army.

The issue of the standing army in England, a group of professional soldiers in royal pay directly responsive to the crown and outside the regulation of statutory law, arose during the Restoration when Charles II continued in active service some of the troops raised by Cromwell. A small force at first, this "standing army" increased during the wars and war threats of the 1660's and 1670's. The failures and general weakness of the militia established in 1662 increased royal concern for creating a reliable coercive force. Parliament had explicitly recognized the royal prerogative of militia command in 1661 and had forbidden militiamen to resist the king or his agents. For a decade the militia proved a reasonably effective force in suppressing dissent and rebellion, especially when used with the army. One activity which brought both forces into controversy was the disarming of
suspected rebels. Game Laws in the 1660's prohibited the poorer classes from having or using weapons, for fear both of poaching and rebellion against the restored monarchy. Sir William Darcy even suggested that the entire civil population be disarmed to achieve stability and order. But disarming on that scale required a larger military establishment than was practical or financially possible, and the militia could not be used for such a task because of its local nature and decreasing reliability. In 1666, therefore, the suggestion was made to abolish all the county forces except the units in London and to tax the people for additional regulars. Taking a course with less political hazard, Charles had limited success in raising volunteers and and "select militia" of cavalry during the Second Dutch War.20

Protest against royal military practices reached its first peak in 1673 during the Third Dutch War. Earlier opposition had been sporadic. In 1660 and 1661, however, Fabian Philipps had opposed the abolition of knight's service land tenure because, like Harrington, he believed it eliminated the military potential of the landholders, the "militia" of the feudal system. He attacked the army as mere "Praetorian Bands" and "Turkish mutinous Janisaries." The full strength of opposition only began to be felt in Parliamentary debates in 1673. The institutional decay of the militia generally and its poor showing during the war led to increased law enforcement activities by the army and greater wartime dependence on royal troops. Charles's failure to follow common law procedures in implementing court martial regulations, problems with administering and mobilizing the army, fear of Catholic plots, and apprehension that Charles would use authority granted to him by the Scottish
Militia Act of 1669 to overrun England with Scottish forces incited Parliament to protest. In the 1673 session Commons complained that the "Continuing of any Standing Forces in this Nation, other than the Militia, is a great Grievance and Vexation to the People." 21

Implicit in this distinction between militia and army, both under royal command, was the problem of statutory regulation and the legal, common law status of defense forces. From 1603 to 1642, Parliament had had no voice, other than in granting funds, in military affairs and the administration of the trained bands. The various militia ordinances and the militia statutes of the 1660's had given members an opportunity to voice their opinions. In Parliamentary eyes, the militia and the trained bands thus took on legal, constitutional status despite their origins in the commands of prerogative. These institutions could trace their legitimacy through the posse comitatus backwards to the unknown source of common law itself, to the mythical foundation of England's "Ancient Constitution."

The notion of the Ancient Constitution exerted a particularly important and powerful influence on the evolution of the Opposition ideology growing out of the standing army controversy. In general terms, this constitution consisted of governmental power relationships, institutions, and customary practices which supposedly had existed since time immemorial. The common law survived as the primary manifestation of this mythical original form of government, with Parliament as its guardian and interpreter. A corollary myth assumed that no law but the common law had ever been legitimately in effect in England, making it the sole means to determine secular rights and obligations. Since, by
definition, common law represented immemorial custom, judicial courts could only declare law and legal principles, not create them. Parliament as the highest court itself could not innovate but simply discover, define, and protect rights, privileges, and obligations. Of all devices supporting the concept of the Ancient Constitution, Magna Carta was probably the greatest. Revived and given tremendous prestige by Sir Edward Coke, it represented the foundation stone of all personal liberties, the chief support of the common law, and the basis of the entire legal system.22

Thus founded, the ideology of the Ancient Constitution presented a compelling argument against the indiscriminate exercise of royal prerogative. The king had to cooperate with Parliament in finding and declaring fundamental law. In military affairs this view presupposed that institutions such as the trained bands before 1642 and the standing army before 1690 were innately inferior to common and statutory law institutions such as the posse comitatus and the Restoration militia. At issue after 1642 and 1661 was not the nature of local forces, but the question of political control. Charles had raised the army on his own authority, and it remained unrecognized in statutory law until after the Glorious Revolution.23

With the 1675 session of Parliament, the standing army issue and the problem of control of the militia intensified with the development of the ideology of the "Country Opposition" against the "Court" and its abuses of constitutional power. Two years earlier Commons had initiated an unsuccessful attempt to modify the militia statutes by reducing the power of the county lieutenants, many of whom had direct interest in
maintaining royal power. The failure of the bill prompted the Earl of Shaftesbury to remark that the non-reisting oath contained in the militia statute threatened in itself to create "a standing army by a Law, and swears Us to a Military Government" by preventing any militia officer from disobeying agents of the crown regardless of the nature of their commands. Such a perversion of the common law obligation to resist felonies endangered the whole structure of law and the Ancient Constitution. J. G. A. Pocock credits Shaftesbury with having given impetus to the development of the Opposition ideology. In the same pamphlet he also warned that the crown's attempt to "debase and bring low the House of Peers" had but one implication, the intent to establish a military dictatorship, "For the power of Peerage and a Standing-Army are like two Buckets, the proportion that one goes down, the other exactly goes up." History, he observed, proved that "standing forces, Military, and Arbitrary Government came . . . plainly in by the same steps." 24 The anonymous Letter from a Parliament Man to His Friend correspondingly argued that "the only Ancient and true Strength of the Nation, the Legal Militia, . . . must, and can never be otherwise than for English Liberty, because else it doth destroy itself; but a standing Force can be for nothing but Prerogative." Finally, Lord Hollis found reassurance in Machiavelli's dictum that mercenaries "will ever be found much weaker than the Native Militia." 25

The juxtaposition of army and militia in this emerging ideology and the reciprocal relationship between the House of Lords and military government indicate another important element of Country thought, the idea of balanced or mixed government. This doctrine had been revived during
the Renaissance and emphasized by Machiavelli from the writings of Polybius. In England, the balance of King, Lords, and Commons represented the three classical forms of government, monarchy, aristocracy, and democracy. A mixture of all three elements, if properly balanced, would save a state from the cycle of degeneration from one pure form to another. Excessive military power in any of the constitutional elements, especially the executive, threatened collapse. Thus, to prevent degeneration (or "corruption" in Machiavellian terminology) required a balance of military strength. As Harrington, Machiavelli, and Aristotle had observed, arms provided one of the fundamental bases of a state. Therefore, if the crown maintained forces unrecognized in law, it imperiled the balance. The militia ("the only ancient and true Strength of the Nation") provided the counterweight. Harrington did not use the concepts of militia and army in this way, nor, according to Pocock, did he recognize the precepts of the Ancient Constitution (since he considered the Middle Ages to have witnessed the decline of feudal military tenure rather than the perfection of constitutional structure). Thus, the Country ideology of militia as counterpoise, as constitutional agency of defense and law enforcement, and as the institutional expression of the ideal of the citizen soldier marked a significant departure from Harrington’s ideas.26

The Country militia, however, was not the institution of the common law except by adoption. A product of general military reform, it was new in law, limited for all practical purposes in membership, and subject to close, even arbitrary royal control. Despite all the polemical writings of the next quarter century, few real attempts were made
to modify royal control. Fewer attempts or serious suggestions were made to transform the county forces into the institution portrayed in the ideology. The Opposition sought mainly political and administrative changes. They attempted to limit the arbitrary nature of royal command by eliminating the non-resisting oath and to insure the continued existence of the militia as the potential means to prevent "corruption" of the government. They also sought to prevent the use of the militia during elections to influence the results. Finally they objected to the repressive activities of the militia against opponents of the crown, especially the zeal which some lieutenants showed in making arbitrary arrests, searches of private property, and confiscation of firearms and other military equipment. At least one member of Parliament contended before the Glorious Revolution that the militia statutes themselves had been responsible for disarming virtually the whole nation.27

The House of Commons did propose a militia reform bill in 1678. The Popish Plot of that year accelerated Parliamentary desire to exercise some control over the militia in order to defend its members and the Protestants of the nation. Members therefore resolved to call out one third of the county forces to suppress anticipated Catholic insurrections. When it was pointed out that only the king could mobilize the militia, Parliament changed tactics and asked Charles to summon each third of the militia in rotation. He refused by vetoing the bill, only his second veto of a public act. He had acted thus, he claimed, "because it puts out of his power the militia for so many days. If it had been but for half an hour, he would not have consented to it, because
of the ill consequences it may have hereafter, the militia being wholly in the Crown." \(^{28}\) Gilbert Burnet claimed that he had seen through this smokescreen and had warned the king of Parliament's "hope" to use the militia to obtain their other demands. Parliament responded by debating ways to disband the army. They continued to urge Charles to use the militia ("the settled legal Forces of this Kingdom, actually in Arms") and even the _posse comitatus_ to put down Papist uprisings. Indeed, Burnet observed, "the nation was . . . so much alarmed that all people were furnishing themselves with arms, which heightened the jealousy of the court." \(^{29}\)

Here can be seen some indication of the context in which the Bill of Rights of 1689 was drawn. The Game Laws and the disarming of Catholics, dissenters, and any opponents or suspected opponents of the crown in the quarter century before the Glorious Revolution had drastically reduced the number of military arms available in England. William Sacheverell in December 1678, for example, had proposed in Parliament to strengthen the prohibitions of the old Statute of Northampton, making it "Felony for a Papist convict to ride armed, though commissioned by the King; and that any Protestant subject may have power to seize his arms, and, however commissioned, that a Protestant subject may stand upon his guard against him, for his safety." Such actions and proposals reflect the widespread fear in England, by both Court and Country, of the possession and use of arms by the wrong sort of "people." "God forbid," cried Sir Harbottle Grimstone, that the Protestant "people should ever be brought into so desperate a condition, that they may not draw their swords to defend themselves!" Given the Harringtonian emphasis
on the virtue and necessity of citizen soldiers, the Country notion of
the counterpoise between militia and army, and the subversion of the
militia from its legal duties to committing illegal acts, the disarming
of Protestants took on enormous significance.30

The Exclusion Crisis of 1679–1681 produced a few pieces of polemi-
cal writing which reflected the Country ideology of militia; it also led
to increased confiscation of arms from Catholics and Protestant dissen-
ters. The controversy grew out of the Exclusion Bill designed to pre-
vent the Catholic Duke of York, later James II, from inheriting the
throne. The bill heightened the religious and political strife beset-
ting England. The London trained bands proved very energetic in en-
forcing the law against Catholics. Passage of the Habeas Corpus Act in
1679, however, ameliorated some of the worst aspects of arbitrary arrest
and helped to repair the increasingly disreputable image the militia had
gained as a repressive agency. A Country measure, it gained the status
of a fundamental constitutional guarantee against imprisonment without
specific cause. In 1679 and 1680 Parliament made cursory efforts to re-
form the militia. Of greater importance were two works published as
part of the ideological controversy. Henry Neville, a Country polemi-
cist, produced Plato Redivivus in 1681. As part of his larger argument,
he challenged royal use of the militia for any other than its two tradi-
tional functions: the "arming of the people for war," and "causing the
law to be executed by serving writs; and in case of resistance, giving
possession." Both functions, we have seen, originally belonged to the
posse comitatus; in the 1680’s the posse still retained the latter duty.
The sheriff might call the militia to aid him, but only as individuals,
therefore members of the posse. John Somers, in The Security of English-Men's Lives in 1682, made clear the role of the posse. Only the "chief Sworn Officer of the County, the Sheriff," he wrote, should be "trusted with the Execution of all Writs and Processes of the Law, and with the power of the County," the posse comitatus, "to suppress all Violences, unlawful Routs, Riots, and Rebellions." The military power of the crown, exercised through the army and militia, therefore, did not fulfill the common law requirements of the Ancient Constitution. Until Parliament stripped the militia of its unconstitutional features, it remained the creature of prerogative.31

During the crisis the crown made its first serious attempt to appoint militia officers by party; this "perversion" of the traditional system provides some additional insight on the formulation of the Bill of Rights. In 1678 Henry Layton had proposed that the lieutenancies be filled only by Anglican supporters of the crown. Charles did not act until 1680. In 1681 and 1682 he removed lieutenants who were members and supporters of the Country opposition in Parliament and in some cases ordered the dismissal of deputies, normally the responsibility of the lieutenants themselves. He issued a general order in June 1681 to deny militia commissions to any men who had been removed as justices of the peace. Thus, by the last years of Charles's reign, militia leadership in the counties had taken on a predominantly Tory coloring, much to the distress of the Country aristocracy and gentry who traditionally had controlled all county offices.32

When the Duke of York came to the throne in 1685, he had grown dissatisfied with the militia. Upon Charles's death, the Duke of Monmouth
had raised a rebellion to prevent James's accession, hoping with Protestant and Parliamentary help to become king himself. The militia and posses called out to suppress Monmouth's Rebellion failed, and it was put down by the army. One of James II's first proposals, therefore, was to abolish the militia and depend on the army. He explained to the House of Commons that

I hope every-body will be convinced that the Militia, which hath hitherto been so much depended on, is not sufficient for such Occasions; and that there is nothing but a good Force of well disciplined Troops in constant Pay, that can defend us from such, as, either at Home or Abroad, are disposed to disturb us.33

Naturally his proposal raised the fears of the Country Opposition who had so much depended upon the militia, in its ideological and constitutional manifestations, to counter the army. The Reverend Samuel Johnson, a member of Commons, reflected the attitudes of many of his colleagues in criticizing this plan. "The immediate consequence" of having "the Militia dissolv'd," he declared, "was, the disarming of the Nation, and exposing it naked and defenceless to this army, which had then been our Masters by Law."34

Johnson here indicated another important element in the context of the Declaration of Rights. "Disarming" in 1685 had expanded from the confiscation of the weapons of the civil population to the elimination of all military potential outside the royal army. Ideologically, such an innovation would have destroyed the constitutional balance among the elements of government by placing in executive power the entire military system. In the next three years James abandoned interest in destroying the militia legally; rather, he deliberately neglected to train it and used his appointment power to replace lieutenants,
deputies, and militia officers who opposed his policies with Catholic and Protestant supporters.

During his short reign, James II pursued this policy of neglecting the militia, making wholesale changes in its officers, and continuing to disarm disaffected people. He apparently made no attempt to have Parliament appropriate funds to pay the militiamen called out in 1685. This omission had a debilitating effect on their willingness to fulfill their military obligations thereafter, although individuals had never found drill popular. Since the reign of Charles I musters had been held irregularly and local officials had not collected the militia rate in full; lieutenants and deputies, however, did generally enforce the requirements for membership and arms. When James ordered the militia companies of Cornwall, Devon, and Dorset to discontinue training indefinitely after 1687, other counties also neglected this obligation. The case of Lincolnshire epitomized their reactions. In 1688 the County Lieutenant, the Earl of Lindsey, wrote to the king that "being informed that musters are not pleasing to your majesty, they have met but once since your coronation." It is doubtful that this neglect seriously damaged the militia's potential to perform its primary duties of confiscation of arms and suppression of opposition to the crown. Units in the north of England continued such activities throughout the reign. Even after William of Orange landed in 1688, militia units favoring either William or James arrested leaders of doubtful allegiance to their own lord and occupied areas to free the armies for military operations.

The purging of the militia command hierarchy exacerbated the effect of James's disinterest by destroying morale, creating disaffection, and
threatening the status of local leaders. By the summer of 1688, sixteen county lieutenants and one third of the deputies were Catholics. Other newly appointed officials were Dissenters and Whigs willing to support James for the repeal of the Test Acts (which prohibited Catholics from holding public office) and other legislation. John Miller’s study of the royal policy toward Catholics under Charles and James contends that the militia issue was simply a part of a larger effort to make a fundamental change in the distribution of local power. Unlike the Tories Charles had appointed during the Exclusion crisis, the new officers came from outside the narrow confines of the traditional local leaders. Although the Catholics were acceptable socially, they had had no local political or military experience. The Dissenters and Whigs were not popular for their views. Thus, James helped build a great body of resentment against his policy and his new officials. Miller has also shown that the weakness and disaffection of the militia sprang to a great extent from ill feelings toward James’s appointees. Some lieutenants had not appointed new deputies when the old ones had been dismissed. Some deputies found that they could not enforce their authority because militiamen refused to serve under any "Roman Catholic or not qualified lieutenant." The situation became so critical in Staffordshire that Lord Aston, the lieutenant, declared that "really there is at present no militia at all." The added factor of nonpayment for service in 1685 made it illegal, according to Miller, to march the militia from one county to another. Men did march in 1688, both in favor of James and of William, sometimes at the behest of local gentlemen acting on their own authority.\(^{37}\)
Thus by the time William landed in late 1688, Country opposition to James's policies both in and out of Parliament reached its peak. The birth of a male heir, with the clear implication of the long-range continuity of Catholicism in the crown, led to a revolutionary reaction, the Glorious Revolution, and the accession of the Protestant Mary and her husband William. The Convention Parliament which met before their coronation drafted the Declaration of Rights, later enacted by statute as the Bill of Rights, enumerating grievances against the crown and confirming certain fundamental rights of Englishmen.

The actual formulation of the Declaration and Bill of Rights followed the path of compromise. Robert J. Frankle in investigating the sequence of events argues that the Declaration produced in February 1689 was a diluted version of a more detailed and comprehensive plan to achieve significant constitutional reform. The Convention Parliament met on January 22, and in the following weeks members made proposals for far-reaching changes in law. Some members became alarmed that making William and Mary's accession contingent upon their acceptance of reform (which in some cases would have drastically limited executive power) might prolong the interregnum dangerously in the face of potential Catholic reaction. Instead of reform, the ensuing compromise embodied general demands. The first version of the Declaration, approved by the full House of Commons on February 2, contained explicit language concerning weapons and their relationship to military defense. It specified that the "Acts concerning the Militia are grievous to the Subject," condemned the "raising or keeping a Standing Army" in peacetime without Parliamentary consent, and declared that
It is necessary for the publick Security, that the Subjects, which are Protestants, should provide and keep Arms for their common Defence: And that the Arms, which have been seized, and taken from them, be restored.

This provision had been in answer to the grievance that James and his ministers had sought to destroy religion and law, in part, "By causing several good Subjects, being Protestants, to be disarmed." Commons found the proposed Declaration too broad and returned it to committee on February 7 in order to distinguish between items "introductory of new Laws" and "those that are declaratory of ancient Rights." Shorn of the clause demanding the return of confiscated weapons and the grievance against the militia statutes (both requiring special legislation to implement), the Declaration approved by the House on February 8 still prohibited standing armies and contained an arms guarantee which declared "That the Subjects, which are Protestants, may provide and keep Arms for their common Defence."38

The House of Lords accepted the revised Declaration but insisted on a few changes. To the arms provisions they suggested two amendments to make the grievance more specific but the guarantee more conditional. "After 'disarmed,'" the Lords resolved, "add 'at the same time when Papists were both armed and employed, contrary to Law," because, they explained, "This is a further Aggravation fit to be added." The Lords, on the other hand, gave no reason for their changes to the guarantee. "Instead of 'provide and keep,'" they wrote, "read, 'have,' and leave out 'common;' and after 'Defence,' add, 'suitable to their Condition, and as allowed by Law.'" Perhaps they feared that an unlimited guarantee applying to all Protestant "Subjects" was too broad, would negate
standing prohibitions such as the Game Laws and law against Dissenters, and might lead to social disruption. Commons accepted the first amendment but insisted that the second be worked out in conference. On February 13 William and Mary received the completed Declaration of Rights at their coronation. 39

When Parliament reconvened at the end of 1689, it enacted the Declaration as a statute, the Bill of Rights. Early in this "Act for Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown," Parliament enumerated its grievances against James II. It claimed that he and his ministers had endeavoured to subvert and extirpate the protestant religion, and the laws and liberties of this kingdom . . . By causing several good subjects, being protestants, to be disarmed, at the same time when papists were both armed and employed, contrary to law . . . All which are utterly and directly contrary to the known laws and statutes, and freedom of this realm.

Therefore, Parliament considered it its duty to declare

for the vindicating and asserting their ancient rights and liberties, . . . That the subjects which are protestants, may have arms for their defence suitable to their conditions, and as allowed by law . . . . And they do claim, demand, and insist upon all and singular the premisses, as their undoubted rights and liberties.

William and Mary formally accepted and enacted the Bill of Rights on December 16, 1689. 40

The arms guarantee of the Bill of Rights contains six elements which reflect the constitutional issues involved in and arising from the controversy over disarming. The phrase, "the subjects which are protestants," indicates that the right being enunciated was not universal. In the common sense of the word "protestant," Parliament simply
drew the distinction between Roman Catholics and other Christian Englishmen. This contrast is plain in the preamble to the indictments: James and his ministers had attempted "to subvert and extirpate the protestant religion." It is also clear from the grievance concerning arms: Protestants had been disarmed while "papists were both armed and employed." Parliament also used the word in its more restricted connotation. From the sixteenth to the eighteenth centuries, Englishmen distinguished between Anglican "Protestants" and other denominations. In 1661, for example, Jeremy Taylor, preaching at the opening of the Irish Parliament, declared, "I hope the presbyterian will join with the protestant, and say, that the papist, and the Socinian, and the independent, and the anabaptist, and the quaker, are guilty of rebellion and disobedience." As late as 1860, this usage was still common in certain areas of England. Before 1689, moreover, Parliament had passed statutory restrictions on arms keeping by Catholic and Dissenter "recusants" who refused to attend Anglican services. Therefore, the Bill of Rights' guarantee applied only to members of the established Anglican church.41

These "protestants," the document continued, "may have arms." In common law, "arms" did not apply exclusively to gunpowder weapons or even to military equipment generally. Rather, it referred to "any thing, that a man in his anger or furie taketh into his hand, to cast at or strike another." Clearly, however, the Bill of Rights used the word in its restricted sense of military weapons, especially muskets and pikes. The conclusion is apparent from the context of disarming which had taken place since the end of the Protectorate. In some cases, confiscation of sporting guns had occurred, but this seems the exception rather than the
normal practice. Generally, detachments of militiamen and troops of the royal army confiscated military weapons from Catholics and Recusants before 1685 and from Anglicans afterwards. Specific statutory law required the former, an arbitrary reading of the Militia Act of 1662 allowed the latter. Under that act, county lieutenants had the authority to search for and seize weapons "in the houses of dangerous persons." An Anglican became dangerous when he opposed royal policies and actions.42

Although this provision was couched in the conditional verbal phrase, "may have," Parliament had enunciated a previously existing "right," not created a new one. Here, "right" defines well what Parliament produced. Defined by the Oxford English Dictionary as "a legal, equitable, or moral title or claim to . . . the enjoyment of privileges or immunities," the "right" to "have arms" rested upon the legal obligation (in the words of the two Commons' versions of the Declaration) "to provide and keep" them as part of each individual's military obligation, an obligation well established in both common and statutory law. The "right" which Parliament proclaimed had become increasingly restricted by the seventeenth century. Under the Assize of Arms, the Statute of Winchester, and Mary's arming statute, no man had been exempt from providing some type of military equipment. Even during Elizabeth's reign, Catholics had been disarmed (both to prevent rebellion and to supply the army with weapons) but they still had to obey the statutes or be fined. As the problem of Catholicism and Dissension increased, the right decreased in universality. Parliament in 1689, therefore, defined the right to include "protestants" only.43
In another important sense, the arms guarantee reiterated the fundamental "right" of Parliamentary consent being required for all forms of taxation. Since at least Magna Carta, Englishmen had sought to protect property, whether in the form of money, real estate, or personal possessions, from the arbitrary power of the crown. The Petition of Right of 1628, for example, had protested against quartering and excessive demands for common law coat and conduct money as violations of this right. Under certain conditions, Parliament had allowed the crown to "impress" horses, food, and wagons from individuals for military use. All these actions amounted to a tax upon citizens. So too did confiscation of arms, sanctioned by law in some cases but not against Anglicans. The Bill of Rights, in naming "protestants" in the arms guarantee, thus tempered the potential for arbitrary confiscation contained in the Militia Act of 1662. Without explicit Parliamentary consent, county lieutenants thereafter could proceed against Anglicans only by proving them, in fact, to be "dangerous persons."

The phrase "may have arms" conditioned the guarantee, with the last three phrases further defining the conditions. First, the guaranteed arms were "for their defence." The two Commons versions of the Declaration emphasized "publick Security" and "common Defence," terms indicative of collective defense of society against internal and external threats. In common and statutory law, county forces performed both military and law enforcement duties, and individuals were obligated to oppose the commission of felonies whether by thieves, murderers, rioters, or invading armies. In both cases, the goal was public safety and common defense, not simply individual self-defense. Sir William Blackstone
later epitomized the common law rules of self-defense. For the protection of life and limb, he wrote, English law "pardons even homicide if committed se defendendo, or in order to preserve them." But, mere threats to one's body or property, or even the destruction of property, did not condone such extreme reaction, "because," noted Blackstone, "in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages." Thus, under common law, self-defense had only limited relevance in the context of disarming and neglect of the militia during the 1680's.44

The Lords version of the arms guarantee, however, added a subsidiary connotation to the predominant connotation of collective military defense contained in the Commons version. Since the Restoration, some men had complained that being disarmed had left them utterly defenseless. The posse comitatus was so infrequently summoned and so few men of the middle and upper classes performed personal military service in the militia that the complaint must have referred to self-defense. As will be seen in the next paragraph, the Lords showed special concern that the arms guarantee not be interpreted too broadly. The peerage and gentry required some protection from the more rowdy elements of the poor, protection in this case taking the form of "arms," of military weapons for individual self-defense as well as collective military defense. Individual and collective "defence" thus existed side by side in the Bill of Rights, with the latter providing the major emphasis.45

The second conditioning phrase, "suitable to their conditions," referred to the tradition of graduated rates of the obligation to provide military arms and to the prohibitions on arms keeping previously
established by statute. The Assize of Arms and Statute of Winchester had required richer men to supply larger amounts of armor and weapons. The Restoration militia acts continued this practice, but restricted the obligation to men having more than £50 income from estates or £600 in goods or money annually. Less wealthy men generally performed personal service using the arms and equipment of their social betters. Poor people also came under the provisions of the Game Laws which prohibited them from either possessing or using firearms, for fear that they might use them for poaching, rebellion against the crown, or even attacks on the upper classes. These laws followed the pattern of a statute enacted under Henry VIII which forbade anyone with an income of less than £100 in land or money to own or use crossbows or handguns.46

The last condition, "as allowed by law," made the entire guarantee contingent upon the will of Parliament. A number of existing laws placed restrictions on the carrying and use of weapons. One prohibited anyone from bringing arms to meetings of Parliament. Another, the Statute of Northampton, made illegal the carrying of weapons in towns, fairs, and markets, riding armed, terrifying the people with weapons, or bringing them into the presence of royal justices, ministers, or the king himself.47 Of greater importance, of course, were future acts. During the quarter century after 1689, in fact, the crown, without Parliamentary objection, ordered the disarming of Catholics and Anglican "non-jurors" (priests who refused to take the oath of allegiance to the crown) in fourteen different years. Parliament had enunciated the right to keep arms; Parliament restricted its applicability; and Parliament maintained the right to define it or abolish it utterly.48
In the same way, Parliament in its legislative capacity with the crown had the right to reform the militia in order to eliminate abuses and make it more effective. Despite the inadequacies of the militia acts, however, Parliament did not reform them. An attempt had been made in June 1689, but the bill had become stalled in the House of Lords and died when William and Mary prorogued the Convention Parliament in October. Half the changes proposed had been aimed at increasing efficiency, half at preventing abuses. Among the latter were provisions for reducing the power of the crown and the county lieutenants to appoint and dismiss officers and to search for and seize arms. Some members sought to establish clearly defined categories of people (especially Catholics) who could be disarmed. Although this bill failed, Parliament did strike down the non-resisting oath by separate legislative action, thus reducing the need for extensive reform.49 Country members of Parliament and their supporters outside, however, complained that the failure of reform endangered the nation, especially during the war with France in which England had become involved in 1689. Three years later, John Hamden made the point clearly in Some short Considerations concerning the State of the Nation. He believed that the fact

that every English Subject has a Right of keeping Arms for his Defence ... is not enough. The old Laws must be reviv'd, and our Militia, which is at present but a Burden and Grievance to us, must be put into a real Condition of being useful, and a true Defence to the Nation.50

Militia and arms, of course, were inextricably combined in the Country ideology. Although some supporters had identified the existence of the militia as a constitutional right, the Declaration and Bill of Rights contained no reference to it.
This omission of militia from the Bill of Rights, together with the failure of militia reform, indicates the weakness of the Country ideology in translating its theoretical precepts into political action. Country members had been able to incorporate their abhorrence of the standing army into the document. In a sense, this victory made specific reference to the militia unnecessary. Henceforth, only standing armies maintained without Parliamentary approval were unconstitutional. With the Mutiny Act of 1689, the army joined the militia as institutions under statutory regulation, no longer counterpoised but existing as two parts of the same system. The arms provision of the Bill of Rights thus represented a wider guarantee than was possible by associating arms keeping specifically with militia service (which, in fact, had never involved more than a fraction of the adult male population). In this context, therefore, the Harringtonian notion of the legitimacy of arms in the possession of all citizens played a more significant role than the Country ideology of militia. As we shall see, however, in the American colonies, the relationship between citizens and militia service differed from this model, giving added relevance to the Country image of the militia and arms.
NOTES


3 Wm. & Mary, st. 2, c. 2.


8 Bayley, War and Society, p. 180. Quotations are from Flavius Vegetius, Foure Bookes of . . . Mariall Policye (London, 1572), ff. 1r, 2r. Another English translation was published in 1489.


11 Machiavelli's works were translated and reprinted several times in the 17th and 18th centuries. The quotations used here are taken from Henry Neville's edition of The Works of the Famous Nicholas Machiavel, Citizen and Secretary of Florence (London, 1695), pp. 394, 417, 215, 417, a reprinting of the 1st edition of 1675.
Ibid., pp. 441, 323, 399, 447, 442, 272, 444, 447, 447, 411.

Ibid., pp. 276, 448, 312.

Ibid., pp. 214, 291, 448.


Ibid., pp. 165, 412, 412, 452, 312.

Ibid., pp. 443, 425, 443, 443, 444.

Ibid., pp. 213, 682-685, 218-219, 228.


A Letter from a Parliament-Man to his Friend, p. 4, quoted in


27 Archibell Grey, comp., Debates of the House of Commons (10 vols., London, 1763), IX, 30-32; Western, English Militia, p. 84.


29 Bishop Burnet's History of His Own Time (2 vols., London, 1724-34), I; Western, English Militia, p. 84 (quotation). Journals of Commons, IX, 544.

30 Grey, comp., Debates, VI, 328, 329. Western, English Militia, p. 5, found that in 1683, in only three raids on five Englishmen, the militia confiscated over 79 muskets and 50 pikes.


36 Ibid., p. 662. CSPD, 1686-87, nos. 1807-1808.


39 Ibid., X, 25.


42 John Cowell, The Interpreter: or Booke Containing the Signification of Words (Cambridge, 1607), s.v. Armour (Armat); Cf. Termes de la Ley (1641), s.v. Arms, quoted in OED. Western, English Militia, p. 70, discovered at least one instance in which birding guns were confiscated in addition to military weapons. 1 Wm. & Mary, s. 1, c. 15, sec. 4 reiterated the previous statute to disarm recusants by specifying Catholic recusants. Search and seizure authority: 13 & 14 Car. II, c. 3, sec. 14.


45 Western, English Militia, p. 69, cites CSPD, Jul-Sep 1683, pp. 402-403, that Sir Robert Atkyns, a retired judge, complained that arms confiscations had left him dishonored and defenseless.

46 13 & 14 Car. II, c. 3, sec. 3, 4. Game Laws: 22 & 23 Car. II, c. 25, sec. 2, 3; C. Kirby, "The English Game Law System," AHR, 38 (1932-33), 241-242; Western, English Militia, pp. 71-72. 33 Hen. VIII, c. 6 (1541): "If any person have shot in, used, or kept any hand gunne, but such as in stocke and gun one yard long: or any hagbut or demyhake, not being three quarters of a yard long" risked committing a felony; William Lambarde, Eirenarcha (London, 1619), quoted by Sir William Holdsworth, A History of English Law (12 vols., London, 1903-31), IV, 567.

defined "Affray" to include the carrying of weapons which "strike a
care into others that be not armed as he is" which had been prohibit-
ed by the Statute of Northampton (p. 134). Michael Dalton's The
Countryry Ivstice (2nd ed., London, 1619), pp. 28-31, and virtually all
subsequent manuals for justices of the peace in England and America made
the same precise points. The continuity of emphasis on these violations,
though it did not prove that the Statute was rigorously enforced, does
indicate that it still had legal standing.

48 Western, English Militia, p. 69n: orders for disarming were
issued in 1689-92, 1696, 1699-1707, 1710, 1711, and 1714.

49 Ibid., pp. 85-87. The bill is printed in HMC, House of Lords,
1689-90, pp. 206-217. Bishop Burnet, who had suspected Parliament's in-
tentions in 1678, wrote that this bill had been tabled because the Lords
who were County Lieutenants disliked the prospect of losing so much
power: History of His Own Time, II, 14. The non-resisting oath, 13 &
14 Car. II, c. 8, sec. 11, was struck down by 1 Wm. & Mary, c. 8, sec.
11.

50 John Hammond, Some short Considerations concerning the State of
the Nation (London, 1692), printed in A Collection of State Tracts
Publish'd during the Reign of King William III (London, 1706), II, 327.
PART TWO

ORIGINS OF THE COLONIAL MILITIA

When Englishmen settled in America, they naturally adopted the military practices of England. The period of development from 1607 at Jamestown until 1674 when the crown made its first efforts at reforming these practices witnessed the close emulation of military organization, officers, and structure of civil and political control in effect at home, especially after Parliament seized control of English government in 1642 and the colonial governments in 1652. After the Restoration, these similarities became detrimental to imperial relations. When added to the military inefficiency of the colonies, reform became a necessity. In the royal colonies the crown simply ordered the governors to modify their defense systems. The charter colonies required charter revocation and governmental consolidation and royalization to achieve that result, and then not successfully. With the Glorious Revolution, however, reform hesitated only momentarily until propelled forward by the necessities of warfare. Under William and Mary and Anne, the charter colonies faced another attempt at "reunification," combined military commands, and Privy Council supervision of local affairs. The end of war in 1714 also ended reform measures. The colonial assemblies, particularly in the royal colonies, thereafter began their "quest for power" and made military authority a key goal. By 1765 almost every
colonial legislature had imposed statutory restrictions on their governors and had usurped by various means a large part of his military prerogative. By the eve of Revolution, therefore, the colonial militia systems were characterized by firm civil and legislative control, with legislative rather than executive definition of military obligation and the terms of arms bearing.
CHAPTER THREE

Colonial Adoption of English Military and Politico-Military Practices, 1607 - 1674

Such principall governour . . . shall [have] full power and auctoritie to use and exercise marshall lawe . . . in as large and amble manner as oure lieutenant in oure counties within oure realme of England have or ought to have by force of their commissions of lieutenancy.

—Second Virginia Charter (1609)¹

The English military institutions and practices of the fifteenth and sixteenth centuries provided highly articulated models for colonists in the New World to build their own defense systems. Rather than reviving "a decaying medieval institution—the militia," these mainland and Caribbean settlers emulated the military innovations of the crown in modernizing the English county forces. Although Americans adopted the universal military obligation of the medieval posse comitatus, out of necessity, the other characteristics of their systems were anything but medieval. Every colony until the Quakers came to America hired or appointed military men well versed in the current English and European practices to direct local defense. Their experience in English garrisons, in European mercenary armies, and in the English civil wars deeply influenced their behavior and attitudes. Faced by a hostile environment and surrounded and outnumbered by Indians, Spaniards, and Frenchmen who resented English intrusion in America, the colonial military leaders at
first chose English practices relevant and adaptable to American conditions. Within a short time they also introduced characteristics of the English county forces which had no absolute necessity. Especially in the royal colonies of Virginia, Jamaica, and Barbados, the crown through the Privy Council influenced the form of emulation and insisted upon the adoption by the colonists of the latest innovations being made in the shires. The New England colonists also stayed abreast of institutional change, especially modifications made by Parliamentary forces during the Civil War and Protectorate.²

Despite such extensive copying of institutional forms and practices, the American military forces differed from the English in some significant ways. The colonists, in the first place, had no English statute to follow until the Militia Ordinance of 1642. Even had Parliament managed to enact one, the colonies lay technically outside the jurisdiction of English law and precisely in the direct power of royal prerogative. Therefore, the colonists had no legal obligation to adopt the traditional, common and statutory law practices of the country forces. Moreover, except in the royal colonies, the king had delegated the authority for local military command to the various corporations and proprietors receiving charters, with few guidelines for military organization and administration. Finally, because of the small number of settlers and the immediacy of the military threat to them in the New World, the colonial forces comprised virtually every free adult male (in the older tradition of the posse comitatus), and every man was obligated to train as well as serve, a double departure from the English practice. These circumstances as well as the vicissitudes of Anglo-American historical
development in the first half of the seventeenth century prevented the colonies from following a single line of evolution in military affairs. The insistence of the New England colonies on retaining the practices associated with the years of Parliamentary control and the outmoded characteristics which remained with the forces of the other colonies after the Restoration provided the impetus and justification for the crown's attempt to reform the hybrid colonial systems into ones more in keeping with the Militia Statutes of 1662 and 1663, the subject of the next chapter.

Much of the confusion which beset colonists in their creation of the means of defense can be traced to the legal status of the colonies as "dominions" of the crown, lying outside the "realm" of England. It can also be found in the controversy between King and Parliament over the proper locus of military authority in the kingdom. These royal dominions, as defined in medieval law and redefined in Sir Edward Coke's opinion on Calvin's Case in 1608, had no benefit of English statutory or common law. Prerogative, as it theoretically operated in the King's English demesne (lands held directly by the crown prior to the Norman Conquest), determined the rules of justice and administration. Coke identified two types of dominion. Lands acquired from Christian rulers retained local law, subject to royal command. Lands from non-Christians lost all rights to native law and were thereby totally subordinate to the King's will. Only if the King explicitly introduced English law into such an area, as John had in Ireland, did Parliament have a voice in dominion affairs. The colonial dominions, taken from non-Christian Indians, therefore technically existed under the law as the creatures
of royal prerogative. The crown did not retreat from this position until the eighteenth century. Although the Stuart monarchs had delegated extensive powers through the colonial charters, none introduced English law. Rather, the charters invariably demanded that the colonists establish rules of justice and law, with the single proviso that they simply not run contrary to English laws. While the charters claimed to guarantee to Englishmen in America all the rights, privileges, and immunities of their fellow countrymen in England, Americans were denied one of the greatest rights, the common law itself. That omission proved troublesome in the entire colonial period, both legally and militarily.  

The crown attempted to settle military problems by delegating command authority to the officers of the chartered companies and to individual proprietors. All charters granted in America in the century and a quarter between that of Virginia and of Georgia were cast in virtually the same format and wording of the military powers delegated. James I, for example, delegated to the Virginia Company part of his "primitive prerogative of generalissimo and commander in chief," dissociating himself thereby from the immediate direction of the colony's defense. He explicitly empowered company officers to build forts, transport military arms and supplies out of the realm, and defend the community. According to the 1609 charter, they

shall and may from Time to Time and at all Times for ever hereafter, for their several Defence and Safety, encounter, expulse, repel, and resist by Force and Arms, as well by Sea as by Land, by all Ways and Means whatsoever, all and every such Person or Persons . . . that shall enterprize or attempt at any Time hereafter, Destruction,
Invasion, Hurt, Detriment, or Annoyance, of the said Colony and Plantation.  

The king retained ultimate military authority, but chose not to exercise it. Colonial corporate charters legally interfered no more with royal military prerogative than did the corporate charters of English towns. The wording of the charters implied some form of military obligation of individuals; since authority for establishing colonial governments and defense flowed through the crown, the most clearly applicable form of military obligation was that imposed in England by the crown. By delegating immediate command authority, however, the crown for all practical purposes allowed the power to define such obligation fall into the hands of the corporations and proprietors.

Military obligations, institutions, and practices in corporate Virginia generally followed those in England, modified by local circumstance into what Stephen Webb has called the "military plantation model of society." Virginia's charters created a London-based council with general powers over the colony, a resident governor, and, in 1609, a resident council to assist him. That year the London council delegated to Governor Sir Thomas Gates specific military powers to build forts, appoint and commission subordinate officers, establish watch and ward, and divide the settlers into military companies whose captains would "traine them" and "teache them the use of their arms and weapons." From the beginning, then, Virginia colonists as a group were subject to the military obligation of training, unlike England where few men trained. In emulation of England, on the other hand, Gates could use martial law in case of mutiny or rebellion in the same way "as oure leutenant in oure counties within oure realme of England."
During the half decade from 1611 to 1616 the Virginia Company stretched military obligation to its farthest extent in any colony in the colonial period by imposing stringent regulations based upon the practices of English mercenaries serving in Europe and Ireland. Professional soldiers, such as Captain John Smith, had been hired to bring stability and order to the business venture. When threatened with the loss of the colony, the company allowed its officers to take extreme measures such as the partial enforcement of Dale's Laws. A code of military rules borrowed virtually intact from English mercenary use, they emphasized universal military organization, training, and discipline by means of martial law. The provost marshal, an English officer, enforced this military law. Unlike his English counterpart, the Virginia officer was also responsible for training and civil law enforcement, a duty he retained until 1635 when counties and sheriffs were introduced. Another aspect of this military system had a direct English legal precedent. The company required men to carry weapons to work and to church. This could represent simply a regulation to force the settlers into the habit of military readiness, which they may well have lacked the good sense to develop. On the other hand, by specifying church and work rather than making a general demand for being armed at all times, the regulations point to an explicit exemption of the settlers from the traditional arms prohibitions of the medieval Statute of Northampton and more recent English laws governing the use of weapons. In every colony in the next century, moreover, governors and assemblies followed the same practice of ordering men to bring arms into churches and public buildings and, when the particular emergencies ended, to
desist. Such actions do not imply that the regulations were in force in the colonies; they may imply that the colonial officials sought to overcome the hesitation of individuals to violate long-standing English prohibitions.6

In the last years of the Virginia Company’s life, the governor and council continued to publish military orders. The House of Burgesses, established in 1619, however, had no share in military affairs until 1624, two years after the nearly fatal Indian massacre. The unpreparedness of the settlers proved the need for a different approach to the problem. The company officers finally turned to the assembly in hopes that legislative approval of defense regulations would insure popular support. The attempt failed to save the company from the “difficultie and griefe” which Governor Sir Francis Wyatt experienced in trying “to mantaine a warr by vnwillinge people,” and from the loss of its charter in 1625. The Virginia experiment demonstrated that military obligation pushed to the extreme was incompatible with the self-interests of the civilian settlers and that all English military practices were not readily transferrable to America.7

Virginia became a royal colony in 1625 under the direct supervision of the Privy Council. Wyatt continued as governor and made several suggestions for improving colonial defense. These the Privy Council rejected in favor of practices then being implemented in England. Everyone, for instance, remained responsible for defense of his own life and home, but newcomers were exempt from the general military obligation to be "rated to ye maintenance of ye warrs proportionally to their abilities," with men from seventeen to sixty eligible for personal service.
In 1628 the Privy Council ordered the erection of warning beacons (such as had been in use in England for over a millennium) to alert settlers of Indian or European attack; required every colonist to arm himself; and appointed a "Muster Master generall" to inspect arms and, like the contemporary English mustermasters in the shires, "alsoe traine and exercise the people."8

The role of the House of Burgesses remained one of advice and consent to the executive actions of the governor and council. Unlike in England, however, the legislative assembly regularly participated in military affairs. In 1629 and 1630 the House approved a number of measures giving legal form to earlier legislative orders; the next decade saw a drastic drop in such activities perhaps as a result of a lessening of tensions with the Indians and the increased military responsibilities of the newly created counties. To administer county affairs after 1634, the governor appointed sheriffs, constables, justices of the peace, and county lieutenants with duties similar to their English counterparts. He delegated power to them to care for local defense and political needs, decreasing the need for reliance on central authority. Even during the war and its threat in the 1640's, therefore, the burgesses acted only to authorize the county lieutenants and their deputies to form councils of war (as in England) with power to impress men and supplies and to charge settlers from sixteen to sixty with the expense of keeping local garrisons.9

The Privy Council clearly intended the governor and his executive council to retain the bulk of military authority in their own hands. Sir William Berkeley's commission in 1641 appointed him civil governor and
"Captain General" of the colony. He could appoint and sit on a general council of war empowered "to send out forces" and to "make War and Peace." As governor he had authority to order male settlers to arm themselves, to appoint mustermasters, and to compel men to perform personal military service. Impressment proved such a necessary device that the assembly confirmed its validity in 1644. Four years later when some colonists challenged the authority for imposing compulsory service, the House of Burgesses passed an explanatory bill which emphasized that the governor's commission and instructions gave him "full and ample power" for conscription. In answer to complaints that a specific legislative act was necessary to authorize impressment, the bill declared that "we may not presume to conceive that any act of Assembly can add strength or vigor" to the "power in the commission literally expressed." This acknowledged subordination, however, lasted only until 1652 when Parliamentary forces took control of Virginia.10

Military obligation in corporate Virginia had followed no single pattern, adopting the usual requirements for arming, training, and personal service and introducing officers such as the provost marshal and military discipline from English mercenary practice. Obligation in royal Virginia, on the other hand, closely followed the model of county forces being advocated by Charles I. As in England the Privy Council required men to pay military taxes, establish beacons, provide arms, appoint and pay mustermasters, train, serve in military expeditions, carry weapons to work and church, be commanded by county lieutenants and deputies, and, in 1642, to reorganize the various military "plantations" into "Companyes" of a specified size like the "Trayne bonds" in England.
The direct legal connection between royal colony and the crown justified the imposition of the legal obligations required by the crown within the realm. ¹¹

In New England and Maryland this direct legal connection did not exist. Charles I had granted a corporate charter to Massachusetts Bay and a proprietary charter to Lord Baltimore; as in Virginia he surrendered his prerogative of immediate military command. Rhode Island and Connecticut governed themselves without royal charters until the Restoration, and Plymouth never received one. In each case, military obligation tended to follow some practices in England, especially those arising from common and statutory law rather than those imposed by the king by prerogative. This emphasis upon known law predisposed colonists to use legislative means to define military obligation in a legally recognized manner. Emphasis upon legislative rather than executive regulation of military affairs, however, brought New England and especially Massachusetts Bay into direct conflict with royal prerogative. Even in Plymouth the whole "civil body politic" participated in appointing Miles Standish as military commander, rather than leaving the responsibility to an executive officer of government. ¹²

Legislative jurisdiction in Massachusetts Bay had a firm basis in the 1629 charter which differed from the Virginia charter of 1609 in two significant ways. Although martial law had been authorized in Virginia and even in the 1620 charter of the New England Company, it did not apply in Massachusetts Bay. Secondly, the charter authorized the General Court of the company "to make Lawes and Ordinances for the Good and Welfare" of the colony. This differed from Virginia where "orders,
lawes, directions, instructions, formes and ceremonies of government and magistracie" were formulated by governor and council. Massachusetts also had the advantage of having removed the charter and the entire government to the New World, out of reach of immediate royal influence.\(^{13}\)

During the early years, however, Governor John Winthrop and the Court of Assistants made law and military regulations. By 1631 each male settler had to "finde" a musket, powder, and shot, to "traine" with his "companie" every Saturday, and not to travel unarmed. As in Virginia, the form of such military obligation had its precedent in England, but the universality of its application to the adult men was unique. Another unique practice was to have far-reaching consequences for the colony in the seventeenth century and for all the revolutionary provinces a century later. In 1632, "the people" successfully petitioned Winthrop that "every company of trained men might choose their own Captain and officers."\(^{14}\)

The General Court, including the lower house of representatives from the towns, began regular meetings in 1635. Among its first military actions, it empowered the governor, deputy, and seven members of the court "to dispose of all military affaires w	soeuer." While actual administrative and command authority in Massachusetts Bay remained in executive hands, the legislature achieved a degree of statutory regulation which Parliament did not have until 1642. Even though the General Court chose not to make military laws and orders, its act of delegation established the legal precedent for later claims to such authority. In 1636 it enacted a statute prepared by the special
council to reorganize the various "companies" into three regiments, a measure advocated for the English county forces but not yet achieved. Two years later the Court accepted a petition of a group of Boston gentlemen to establish a private military organization modelled on London's Ancient and Honourable Company of Artillery and on the Military Gardens of the 1620's. Governor Winthrop, however, hesitated to "erect a standing authority of military men, which might easily, in time, overthrow the civil power," but upon assurances that the members would obey civil officials and the law absolutely, he accepted the petition.15

Military affairs in Massachusetts Bay represented just one aspect of the Puritans' desire to escape the worldliness of English society and to establish a community based on cooperation and voluntarism. Thomas Breen, for example, has called the defense system a "covenanted militia" because its characteristics reflected as much the concerns of the Puritans as it did the practices of the English trained bands. Popular election of military officers allowed men some measure of control over their earthly destinies and expressed their social ideals as much as did their activities in church and town meetings. "Trainbands," as the military companies were designated, did not always enjoy peaceful elections but sometimes bred factionalism in the towns and between town and provincial government, an unforeseen consequence. A disputed military election in Hingham in 1645, for example, sent reverberations throughout the colonial government. At the very least such controversies caused "discontent and murmurings." On the other hand, military elections generally encouraged settlers to accept defense obligations, certainly with more readiness and conscientiousness than in Virginia.16
Connecticut and Maryland emulated the legislative military practices of Virginia and Massachusetts Bay during the 1630's. Connecticut's General Court helped define individual obligation in 1636 and 1637: all men over sixteen except magistrates, clergymen, and others with "sufficient excuse" had to train and perform personal service. Everyone, without exception, had to provide public supplies of powder and shot. Also, soldiers could nominate their own officers, subject to approval and commissioning by the governor. Maryland's proprietor, Lord Baltimore, had more formal authority than Connecticut's governor. His charter invested him with the "full and unrestrained Power, as any Captain-General of an Army ever hath had." Only in 1639 did the colonial assembly succeed in gaining some statutory regulation of military affairs by requiring all households to keep arms and powder in proportion to the number of adults living in each and by authorizing inspectors to insure compliance. Such actions had little immediate constitutional significance but did emphasize the disparity between the success that colonial assemblies were achieving in military regulation and the lack of success experienced by Parliament. 17

The next stage in colonial legislative jurisdiction came with the creation of the New England Confederation in 1643. This defensive alliance resulted from the military weakness of the colonies of Plymouth, Massachusetts Bay, New Haven, and Connecticut during the Pequot War. Each colonial assembly appointed members to a single council of war which supervised wartime operations, set quotas of troops for each colony, and appointed a commander in chief during emergencies. Individual colonial councils of war had the subsidiary power to conscript
men for service. The Confederation, which continued a haphazard existence for forty years, allowed the assemblies a larger role in defining and implementing individual military obligation by forcing on them the need for cooperation. The requirements of warfare without assistance from the crown necessitated colonial self-reliance; in order to insure popular compliance with military orders, the assemblies had to act.18

In September 1643, the General Court of Massachusetts Bay followed Parliament's lead in assuming supreme command of all the colonial military forces. It again delegated power to a special council of war consisting of the governor and court members, but unlike the 1635 act, this one made legislative power explicit. This act specified that regimental officers raise troops during emergencies without prior approval from the council of war or the Court. To allay the fears of the settlers that this delegation of authority might create a dangerous military power uncontrolled by civil processes, the act declared that "For as piety cannot be maintained without church ordinances & officrs, nor justice without lawes & magistracy, no more can or safety & peace bee preserved without military orders & officrs." The act also created the office of Sergeant Major General, as in England the commander of a geographical district, who directed colonial field operations. To administer the colonial county forces, the Court ordered each county to appoint a lieutenant, who with the newly appointed Sergeant Majors of each and the general council of war, met annually to plan for future contingencies.19

Two years later the General Court created three additional private military companies in Essex, Middlesex, and Old Norfolk counties. These organizations received exemption from all military obligations in the
trainbands except for the fundamental duties of personal service and arming because the private companies performed their own training. They controlled their membership, elected officers, and supplied their own uniforms, provisions, and equipment at no cost to the colony except during wartime. Governor Winthrop did not approve; he distrusted the petitioners' "importunity to have the whole power of those [military] affairs committed to them." Although some members agreed with him, the General Court exercised its military power and approved the petitions.20

Legislative authority proceeded more slowly in Connecticut, Plymouth, and Rhode Island, although here too colonial executives lost military power. The Connecticut General Court in September 1642 appointed a committee to "levy" the towns for men to fill the colonial quota set by the Confederation. The Plymouth assembly participated in military affairs only to the extent of creating a general council to supervise colonial forces. This organization, Harry Ward has noted, was the most "expressly military" council of war in any of the New England colonies, exercising very little political power. Perhaps Governor William Bradford's somewhat arbitrary rule and Plymouth's questionable legal status because of its lack of a charter inhibited legislative development. Finally, Quaker influence and Roger William's pacifism kept Rhode Island from developing any system of defense until after the Restoration.21

In March 1652 Virginia and Maryland surrendered governmental authority to Parliamentary agents. During the past decade Maryland's military system had deteriorated badly, with the colony wracked by rebellion and disturbances. The election of new assemblies, however, led to their
claim of supreme power based on Parliament's example. It also led to the reorganization and improvement of the military systems of both colonies. Maryland's delegates quickly defined individual military obligation and created two regiments from the various county forces. Virginia's new "Grand Assembly" submitted to the English Council of State's demand for the surrender of all public munitions and arms. It also created English-type "commissioners of the militia" for each county with powers of impressment, and it set quotas for expeditions against the Indians. In 1660 it appointed a governor and "authorized and Made" Colonel Manwaring Hamond "Major General of Virginia," a post strikingly similar to the English Major Generals appointed by Cromwell.22

By the time of Charles' Restoration in 1660, the local military forces of the colonies had developed a remarkable degree of similarity to the county forces of England. A summary of these characteristics for Virginia and Massachusetts (as examples of a royal and a charter colony) is found in Table 2. Virginia's forces before 1652 had taken on many of the characteristics of the "militia" advocated and adopted by Charles I. The governor exercised power of immediate command through his executive council, council of war, county lieutenants, deputy lieutenants, mustermasters, and provost marshals. Privy Council and governor defined and effected military obligation based upon royal prerogative. Counties financed expeditions both within and outside their jurisdictions and paid the mustermasters. Individuals were obligated to provide arms and equipment, to be trained, and to serve upon need under martial law. The governor created special military companies and paid garrisons. Two major characteristics distinguished colonial from English forces.
### TABLE 2
Structure, Function, and Obligations of Colonial Military Forces: Virginia and Massachusetts, 1607 - 1660

<table>
<thead>
<tr>
<th>Liability:</th>
<th>Virginia 1607-1625</th>
<th>Virginia 1625-1651</th>
<th>Virginia 1652-1660</th>
<th>Massachusetts Trainbands 1630-1660</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arms Service: Defense Expeditions Training</td>
<td>Universal</td>
<td>Universal</td>
<td>Universal</td>
<td>Universal</td>
</tr>
<tr>
<td>Selective</td>
<td>Selective</td>
<td>Selective</td>
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<tr>
<td>Universal</td>
<td>Universal</td>
<td>Universal*</td>
<td>Universal*</td>
<td>Universal*</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Obligation:</th>
<th>Virginia</th>
<th>Company</th>
<th>x</th>
<th>x</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prerogative Statutory</td>
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<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Command: Ultimate Colony County</th>
<th>London Council</th>
<th>King</th>
<th>Protector</th>
<th>General Court</th>
</tr>
</thead>
<tbody>
<tr>
<td>Governor &amp; Council</td>
<td>Governor &amp; Council</td>
<td>Grand Assembly &amp; Major General</td>
<td>Commissioners of Militia</td>
<td></td>
</tr>
<tr>
<td>Plantation Commander</td>
<td>Lieutenant</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Primary Functions: Invasions</th>
<th>Law Enforcement Expeditions</th>
<th>Rebellions</th>
<th>x</th>
<th>x</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Organization: Units: Type:</th>
<th>County</th>
<th>Company/Regiment</th>
<th>Infantry</th>
<th>Cavalry</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
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</tr>
</tbody>
</table>

* The colonies allowed some exemptions from training, revocable by appropriate executive or legislative action.
First, while every adult male in England owed the nation some form of military obligation, not everyone performed personal service or provided weapons and supplies. In each of the colonies, however, obligation to be armed, to train, and to serve was almost universal. Some colonies did grant exemptions from the former two duties, but none exempted men from the fundamental obligation of service in defense of the community. Service in expeditions and during wartime was selective: only when volunteers ceased to enlist did the colonial governments turn to conscription, and then individuals usually were allowed to hire substitutes. The fact that many drafted men could not afford to do so does not negate the non-compulsory nature of such military service. The second distinction from English practice concerned legislative authority. The New England colonies best demonstrated the assumption of executive military power, and, after 1642, the colonial forces closely resembled county forces in England. Massachusetts Bay had a colonial council of war, a commanding Sergeant Major General, county councils of war, county Sergeant Majors, Lieutenants, and trainband officers. Soldiers nominated their officers. Only slowly before the 1660's was the word "militia" used to designate the colonial force and then only in the widest sense of the entire military potential of the colony.

By 1660 military forces in most of the colonies had begun to be referred to as "militia" in law and official reports, emulating the current English usage, especially the Militia Ordinance of 1652. Virginia and Massachusetts seem to have been the first to adopt the term that year. Maryland followed in 1654, with Bermuda and New Haven Colony two years later. Jamaica, New Jersey, New York, and Connecticut did so in
the 1660's. Only Plymouth and Rhode Island failed to conform until the
1680's when they were forced to do so by the Dominion of New England.
Adoption of the name simply added another similarity between colonial
and English practices. These similarities of organization, practice,
obligation, and nomenclature were so great that there can be said to
have existed a single Anglo-American system of local military defense
by 1659, with variations based on local peculiarities. Since Parlia-
ment after Charles's execution claimed authority over the realm and do-
ominions, the technical legal status of the colonies as creatures of
royal prerogative disappeared. And since Parliament made no attempt to
specify by statute the military organizations of the colonies, local
practices received implicit legislative approval.24

With the Restoration in 1660, however, the single Anglo-American
military system began to break down. The militia statutes of 1662 and
1663 established the English county forces on a new footing under the
unchallenged legal prerogative of the crown. The Privy Council immedi-
ately made use of this authority and its supervisory authority over the
royal colonies in 1661 and 1662. It ordered the governor and council of
Jamaica to establish a "militia" among the English settlers, to arm and
train them, and to make regular military reports to Whitehall. These
reforms were made to strengthen the island's defenses in the decade
after its conquest from Spain. The nature of some of the institutional
changes and the authority on which they were based presaged the future
royal policy of military reform against all the colonies, royal and
private, the subject of the next chapter.25
Imperial reform in the 1670's sought to rectify the loss of the crown's military prerogative surrendered in colonial charters and usurped by colonial legislatures. It is ironic, therefore, that Charles II almost immediately after the Restoration granted away significant military authority in the charters of Connecticut and Rhode Island. Since both documents were issued after the militia statute of 1661 explicitly recognized royal military prerogative, Charles's grant of immediate military command to the colonies themselves legally placed local military authority out of his hands. Unless the crown could modify or revoke the charters or interpret the military clauses favorably to itself, the military status of these private colonies was questionable. As the Rhode Island charter proclaimed, the king granted power to the governor and assistants "at any tyme when the sayd Generall Assembly is not setting, to nominate, apoynt and constitute, such and so many commanders, governors, and military officers, as to them shall seeme requisite." In England the crown appointed all senior officers and the county lieutenants nominated subordinate officers. In the royal colonies, the governor and council performed much of the latter duty although sometimes they delegated part of the power to local officials. In each case, ultimate power resided in the crown. In these corporate colonies, however, the king surrendered his power by specific reference.26

The proprietary charters issued for New York, Carolina, and Pennsylvania, and the subsidiary charters which the Duke of York granted for East and West Jersey, contained no similar military provisions and thus no obstacle to royal prerogative. Only in Pennsylvania where the Quaker settlers and proprietor prohibited military organization and obligation
did a serious constitutional issue arise. Even there, the crown did not attempt to exercise its rights of command until the pressures of war in the 1690's forced the issue.\textsuperscript{27}

The crown levelled its first criticisms of colonial political and military practices against Massachusetts Bay in the 1660's. Slow to proclaim the Restoration, Puritans represented a significant body of opposition to the crown; their military system represented a direct institutional and psychological link to the Puritan Parliamentary army and the Interregnum. Complaints from within and outside the colony indicated gross charter violations and governmental irregularities including militia elections and legislative military dominance. The General Court, faced by such external scrutiny and internal pressures like the Ipswich election dispute, appointed a committee of its own to rectify "what is amiss" with and to "settle" the militia. Even had such internal reform not been the product of legislative initiative, the system required extensive modification to make it acceptable to the crown. Charles appointed a special commission in 1664 to investigate the New England colonies. To reassert royal military authority, the commission- ers had instructions to appoint a militia commander for Massachusetts Bay "nominated or recommended by us." Additional secret instructions emphasized the precariousness of the General Court's actions. "If they will consider their Charter," read the orders, "they will not find that they have in truth, the disposall of their owne Militia as they imagine." The commission, however, failed in its mission, leaving the entire problem for future action by the crown.\textsuperscript{28}
Military affairs in the other colonies varied in their degree of acceptability to the crown. The New England investigating commission had additional instructions to secure military support from New England in order to capture New Amsterdam. The operation was a success and Colonel Richard Nicholls took control of the city and colony by September 1664. Charles II quickly granted the territories as a proprietary holding to his brother James, the Duke of York. Since James was heir to the throne and shared Charles's views on prerogative, the New York charter contained no provision for a representative assembly; military authority lay entirely in executive hands. Military obligation, therefore, was established by the Duke of York's laws. Since the "good Management of the Militia," they declared, constituted "the Support of all Governments in Peace and Safety," every male over sixteen was required to furnish military weapons. All had to train except public officials and certain others upon local court ruling. In defensive wars, no one was exempt from personal service. In offensive wars requiring expeditions to aid other colonies, only volunteers could be enlisted because, as in England, the Duke's Laws recited, no person could be compelled to serve "without the bounds and limits of this Government." No troops could be raised under any circumstances without proper warrant from the governor. Fines and penalties for noncompliance, although imposed by court martial, could be collected only through normal judicial processes. Such restrictions on executive military power were constitutional, based upon established English practice and tradition since the Middle Ages, not to be arbitrarily discarded even by the Duke of York. But since none of these "guarantees" had been written into the charter, law
made by proprietor and governor was law which could be unmade by pro-
prietor and governor. In 1667, for example, Governor Nicholls insisted on
transforming one third of the militia from relatively cheap foot sol-
diers to vastly more expensive cavalry troops, along the line of pro-
posals being made in England. He persuaded Connecticut's General Court
to adopt a similar measure, for the two colonies' mutual benefit, but
failed to convince Massachusetts Bay. Nicholls' action was unilateral
and executive in New York, that of Connecticut and Massachusetts, col-
lective and legislative. 29

The New Jersey proprietors quickly modified the executive emphasis
of their charters from the Duke of York by establishing an assembly. The
Concessions and Agreements of 1665 grounded basic military authority—
the power to constitute military units and to "make warr Offensive and
Defensive"—in the assembly, which could also determine the number of
troops to be raised for garrisons and wartime operations. Although gov-
ernor and council had the power to nominate and appoint military offi-
cers, and need seek the advice of the assembly only if necessary in
particular cases, the assembly soon began to influence the selection
process. 30

New Jersey's proprietary concessions had been modelled on those
of the Carolina proprietors who had similarly delegated virtually all
routine military powers to an assembly. The Carolina charter allowed
the assembly to determine the number of military units, the length of
obligatory service, the frequency of musters, and questions of war and
peace. Quickly, however, the proprietors found the concessions too
liberal. They then turned to the Fundamental Constitutions of Carolina
drafted by John Locke. It established a more rigid system which placed military power in a Grand Council composed of the proprietors themselves and councillors from the various proprietary courts but no popular representatives. In 1669 the proprietors appointed William Sayle as governor, to exercise civil and military power in conjunction with a small council. This body may have been the "Grand Council" which enacted a militia ordinance in 1671 rather than the proprietors' council since Locke's Fundamental Constitutions were never fully implemented. Popular dissatisfaction with the arbitrary actions of the proprietary government led to social instability. Six of fourteen governors were forced from office in the next forty-two years.31

During the same period Connecticut, with its corporate charter and tradition of legislative power, firmly established military authority in its assembly. The General Court reenacted the defense regulations of the 1630's, imposed fines on anyone who refused or neglected to obey its orders, and in the late 1660's appointed a standing committee to supervise military operations. In 1667 it established in each county a "committee of the Militiae" to direct local defense. By 1673 the Court had perpetuated the military institutions and practices of the English civil wars. Militia companies nominated their own officers, Sergeant Majors and a Sergeant Major General commanded county and colonial forces. The General Court also appointed a special wartime commander in chief, formed legislative councils of war, and authorized local officers to conscript men for service.32

The Virginia House of Burgesses proved less successful in sharing military power with the royal governor and council. Actual exercise of
this power, however, had become increasingly decentralized; local magistrates had served as county civil commissioners and as commissioners of the militia during the Protectorate and had continued their dual office-holding afterwards. Their control was necessary since the scattered settlements separated by wide rivers made military centralization impractical. Many of these local leaders also served as councillors and burgesses who attempted to extend local power into colonial government. The resulting confrontation, discussed in the next chapter, had been precipitated during the 1660's and 1670's by repeated requests by the governor for the burgesses to approve defense statutes, undoubtedly to insure popular compliance. Even before the Second Dutch War began in 1664, the assembly passed measures for preserving and increasing public supplies of munitions and attempting to strengthen frontier settlements by requiring each to keep at least four well armed "able hands" to ward off Indian raids. During the ensuing war the burgesses continued to provide military regulations including a provision for conscripting men for frontier garrison duty. They took similar action during the Third Dutch War. In 1673 Governor Sir Henry Chicheley discovered that only about a tenth of the militia had weapons, indicating poor compliance with military requirements. The assembly therefore required each company to inventory its arms, the county courts to levy a special tax to buy weapons and powder, and the militia captains to sell them to their men at "reasonable" rates. In all these activities, the governor and council simply could not operate with much success on their own authority without legislative assistance.
Legislative sharing of and legislative dominance of military affairs thus characterized virtually every colony by the time of the Third Dutch War in the early 1670's. These practices served as vivid reminders to the crown of Parliamentary incursion into executive authority in 1642. When seen with the outmoded and ineffective military systems of most of the colonies and the Parliamentary military characteristics of the New England forces as well as the recalcitrance of Massachusetts Bay toward the crown, the situation required reform. In the royal colonies the king could operate through the Privy Council to restructure the militias and governmental relationships. The private colonies, though legally subject to royal command, could not be fully reformed without modifications of their charters, or even charter revocation. Both processes required formal legal procedure, time, royal attention, and provision for substitute forms of government. As closely as the colonists had emulated English practices, they had not changed when English practices were modified after the Restoration. To alter the direction of institutional development in the colonies therefore required the use of force, both legal and executive, beginning in 1674.
NOTES


8 CSPC, 1574-1660, pp. 79, 73. Instructions to Governor and Council, 19 April 1626, printed in VMHB, 2 (1895), 393-396. Instructions, 6 Aug. 1628, APCC, I, 128.


16 Ibid., pp. 75, 84, 87, 89. Winthrop, History, II, 229-231.


26 Poore, comp., Federal and State Constitutions, II, 1600.

27 Copies of charters and concessions may be found, ibid., and in Boyd's Fundamental Laws, pp. 2-105.


33 Examples of dual officeholding may be found for Lancaster County (1656) and Lower Norfolk County (1672) in The Old Dominion in the Seventeenth Century: A Documentary History of Virginia, 1606-1689, ed. Warren M. Billings (Chapel Hill, 1975), pp. 82, 85. Berkeley reported in Dec 1673 that men were unwilling to leave home in wartime for fear of jeopardizing their families and properties to white and black servants and single freemen of doubtful allegiance, pp. 258-261. Hening, ed., Statutes at Large, II, 126, 126-127, 209, 215, 220-221, 246-247, 258, 304-305. CSPC, 1669-74, no. 1118. APCC, I, 593.
CHAPTER FOUR

Imperial Reform of the Colonial Militias, 
1674 - 1721

Within all his Majesties realms and dominions, 
the sole supream government, command and dispos- 
sition of the militia . . . is, and by the laws 
of England ever was the undoubted right of his 
Majesty.

--Parliamentary Militia Statute (1661)\(^1\)

Order for militia-officers to send in lists of 
their men and arms, and to signify to their dele-
gates, when elected, their opinion as to the ne-
cessity or otherwise of new-modelling the militia.

--Council of Maryland (1698)\(^2\)

The Restoration Militia Statute, passed in 1661, recognized the 
royal prerogative of military command in England and the colonies ("his 
Majesties realms and dominions") and denied the right of Parliament or 
individuals to challenge that power. Thus when Charles II and his 
agents turned their attention to the North American and West Indian col-
onies, they found military systems which not only violated the spirit of 
executive command but also offended the king by direct reminders of the 
practices of his enemies during the Interregnum. The colonies did not 
cheerfully nor with much energy or concern aid one another during the 
most trying and dangerous periods of warfare. The Confederation of New 
England had proved a weak form of cooperation, and royal governors could 
not persuade their assemblies to act with vigor. Starting in the West
Indies, therefore, the Privy Council ordered royal governors to reorganize and "settle" the militia, modifying English practices to suit local conditions. Virginia's Governor Culpeper had the greatest success in 1681 in achieving recognition of command prerogative. The charter colonies proved more difficult to coerce. Charter revocation generally failed, as did the political consolidation of the Dominion of New England and later attempts to "reunify" these colonies to the crown. Reform continued despite the Glorious Revolution, finally coming to a halt at the end of Queen Anne's War. By that time, virtually every colony had adopted many institutional characteristics of the English militia, and combined wartime military command had been imposed on some of the northern colonies. Legislative authority in military affairs had begun its resurgence even before the crown turned its attention from reform. In institutional terms reform proved successful; in terms of a permanent shift to executive military authority, it failed. In terms of long-range influence, these reforms created constitutional crises which helped define the military powers of executive and legislative branches of colonial government up to the American Revolution.

The Anglo-Dutch wars of the 1660's and 1670's revealed inherent weaknesses in the colonial defense systems. The Privy Council first concentrated on the West Indian colonies, the area of most immediate danger from invasion and war. Between the wars, it ordered the governors of Jamaica, the Leewards, and Barbados to establish militia systems and to train and arm the settlers. Jamaica's governor had already had trouble with the assembly, which had balked at his broad
exercise of power. By 1677 lower house and council both objected to Lord Vaughan's commission because its militia provisions violated the colony's existing militia act which they refused to modify. In practical terms, he had "no positive power" to act without the consent of council and assembly. His successor, Lord Carlisle, had no better success. The council refused to pass a militia bill sent from the lower house because it allowed the governor discretionary power to obey his instructions from the crown, and continued its adamant refusals through four years and another governor. Sir Henry Morgan unsuccessfully sought a compromise in November 1681 by adding to the bill a clause which prohibited the governor from demanding compulsory militia service "or do[ing] any other thing contrary to the laws of England." Only in January 1682 did the councillors relent; even then they petitioned the Lords of Trade to explain that such discretionary power "rendered not only that Bill but all our other laws ineffectual" and subject to arbitrary executive power. By 1682 reform had begun to be successful elsewhere and the Lords of Trade ignored the petition. 3

Barbados, unlike the Leeward Islands which had quickly established a militia system after their capture from the Dutch, continued its system from the 1660's. Its assembly refused, however, to pass militia bills which gave life to the system for more than a few months at a time. Temporary acts placed considerable influence in the assembly and brought into doubt the crown's power to insist upon military service without legislative consent, an issue which came to plague royal governors and Privy Council for almost the next century. Contrary to instructions from the Privy Council, Governor Atkins failed
to secure a permanent act. His successor improved the militia system
but also failed to persuade the assembly. By the early 1680's, there-
fore, the Privy Council had achieved only limited success in militia
reform in Barbados. 4

Virginia, the only mainland royal colony in the 1670's, also caused
problems for King and Privy Council. Military issues played a major
role in inciting Bacon's Rebellion which disrupted colonial stability
and led to direct royal military intervention. Early in 1676 Virgin-
i ans charged Colonel Edward Hill with having illegally conscripted thir-
ty men for service outside their county. Apparently he had not se-
cured proper warrants though he claimed to have acted in the king's
name and by the governor's authority. His actions violated regulations
enacted by the assembly. The extent of legislative influence in mili-
tary affairs can be seen in the defense act of March 1676, passed be-
fore the outbreak of rebellion. It authorized the House of Burgesses
to name the locations for garrisons, nominate commanders, specify
rates of pay, establish articles of war, appoint special commissioners
to supervise impressment of men and supplies, and even officially dele-
gate power to the governor as commander in chief. As in the past it
waived the prohibition of the Statute of Northampton by ordering set-
tlers to carry weapons to church and to court sessions. When Bacon's
followers took control of Jamestown in June 1676, they also took over
the assembly and passed a new militia act to prosecute the Indian war
more effectually than Governor Berkeley had done, another military
grievance. The act authorized a larger operational force composed of
both infantry and cavalry to be paid by the counties. Men could still
be conscripted for service but were allowed to hire substitutes. Finally each company could nominate, and in effect elect, its own officers who would then be commissioned by Nathaniel Bacon, the commander in chief. The two latter provisions attempted to reform two powers of prerogative which some men found objectionable—compulsion and patronage. Both had been or were becoming sensitive issues in England and the other colonies.\(^5\)

When Bacon died in 1677 the rebellion collapsed. British regulars arrived only in time to suppress the last pockets of resistance, but remained in Virginia for several years as the main physical support of government. The reconstituted assembly responded to the governor's orders to prevent further disturbances by prohibiting armed gatherings of five or more men without explicit legal authority on pain of prosecution for riot and mutiny.\(^6\) Helen Hill Miller has called this act a direct attack on the right to bear arms, but since no such right then existed and the assembly simply followed accepted legal procedure in dealing with rebellious situations, her conclusion is groundless. Men could gather for legal purposes of militia training and service, when summoned by proper warrant, the only "right" of arms which English law then recognized. Although Virginians had not previously been prohibited from carrying weapons, the king's prerogative supplied the source of law, and it guaranteed no right to arms. During the rebellion some small arms had been confiscated in Isle of Wight County, probably for use by expeditions against the Indians and possibly without proper warrants, a violation of a standing law, not of a constitutional right. In June 1680 the assembly formally
forbade white and black slaves from carrying arms, so apparently there had been no earlier explicit legal restrictions. Under English law, however, no one could gather in armed or unarmed groups larger than twelve without possible charges of riot or treason, regulations implicit in the commissions of the royal governors. Thus no right to bear arms outside legal militia service existed.7

Quaker reaction in West Jersey in 1681 to military activities in the colony indicates contemporary understanding of the concept of arms bearing. Quakers among the proprietors insisted upon exemption from military duties and had their beliefs set forth in the Fundamental Agreements issued in November 1681. Quakers claimed that they had and desired "no freedom to defend themselves with Arms," no ability "for Conscience sake [to] bear Arms," and therefore should not be compelled to do so. They recognized that some men "judge it their Duty to defend themselves, Wives and Children with Arms." Since compromise presented the only realistic solution to the problem of colonial security, the Agreements exempted Quakers from bearing arms and allowed others to "have their Liberty to do [so] in a legal Way." Once again colonists recognized the necessity for legal restrictions on the use of arms. The Agreements established an unwieldy and unique committee to supervise defense needs and allowed any members "Duty bound to make Use of Arms" to vote on raising men and money for war. Although this system was never implemented, Quakers thereafter were exempt from duty under West Jersey militia laws.8

Culpeper had less success in settling and reforming the militia. The Privy Council had instructed him, as it had the West Indian
governors, to arm and bring under militia organization all freemen and Christian servants. The latter provision met heavy opposition from masters who had expressed their fear during the Dutch wars of leaving homes and families unprotected from the consequence of unarmed assault by servants and slaves. Bacon’s Rebellion surely reinforced their misgivings, but Governor Berkeley’s estimate that “six parts of seaven at least” of Virginia’s population “are Poore Endebted Discontented and Armed” had little basis in reference to arms. In 1673 Governor Chicheley had found that only a tenth of the militia had weapons. Seven years later about half of the 7000 militiamen had firearms. These reports do not indicate the numbers of weapons held outside the militia, but they do give a different impression from Berkeley’s since the militia comprised most freemen, who were required to furnish their own equipment. Thus, shortages of arms, the unwillingness of masters, and the lack of qualified officers frustrated the little effort Culpeper put into implementing these instructions before returning to England. During his absence, problems with the militia became especially acute. The tobacco cutting insurrections of 1682 and the threat of Indian war emphasized the need for a reliable military force. In November 1682 the assembly replaced the regular companies introduced during Bacon’s uprising with twenty volunteers from each county to guard the frontiers.

Paid voluntary guard units were not “militia” in the sense used in England or America. In England, authority for their establishment was statutory or based on prerogative, not part of the common law obligation on which posse, trained band, and militia service were grounded.
The act of volunteering made the soldier's relationship to the government contractual, not obligatory. Legally, no man could be compelled to serve in the guards or army. In Virginia, "militia" was a specific institution, created by prerogative demand expressed through statutory law but based ultimately on the common law obligation of community defense. Frontier guards represented contractual service, therefore outside the "militia" system but inside the military authority of government. Since by technicality common law did not legally apply to Virginia, governor and assembly could compel men to serve as guards. In April 1684 a statute replaced the county guards by a force of 120 volunteer cavalymen, with provision that the governor could issue warrants to conscript men if the quota was not voluntarily filled. 10

The House of Burgesses refused to renew the conscription act when it expired in 1685. The new governor, Lord Effingham, therefore sought to raise twenty-four men on his own authority to serve in the king's pay, with the assembly authorizing an equal number in colonial pay. He had been instructed to reform and "methodize" the Virginia militia, bringing it "as near as ye Constitution of this governm' will beare to ye Kingdom of England, both for horse, and ffoot." Like the English militia which Charles II had sought in 1662, the colonial force would include a "Standing Militia" in each county, based on the number of taxables, to provide a permanently embodied defense of colony and governor. Effingham, however, dissolved the assembly for other reasons, and the proposal was lost. By the time of the coronation of James II, Virginia's governors had achieved one major military goal in persuading
the assembly to recognize royal command prerogative but failed to implement fully their orders to reform the institution of militia.\textsuperscript{11}

The crown faced a different problem in the northern charter colonies. Whereas the Privy Council could simply order Virginia's royal governors to enforce the wishes of the crown, the corporate and proprietary charters elsewhere created an effective buffer against Privy Council action. The king could not unilaterally modify the charters; thus he had to seek other means of reform up to and including charter revocation. Infractions of the newly imposed navigation system brought New England again under royal scrutiny. As early as 1675 English officials had contemplated some form of colonial consolidation under a single governor-general. Military inadequacies of the Confederation of New England during King Philip's War in 1675 and 1676 added to the colonial problem. Interregnum military practices and legislative military dominance, together with reports after 1677 of irregularities such as improper military oaths of allegiance, illegal conscription, and questionable composition of forces made the need for reform all the greater. Edward Randolph, the royal Surveyor General of Customs and New England's nemesis, constantly criticized defense arrangements. None of his suggestions was accepted because the crown had begun proceedings to revoke the Massachusetts charter. Therefore, the crown and Privy Council turned its immediate attention to the military and charter problems of Bermuda, a case with many parallels to Massachusetts.\textsuperscript{12}

By the late 1670's the Bermuda charter was also ripe for revocation because Company rule had become quite weak and had failed to
provide effective government. The English attorney general formally charged the company in 1681 with failure to provide adequate defenses and for imposing illegal land and poll taxes. He proceeded against the charter by writ of *quo warranto*. Although legal difficulties delayed action, the issue of military defense remained vital to the government's case. The attorney general argued in June 1683 that despite the explicit grant of military authority to the Somers Island Company contained in the charter there was no obstacle "to exclude the King from ordering and disposing of the militia of the Island for the safety thereof, or from constituting a Governor or lieutenant in order thereunto." This opinion was highly significant for the issue of militia command elsewhere in the colonies in the next decade. Despite the charter authorization of immediate military command, the King still exercised his supreme command prerogative. Before any action could be taken upon this power to appoint an island commander the charter fell in 1684, soon followed by that of Massachusetts Bay.

After charter revocation Massachusetts became a royal colony and would have received its own governor had not the pressures toward colonial consolidation already brought most of the northern colonies into the newly created Dominion of New England. Massachusetts Bay joined New York, New Hampshire, Plymouth, New Jersey, and Pennsylvania under Governor Sir Edmund Andros. Andros, the previous governor of New York, had been appointed "Captain General and Governor in Chief" of each of the colonies with full power as the King's military lieutenant of immediate command of forces, including power to transfer the militia to any other colony for operations and power to exercise
martial law during invasion, insurrection, and war. In 1686 Andros assumed the government of Rhode Island after demanding the surrender of its charter. In 1687 he took control of Connecticut.\textsuperscript{14}

In militia affairs the Dominion of New England made one major change: it eliminated legislative influence by abolishing the lower houses. The governor and his council exercised total authority for all the colonies. They did retain for the time being all the previous commissioned officers, demanded quarterly reports on the state of forces, and ordered that small arms and artillery be stockpiled. By 1688 they assumed closer control by reducing somewhat the number of exemptions from personal service granted by each colony and began to specify the number of \textit{militiamen} to be maintained in each jurisdiction. The governor and council eliminated all the old trainband, council of war, sergeant major general characteristics of the New England militia and replaced them with the more standardized units of companies and regiments used in England. None of these changes, however, were as radical as those Effingham had proposed for Virginia or those being attempted in England.\textsuperscript{15}

Military consolidation, however, provided colonists with a grievance against James II and his governors and officials in America. When news of the Glorious Revolution reached the colonies in the spring of 1689, Massachusetts, New York, and Maryland experienced their own "revolutions" against the Dominion of New England and Lord Baltimore's proprietary rule. In the process, Andros was overthrown and the Dominion destroyed. New Yorkers complained about the powers illegally held by Catholic officers, about Lieutenant Governor Francis
Nicholson's obstruction of the militia fulfilling its duties, and about his threat to use Irish troops against New York City. They also condemned the exercise of martial law and compulsory quartering. Marylanders likewise condemned the military dangers to which the proprietor had exposed the colony and the serious attempt governor and council had made to wrest from the assembly "an unlimited and tyrannicall power in the Affairs of the Militia." In January 1689, moreover, the council had issued a proclamation requiring militiamen to turn in all public arms to certain gunsmiths for repair, later to be reissued to men who would support the crown and proprietor. When the council refused to return the weapons, the anti-proprietary party labelled the whole affair "attempts to disarme the Protestants," convincing them that they had a "just case as to fly to arms." In the Maryland experience, unlike the English, "disarming" involved not the confiscation of private weapons but the recall of public firearms. The result may have been the same--inability to fight and the weakening of collective military potential--but the procedure and the grievance differed.

The Glorious Revolution really marked only a dividing point in colonial military reform. The experiment in total consolidation failed, leaving the crown with the less efficient possibility of combined military command. The War of the League of Augsburg starting in 1689 and the War of the Spanish Succession under Queen Anne in 1702 required improved colonial defenses. King William, directing the first war, decided to continue his predecessors' efforts to reform the colonial militias and moderate legislative power in order to strengthen the hands of the governors.
In an attempt at consolidated military command using its authority over the royal colony of Massachusetts as a base, in December 1691 the Privy Council appointed Sir William Phips of Massachusetts captain general and commander in chief of the militia and other forces of Massachusetts, Connecticut, and Rhode Island in both war and peace. The two corporate colonies refused to comply with Phips's orders, basing their opposition on the military powers granted in their charters. On August 2, 1692, Rhode Island petitioned the crown, complaining that the commission given to Phips had violated their charter rights. It claimed that because the charter of July 1663 postdated the English militia acts of 1661 and 1662, the king had thereby surrendered his military authority over the colony. Phips's attempt to commission militia officers objectionable to the Rhode Island government simply emphasized the danger of exercising authority from outside the colony. When many of the nominees refused the commissions, the colony believed itself defenseless and convened the General Court "for the resettling the militia" in its own way. The questions thus remained open for two more years.17

In the fall of 1692 the crown ordered each of the colonies, corporate, proprietary, and royal, to assist New York in the defense of the Albany frontier. At the same time the Privy Council attempted new military consolidation by appointing Governor Benjamin Fletcher of New York as captain general of New York, New Jersey, Pennsylvania, and Connecticut (transferred from Phips). The commission explicitly cited the militia acts of 1661 and 1662 as authority for the action.18 In a significant opinion the attorney general argued that royal
prerogative and sovereignty over Connecticut and New Jersey allowed
William and Mary to

appoint Governors for these places with such Powers, and authorities for the Government thereof, and for raising men and furnishing Provision for the necessary defence of his Subjects and the neighboring Colonies. 19

Connecticut did not accept this decision willingly. In September 1693 the towns requested the assembly to petition the crown again "for the continuance of our militia and all our charter priviledges." The assembly soon appointed Fitz-John Winthrop its agent and urged him to argue that Connecticut's forces differed from those of England. The small and scattered population necessitated close supervision by a militia residing in the colony. 20

Before Winthrop could sail for London, however, Governor Fletcher paid a memorable visit to Hartford to publish his commission. He immediately came into conflict with the assembly. Without any attempt to allay their fears of executive despotism, he rejected their written arguments against his assuming command and refused to read the charter. His manner was brusque.

I doe not demand the Militia from you [he was reported to have said], knowing very well as you yourselves doe, that you have no right to it, being settled on the Kings and Queens of England and their successors, by severall Acts of Parliament and by noe power on earth can be demised from the present possessor of the Crown. 21

The General Court argued that the charter had granted them sole power and that Fletcher's commission did not explicitly supersede the charter. Because the charter had never been revoked, but in fact had been reconfirmed by the attorney general in 1690, they urged Fletcher "to
continue the Militia as formerly" until Winthrop could get a definitive ruling from the crown.\textsuperscript{22} Fletcher did not wait. When he attempted to muster the local militia to read his commission, the traditional story goes, the commander ordered the drums beat so loudly that Fletcher could not be heard. He gave up in disgust, returned to New York, and reported to London, admitting that he could not compel obedience because he had had no troops with him. The charter, he argued in November, granted only immediate command powers which did not extend to his own project, "a fixed, standing militia."\textsuperscript{23}

Fletcher had some supporters in Connecticut, one of whom, Gershom Bulkeley, published a pamphlet early in 1694. He argued persuasively that Connecticut's very failure to comply with Fletcher's commission (regardless of how legally correct their interpretation of its validity was) made the General Court potentially guilty of treason. Because militia officers had continued to call out and train armed troops, without the authority of their commander in chief, Governor Fletcher, legally they acted as private citizens, not commissioned military officers. Their actions could thus be construed as constructive levying of war against the crown, treason by statutory definition. Bulkeley also argued in favor of the validity of Fletcher's commission, quoting extensively from the Ship Money Case of 1637 that the king was generalissimo of all forces in the realm and dominions.\textsuperscript{24}

In January 1694 Fitz-John Winthrop arrived in London and petitioned the crown for redress of Connecticut's grievances against Benjamin Fletcher.\textsuperscript{25} At the basis of all his arguments, Winthrop was assuming a direct legislative-executive relationship between colony
and crown, making the General Court the analogue of Parliament and heir
to Parliamentary rights. The militia, he argued, was a primary sup-
port of the government, with

so close a connection . . . that whosoever hath the
absolute power of the former, must draw all the author-
ity of the latter to himself . . . for the command of
every mans person will undoubtedly produce the com-
mand of every mands purse, and the alteration of the
present modell of the militia, will be an alteration
of the laws also.

The people feared removal of civil restraints on military power, especi-
ally the power to demand money from the assembly. A commander from
outside Connecticut "could become the perfect master of the lives, li-
berties and estates of the English in that colony," and could not
be held accountable by the people of that colony. Finally, as the Eng-
lish militia was commanded by the king and lieutenants under Parliamen-
tary restrictions, so Fletcher's command should be subject "to the
Laws and Constitutions" of Connecticut.26

At the same time Privy Council, Lords of Trade, and attorney gen-
eral were also dealing with complaints from Rhode Island, still unhap-
py with Governor Phips's commission. The assembly addressed William
and Mary in October 1693, seeking resolution of the militia issue and
confirmation of their charter. Two months later the attorney general
presented an important decision which modified his earlier opinions on
Bermuda and Connecticut and New Jersey. He confirmed the legality of
Rhode Island's charter, including the provision granting the corpora-
tion appointment power of militia officers, agreeing that nothing in
the charter was contravened by the Restoration militia acts. There-
fore, in point of law, there was no reason to deny the petition
for confirmation. The crown, therefore, confirmed the charter in December 1693.27

Final resolution of the first phase of the militia command issue came the following spring. In April 1694 the attorney general presented yet another opinion concerning Rhode Island, Connecticut, and East and West Jersey. It recognized that the charters and grants did indeed "give the ordinary power of the militia to the respective governments" but argued that the crown had authority to appoint a "Chief Commander" of a small part of the militia "in times of invasion and approach of the enemy, with the advice and assistance of the Governors of the Colony" who would command the remaining forces for local defense. During peacetime all power would revert to the colonies. The Privy Council promulgated the opinion on April 13, specifying that the Councillors would soon assign quotas to each colony for the defense of New York. In August 1694 Queen Mary directed each of the mainland colonies to prepare troops for service in New York.28

Establishing a model militia system in Massachusetts had been one of the earliest imperial reform goals of the 1680's. Failure to achieve it had helped lead to charter revocation in 1684 and the establishment of the Dominion of New England. The revolutionary settlement had granted a new charter in October 1691, but Massachusetts did not resume full corporate status because the crown appointed its governor. He was empowered to act as chief commander of the militia, exercising by himself without assembly approval the standard charter powers of training and leading the colonial forces, imposing martial law, and building forts. He could not assume absolute authority because he
was explicitly forbidden to order the militia to operate outside Massachusetts without the "Free and voluntary Consent" of the soldiers themselves or the express consent of the general court. This provision set up a potentially dangerous confrontation between the new governor, William Phips, and the assembly concerning the legitimacy of his instructions ordering him to use the militia in any colony needing help, especially New Hampshire, Connecticut, and Rhode Island over which he also held commissions as military commander. The assembly neatly avoided the confrontation and enhanced its own power by passing a bill in June 1692 to authorize the governor to "raise and transport" militiamen into those colonies and New York. The bill expired in six months. Two implications may be derived from the action of the assembly. It established the precedent that the governor must get assembly approval before he could implement his instructions in certain military matters. The temporary nature of the act also required continued and frequent application to the assembly for military authority, one basis of legislative dominance of military affairs in several colonies in the eighteenth century, as will be seen in the next chapter.29

The assembly, however, lost a more important opportunity for enhancing its military power in November 1693 by passing a permanent act to organize the reformed militia. In fact, Massachusetts was the only colony in the eighteenth century to have a permanent militia act and it also had the only act prohibiting the carrying of weapons in public. Soon after the colony received its new charter, the assembly proved generally obedient in passing legislation initiated by the Privy
Council. In November 1692 it enacted the basic provisions of the medi-
eval Statute of Northampton and added a penalty. A year later it
passed the militia act, a model which the Privy Council wanted for
every colony. It required all males from 16 to 60 to "bear arms" in
times of emergency, but exempted officers of government, clergymen,
teachers and students, certain millers and shipmasters, and all Blacks
and Indians from training and musters. Each had to provide certain
specified military weapons at his own expense. The act eliminated vir-
tually all the objectionable characteristics of the militia from the
1640's and 1650's. A companion act passed the same day, also perma-
ment, reiterated the personal liability to service and established
procedures for raising wartime troops by voluntary enlistment and con-
scription. Despite the permanency of the acts, the assembly did par-
ticipate in their formulation and thus help define military obliga-
tion. 30

In New England, the governor of Massachusetts exercised command
authority over the militia of Massachusetts and New Hampshire (both
royal colonies) and wartime command over Rhode Island. Because the
militia of New Hampshire was too small and scattered to provide oper-a-
tional forces, and because Rhode Island continually offered excuses
instead of troops, the militia of Massachusetts attained a high level
of expertise and wartime experience in defending the exposed frontier.
New York's militia, on the other hand, never developed into an effi-
cient, operational force. After 1692 the crown required all the colo-
nies to provide troops or money for the defense of the Albany frontier.
It stationed four British regular independent companies in the colony.
At no time after the 1690's, John Shy has demonstrated, did the crown intend for the colonies to defend themselves. Militia was an auxiliary force for field operations and a local defense force, yet the vulnerability of each of the colonies to land and sea assault insured a permanent need for such a local force. 31

From 1695 to 1700 the crown insisted upon militia reform and assistance to New York. During 1695 and 1696 both Connecticut and Rhode Island balked at Governor Benjamin Fletcher's incessant requisitions for troops, citing the opinion of the attorney general, their own legal definition of orders in council, and their needs for home defense as excuses for failing to send their quotas or for sending them after long delays. In 1696 Fitz-John Winthrop presented arguments to the new Board of Trade to temper Fletcher's frequent demands. He claimed that Fletcher's time limits were too short, the colony too open to land and sea invasion, insufficient supplies, funds, and men. In February 1697 Winthrop petitioned the Board concerning the commission of the Earl of Bellomont who was to replace Fletcher. He argued that "the imposing a General over them with power to demand arms and ammunition and lead the inhabitants out of the Colony without the consent" of the corporation would violate the charter. In April the Board approved Winthrop's request, and in August the Privy Council exempted both Connecticut and Rhode Island from the full force of Bellomont's commission. Once again the corporate colonies escaped the influence of military consolidation and reform. 32

To the south, however, Maryland came under the full force of reform. Lord Baltimore had lost his proprietorship and the colony had
been royalized in 1692. In 1693 Francis Nicholson, the lieutenant
governor of the Dominion of New England, became governor of Maryland
where he continued his attempts to create an efficient militia. At
first he allowed the old acts of 1678 and 1681 to be revived. In May
1695 he insisted upon regulations for impressing or confiscating arms,
horses, and supplies for militia use. The lower house procrastinated
so badly in accepting Nicholson's reforms that he threatened in 1697
to go to the county militia musters with "a copy of the old law in one
hand, with the officers necessary to enforce it, and of the proposed
law in the other, that the people may see that an easier law than the
present was proposed to the Delegates, but rejected." The lower house
called his bluff, defeated the bill, and apparently suffered no conse-
quences from the other colonists.

In the summer of 1697 Nicholson discovered that Maryland's militia
had serviceable arms for only one-eighth of its members and in 1698 took
steps to improve that situation and to "new-modell" the militia. The
council ordered local officers to compile muster rolls, inventory arms,
and inform the delegates of the need for militia law reform. Evi-
dently Nicholson could get no compliance without statutory revision
and expected that only with pressure from county leaders. When the
assembly sat in March 1698, he again proposed reform, but again the
lower house "resolved that the old Militia Act should remain unaltered."
Nicholson complained to the Board of Trade that the old law was so in-
sufficient that he could not find enough men qualified to be officers.
He hesitated to issue commissions because he feared that such new
officers as were available would use their power "to the king's
prejudice" by attempting revolution or at least "very great disturbance." In November he tried the delegates once again, and again he lost. In 1699 they did pass a new law but with only slight changes from the old one. For all Nicholson's attempts, he achieved very little before he left Maryland to be governor of Virginia. 34

The problems Nicholson faced in Maryland were not unique. Elsewhere assemblies opposed executive demands for militia reform. This colonial opposition impelled imperial officers to more extreme solutions—including governmental consolidations, intercolonial military command, and "reunification" of all charter colonies to the crown and their conversion to royal provinces. As early as December 1695 Edward Randolph had proposed a grand reorganization of the mainland colonies and the Bahamas into six consolidated governments. In September of the next year the new Board of Trade sent an important statement on colonial defense to the king. The colonies in general had failed to comply fully with defense quotas and were

so crumbled into little Governments and so disunited in those distinct interests that they have hitherto afforded but little assistance to each other, and seem as they now are, to be but in ill posture [for defense], and a much worse disposition to doe it for the future.

The colonies certainly had sufficient manpower for effective defense. The Board proposed that the king appoint a single "Military head" or captain general for the colonies, well within his prerogative, although this officer's power would exceed the limits defined in the 1694 attorney general's opinion. Not only would he command regular and militia forces with authority to levy men and arms, subject only to
the "limitations and instructions" of the crown, but he would also "appoint and Commission officers" for training those he considered fit to bear arms. As for the Quakers who "out of mistake or pretence of conscience refuse their personal aid," the commander would have discretionary power to accept money as a commutation. Finally, the captain general would be given the civil powers as governor of whichever colony he happened to be in at any one time.35

The Board of Trade thus recommended a significant revision of colonial military policy, attempting to restore prerogative militia powers through a commander in chief who would operate unhampered by legislative restraint. The tenor and goals of this proposal went against the current of colonial institutional and constitutional development. Whereas the colonies in the legal status of dominions lacked the benefit of common law and parliamentary restrictions on executive power and had been seeking to establish a political relationship with the crown similar to that of Parliament, imperial officials were attempting to bring the colonies more closely under royal control without legislative limitations. There can be no doubt of the authority of king-in-parliament. Robert Schuyler has argued that after 1689 Parliament did have full legal authority to legislate for the colonies and presumably to extend the benefits of common law. But it chose to allow the crown in its executive role to govern colonial affairs. Because the practical relationship between king and colonies changed very little after the Glorious Revolution, many colonists did not recognize any shift in sovereignty. Therefore, recommendations and actions to achieve colonial union seemed to threaten the fundamental constitutional
relationships between colonial dominions and the crown, threatening especially to dissolve the legislative restrictions so laboriously imposed in America.

The Board's proposals were soon joined by other official and non-official recommendations for colonial unification and by additional letters of complaint from royal governors. Even William Penn urged the Board to consider a general Congress of colonial deputies and a wartime "Cheife Comander" of the colonial quotas. Early in 1697 the Board presented another representation to King William, which argued that

the different forms of government in the various colonies render all union, except under such a military head, impracticable, and that the regulations of 1694 have been so little complied with that it requires the exertion of a more vigorous power than has yet been practised to make them produce the desired effect.

Therefore, the king should appoint a single governor for the northern colonies who would have wartime militia command over the charter colonies. Because the assemblies would present problems, the Board suggested that William inform the assemblies that they must "enact such laws as will enable your Captain-General to execute his Commissions."

William therefore appointed the Earl of Bellomont as governor of New York, Massachusetts, and New Hampshire, with wartime command authority over East and West Jersey, Rhode Island, and Connecticut; the latter two, however, escaped his full military power because of Fitz-John Winthrop's appeal to the Privy Council.

Bellomont's multiple commissions marked the beginning of a third phase of imperial experimentation in defense arrangements. The first
phase had seen royal governors given peacetime militia command over charter colonies, the second wartime command only. The third phase was an attempt to consolidate executive power under a single officer. This experiment ended with Bellomont's untimely death and an effort to use parliamentary power to eliminate the charter colonies altogether. Colonial defense played an important role in the entire reunification process and provided a vulnerable point upon which to revoke the charters. Especially after 1699 charter governments were challenged on grounds of irregularities in fulfilling the defense requirements of the charters themselves and of royal orders. Rhode Island was charged with allowing militia officers to be elected by the men of their units and general officers by colony-wide vote. Pennsylvania was frequently accused of total defenselessness.

In 1701 crown adherents began the process of charter revocation, while the Board of Trade continued to gather data on the practical aspects of colonial defense. Edward Randolph sent a series of reports surveying conditions in each colony; he heavily criticized the proprietors for failing to maintain adequate militia systems. The Board therefore argued in its report to Parliament that

these governments do not put themselves into a state of defence against an enemy; nor do they sufficiently provide themselves with arms and ammunition; many of them having not a regular militia, and some of them being no otherwise, at present, than in a state of anarchy and confusion.

Therefore, because defense was a "matter of greatest importance to the trade of this nation," the Board strongly urged that the charters be revoked and the colonies reunited to the crown. On April 24, the House
of Lords introduced the first reunification bill, but it never reached the floor for debate. The Board of Trade renewed its efforts, and sent another lengthy analysis to Parliament.

In the spring of 1702 Colonel Robert Quary, a Board agent who had long sought to eliminate Penn's proprietary rights, submitted a number of long and important papers on the state of colonial defense and political establishments. His scheme for "better Setling & Regulating the Militia" seems to have been a modification of the Massachusetts model law. Every freeman between sixteen and sixty would constitute the militia, commanded by a royal officer, and organized in independent companies (rather than regiments) of infantry and dragoons. Each inhabitant's wealth determined his militia obligation as in England, in order to distribute the charges of defense "Equally on the poore & Rich." The latter would serve as cavalry and be required to "find" one or more additional men. Soldiers would be provided with public, not privately-owned weapons. Quary had little patience with the Quakers; he therefore proposed that they perform "equal duty on some public works" as well as pay a commutation fee. He also proposed using martial law, compelling the militia to go to the aid of other colonies, and forcing the assemblies to enact his plan, by the power of Parliament if necessary. Quary's recommendation provides an important insight into the crisis in constitutional relations over defense. Not only had the crown interfered for over a decade in the general management of colonial military affairs, but now royal agents were proposing to strip the assemblies of their authority to regulate their own militia.
Virginia's response to the reforms of Governor Francis Nicholson indicates the reaction which would have met Quay's ideas. Nicholson made suggestions similar to those he had made in Maryland, especially urging the House of Burgesses to enact more effective legislation. When like Lord Culpeper he proposed that "all Planters and Christian Servants" should be armed and trained, the Burgesses were willing to amend the law but complained that such a reform "would be very burthensome, uneasy and ruinous to the Inhabitants . . . and would be attended with many Evil and pernicious Consequences." The poorer freemen could not afford to arm their servants nor have them continually on call for service because it would reduce their already marginal profits. Also, those servants were generally the "worser Sort" of Europeans and Irish, whom it could be dangerous to arm.41

In 1701 Nicholson convinced the council to order county officers to intensify training and select a small number of "young brisk men" to be formed into special companies for immediate service. He also proposed changes in the militia act: all arms should be of a standard bore size; infantry should be converted into cavalry and dragoons; each county should build a public magazine, provide prizes to encourage the development of "feats of arms or deeds of Chivalry," establish an alarm system to warn against invasions, and appoint mustermasters to train the local troops and keep accurate records. All these reforms, of course, were expensive to the counties, so nothing was done.42

The fall session of assembly found the governor again pressing for change, this time arguing for increased supplies of arms, pay for militia service, and power to impress arms and provisions, as well as
selecting small numbers of men for expeditions without mobilizing the entire militia. The Burgesses responded with a series of resolutions. They believed enough arms were available in the colony; a special fund was unnecessary. They opposed buying arms from local merchants because Nicholson already had limited impressment authority. They felt mustermasters were too expensive: it was the duty of local officers to train their men.43 Nicholson later warned the Burgesses of the danger they placed the colony in by failing to aid New York and "to new frame and model the Militia." Still they refused to act. In December he explained to the Board of Trade why militia reforms had failed. Most Virginians were too provincial to recognize the wider needs of empire. Tobacco crops would be ruined by neglect even during a short, month-long campaign in the growing season, and servants left at home could not be trusted either to watch the crops or to remain at peace.44

Despite these problems, Robert Quary commended Nicholson on the progress he had already made but agreed that the militia of Virginia in general remained "undisciplined and unskillful," especially because of the lack of arms and ammunition. On the basis of this report the Board of Trade recommended that the crown send a supply of weapons to Virginia to be paid for by the assembly. Nicholson appointed new officers and bought arms to sell to the three-quarters of the militiamen not adequately armed. During the 1701 assembly session he convinced the Burgesses to grant him discretionary power to call out the militia during recess in case of need—"as long as it was "without the Charge of a Standing force." When the assembly convened in August 1702, Queen Anne's War had begun, giving Nicholson's proposals new
significance and impelling the Burgesses to renew his discretionary powers. In the following two years Nicholson used only about a fifth of the militia for active operations, transforming them into what Quay later called the best militia on the continent. 45

Nicholson soon met the most serious opposition to his militia reforms. During the spring of 1704 what Quay had called the "uneasy, factious and turbulent spirits" in the colony began to accuse the governor of military irregularities, including his use of "blank" commissions for county militia officers. These enabled him to fill in the names of his supporters and remove his enemies from military posts without restraint. More damning was Robert Beverley's History and Present State of Virginia, published in London in 1705, levelling criticisms against both Nicholson and Quay. He accused them of recommending "That a standing Army be there kept on foot, to subdue the Queen's Enemies; which in plain English, is imploring Her Majesty, to put the Plantations under Martial Law." Beverley also argued that Nicholson had attempted to transform the militia, "the only standing Forces" in Virginia, into an army, and that the governor had threatened "very publickly, That he knew how to govern the Country without Assemblies; and if they should deny him any thing, after he had obtain'd a standing Army, he wou'd bring them to Reason, with Halters about their Necks." Whether Beverley expressed the real fears of Virginians or simply directed his arguments to the prejudices against standing armies of his English audience, this work indicates that Virginians were not ignorant of the ideological controversies in England. 46 James Blair, President of the College of William and Mary and Anglican commissary, played a
leading role in the opposition against Nicholson. He too used the ideology of militia, gleaning arguments from Andrew Fletcher's *Discourse of Government with Relation to Militias*, an important tract in the English controversy over the army, and Fletcher's speeches before the Scottish Parliament. Blair accused Nicholson of acting like Cromwell and Nathaniel Bacon in his relations with the colony, subverting the militia by transforming part of it into an unconstitutional army. Although these expressions of ideology in Virginia were relatively limited, they occurred in a highly charged atmosphere of legislative opposition to executive military power. They tended to reinforce older constitutional attitudes rather than supplant them, a clear foreshadowing of later extensive use of ideology in all the colonies. 47

Simultaneously with this controversy, according to Quary, the Virginia council posed a much greater danger to executive military power than was the House of Burgesses, by gathering extensive military power into its own hands. By 1706 they had transformed themselves from mere regimental colonels into county "Lord Lieuts." and had assumed the power to appoint county officers, including new colonels. The Burgesses restricted the powers of the governor; now the councilors had taken a big step toward stripping him of all practical military command. 48

At this time Rhode Island and Connecticut had again become involved in the defense of their charters. After the failure of the first reunification bill, the crown had commissioned Lord Cornbury and Joseph Dudley as governors of New York and Massachusetts, respectively, to replace the deceased Earl of Bellomont, because a single
governor for both regions had proved inefficient and ineffective. One of Cornbury's first requests after arriving in New York was for power to appoint militia officers in both New Jersey and Connecticut. Whereas Dudley's commission explicitly gave the governor only wartime command of the Rhode Island militia, Cornbury had been made captain general of Connecticut. After negotiations in Whitehall, Henry Ashurst, the colony's agent, convinced the Privy Council to modify Cornbury's commission to parallel Dudley's.49

When Joseph Dudley, who had been president of the council of the Dominion of New England, went to Rhode Island to publish his commission, he received little better treatment than had Benjamin Fletcher in Connecticut a decade earlier. Dudley was not nearly so outspoken, but when governor and council insisted upon reciting their charter privileges, and then waiting for the assembly to meet the next month, he reacted with the same arguments Fletcher had used. He remarked "that the militia was by Act of Parliament vested in the Crown; and that is was her Majesty's prerogative to dispose thereof as she should think fit," and that his business was entirely with the governor and council, not the assembly. When he presented a legal warrant for mustering the local militia, the commander refused, contending that his commission required him to take orders only from the assembly or from the governor and council. Dudley gave up, returned to Boston, and reported this insubordination to the Board of Trade. The assembly's line of argument had changed somewhat since 1694; it now claimed to have been given by the charter "the sole power of the militia," not simply ordinary command powers. Because Dudley's new commission contained "no express
superseding of the power of the militia" and no order to surrender the charter, the assembly believed it their duty "to endeavor to continue the militia as formerly" until they received a definitive answer from the crown.

Rhode Island's actions strengthened the Board of Trade's case against the charter colonies. In November 1702 it wrote to the queen concerning the necessity for providing an adequate defense. It argued unsuccessfully that Parliament should act and that she should use the authority declared in the attorney general's opinion of 1694 to appoint a royal governor with civil and military powers over Rhode Island during the course of the war. During the next two years relations between Joseph Dudley and both Rhode Island and Connecticut worsened. Failures and delays in sending militia quotas to Massachusetts increased the level of irritation. Connecticut especially insisted upon using legislative councils of war and legislative commissioners to handle military affairs with Dudley, and he became aware of Rhode Island's practice of electing military officers. 51

These conflicts between legislative and executive control of the militia intensified the pressures for imperial reform. In 1704 the Board continued to report charter irregularities; during the summer it repeated its recommendation for a wartime governor for both Rhode Island and now Connecticut. Not until 1705, however, did the Privy Council order formal charges brought against the colonies. The charges cited failure to fulfill military quotas for New York and Massachusetts, refusal to submit to Dudley's commission, and disobedience to orders for mustering the militia. In January 1706 the Board presented its
evidence to the queen. Militia irregularities were only part of the whole pattern of governmental variations from the charter, failures to enforce the navigation acts, harboring of pirates, and encouraging of military deserters from other colonies. The report contended that the three New England charter governments had failed to provide adequately for their own defense.

These mischiefs [the Board wrote] arise from the ill use they make of the powers entrusted to them by their charters, and the independency which they pretend to, presuming that each government is obliged only to defend itself, without any consideration had of their neighbors, or of the general preservation of the whole.

The best solution, it repeated, was to revoke the charters and establish full royal governments. The attorney- and solicitor-generals thereafter presented an opinion reconfirming their 1694 action by declaring the legitimacy of the crown's appointing a wartime civil and military governor for the corporate colonies. They argued that as long as he was prohibited from changing property laws and judicial proceedings, his appointment would not violate the charters but would increase royal supervision.

Rhode Island's response to these proceedings indicates an increasing assertiveness on its part concerning the validity and fundamental importance colonists attached to the charter. The corporation argued that it had been "advised by Counsel that they are not obliged by Law to furnish the other Provinces with any Quota, nor doe they apprehend there is any necessity," but that they had indeed obeyed royal commands. It denied royal authority to appoint a military commander, relying on its reading of the charter in which "the Militia, or power of
commanding thereof, is fully granted to them by their Charter, and that they have been in possession of the same above 40 years." Therefore, they had rightfully prevented Dudley from reviewing the militia because Rhode Island, not he, commanded it.\textsuperscript{53}

By 1708, then, the issue of militia command in the corporate colonies remained as sensitive and as potentially dangerous as it had been in 1694. Neither Rhode Island nor Connecticut was willing to part with any portion of their charter powers, disregarding even the legal right of the crown to regulate certain aspects of their governments. Repeated orders and demands for troops and recognition of military commanders had been useless. As long as the charters remained in force, neither colony would submit to royal will. Massachusetts, however, was a special case. Its General Court had been charged with refusing to appropriate money for building forts and refusing to supply the royal navy with masts and other naval stores. The charter issue was concerned less with militia affairs than with sheer legislative power because militia command was securely in the hands of the governor both by statute and by charter grant. Legislative power over the militia became an issue only in the 1720's.\textsuperscript{54}

New York, on the other hand, had immediate problems over the precise issue of legislative power in militia affairs. The assembly had been involved since 1690 in the factionalism resulting from Leisler's Rebellion and had frequently opposed its governor, now Lord Cornbury. Since 1684, New York had been administered by only three militia laws, one in 1684, another passed by the Dominion of New England, and a third in 1691. All three had been permanent acts, with no expiration dates.
In 1702 a new act was passed, effective for only two years. Temporary acts, by their very nature as Barbados had discovered in the 1680's, placed tremendous power in the legislative body and vexed imperial authorities. Once precedent had become established, the governor had to go to the assembly to renew or amend the current law. Militia command, no matter how legitimately fixed in the governor's commission, was useless without statutory sanctions to enforce it. The assembly allowed the militia act to die seven times between 1704 and 1715 in the midst of Queen Anne's War. Four of the times had been for periods of less than a month while the assembly was considering revival. The other occasions involved lapses of nineteen months (November 1704 to June 1706), fifteen months (June 1707 to September 1708), and eight months (October 1714 to July 1715).\textsuperscript{55}

As early as September 1702, Governor Cornbury had complained about the wretched condition of most of the militia. The Board of Trade examined the first temporary act but did not criticize its time limitation, perhaps because many other colonies had consistently enacted limited acts. It urged Cornbury to attempt to use the act, but if it proved deficient, he must seek amendments. By 1704 the governor was convinced of the factionalism of his political opponents. He notified the Board that many of the members believed "themselves equal to the House of Commons in England; and that they were intitled to all the same powers and privileges, that a House of Commons of England enjoys." In England since 1690 the Commons had passed annual mutiny acts and supplementary militia acts with limited lives. Parliament had occasionally allowed the mutiny acts to expire, so that New York had
a clear precedent for its actions. In July 1706 Lord Cornbury suggested that the Board recommend to the queen the need for a Parliamentary mili-
tia act for the colonies because the provinces he was associated with, especially New York and New Jersey, had grossly inadequate laws and the assemblies refused to pass new ones.

Virginia faced the same predicament. Its militia had virtually disintegrated as an effective military force after Nicholson's recall, partly the result of inadequate laws, partly lack of enforcement. Toward the end of Queen Anne's War Governor Alexander Spotswood's at-
ttempts to revive the militia met with opposition from the House of Bur-
gesses similar to that which Nicholson had experienced. Local leaders accused him of perverting the system by transforming it into a "standing militia." He had indeed reduced the strength of the active forces from 14,000 (virtually universal obligation for freemen) to 3000 foot and 1500 horse troops, "to huff and bully ye people," according to the opposition. In their eyes Spotswood's actions constituted the "rais-
ing a standing Army at the yearly Charge of more than 600,000 lbs. of Tobacco, to the Entire ruin of the Country, and a means for him to gov-
ern Arbitrarily and by Martial Law." Spotswood admitted reducing the size of the militia and attempting to distribute the charges and obli-
gations of service more equitably between the better and "poorest sort" of colonists. But he contended that his reforms were "no more than what is agreeable to the Constitution of Great Britain." The colonists' fear of his small force seems to have had its basis in English and clas-
sical experience. The whole thrust of militia reform since the six-
teenth century had been to reduce the size of the county forces, to
make them more manageable and efficient. Cromwell's "New Militia" had managed to terrify the English country gentlemen by its energy and independence from the county magistracy. The "standing militia" of Virginia had the potential to throw off their dependence on the colonial magistrates in favor of direct obedience to the governor, who owed his loyalty to the crown, not the colony. 57

In 1715 a final reunification bill was introduced in Parliament, based upon colonial appeals for military protection and the recent Indian attacks on South Carolina. When the bill failed the Board resumed efforts to appoint military governors for the charter colonies. Once again Rhode Island protested the loudest. It instructed Richard Partridge, the colony's agent, to petition the crown to exclude Rhode Island from the commission and instructions of the new governor of Massachusetts, Samuel Shute. The Attorney General's opinion on the petition stressed the irrelevance of the military provisions of the corporate charters. The Restoration militia act had been "a declaratory law," the Attorney-General wrote. Therefore, "the power of disposing of the Militia was always in the Crown in all H. M. Dominions and was not vested by yt Act . . . . The Crown may as well put the disposition of ye Militia of a foreign Plantation in a subject as it may ye powers of government." Therefore, when the Board prepared Governor Shute's commission and instructions, it included Rhode Island under his military command in wartime. 58

Although Rhode Island's and Connecticut's continual opposition had not modified the position of the corporate colonies much from 1694 to 1716, their exertions had helped establish the limits of royal military
authority in practical terms. They failed to rid themselves entirely of royal intervention; conversely, the crown had been unable or politically unwilling to eliminate the colonies or even to appoint wartime civil and military governors. The Board of Trade's enthusiastic drive for reunification had failed, its exertions for military reform were completely blocked. Yet by 1721, virtually every colony (except Connecticut and Rhode Island) had adopted various characteristics of the English militia system. While military efficiency had been one motive of reform, the paramount issue since 1674 had been the validity of royal prerogative of command. Royal actions on both side of the Atlantic and the opinions of the crown's law officers firmly established the right of the king or queen to exercise military control of all colonies, royal or charter, during wartime. In the next half century, however, the increasing strength of the assemblies eroded much of that legal authority.
NOTES

1 13 Car. II, c. 6, sec. 1 (emphasis removed).

2 CSPC, 1697-98, no. 166.


4 E.g., CSPC, 1675-76, nos. 651, 682; 1677-80, nos. 624, 895, 1325, 1427; 1336. 1681-85, nos. 1432, 1661; 1685-88, no. 153.


6 Hening, ed., Statutes at Large, II, 386.

7 Helen Hill Miller, The Case for Liberty (Chapel Hill, 1965), ch. 3. Grievances of Isle of Wight County, in American Colonial Documents, p. 588: some small arms apparently were confiscated, but the circumstances are not clear. Statutes at Large, II, 416: legal warrants were supposed to be issued prior to impressment of arms or supplies. In Jun 1680 the assembly formally forbade white and black slaves to carry arms (ibid., II, 481-482), so apparently there had been no previous restrictions in law.

8 Fundamental Laws and Constitutions of New Jersey, 1664-1964, ed. Julian P. Boyd (Princeton, 1964), pp. 107, 114, 115-117 (emphasis added). The East Jersey militia act of 23 Mar 1682/3 was not applicable to Quakers: NJ Arch, 1st ser., XIII, 35. Cf. 17 Apr 1686 "Act to Prohibit the wearing of swords, daggers, pistols, dirks, and stilettos," XIII, 156. It was repealed 23 Oct 1686 (XIII, 165) because the assembly could not prohibit the carrying of weapons in public service (such as militia duty).

9 Berkeley report: The Old Dominion in the Seventeenth Century: A

10 Ibid., III, 17-22. Greene, Quest for Power, p. 298, cites this act as the first instance of regulation of militia by House of Burgesses.

11 CSPC, 1685-88, no. 467. EJVaC, I, 111-112 (emphasis removed). CSPC, 1685-88, no. 1475: Council minutes indicate that there was a continuing problem of finding suitable officers for the militia, a task which would have been made simpler only in the lesser number of officers required for the reformed militia. 1689-92, no. 148: when Lord Howard left Virginia, he placed militia control in the councilors, most of whom were already colonels of the county regiments and county lieutenants. No militia charges were made in the formal complaints against the governor, so evidently militia reform was not considered a grievance: nos. 142, 462.

12 Haffenden, "Crown and Colonial Charters," p. 300, 300-303. CSPC, 1675-76, nos. 543, 553; 1067. 1677-80, nos. 373 (abstract of laws); 358 (objections against charter: militia commissions were being issued in the name of the colony, not in the king's name); 378, 379 (Atty Gen objections to illegal impressment of men). NYCD, III, 40 (report that two-thirds of militiamen were not freemen, according to charter). CSPC, 1677-80, no. 904 (at p. 332). Michael G. Hall, ed., "Randolph, Dudley, and the Massachusetts Moderates in 1683," NEQ, 29 (1956), 513-516.


Grievances: Complaints that Andros had commission power to transfer the militia out of Massachusetts; and that he had appointed "Popish Commanders" over troops fighting in the Indian war.


19 NJ Arch, 1st ser., II (1881), 100 (Atty Gen opinion). Based on this opinion, the Privy Council issued a commission for Benjamin Fletcher: APCC, II, 246.

20 PRCC, IV, 102. Winthrop's commission and instructions are contained in Letters from the English Kings and Queens . . . to the Governors of the Colony of Connecticut, Together with the Answers Thereto, from 1636 to 1749, ed. R. R. Hinman (Hartford, 1836), pp. 195-197, 197-203.

21 Ibid., pp. 203-204.

22 The charter had been reconfirmed 2 Aug 1690 by Atty Gen opinion, ibid., pp. 189-191. NYCD, IV, 70 (BF's journal of visit).


24 Gershom Bulkeley, Some Seasonable Considerations for the Good People of Connecticut (New York, 1694). This was answered by the anon. pamphlet, Their Majesties Colony of Connecticut in New England vindicated from the abuses of a Pamphlet licensed and printed in New York, intituled . . . by an Answer thereunto (Boston, 1694), but no copy
has survived. *PRCC*, IV, 111n.

25 There exists a paper, probably written by Winthrop, which contains arguments presented or intended to be presented in oral negotiations. Most simply elaborated on W's instructions, but others expanded the issue; printed in *Letters from English Kings and Queens*, pp. 208-214. Winthrop's petition, pp. 205-207.

26 Ibid., pp. 211-212 (1st quotation; "mands," sic); 212 (2nd quot.); 213.

27 *RICR*, III, 290-292 (Address to King and Queen); 293-294 (opin.).


40 CSPC, 1702, no. 260, esp. pp. 174-176; no. 306 (militia plan). Quotations are from PRO, Colonial Papers, CO 323/3, no. 122.


42 EJVaC, II, 138, 150; 173, 176-177; also, VMHB, 11 (1904), 168.


44 CSPC, 1701, nos. 912; 1040.


47 PRO, Colonial Office, CO 5/1314, no. 40 (abstracted in CSPC, 1704-05, no. 915). See Chapter Six, below, for ideological context of Fletcher's works. Blair was a distant cousin, and probably received copies of the pamphlets and speeches through family members.

48 CSPC, 1706-08, no. 483.


50 RICR, III, 460-462; 462-463, 463 (quotation, my emphasis). CSPC, 1702, nos. 966, 970.


53 CSPC, 1706-08, no. 73 (both quotations, my emphasis).

54 Ibid., no. 19.

55 For summary of temporary acts in NY, see Chapter Five, Table 3, below. Colonial Laws of New York, I, 675, 706-707, 745, 778-779 (short expirations); 591, 611-612, 868 (long expirations).


57 Spotswood's answers to anon. queries: The Official Letters of Alexander Spotswood, Lieutenant-Governor of the Colony of Virginia, 1710-1722, ed. R. A. Brock (2 vols., Richmond, 1882-85), II, 209-212. Cf. CSPC, 1716-17, no. 4521 (which dates it 1 May 1716 instead of 7 Feb 1715/6).
58 Kellogg, American Colonial Charter, p. 309. APCC, II, 708. CSPC, 1716-17, nos. 131; 139; 112 (5 May 1716, written in error as 5 Apr); 149 (final instructions were dated 15 Jun).

59 Although the crown failed in complete militia reform in America, it succeeded in Ireland through the Irish Parliament. In 1715 it enacted a statute "to make the Militia of this Kingdom more useful," with no question of royal prerogative. The Statutes at Large Passed in the Parliaments held in Ireland [1310-1786] (13 vols., Dublin, 1786), IV, 333-342. Rather than a permanent act, however, it expired in 3 years.
CHAPTER FIVE

Arms Bearing, Military Obligation, and Legislative Control of the Colonial Militia, 1721 – 1775

The Crown has no Authority to compel the British Planters to March out of their respective Boundaries, to attack their European Neighbours; and much less to embark on any Expedition, for the Defence of the Sugar Islands, or to annoy the Spaniards in the West Indies.

--Martin Bladen (1739) ¹

The people are taught that the King has no power over the Militia but what is yearly given by Act of Assembly & this opinion I know prevails.

--Cadwallader Colden (1749) ²

Friends had laid it down as their Principle, That Bearing of Arms, even for Self-Defence, is unlawful... [However,] the Sheriff is obliged by the Law... [to call] the whole Posse or Force of his County... to be aiding to him... If need be, they may freely use Fire-Arms, and all Manner of destructive Weapons; and are not at all accountable, by the Law, for any Lives they may take of those in the Opposition.... From whence it is evident, there is no Difference, in the last Resort, between Civil and Military Government.

--James Logan (1741) ³

Militia and military affairs continued to be a constant source of irritation between colonies and crown in the eighteenth century. Imperial reform of the previous thirty years had partially succeeded in transforming the organization of the colonial institutions and in establishing a wartime system of raising manpower and of overall command but
had not improved in any great measure the military effectiveness of the militias. After Queen Anne's War, imperial reform subsided, colonial governors began to lose whatever control they had of local forces, military obligation ceased to be fully enforced, and the institution rapidly deteriorated in military usefulness. Most of this decline can be attributed to three interrelated causes: the changing nature of military threat to the colonies, the questionable legal and constitutional legitimacy of colonial military obligation, and the rise to power of colonial lower houses of assembly. The assemblies emulated Parliament's rise to power in the seventeenth century, especially after 1720 when the dominion status of the colonies and the applicability of statutory and common law became better defined, allowing the assemblies to impose medieval restrictions on executive use of military force. During the mid-eighteenth century assemblies used power over appropriations to usurp military authority, passed temporary acts limiting executive freedom of action, failed to enforce military obligation, and provided for the enlistment of volunteers in lieu of using compulsion. As late as 1766, the Privy Council objected to a New York militia act for violating royal prerogative and criticized Pennsylvania for refusing to pass a compulsory act. Thus on the very eve of Revolution militia affairs persisted as a vexing constitutional issue and the rise of voluntarism predisposed some men to consider arms bearing a right rather than an obligation. Out of all these changes there developed the American constitutional and institutional definition of militia.

Colonial militias declined in institutional effectiveness in the half century before the Revolution. Military historians have long
castigated the weakness of part-time, poorly trained, unprofessional troops without exploring the underlying causes of such weakness. John Shy, however, has gone beyond this traditional interpretation to demonstrate that several circumstances in colonial society account for overall military decline. Militia laws changed little in basic obligation in the course of colonial history, but military needs did change. Shy has shown that the shifting environment of military threat to each colony directly affected the degree of proficiency of colonial forces. The South faced no major threats before the French and Indian War, and New York, with its narrow Albany frontier guarded by a garrison of regulars, took no concerted efforts to maintain militia readiness. New England, on the other hand, faced a continual threat along its wide frontier. Lacking regular troops, these colonies were forced to depend upon the militia and consequently achieved a relatively high degree of effectiveness. The militia as an institution frequently subordinated its military to its social and law enforcement functions but never disappeared (except in Pennsylvania where it was formally established only for a short time after 1755). During the eighteenth century the quality of soldiers also decreased as men able to pay fines or hire substitutes avoided service and training requirements. All these factors help our understanding of the mechanics of deterioration and identify one practical cause but do not provide the fundamental answer. 4

With the general reduction of military threat to the colonies after 1715 and the decrease in crown attempts to reform the militia, Americans began to question the legitimacy of military obligation which in turn helped to define the limits of obligation. Colonial military
responsibilities consisted of three functions derived from English Law: personal service against invaders, rebels, and other law breakers; providing military weapons and equipment for use by oneself or others; and military training. Service in offensive operations against the Indians or outside the colony was voluntary and not obligatory under law, thus not one of the responsibilities of the militia. The first two duties had been derived from common law principles, the third from the prerogative of the crown and, to a lesser degree, from seventeenth-century Parliamentary statutory requirements. In America the obligation to train applied to virtually every adult white free male. Training had been at first a necessity for survival, imposed by executive and later legislative decree based upon an inferred obligation from the colonial charters and royal instructions. Training quickly became onerous, especially when individual settlers ceased to recognize such duties as necessary or in their own interest. During long periods of peace, when governmental pressure to compel obedience to military orders decreased, the obligation generally was ignored. It was the breakdown of this third military obligation which initiated the decline of the militia and made personal service ineffective.

A similar relaxation occurred in relation to personal service itself. The bulk of such service took place in wartime expeditions against Indians. As long as the Indians initiated the conflict, their attacks affected a large number of settlers, and the operations remained within the general areas of settlement, settlers did not question the obligation to serve. But as the length of service increased, operations became centered on the frontier beyond the settled districts,
and the governors rather than the affected individuals began to define "invasion" (so that incidents which might not have affected very many people were construed to be full-scale incursions of hostile enemies, thus requiring the full application of military obligation), this obligation too began to be questioned. Especially burdensome was the knowledge that the societies, having grown in population beyond the threat of extinction, no longer required service from all able-bodied men. Colonial laws in the eighteenth century reflected this knowledge. Men were increasingly allowed to escape duty in wartime by hiring substitutes or paying fines. Increasingly also, colonial governments turned first to volunteers to fill the ranks before resorting to compulsion. As training decreased in frequency and quality, men who actually served became less and less prepared for wartime operations.

This decline in wartime service proceeded more rapidly than in the other two areas of personal service. Except for men living in areas of rebellion and disaffection, militiamen generally turned out and performed effective duty during local insurrections. Colonial uprisings seem to have been limited and did not demand large-scale military force to crush. Military training was not essential in most cases, nor for assisting the sheriff to enforce the law. Militiamen performed the duties of posse comitatus in apprehending felons and runaway slaves and occasionally for suppressing riots. In the South, militiamen effectively established patrols to keep watch on slaves; in the 1740 Stono River slave revolt, they reacted successfully without much prior military training.\(^5\)
The final obligation, that of providing military weapons, had never been fully enforced in the colonial period because the supply of firearms never matched the potential demand. Arms shortages continued to plague military officers and governments during the eighteenth century. Increasingly, therefore, colonies, counties, and towns stockpiled public arms and munitions to insure at least minimal supplies of workable muskets for emergency use and to equip wartime expeditions of men who did not own their own weapons. The level of armament fluctuated with the availability of arms imported by the colonies, supplied by the crown, or manufactured by colonial gunsmiths. Stockpiles increased during periods of protracted wars and fell again with peace. Rust and rot contributed as much to unreadiness as did the indifference and poverty of individual colonists during long periods of peaceful relations with the Indians and European neighbors.⁶

As important as these factors were in the decline of militia effectiveness in the eighteenth century, the most important and fundamental cause lay in the constitutional and political conflicts between the colonial governors and their assemblies. Legislative assumption of executive military authority comprised the most extreme case of usurpation involved in the general conflict. In the preceding half century, the primary motive for imperial militia reform had been colonial infringement upon the royal prerogative of military command delegated by commission or by charter to the various governors. Military affairs remained a sensitive issue up to the Revolution and were exacerbated by what Jack P. Greene has called the general "quest for power" by the colonial assemblies. Following the model of Parliament's lengthy and
bitterly fought battles with the king over the nature and extent of royal prerogative and legislative right, the colonial assemblies progressively tightened their control over legislation by adroit manipulation of their recognized power of raising revenue and approving all money bills. In military affairs, the lower houses went beyond Parliament in assuming authority to command troops in the field, select their officers, and regulate the militia.  

Part of the justification for this usurpation of military prerogative lay in the dominion status of the colonies. Each dominion maintained a direct legal connection with the crown. Before the Glorious Revolution, that connection bypassed Parliament and other institutions in the realm except for agencies of royal prerogative such as the Privy Council. Just as the Irish Parliament acted directly through the king, so (it was assumed in America) the individual colonial assemblies did as well. After the Glorious Revolution, the concept of King-in-Parliament merged with King-out-of-Parliament, eliminating any independent power which the crown possessed. After 1689 the king's prerogative consisted only of such power left undisturbed by Parliament. Americans generally failed to recognize this transition in authority because two major aspects of prerogative which remained included colonial administration and military affairs. Thus, for all practical purposes the Revolution made little difference in America in the relationship between king and colonies. Each colonial government continued to administer political and legal matters in the king's name through the Privy Council and governors. Before the 1720's, consequently, the scope of assembly responsibilities legally remained quite narrow.
In 1720 the crown presented an opening which assemblies exploited for the next fifty years. After a century of denial of the applicability of English law in America, George I's Attorney- and Solicitor-Generals declared that common law and such statutes which affirmed common law principles and which had been in effect in England prior to the earliest American settlements did have general effect in the colonies. More recent statutory law, however, had no legality unless the acts "particularly mentioned" the colonies. "Let an Englishman go where he will," the law officers declared, "he carries as much law and liberty with him, as the nature of things will bear."9

Marylanders led by Daniel Dulany the elder argued in 1728 that this ruling was too limited. They demanded the formal introduction of the whole body of "English Law" which constituted "the Subject's Birth-Right, and best Inheritance." Dulany contended that the law of empire rested on a fundamental misinterpretation of Calvin's Case. While Maryland had been acquired from heathen aborignes, the colony itself could not be considered a conquered province. The settlers were the conquerors and must not be denied their legal rights. The proprietary charter recognized that they retained "all the Rights, Privileges, Immunities, Liberties, and Franchises, of English Subjects"--except common law. Laws support liberty, Dulany observed; therefore, the "Abrogation of such Laws, would in Effect, be an Abolition of the Liberties themselves." The royal law officers replied to the Maryland petition in 1729. English statutory law since 1607 could not be generally introduced into the province. Individual statutes, however, could have effect if "they had introduced, and declared to be laws, by some acts of assembly of the
province, or have been received there by long uninterrupted usage, or practice."\textsuperscript{10}

In the long run these and subsequent opinions enhanced the authority of the assemblies in adopting specific principles of English law. Thereafter in legislative actions concerning the militia, the assemblies increasingly imposed medieval statutory restraints on executive use of local forces. For all practical purposes no colony in 1690 had successfully applied any jurisdictional restrictions on the militia. By 1765 virtually every colony had done so. Royal instructions drafted by the Privy Council and Board of Trade continued to authorize royal governors to transfer militiamen out of the colony to aid neighboring provinces up to the end of the colonial period. Significantly, however, the Privy Council did not disallow assembly acts which contravened those instructions. The resulting limitation on military prerogative of the governors precluded effective use of the militia by the crown in wartime operations. In 1739, Martin Bladen, a member of the Board of Trade, recommended the military unification of the mainland colonies. A single captain general would command a select force of 100,000 colonial militiamen and share civil power with a bicameral Plantation Parliament. Even this executive officer would be limited by medieval statutory restrictions. In order to raise military expeditions he would have to convince the Plantation Parliament that such expeditions were in "their own Interest, and that of their Mother Country," because "the Crown has no Authority to compel the British Planters to March out of their respective Boundaries," whether against French Canada or Spanish America or even to defend the British West Indies.\textsuperscript{11}
The Privy Council took no concerted actions to counteract these restrictions. It did continue to issue instructions for governors to aid other colonies: "In case of any distress of any other of our Plantations," the model instructions read, "you shall, upon application of the respective governors thereof to you, assist them with what aid the condition and safety of your government can spare." Since these orders did not specify militia, the governors could raise volunteers to act as part of the posse regni to fulfill such military needs. In one instance, the Privy Council did criticize a governor for allowing the assembly to restrict his use of the militia. In 1750 Governor James Glen of South Carolina came under censure for failing to take part of the colonial militia into Georgia. This case, however, differed from militia restrictions imposed elsewhere. Both Glen's commission as governor of South Carolina and the charter of Georgia specified that he had command of the militia of both colonies. To deny him the use of the South Carolina militia in Georgia prevented him from fulfilling his dual military responsibilities.12

Statutory militia restrictions emphasized a significant characteristic held commonly by both the English and colonial militias. Whatever the particular institutional form, both agencies retained their constitutional legitimacy which, in the minds of many Americans, the army did not. Militia continued to be more closely related in function and constitutional limitations to the posse comitatus than to the posse regni. Like its medieval antecedent, the English militia was a local force intended to repel invaders, suppress insurrections, and to aid local officials to enforce the law. It could not be legally used outside the
realm except by voluntary consent of the individual militiamen who then accepted wages from the royal treasury and ceased to be part of the militia. Likewise, the colonial militias, the posse domini, performed the same functions. In practical terms they also operated as a wartime force against Indians and Europeans, sometimes beyond the boundaries of their own colonies. Increasingly, however, the medieval restrictions became effective. By midcentury the local militia could not operate outside the borders of the colony without assembly consent or the consent of the individual men, in which case they ceased legally to belong to the militia. The posse domini, therefore, could not be transformed into the posse regni. In 1765, for example, the House of Burgesses refused to reimburse the pay of Virginia volunteers who had left the province to participate in military operations with the British army. Royal military service required royal pay unless the assembly had agreed beforehand that such operations were in colonial interest. The use of the militia became circumscribed in theory as well as fact, and the concept of militia in America took on an added defining characteristic, derived from English experience.\textsuperscript{13} 

Legislative restrictions on colonial governors can be analyzed under three categories: defense of charter rights in the corporate colonies; manipulation of power over appropriations in all colonies; and popular reliance on statutory law to define military obligation. Just as the corporate colonies of Connecticut and Rhode Island had successfully resisted royal attempts to strip them of the military authority of their charters in the 1690's; as Parliament had used the Militia Ordinance of 1642 to challenge Charles I's prerogative of military
command; and as the annual Mutiny Acts after 1690 reduced the independ-
ence of royal military authority; so the colonial assemblies sought to
transfer the military prerogative of their governors into their own
hands.

Rhode Island and Connecticut survived Queen Anne's War with most
of their military power unchecked by imperial reform measures. In 1723
Rhode Island once again defended its right to immediate administration
of the militia. It opposed the introduction of regular troops into the
colony. The militia, it claimed, constituted "the Strength of this
Colony" and had long provided adequate defense without assistance from
the army. The next year it refused to send troops to Massachusetts al-
though the governor there had been commissioned as the wartime com-
der of the militia. Rhode Island contended that the Indian war in which
Massachusetts had become involved was an "offensive" war; therefore, no
military assistance was required. Such arguments did not impress the
Privy Council which persisted in its practice of unified command by
commissioning William Cosby, the governor of New York, as the wartime
commander of the forts and militia quota of Connecticut. From the col-
nial point of view, unification had little practical effect since each
province, like Rhode Island, could define the conditions of their
assistance.14

In Massachusetts, a royal colony, military affairs in the 1720's
became critical. Its charter placed military authority in the governor's
hands. Under Governor Samuel Shute, the assembly contested virtually
every power of prerogative he exercised under his commission and instruc-
tions, ranging from authority over the King's Woods to his demand for a
permanent salary. In 1723 Shute petitioned the king with complaints of charter violations by the assembly including usurpation of his military command responsibilities. By order only of the speaker, for instance, the House of Representatives had twice (in 1720 and 1722) appointed a legislative committee with powers to call out and muster a portion of the militia whenever Shute was away from the colony. This "pretence of power," he argued, was an "unprecedented violation, of the most important and undoubted right of your Crown." He also recited instances of assembly use of appropriations bills to specify the number of men to be raised and their place and length of service during Indian operations. In December 1722 he had confronted the council with the problem. The councillors at first hesitated to answer his queries because of their own precarious position of having allowed the representatives to assume such powers. When they did reply, they simply confirmed that the governor had indeed been invested "with the full power of Government of the Militia or Forces in this Government"; but, they added, this power existed "under the Limitation, and Restriction in the said Charter, and the Laws of this Province." Dissatisfied with the entire situation, Shute sailed for London to present his case personally.15

The controversy continued in Whitehall for three years. In September 1723, the Board of Trade submitted Shute's case to the royal law officers, declaring that the lower house's actions "seem to us to be . . . direct usurpations of the Royal authority, and breaches of the known and indisputable right of the Crown, declared to be such by several Acts of Parliament, particularly that of the 13th year of King Charles II. ch. 6," the Restoration Militia Statute. The following
March Shute further claimed that the assembly had also refused to pay troops for service until it had physically examined and authenticated each unit's muster rolls; perhaps not an infringement, this action certainly impeded the governor's authority.16

During 1724 the House of Representatives took steps to explain its position to the crown. It petitioned the king and sent Elisha Cooke as its agent. The assembly claimed that it had assumed military command because Shute had been out of the province during an unexpected Indian war, and that it had inspected muster rolls simply to insure compliance with the law, not to supervise the governor's actions. The Privy Council rejected these claims and rebuked Cooke.

You play a very bad game if seeking to be solemnly heard [scolded Lord Townshend, President of the Council], you have nothing but trifles to offer in excuse of a Province that has invaded the king's prerogative in every article of government, both civil and military. You have taken upon you to demolish forts, to march armies, to muster troops and to disband them when you please, without any regard to the king's authority.17

As a consequence, the Privy Council and Board of Trade drafted an explanatory charter for Massachusetts, to insure proper interpretation of the colonial government's powers. Military prerogative apparently required no additional explanation and was omitted, a mistake which the assembly later took great advantage of.18

During the 1730's the House of Representatives continued to wear away at executive power, using its control of appropriations as the base. Under Governor Jonathan Belcher, the assembly kept such close supervision over expenditures that he complained to the Privy Council that the house members intended "to assume to themselves the Executive Power of
the Government" and to throw off "their dependence on Great Britain."

They had refused to pay troops, maintain fortifications, or support the
government generally. Their recalcitrance threatened colonial security;
by the beginning of King George's War in 1740, therefore, Massachusetts
was in very bad grace with the crown. Only a change of governors cooled
the controversy. 19

Under the administrations of William Shirley and Thomas Pownall,
the militia issue remained quiet and the controversy over appropriations
for forts and garrisons constituted only a minor problem. In January
1743 the assembly easily agreed to a militia bill to improve and enforce
the permanent act of 1693, and even agreed to Shirley's discretionary
use of the power of impressment of supplies and men. Naval impressment,
however, was another matter. In 1747 an incident in Boston touched off
a series of riots during which the militia refused to suppress the
rioters, proving once again to military reformers that the militia was
an unwieldy sword for law enforcement. Despite the best laws, the at-
titudes of the militiamen themselves always determined the ultimate ef-
ficiveness of the institution. 20 When Pownall became governor in 1757
he decried the "ruin'd, ineffectual and useless" state of the militia,
but he quickly persuaded the assembly to approve a relatively effective
law in 1758 to enforce the earlier permanent acts. 21

In Virginia the House of Burgesses also depended upon its power
over the revenue to gain military power. Generally it approved only
specific appropriations. In 1746, for instance, the house appropri-
ated £4000 to finance an expedition to Canada during King George's War,
specifying in the bill the number of volunteers to be raised and the
amount of their pay. The bill also provided for a legislative committee to supervise application of the funds, thus severely limiting the governor's freedom of operations.22

Other colonies emulated Virginia's and Massachusetts' course of action with increasing frequency in the 1750's and 1760's during the French and Indian War; the assemblies infuriated governors and the crown and made effective use of local forces exceedingly difficult. The most successful means of concentrating military power in legislative hands was less subtle but in the long run more subject to imperial controversy. By various means and long practice Americans convinced themselves that military obligation could not be enforced without explicit legislative consent. Parliament, of course, presented the model of regulating the militia and, after 1690, the army by statute. At issue between colonies and crown was the very basis of royal prerogative of command and the common law basis of most aspects of military obligation. The controversy in the eighteenth century became most severe in Maryland where obligation proved almost unenforceable by any means, New York with its annual militia acts, and Pennsylvania where no militia was established except for a brief time in the French and Indian War. The issue existed to a lesser degree and caused less trouble in the other colonies.23

New York's assemblies had begun the practice of passing temporary militia acts in 1702, as shown in the last chapter. Between 1720 and 1740, the assembly enacted seventeen militia bills, one third of which made substantive changes in regulations. The law lapsed five times, twice for about two weeks each during the course of legislative sessions, three times for extended periods of thirteen months (July 1727 to August
# Table 3
Annual and Temporary Militia Acts in Colonial New York, 1684-1775

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a All acts before 1702 (ch. 114) had expiration dates indicated in the statute. The earlier ones were "permanent," like the Massachusetts militia act of 1693.

b Except for PRCC (Public Records of the Colony of Connecticut), which seems to have the only published copy of the militia act of the Dominion of New England, the citations are from The Colonial Laws of New York from the Year 1664 to the Revolution (5 vols., Albany, 1894-96). The 1684 statute does not have a chapter reference.
1728), six weeks (August to October 1734), and ten months (December 1738 to October 1739). To avoid accusations that the acts usurped power from the royal governor, each act after 1721 contained a disclaimer, stating in effect "that Nothing in this Act Contained shall be Intended or Construed to Derogue from or in any way Lessen or Diminish the Powers or authoritys Lodged and vested in the Captain General or Commander in Chief." Despite this acknowledgements of executive authority, the lower house consistently denied the governor any means to use local forces without prior statutory sanction. New Yorkers correspondingly developed the notion that militia obligation depended entirely upon legislative enactment; men frequently refused to obey orders for muster and training during those periods when no militia law was in effect.24

With such attitudes, collision between the concepts of legislative and prerogative military power became unavoidable. From 1740 to 1754 the assembly passed ten militia acts, three of which expired without being immediately replaced, twice for only a few days each but once from December 1748 to December 1753! Although military affairs played only a minor part in the controversies between Henry Clinton and the assembly, and much of the delay in approving a new act during this prolonged period was caused by royal dissolution of the assembly, temporary militia acts provided a persistent irritant in New York's political history. Clinton quarrelled less with the content of the proposed militia bills than with their temporary nature and with the accompanying popular attitudes of reliance upon statutory rather than executive military orders.25

In addition Clinton believed that the political faction led by James DeLancey sought to deprive him of all power over appropriations,
including military revenue. After an expedition returned from operations in Canada in 1747, Clinton received intelligence of a possible invasion of New York. He therefore urged the assembly to keep eight hundred of the returned men in pay and in military readiness to meet the attack. The lower house refused to appropriate the funds. When Clinton on his authority as captain general ordered the commanders of the volunteers to keep their units intact, they and "every Man unanimously refused to obey my orders from the Crown," he informed the Board of Trade, "unless an Act of Assembly was first passed in this Province for that purpose." He concluded that such action "evidently shows what Allegiance the People of this Province pay to the Crown, and how well my opinion of their levelling and republican Principles has been grounded from time to time." 26 The Board agreed. The assembly indeed seemed to be attempting "to usurp the command of the militia" not only in this case of raising and disbanding forces but also in selecting militia officers. In 1748 Cadwallader Colden confirmed these suspicions; the controversy in his opinion was nothing less than a contrived "trial of the Militia" to test the governor's power. The effort to introduce popular election of militia officers, moreover, could only "help to demonstrate the inclinations of the People in America to deprive the King of the power of the Militia." The Board of Trade used this development as evidence in its case against the assembly. 27

The New York assembly had been dissolved by royal order during the 1747 session just after its approval of the annual militia act. When that act expired in December 1748, militia activity ceased for five years. Clinton turned to the ministry to prohibit temporary militia
acts and, by royal order, to convince the people of the absolute nature of the military prerogative exercised by the governor. The people, however, continued to act, in Colden's words, as if "the King has no power over the Militia but what is yearly given by Act of Assembly." With the cessation of militia activity in the colony, Clinton waited anxiously for the Privy Council to recall the assembly. In 1751 the Privy Councillors outlined the issues at stake. Governors must not surrender any aspect of prerogative, they emphasized, lest the assemblies gain "confidence to attack it" in other areas "which as constantly brings on contests, which again create animosities, which in the end obstruct all parts of government." New York so much represented this process that the DeLancey faction even managed to have Clinton removed in 1753 and reimposed annual militia acts despite crown disapproval.

The militia act of 1755 tightened enforcement in New York and attempted to make local troops more efficient during the French and Indian War, but problems remained. Cadwallader Colden identified one serious difficulty: poor men who could not afford to hire substitutes or pay fines were consistently forced to serve. With many qualified men refusing to accept commissions, "many low people of no esteem among their neighbours" were becoming officers even though they lacked the natural authority of social status to reinforce the authority of their military commissions.

Controversy in New York subsided somewhat during the war but increased again after the Treaty of Paris. The 1764 militia act, renewed annually until 1769, contained a clause which empowered commanders of British regular army units stationed in the colony to take charge of
provincial volunteers during emergencies if the governor was absent from New York. The Privy Council objected that the act improperly eliminated part of the governor's prerogative of command, and it was temporary. "A militia," the councillors informed the governor, "does from the nature of its institution require to be provided for by a permanent establishment and is therefore not the proper object of an annual act." They therefore ordered him to veto any future act of less than five years' duration and which did not contain a suspending clause to allow prior review by the council. Coming on the heels of the New York Restraining Act which had ordered the dissolution of the New York assembly until it complied specifically with the Quartering Act of 1765, the action of the Privy Council concerning the militia made clear the sensitive nature of military affairs in the province. 31

Governor Henry Moore, however, suspected that the assembly would balk at the suspending clause requirement. Indeed, what he called the "Genius and Disposition of the People" did lead to the "total failure of the [militia] Bill" in the 1768 session. Thus from the expiration of the 1767 act on January 1, 1769 until March 1772, New York had no statutory militia obligation, and the colonists refused to muster or train. The 1772 act, passed as a result of executive pressure and the Anglo-Spanish war scare of the previous year, had a two- not a five-year life. Moore accepted it as the best he could expect from the assembly. When it expired in April 1774, the assembly refused to renew it until April 1, 1775, thus leaving the governor without statutory authority over the militia for eleven critical months before Lexington and Concord. 32
Even in the West Indies where the crown had long depended on regular army garrisons for defense, the lower houses achieved considerable success in militia affairs. Settlers disliked frequent musters and training; therefore, the assemblies of Jamaica, Barbados, and the Leewards progressively reduced military obligation, curtailing the discretionary powers of the governors. In Jamaica the lower house allowed many exemptions from training; it defined martial law and the articles of war in annual acts; and it even proposed to constitute itself as the governor's council of war. Governor William Mathew of the Leewards berated the assembly of St. Kitts in 1744 for its militia act containing "preposterous limitations" on his authority; he threatened to organize the militia on his own prerogative if the assembly refused to comply with his orders, probably an empty threat. 33

Virginia governors, on the other hand, had already learned the necessity of popular cooperation for enforcing military orders. Although the militia had deteriorated badly by 1729, governors such as William Gooch could do little more than appoint an adjutant to supervise training without assembly approval. The House of Burgesses did pass new militia acts in this period but refused to enforce them. 34 In 1742 the governor's council reiterated Martin Bladen's observation that the militia could not be compelled to march out of Virginia without individual or legislative consent. As in the other colonies, however, the House of Burgesses did recognize the power of the governor to "levy, raise, arm, and muster" the militia, but by enumerating these activities in a statute the burgesses reinforced the notion that military obligation could be imposed only by legislative action. 35
The problem of militia in Maryland involved temporary and ineffective acts. During the struggle over the discretionary power of the governor and council to raise tobacco revenues to finance minor militia expenses which the assembly had not provided for, the lower house attempted to negate executive power by simply declaring in 1744 that no militia law had been in effect since the expiration of the 1722 act. The governor claimed that the 1722 act had been permanent, but the assembly refused to sanction his military orders or to pass a new act. Without legislative support, he could get no one in the colony to comply with his commands. 36 In the 1750's the confrontation increased. Governor Horatio Sharpe became so exasperated with the continued "Obstinacy of the Assembly" that he ordered militia officers on the basis of military authority granted by his proprietary commission to train their men and to prepare them for a possible invasion. Sharpe quickly discovered the lesson that Clinton had learned in New York: without an adequate militia law, he complained, "we can scarcely oblige the people to act in the Defence of themselves & properties when immediately attacked," much less compel them to march out of the colony. In 1756 the assembly finally passed a new act, but it fell far beneath Sharpe's expectations. A "Leading Man" in the colony later told him that neither Sharpe nor the assembly could compel the people to arm and train; they could only recommend, because "every Step farther than that would abridge the Liberty to which as Englishmen they have an inviolable Right"! In Maryland, at least, there existed a popularly recognized right not to bear arms. 37
In 1757 Sharpe again attempted to exert his authority. Based on his commission and on a proclamation issued by Lord Loudoun, the new commander of the English regular army forces in North America, Sharpe ordered militia officers to train and arm their men. The officers, however, could not compel obedience; even if the men volunteered, the assembly might refuse to pay them. Furthermore, the lower house insisted upon determining for themselves when invasions actually occurred. Indian raids, they decided in the late 1750's, constituted "incursions," not invasions, therefore not requiring militia mobilization and service. Throughout the remainder of the French and Indian War, the assembly withstood pressure from governor, army commander, and English ministry to reform the militia and to contribute money for military operations.\textsuperscript{38}

Quaker pacifism complicated the problems of defense in New Jersey. Governor Lewis Morris failed to get the assembly to pass an enforceable militia at the beginning of King George's War in 1740. Previously, Quakers had been totally exempt from militia duty. This privilege caused their Protestant neighbors to "murmur" and even refuse to muster, "they clayning as much right to an exemption from trayning as the Quakers." Under an earlier militia act, officers had so harshly distressed the goods of men failing to obey the law that Quakers charged they were being persecuted "for conscience Sake." Their neighbors must have agreed because no one would buy the confiscated clothing and farm equipment.\textsuperscript{39}

The New Jersey militia deteriorated badly in King George's War, especially in the Quaker areas in the western parts of the province. In 1744 Morris renewed his proposals for an effective militia law and for
increasing public supplies of muskets. The assembly rejected both bills, arguing that the old law was sufficient and that it was the governor's responsibility to compel officers to enforce the law, not the assembly's. Morris countered this by showing that penalties for refusing to serve as officers did not exist and by lecturing the assemblymen on the nature of his power and the limited validity of their statutes. The existing militia act contained a clause, as in Virginia, which authorized the governor to defend the colony and, if necessary, even to march men out of the province. This authorization, he demonstrated, was "only Declarative" of his commission powers; the act granted no new power, so that he "could, and can do all this, tho' no such Clause had ever been made."

Assembly acts served only one purpose, to subsist and provision the troops. The "grand Deficiency" of the current militia act was that it made no such appropriation. New Jersey's system, which consisted of "the whole Body of the People" from sixteen to fifty, Morris compared unfavorably to the English system which consisted of a select number of men, officered and paid at public expense. Sounding like a Commonwealth polemicist, he declared that "It is the Duty of every Man to resist an Invasion, and consequently every one ought to share in the Expence that it occasions, and not to let it fall solely on those who are employed to venture their Lives in making the necessary Resistance." Since it was "the Practice of all Countries" to pay men for service, Morris expected the assembly to provide the necessary funds. The lower house refused for two more years to relent; they would raise money only after the fact, not before expeditions took place. When the 1738 act expired in 1746,
the assembly passed what Morris called "a good Act" which temporarily settled the militia issue in New Jersey.\textsuperscript{40}

Pennsylvania, the final colony which experienced severe difficulties over the militia in the eighteenth century, illuminates many aspects of the issues of military obligation and legislative control. Until 1755 the province was subject to no militia law and no military obligation. The old issues of Quaker pacifism which had nearly caused loss of the charter in the 1690's arose again with the outbreak of King George's War in 1740. Almost immediately pressure built up to create some kind of militia. Governor George Thomas made political enemies among the Quakers that year by proposing defense measures to protect the frontier settlement of non-Quakers. The next year, James Logan tried to convince assemblymen of the necessity for military defense. Though not a Quaker himself, he often mirrored Quaker interests and attitudes. In the 1690's he had been closely associated with William Penn and lived many years in Pennsylvania. In 1741, however, Logan argued that it was the duty of the Quaker assemblymen to prepare the colony for war. In an open letter to the assembly, he stressed "the Lawfulness of Self-Defence." All government, he contended, was founded on force. The county sheriff of Pennsylvania, modelled on the English officer, was required by law and custom "to find a sufficient Force" to suppress local disturbances. If necessary, he might even call upon "the whole Posse or Force of his County" to assist him in executing the king's writ. Because the members of the \textit{posse comitatus} could "freely use Fire-Arms, and all Manner of destructive Weapons" and were "not at all accountable, by the Law, for any Lives they may take of those in the Opposition,"
and since Quakers were equally liable to answer the summons of the sheriff for local law enforcement as their Protestant neighbors, "there is no difference, in the last Resort, between Civil and Military Government." Therefore, it was the duty of the assembly to establish a "regular Militia" to give order and direction to civil and military defensive operations. Even though Penn had refused to deal in military matters in the colony, the charter allowed him to delegate power to a non-Quaker deputy who could do so. Since Pennsylvania by 1740 was no longer predominately Quaker and the frontier districts were exposed to Indian raids, the Quaker assemblymen must either act or withdraw from proceedings while the non-Quaker members voted for military measures. Logan could not convince them and Pennsylvania remained without a militia act for fifteen more years.41

In the next decade opponents of the Quakers petitioned the crown and attempted to achieve military relief by local politics and polemical argument. Presbyterians on the frontier appealed to the self-interest of the settlers to take up arms in their own defense. Alexander Craighead, a New Light itinerant minister, argued in 1742 that the use of the "Power of the civil Sword, in Defense of our religious and civil Rights and Liberties" was not only sanctioned by law but was the duty of the people. His words, however, carried a double meaning. Not only did he urge men to act without assembly approval to defend themselves, but he also seemed to be inciting Scottish Covenanters "to declare a defensive War against all Usurpers of the Royal Prerogative of the glorious Lamb of God . . . [and] to defend our religious Liberties . . . with our best Skill, Power, bodily Strength and Activity." According
to some contemporary observers, these were seditious words, especially in context of the Scottish rebellion of 1745, but their conjunction with the needs of the frontier settlers gave them more immediacy in the practical problem of defense against the Indians. 42

During the French and Indian War, Pennsylvania found itself in the throes of factional and constitutional conflict over the militia issue and the future of proprietary government. The chief political opponent of the pacifist assemblymen was Benjamin Franklin who had attended the Albany Congress in 1754 and had worked industriously after Braddock's defeat to produce a militia statute. Only in 1755 did non-Quakers in the assembly convince their Quaker colleagues to pass an act to raise volunteers for defensive duty on the frontier. The militia act stands in stark contrast to the model act passed in Massachusetts in 1693. It was temporary; it transferred power over the militia from the governor to the assembly and to the individual militiamen; service was not compulsory; and the militiamen elected their own officers. 43

The voluntary nature of service under the Pennsylvania militia act of 1755 presented a legal and constitutional problem. As James Logan had observed, no one in the province was free from some form of duty involving civil or military defense. The Privy Council objected to the non-compulsory obligation since military service had been derived from common law principles which affected every one. Therefore, it was necessary to disallow the act. Disallowance was also inevitable because of the provision for popular election of commissioned officers, which stripped the governor of an important element of prerogative. As in the other colonies, the temporary life of the act and the lack of
a suspending clause made the law objectionable. Finally, limitation on the area of operations of the militia—to the territory within three days' march of inhabited districts—and of the amount of time troops served—three weeks' duty in frontier garrisons without explicit assembly consent—led to the Privy Council action. News of the disallowance however, arrived just as the law expired in 1756, so that the ministry's censure had no practical effect except to discourage the Quakers from passing another militia act for the remainder of the colonial period.  

Colonial officials mirrored the opinions of the Privy Councillors toward the Pennsylvania militia act. While the Privy Council called it "improper and inadequate," Robert Dinwiddie, governor of Virginia, described it as the "Joke of all military Affairs," and Pennsylvania's Lieutenant Governor Robert Morris considered it "to answer no Purpose, but amuse the People." Daniel Dulany in Maryland, however, recognized that the act was probably the best that the pacifists would ever approve since they believed that an effective, compulsory law "would have destroyed all Quakerism." In the fall of 1756 Pennsylvania's governor, William Denny, wrote to Thomas Penn, the proprietor, that the frontier settlers were leaving their homes because they had no legal means to protect themselves. The assemblymen, he had learned, would not pass a new act unless it allowed "the Peoples Choice of the Officers" or, at the very least, popular recommendation for assembly selection. The assembly, still under the influence of the need for some kind of frontier defense, approved another militia bill in 1756. Franklin sailed to London in 1757 to defend the assembly's action and act as colonial agent. Penn wrote to the Duke of Cumberland that Franklin had been
responsible for the "republican schemes" contained in the militia act. In September 1757 Governor Denny vetoed the act as neither "equitable nor constitutional" in its exemption of Quakers and Moravians from militia duty. As a consequence, Pennsylvania thereafter lacked even an amusing militia law. 46

The English government did not make any attempt to reform military affairs in the colonies before the French and Indian War. Lord Halifax had revived the Board of Trade since his appointment as its President in 1748, but the Board's actions in the early 1750's tended to be admonitory rather than prescriptive. The circular letter sent to the governors in 1752, for instance, simply instructed them to protect the royal prerogative by restraining the power of the assemblies, but it did not offer any practical suggestions. After 1754 the crown reached its most workable solution in regard to the colonial militias--it bypassed them in favor of the regular army. With the introduction of large numbers of troops in America during the war, the Board of Trade realized its old dream of appointing a single military commander for all military forces who would attempt to secure from the individual colonies financial and military assistance for wartime operations. The assemblies, however, refused to cooperate with Lord Loudoun or procrastinated so blatantly in appropriating funds and in allowing provincial volunteers to assist the army that their assistance was minimal. Moreover, Loudoun complained to Pitt in 1757, the "Provincial Troops" offered to him for service were generally inadequate. The militia, "the real Inhabitants; Stout able Men" served only within the limits of the individual colonies and then only for short periods of time. 47
By 1759 during the French and Indian War, four southern colonies joined the other provinces in successfully imposing operational restrictions on the use of local forces. Virginia did so by adding clauses to the 1755 defense act and the 1756 act for impressments to prohibit the militia to leave the colony. Georgia, Maryland, and North Carolina followed in 1755, 1757, and 1759. Except Maryland, which based its action on its own seventeenth-century precedents, the colonies seem to have adopted Parliamentary usage. The Privy Council managed to persuade the Virginia House of Burgesses to allow the use of militia against the Indians outside the colony. North Carolina avoided direct confrontation with Whitehall by failing to replace an unenforceable act. Only in 1760 did the assembly provide a useable military statute. South Carolina simply refused to reorganize the militia or to allow Governor William Lyttelton to conscript men for service. The lower house delayed establishing a volunteer force and then demanded its early disbandment. 48

Such operational restrictions and the general ineffectiveness of the colonial militias and provincial troops in the French and Indian War reinforced the unfavorable opinion of the militia held by the Privy Council and Board of Trade. Like Martin Bladen in 1739, William Knox argued that regular army troops should be used for operations in America. The militia "could never be compelled" to march out of their own provinces," he noted, and because the assemblies would never allow army officers to command militia companies, colonial forces could be "of no use for the general defence of the whole" continent. English officials, however, did not thereafter ignore the militia but accepted it for
what it was, an emergency defense force for local defense and law enforcement.\textsuperscript{49}

Pennsylvania's struggle to establish such a force continued to complicate imperial and intercolonial relations until the outbreak of the Revolution. Although the 1755 militia act had been disallowed and the 1756 act vetoed, men continued to arm themselves and to assemble for both legal and illegal purposes. Murders of Indians by the Paxton Boys from 1763 to 1765 led to a military response. Henry Muhlenberg, for instance, noted in his diary that even Quakers "formed companies, and took up arms" to oppose the rioters. Generally, men answered the summons of the sheriff to form the \textit{posse comitatus} and to operate at times with regular troops to suppress the insurrection. Governor John Penn lamented the lack of "a proper Militia Law" which might have prevented outbreak of the disturbances. "Such a Law," he observed to General Thomas Gage, was "absolutely necessary to aid the civil powers, and indeed [constituted] the only natural defence and Support of Government." Because Pennsylvania did not get a proper militia law, the government increasingly depended upon volunteers to oppose the Indians and the posse to oppose felons.\textsuperscript{50}

During the border dispute between Virginia and Pennsylvania over jurisdiction of Westmoreland County, the problem of legal obligation to serve in the militia and the problem of illegal assembly and use of weapons make clear that in Pennsylvania as elsewhere in the colonies the concept of arms bearing applied only to legal use of weapons for military and law enforcement purposes. Other use was illegal. \textbf{Virginia} claimed lands around Pittsburgh as territory granted in the original
corporate charters. Pennsylvania claimed them as part of its proprietary grant. Both claimed to exercise legal authority. Governor Dunmore acted upon petitions of Virginians in the district "that they might have some lawful militia establishment to defend them in case of an attack from the Indians" under general command of the Augusta County lieutenant. Penn, however, denied that Dunmore had authority in the area. He warned that the "Meeting of a number of People under Arms, in Consequence of" the summons of the militia captain appointed by Dunmore would "undoubtedly be an Act of a criminal Nature, for which they may be indicted and punished, and comes properly under the Idea of an unlawful Assembly, with an intention to disturb the public Peace." Furthermore, this militia was "composed of Men without Character and without Fortune, and who would be equally averse to the regular Administration of Justice under the Colony of Virginia" as under Pennsylvania.\textsuperscript{51} Bringing armed men to trial, however, presented a delicate problem which Penn chose to bypass. Because Virginia "hath the Power of raising a Militia" which Pennsylvania lacked, he informed the Westmoreland justices of the peace, it would "be in vain to contend with them in any way of Force." The only troops he could raise were a few "rangers," armed and paid at public expense, to patrol the frontier against the Indians. This inability to embody troops and the "mutinous and ungovernable spirits" of the Virginia militiamen around Pittsburgh convinced Dunmore to go west himself with reinforcements in the summer of 1774 to direct operations against the Indians and, presumably, the Pennsylvanians.\textsuperscript{52}

Throughout the eighteenth century the phrase "to bear arms" was consistently used in the context of military affairs. There is no
evidence that it referred to the carrying of weapons by individuals for any reason other than law enforcement or military service. For instance, the gathering of groups of armed men without legal authority, as in western Pennsylvania, violated specific colonial laws against riots and other unlawful assemblies, as well as the principles of the Statute of Northampton. By the eighteenth century, these rules had been somewhat relaxed, allowing gentlemen to wear swords in public and, to a lesser extent, allowing anyone to carry weapons peaceably. The only colony to establish these rules by statute had been Massachusetts in 1692. Otherwise, the Northampton statute provided the only controlling law. Although few people were indicted for violating this law, manuals for justices of the peace as late as the mid-1770's continued to cite and quote from the statute.53

The reluctance of pacifists to "bear arms" in the colonial period and the demand by some non-Quakers to do so establish part of the context of the arms and militia guarantees of the state bills of rights in the 1770's. Throughout the colonial years, Quakers and Moravians and other pacifists had been exempted from the full force of the militia laws. Although some non-Quakers became jealous of this privilege, others objected to being denied the opportunity to fulfill the common law military obligation—when it was in their own interest to do so. Without statutory sanction, however, gatherings of armed men even for the purpose of community defense sometimes had been construed as unlawful assembly and riot. Thus, a right to "bear arms" was required to correct this inequity.54
The solution which presented itself to men who sought to perform military service was the old practice of raising volunteers. The Pennsylvania assembly in 1755 had used that alternative to avoid facing the issue of compulsory service for pacifists. This voluntary "militia" was a private association formed to fulfill public goals. As a private organization, the members legitimately elected their own officers. The Privy Council had objected to this procedure because of the quasi-public nature of the association and its imposition of military obligation on citizens of the colony. Pennsylvania had used the precedent of Rhode Island and Connecticut in the eighteenth century and of Massachusetts in the seventeenth to allow popular election of officers as well as the practice among some volunteer units in the wars with France and Spain. On a more permanent footing were the "independent companies" in many of the colonies which, also as private groups, elected officers, established rules, and performed their own training. Colonial governors had allowed such units to exist because they usually consisted of men interested in military exercise and who, in wartime, frequently became officers of the provincial troops raised for operations. In Virginia Dunmore had granted commissions in the statutory militia to men chosen by the company. In New York, Cadwallader Colden favored the experiment of some of his neighbors to band together and elect officers because the men chosen were of a higher social class than the officers of the militia establishment.55

The constitutional history of the militia in the sixty years before the American Revolution thus reflected the growing strength of the colonial assemblies both in controlling in practical terms the administration of the militia and appointment of officers, and in defining
military obligation in such a way that the lack of appropriate statutory regulation negated the military prerogative of the governors. To some colonists, the legal obligation to aid the sheriff in apprehending felons had become totally separate from the military obligation to train and to serve. Moreover, the practice of the assemblies in imposing the medieval statutory restraints on executive military authority convinced English officials that the militia could not legally be used as a primary instrument of American defense except in local operations. Reform had failed in the early years of the century but by the 1760's the colonial militia establishments generally conformed with many English practices. The American militia on the eve of Revolution was a military force imposing virtually universal obligation for service and training on the free, white, adult male citizens of each colony. Assemblies defined this obligation to exempt certain classes of men from the less fundamental obligations of training and providing military arms and equipment, but no man in any colony (except Pennsylvania) was legally exempt from personal service during direct attacks on the community, an obligation derived from common law practice in England. Men could, however, hire substitutes or pay the fines involved for noncompliance. In the final analysis, of course, the attitudes of the individuals required to train or serve dictated the success of the militia systems.
NOTES


3 "James Logan on Defensive War, or Pennsylvania Politics in 1741," PMHIB, 6 (1882), 404, 406.


6 Neither militiamen nor provincial troops ever seem to have been fully armed during the colonial period, especially during wartime; see, for example Gov. Nicholson's complaint about Maryland in 1697, CSPC, 1696-97, p. 547 (only one-eight of the militia armed), and the problem in Virginia in 1713, JBT, II, 404. For stockpiling of powder in Massachusetts, see A&R, I, 131 (sec. 20). Public supply of arms became more common by the end of the colonial period; see, for example, DAMR, VII, 358 (arms stored in NY city hall), IX, 112 (800 muskets in Charleston, S.C. armory); and JHBurgesses, 1773-76, p. 238 (muskets stored in Williamsburg magazine).


8 Bradley Chapin, Early America (New York, 1968), pp. 79-83.


16 CSPC, 1722-23, n. 704, p. 339; 1724-25, no. 77.


23 Ibid., passim, and Burns, Controversies, passim. The whole topic of the effect of annual military acts in the colonies needs work.

24 The Colonial Laws of New York from the Year 1664 to the Revolution (5 vols., Albany, 1894-96), II, 1, 421, 657-658, 947; III, 3-14. Quotation is from II, 196 (1724 act); cf. II, 91 (1721 act). For a summary of militia legislation, see Table 3.

25 Ibid., III, 648.

26 NYCD, VI, 411.


35 Hening, Statutes at Large, VI, 113.

36 Newton D. Mereness, Maryland as a Proprietary Province (New York, 1901), pp. 286-288.
Without an act, "the people... cannot be compelled to serve in Defence of the Country": VI, 353.

Ibid., VI, 554; IX, 3, 30-32 (cf. XIV, 155), 255.

Burns, Controversies, p. 393. NJ Arch, 1st ser., VI, 104-105.


47 Jack P. Greene, "An Uneasy Connection: An Analysis of the Pre-
Conditions of the American Revolution," in Essays on the American Revolu-
tion, eds. Stephen G. Kurtz and James H. Hutson (Chapel Hill, 1973),
p. 70. Circular ltr. to governors: JBT, 1749/50-53, p. 323. Shy,
Towarvs Lexington, p. 35. Clarence E. Carter, "The Office of Comman-
der in Chief: A Phase of Imperial Unity on the Eve of the Revolution,"
in The Era of the American Revolution: Studies Inscribed to Evarts
Correspondence of William Pitt, I, 55.

48 Greene, Provincial Governor, p. 100. Hening, Statutes at Large,
Arch Md, IX, 121. CRNC, VI, 119, 141-142. Greene, Quest for Power, pp.
304-306.

49 Thomas C. Barrow, "A Project for Imperial Reform: 'Hints Re-
specting the Settlement of Our American Provinces,' 1763," WMO, 3rd

50 Muhlenberg quoted in Charles J. Asbury, "The Right to Keep and
Bear Arms in America: The Origins and Application of the Second Amend-
ment to the Constitution" (Unpub. Ph.D. diss., Univ. of Michigan, 1974),
p. 60-61. Penn to Gage, Pa Arch, 4th ser., III, 305-306; cf. pp. 273-
274. Apprehension of men "without any authority, assembled in arms,"

51 Dunmore's actions, DAMR, IX, 259. Pa Prov Council Min, X, 145,
165-167.


53 An Abridgment of [Richard Burn's [The] Justice of the Peace
[and Parish Officer] (Boston, 1773), a reprint and abridgment of the
The rules also appear in William W. Hening, The New Virginia Justice,
Comprising the Office and Authority of a Justice of the Peace, in the
Commonwealth of Virginia (Richmond, 1799), pp. 18-19.

54 In addition to Pennsylvania, Georgia and Massachusetts exempted
Quakers and Moravians; Georgia: CSPC, 1737, nos. 168vii, 504; Massa-
chusetts: A&R, IV, 49-51. Catholics, on the other hand, were sometimes
disarmed; Virginia: Hening, Statutes at Large, VII, 36 (1756): this
action was not complete. Catholics were denied only "arms, weapons,
gunpowder or ammunition, (other than such necessary weapons as shall
be allowed to him, by order of the justices of the peace at their
court, for the defence of his house or person)."
PART THREE

ORIGINS OF THE RIGHT TO BEAR ARMS

The right to bear arms—the classical Jus Militiae or right to serve in the army—grew out of the constitutional right to keep arms, the right of self-preservation, and the common law obligation of military and law enforcement service, all in the context of the American Revolution. Thoroughly indoctrinated with the principles of Country ideology and of Natural Rights philosophy, Americans looked to the colonial militia and posse comitatus to provide them with the means of opposing the British army after the occupation of Boston in 1768. When Parliament condemned such measures taken by Bostonians, Patriots reiterated the constitutional right to keep arms. When active military resistance became necessary after 1774, Patriots abandoned the old institutions in favor of a "new militia" of volunteers. When King and Parliament in turn condemned these measures as treasonous, Patriots incorporated the Jus Militiae into their state bills of rights in 1776 as either the right of militia or the right to bear arms, in justification of their revolutionary actions. During the war, the ideological concept of the citizen soldier lost its exclusive identification with the militia: the militia had failed as an effective operational device, compulsory service had been reimposed, and the idea of a citizen army had begun to take shape. The development of this opposing theory had its culmination in the Federal Constitution of 1787 which provided
nationalists with the potential to reform the militia into a modernized reserve force and auxiliary to the army. The Antifederalist opponents of consolidated governmental and military power demanded a guarantee in a federal bill of rights of Jus Militiae against potential despotism by the federal "standing army," the ancient nemesis of militia and free government. They got recognition of this right of militia and of arms keeping and arms bearing in the Second Amendment, proposed formally in Congress in 1789 and ratified by the states in 1791.
CHAPTER SIX

Ideological Concepts of Militia and the Right of Self-Preservation, 1690 - 1776

A good militia is of such importance to a nation, that it is the chief part of the constitution of any free government. . . . [It] will always preserve the public liberty. . . . The Lacedemonians continued eight hundred years free, and in great honour, because they had a good militia.

--Andrew Fletcher (1698)\(^1\)

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

--Sir William Blackstone (1765)\(^2\)

By the time American Patriots drafted their bills of rights and first state constitutions in 1776, they had been exposed to three different bodies of contemporary thought concerning militia and arms. The ideology of militia championed by the Country Opposition to the English crown and governmental power coalesced with the concepts of natural law and natural rights and the ideas of the newly reformed English militia to form a potent though sometimes conflicting description of the value, legitimacy, means, and ideal of collective military activities in behalf of political liberties. Within these three bodies existed many notions of the proper composition of
military force, some of which Americans could identify before 1774 with the colonial militia and afterwards with their "new militia."
In general terms they also identified their "militia," in its various definitions, as the only legitimate constitutional military force, the proper means to employ the talents of citizen soldiers, and the institutional counterpoise to peacetime standing armies. After the 1740's Americans became increasingly aware of two competing institutional forms of militia existing in the Anglo-American world. The model of universal military obligation, expressed in colonial law and English constitutional tradition, conflicted with the model of selective reserve forces, expressed most recently and compellingly in the movement for English militia reform which climaxed with the English Militia Act of 1757. Debate over English reform generated considerable polemical debate on the militia and its role in society which included proposals for American reform. The concept of militia outside the polemical debates held an important place in theoretical discussions of the state and economic life, in addition to the militia's political importance. Thus, writers such as Adam Smith and John Millar analyzed the strengths and weaknesses of the militia in the various forms. Finally Americans had been exposed to the philosophical concepts of natural rights, finding special applicability in the right of self-preservation by individuals and societies of themselves and their liberties, and the right of resistance to tyrannical government. Sir William Blackstone especially tied these concepts to the constitutional right of possessing arms and American Patriots tied both to the concepts of militia. Without these
essential elements, the right to bear arms of 1776 would have had a more superficial and transitory meaning, a mere justification of armed insurrection, than it actually had. They provided the deeper significance to the right which made it a fundamental constitutional concept.

The ideology of militia achieved its classic and first full-scale development in the 1690's as part of the English Radical Whig reaction to Parliament's approval of a permanent establishment of the army during peacetime. The notion of militia as a constitutional means to counteract the debilitating influences of a professional army on English society had first been enunciated as early as 1648 when the Long Parliament first drew an institutional distinction between the "militia" of England—the county forces—and the New Model Army. As shown in Chapter One, Parliament's challenge to the military prerogative of the crown by the Militia Ordinance of 1642 had initiated a tremendous amount of writing to justify the usurpation on the grounds of constitutional precedent and the rights of Parliament. Toward the end of that controversy, James Harrington had introduced and synthesized the Humanist and Classical Republican traditions of the citizen soldiery with the concept of arms. Harrington had written Oceana in criticism of the military practices and despotism of Cromwell's Protectorate and in praise of the virtues and military potential of the independent landholding gentry of England. His writings had provided the means to transmit the political and military ideas of Machiavelli to England.³

Harrington's intellectual descendants, called variously the Neo-Harringtonians, Commonwealthmen, Radical Whigs, and Country opposition,
began developing these ideas in the late seventeenth century. To them must be given responsibility for formulating the concept of the militia as counterpoise to the army which quickly was transmitted to the colonies in the early eighteenth century. Their concepts were not entirely original. They depended heavily in certain areas upon the Machiavellian and Harringtonian notions of the societal value of citizen soldiers and the harmfulness of mercenary troops, and the notion of the mythical English Ancient Constitutional practices and institutions. In addition, much of the Humanist, Classical Republican, and Harringtonian corpus of ideas depended upon the concept of political power operating through popular and legislative channels. The specter of potentially unlimited prerogative dominated the writings of the Commonwealthmen. In England where the Glorious Revolution had synthesized King and Parliament, the radical cry against independent executive power proved futile. In America, however, it proved an effective, dominating, and ultimately dangerous means of opposition to the theoretically unchecked prerogative of the governors, apparently unaffected by Parliament’s victory in 1688.4

Although agitation for reform of the Restoration militia statutes and opposition to the royal army politically and ideologically had begun in the 1670’s, full-scale polemical writing did not begin until 1697. The Army had survived the Glorious Revolution, and though it had been brought under the statutory regulation of the annual Mutiny Acts, it still presented to the opposition the threat of unlimited, despotic power. To Robert Molesworth, European experience warned of the ultimate danger of professional armies. French and German princes
had made the mistake of "esteeming Soldiers the only true Riches."
This "mischievous Custom" had the consequence of making warfare and
destruction "absolutely necessary." Particularly instructive for
Molesworth's audience in 1694 was the fate of Denmark. The Danish
court had established a standing army of foreign mercenaries so dan-
gerous that they threatened to enslave both the nobility, which could
no longer effectively oppose the crown, and the people, who lacked the
means of opposition and who consequently lost the desire and capacity
for revolution, the ultimate form of resistance to despotism.  

Commonwealth principles lay at the base of the militia and anti-
army polemics in the 1690's and in the eighteenth century. Molesworth
himself in 1721 published the most explicit statement of beliefs in the
preface to his translation of Francis Hotman's 1574 work, Franco-
Gallia, a treatise on the legal and constitutional structure of medi-
eval France destroyed by the rise of absolutist kings. To Molesworth,
the medieval French political system represented the English and Euro-
pean ideal of the uncorrupted "gothic" constitution, balancing the
powers of communities into a stable society. "A real Whig," he wrote,
"is one who is exactly for keeping up to the Strictness of the true old
Gothick Constitution, under the Three Estates of King (or Queen) Lords
and Commons; the Legislature being seated in all Three together."
Thus a "true Whig" or "Commonwealthsman" was not, as their enemies
claimed, a rebel seeking to restore republicanism and civil war, but a
friend of liberty. Englishmen, in fact, had not taken "up Arms a-
against their Prince" in either 1642 or 1688 out of a desire for
personal gain, but only "when constrain'd to it by a necessary Care of their Liberties and true Constitution." That true constitution might allow standing armies in wartime but rarely during periods of peace because it was always "much more desireable and secure to govern by Love and common Interest, than by Force." Even a Commonwealthman might accept a temporary peacetime "Whiggish Army" to stabilize domestic social and political life disturbed by executive tyranny as long as the army acted as "the Guardian of our Liberties." Generally, however, the power of the sword must remain in the hands of the people. 6

Molesworth's emphasis upon the "invincible Militia" composed of "wise and valiant Citizens" who were "Proprietors of the Estates they fight for" reveals one of the first ideological references to a right to use arms. A well regulated militia, he observed, would make peacetime armies unnecessary, discourage foreign invasion, "and secure effectually our Liberties against any King that shou'd have a mind to invade them at home, which perhaps was the Reason some of our late Kings were so averse to it." Militia in the 1720's, as in the 1690's, was not well regulated, being composed of servants, untrained men, and officers of little estate and low reputation. To deny men the opportunity to perfect themselves in military drill was to deny them their birthright. "The arming and training of all the Freeholders of England," declared Molesworth,"is our undoubted ancient Constitution, and consequently our Right." The right claimed by Molesworth clearly implied the right to military defense, not to private use of weapons. 7

All these Commonwealth principles permeated the writing of the Radical Whigs in the 1690's. The relaxation of state censorship in
1697 at the end of the War of the League of Augsburg combined with the failure of the ministry to disband the army or reform the militia to give impetus to a massive outburst of polemical activity. The cyclical nature of history served as a fundamental assumption to anti-army writers. John Trenchard warned the readers of his Short History of Standing Armies in 1698 that "Men in the same Circumstances will do the same things, call them by what names of distinction you please. A Government is a mere piece of Clockwork; and having such Springs and Wheels, must act after such a manner: ... therefore the Art is to constitute it so that it must move to the public Advantage." The army represented a case in point. Armies might fulfill certain needs of government, but throughout history mercenary troops, especially those kept during peacetime, had endangered society. Professional "standing" troops lacked virtue and courage, led debauched lives, and owed loyalty only to their commanders and paymasters. Kings lay as much in the power of a hired army as the nobility and people. Caesars had risen to the throne of imperial Rome on the basis of armies, and Caesars had been deposed by that force. Standing armies had been so unreliable and such a corrupting influence in past societies that Trenchard could see no hope for England. If the army still in pay in 1698 "doe not make us Slaves," he warned, "we are the only People upon Earth in such Circumstances that ever escap'd it with the 4th part of their number." William III's virtue might save England from its peril, observed Trenchard, but "'tis a most miserable thing to have no other Security for our Liberty, than the Will of a Man, tho' the most just Man living: for that is not a free Government." A more reliable
solution was institutional. The militia could provide the perfect counterpoise to the army in the clockwork of government. Other Commonwealth men echoed and amplified this cry.\(^8\)

Andrew Fletcher considered the problem in detail in his *Discourse Concerning Militia’s and Standing Armies*, a pamphlet which quickly crossed the Atlantic to influence military affairs in Virginia. In the earlier history of Europe, monarcs had been limited in their use of force. Placing "the Sword in the hands of the Subject," Fletcher noted, had been "Essential to the Liberties of the People." Absolutist rulers, however, had seized exclusive military power by hiring mercenaries. Although England had escaped this fate thus far by controlling military appropriations through parliamentary grant, European experience showed that "he that is arm’d is always Master of the Purse of him that is unarmed." Security against this form of usurpation was not inherent in any government, nor security that "these Standing Forces" would not eventually "suppress the Liberties of the People." Before the 1690's the only "real security" had been the constitutional prohibition on standing armies and the common law obligation of arming the people. During the Restoration, however, Parliament had recognized the King’s sole command of all military forces, which had created the potential for tyranny. The solution, just as Trenchard had concluded, required a "well-regulated Militia," capable of providing safety from invasions and the "Danger of Slavery at home."\(^9\)

Fletcher’s militia did not resemble the English county forces of the 1690's nor even the old trained bands, so much as some colonial militias and the militia which had been proposed by Machiavelli. Rather
than allowing "the Scum of the People" to compose the county forces, Fletcher wanted to revive the "many excellent and wholesome Laws" for exercising "the whole People." Undoubtedly referring to medieval statutes for universal arming and musters which had been rescinded early in the seventeenth century, he overlooked the fact that training had not been part of the common law tradition. He did, however, refer to a "Judicious Author" who, like Machiavelli (if it was not he), "well observed... that 'tis easier to exercise a greater number than a less," more convenient to have a widespread force of trained soldiers able to answer a call to rendezvous in small numbers at a given place than a small militia which must travel far at great inconvenience. "By this means," he argued, "the Choice will be greater, as it ought to be, so that Trade, Manufactures and Husbandry may be as little disturbed as possible." In the final analysis, Fletcher emphasized in the revised Scottish edition of his tract,"a good militia is of such importance to a nation, that it is the chief part of the constitution of any free government... [It] will always preserve the public liberty." The Spartans in fact had maintained their freedom for eight centuries "because they had a good militia." 

The common law medieval idea of universal military obligation appealed to the Commonwealth. Their "militia," however, comprised not merely the county forces as part of a larger system of defense but the whole military potential of the nation, the posse regni in the widest sense, the power of the nation. Algernon Sidney's posthumously published Discourse Concerning Government—the "textbook" of the American Revolution, according to Caroline Robbins—argued that "no State can be said to stand upon a steady Foundation, except those whose
strength is in their own Soldiery, and the body of their own People.

Another Radical Whig, Walter Moyle, placed the concept of the citizen soldier in the context of England's Ancient Constitution and of the Gothic Balance.

It is universally true [he wrote], that where-ever the Militia is, there is or will be the Government in a short time; and therefore the Institutions of this Gothic Ballance (which was established in all Parts of Europe) made the Militia to consist of the same parts as the Government, where the King was General, the Lords by virtue of their Castles and Honours, the great Commanders, and the Freeholders by their Tenures the Body of the Army; so that it was next to impossible for an Army thus constituted to act to the disadvantage of the Constitution.

Only by extraordinary accident or willful interference could such a system collapse. Yet, Moyle argued, "the Conduct of the Court in industriously enervating this Force" in the 1680's by attempts to "disarm the People, and make the Militia useless" had led directly to the creation of a standing army in England, and, he might have added, to the enunciation of the right to keep arms. Arms must remain in the hands of the people; the people must control the power of the sword.

How could the English militia fulfill these goals? Its organization was deficient, the units filled with "scum," and, lacking trained and competent officers, it was virtually untrained and seriously lacking in arms. The Commonwealthmen believed only Parliament itself could propose reforms, but, under the pressure of polemical debate, they steadily made clear "what is amiss" so that the legislators could act. Most wanted universal service obligation, general arming, and effective training, especially of the freeholders of the shires. Andrew Fletcher
proposed four training camps for young men, to last one year for those who had to receive public support and two for those who could pay their own expenses. The camps would teach use of arms, horsemanship, and reading (especially history and military annals). They would be run entirely on military lines, with their own officers, court martial system, but no clergymen—forcing the youths to aid each other in psychological need. After training, soldiers would return home, ready on call for war and internal disturbances. Walter Moyle believed that laws against shooting had to be revised and that soldiers disbanded from the standing army should help compose the militia. National territory, to be enlarged, Moyle argued, required an enlarged population with "the sword put in their hands" to create "a brave militia . . . of men spirited by freedom, plenty, and property."15 One anonymous writer urged that all that was really necessary was to enforce current laws and impose stricter penalties.16 Others believed the law needed to be modernized, reducing the size of the militia and increasing training from four days a year to a month or six weeks.17 Finally, John Toland argued that servants be excluded entirely from the county forces, and that freemen be trained one afternoon a week and mustered in units quarterly. All freemen became eligible for personal service, and all others chargeable for financial support. Officers would be men of estate who would rotate every three years to provide experience for all eligible men. In case the nation did not give up its restrictions on foreign service, volunteers could be raised from the trained militia.15

The image of militia which emerged in the 1690's was not entirely one of an ideal, utopian force, capable of feats worthy of Roman legions.
The opponents of the Commonwealthmen presented a strong counterimage of militia, reflecting its actual operation in England.¹⁹ No militia, one "D. F." argued, had ever been very successful without the assistance of regular troops. If militia were "regulated and Disciplin'd, I say they may enslave us as well as an Army; and if not, they cannot be able to defend us."²⁰ Rather than serve in war, county gentlemen and freeholders preferred to hire substitutes and remain at home. "They love their Country," another pamphleteer contended, "but Education had in great Measure taken them off from the Vanity of admiring wooden legs and broken pates."²¹ Daniel Defoe argued that the very concept of a well-regulated militia was a "Black Swan," an "unheard-of thing."²² This anti-militia image was summed up in the classic lines of John Dryden in his Cymon and Iphigenia in 1700:

The country rings around with loud alarms,
And raw in fields the rude militia swarms;
Mouths without hands; maintained at vast expense,
In peace a charge, in war a weak defense:
Stout once a month they march, a blustering band,
And ever, but in times of need, at hand.
This was the morn when, issuing on the guard,
Drawn up in rank and file they stood prepared
Of seeming arms to make a short essay,
Then hasten to be drunk, the business of the day.²³

The image of militia which emerged so fully articulated in England as a result of the standing army controversy played an increasingly important role on both sides of the Atlantic. In Virginia, as shown in Chapter Four, James Blair in 1705 drew explicitly on the works of Andrew Fletcher for arguments to attack Governor Nicholson’s policy toward the militia. Robert Beverley also attacked the policy as the genesis of a colonial standing army, a charge repeated in 1716 against Governor
Spotswood. The ideology had less immediate influence in the other colonies. The controversy against the army continued to influence polemists in England during the eighteenth century and, through their writings, the American colonists. Old and new Commonwealthmen continued their defense of the citizen soldier; their solution to the dangers of professional armies lay in a militia indoctrinated by "Whiggish" ideas of liberty.

The principles which underlay this "Whiggish" militia were neatly sketched by John Trenchard and Thomas Gordon in 1722 in one of Cato's Letters published in a London newspaper and reprinted widely in the colonies. "Military Virtue," they wrote, was the product of liberty.

In free Countries, as People work for themselves, so they fight for themselves: But in arbitrary Countries...[a] tyrant has no Resource; his Subjects having neither Arms, nor Courage, nor Reason to fight for him: He has no Support but his standing Forces... In attacks upon a free State, every Man will fight to defend it, because every Man has something to defend in it. He is in love with his Condition, his Ease, and Property, and will venture his Life rather than lose them; because with them he loses all the Blessings of Life.24

Therefore, it was essential to make use of the natural interests and virtues of the people in defense in order to avoid the dangers inherent in mercenary armies. "In free States," they concluded, "every Man being a soldier, or quickly made so, they improve in a War, and every Campaign fight better and better." Trenchard and Gordon illustrated their essay with proofs from classical and medieval history of small states which had successfully opposed and even conquered large nations defended by mercenaries.25

Several other works before mid-century enhanced this image of the militia. Military power, according to Roger Acherley's Britannic
Constitution, was a matter of supreme importance in any nation and must be controlled by "the National Power." The true functions of military forces, he contended, were "to Protect the Land, and to Defend, and Repel Foreign Injuries and Invasions, and to Suppress Domestick Rebellions, and Insurrections; all which Centre rather in Defensive than in Offensive Wars." In order to prevent "such National Armies" from subverting the constitution, "Standing Land Forces, in Times of Peace" had to be avoided. Even Parliament might be unable to compel these forces to obey its will and might even be dispersed by the army. Although Acherley did not offer the militia as a direct solution to this problem of untrustworthy land forces, he did demonstrate later in his work the power Parliament had exercised when it took the command of militia away from Charles I.²⁶

The militia, if properly settled in the medieval, pre-Norman, or classical manner, Thornhagh Gurdon argued, could provide a means to eliminate peacetime armies. He referred the readers of his History of the High Court of Parliament to the reign of Athelston to prove that "the settling a Militia according to Mens Estates" had existed in Saxon England and offered an example from the Ancient Constitution for modern emulation. Thomas Gordon's translations of the works of Tacitus in 1728 and Sallust in 1744 emphasized the dangers of great armies during peace and war and the oppressions and severities of civil war. "Power unrestrained, and Liberty uncontrolled," he editorialized, "are both apt to make Men wanton and insolent." The use of force always brings "the Contest to the Decision of the Sword." Once fighting begins, it is difficult to stop, giving rise to military commanders such as Cromwell who overcome their civil masters and establish their own bases of power.
In the long run, power itself must be controlled to prevent abuse. James Ralph's *History of England* showed that the greatest abuses had come from the rulers themselves. The anti-army writing of the 1690's had proved to him that "A free People . . . has a Right to maintain that Freedom by the Sword" even against "their perfidious Governours." Unless the people were armed, armies could rule them. Englishmen before the seventeenth century had avoided armies by "their Custom of Friboroughs, or Frankpledges, Inquests, Oaths, and Penalties, Tenures by Knight-Services, Commissions of Array, &c. Which being of approv'd Benefit, and Equality, were much more suitable to the Genius and Interest of the People, than a Standing Army." The Ancient Constitution's placing of military power in the hands of the people and their institutions thus continued to offer an alternative to the dangerous modern military system.27

Even Viscount Bolingbroke, the Tory opponent of governmental power, adopted some of the Whiggish anti-army sentiments. He was especially critical of apologists of centralized government who defended the army as necessary to defend liberty. "Nothing can be more absurd," he wrote in *A Dissertation Upon Parties*, "than to employ, in defence of liberty, an instrument so often employed to destroy it." In his *Remarks Upon the History of England*, Bolingbroke described those dangers. "All standing armies," he had discovered, "for whatsoever purpose instituted, or in whatsoever habit clothed, may be easily made the instrumenta of faction." Yet, he observed, "if a spirit of liberty be kept up in a free nation, it will be kept up in the army of that nation; and . . . when it is thus kept up, though the spirit of faction may do great hurt, it cannot complete the public ruin." Thus, an army properly composed and
controlled could maintain liberty; but any army was susceptible to faction and danger to the nation. This "same truth," concluded Bolingbroke, "was again confirmed to us no longer ago than" 1688. 28

Apologists for the army had gained considerable power by the 1740's as a result of renewed European warfare and the success of the army in belying the dire predictions about its conduct made by Country polemicists. After 1739 and especially after the miserable performance of the militia against the Scottish uprising of 1745, military reformers began to pressure Parliament to transform the county forces into a modern auxiliary and reserve to the army. As long as the militia "remains upon the ancient Footing," complained one author, all attempts "to make the Militia effectual or more useful . . . must meet with the greatest Opposition." Maintaining an army large enough to satisfy domestic, colonial, and European needs would be prohibitively expensive and dangerous. The same anonymous author found a solution in a "selected Militia" of well-affected and paid part-time soldiers to serve in concert with the army. Another suggested that 18,000 volunteer militiamen could adequately augment 17,000 regulars during wartime. 29

These plans for an army reserve on the model of Cromwell's "New Militia" evoked a response from the descendents of the Commonwealth men. Colonel Samuel Martin revived the Classical Republican and Ancient Constitutional image of universal military obligation in his Plan for Establishing and Disciplining a National Militia in Great Britain, Ireland, And . . . America in 1745. He agreed that the militia needed to be reformed, but not as a reserve too closely identified with the army. Rather he concluded that the militias of England and America should be
reorganized into two complementary bodies, a "superior militia" composed of men of property and a "subordinate militia" of common men and servants which together would create a formidable institution. Martin advocated popular election of commissioned officers, a procedure not yet revived in the colonies. Like Machiavelli, whom he cited as a source for many of his ideas, Martin argued that men, not riches, were the sinews of war and that a free state had nothing to fear from placing arms in the hands of the people. He opposed making war a profession and advocated that wartime soldiers revert to their civilian occupations at war's end. Militia, thus, would replace the army during peacetime. Americans became aware of the arguments for reform when Martin's pamphlet was reprinted in the colonies. 30

This initial polemical activity for militia reform, however, had little influence on Parliament, especially after the end of the War of the Austrian Succession in 1748. That year in France Montesquieu published his Spirit of the Laws, a work which received considerable attention in England and America. Though it had little direct influence in the militia issue, it did contain favorable comments on the role of the citizen soldier in society. Although the potential for abuse of power in monarchies made it dangerous to concentrate civil and military responsibilities in the same officials, the same was not true for republics. In republican societies, as Englishmen had discovered, the danger lay in establishing an exclusively military interest. To allow military professionals to enforce civil law was incompatible with republicanism. Since in a republic, he declared, "a person takes up arms only with a view to defend his country and its laws," civil and military duties could safely
be placed in the same hands. Citizens had no separate military interest, but "because he is a citizen," concluded Montesquieu, "he makes himself for a while a soldier," then returns to his civilian pursuits. 31

Opponents of extreme transformation of the militia, which would have created a county force with definite military interests, mobilized their polemical strength against a reform bill introduced in Parliament in 1752. William Thornton published an important tract, which was reprinted in New York the following year, in an attempt to influence the proceedings. The Counterpoise sought to reunite the Commonwealth's detestation of the army and praise for the militia with the realities of the mid-eighteenth century. He agreed that "Standing Armies have ruined all countries that have had them, without a counterpoize," and argued that "a well regulated Militia" could "at little or no expense" provide "a sufficient Power to control and balance" the army. The militia, he believed, could both supplement the army during emergencies and render professional soldiers safe to government and society. Citing Machiavelli for examples of the consequences of an uncontrollable army, Thornton praised the Swiss militia which had defeated the Duke of Burgundy's army, the Genoese who had turned back the Austrians, and the New Englanders who had captured Louisbourg. The English militia could achieve similar feats only if Parliament modernized arming and training requirements and improved the quality of commissioned officers. Then 150,000 militiamen would cost only as much as 6,000 regulars, allowing the army to be reduced to 50,000 men. 32

Other writers joined Thornton in influencing Parliament. Lord Sackville's Treatise Concerning the Militia agreed that army and militia
must coexist. Strong county forces could provide men for continental operations and protect England from invasion and insurrection. "For then," he declared, "every man being enabled to defend his property, all the coasts of Britain will be covered with soldiers, who fight not for pay but for property, for their families, for their religion, and liberties." An enemy who managed to land "must fight every inch of ground, and still find people in arms against him wherever he goes." Sackville urged that the militia consist of men of property, ranked according to holdings in infantry and cavalry units. From this "general militia" would be chosen a "select or standing militia" for immediate use. However, he recognized and accepted the medieval constitutional restrictions on the area of service. No one, he repeated, must cause the militia "to march out of their respective counties upon any pretext, or by any command whatsoever; upon pain of being declared enemies to their country, and guilty of high treason." Finally, Sackville made his Commonwealth bias most clear by favorably quoting from Algernon Sidney's work that England's strength lay in "the body of their own people."  

Samuel Squire presented the opposite view in his *Enquiry into the Foundation of the English Constitution* in 1753 after the militia bill had died. He argued that the "standing army, as it is at present constituted, paid, commanded, and recruited, will always be a guard to our internal tranquility" and a support for allies in war and peace negotiations. The ancient German and Anglo-Saxon kings had needed "a regular and well disciplined body of militia," but the time had passed when "all the native freemen were soldiers." The present army, he concluded, "is the army of the people, more properly than of the king."
Despite voices such as Squire's, the predominant tone of ideological argument and political discourse unconnected with the Parliamentary bills favored the militia over the army. David Hume and Francis Hutcheson, Scottish intellectuals outside the political atmosphere of the militia debate and well known in America, helped carry forward the concept of militia derived from James Harrington. Hutcheson in *A System of Moral Philosophy* argued the virtues of the militia as a whole and of the citizen soldier over the dangers to society of the standing army. Hume described "modern armies" in the traditional Commonwealth manner as comprising "a low rascally set of people." In his essay on the "Idea of a Perfect Commonwealth," Hume modelled the perfect militia "in imitation of that in Switzerland" except that 20,000 men would serve each year in a training camp to acquaint them with military life. By such writings as these, Americans remained aware of the importance which the militia retained outside the polemical debates.  

From 1752 to 1756, Parliament rejected or allowed to die a number of proposals to reform the hundred year old militia system. By 1754, war had broken out in the colonies and was imminent in Europe, requiring the mobilization of large numbers of men as a defense against invasion of England and for operations in America and on the continent. The potential of the militia had to be tapped to avoid the massive expenditures required to keep garrisons at home. The solution, declared a writer in 1756, was "Self-defence"—"the Business of all." Parliament must eliminate the laws against hunting so that men could learn the use of firearms which, in turn, would enhance their "Love of Liberty and Independence, along with a Confidence in Parliament."
Studying in London and following Parliamentary affairs in 1756, John Dickinson was struck by the incongruity of the ministry's defeat of a militia bill passed unanimously by Commons. It "astonished" him "to hear from Englishmen" some of the arguments against the bill urging the advantages and necessity for keeping native and foreign mercenaries. He was particularly upset to hear "that a militia would introduce a military spirit, would destroy that commercial one which is now become a part of the English Constitution, & [that] in a little time, it would be necessary to make laws for suppressing it." Dickinson's reading of English history and anti-army literature had created for him the image of the militia as the true English constitutional military force, an image shared by other Americans. 37

Discussion of the militia naturally brought to public attention the seventeenth-century controversies between Charles I and Parliament, Cromwell's use of militia, and the ideological arguments of the Restoration and Glorious Revolution. Mid-eighteenth-century military developments added another element: the need for a strong land force to oppose European standing armies. The interaction of these influences produced some interesting proposals. Most advocates of a reformed militia recognized modern military problems and sought to cast their ideas accordingly. Very few tracts took a blatantly libertarian anti-army stance but considered a "judicious mixture" of militia and regulars compatible with their ideological beliefs. Mid-century writings advocated a militia to supplement the regular army and free it from manning home garrisons against invaders and from duties of suppressing local disturbances and insurrections. 38
The parliamentary act passed in 1757 established a new militia, a force of part-time soldiers for local defense and home duties, to be called out during emergencies and organized and armed as regulars. The act reduced the number of men obliged to serve, assessed the shires for proportional quotas of men, and charged parishes with finding men and arms. Medieval restrictions still applied: the militia could not be used outside the realm. Major problems common both to the English and colonial militias involved selection of men for service and appointment of officers. One disgruntled writer in 1762 considered the idea of conscripting men if voluntary enlistments failed as "ridiculous, impracticable, and carrying an utopian idea of property and patriotism into the ranks." Others criticized the act as a poor compromise.³⁹

Thus by the 1760's two institutional images of militia had been established and, in England, had partially merged. The original constitutional image had developed during the seventeenth century on the model of the English county forces and the American colonial forces, representing universal military obligation and combined civil and military functions. Late seventeenth-century Commonwealthmen had modified this image, transforming the county forces from their theoretical and ideological position as the sum of English military power to a mere counterpoise to the standing army. Eighteenth-century military reformers had synthesized portions of the Commonwealth model with institutional practices based upon Cromwell's New Militia and the Restoration militia acts, adding the concept of the county forces as reserves and auxiliaries to the army. Even libertarian reformers in the mid-eighteenth-century recognized the institutional advantages of some of these
characteristics. The 1757 statute actually represented a compromise. The militia retained many of the constitutional features—it could not be employed outside the realm nor within the realm except for its three functions of repelling invasions, suppressing insurrections, and enforcing the law. And though the new, smaller, and more highly trained militia companies were permanently associated with particular regiments of the regular army, the militia remained a separate organization serving as rear area forces. During the colonial period, Americans generally advocated the Commonwealth or constitutional image, or some combination of the two based upon actual institutional characteristics of the colonial militias. Only at the beginning of the Revolution, as shown in the next chapter, Americans began to assimilate the reserve model into their ideology and their military reform plans.

During the eighteenth century Americans also assimilated the ideology of natural rights. The philosophy of natural rights, especially the concept of the right of individuals and societies to self-preservation, represented a major philosophical, intellectual, and ideological influence on American concepts of militia and the right to bear arms. Nature, according to Basil Willey, had been a "controlling idea" in Western thought since classical times. Since then, as well, had existed the notion of a body of natural law governing human relations which transcended the course of ordinary, man-made statutes. Until the Renaissance, moreover, this concept had been inseparable from that of God. Only after the sixteenth century did the political or juristical elements become distinct from the theological, being incorporated into an independent and rationalist system of thought. It is the emergence of
this system which endowed the subsidiary concept of self-preservation with its sense of absolute right. In addition the parallel development of the "state of nature" theory to explain the origin of society and government enhanced the concept by identifying it with the most fundamental and original rights of individuals. At issue here was the philosophical connotation of that right and its transmission to America. 40

Among the earliest modern exponents of a secular law of nature and concept of self-preservation was the seventeenth-century Dutch politician and humanist Hugo Grotius. His treatise on The Law of War and Peace represented one of the earliest attempts to establish a system of law to regularize relations among European monarchies. Published in Paris in 1625 and Amsterdam in 1631, the book went through forty-four Latin editions and twenty-three translations before the end of the eighteenth century, five into English. The treatise rested on the fundamental basis of the lawfulness of war. Paraphrasing Cicero, Grotius identified as "the first principles of nature those in accordance with which every animal from the moment of its birth has regard for itself and is impelled to preserve itself, to have zealous consideration for its own condition and for those things which tend to preserve it." War, thus, being a means of preserving life and limbs and keeping or acquiring useful things, could not be inconsistent with the principles of nature. "Right reason," on the other hand, "and the nature of society," which have greater importance than unregulated nature which no longer exists, impose a vital qualification: force may be used, but not force which is in conflict with society itself, that is, "which attempts to take away the rights of another." Self-defense,
Grotius found, was a flexible principle, allowing individuals and societies to justify the use of force to protect lives and property and to wage war lawfully. But self-preservation could not be an absolute right free from external regulation.\footnote{41}

Other European legal commentators followed this line of reasoning, as Charles F. Mullett has shown, by placing self-preservation among the most essential rights belonging to individuals and societies. Significantly, Samuel Pufendorf's \textit{Of the Law of Nature and Nations}, J. J. Burlamaqui's \textit{Principles of Natural and Political Law}, Vattel's \textit{Law of Nations} or \textit{Principles of the Law of Nature} established the concept as "fundamental law," based upon nature and reason, which existed outside and took precedence over civil law. Thus, under various circumstances, a person could defend himself by killing an attacker who threatened his life despite statutes prohibiting murder. This very concept of self-defense was embodied in English common law.\footnote{42}

English law and writings on natural rights influenced eighteenth-century Anglo-American intellectual development to a greater degree than did Continental works. Here again, Mullett has demonstrated that the concept of self-preservation occupied an enduring position in the hierarchy of natural rights. Sir Francis Bacon included it with the rights of liberty and of "the society of man and wife" as three principles derived from natural law which transcended both common and statutory law in England. William Prynne, on the other hand, found the source of this right in both common and natural law, in mutual reinforcement.\footnote{43}
Thomas Hobbes, in the mid-sixteenth century, emphasized the overwhelming importance of the concept of self-preservation by identifying it as the only absolute, unconditional right arising from nature, with all other duties being derived from that concept. He offered the first serious intellectual challenge to the entire philosophy of natural rights and fundamental law, grounding his own theory in the positive civil law of man and the coercive power of government. His concept of self-preservation denied the right of revolution and armed resistance to duly constituted authority but placed the survival of the controlling elements of society higher than the survival of individual or community liberty. Hobbes' speculations on human nature, society, and government did not gain much popularity among Englishmen, being assaulted and rebutted by legions of critics. But this basic concept itself persisted in English thinking and received the best known and most influential restatement from the work of John Locke.44

John Locke’s Second Treatise of Government perpetuated the right of self-preservation in Anglo-American political theory. Unlike Hobbes, Locke followed the traditional pattern of treating the concept as only one of some number of basic rights derived from nature, and of denying its absolute quality. Only in the mythical state of nature or the very real state of war, he wrote, could every person be the "Executioner of the Law of Nature"; only there ruled the right of self-defense, the "Right to destroy that which threatens me with Destruction." In society and in peace, on the other hand, the concept of property defined right and obligation. Property, in Locke's theory, encompassed not simply one's estate but also one's life and personal liberty, and the rules
of society provided all lawful remedies for abuse. Only when abuse such as royal prerogative threatened "Life, Liberty, and Estate," and consequently the stability of society, could force be applied. "In all States and Conditions," Locke emphasized, "the true remedy of Force without Authority, is to oppose Force to it," not the strength of individuals but of the people as a whole under proper authority whether it be civil or natural law. Many people, he added, had "mistaken the force of Arms for the consent of the People," failing to recognize the collective nature of proper resistance to abuse. Here, then, is no justification of an unrestricted right of self-protection or retaliation by individuals, but a closely regulated means of maintaining societal stability, a means inherently collective and fundamentally legal.  

The concept of self-preservation maintained its importance among eighteenth century writers and thinkers. Once again Charles Mullett has shown the progress of such theory in his description of Benjamin Hoadly's The Original and Institution of Civil Government in 1710 and Thomas Burnett's Essay upon Government in 1726. Both authors, in good Whig tradition, concluded that self-defense applied to society as a whole, and that only in the last resort could the right of self-preservation justify resistance to government. The Radical Whigs, John Trenchard and Thomas Gordon, in Cato's Letters, also rationalized the use of force based on this right as an ultimate remedy for abuse.  

The most influential English writer to describe the natural right of self-preservation, and the one to tie it most convincingly to the body of English law and to the concept of the right to keep arms was Sir William Blackstone. Although his Commentaries on the Laws of
England had its basis in a close analysis of common and statutory law, judicial decisions, and other legal commentaries, Blackstone prefaced his work with a general essay on the origins of law and the rights of individuals. In this analysis he postulated the existence of a number of absolute and a number of auxiliary rights belonging to persons as human beings, adapted from the continental school of natural law of Pufendorf and especially Burlamaqui. The first of his three "absolute rights of every Englishman . . . usually called their liberties, as they are founded on nature and reason" paralleled the concept of self-preservation. However, this "right of personal security," Blackstone wrote, "consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation," a much wider rendering than the European model. He did accept the notion of self-defense against life and limb as a fundamental right because "the law of England," not simply natural law, placed "such high value" on their protection "that it pardons even homicide if committed se defendendo, or in order to preserve them." Contrary to the popular view of the nineteenth and twentieth centuries, however, and in divergence from the absolute character of this right imposed by Hobbes and even Locke, Blackstone rejected the extension of this right to include defense of property or even the fear of bodily injury. "A fear of battery or being beaten," he observed, "though never so well grounded, is no duress; neither is the fear of having one's house burned, or one's goods taken away and destroyed." The reason was simple. Society provided legal remedy. "In these cases," he concluded, "should the threat be performed, a man may have satisfaction by recovering equivalent damages,"
a different situation from the defense of life because "no suitable atonement can be made for the loss of life, or limb." 47

In addition to the two other absolute rights of liberty and property, Blackstone enumerated five "auxiliary subordinate rights" to protect the others. Here, the means of self-defense come last and receive the briefest mention, following those of parliament, limitation on royal prerogative, judicial remedy, and petitioning king and parliament for redress of grievances. Only after these other means had failed should Englishmen resort to the "fifth and last auxiliary right," the right "of having arms for their defence, suitable to their condition and degree, and such as are allowed by law." The two qualifications incorporated into the English Bill of Rights identified the right, not as absolute, but as "a public allowance under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." Like the other "liberties of Englishmen," Blackstone recognized that this one was "more generally talked of than thoroughly understood" and sought to make them "perfectly known." 48

Arms, then, in Blackstone's analysis, provided the ultimate sanction of individuals in society to defend that society against abuse of power by governing officials. How they could be used effectively presented a real problem. English law recognized the king himself "as the generalissimo, or the first in military command" because the "great end" of society and government was to protect the "weakness of individuals" by directing the "united strength of the community." To create
"a distinct order of the profession of arms," he warned, was "extremely
dangerous" in "a land of liberty." "No man should take up arms, but
with a view to defend his country and its laws," Blackstone observed;
"he puts not off the citizen when he enters the camp; but it is because
he is a citizen . . . that he makes himself for a while a soldier."
Thus, the proper means of resisting oppression, either from foreign
invaders or fellow countrymen including, presumably, the king himself,
was for every citizen to become a soldier to defend the law. Blackstone
did not explicitly argue that the "militia" should violate statutory
law and disobey the order of the king, the commander in chief. But the
inference is clear. If the ultimate sanction of society is to preserve
itself, by arms if necessary, and if every man is properly a soldier in
times of need, and the proper institutional structure for organizing
these men into a military force was the "militia," then the militia re-
presented a legitimate means of exercising societal sanctions.49

Blackstone established the connection between the natural right
of self-preservation and the English rights of self-defense and of keeping
arms. Americans, as will be shown in the next chapter, quickly ad-
dopted his point of view and used the Commentaries as the authority for
military preparations against the English army in Boston in 1768. Yet
Blackstone had more to say on the militia and the army, much of value
for the revolutionary "new militia" of the mid-1770's. Blackstone
observed that England had maintained no permanently embodied military
forces until the reign of Henry VII. Before that, the English tradition
had been that of universal military obligation. The Saxons, for example,
had exercised the practice of having war leaders "elected by the people
in their full assembly, or folkmote," so that if this delegated power were abused, the people could just as easily withdraw it from a guilty leader. In this way the "Saxon constitution," like that of the "ancient Germans," their ancestors, maintained "an independent power over the military." By the time King Alfred "first settled a national militia," making "all the subjects of his dominion soldiers," the earls were no longer elective and were too dangerously powerful. The Norman Conquest introduced the feudal military system which quickly degenerated into monetary commutation for personal service. Partly to compensate for this weakness, non-feudal service obligations were reiterated through the Assize of Arms and Statute of Winchester requiring men to keep weapons "according to his estate and degree." Only with the repeal of these and subsequent arming statutes did Parliament challenge the king's "power of the militia," the confrontation which led to civil war in 1642. Blackstone also described the outline of military obligation under the 1660 and 1757 militia statutes and the safeguards imposed on the use of the army by the annual Mutiny Acts after 1690. What he did not emphasize was the selective and limited nature of membership in the militia, making it as a distinct institution of the eighteenth century only a potential means for opposing tyranny. Yet, as we have seen, the general and indiscriminate usage of "militia," which Blackstone was himself guilty of except in the final section of his analysis, provided an ambiguous definition for Americans. 50

English writers in the 1760's and 1770's made little of the distinction between self-defense and militia and between militia and arms,
thus compounding the ambiguity. In 1763, for example, Fenning's *Royal English Dictionary* defined militia as "the standing force of a nation; the inhabitants of a country trained to arms, and acting in their own defence." In *An Argument Concerning the Militia*, Sir George Savile criticized the reformed institution but admitted that "in cases of necessity, and where the very being of a constitution is at stake, every state has an absolute and indefeasible right of calling on every subject, capable of personal service, to stand forth in defence of his country in its distress." Anthony Ellys agreed and demonstrated in *Tracts on Liberty* that under English law "no force can be used but in execution of legal processes, or for resistance of any sudden invasion. In any other case, no great company of persons can appear in arms, or in any forcible manner without a commission from the crown." Parliament, he felt, had wisely settled military prerogative in the king in 1661. Yet the law "would have been null in itself" had it in fact eliminated the means for "all persons to defend themselves" when the king or his officers "should act the most illegally, and endeavour to destroy the constitution." Rather, the *Militia Act* had been "designed to leave the subjects to their civil rights." "Privileges," he concluded, "without a right of defending them, are of very little significance." Precisely this point was reinforced by Francis Hutcheson and Joseph Priestley. Hutcheson argued that in a state of "natural liberty" "none of our rights could be safe, were we prohibited all violent efforts against the injurious." Priestley looked at the history of "hostile opposition to government" and concluded that "without exception" "the people must
have been in the right" because of all the obvious "difficulties, that lie in the way of procuring redress of grievances by force of arms."
Finally, James Burgh contended in his 1774 Political Disquisitions that "possession of arms" in itself "is the distinction between a freeman and a slave." A freeman "ought to have arms to defend himself and what he possesses, else he lives precariously . . . awed into submission to every arbitrary command." Burgh did not specify militia as a concomitant to arms keeping, but he later emphasized that if the militia were the only national military force, "if the people were armed and the court unarmed," the people would less likely be oppressed. In the words of Edward Montagu, "nothing but an extensive Militia can revive the once martial spirit of this nation, and we had even better once more be a nation of soldiers, like our renown'd ancestors, than a nation of abject crouching slaves." 51

Two final Scottish works established the context for the American debate on arms and the militia. Though neither John Millar's Origin of the Distinction of Ranks, published in 1771, nor Adam Smith's Wealth of Nations, appearing in 1776, had much immediate influence on American revolutionaries, each presented a sociological view of the evolution and decline of the militia as an effective military institution. With the transformation of the English militia in 1757 and the loss of influence in England of the ideas of the Commonwealthmen, works such as these drove a deeper wedge between the English and American concepts of militia and ultimately reinforced the opinions of American military reformers such as George Washington, Alexander Hamilton, and Henry Knox
that neither the old colonial militia nor the new revolutionary militia was acceptable for the growth of the new nation into political and economic maturity. 52

John Millar reviewed the evolution of military history in relation to advances in government and society. "Mankind, in a rude age," he observed, "are commonly in readiness to go out to war." By constant engagements men "are trained to the use of arms, . . . acquire experience in the military art"; and, "without any trouble or expense, a powerful militia is instantly maintained." In a more developed society when government "acquires so much authority as to protect individuals from opposition" and to end private wars, people lose "their martial ardour." Finally, advances in art and manufactures, especially the introduction of luxury, create self-interest opposed to military exertion and "the bulk of a people become at length unable or unwilling to serve in war," and when called upon, hire substitutes, thus creating an army of men whose self-interest lies in the money they receive for their service. Thus, Millar noted, "the introduction of mercenary forces is soon followed by that of a regular standing army," in which "the business of a soldier becomes a distinct profession." Rather than criticizing this development, he simply observed that it had occurred "in all the civilized and opulent nations of antiquity," as well as in modern Europe. Though such armies had often been "the great engine of tyranny and oppression," they had also produced "a tendency to inspire the people with notions of liberty and independence." Therefore the "total revolution in the manner of conducting their military operations"
which "the influence of civilization" had had "upon the temper and dispositions of a people" could not be considered totally negative.\textsuperscript{53}

Adam Smith, whose lectures in the 1760's at the University of Glasgow provided the basis for his \textit{Wealth of Nations}, echoed many of Millar's sentiments. Using a functional analysis of warfare in agricultural and manufacturing nations, he described the distinction arising from increasing societal development. In simpler societies every man was a soldier, fighting without pay and without loss of livelihood from his farm. In more complex societies, men who served in wars lost income by being away from their trades; consequently, few men could be sent to war without national economic ruin. Therefore, division of labor required the creation of a "particular class of citizens" to make warfare their "principal profession." To require everyone to undergo military training, Smith observed, "would not promote their own interest" because of the expense in time, and it would only create an "imperfect military force." Since "the natural habits of the people render them incapable of defending themselves" without pay or public coercion, the resulting institution invariably displayed its amateurishness in peace and war because "the character of the labourer, artificer, or tradesman, predominates over that of the soldier." Professional armies always fought more effectively and, properly composed, did not endanger but protected public liberty.\textsuperscript{54}

Smith's analysis differed from previous argument concerning armies by its non-ideological approach. Whereas the Commonwealthmen contended that virtue supplied one universal animating force for military and political action, and that it was in everyone's "interest" to defend
self and society, Smith argued that citizens would fight only for economic self-interest, only if they received positive economic incentive from the state. In manufacturing nations, he observed, economic gain displaced republican sacrifice as a primary motivating force. On another level, he agreed that the two interests might merge, admitting that defense depended a great deal "upon the martial spirit of the great body of the people" and that if "every citizen had the spirit of a soldier" a large standing army would be unnecessary. In fact, the ideal composition of his army bore remarkable resemblance to the ideal militia of the republicans. Both must consist of citizens, commanded at the top by the king and immediately by the "principal nobility and gentry of the country," that is, by those "who have the greatest interest in the support of the civil authority." The difference lay in the smaller number of men Smith advocated. Thus, advocates of the traditional universal militia, of the modern reformed militia, and of the volunteer army could look to the Wealth of Nations for arguments to support their own claims. The importance for the revolutionary debate in America was the existence of a strain of thought which separated arms-bearing in defense from the institution of militia.55

Thus the ideological and philosophical context within which the American revolutionaries created their "new militia" and the right to bear arms contained elements which supported both old and new institutional and constitutional practices. The concepts of militia, arms, standing armies both properly and improperly composed, self-defense, self-preservation, and armed resistance against oppressive government permeated the large body of writings available to eighteenth-century
Americans. The Country image of militia and army identified the "new militia" as the proper agency for expressing Patriot military resistance. The natural rights philosophy gave Patriots the immediate justification for such resistance. For some Americans, the sociological and economic analyses of the disadvantages of all militia provided arguments for relying on an American regular army despite the ideological bias against one. Finally, the ambiguity of all the received definitions of militia and arms provided advocates of every variety of American state and national militias and armies legitimate theoretical support for adopting their systems after 1776.
NOTES


5 Robert Molesworth, *An Account of Denmark, as It Was in the Year 1692* (London, 1694), pp. 125, 268.


7 *Franco-Gallia*, pp. xxxi, xxvi (emphasis removed).


9 Andrew Fletcher, *A Discourse Concerning Militias and Standing Armies* (London, 1697), pp. 6, 7, 15, 21, 22. See also Chapter Four, above, concerning colonial use of this pamphlet.


12 Caroline Robbins, "Algernon Sidney's Discourses Concerning


14 Ibid., p. 20.


21 Anon., An Argument Proving, That a small Number of Regulated Forces... cannot damage our Present Happy Establishment (London, 1698), p. 15.


23 John Dryden, Cymon and Iphigenia (trans., [London?], 1700), 11. 399-413.


25 Ibid., II, 285; cf. nos. 94, 95 (anti-army).

26 Roger Acherley, The Britannic Constitution: or, the Fundamental


30 [Col. Samuel Martin], A Plan for Establishing and Disciplining a National Militia in Great Britain, Ireland, and In all the British Dominions of America (London, 1745), pp. 6, 19, xviii, xxxv, xxxvi. A brief analysis of this tract, emphasizing the "antiquated and vestigial feudal form of the militia system" advocated by Martin, is found in Fred K. Vigman, "A 1745 Plan for . . . a National Militia in Great Britain and . . . America," Mil. Aff., 9 (1945), 355-360. Cf. the arguments contained in a reprint of John Trenchard's 1698 Short History of Standing Armies under the title Standing Armies Standing Evils (London, 1769), pref., p. iii. Cf. also Seasonable and Affecting Observations on the Mutiny-Bill, Articles of War, and Use and Abuse of a Standing Army (London, 1750), p. 6, which argues that the militia probably could answer all the ends of the army without the abuse.


32 Clode, Military Forces, I, 38. W[illiam] T[hornton], The Counterpoise. Being Thoughts on a Militia and a Standing Army (London, 1752), pp. 8, 1, 13, 38. This pamphlet was reprinted in New York in 1753.

33 C[harles] S[ackville] ([2nd Duke of Dorset]), A Treatise Concerning the Militia (London, 1752), pp. 7 (emphasis removed and commas substituted for semicolons), 32-34, 36 (emphasis removed), 40, 56.


43 Mullett, Fundamental Law, pp. 47, 52.

44 Leo Strauss, Natural Right and History (Chicago, 1953), p. 181.


46 Mullett, Fundamental Law, pp. 60-61.


49 Ibid., pp. 262, 408.

50 Ibid., pp. 409, 410, 411.


CHAPTER SEVEN

Militia, the Right to Keep Arms, and
Opposition to the British Army,
1768 – 1774

It is a natural right which the people have re-
served to themselves, confirmed by the Bill of
Rights, to keep arms for their own defence; and as
Mr. Blackstone observed, it is to be made use of
when the sanctions of society and law are found in-
sufficient to restrain the violence of oppression.

--New-York Journal (1769)

Americans had been indoctrinated for over half a century by the
various ideological concepts of militia and arms. By the eve of the
Revolution they recognized the role of militia as counterpoise to the
army and the necessity of keeping a peacetime army under certain circum-
stances and with proper safeguards. The colonial militia forces resem-
bled to a high degree the ideal institutions of some polemicists, with
nearly universal obligation of freemen for training, service, and pro-
viding their own weapons. The practice of elective officers in the Con-
necticut and Rhode Island trainbands, in the "independent" companies of
many colonies, and sometimes in the volunteer forces raised during war-
time resembled the practices described by historians of the classical
world and of Anglo-Saxon England. Finally, the militias, being the only
military establishments raised by the authority of the colonial govern-
ments and controlled by representative assemblies, made the parallels
between colonial and ideological characteristics, proposals, and ideals
the more striking. Thus when the British army occupied Boston in the fall of 1768, Patriots had ready-made for them a comprehensive body of ideological, constitutional, and philosophical concepts with which to attack the army and defend the militia. Out of this polemical controversy arose the essential elements of the intellectual justification of the right to bear arms, the synthesis of legal, natural, and constitutional rights which identified the right to keep arms with the colonial militia.

Historians have found little evidence of American writers' having criticized the English army in ideological terms before 1768. Colonial defense of the militia centered, rather, on justification of assembly control and emphasis upon Anglo-American institutional similarities. English writers had used the colonial militia as examples of good and bad behavior on the battlefield and had made various proposals for general reforms on both sides of the Atlantic. In 1764 James Otis had confidently asserted that "a good provincial militia," aided only in extraordinary circumstances by the English army, would satisfy all the military needs of the American colonies. Clearly Otis here adopted the modified Commonwealth view that army and militia could coexist. Josiah Quincy, also from Massachusetts, emphasized another point which some English writers had made. In his judicial reports on suits involving writs of assistance, he argued that the sheriff in the colonies always had available the civil posse comitatus to aid him in enforcing the law. To Americans, therefore, the army was neither a practical nor a constitutional necessity. Posse and militia, in the American experience, comprised the same body of men who performed
similar functions: the maintenance of public order from domestic and foreign threats, through the use of force and arms.²

Both posse and militia were constitutional institutions, reflecting the tradition of unpaid service to society, public virtue, self-sacrifice, and popular participation in governmental administration. Both also reflected a vital aspect of the right to keep arms. Arms were intended for use, with posse and militia providing the two constitutionally legitimate means of collective application of force, the former for civil police, the latter for military defense. Quincy emphasized the constitutional practicality of posse over army for routine reinforcement of the county sheriff, since military participation in quelling riots posed severe legal questions. From the passage of the Riot Act by Parliament in 1715 until the Gordon Riots cases in 1780, magistrates in England and America had hesitated to call upon military force, whether army or militia, to disperse rioting mobs.³ The colonial militia laws added to the Americans' hesitancy in many cases. Local militiamen and rioters were frequently the same men, thus preventing effective use of military force. Magistrates therefore turned to the common and statutory law obligation for all subjects to oppose the commission of felonies, embodying men willing to do so into the posse comitatus. Finally, the posse, at least in theory, provided a non-military means for social control, an important consideration for Americans ideologically sensitive to the standing army with its threat of uncontrolable military force. Therefore Quincy in 1765 and Sam Adams and the
Boston Town Meeting from 1768 to 1773, placed heavy emphasis upon the posse (an institutionally anachronistic means of law enforcement) as a substitute for the army in local civil affairs. Their subsequent abandonment of arguments for the posse in favor of the militia may be seen as less an example of shifting arguments to justify opposition to the British army than simply a logical step in ideological and constitutional resistance. Only after the Boston Massacre when the situation portended the necessity of large-scale military opposition to the army did polemicists turn completely from posse to militia.4

The occupation of Boston in late 1768 triggered American ideological resentment toward the British army and the glorification of posse and militia. This confrontation between citizen and soldier, between colonial and imperial law, and between posse domini and posse regni accelerated the development of the right to keep arms into a right to bear them. The army issue provided the context for uniting ideological, constitutional, and natural rights concepts concerning the proper defense of society.

The radicals of Boston quickly made clear the connection they saw in English constitutional tradition between the colonial militia and the right to keep arms. Within weeks before the landing of the first English regulars, the Boston town meeting met on September 13 to draw up a declaration of their rights and a series of resolves to put them in effect. Here Americans explicitly set forth their adherence to the arming provision of the English Bill of Rights and explicitly associated the right to keep arms with the militia.
Because "the first Principle in Civil Society" established the right of an individual to give his consent to all laws through legislative enactment, and because the people of Massachusetts had not approved the coming of the army, the town meeting declared the occupation a grievance and "an infringement of their natural, constitutional and Charter Rights." Here, too, Americans emphasized the role of natural rights in their scheme of society. A second, more important declaration, concerned the militia and arms. By "a very great Majority" the town meeting reiterated the provision of the English Bill of Rights that "the Subjects being Protestants, may have Arms for their Defence," and indicated their understanding of it. "It is the Opinion of this Town," the vote read, "that the said Declaration is founded in Nature, Reason and sound Policy, and is well adapted for the necessary defence of the Community." Furthermore, they noted, the existing militia law provided ample legal means to provide every man with "Musket, Accoutrement and Ammunition" so that the "Inhabitants of this Town" would be prepared "in case of sudden danger."  

Once troops had landed in Boston on September 28 polemical attacks on the constitutional illegitimacy of a peacetime army rapidly intensified. The most famous and influential writings appeared in the Boston Gazette, under one of Sam Adams's pennames, VINDIX. Adams used every available device to criticize the occupation, including the great constitutional documents of English history: the Bill of Rights, Petition of Right, and Magna Carta. Likewise
he emphasized the importance of constitutional devices to make the
army unnecessary. Following Quincy's lead, Adams gave unprecedented
praise to the *posse comitatus*, in the way he later praised the mili-
tia. It consisted, he wrote, of "the body of the county, which is
their natural and legal strength." With it magistrates "will see
their authority rever'd: The boldest transgressors will then tremble
before them, and the orderly and peaceable inhabitants will be re-
stored to the rights, privileges and communities of free subjects."6

When Parliament and the ministry reacted adversely to these
claims of constitutional right, Sam Adams and the Boston radicals
produced additional justification for their arguments which carried
them yet closer to creating the right to bear arms. In December
1768, upon arrival of the various declarations passed by the Boston
town meeting, the House of Lords introduced and sent to Commons a
resolution condemning them as "illegal and unconstitutional, and
calculated to excite Sedition and Insurrections."7 This news upon
reaching Boston excited particular controversy. The *Journal of the
Times* protested on February 6 that

> it is certainly beyond human art and sophistry
to prove the British subjects, to whom the
privilege of possessing arms is expressly
recognized by the Bill of Rights, and, who live
in a province where the law requires them to be
equip'd with arms, &c. are guilty of an illegal
act, in calling upon one anothgr to be provided
with them, as the law directs.

Sam Adams, as WINDIX in the *Boston Gazette*, based his justification
upon Blackstone's scheme of rights. Quoting the jurist, Adams emphasized that "the right of having and using arms for self-preservation and defence" represented the ultimate means of opposing tyranny. For precisely this reason, he wrote, the town meeting had called upon Bostonians to obey the militia law. Finally, the Journal of the Times set forth the fundamental justification for Boston's actions, juxtaposing natural with constitutional rights.

It is a natural right which the people have reserved to themselves [the article declared], confirmed by the Bill of Rights, to keep arms for their own defence; and as Mr. Blackstone observes, it is to be made use of when the sanctions of society and law are found insufficient to restrain the violence of oppression.\(^9\)

The Boston Massacre in March 1770 seemed to confirm all the fears of Bostonians concerning the dangers of standing forces. Although the trial of the eight soldiers accused of murder reiterated the common law obligation even of soldiers, if properly summoned, to aid the sheriff in suppressing riot, the colonists objected to law enforcement by the military. Furthermore, although Edmund Trowbridge's charge to the jury emphasized that by common and statutory law the king had command of all militia and land forces in the realm and dominions, the colonists continued to look upon the militia as the only proper means to defend their society. The themes of the constitutional legitimacy of the militia, of use of arms as a means of societal defense, and of the unconstitutional nature of the army because it lacked the consent of the dominion assemblies were enhanced and given wide circulation by the publication of the ensuing Boston Massacre Orations each year.\(^{10}\)
James Lovell delivered the first Massacre Oration in April 1771. He told his audience that both Blackstone and the Bill of Rights warned against standing armies and argued that a particularly invidious consequence of keeping an army was that it led to "a total neglect of the militia, or tends greatly to discourage them." No longer the posse but the militia composed of freeholders provided "the true strength and safety of every commonwealth or limited monarchy." 11

During 1772 and 1773 the Boston Town Meeting continued to emphasize the duty of Americans, under natural law, to look to their own safety. In their November 1772 statement of rights and grievances, the members examined the natural rights of life, liberty, and property. These, they resolved, were "evident Branches of, rather than deductions from the Duty of Self Preservation, commonly called the first Law of Nature." This "perpetual law of self preservation," they repeated in March 1773, was one "to which every natural Person or Corporate Body hath an inherent right to recur." Human law could not transcend it, and where no positive law provided for "the common safety," they concluded, "the People have a right to consult their own preservation; and the necessary means to withstand a most dangerous attack of Arbitrary power." 12 By May 1773, thus, the Boston Town Meeting had come full circle, from defending their rights under the colonial militia law, to constitutional and to natural rights, back to the militia. Because "Standing Armies have forever made Shipwreck of Free States," they observed, "the Militia of the Colony" (no longer the posse comitatus) "are its natural and best
defence: and it is an approved maxim in all well policed States, that the Sword should never be intrusted but to those who combat \textit{pro aris et focis}; and whose interest it is to preserve the publick peace.\textsuperscript{13}

Resistance to governmental tyranny, the preservation of liberty, and the keeping of public peace were also the themes of a sermon delivered by Simeon Howard to Boston's Ancient and Honorable Artillery Company in 1773. "A people who would stand fast in their liberty," he argued, "should furnish themselves with weapons proper to their defence, and learn the use of them, . . . a necessity which the depravity of human nature has laid upon every state." Defence, however, was not an individual but a community action, not private vengeance but public warfare by military means "against invaders." "So much depends upon the military art, in the present day," he observed, "that no people can reasonably expect to defend themselves successfully without it." Rather than rely on a standing army to exercise that military art, Howard advocated "a safer way," one that had "always been esteemed the wisest and best, by impartial men," one which placed "the power of defence in the body of the people," a "well-regulated and well-disciplined militia." Such a force had to be composed of propertied men "inured to labour," "subject to discipline and order," and governed by "a power of calling it forth to action, whenever the safety of the people requires it." Such was the expense and exertion necessary to perfect this militia, Howard noted, using Adam Smith's arguments, that all men could not be members. Those who did so acted "a laudable part" and like the
Artillery Company, raised themselves in the estimation of the people. The militia ideal, here combining elements from Commonwealth and socio-economic writings, provided the means for Americans to defend themselves by arms. The philosophical justification Howard found in the natural right of self-preservation, "one of the strongest, and a universal principle of the human mind." It had particular applicability to Boston and the militia in 1773 because it "allows of every thing necessary to self-defence, opposing force to force, and violence to violence."

John Hancock's Massacre Oration in 1774 reinforced Howard's views. A well disciplined militia, "a safe, an honorable guard to a community" like Boston, provided sufficient security against invaders. "From a well regulated militia," unlike the army, he argued, "we have nothing to fear; their interest is the same with that of the state; . . . they fight for their houses, their lands, for their wives, their children; . . . they fight proaritis & focis, for their liberty, and for them- selves, and for their GOD."

Thus by the spring of 1774 Patriots in Massachusetts had committed themselves ideologically to the militia which acted as their primary agency for expressing their right to keep arms and potentially for fulfilling their rights of resistance and self-preservation. Arrival of the news of the Boston Port Bill and the other Coercive Acts in the late spring and summer sounded the first serious call for military preparedness. Americans, especially Bostonians, perceived the closure of the port as a threat to the safety of Massachusetts and the other colonies. New Englanders, therefore, sought to revive their militia systems to provide the means to defend the colonies against military conquest by
the crown. Connecticut and Rhode Island had maintained a steady but low level effort to improve the militia, but military activities elsewhere had declined drastically after the French and Indian War. Even the military preparations in New England in the wake of the occupation of Boston in 1768 and the Boston Massacre in 1770 had accomplished little. In January 1776 Governor Cooke of Rhode Island complained that even in his colony men "for many years past" had "entirely neglected military discipline; and disposed of their arms."¹⁶

During the Anglo-Spanish war scare of 1771 and Indian troubles in the south two years later, royal governors in New Hampshire, Massachusetts, Virginia, Georgia, and South Carolina found the colonies so deficit in "military preparations for the Defence & Safety" of the provinces that they urged the assemblies to act, but without success.¹⁷ Generally the lower houses looked upon the proposals with suspicion, probably as attempts to increase the governors' own power. Virginia's House of Burgesses, for example, allowed the militia act to expire in 1773, leaving the colony without a statutory militia. New York, it will be recalled, similarly had no statute from 1769-1772 and 1774-1775 because of legislative-executive conflict, and Pennsylvania had not passed one since the end of the war.¹⁸ With arrival of the first Coercive Act in Boston in May 1774, however, military activities began in greater earnest. Connecticut and Rhode Island reorganized their trainbands, appointed new officers, and inventoried arms and ordnance. New York attempted to buy gunpowder in Europe. In Virginia, Richard Henry Lee introduced a bill to revive the militia act, but conflict with the governor prevented passage. Dunmore sought "a regular force"
instead of militia to campaign against the Indians and to settle the boundary dispute in Western Pennsylvania. The burgesses hesitated to take such an extreme measure. Finally, Massachusetts towns exercised and armed local militiamen and, as shall be seen below, frightened Loyalists and English officials alike.  

During the initial controversy over Parliament's action, Josiah Quincy Jr. published the influential tract, Observations on the ... Boston Port Bill, attacking the need for the British army in America and defending the militia in terms which echoed through resolutions and declarations of the revolutionaries for the next two years. The introduction of military forces into a peacetime society, he observed, had always marked the first step in the path to tyranny, in addition to having proved itself "the most extensively fatal to religion, morals and social happiness." Experience showed that even an army of natives could be dangerous, especially if "princes and their subalterns" made it their policy to "discourage a martial spirit among the people" and to "render useless and contemptible the militia." The militia was not simply one military institution among many but comprised "the natural strength, and only stable safeguard of a free country," or, as Quincy quoted John Milton concerning the English trained bands, "the truest and most proper strength of a free nation."

No free government [Quincy continued] was ever founded or ever preserved it's liberty without uniting the characters of citizen and soldier in those destined for defence of the state. The sword should never be in the hands of any, but those who have an interest in the safety of the community, who fight for their religion and their offspring;--and repell invaders that they may return to their private affairs and the enjoyment of freedom and good order.
Ultimately every society had to face the truth that the "supreme power is ever possessed by those who have arms in their hands and are disciplined to the use of them." "Regular soldiers," however, who are "embodied for the purpose of originating oppression or extending dominion, ever compass the control of the Magistrate" and violate the principle of civil supremacy over the military "on which the preservation of our constitution depends." Although military forces in themselves posed great danger to Englishmen and Americans, Quincy recognized another threat. He identified the "officers employed in the customs, excise, in other branches of the revenue, and other parts of public service" as "in effect a SECOND STANDING ARMY" of potentially greater danger to Englishmen and Americans than the regular army.  

Characteristic of American ideological writings, Quincy's Observations defined the concept of militia in general terms. "A well regulated militia," he observed, "comprised of the freeholders, citizen and husbandmen, . . . take up arms to preserve their property as individuals, and their rights as freemen." Two points are readily apparent. Quincy's militia comprised only freeholders who farmed their land and who enjoyed the privileges of citizenship. Presumably neither servants, poor landless men, nor recent immigrants qualified. Such standards were in keeping with those of some Commonwealthmen and of Harrington and Machiavelli: the citizen soldier must literally be a citizen. Moreover, he must fight in the interests of religion, descendants, and property. The survival of free government was the product not the object of societal defense. Finally, the citizen must also literally be a soldier, subject to military "discipline"—that is, to training—but not to martial law.
which violated "the fundamental rights and liberties of a free people" and had been condemned by Parliament as being repugnant to Magna Carta. Contrary to modern military practice, Quincy argued that officers in command of citizens must be chosen by the citizen soldier, not appointed by executive power. He praised "THE MILITIA of England" which in "antient time" had been "raised, officered and conducted by common consent," not much unlike the military practices of seventeenth-century Massachusetts. The idea also had been part of the stock of some Commonwealthen and Classical Republicans, and by the 1770's was rapidly regaining importance. Quincy thus reflected the militia ideal which in the spring of 1774 was just beginning to exert influence on institutional developments.22

Thomas Jefferson expressed similar concern about the proper composition of military forces, and Virginians began to associate the concept of self-preservation with military defense. In August 1774, Jefferson's *Summary View of the Rights of British America* declared that Americans objected to the English standing army because it was "not made up of the people here, nor raised by the authority of our laws." "Every state," he argued, "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." Like Quincy, Jefferson emphasized the citizen soldier and local control although he did not specify militia as the institutional ideal.23 Patriots in Fairfax County going a step beyond other county committees in accepting the relationship between the natural right of self-preservation and the duty of military defense, adopted some of the notions expressed in Massachusetts in the
late 1760's. Implicit in their resolution on July 18, that "the Motives of Self-Interest and Preservation will be a sufficient Obligation" to guarantee that colonists generally would defend the empire if they were "treated upon an equal Footing with our fellow Subjects," was the assumption that self-interest and self-preservation would also compel them to defend Virginia against hostilities initiated by England. Thus, Virginians recognized the applicability of natural rights and Commonwealth ideology to their own increasingly precarious position in relation to Parliament and King and sought to justify their opposition.24

Thus on the eve of the first armed confrontation between militia and army in September 1774, Americans displayed their attraction to the ideology of militia and the natural right of self-preservation. Their polemical arguments and official justifications of their actions and resolves clearly show the operation of ideological, institutional, and philosophical forces, the merging of which was driving Americans toward the definition of a right to bear arms. The precondition for enunciation also reveals the collective and military nature of their emphasis on self-defense. Only with the legal and institutional elements added between September 1774 and July 1776 did that nature fully reveal itself.
NOTES


5 Boston Town Records, 1758-1769, pp. 261, 263, 264.


8 Boston Under Military Rule, p. 61.

9 Writings of Samuel Adams, I, 317-319: Adams, under the penname "E. A.," wrote: "At the revolution, the British constitution was again restor'd to its original principles, declared in the bill of rights; which was afterwards pass'd into a law, and stands as a bulwark to the natural rights of subjects. 'To vindicate these rights, says Mr. Blackstone, when actually violated or attack'd, the subjects of England are
entitled first to the regular administration and free course of justice in the courts of law—next to the right of petitioning the King and parliament for redress of grievances—and lastly, to the right of having and using arms for self-preservation and defence.' These he calls 'auxiliary subordinate rights, which serve principally as barriers to protect and maintain inviolate the three great and primary rights of personal security, personal liberty and private property': And that of having arms for their defence he tells us is 'a public allowance, under due restrictions, of the natural right of resistance and self preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.'—How little do these persons attend to the rights of the constitution, if they know anything about them, who find fault with a late vote of this town, calling upon the inhabitants to provide themselves with arms for their defence at any time; but more especially, when they had reason to fear, there would be a necessity of the means of self preservation against the violence of oppression.—Every one knows that the exercise of the military power is forever dangerous to civil rights; and we have had recent instances of violations that have been offer'd to private subjects, and the last week, even to a magistrate in the execution of his office!—Such violations are no more than might have been expected from military troops: A power which is apt enough at all times to take a wanton lead, even when in the midst of civil society but more especially so, when they are led to believe that they are become necessary, to awe a spirit of rebellion, and preserve peace and good order. But there are some persons, who would, if possibly they could, persuade the people never to make use of their constitutional rights or terrify them from doing it. No wonder that a resolution of this town to keep arms for its own defence, should be represented as having at bottom a secret intention to oppose the landing of the King's troops: when those very persons, who gave it this colouring, had before represented the peoples petitioning their Sovereign, as proceeding from a factious and rebellious spirit; and would now insinuate that there is no impropriety in their addressing even a plantation Governor upon public business—Such are the times we are fallen into!" (Initially published in Boston Gazette, 27 Feb 1769). Second quotation: Boston Under Military Rule, p. 79 (dateline 17 Mar 1769).


11 Orations Delivered at the Request of the Inhabitants of the Town of Boston, to Commemorate the Evening of the Fifth of March, 1770 (Boston, 1785), pp. 10, 9.

12 Boston Town Records, 1770-1777, pp. 95 (20 Nov 1772), 121 (9 Mar 1773).
13 Ibid., p. 133 (5 May 1773).

14 Simeon Howard, A Sermon Preached to the Ancient and Honorable Artillery Company in Boston, New England, June 7, 1773 (Boston, 1773), pp. 25, 28, 29, 26, 37, 14.

15 Orations . . . to Commemorate the Evening of the Fifth of March, 1770, p. 50 (5 Mar 1774).

16 RICR, VII, 501.

17 PPNH, VII, 267 (Jan 1771): Gov. John Wentworth sought to form "the Militia into a powerful & respectable body." Papers of Benjamin Franklin, XVIII, 125-126 (Jun 1771): military preparations in Mass. PRCC, XIV, 3-4, 6-12 (Oct 1772): new militia act and appointment of officers in Conn.; XIV, 93 (May 1773): procurement of public arms, "to be and belong to the Colony and kept for that purpose." DAMR, VII, 31 (Jan 1774): proposal by Gov. Sir James Wright "to put militia in order" in Ga. JHBurgesses, 1773-1776, pp. 23, 29, 31, 34, 35 (Mar 1773 militia bill); 84, 89, 101, 105, 112 (May 1774 defense bill); 84, 88, 89, 90, 100 (May 1774 militia bill); 233 (1771 formation of Norfolk independent co.). DAMR, VIII, 158 (Aug 1774): Gov. William Bull proposed "to purchase a number of smallarms to be given to many poor Irish and others in our western frontiers, with ammunition, upon the apprehensions of an Indian war." It is only fair to note that the House of Representatives in Massachusetts did urge the governor to fill up officer vacancies in order to prepare for war in 1770. He refused, undoubtedly because of the tense situation following the Boston Massacre and his sensing the potential for resistance which an operational militia would present: Burns, Controversies, p. 203.

18 The Colonial Laws of New York from the Year 1664 to the Revolution (5 vols., Albany, 1894-96), IV, 592n; V, 342n, 342-351.


20 Josiah Quincy, Jr., Observations on the Act of Parliament Commonly Called the Boston Port-Bill; with Thoughts on Civil Society and Standing Armies (Boston, 1774), pp. 32, 33, 36, 40, 41.

21 Ibid., pp. 52, 53, 54, 65.

22 Ibid., pp. 41, 55, 42.

23 [Thomas Jefferson], A Summary View of the Rights of British America (Williamsburg, 1774), pp. 21, 22.
CHAPTER EIGHT

The Rise of the Revolutionary "New Militia,"
1774 - 1776

We hope that you will in imitation of the other Colonies proceed to choose your officers and establish your Militia upon the new Plan which had been adopted by every Colony upon the Continent.

--John Sullivan and John Langdon (1775)\(^1\)

The united colonies were roused to arms.--They new modelled their militia--raised regular troops--fortified the harbors--and crushed the tory parties among them.

--William H. Drayton (1776)\(^2\)

From the fall of 1774 to the fall of 1775 American Patriots abandoned the old, legal institutions of colonial militia in favor of the "new Plan" embodying some of the concepts and practices of military modernization of local forces advocated by reformers on both sides of the Atlantic for a quarter century. The "new militia" of 1774-1776, however, represented a compromise between the ideals of a small, compact reserve force of volunteers, strictly auxiliary to the army, and operating with public arms and in public pay, and the needs of revolutionary military resistance with a dominant trend toward democratization and suspicion of military power. The revolutionary militia was not only the colonial militia purged of Loyalists but a marked departure in legal status and internal administration from its predecessor. Whereas the latter had been a legally compulsory system, commanded by governor and council, with an appointive, hierarchical officer system, and a body of
men little interested in training and service, the former especially in its early stage was a voluntary association of men who governed themselves, elected their own officers, and displayed an active, enthusiastic interest in military affairs. After the outbreak of war, the colonies adopted the recommendations of the Continental Congress for a modified system under civil control, utilizing both the model of voluntary minutemen from New England and an unsuccessful attempt to maintain a viable local "militia" for emergency local defense. This system did not suddenly spring into existence. Modernization and reform had long been advocated, and legislative control of military affairs emerged in 1775 only as the culmination of a process which had started in the previous century. Although the new militia, almost from force of habit, quickly returned to what Landon Carter in Virginia called the "old Channel" of apathy and indifference after the hardships of actual war made the risks of playing Cincinnatus all too clear, many characteristics of the revolutionary practices persisted even after 1776. 3

By late summer 1774 New England had received news of passage of the Coercive Acts. The threats against Massachusetts, especially against Boston and the colonial charter, and the rumor of military enforcement of the punitive statutes led to a marked increase in military arming and training throughout the region. 4 These activities alarmed English officials and American Loyalists. Major General William Brattle, Loyalist and commander of the Massachusetts militia, urged General Gage on August 27 to vacate the commissions of every militia officer in the province and to remove military stores from the magazines at Charlestown and Cambridge. Only such measures, he believed, might prevent
armed confrontation. Gage recognized the threat but chose to take the
less drastic measure. On the morning of September 1, therefore, three
hundred British troops transferred to Boston the stock of provincial
gunpowder at Charlestown and the cannon and stores from Cambridge. Two
consequences flowed from Gage's action. First, an immediate and wide-
spread "Rising of the People" occurred in New England. Despite the
authority Gage wielded as Governor of Massachusetts and supreme comman-
der of its military forces and supplies, Patriots viewed his action
with suspicion, as a deliberate "Intention to disarm the people." A ru-
mor quickly circulated that six Americans had been killed--another "mas-
sacre"--and that the British had bombarded Boston. Ezra Stiles, presi-
dent of Yale and an interested observer of the commotions, concluded
that all of New England had become aroused by the end of a week and that
armed meetings had taken place as far south as Delaware. Estimates of
the number of men involved varied, reaching as high as ten thousand,
but all observers probably agreed with Joseph Warren's description that
"incredible numbers were in arms." When it became apparent that no
blood had been spilled and that the army did not oppose the demonstra-
tors, the war scare subsided.  

The more far-reaching consequence of the powder crisis proved to be
the radical transformation of the colonial militia. The Suffolk Re-
solves provided the necessary impetus. Passed by the Suffolk County
Convention dominated by Bostonians, and adopting proposals made a few
days earlier by the Worcester Convention, the resolves criticized Gage's
fortification of Boston Neck and urged officers in the county to resign
their military commissions in favor of men "elected by each town . . .
who have evidenced themselves the inflexible friends to the right of the people." Brattle's suggestion would have left the militia without officers; this solution supplied new officers with firm local support. The resolves also encouraged the "inhabitants . . . who are qualified . . . to acquaint themselves with the art of war as soon as possible" and to "appear in arms" every week for training.8

The First Continental Congress accepted the Suffolk Resolves and held up the Massachusetts example for general emulation. Congress had convened on September 5 to protest the Coercive Acts and prepare a statement of American grievances against Parliament. Upon passage of the resolves, Paul Revere carried the document to Philadelphia where delegates had rejected Joseph Galloway's plan of conciliation by a narrow margin. On September 17 they enthusiastically accepted the Suffolk proposals for protest and military preparedness. As Caesar Rodney wrote to his brother in Delaware, Congress had "ordered all those able to bear arms to keep in readiness to defend their inherent rights, even with loss of blood and treasure." Thereafter Patriots in every colony prepared for war.9

Military preparations began in earnest after publication of the Suffolk Resolves, though the level of activity fluctuated until war broke out in April 1775. The creation of the new militia took place in two stages. The first was characterized by the rise of companies of minutemen in New England and the creation of independent companies in Virginia and elsewhere. It lasted until the summer of 1775. The second stage followed congressional approval of a series of resolutions in July recommending a uniform though somewhat modified version of the
first-stage institutions. Patriots reacted to the Suffolk Resolves immediately in two major ways. The charter colonies of Massachusetts, Connecticut, and Rhode Island sought to depend upon the old statutory militia systems, modifying them to meet the needs of combat readiness and Patriot political control, all within the bounds of charter power. Other colonies, lacking charters, turned to more drastic solutions.

Unlike their northern neighbor which had virtually lost its charter when Parliament passed the Massachusetts Government Act, Connecticut and Rhode Island retained charter powers and local control of their militias. As shown in Chapter Four, both colonies had gained the grudging approval of the crown to exercise wide authority over local forces except during wartime. The long-established practice of popular election of officers and governors further insulated the colonies from royal military control. Revolutionary military preparations thus consisted simply of enforcing statutory obligations, increasing the degree of arming and training, and allowing volunteers to establish "independent companies" and companies of "minutemen." In no sense, however, could the corporate governments legally compel men to commit treason by attacking the royal army. The refusal of Loyalists and pacifists to serve in the companies of "militia and trainbands" transformed the obligatory militia into an essentially voluntary one.

Without its charter, Massachusetts lacked this degree of control over the militia. General Gage's commission as royal governor and commander-in-chief of the colony's military forces gave him full legal authority to follow General Brattle's advice to rescind the commissions of all militia officers and thus render the institution useless. He
also could legally disarm the province by taking all public stores of powder, cannons, and muskets into custody of the army. Radicals recognized the threat when British troops marched to Cambridge and Brattle's letter became public and was printed in Boston newspapers. The parallel to the actions of James II seemed too real. Therefore, when Gage withdrew his summons for a session of the General Court, radicals convinced the delegates already elected by the towns to meet as a Provincial Congress in October 1774. Like the Continental Congress, this meeting accepted the Suffolk and Worcester Resolves and similar documents of other counties. It also approved the report of a special committee on defense measures and established a civil committee of safety to supervise and control military affairs. Congress claimed authority based upon previous charter powers to control the statutory militia. It created companies of Minutemen drawn from the ranks of the militia who were allowed to elect their own officers. (While this became the practice of the statutory militia as well, the method of selection had been left up to each town.) Finally Congress urged the towns to pay the minute companies and provide weapons and equipment for men too poor to furnish their own. In effect, Massachusetts had created a voluntary militia, about twenty percent of the whole force, armed and paid by the public and serving under authority of an extra-legal political association. Like Connecticut and Rhode Island, Massachusetts could not compel anyone to commit treason, thus transforming militia obligation into a matter of personal choice.\(^\text{11}\)

Despite the essentially voluntary nature of the transformed Massachusetts militia, Patriots had violated both colonial and imperial law.
Without explicit authority usually given by commission, no individual could muster or exercise armed men. Groups of men without proper summons could not gather in arms, nor could they advocate or attempt to alter the law. In the latter case, the provincial and Continental Congresses were unlawful assemblies whose actions verged on treason. General Gage recognized the illegality of the Massachusetts congress. He condemned the "unlawful proceedings" in general and especially the delegates' taking "upon themselves to resolve and direct a new and unconstitutional regulation of the militia, in high derogation of his majesty's royal prerogative." Their actions, he declared, threatened to "ensnare" the people "with perjuries, riots, sedition, treason and rebellion."12

Daniel Leonard echoed Gage's charges. Writing as Massachusetts on December 12, he reviewed the legal grounds for treason. In addition to the obvious offenses "of attempting the life of the king, or fighting his troops," "high treason and rebellion" also consisted of less obvious activities. He wrote that it was treason

for a number of men to assemble, armed and forcibly to obstruct the course of justice . . .
or for a number of people to take the militia out of the hands of the King's representatives, or to form a new militia, or to raise men and appoint officers for a public purpose, without the order or permission of the King or his representative;
or for a number of men to take their arms, and march with a professed design of opposing the King's troops.13

John Adams, Leonard's polemical opponent, could not legally justify Patriot activities. His Novanglus letter of February 5 therefore could only claim that the "new-fangled militia, as the specious Massachusetts calls it, is such a militia as he never saw," with officers
chosen for their "estates, abilities, and benevolence" by the province, not by the governor. 14

The Attorney- and Solicitor-Generals in England, Parliament, and even the Massachusetts radical Joseph Hawley supported Leonard's argument, in part for precisely the actions which Adams had bragged about. On December 13 the crown's law officers declared that the Cambridge powder uprising and other disturbances against royal and provincial officials presented "the history of an open rebellion and war." They named five individuals in particular who had committed "overt acts of high treason in levying war" against the crown. Early in February the law officers condemned the acts of "seizing public money and new-officering and disciplining militia" committed by the Massachusetts Provincial Congress. Soon after, Parliament expressed its concern generally that "a rebellion at this time, actually exists" in that colony, and that "unlawful combinations and engagements" in other colonies tended to encourage the New Englanders. Even Hawley recognized the dilemma. "According to their present respective constitutions," he warned on February 22, none of the provinces had legal power for "the levying, susisting, and paying of troops . . . in a governmental way." 15

The New England colonies met the challenge of the dilemma over legal control of military forces and the need to avoid charges of treason in two ways. They attempted to remain within at least some of the legal forms, especially those practiced under charter authority. They also justified their actions on the basis of natural rights. The colonies had agreed in the spring of 1775 to have in readiness an "Army of Observation" to oppose offensive actions by British forces. Though
raised from the militia, the men filling the army's ranks were volunteers, making the whole a voluntary military association. These Patriots claimed to use "lawful ways and means" to "recover, maintain, defend and preserve" their rights. Their oath of enlistment specified that they served "in the Majesty's Service," but in provincial pay. In theory and in form, therefore, they ceased to be part of the unembodied posse dominii by entering the posse regni, freeing them from normal restrictions on service outside each individual colony. After the outbreak of war in April, however, theory collided with fact. One part of the posse regni (the British army under Gage) could not fight another part (the Army of Observation) without legal repercussions. Since the Patriot army had no legal basis outside the claims of charter rights, it too was an unlawful assembly, its men guilty of having raised "force and arms" against royal authority.¹⁶

Patriots justified their military actions at Lexington and Concord and their various military activities on the basis of "the great law of self preservation" and constitutional "principle of self-defense."¹⁷ The Second Continental Congress, on July 6, presented the most formal justification. The "Declaration ... setting forth the Causes and Necessity of their taking up Arms" rested on two points. The British army had initiated the conflict by marching to Lexington "in warlike Array." Americans thus fought a defensive war "to repel" this "cruel Aggression."²⁰ The attempt to disarm Massachusetts by confiscating military stores had its parallel in Gage's disarming of individual Bostonians. Patriots had voluntarily "deposited" their weapons and powder with the town magistrates for safe keeping. Gage had seized the firearms "in open
violation of Honour" and (though the Declaration did not name it) of the English Bill of Rights. Such unconstitutional actions thus "rendered it necessary" to change American protest "from Reason to Arms." Patriots had not committed treason. They had not raised armies to fight for independence, "for Glory or for Conquest." Rather, they had "taken up Arms" in "defence of the Freedom that is our Birthright" and "for the protection of our Property . . . against Violence actually offered." Significantly, these final arguments closely followed Blackstone's. Liberty and property constituted the two absolute rights of Englishmen. Peaceful protest had failed, leaving only his fifth subordinate auxiliary right--the use of arms--to oppose the "violence of oppression."18

By the spring of 1775, the "new militia" of New England provided several models, as well as a body of ideological and constitutional justification, for emulation elsewhere. The royal and proprietary colonies, however, could only adopt various aspects of the militias of the charter colonies. In some cases the absence of active militia statutes presented difficulties not encountered in New England. In others, the legal status of the colony and the authority of the governor required a more drastic transformation of the militia. The experiences of Virginia, Maryland, Pennsylvania, and New York indicate the scope of change necessary and the variety and uniformity of the new militia.

Voluntarism and elective officers provided the key characteristics of the new Virginia militia. When news of the Cambridge powder uprising and of the adoption of the Suffolk Resolves reached the colony
In late September, Patriots began to prepare for war. On September 21 the Fairfax County committee, under the leadership of George Mason and George Washington, established an "independent company" of volunteers. The colonial militia act had expired in 1773, leaving Virginia without legislatively approved local forces while Governor Dunmore was engaged in military operations against the Indians in the Ohio Valley. Therefore, the Fairfax committee argued that the company served the dual purpose of providing defense against a possible Indian invasion and of preventing "the Destruction of our Civil-rights, & Liberty." Legally founded as a private "Association," the company wrote its own regulations, chose its uniform, and made "the Choice of our own Officers." The members pledged to arm and train themselves to be "in Readiness" to oppose any "hostile Invasion, or real Danger of the Community." Finally, to obviate charges of treason, the associators promised to defend "the legal prerogatives" of the king as well as their own "just Rights & Privileges" based on "the Principles of the British Constitution."¹⁹ Other counties followed the Fairfax example, especially after Patrick Henry returned from the Continental Congress and founded a company at Hanover Court House.

The Fairfax committee did not invent independent companies. Virtually every colony had used them in the previous century to tap the military enthusiasm of individuals dissatisfied with the statutory militia system. Other men had joined such companies for the status and social clubbishness often accompanying membership. Both English and colonial law allowed the formation of "elite" units, frequently incorporating them by legislative act, making the members exempt from
training in the statutory militia units. Incorporation, however, never freed anyone from the obligation to serve when called upon. As late as 1770 during the Anglo-Spanish war scare, for example, Governor Dunmore had encouraged men in Norfolk to establish an independent company to make them "more capable of acting upon an Emergency." His offer to grant commissions to the officers elected by the association had insured formation of the unit. In 1774 and 1775, of course, Dunmore's opinion of independent companies changed.21

The first Fairfax company had been formed as an expedient. When it became apparent that Dunmore would not call the general assembly which alone could revive the expired militia act, the county committees sought to put the military unit on a more permanent footing. George Mason drafted comprehensive articles of association in January 1775, adopting recommendations made the previous month by the Maryland Provincial Convention. Arguing as did his neighbors across the Potomac River that "a well regulated Militia, composed of the Gentlemen, Freemen, and other Freemen" of the community provided the "only safe & stable security of a free Government," Mason proposed to expand the original association into "a Militia" of several companies. Rather than being composed of a few activists, the new units would consist of "all the able-bodied Freemen" from eighteen to fifty, serving under "Officers of their own Choice" and being paid from funds raised in the county. The articles emphasized that this "Regulation & Establishment" would exist only until "the Legislature" enacted "a regular and proper Militia Law."22
Mason and other Virginians freely acknowledged that they had borrowed their description of the militia ideal from the Maryland Convention which had met in Annapolis in December 1774. Like its neighbor, Maryland lacked "a well regulated militia" and turned to the expedient of extralegal military associations. The convention prepared a set of resolutions which indicated Marylanders' understanding of the ideological relationship between the militia and the British army and the proper constitutional form of provincial forces. Borrowing from Josiah Quincy's Observations, the general body of militia ideology, and the recommendations of the First Continental Congress, the delegates resolved

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 our mother country from any expense in our protection or defence; will obviate the pretence of a necessity for taxing us on that account, and render it unnecessary to keep any standing army (ever dangerous to liberty) in this province.

The resolutions explained that this new militia elected its own officers, established its own particular rules of training, and provided its own weapons. Like Massachusetts, the convention recommended that each county raise voluntary contributions of money to purchase public stores of arms and ammunition.

The new militia in Maryland met a critical response from Loyalists who recognized the extralegal nature of its existence. William Eddis described the fund for public weapons as having "more the complexion of an arbitrary tax rather than a voluntary contribution." The "ancient establishment" of the militia, he noted, had been lost. Daniel Dulany objected strongly to the new militia, which accepted servants in its
ranks. He believed it "improper, because it effectually supersedes the Constitutional Militia," theoretically "composed of the Freemen of the Province." Patriots gave such objections scant attention, though the members of an independent company in Baltimore defended themselves publicly by arguing that their forming the company as well as actually "resisting, with force, every illegal attempt, upon their liberty and property" was "not repugnant to the oaths of allegiance." 25

Maryland's description of the new militia in ideological terms did much to spread the popularity of this form of military resistance. County committees in Delaware and Virginia quickly adopted the terminology. Augusta and Fairfax Counties passed virtually identical resolutions, as did New Castle County in Delaware. On March 14, moreover, Kent County expanded the original statement to describe the militia as "a constitutional right." 26

In the winter and spring of 1775, almost every colony established military associations on the model of the independent companies of Virginia and Maryland. They appeared in New Hampshire, the district of Maine, Delaware, and North Carolina, with at least one in Pennsylvania. Similar organizations probably existed in New York and South Carolina and possibly in Georgia. With the companies of minutemen in New England, the new militia had thus quickly made a place for itself among Patriots. After April 1775, every colony adopted the model. 27

Virginia continued to lead in the actual development of the new militia, transcending the original idea of independent companies and adopting a modified version of the New England minutemen. The process of change took place in part as a result of Dunmore's refusal to
summon the Virginia assembly, the outbreak of war with the ensuing need for practical institutional effectiveness and the recommendations of the Second Continental Congress. Dunmore's stubbornness led Virginia radicals to meet as a provincial convention in Richmond to make general military preparations. On March 23, it adopted parts of Mason's articles of association and recommended that each county form "volunteer companies" under the rules of the expired Militia Act of 1738. Events soon proved the inadequacies of this approach.  

Two days after Lexington and Concord, and before word of the battles reached Virginia, Dunmore ordered the removal of gunpowder and stores from the Williamsburg magazine. His actions touched off a storm of military activity, mutual accusations, and fully developed justifications of Virginia's new militia. Dunmore cited his commission as authority to transfer the gunpowder from the magazine. Virginians protested peacefully, but the arrival on April 28 of the news from Massachusetts triggered a military response. On Saturday, April 29, about 600 men gathered in Fredericksburg to march on the capital. Only the appeals of Peyton Randolph and other leaders averted hostilities, but Dunmore continued to hear rumors of the approach of independent companies, which he described as "the March of the People" into an "Actual State of Rebellion." Unauthorized raising of armed men, especially for purposes of opposing governmental authority, spelled treason. "Nothing can justify men, without proper authority," he declared on May 3, "in a rapid recurrence to arms, nothing excuse resistance to the executive power in the due enforcement of law." The widespread "arming and disciplining men," especially the approach to Williamsburg of the Hanover
Company led by Patrick Henry, presented "the appearance of actual war." Bloodshed was avoided, however, and on June 1 Dunmore convened the General Assembly to consider Lord North's plan of conciliation.30

The assembly gave considerable attention to military affairs, starting with Dunmore's proposal to pay "the Militia"—that is, those men raised by legal means under the governor's authority—which had served in the Ohio Valley. The Burgesses accepted the plan, prepared, and passed a bill for the purpose, only to have it killed by a veto. Dunmore objected to the method of raising funds and to the lack of a suspending clause. Although he acted under explicit instructions from the Privy Council for such circumstances, the Burgesses must have readily sensed the historical parallels. Vetoes had rarely been used in England since the Restoration and not at all since Anne. Yet the last royal veto in 1708 had been against a militia bill, as had the veto by Charles II in 1678. Little wonder then that the Burgesses thereafter refused to pass bills to revive the expired militia and defense laws which might either be vetoed or used against the Patriot cause.31

On June 10 Dunmore censured the "violent and disorderly proceedings of the People" and the evident "design" of the Burgesses "to usurp the executive power" of control of the powder magazine. He warned the representatives that he would go so far as the "disarming all independent companies, or other bodies of Men raised and acting in defiance of lawful authority" in order to reassert his power. Naturally alarmed, the Burgesses appointed a committee to explain their actions.32

On June 14 the committee presented its report on the creation of military companies and the disturbances over the powder incident.
Testimony from many counties not surprisingly supported the Burgesses' contention that the companies had not been raised to enforce the orders of the county committees but out of a sense of need for "the general Defence of the Country." Some units, such as the one in Norfolk, had long been established, recognized, and even approved by Dunmore himself. All had acted, even after the powder removal and news of war, in a "very orderly and peaceable" manner. The house accepted the report and used it as the basis for an address to the governor. "Independent Companies at first," members asserted, "and the Rise of Voluntier Companies afterwards" simply represented a means for "defending their Lives and Property" against external threats. These associations had been specifically "designed to distinguish them from the Militia at large" but with no intent to interfere with "the legal and constitutional Powers" of government. Dunmore's emptying of the Williamsburg magazine had frightened Virginians both because it limited their immediate means of resistance, and because it seemed to constitute part of "that general System adopted," especially in New England, "to render the Colonies defenceless" by "disarm[ing] the People." Since "Self-Preservation, the first Law of Nature," forbade anyone from remaining defenseless, and since the lack of an active militia law and any hope of legislative action to remedy the situation, some counties had acted on their own while others had responded to the recommendations of the provincial convention. The House of Burgessess had also attempted unsuccessfully to appoint a guard for the magazine to prevent further loss.33

Dunmore saw little validity to such arguments. He disallowed the guard, considering the House's unilateral action a usurpation of his
authority. Writing to Lord Dartmouth on June 25, he argued that the proliferation of companies and the Burgesses' actions had "wrested out of [his] hands" the "command of militia as well as the custody of magazines and public stores," making Virginians "a very numerous people in arms."34

To maintain themselves in arms, Patriots at the third provincial convention in July and August turned their attention to defense matters. On July 17, the day the meeting convened, the convention assigned a committee to prepare an "ordinance" for raising military forces and appointed a committee of safety to control those forces. George Mason well understood the difficulties his committee faced in creating an effective defense system. On July 24 he wrote that progress had been slow in drafting regulations for enlisting troops for continental service and for finding the means "to new model the whole militia." By August 21 these problems were resolved and the "Ordinance for raising and embodying a sufficient Force for the defence and protection of this Colony" received final approval.35

Virginians faced the same legal difficulties with this ordinance which Patriots in Massachusetts had encountered. Without the participation of governor and council and especially without proper summons to meet as a legislature, the convention delegates had no authority to enact regulations legally binding on colonists. In this case, however, there existed the means (the device of the ordinance) and the precedent (the English Militia Ordinance of 1642) to give legal justification for their actions. The Long Parliament had turned to the ordinance in order to exercise its legislative will without royal consent. Specifically in 1642, members had argued that Charles I had consistently failed
to provide for national defense, thereby forcing them to act on their own authority as representatives of the people. Then, as in 1775, the executive had disapproved legislative attempts to appoint temporary military guards. Although contemporaries did not explicitly justify the Militia Ordinance in these terms, their actions paralleled those of Parliament, and they had available John Rushworth's *Historical Collections* of documents from the period of the Civil War and had used it to find a Parliamentary precedent to declare the Day of Fasting and Prayer in 1774. The Virginia Convention also acted on authority it claimed as a representative of the people. After final approval of the ordinance the convention saw the necessity for explaining its actions. Its "Declaration . . . setting forth . . . the necessity of immediately putting the country into a posture of defence, for the better protection of their lives, liberties, and properties" cited three reasons for acting. The dangers of invasion and insurrection (Dunmore had threatened to free the slaves to fight the Patriots) had been compounded by the Governor's having allowed Virginia to slip into a "defenceless state." Finally, the meeting of a full assembly to enact a proper statute appeared unlikely, making it the convention's "indispensable duty" to act.  

Virginia's Militia Ordinance marked a second stage in the development of the new militia, independently paralleling some of the recommendations being made by the Continental Congress. In addition to authorizing creation of two regiments of "regular" troops for service with the Continental Army, the ordinance established a battalion of minutemen in each county in addition to the "militia" which comprised the bulk of adult white male manpower. The volunteer and independent
companies had been "melt[ed] down ... into this great establishment" of minutemen who provided a force for provincial defense and a source of men for the army. By the middle of July, when the congressional resolutions were approved, the Virginia convention had already made considerable progress on the ordinance. What influence these recommendations had is difficult to assess, though the similarities of the two systems are striking.  

Together with the examples of minuteman companies in New England and the independent companies in Virginia since the fall of 1774, the resolutions of the Second Continental Congress provided the final impetus in creating the new militia. Concern over the need for manpower and for effective military organization convinced member of Congress that each provincial convention must take some action to regulate and reform the old militia. The necessity of action was especially critical in those colonies whose militia laws had lapsed, where Loyalists still retained considerable influence, or where no militia had ever formally existed. Virginia, in the first category, had solved the problem initially through the independent company, a device widely copied. New York, in both the first and second categories, reacted to the challenge more slowly, gaining strength only after congressional urging. Pennsylvania, in the third, had attempted to form local military associations but also found the congressional resolutions the source of reform.  

On Thursday, July 18, the Continental Congress recommended for provincial adoption a series of resolutions defining the new militia in the form it retained until Independence a year later. Unlike the system of independent companies and military associations, this second stage
of militia development sought to bring the local forces into a state of rough uniformity from colony to colony, make them more generally subservient to civil control, and create a potentially effective means of military resistance, both locally and nationally. Each of the "regular companies of Militia" was designed to consist of eighty-three men, with officers elected by the soldiers. To maintain a degree of civil subordination, Congress suggested that the various conventions appoint officers of field and general rank and commission them on their authority as representatives of the people. Also, the appointment of civil Committees of Safety to govern military affairs would maintain civil supremacy. The resolutions specified regimental organization, equipment, and a standard-sized musket. They also recommended that twenty-five percent of the militia be established as companies of minutemen "to be ready on the shortest notice, to march to any place where their assistance may be required in their own or neighboring provinces. This provision alone marked a significant distinction from the old militia, with its statutory restrictions (based on medieval precedents) limiting service within each individual colony. New also was the distinction from both the old militia and recent military associations that the minutemen would be rotated every four months, with drafts from the regular militia companies. 40

This modified form of the new militia recognized some of the inherent weaknesses of voluntarism which increasingly damaged the Patriot war effort in the next year and led to the attempts to reform the new militia into a version of the old. Whereas the volunteer companies and associations had been fully voluntary (except for social and
sometimes military pressure), with all the institutional consequences flowing from that fact, the new minutemen were to be chosen on the basis of rotation. Certainly men could volunteer and those seeking to avoid service could hire substitutes, but the principle arising from the congressional resolution signalled a return to some form of compulsion. As will be described in Chapter Ten the failure of voluntarism necessitated reform and the reinstatement of compulsory service.  

New York and Pennsylvania emulated the practices in New England and Virginia, but eventually adopted the recommendations of Congress. New York's revolutionary leaders recognized the necessity of extralegal military resistance, with the presence of large numbers of Loyalists and men of doubtful allegiance probably influencing their opinions. The provincial militia law had expired in April 1774, requiring both Patriots and Loyalists to form military associations. Loyalists in Dutchess County in January 1775, for example, agreed to defend themselves against "any bodies of men riotously assembled, upon any pretence, or under any authority whatsoever, not warranted by the laws of the land." Cadwallader Colden, the lieutenant governor, approved enactment of a militia bill to obstruct attempts by Patriots to "establish a militia, by election of the People." When news of Lexington and Concord reached the colony, Patriots claimed that "six or seven thousand men . . . unanimously agreed to defend their liberties, &c. at all hazards." They armed and "form[ed] themselves into companies" and signed a military association. By August, the Albany Committee of Correspondence could make a distinction between units of "the old Militia" and new units being formed in the county. Late that month the provincial
congress passed a militia act which adopted the congressional resolutions. 43

In Pennsylvania, on the other hand, military associationism ran rampant after Lexington and Concord. Like New York and Virginia, Pennsylvania had no militia act in 1774 and 1775. Unlike them, it had no strong tradition of military defense and no local military organization upon which to base armed resistance. Observers believed, however, that the provincial congress planned to embody a militia and raise 60,000 men. York County established military companies in February, followed by other counties in the following weeks. 44 The articles of association of Chester County on May 15 were representative.

It is the indispensable duty of all freemen of this County [they resolved] immediately to form and enter into Associations for the purpose of learning the military art, and that they provide themselves with proper Arms and Ammunition, to be ready in case of emergency to defend our liberty, property and lives against all attempts to deprive us of them. 45

In June the provincial convention met and sought to relieve some of the problems which had arisen during the creation of the associations. Especially burdensome for some Patriots were the financial straits which military service placed their families in. On June 30 the convention agreed to provide pay during invasions, the money to be raised as a tax on the colony. "There is the highest Reason and Justice," they declared, "that all the Members of the Community, who are equally interested in the Preservation and Security of our common Liberties, should contribute to the Assistance and Support of those who take a more active, laborious and dangerous Part." 46
Not for the last time did the Pennsylvania convention deal with the problem of conscientious objection. Quakers and other pacifists, of course, could not honestly sign the articles of association or support with money Patriot military operations. Delegates at the June session simply urged the associators to recognize the dilemma of the pacifists and urged the Quakers to support their neighbors voluntarily. During the coming year, however, the problem grew more severe, requiring the convention to demand war taxes from Quakers who otherwise would be treated as Loyalists, thus outside the protection of citizenship. The issue was complex and required time and patience to resolve. For purposes of analyzing the new militia, however, it must simply be noted that Pennsylvania differed from the other colonies in having military associations which did not comprise the whole adult white male Patriot population.47

All colonies experienced concern over the method of selecting officers for the new militia. Election of company officers by the men in the ranks received virtually unanimous approval among Patriots as the most equitable (if not the most effective) means of building popular support for armed resistance against British authority. Selection of higher-ranking officers proved a more difficult and divisive issue. Since the mode of selection represented one consistent measure of the viability of the new militia and one common provision running through most state constitutions, it is necessary to describe in some detail Patriot attitudes and the controversy surrounding the issue in 1775-76.

The new militia was modified in 1776 but popular election of commissioned officers persisted, indicating the importance attached to
the practice. As early as April 1774 Thomas Pownall, ex-governor of Massachusetts, had warned the House of Commons that "with regard to the officers who command the militia of that country, they will have them of their own appointment, and not from government." The towns had always had an important voice in choosing officers, a voice stilled by the Massachusetts Government Act. In the eighteenth century only the militiamen and towns of Connecticut and Rhode Island had retained the formal responsibility of electing officers. Massachusetts, as shown in Chapter Three, had had the privilege until its charter had been vacated in 1684, but since then the formal power had passed into the hands of governor and council. Ideologically, popular election was viewed with great esteem, as an ancient proceeding worthy of modern adoption, reflective of the power of the people to exercise fundamental political choice. 

George Mason, during the fateful month of April 1775, composed the most highly developed American justification of officer elections. Since the Fairfax independent company, he argued, was "essentially different from a common collection of mercenary soldiers," "formed upon the liberal sentiments of public good," and composed of "gentlemen of the first fortune and character," it set an example for the province. "We came equals into world," Mason declared, "and equals shall we go out of it. All men are by nature born equally free and independent. . . . 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." Given this ideal of society together with the "inordinate lust of power in the few" which threatened that ideal, some precautions
had to be taken. "To prevent these fatal effects," he wrote, "and to restore mankind to its native rights" required frequent 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 means of rotation, dissolved into and blended with that mass from which it was taken, inevitable destruction of the state follows. 49

The success of the annual election of Roman consuls and other officers disproved the forebodings of critics who urged dependence on men already experienced in military affairs. "By investing our officers with a power for life, or for an unlimited time," Mason warned, "we are acting diametrically contrary to the principles of that liberty for which we profess to contend, and establishing a precedent which may prove fatal." "In all our associations," Mason concluded, "in all our agreements let us never lose sight of this fundamental maxim—that all power was originally lodged in, and consequently derived from, the people." 50

Patriots in Cumberland County in Pennsylvania echoed these sentiments. In suggesting changes in the provincial military association at the end of 1775, they argued that all officers below the rank of general "should be voted in by ballot annually, in the same manner as Members of the Assembly, Sheriffs, and other civil Officers." "Annual election," they emphasized, "is so essentially necessary to the liberty of freemen, that your Petitioners hope the honourable House will be careful not to deprive their constituents of it." 51
In every colony the royal proclamation of rebellion and various recommendations for such a proclamation made in Parliament alerted Patriots to the need and ultimately necessitated action over civil and military commissions. As we have seen, New England took the lead, the Worcester and Suffolk county conventions early urging Patriot militia officers to resign their commissions and allow the towns to make the choice (in effect popular election by the various companies). Similar actions took place elsewhere after Lexington and Concord. Governor Josiah Martin of North Carolina, for example, decried the "spirit of disorder... particularly evinced by the meetings which have been held among the people for the choice of Military Officers by which they have usurped the undoubted Prerogative of the Crown, and the frequent Assemblies of the People in Arms by the invitation of officers so illegally constituted." The process of democratic selection was given added impetus by the Continental Congress. In addition to recommending formation of "regular companies of Militia" and minutemen, as shown above, the congressional resolutions on July 18 urged "that the officers of each company be chosen by the respective companies." Thereafter, the practice became universal. Even Georgia, where Governor Wright maintained broad royal power, had initiated the practice in August. He naturally viewed it as "a very extraordinary and dangerous Tendency... calculated to Wrest the Power and Command of the Militia from the Crown." Although he believed the people might under certain circumstances "recommend officers," he distrusted the present attempts at "Reform in the Militia" as the work of radicals. In fact popular election was a sham, not "the voice of the People, but the voice of Congress."
Although popular election of officers became a dominant characteristic of the new militia, not every Patriot accepted the practice without reservation. Mason's defense of elections had been directed against men who supported selecting officers on the basis of military talent. In New York, on the other hand, many conservative Patriot leaders felt that elections opened the very real possibility of social revolution against their own authority. James Duane recognized the threat and the need to "render landed property secure." In June 1775 he confided his misgivings to Robert Livingston.

We must think in Time [he warned] of the means of assuring the Reins of Government when these Commotions shall subside. Licenciousness is the natural object of a civil discord and it can only be guarded against by placing the Command of the Troops in the hands of Men of property and Rank, who by that means, will preserve the same Authority over the Minds of the people which they enjoyed in the time of Tranquillity. 56

Duane was not alone in his concern. After four months' experience with the militia act passed by the provincial congress in August 1775, a committee recommended its revision by giving greater weight to seniority and "true merit and ability" in the choice of officers. 57 In Virginia, Landon Carter resigned as County Lieutenant in February 1776 because the Militia Ordinance prevented his making "the appointment of any subaltern nor even a Serjant or a Drummer." "From Experience," he complained, "people who only took places for the sake of the feather of distinction" exercised "no controul but that of Native Indolence." He saw the need for "a Superior officer to spur them to any duty." Elections simply did not provide the necessary impetus. 58
The most significant controversy over elections took place in Massachusetts. Here the issue concerned the division of power between the House of Representative and the Council. When the Second Continental Congress recommended that individual militiamen elect their company officers, it further suggested that higher ranking officers, from major to major general, "be appointed by their respective provincial assemblies or conventions." Especially in Massachusetts the question of which body of government had inherited the governor's power over military affairs became a focus of controversy. If the old charter had indeed been restored, the the Council should resume its authority, previously shared with the governor, in approving officer appointments. House members argued that their status as direct representatives of the people conferred on them "the indispensable right of the people which they will not relinquish." Some saw the charter as more of a hindrance than the foundation of new government: "Can an adherence to the old rotten charter be a balance for having the militia in the hands of the people?" asked James Warren in a letter to Sam Adams in November 1775. By mid-December the two houses had settled the issue but spent another month working out the details. The Militia Act of January 1776 embodied the compromise that both houses would share militia appointments. Each company continued to elect its own officers while the House and Council appointed field and general officers, each house having a veto over the selections of the other. 59

Thus by January 1776 the major characteristics of the new militia had become established. Voluntarism, elective officers, civil control, and formation of special units of men for purposes of immediate
provincial defense distinguished the new model institution from the old compulsory, hierarchical colonial one. The new organizations also took on the reputation and ideological characteristics previously identified with both the old militia and the undefined "militia" of the polemicsists in England and America. Of course, the revolutionary systems inherited much from their colonial predecessors and bequeathed much, as we shall see, to the new compulsory systems after 1776. What is significant is that Patriots abandoned the old legal arrangements and restructured the artifacts into a means of military resistance. This required more change (in a legal and institutional sense) than a mere purging of Loyalists from the ranks. Equally significant is that by the late spring and early summer of 1776 when the state bills of rights were being composed, Patriots had two clear models to identify with the concept of "militia," not one. Although the "new militia" of 1774-1776 had already badly deteriorated by then and was soon replaced by a modified version, the two traditions allowed Patriots of varying beliefs about the militia to interpret the provisions of the bills of rights in two conflicting perspectives. This dichotomy persisted in American thought at least to the end of the century. Thus the development of the new militia provides an essential point of analysis in determining what Patriots in 1776 meant by the right to bear arms.
Table 4
Structure, Function, and Obligations of the "New Militia,"
1774 - 1776

<table>
<thead>
<tr>
<th>Liability:</th>
<th>Colonial Militia</th>
<th>&quot;New Militia&quot;</th>
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<tbody>
<tr>
<td></td>
<td>New England</td>
<td>Elsewhere</td>
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<td>Universal</td>
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<td>Election</td>
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* Although training obligation was theoretically universal in the colonies, some men received exemptions; conversely, under the new militia, arms and service obligations were universal among the Patriots but constructively voluntary (or selective) because Loyalists and pacifists refused to comply.
NOTES


5 Printed in Boston Evening Post, 5 Sept 1774.


8 Journals of Each Provincial Congress of Massachusetts in 1774 and 1775 . . . and Other Documents, ed. William Lincoln (Boston, 1838), pp. 636 (Worcester), 603-604 (Suffolk).


11 Lincoln, ed., Journals of Each Provincial Congress, pp. 643 (Worcester), 659 (Cumberland), 621 (Hampshire); 624 (Plymouth); 31-34, 41-48, 69-72.

12 Ibid., p. 743 (my emphasis).

13 Mason, ed., American Colonial Crisis, p. 4 (my emphasis).
14  Ibid., p. 131.


19 The Papers of George Mason, 1725-1792, ed. Robert A. Rutland (3 vols., Chapel Hill, 1970), I, 210-212 (Sept 1774); George Washington wore the uniform of the Fairfax Independent Company when he accepted command of the Continental forces in June 1775; Mason described the company as a means to "breed a number of officers" for wartime service, I, 231 (Apr 1775). Charles Lee (Oct 1774) described the raising of forces in Va, RI, NC, SC, Mass, and "even this Quaking Province," Am Arch, 4th ser., I, 949-950.


21 JHBurgesses, 1773-1776, p. 232; cf. NYCD, VIII, 341-342 (Jan 1773): the elected officers of the independent companies of NYC were granted commissions in the militia because they were "Gentlemen of the first families and distinction." Lt Gov William Bull in SC had a low opinion of the independent companies forming there in the summer of 1774: "The uniform of clothing invites the young men to enlist, and after their exercise they go to the tavern and there indulge in social joys and doubtless mix politics in their wine and pride themselves in
dressing and thinking in uniform," DAMR, VIII, 159.

22 Papers of George Mason, I, 215-216.

23 Proceedings of the Conventions of the Province of Maryland (Annapolis, 1775), p. 7. Cf. similar resolutions: Papers of George Mason, I, 212-213 (Jan 1775), 215-216 (Feb 1775); Journal of the Proceedings of the Convention Held at Richmond, in the County of Henr-


25 William Eddis, Letters from America, ed. Aubrey C. Land (Cam-
1775, Proceedings of the Conventions, pp. 14-16. Association of the Freemen of Maryland, July 26, 1775 ([Annapolis, 1775]).

26 Papers of George Mason, I, 212 (Fairfax). Revolutionary Vir-


27 PPNH, VII, 422 (Dec 1774), 446 (Mar 1775). Am Arch, 4th ser., I, 1022 (Del: Dec 1774); Principles and Acts, p. 257 (Del: Mar 1775).

Docu Hist Maine, 2nd ser., I, 14 (1910), 238 (Mar 1775). DAMR, IX, 71-74
(NC: Mar 1775). Pa Arch, 2nd ser., I, 14 (1888), 532 (Feb 1775). Extracts from the Journals of the Provincial Congress of South Carolina, 1775-
pondence, 1775-1778, ed. James Sullivan (2 vols., Albany, 1923-25), I,
23-24 (May 1775); independent companies certainly existed in NY by the end of May, p. 41; cf. the list of companies formed by Aug, in NYCD,
VIII, 601-603 (such as the German Fusiliers, the Sportsman Company, the Bold Forrester, and the Oswego Rangers); cf. Minutes, I, 193-194 (Aug
1775).

Henry’s resolutions are printed in Principles and Acts, p. 308. The report of the committee to prepare a militia plan is printed in Papers of Thomas Jefferson, I, 160.

29 A similar incident occurred in NC, on May 23, when Gov Josiah Martin dismounted some old cannon in New Bern previously used only for ceremonial purposes. It caused a similar "general alarm" and led to
the formation of independent companies: DAmR, IX, 210 (Martin to Dartmouth, 30 Jun). CRNC, X, 26-29, 38-40.


32 JHBurgesses, 1773-1776, p. 214.


34 Ibid., pp. 270-271. DAmR, IX, 201, 203.


36 See above, Chapter II. JHBurgesses, 1773-1776, p. xv: "agreeing that we must boldly take an unequivocal stand in the line with Massachusetts, [we] determined to meet and consult on the proper measures, in the Council Chamber, for the benefit of the library in that room . . . With the help, therefore, of Rushworth, whom we rummaged over for the revolutionary precedents and forms of the Puritans of that day, preserved by him, we cooked up a resolution, somewhat modernizing their phrazes, . . . ."

37 Proceedings of the Convention . . . [July 17, 1775], p. 57.


39 JCC, II, 187-190.

40 Ibid., p. 188.

41 "The Diary of James Allen Esq., of Philadelphia, Counsellor-at-Law, 1770-1778," PMHB, IX (1885), 186: "My Inducement principally to join them is; that a man is suspected who does not; & I chuse to have a Musket on my shoulders, to be on a par with them; & I believe discreet people mixing with them, may keep them in Order." John Shy,

42 Am Arch, 4th ser., I, 1164. NYCD, VIII, 564-565.


46 Pa Arch, 4th ser., 3 (1900), 547-548 (30 Jun resolutions); 8th ser., 8 (1935), 7238 (23 Jun recommendations which were approved 30 Jun [quotation]).

47 Ibid.: "the Petitioners on this Subject would only add that the Provision here requested is no more than that made by the Militia Laws in England, and the neighbouring Provinces in Case of Invasion or Insurrection, and by all judicious and sensible Men deemed absolutely necessary to give Efficacy, Spirit, Vigor and Success to any military Association whatever." 27 Sept 1775, Memorial from Officers of Philadelphia Military Assn., Ibid., pp. 7259-7260. 27 Oct, Address of Quakers, pp. 7326-7330. 30 Oct, Petition of Committee of Philadelphia, pp. 7334-7337.

48 Principles and Acts, p. 197.

49 Papers of George Mason, I, 229, 230.

50 Ibid., p. 231.

51 Pa Arch, 2nd ser., 14 (1888), 470-472.

52 DAmR, IX, 70-71 (NH: Patriot leaders urged "all the officers of their own and the neighbouring regiments to come to me in a body with their men and give up their commissions and then to proceed to choose their own officers. Gov John Wentworth to Dartmouth, Mar 1775). RICR, VII, 335 (Gov Joseph Wanton refused to sign commissions of officers in the Army of Observation in May 1775, "having heretofore protested against the vote for raising men, as a measure inconsistent with my duty to the King").

54 JCC, ii, 188.

55 CRGa, xii, 424, 421-423, 428-429 (quotation).


CHAPTER NINE

Birth of the Right to Bear Arms in the State Bills of Rights, 1776 - 1784

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.

--Virginia Declaration of Rights (1776) ¹

The people have a right to keep and bear arms for the common defence.

--Massachusetts Bill of Rights (1780) ²

To defend their Property by Arms, and to repel Force by Force, is inconsistent with the Character of good Citizens, until they have first tried the legal & constitutional Modes of Redress.

--George Mason (1781) ³

In May 1776 the Second Continental Congress urged the colonies to establish permanent governments to replace the various provincial conventions and congresses. The drafting of the new constitutions and bills of rights were considerably advanced in some states when Congress approved the Declaration of Independence, but not until 1780 and 1784 did Massachusetts and New Hampshire complete documents acceptable to their citizens. Eight states plus Vermont passed bills of rights and of these all except Connecticut contained either a guarantee of arms bearing or of militia; none contained both. The two clauses quoted above indicate the scope of these constitutional provisions. The four

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bills guaranteeing the right to bear arms emphasized its role as a principal support of government and society, and as a substitute for a standing army. In all cases the clauses imply a justification for armed resistance to oppressive and unconstitutional governmental activities as well as a guarantee of citizen participation in military defense. An examination of these clauses and the concepts contained in and associated with them, as well as constitutional militia provisions, reveals the contemporary understanding of the right to bear arms.

Four states declared the militia to be a right of citizens in their bills of rights. Virginia's version, drafted in 1776, established the pattern and contained the fullest description. Its constitutional ideal was a militia "well-regulated," consisting of "the body of the people," rather than a small portion of its citizens, who would be "trained to arms." The resulting institution thus constituted the "proper, natural, and safe defence of a free State." Delaware and Maryland in 1776 and New Hampshire in 1784 copied verbatim the last part of Virginia's guarantee, the first two substituting "Government" for "State" and the latter "state" for "free State." Three other states and Vermont declared the right to bear arms. Pennsylvania in 1776 and Vermont in 1777 adopted the same guarantee, that the "people have a right to bear arms for the defence of themselves and the state." North Carolina at the end of 1776 made its definition of the right more limited, "for the defence of the State" only. The 1780 Massachusetts bill of rights added the English right of arms keeping to that of arms bearing "for the common defence." New York, which had no bill of rights and whose leaders considered arms bearing a privilege and an obligation
rather than a right, included a virtual guarantee of the institution in
the body of its constitution.\footnotemark[4]

The deceptively simple guarantees of militia, the right to keep
arms, and the right to bear arms contain a large body of associated ide-
as, concepts, and connotations from which they cannot be separated. By
1776 the concept of militia encompassed a wide variety of institutional
models, constitutional practices, and ideological values. In the Ameri-
can experience alone, militia had gone through four major stages, the
pre-Restoration colonial forces under local control, the reformed mili-
tia of the Stuarts, the eighteenth-century forces, and the Revolu-
tionary "new militia." Given the additional English models of trained
bands under both royal and Parliamentary control, Cromwell's militia,
the Restoration militia, and the modernized militia of 1757, American
constitutionalists had a wide choice. Militia, however, was far more
than a mere institution. During the 1690's, the militia had become
an important constitutional issue between the New England charter
colonies and the crown. The partial victory won by Rhode Island and
Connecticut had insured their continued control of the institutions
with little royal interference. It had also insured that the institu-
tional characteristics of trainbands, independent companies, and elec-
tive militia officers persisted in viable form up to the Revolution.
Also, as will be seen in the next chapter, militia represented mili-
tary power, requiring distribution and settlement in state and nation-
al constitutions. Especially important in this respect was the nature
of compulsion and the form of officer selection. Militia also repre-
sented an ideological concept and a polemical weapon against the
standing army. As the preceding chapters have shown, however, the militia concept maintained a separate though clearly interrelated existence with the army issue. While militia operated polemically as the counterpoise to the army, it also played an important role in the developing idea of the citizen soldier, whether serving in local or national forces.

The use of the word "militia" in state bills of rights, therefore, could not be exclusively identified with any one existing definition. Many Patriots accepted the definition which John Adams presented in Thoughts on Government in 1776, taking the old compulsory system as its model. "A militia law," he wrote, "requiring all men, or with very few exceptions, besides cases of conscience, to be provided with arms and ammunition, to be trained at certain seasons, . . . is always a wise institution." Other Patriots, especially outside New England, had a less precise notion of what militia was or was intended to be. William H. Drayton exemplified this view in his charge to the Charleston grand jury in South Carolina a year after the American victory at Concord. "The regular bands of the tyranny," he generalized, had been repelled by "a handful of country militia, badly armed, suddenly collected and unconnectedly, and irregularly brought up." Despite the divergent opinions on the composition of the institution, few Patriots failed to emphasize the fundamental importance of the militia to the safety of society and the consequent need for it to be well-regulated. The Virginia Declaration of Rights, quoted at the head of this chapter, made the point clearly, as did the anonymous pamphlet published in Pennsylvania in 1776, which declared that the militia "is the natural support
of a government" which is "founded on the authority of the people only."
Nearly everyone agreed that militia was necessary in 1776, but opinions varied on the reliance which should be placed on it for active military operations and on the exact institutional definition. Thus, advocates of various forms of the old, new, and modified versions of the colonial and state militia establishments could accept the militia provisions of the four state bills of rights without hesitation, leaving the battle over details to the new legislatures. 8

The Oxford English Dictionary gives an indication of the ambiguity which also clung to the phrase "well-regulated" militia. The general definition of "regulated"—being governed by rule, properly controlled—was supplemented by special usage for soldiers. "Well-regulated" connotated "properly disciplined." The word "discipline," as verb and noun, itself had several shadings of meaning when applied to military affairs in the eighteenth century. Basically the concept referred to military training in the use of weapons and obedience to command. In its widest sense in the seventeenth and eighteenth centuries "discipline" connoted "Training or skill in military affairs generally; military skill and experience; the art of war." As late as 1813, the Duke of Wellington could complain "that, if discipline means obedience to orders, as well as military instruction, we have but little of it in the army." Thus, this important concept, the key adjective description of the word "militia" in the Bills of Rights, also had no unambiguous meaning which Americans could use. One thing was clear about the word "militia"; it referred to military service, whether voluntary or compulsory. 9
In the tradition of English constitutionalism, the same thing was true about the principle or right to keep arms. The Bill of Rights of 1689, as shown in Chapter Two, represented a complaint against the actions of James II in "disarming" the militia, both by neglecting to train it and by confiscating the weapons of his Anglican opponents. Drayton, in his charge to the grand jury, also made extensive remarks on "the famous revolution in England" in 1688, quoting the charges against the king, including that which provided the basis for the arming guarantee: "By causing several good subjects, being protestants, to be disarmed, at the same time when papists were both armed and employed contrary to law." In a similar vein Drayton noted that General Gage had "violated the public faith" by "disarming the imprisoned inhabitants of Boston" in 1775. He also used the concept of "disarming" in the wide sense of any military weapons: "Our liberties and safety cannot be depended upon, if the king of Great Britain should be allowed to hold our forts and cannon. . . . For if he holds our forts, he may turn them against us, as he did Boston against her proprietors: If he acquires our cannon, he will effectually disarm the colony." This usage of the concept remained consistent from 1768 to 1776 in relation to the actions of the English government against American Patriots. 10

The concept of disarming of Patriots in violation of the English Bill of Rights began in Boston in 1768. By the time of the Cambridge and Charlestown powder incident in September 1774, the pattern was set. Radicals claimed that Gage's removal of provincial stores of gunpowder and cannons revealed a deliberate "Intention to disarm the people" requiring from Patriots, in Ezra Stiles' words, "the Defence of Liberty
by Arms." In the ensuing months, radicals in Rhode Island removed forty-four cannon from Fort Island near Providence, and Patriots in New Hampshire captured Fort William and Mary to prevent confiscation of its cannon and gunpowder by the Royal Navy. Americans generally sought to buy gunpowder and arms from Europe until the English government placed an embargo on such transaction. 11 In January 1775, the Secretary of State, Lord Dartmouth, ordered Gage "upon no account [to] suffer the inhabitants of at least the town of Boston to assemble themselves in arms on any pretence whatever either of town-guard or militia duty." Earlier Dartmouth had passed along a suggestion then circulating in Whitehall of equally grave significance: "To prevent the fatal consequence of having recourse to the sword," he wrote on October 17, "dismarming the inhabitants of the Massachusetts Bay, Connecticut and Rhode Island has been suggested." 12 General Percy, one of Gage's subordinates, identified the real problem and shows us the relationship between arms and military service. The militia law itself, he observed, "makes an insurrection here always more formidable than in other places" because "every inhabitant" was legally obliged to keep a musket, bayonet, and a "pretty considerable quantity of ammunition" and "every township . . . a large magazine of all kinds of military stores." 13 Gage also realized the magnitude of the task Dartmouth had recommended and objected that the idea "neither is or has been practicable without having recourse to force and being masters of the country." From his later treatment of Bostonians, Gage seemed aware of the legal restraints on such widespread confiscations without a proclamation of rebellion or legal actions taken against individuals who used or carried weapons. As late as a week
after Lexington and Concord, he allowed inhabitants of Boston to keep their private arms. Even then he specified only that people seeking to leave the city had to surrender their weapons and powder.  

Patriots viewed Gage's actions in a different light. The Massachusetts Provincial Congress claimed that he had refused to allow anyone to leave even after they had "delivered up near 3000 stands of arms," thus placing themselves under his absolute power. In July the Continental Congress repeated the allegation, claiming, however, that after he had "ordered the Arms deposited" he had them "seized by a Body of Soldiers"; Gage supposedly kept the Patriots as prisoners except for a few who were "compelled . . . to leave their most valuable Effects behind." Thomas Lynch echoed this charge in a letter to Ralph Izard a day later. The embargo on gunpowder and Gage's actions, he wrote, "deprive us of the means of defence" and thus constituted an attempt to "disarm us." 

In Virginia in June 1775, Governor Dunmore threatened the "disarming [of] all independent companies, or other bodies of Men raised and acting in defiance of lawful authority," but not the confiscation of private weapons. The House of Burgesses understood the military implication of his remarks and complained that the threat seemed "Part of that general System adopted to render the Colonies defenceless," part of the "many Attempts in the Northern Colonies to disarm the People, . . . thereby depriving them of the only Means of defending their Lives and Property." 

"Disarming," as used by the Patriots in their complaints against Parliament and the Crown, therefore referred to the confiscation of all types of weapons and supplies capable of supporting military resistance. Whereas there is considerable evidence pointing toward confiscation of
the arms of members of military organizations, there is little pointing toward private weapons. Except for Boston, an occupied city inhabited by armed Patriots, allowed to parade armed in militia companies and in the town guard until quite late in an atmosphere of crisis, and where confiscations were ordered only after the outbreak of civil war, apparently no private weapons were confiscated by the British except under circumstances of legal right. The same cannot be contended for the Patriots, as shall be seen below.

Given the military context of Anglo-American understanding of the right to keep arms in 1776, it is not surprising that the same context applied to the newly created right to bear arms. The *Oxford English Dictionary* again supplies the general connotation. The expression "to bear arms against" referred to being engaged in hostilities with someone, "hostilities" having the definition of acts of warfare or war itself. To "bear arms," thus meant to serve as a soldier, perform military service, to fight. The governor of Rhode Island in June 1775 commanded "every man in the colony, able to bear arms, to equip himself completely with arms and ammunition, according to law." The New Jersey provincial congress defined deserters as "men capable of bearing arms, who depart" the scene of military action. During the war both sides forced men, legally or illegally, to perform military service. William Drayton accused Parliament of having passed "a law to make slaves of the crews of such Vessels [Patriot prize ships], and to compel them to bear arms against their conscience, their fathers, their bleeding country!" The Declaration of Independence levied the same charge against George III: "He has constrained our fellow Citizens taken
Captive on the high Seas to bear Arms against their Country." Although Americans were open to the same indictment. New York Patriots were accused of having used force in April 1776 "to compel [one Gilbert Bates] and others to bear arms." The most frequent use of the expression related to the refusal of pacifists to participate in the war. The North Carolina provincial congress dealt with religious sects "who conscientiously scruple bearing arms," while New Jersey fined "those who refuse to bear arms for the protection of the State." When Quakers in Lancaster County, Pennsylvania, refused to join the military association, "notwithstanding their willingness to contribute cheerfully to the common cause otherwise than by bearing arms," they were "maltreated" by their neighbors. Benjamin Franklin, as head of the provincial Committee of Safety in September 1775, requested the assembly to make regulations to govern pacifists "who, from their religious Principles, are scrupulous of the Lawfulness of bearing Arms" in the military associations. Finally, in justifying their non-participation, Quakers in Pennsylvania declared that since the inception of their sect, they had "declared to the World that [they] could not for Conscience Sake bear Arms, nor be concerned in warlike Preparations, either by personal Service or by paying any Fines, Penalties or Assessments, imposed in Consideration of our Exemption from such Services."

Despite such evidence, some twentieth-century writers have argued that the right to bear arms applied to legal self-defense, to the protection of the individual's life and property. Patriots, of course, did justify their actions against English authority in terms of self-defense, a legal concept, and self-preservation, a philosophical term.
In the large context of revolutionary affairs in the mid-1770's, however, the connotation given to these terms was military. William Drayton again provided an insight. Americans, he observed, had been "forced to take up arms in our own defence" to avert "the sword of civil war."\textsuperscript{23} Connecticut's governor Jonathan Trumbull put the same idea in the terms of the law, arguing that Patriots dreaded the "idea of taking arms" with the resultant "horrors of a civil war," but did so because they believed "themselves justified by the principle of self-defence . . . to defend their rights and privileges to the last extremity."\textsuperscript{24} In other cases, as shown in this chapter, Americans argued that they also defended the rights of property. Blackstone, of course, disagreed that force and homicide could be used legitimately under common law to protect property. But had not James Burgh argued that a freeman to remain free "ought to have arms to defend himself and what he possesses"? And had not John Locke made life, liberty, and property the three fundamental rights of all men? Since the colonial law courts had closed and imperial authority was just then being replaced by the authority of the new states under written constitutions, did not property appropriately fit under the guarantee of self-defense? The answer Americans found was positive, but not so much protection of property from felons but from the ravages of the British army in the field and British officials who sought to tax and confiscate goods and estates to control Americans. Thus self-defense in the context of 1776 referred to collective defense of the society and its members.\textsuperscript{25}

The collective nature of self-defense in the Revolution is most clearly shown in Patriot adoption of the natural right of
self-preservation. "Self-Preservation," claimed the Virginia assembly in 1775, "the first Law of Nature" forbade "that the Country should again be thrown into a defenceless State," thereby justifying the founding of independent companies. Likewise Patriots in Chester County, Pennsylvania, defended their forming of "an Association for mutual Defence" on the basis of "Motives of Humanity as well as Self-preservation." The Massachusetts Provincial Congress cited "the great law of self-preservation" as the justification for recommending that everyone "prepare against every attempt" at surprise attack by "perfecting themselves forthwith in military discipline." Rhode Islanders were warned by their assembly that "every principle, divine and human, require us to obey that great and fundamental law of nature, self-preservation, until peace shall be restored" by "carrying on this just and necessary war." Finally, Moses Mather placed the natural and legal rights in a military context in America's Appeal to the Impartial World in 1775.

It is evident [he contended], that man hath the clearest right, by the most undefeasible title, to personal security, liberty, and private property. And whatever is a man's own, he hath, most clearly, a right to enjoy and defend; to repel force by force; to recover what is injuriously pillaged or plundered from him, and to make reasonable reprisals for the unjust Vexation. And, upon this principle, an offensive war may sometimes be justifiable, viz. when it is necessary for preservation and defence.

Thus, self-defense and self-preservation in Revolutionary America carried the connotation of collective action in a military sense.

The right to bear arms in the final analysis, like the right to keep arms in 1689, implied no absolute freedom of the use of weapons or even of military defense. The guarantees applied only to citizens.
Not yet faced with the problem of armed and hostile Loyalists in June 1775, North Carolina's delegates to the Continental Congress confidently asserted to the town and county committees that "It is the Right of every English Subject to be prepared with Weapons for his defence," and urged them "to form yourselves into a Militia." Less than two months later, shortages of arms and the uncooperativeness of the Loyalists forced the Committee of Safety to order them to be disarmed. Anyone who refused to sign the articles of association to join the new militia was suspect. "The principles of self-preservation," the committee declared in a neat reversal of previous Patriot complaints against the British, "make it absolutely necessary that they should be deprived of their arms." By April 1776 the provincial congress established formal regulations for confiscating Loyalists' weapons and purchasing arms from pacifists. The difference in treatment reveals the nature of the right of arms bearing in North Carolina, which the state bill of rights later limited to "the defence of the State." By refusing to associate and by supporting the crown, Loyalists had alienated themselves from the privileges of citizenship, including the right to keep arms. Pacifists, on the other hand, supported the Patriot cause and remained citizens. Thus, the congress urged Quakers, Moravians and Dunkards "who conscientiously scruple bearing arms, and as such have no occasion for fire arms" to sell their weapons for public use. The congress made clear, however, in keeping with the constitutional right, "that no compulsion [would] be exercised to induce them to this duty." New York faced the same problem with Loyalists and the same need for fire arms. In Albany, however, and perhaps elsewhere the question arose whether the
regulations for disarming included sidearms, weapons of only marginal military use. The committee of correspondence decided that the rules did apply to such weapons; how other Patriots dealt with the issue is not known. New York appended no bill of rights to its constitution in 1777 and in no way enunciated a right to bear arms. An incident in June 1776 demonstrated the attitude of state political leaders. In March the committee of safety had drafted an oath of association for the new militia containing a provision which violated existing militia regulations by allowing associators to be "march[ed] to the most distant of the Colonies whenever called upon." Some men had been disarmed when they refused to take the oath because of the discrepancy. The provincial congress changed the oath but refused to admit that the non-associators had been wronged. Military service in New York was not a right: congress had the authority to extend "the Privilege of bearing Arms" or deny it according to its best judgment.33

Disarming of Loyalists and pacifists revealed the applicability of the constitutional guarantees of militia and arms keeping and bearing in every colony and state. The issue has profound importance for our understanding of the context and implications of state bills of rights. As early as May 8, 1775, the Massachusetts provincial congress recommended "the disarming certain persons in the colony . . . to put it out of their power to join with the open and avowed enemies of America."34 In the following months Patriots arbitrarily and, after conviction of Loyalists, legally confiscated weapons from their enemies. Refusal to join military associations constituted the most frequent excuse for disarming after the Continental Congress passed a resolution on March 14, 1776,
recommending that "persons . . . notoriously disaffected" and non-associators lose any rights to have firearms. 35 Pennsylvania's assembly at first did not allow pacifists or other "well-affected non-Associators" to keep private weapons. 36 Some citizens there and in Virginia objected, but their voice was small. Landon Carter disagreed with the policy of "taking arms away from the very friends to America" and paying them "in the same manner" as "enemies to the country," because it left them in a "defenceless situation" against actual invasion and even "arbitrary government" which historically had made disarming of citizens "the very first step in all despotic climax." 37 In May 1776 arms collectors in the Dock ward of Philadelphia reported that one Adam Hubly had a musket but "refused to give it up, thinking no Compulsion should be used to those who keep them for their own Defence, tho' do not associate." 38 John and Joseph Romich in Northampton County also refused and used "loaded fire-arms" to discourage the collectors in June, but they eventually surrendered. 39 Sometimes in Pennsylvania and elsewhere it became necessary for collectors and sheriffs to summon the militia to aid in overcoming resistance. The committees of safety, however, returned confiscated arms to non-associators who finally took the oath, reinforcing the idea of arms bearing as a right, defined by the Pennsylvania constitution as "for the defence of themselves and the state." 40

Thus American Patriots viewed the right to bear arms in every colony, including Pennsylvania with its ambiguous guarantee, in a military context, as the means by which each colonial society could resist the illegalities and unconstitutional actions of the English crown and its agents, especially the army which Americans associated with the
ideological concept of the standing army. All eight bills of rights containing arming or militia provisions also condemned the keeping of such armies generally and especially without legislative consent. The existence of these complaints, sometimes in the same clause or sentence as the guarantee, otherwise in the next following clause, confirm the military nature of the right to bear arms in its revolutionary context. Militia had a separate meaning and a separate existence from the standing army issue in the colonial experience. To find them in such intimate juxtaposition in the state bills of rights demonstrates one set of circumstances in which the guarantees developed between 1768 and 1776, the threat that English military power would subdue the colonial societies under a harsh despotism. The other sets of circumstances involved the legal and constitutional ability of the Patriots to resist forcibly oppressive and unconstitutional governmental action. As discussed in the two preceding chapters, Patriots feared being disarmed and the legal militias in the New England charter colonies being destroyed since both actions eliminated their physical ability to resist. Patriots elsewhere feared that their military associations outside the legal militia systems would be misrepresented as treasonous assemblies of armed men rather than constitutional gatherings of men seeking redress of grievances. The army issue certainly played an important part in the creation of the right to bear arms, but not a dominant one.41

As soon as the Continental Congress approved John Adams's resolution on May 15, 1776 for the colonies to adopt new constitutions, Patriots began work on bills of rights and frames of government. John Adams's pamphlet, Thoughts on Government, circulated widely that spring,
had enormous influence on the nature of the first state constitutions. He commended to Americans the "principles and reasonings" of such seventeenth-century figures as "Sidney, Harrington, Locke, Milton, Nedham, Neville, Burnet, and Hoadley" who, as we have seen, had dealt with the issues of arms and militia in their writings on government and society. Adams urged that governors should exercise "command of the militia" and that officers be chosen by both houses of the legislatures. Militia obligation, as in the colonies, should include all men except pacifists. Adams recognized, as did many Patriots, that new governments were necessary, not only from the theoretical need to implement the principles for which Americans had been struggling, but also from the very practical need to reestablish legal authority in the wake of the collapse of colonial governments. As Colonel John Washington observed to Richard Henry Lee in April 1776, "All officers under the Crown are certainly uncommissioned, and . . . we can no longer do without some fixed form of government."\(^{42}\)

Except for Massachusetts and Rhode Island which had assumed government under the power of their charters in 1775 and 1776 respectively, and New Hampshire and South Carolina which adopted preliminary constitutions early in 1776, Virginia adopted the first constitution after the resolutions of the Continental Congress in May. New Jersey completed work in July 2 without a bill of rights, but all the other constitutions drafted in 1776 (Delaware, Pennsylvania, Maryland, and North Carolina) and Connecticut's modified colonial charter contained separate bills of rights. In the next two years Vermont drafted a bill but Georgia, New York, and South Carolina did not. Finally in 1780
and 1784 respectively, Massachusetts and New Hampshire followed the 1776 example. All the new constitutions dealt with military power. Each specifically empowered governors or executive officers to command the militia; each provided for the selection of militia officers; and each which contained a bill of rights, plus New York, guaranteed the existence of militia either by direct reference or by guaranteeing the right to bear arms. These provisions represented a modification of the military power won by the lower houses during the colonial period. In no state was any serious objection made to the fact of militia command by the governor, though questions were raised concerning the extent of his power. Patriots in this case accepted the necessity, both practical and theoretical, of locating military authority in a single officer of government, while in some cases retaining the power of appointment and of organizing the militia in others. A summary of military provisions and guarantees is shown on Tables 5 and 6.43

In the last weeks of May 1776 Virginia and other provinces began work on the new constitutions. George Mason prepared the first draft of Virginia's Declaration of Rights, but it contained neither a guarantee of militia nor a prohibition on standing armies. These were added to the committee draft completed on May 27; since the wording is similar to that which Mason used in his militia plan for Fairfax County in February, it seems he probably wrote the provision himself.44 The final draft, approved by the convention on June 12, contained three clauses concerning military power. Section 13 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
<table>
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<th>Bill of Rights</th>
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<td>18 Mar 1778</td>
<td>[None]</td>
<td></td>
</tr>
<tr>
<td>Massachusetts</td>
<td>2 Mar 1780</td>
<td>Arms^i</td>
<td>Militia</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>2 Jun 1784</td>
<td>Militia</td>
<td></td>
</tr>
</tbody>
</table>

^a Militia "guarantees" contained in body of constitution.
^b Resumed colonial charter.
^c Adopted colonial charter; Conn. B of R did not mention arms/militia.
^d Jefferson proposal for right of arms use was rejected.
^e Bear arms for defense of self and state.
^f Freemen "shall be trained and armed" for state defense.
^g Bear arms for defense of state.
^h Militia "shall be armed and disciplined" for military service.
^i Keep and bear arms for common defense.
Table 6
Militia Provisions in State Constitutions, 1775-1784

<table>
<thead>
<tr>
<th>State</th>
<th>Approved</th>
<th>Officer Appointment Power</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Massachusetts</td>
<td>1775</td>
<td>GF</td>
<td>C</td>
<td></td>
</tr>
<tr>
<td>New Hampshire</td>
<td>5 Jan 1776</td>
<td>GF</td>
<td>C</td>
<td></td>
</tr>
<tr>
<td>South Carolina</td>
<td>26 Mar 1776</td>
<td>F</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rhode Island</td>
<td>4 May 1776</td>
<td>FC&lt;sup&gt;a&lt;/sup&gt;</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Virginia</td>
<td>29 Jun 1776</td>
<td>FC</td>
<td></td>
<td></td>
</tr>
<tr>
<td>New Jersey</td>
<td>2 Jul 1776</td>
<td>F</td>
<td>C</td>
<td></td>
</tr>
<tr>
<td>Delaware</td>
<td>20 Sep 1776</td>
<td>GF&lt;sup&gt;b&lt;/sup&gt;</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>28 Sep 1776</td>
<td>FC</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Connecticut</td>
<td>Oct 1776</td>
<td>FC&lt;sup&gt;a&lt;/sup&gt;</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Maryland</td>
<td>9 Nov 1776</td>
<td>FC&lt;sup&gt;c&lt;/sup&gt;</td>
<td></td>
<td></td>
</tr>
<tr>
<td>North Carolina</td>
<td>18 Dec 1776</td>
<td>GF</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Georgia</td>
<td>5 Feb 1777</td>
<td>FC</td>
<td></td>
<td></td>
</tr>
<tr>
<td>New York</td>
<td>20 Apr 1777</td>
<td>FC</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Vermont</td>
<td>8 Jul 1777</td>
<td>G</td>
<td>FC</td>
<td></td>
</tr>
<tr>
<td>Massachusetts</td>
<td>[10 Feb 1778]&lt;sup&gt;d&lt;/sup&gt;</td>
<td>GFE&lt;sup&gt;e&lt;/sup&gt;</td>
<td>C</td>
<td></td>
</tr>
<tr>
<td>South Carolina</td>
<td>18 Mar 1778</td>
<td>[not mentioned]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Massachusetts</td>
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<td>M</td>
<td>BFC</td>
<td></td>
</tr>
<tr>
<td>New Hampshire</td>
<td>2 Jun 1784</td>
<td>C</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

B: Brigadier Generals  C: Company Officers  F: Field Officers  G: General Officers  M: Major Generals

<sup>a</sup> Colonial charters gave power to General Court which delegated it.
<sup>b</sup> "Army" officers; militia not mentioned.
<sup>c</sup> Governor, jointly with Council.
<sup>d</sup> Constitution not ratified.
<sup>e</sup> Governor, jointly with Senate.

NOTE: Some constitutions did not specify every type officer.
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.  

Virginia's frame of government implemented these guarantees by establishing the militia, making no provision for peacetime armies, and placing the military power under civil control. Mason suggested that the governor appoint all officers and command the militia, perhaps modelled on ideas contained in John Adams's *Thoughts on Government*. Thomas Jefferson made several proposals which explicitly prohibited standing armies and guaranteed that "No freeman shall ever be debarred the use of arms." In succeeding drafts he dropped "ever" and added the qualification that the right applied only "within his own lands and tenements," hardly an absolute freedom of carrying or using weapons. The convention rejected Jefferson's second proposal and modified Mason's plan to allow county courts to recommend militia officers for the governor to appoint and specified that the governor's "direction of the militia" applied only when militiamen were called to duty and then only "under the laws of the country." Thus written, Virginia's constitution went into effect on June 29 and provided the model for other states to emulate.

The Pennsylvania constitution, implemented in September 1776, was the most radical of the early state frames of government. Like other states, Pennsylvania obligated its citizens to perform civil and military duties but also provided the widest guarantee of the right to bear arms, of the institutional existence of the militia, and of the popular selection of militia officers. Section VIII of its bill of rights declared that since every citizen had a right to life, liberty, and
property, each was consequently "bound to contribute his proportion towards the expense of that protection, and yield his personal service when necessary, or an equivalent thereto." No man's property could be "justly" taken, however, without his own or his representative's consent, "nor can any man who is conscientiously scrupulous of bearing arms be justly compelled thereto if he will pay such equivalent." On the other hand, no citizen could be prevented from bearing arms. Section XIII guaranteed

That the people have a right to bear arms for the defence of themselves, and the state; and as standing armies in 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. 48

Here as in the Virginia declaration, the standing army prohibition stood next to the guarantee of militia or arms. In Virginia the writers of the declaration had had ample cause to include a trained militia as a right of citizens. Governor Dunmore had condemned the independent companies and had threatened to disarm them; the only means at his disposal was the British army, the "standing army" of ideological and constitutional tradition. Some county conventions, especially Fairfax, had stressed the value of the militia as a substitute in America for the army. Therefore, the Declaration of Rights reflected this concern. In the Pennsylvania bill the guarantee of the right to bear arms, without explicit reference to militia, reflected a different though related concern. Since the disallowance of the voluntary militia act twenty years before, Pennsylvania had had no legal militia. The military controversy in that province therefore concerned the legal ability
of non-pacifists to defend themselves by collective military means against attacks from Indians and even from Virginians who contested Pennsylvania's western jurisdiction. Only after April 1775 with the creation of military associations did the question of the right to bear arms require formal settlement. Thus, the writers of the Bill of Rights made explicit reference to the legal and constitutional right of all citizens to defend "themselves, and the state" with arms.

The Pennsylvania constitution also established a legal militia and provided for popular election of officers in the most generous terms of any state outside New England. Section 20 of the frame of government named the President of the Executive Council to act as commander-in-chief. Section 5 stipulated that "The freemen of this commonwealth and their sons shall be trained and armed for its defence" under legislative direction, "preserving always to the people the right of choosing their colonel and all commissioned officers." In New England popular election reflected long-established practice; in Pennsylvania it reflected democratic theory. "Demophilus," in Genuine Principles of the Ancient Saxon, or English Constitution, argued that the constitutional convention had to settle the militia. History, he wrote, proved that "The best constructed civil government . . . ha[d] but a poor chance for duration, unless it be defended by arms, against external force as well as internal conspiracies of bad men." Since the new government was to be founded "on the authority of the people only," the "Militia is [its] natural support." Demophilus equated "militia" with military associations. He urged that "the associators should have the choice of all officers immediately commanding them," including field officers.49
The Pennsylvania constitutional convention influenced the proceedings of meetings in other states and was itself influenced by Virginia and possibly by Maryland and Delaware. The arms provision of the bill of rights has some similarity to that of Virginia, especially in clauses concerning the standing army and civil-military relations. It also shows a remarkable likeness for Delaware's declaration of the obligation of citizens to personal service and the commutation of military service for pacifists. It is clear, however, that Pennsylvania's guarantee of the right to bear arms was unique. Delaware, Maryland, and New Hampshire modelled their provisions on Virginia's militia clause. Delaware declared that the militia "is the proper, natural, and safe defence of a free Government," while Maryland modified the wording by calling the militia "the proper and natural defence," and New Hampshire "proper, natural, and sure defence of a state." Pennsylvania, in turn, directly influenced North Carolina and Vermont, the latter copying the arms guarantee and militia officer provisions verbatim in its constitution of July 1777.50

North Carolina was the second state to declare a right to bear arms, following but modifying Pennsylvania's guarantee. The Declaration of Rights copied verbatim the prohibition on standing armies and the guarantee of civil control of the military. Section XVII, however, declared "That the people have a right to bear arms, for the defence of the State," dropping the reference to defense of self. North Carolina had had a colonial militia system and had recognized the right of citizens to defend themselves. The provincial delegates to the Continental Congress had written to Patriots at home in 1775 that "It is the Right of every English Subject to be prepared with Weapons for his Defence."51
Patriot leaders in New York, whose constitution was in many ways the most conservative of the revolutionary era, expressed a different point of view. To them, arms bearing represented a privilege, removable by the government at its discretion. Therefore, New York's constitution contained no guarantee of arms bearing, and in fact contained no bill of rights at all, though it did list some legal guarantees in the body of the document. The War for Independence raised many questions of social control, characterized by Carl Becker as a struggle for "who should rule at home" in addition to the struggle with England for "home rule." One means of achieving social stability centered on the selection of militia officers and the firm establishment of the obligation of militia service. Section XL of the frame of government, in similar fashion to Pennsylvania, recognized "the utmost importance to the safety of every State that it should always be in a condition of defence." Thus it was "the duty of every man who enjoys the protection of society to be prepared and willing to defend it." The means of protection lay in the militia which the constitution declared would "at all times hereafter, as well in peace as in war, shall be armed and disciplined, and in readiness for service." Recognizing the reluctance of Quakers, who "from scruple of conscience, may be averse to the bearing of arms," the constitution allowed the legislature to establish commutation rates. On the other hand, the constitution vested the entire appointment power of militia officers in the hands of the governor, a direct continuity with colonial practice. 52

The Massachusetts constitution of 1780 in many ways also represented a direct continuity from colonial tradition. In January 1776
the Council and House of Representatives had reached a compromise over the locus of military appointment power by sharing the selection of field and general officers and allowing the individual militiamen to choose their company officers. Since 1775 the province had operated under its revived charter but it soon encountered opposition from various towns seeking to establish a more permanent government. The "antient Mode of Government" with its tendency toward corruption, especially in the arbitrary appointment of officials, required change to prevent future evils. Moreover, Pittsfield argued in May 1776, since "the collapse of royal control had thrown the colonies generally "into a state of Nature," it had become imperative to establish "a fundamental Constitution as the Basis & ground work of Legislation." The General Court finally submitted in the fall of 1776, offering to draft a new frame of government itself. Despite some opposition and hesitation during 1777, a committee composed of members from each county prepared a draft which the legislature adopted in February 1778. This constitution had no bill of rights and vested the appointment power over generals and field officers in the governor and Senate; selection of company officers, not mentioned in the document, apparently remained with the town and the individual militiamen. In addition, the governor with Senate advice had the power to "march the militia . . . out of the state" to defend other parts of the United States. The towns of Massachusetts rejected the Constitution of 1778 because it had not been submitted to a special convention nor popularly ratified. They also objected to the lack of a bill of rights and the military appointment powers of the governor.
The Massachusetts legislature accepted the popular demand for a constitutional convention in February 1779, which met in Cambridge in September. In the following months John Adams prepared the basic draft of the new document with some collaboration with Samuel Adams and James Bowdoin. The Constitution of 1780 contained a lengthy Declaration of Rights and a comprehensive frame of government. The declaration made clear that two of the "natural, essential, and unalienable rights" of citizens included "the right of enjoying and defending their lives and liberties" and of "acquiring, possessing, and protecting property." In emulation of the Pennsylvania Bill of Rights, Massachusetts declared that since each citizen "has a right to be protected . . . in the enjoyment of his life, liberty and property," each also had "to contribute his share to the expense of this protection; to give his personal service, or the equivalent, when necessary. No person's property, however, could "with justice" be taken for public use without personal or legislative consent. Also in adaptation of the Pennsylvania guarantee, article XVII stated that

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.\textsuperscript{57}

The juxtaposition of the army with the arms bearing provision reflected the long-standing concern the leaders and publicists of Massachusetts had shown about the dangers of uncontrollable military force since the occupation of Boston in 1768. The presence of the British army had impelled the Boston Town Meeting to reiterate the right to keep arms of
1689 and to recommend full compliance with the colonial militia laws.
Early in 1769 the House of Lords had condemned this declaration of right as seditious. In 1774 and 1775 Gage's troops had removed military stores from various provincial magazines and, after war had begun, had disarmed the Patriots remaining in Boston. These specific grievances certainly account for inclusion of the right to keep arms in the Massachusetts declaration. The right to bear arms, rather than an explicit reference to the right of militia, seems to have been included for syntactical reasons, without loss of meaning. Arms bearing referred predominately to military defense, as we have seen; the inclusion of the qualifying phrase, "for the common defence," reinforced the collective nature of the right. Every town, however, did not agree with the exact wording. Williamsburgh and Northampton in Hampshire County, for example, suggested that the guarantee read that the right to keep and bear arms was intended (quoting the Northampton resolves) "as well for their own as the common defence" in order to harmonize much better with the first article of the declaration. Williamsburgh explained that it considered it "an essential priviledge to keep Arms in Our houses for Our Own Defence and while we Continue honest and Lawfull Subjects of Government we Ought Never to be deprived of them."58 Taken together and in the context of the state's grievances, however, the predominant meaning stands. Final support of this view can be found in the action of "Massachusetts in 1776 to authorize the abridgement and reprinting of an English manual for justices of the peace. Among the items copied verbatim was the prohibition on private use of arms from the medieval Statute of Northampton, the same law which "Massachusetts
had reenacted with penalties in 1692. The right to keep and bear arms under the 1780 constitution therefore clearly implied military weapons for collective military uses.

The 1780 constitution also modified the 1778 provisions for selection of militia officers, transferring the whole of the governor's power out of his hands. The legislature assumed the authority to choose all major generals but allowed the individual towns and all militiamen over twenty-one the power to elect all company and field officers and brigadier generals. Also, the constitution prohibited the governor, who retained his responsibility as commander-in-chief, from using any constitutional or legislative power to compel any militiaman to march out of the state "without their free and voluntary consent, or the consent of the General Court." The practical authority which the legislature had exercised since the 1720's and the legal restrictions of medieval military statutes adopted in the colony were thereby made part of the fundamental law of Massachusetts. As with the arms guarantee, not everyone agreed with these provisions. Some towns liked the 1778 powers of the governor. Some distrusted popular elections; others wanted more democratic suffrage rules and annual elections. Despite such challenge, the constitution was finally ratified and provided a model for the convention of New Hampshire, the last state to adopt a new constitution.  

New Hampshire's Constitution of 1784 adopted the Massachusetts right of defending life, liberty, and property, and of requiring personal service. It added the Pennsylvania exemption of pacifists "conscientiously scrupulous about the lawfulness of bearing arms" and copied
the central portions of Virginia's militia provision and standing army prohibition. It established the governor as commander-in-chief and allowed militiamen to elect their officers and required their own or legislative consent to march the militia out of the state. 61

Thus by 1784 every state except Connecticut which adopted a bill of rights guaranteed collective military resistance in defense of life, liberty, and property of the community and the state. Every state established the governor as commander-in-chief of the militia and most guaranteed the institutional existence of the militia explicitly or by reference in the body of the constitution. Military power in its composition and in its locus in government played an important part in the debates over the institutions, a part so vital in political, constitutional, and ideological terms that the guarantee of the right to bear arms could have no other than a military meaning. In every case the members of the various conventions chose the phrase "to bear arms" with all its long-standing military connotations over the more ambiguous phrase "to use arms." Arms bearing had a specific legal and traditional meaning while arms use would have allowed too great a leeway on personal interpretation. The early state constitutions from 1776 to 1784 deliberately created the right to bear arms as a remedy for the constitutional grievances concerning military power, armed resistance to tyrannical government, and the existence of the quasi-legal "new militia" which they had experienced since 1768 and especially after 1774.
NOTES


4 Specific citations and an analysis of these provisions is found later in this chapter.


8 "Demophilus," The Genuine Principles of the Ancient Saxon, or English Constitution. Carefully collected from the best Authorities; with some Observations, on their peculiar fitness, for the United Colonies in general, and Pennsylvania in particular (Philadelphia, 1776), p. 23 (emphasis removed).

9 OED, s.v. Regulate; Discipline (quotatation).

10 Principles and Acts, pp. 75, 74, 79.

(Boston, 1902), pp. 46-47. DAMR, VIII, 250; 214 (embargo).

12 Ibid., IX, 41 (27 Jan); VIII, 211 (17 Oct).


14 DAMR, VIII, 241-242 (15 Dec); cf. p. 222 (30 Oct). Ibid., VII, 346 (On 24 Apr 1775, a Lt Nunn left Boston. He later reported that Bostonians "had not been disarmed."). IX, 131.


16 JHBurgesses, 1773-1776, pp. 215 (10 Jun); 258, 257 (19 Jun).

17 OED, s.v. Arms. RICR, VII, 358. NJ Arch, 1st ser., 31 (1923), 191.


19 DAMR, X, 278.

20 CRNC, X, 526. NJ Arch, 2nd ser., 1 (1901), 163.


22 Carl Bakal, in his journalistic The Right to Bear Arms (New York, 1966), cites passim arguments of anti-gun control advocates who contend that the right to bear arms implies predominately the right of self-defense. He particularly cites Bartlett Rumfoll, whose writings seem to have appeared only in the American Rifleman, as a leading advocate of this point of view, p. 295. See also, Stuart R. Hays, "The Right to Bear Arms, A Study in Judicial Misinterpretation," WMLR, 2 (1959-60), 387; in addition to his arguments concerning the right of military service against tyrannical government, he states that "Without this basic right ["the right of personal self-defense"] there would be no reason for man to bear arms. The right to bear arms must therefore draw its strength from the rights of man to resort to force when law fails or an adequate remedy is not immediately available to prevent the loss of human life."

23 Principles and Acts, p. 74.

24 Trumbull Papers, MHS Coll, 5th ser., 10 (1888), 289.

25 James Burgh, Political Disquisitions: Or an Enquiry into Public

26 JH Burgess, 1773-1776, p. 261.

27 Pa Arch, 8th ser., 8 (1935), 7332.

28 Journals of Each Provincial Congress of Massachusetts in 1774 and 1775 ... and Other Documents, ed. William Lincoln (Boston, 1838), p. 103.

29 RICR, VII, 369.

30 [Moses Mather], America's Appeal to the Impartial World: Wherein the Rights of the Americans ... Are Stated and Considered and the Opposition Made by the Colonies ... Vindicated (Hartford, 1775), p. 6.

31 CRNC, X, 22.

32 Ibid., XI, 263 (Col Robert Howe in Dec 1775 "lament[ed] ... the Disarmed Situation of North Carolina" where "the officers could find hardly any Inhabitants armed, and such as had Arms, not one in twenty fit for service."). X, 138 (Aug 1775 [first quotation]). X, 526 (Apr 1776 [second quotation]).

33 Minutes of the Albany Committee of Correspondence, 1775-1778, ed. James Sullivan (2 vols., Albany, 1923-25), I, 353: "This Committee took into Consideration the Resolution of this Board respecting the disarming Dirck Gardineer and are thereupon of Opinion that the said Resolution includes Side Arms. ..." In Provincial Congress. New-York, June 20, 1776 ([New York, 1776]) (my emphasis).

34 Lincoln, ed., Journals of Each Provincial Congress, p. 205: Congress required town and district committees to "inquire into the principles and conduct of such suspected persons, and that they cause all such to be disarmed, who do not give them full and ample assurances ... of their readiness to join their countrymen, on all occasions, in defence of the rights and liberties of America. ..."

35 DAMR, IX, 135-136 (NH: Patriots "took away their arms from half a dozen respectable freeholders, because they had not been active in promoting their measures," May 1775). Cf. John Drayton and William Henry Drayton, Memoirs of the American Revolution from Its Commencement to the Year 1776, Inclusive: As Relating to the State of South Carolina (2 vols., Charleston, 1821), I, 300-301 (opposition to arming Indians and Catholics by British officers; opinion that they should be disarmed). DAMR, X, 177 (NY: 14 companies of men from Conn. marched to Courtland Manor "to disarm inhabitants" Nov 1775). PRCC, XV, 193 (Conn: any one who "shall libel or defame" the Contl. Cong. or Conn. Gen. Ass. and be "convicted before the superior court, shall be disarmed and not allowed to have or keep any arms, and rendered incapable to hold or serve in any office civil or military." Dec 1775). CRNC, XI, 267
(SC: NC "provincials and militia" had helped to suppress "the insurgents on our western frontier. Those people are, we hope effectually subdued; many of their leaders are in jail; others have fled [sic] the country; hundreds of the common class have surrendered their arms, and plighted their solemn promises to behave quietly for the future." Jan 1776).

NJ Arch, 2nd ser., I (1901), 10n (NY: Cont'l Cong ordered minutemen to disarm Loyalists in Queens Co. Jan 1776). Minutes of Albany Committee, I, 336 (NY: Militia ordered "into the District of Manor of Livingston with orders to disarm and apprehend all such suspected persons as shall be returned to them by the Committee" of the manor. Feb 1776). Ronald Hoffman, A Spirit of Dissension: Economics, Politics and the Revolution in Maryland (Baltimore, 1973), p. 191 (Md: disarming of non-associators, Jul 1775). Pa Arch, 4th ser., 3 (1900), 609 (Pa: representation to Committees of Inspection and Observation of the need to collect arms from non-associators, Apr? 1776). NHSP, XXX, 1-2 (NH: Association Test Oath, Apr 1776). CRNC, X, 525-526 (NC: Regulations for disarming, Apr 1776). The Diary of Colonel Landon Carter of Sabine Hall, 1752-1778, ed. Jack P. Greene (2 vols., Charlottesville, 1965), II, 1026 (Va: note on meeting of co. committee: "to enquire who have or have not signed the Association to defend their country that they may be disarmed according to the directions of the Congress," Apr 1776). After 14 March 1776, the provinces based their local regulations on the resolutions of the Continental Congress: JCC, IV, 205.

36 Pa Arch, 8th ser., 8 (1935), 7506-7507.
37 Diary of Colonel Landon Carter, II, 1042-1043.
38 Pa Arch, 2nd ser., I (1874), 600.
39 Ibid., 14 (1888), 604.
40 Ibid., 15 (1890), 351-362; 14 (1888), 244; 15 (1890), 366 (quotation).
43 References to constitutions in the following notes may be found in Poore, comp., Federal and State Constitutions.
44 Papers of George Mason, I, 276-282, 284, 286n.


49 "Demophilus," Genuine Principles, p. 23 (emphasis removed).

50 Max Farrand, "The Delaware Bill of Rights of 1776," AHR, 3 (1898), 644, 646, compares the guarantees of Del, Md, and Pa. Del, sec. 10, 18; Md, sec. xxv, xxvi, xxvii (Poore, I, 819); NH, sec. xiii (Poore, II, 1281); NC, sec. xvii (Poore, II, 1410); VT, sec. xv (Poore, II, 1860).

51 Poore, II, 1410. CRNC, X, 22.


53 Poore, II, 1339.


55 Petitions of Pittsfield, Dec 1775, May 1776, in Massachusetts, Colony and Commonwealth, pp. 18, 27.

56 A copy of the 1778 constitution is found ibid., pp. 51-58; military provisions, pp. 56-57. Popular Sources, p. 46.


58 Massachusetts, Colony and Commonwealth, p. 113. Declaration of Rights, art. I (my emphasis), x, xvii; ibid., p. 130.

59 Popular Sources, pp. 574 (Northampton); 624 (Williamsburgh).


61 Poore, II, 1280-1282, 1288-1289.
CHAPTER TEN

Federal Constitutionalism and Attempted Militia Reform, 1776 - 1787

I sometimes wish we had at first so regulated the Militia of the Continent as to afford a Constant supply [of men] to an army.

--James Warren (1778)

The only probable means of preventing insult or hostility . . . is to put the National Militia in such a condition as that it may appear truly respectable in the Eyes of our Friends and formidable to those who would otherwise become our enemies.

--George Washington (1783)

Congress shall have the 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 the officers, and the authority of training the militia according to the discipline prescribed by Congress.

--Federal Constitution (1787)

The War for American Independence quickly proved the shortcomings of the revolutionary new militia. By the end of 1775, both military and political leaders saw the necessity for some degree of change to bring the various state associations into greater uniformity, to increase the aid given to the Continental forces, and to insure firm civil control. Starting in July 1775 the Continental Congress began making recommendations to the provinces to heighten military efficiency and readiness. As the war progressed, problems with the organization,
command, and military ability of the militia came increasingly in view. The new states made one major alteration after independence in 1776; each transformed the voluntary military associations into compulsory militia systems. Farther than that, however, the state legislatures did not go, objecting to proposals to curtail their own powers and to abandon the medieval restrictions on militia service. Such obstacles destroyed militia reform. At war's end, nationalists again attempted to transform the state forces into a "national militia" embodying many of the proposals made during the war and many of the characteristics of the English militia. The failure of these efforts added impetus to the movement for a strong central government which was created under the Federal Constitution in 1787 and which contained the potential to reform the militia. What developed from 1775 to 1787 was a "court" model of an effective militia. Characterized by efficiency, central control, small size, and public arms and pay, the "court" militia differed from the more traditional "country" institution which clung to the revolutionary model with its legislative control, constitutional restrictions, civil-military functions, elective officers, compulsory membership, and military inefficiency. The dichotomy between these two incompatible models persisted in American consciousness for well over a century, preventing effective reform.

Proposals for reforming the colonial militia systems were not new in 1775. The English government had pursued a policy to transform the seventeenth-century colonial forces into a more effective English-style militia for over forty years after the 1670's and had succeeded to a certain degree in eradicating many objectionable characteristics. All
the colonies had objected to change, but once reform had been achieved they quickly claimed the modified institutions as their own. By the 1770's the lower houses of assembly had vested themselves with considerable power over expenditure of military funds, appointment of commissioned officers, and the structure and operations of wartime forces. In some provinces, especially New York, colonists refused to obey the military commands of the governor without statutory compulsion, even claiming (despite legal evidence to the contrary) that no military obligation and no militia system existed without legislative consent. Although the thrust of military institutional development during the seventeenth and eighteenth centuries was away from universal obligation for membership in virtually autonomous local military systems the American systems persisted. The reluctance of Parliament to reform the English militia, the weakness of royal power in America, and the imperial policy of introducing regular troops as the primary operational and garrison forces in America made colonial reform unlikely. In 1757 Parliament revived and changed the English militia into a force more suitable for assisting the army in wartime, modifications which some publicists urged that the American systems should undergo. By the 1770's, therefore, the colonies had militia systems outworn by contemporary English and European military practices, unwieldy in colonial operations, but completely under colonial control.⁴

Some Americans recognized the problems which the colonial systems presented for effective resistance to the British army. After the Boston Massacre, for example, "Military Countryman" presented his proposals for reform in the Boston press. He argued for increased training,
competent officers, and the revival of the art of war generally. By 1774 he had declared that the purpose of the militia was to train "a certain part of the community" to be soldiers, not virtually every adult male as required by Massachusetts law, and that the colonial militia should be one "similar or nearly similar to that in Great-Britain."

Other reformers, such as Timothy Pickering, published manuals of training and exercise from England and Europe. Pickering's *Easy Plan of Discipline for a Militia* reviewed the Prussian system of training and quoted from the Parliamentary militia statute of 1757 before introducing his simplification of the Norfolk plan of drill.⁵

The shortcoming of the military associations, independent companies, and minutemen which came into existence after the fall of 1774 emphasized the need for more effective control, organization, arming, and training. Joseph Hawley examined the legal problems of military resistance which the colonies had faced in the winter of 1775. Although the soldiers were ready to fight, the governmental apparatus to insure full popular support did not exist. "Without a Legislature which the people will cheerfully submit to," Massachusetts and every other colony except Connecticut and Rhode Island "cannot levy, subsist and pay an army sufficient to afford us any hope of present resistance." Without "assum[ing] a new government," the colonies were helpless to keep even volunteers in the field. The New Hampshire provincial congress added another warning in May. A regular army ("although consisting of our own Country men") "without a civil power to provide for & control them" spelled danger to the state; therefore Patriots had to assume "the Powers of civil Government . . . absolutely necessary for the salvation
of our Country." Thus the first step required to reform the new militia was to establish constitutional government to control it.  

During the year before independence and the writing of the first state constitutions, the Continental Congress attempted to make provision for controlling and using the militia for national ends. In June 1775 it appointed a committee to make proposals to put the "Militia of America" into "a proper state." Congress accepted the report in July and recommended that the provinces model their associations and forces on the characteristics (described in Chapter Eight) of intensive training, elective officers, standard sized companies, and separate units of minutemen. These reforms helped define the revolutionary "new militia" until mid-1776.  

Apparently congressmen discussed the possibility of bringing the entire body of the new militia under Continental control once a national legislature was established. Sam Adams informed Elbridge Gerry in October 1775 that such a government might be the proper locus of "the whole military power in every Colony," but that until it was created, "the militia of each colony should be and remain under the sole direction of its own legislative, which is and ought to be the sovereign and uncontrollable power within its own limits or territory."  

On November 4 Congress authorized General Washington to mobilize the militia of the New England colonies at his own discretion, but a month later it retracted the authorization. Henceforth, Washington had to make formal appeal to the various governors, conventions, and councils for permission to call out the militia. The colonies also objected to the transfer of forces from one province to another "without permission of the civil power of that province" or explicit congressional orders.
All such actions of the army and militia threatened to establish "the Military above the Civil" power, the first step toward tyranny. Congressional reform, even in the general areas of command and control, thus was unable to initiate operational reform of the militia.9

A major obstacle in the way of reform proved to be the reimposition of colonial legislative restraints on the military associations as if they were the legal militia. The hesitation of the Maryland Council of Safety in June 1776 to compel the associators to march out of the province is a case in point. The Continental Congress had recommended the formation of a "Flying Camp" of militiamen to defend the middle colonies in case of invasion. When informed of the scheme, the Council of Safety jumped to the conclusion that Congress would ask the council to order men out of Maryland to join the camp. Since it lacked authority to do so, it called the convention to meet and informed Maryland's delegates at Philadelphia "of the impossibility of marching the Militia out of the Province without their [the men's] consent," the only alternative to legislative approval. Thomas Stone and John Rogers, the delegates, agreed with the Council and explained that Congress had foreseen the problems and favored taking volunteers. "It was never intended," they wrote, "that any part of the militia was compellable to march out of the Provinces; nor do we know of any Power in ours, even tho the Convention was sitting," to do so, though the convention itself had to commission officers and appropriate funds.10

A related problem concerned the whole question of compulsory service. The one characteristic of the new militia which distinguished it most consistently from the militias of any of the colonies before 1774
was its voluntary nature. The military associations legally were organizations of men freely joined for collective action. Although after a year of active warfare associators frequently forced uncommitted men to join by the threat and reality of disarming and loss of civil rights and put social pressure on others who wavered in their commitment to remain members, the various provisional governments simply lacked the legal authority to compel men to perform military duties. When it became apparent in the spring of 1776 that they must declare their independence, the colonies found themselves thrown into a legal state of nature in which all existing statutory law disappeared. New governments had to be created, everywhere founded in some degree on the authority of the people themselves, and new laws passed or old one reenacted. Since personal military service had always been the fundamental military obligation of all free white adult men in both England and America, and since compulsion had always been necessary to enforce that obligation, the new states quickly reinstituted the colonial practices. Every state upon establishing a legislative body either reenacted colonial militia laws or introduced new ones. The failure of voluntarism to produce sufficient forces willing to remain in the field for sufficient periods of time under military discipline thus required the return to the traditional necessity of compulsory service.11

Although Americans accepted the return of compulsion, they found that the revival of the colonial militia acts also revived legislative jealousy of executive power and the medieval restraints imposed by the assemblies upon the colonial governors. Chief among these limitations were the prohibition on compulsory service outside the home
state and the institutional and legal gulf between the *posse dominii* and the *posse regni*. The recommendations of the Continental Congress to conscript militiamen to serve in the Continental forces failed because of this gulf. The Congressional plan for a regular American army to oppose the regular troops of the British army bore fruit in the fall of 1776. The unreliable nature of the New England militia and the military associations elsewhere, the short enlistments in the Continental forces, and the general problems of voluntarism made a permanently embodied, long-term army under Congressional control absolutely essential. A proposal was even made in South Carolina to abolish the militia completely and depend on the army. At precisely this point of crisis Washington made his famous but disparaging remarks about the militia. Militiamen, he exclaimed to the President of Congress, were always "timid and ready to fly from their own shadows." "To place any dependence upon militia," he found, "is assuredly resting upon a broken staff." The new militia had failed as an effective operational force; military historians argue that the institution, whether new or old, simply was not capable of sustained military operations against a trained, disciplined army. Partly the problem of militia lay in its voluntary nature, the practice of elective officers, and the lack of training, shortcomings which military reformers in the next two decades made numerous proposals and attempts to correct. No one argued, however, that the militia could not supply manpower for the army. What Americans did argue about was the means by which militiamen entered the army, the old question of compulsion.
To spur recruiting in the Continental Army, Congress urged the legislatures in April 1777 to make provisions to exempt any two militiamen from actual wartime service who provided one man to serve in the army for three years. It also recommended that pacifists and other men already exempted from service be required in lieu of fines to find a number of recruits, and that servants and apprentices who normally did not belong to the militia be allowed to enlist. As a threat to encourage voluntary compliance and enlistment, Congress added that if the state quotas were not filled by these means within one month, the legislatures should require that "indiscriminate draughts" be made from the militia. Outright and undisguised military conscription into the American posse regni was no more popular in the states than it ever had been in England. Congress had not ordered conscription; it had no power to compel the states. The state legislatures presumably could impose such conscription by statutory innovation. But legal capacity had no bearing on popular perception. Thomas Jefferson described the problems which conscription would have caused had it been imposed in Virginia. "A draught from the militia," he explained to John Adams, "in this country ... ever was the most unpopular and impracticable thing that could be attempted. Our people even under the monarchical government had learnt to consider it as the last of all oppressions." During the rest of the war recruiting remained a pressing difficulty but the states never turned to conscription in any large-scale way, preferring to raise short-term troops and to reinforce the army with the militia.13

Military reformers during the war had no more success in modifying the practice of electing officers than it had with conscription.
Complaints against incompetent officers, electoral abuses, and even failure to require elections identified the contributing factors to militia unreliability. Some states had attempted to place appointment power in executive or legislative hands, but most found it expedient to allow the militiamen to select their own company officers.14 Neither process, as John Adams testified, had much success in improving the quality of the commissioned ranks since "there is so much of Accident in the appointment of Officers."15 Furthermore, the practice of popular election had become so entrenched that the habit of election naturally carried over into civil political suffrage. Militiamen after 1775 who were not otherwise eligible to vote in civil elections demanded the right based on their militia service.16 Military reform in this area really had no chance, even had the idea of suffrage as a virtual right not reinforced the practice. An anonymous Englishman noted in his Tracts, concerning . . . Militia in 1779 that "the New England Militia have always maintained the ancient constitutional right of choosing their own officers in the public Folkmores," a practice which characterized "the original constitution of our national Militia" in England, and, consequently, that of all the colonies and states.17

By the end of 1777 Congress recognized the futility and the ineffectiveness of using militia in most wartime circumstances. The draft Articles of Confederation, for example, simply required each state to maintain "a well regulated and disciplined militia, sufficiently armed and accoutred." Even such a simple request proved difficult for the states to comply with. Money and arms were always in short supply.18
Jefferson later observed in *Notes on Virginia* that the requirement for men to provide their own weapons "was always indifferently complied with," the southern counties of the state being "entirely disarmed" and the middle areas having less than a quarter of the militia armed in order to provide weapons for the regular troops raised in the state. In April 1778 Congress cautioned General Horatio Gates against using his authority to call out the militia unless absolutely necessary since militia service had always proved very expensive and disruptive of agriculture and might slow down recruiting for the regulars. At the end of 1779 it urged Connecticut and other states with diminished treasuries to avoid using the militia unless absolutely necessary.\(^{19}\)

For the remainder of the war Congressional attention remained predominately on the army except during the Southern campaigns where militia became an essential means of supplementing the small army of regulars. The militia had a number of striking successes, notably at King's Mountain and Cowpens, which reinforced the positive image of the institution which Americans as a whole accepted as natural. Even Nathaniel Greene, the army commander in the south, praised the "Enterprise and Spirit" which the militia had displayed on occasion. But he also warned that though "this Great Bulwark of Civil Liberty promises Security and Independence to this Country," the militia should "not be depended upon as a principal but employed as an Auxiliary." Auxiliary status with the militia supplementing the army had been an important characteristic of some of the anti-army polemical tracts of the 1690's and corresponded to the status which the reformed English militia had assumed since 1757.\(^{20}\) Criticisms of the southern militia in 1781 had
the ring of northern criticisms half a decade earlier. Governor Thomas Burke of North Carolina, an opponent of standing armies, believed that the experience of actual warfare "had taught us that the Militia, in its present state, is very inadequate to prevent ravages from almost any collected body of troops." Short enlistments aggravated the problem and imposed heavy financial burdens on the state. When Virginia increased the length of militia service in 1781 to overcome similar difficulties, it met with protest as well as obedience. And when the campaign against Yorktown led to illegal seizures of horses and other private property, no less a figure than George Mason, through a petition to the legislature from Prince William County, complained of a violation of the militia clause of the Declaration of Rights. Military power, he argued, was no longer subordinate to the civil government. 21

What emerged from the constant emphasis upon the inadequacies of the revolutionary new militia, the reimposition of legislative restrictions from the colonial experience, and the constitutional limitations on military power generally was a dichotomy of views on the militia. The distinction between old and new English militias from the seventeenth century, between colonial and imperial models of the militia, and between the "ancient" colonial establishment and the "new militia" of 1774-1776 persisted in American thought. The nationalist military reformers of the 1780's advocated militia characteristics similar to the English "court" view while advocates of state militias governed by legislative and constitutional restraints adopted the English "country" view. These terms had long existed in English politics to denote attachments and loyalty to the crown or to the local communities. Americans
had long been indoctrinated in the Country ideology of distrust of strong central government and of militia as the proper substitute for the army. With the experience of war, the failures of the militia, and the need for an army, some Americans shed their ideological bias toward standing armies in favor of a more practical belief in cooperation between national and local forces. A corollary view required that the militia be reformed to make it a more efficient and useful institution during wartime. During the following decade, militia nationalists fought for reform at the national level as well as attempting to modify militia law in some states. In general their proposals did not succeed although the constitution drafted in 1787 did offer the potential for real change.

Militia localists opposed these measures. Their views may be summarized by some contemporary quotations from Englishmen of the Country view since the American Country voice successfully resisted reform by its silence until 1787. Charles James Fox, speaking in Parliament in November 1775, described "the original meaning and intention of the English militia" which was equally appropriate for America. He "laid it down as a doctrine, that formerly a militia-man was merely armed and disciplined, that he might, when danger was at his door and pressed upon him, defend himself." Such procedure had great theoretical appeal but had proved disastrous in the realities of the American Revolution. Fox also made the point, which Americans later argued vociferously, "that he saw no difference between a standing army of regulars, and a standing army of militia, whom the King could call out when he pleased." William Eden observed in 1779 that a recruit for the militia "must
begin to mean the same thing as a recruit for mere mercenary troops; and the militia itself will, in effect, become a disciplined and well exercised standing army." All this had happened because "the original idea of our militia" had been lost and the "militia [had] degenerated from its original institution." Smith's Universal Military Dictionary in 1779 defined militia generally as any body of soldiers and specifically as "the trained-bands of a town or country, who arm themselves, upon a short warning, for their own defence; so that, in this sense, militia is opposed to regular or stated troops." Neither Fox nor Eden believed the virtues of militia had been entirely lost beyond revival and would have agreed with the anonymous author of Tracts, concerning ... Militia that "A national militia, therefore, ought to be constituted upon principles as opposite to those of standing armies as possible." Finally, Francis Sullivan, the English lawyer whose early works had so greatly influenced Jefferson, praised in his Lectures on the Constitution and Laws the practice of entrusting "the civil and military sword in the same hands." Modern nations which had abandoned that principle, he wrote, "have ever been exposed to ... having the civil and legal authority subverted by the military power."

By the last years of the Revolutionary War, many Americans agreed that militia and army required totally separate establishments, and that the militia should continue as a local institution performing military and law enforcement functions. The Articles of Confederation, which finally went into effect in 1781, reflected these views. They stipulated that each state would continue to maintain its militia, well armed, equipped, regulated, and disciplined, but would not keep any
other "body of forces" in peacetime except as prescribed by Congress. This arrangement also reflected the views of nationalists who sought to vitalize militia and to place power to raise and support wartime armies in the hands of the central government. The Articles contained no prohibitions on standing armies. Thomas Burke, North Carolina’s champion in Congress of civil supremacy over military power, offered partial explanation. Although he had been disconcerted by the poor performance of the militia, he argued that the "War will make too many of our people Soldiers to leave us anything to apprehend" from a standing army. Generals and field officers belonging to the Massachusetts Line reflected another attitude which made any prohibition unnecessary. Addressing the state senate in November 1780, they declared that "We consider ourselves as citizens in arms for the defence of the most invaluable rights of human nature." Finally, the overwhelming support which Americans gave to George Washington, the quintessential Cincinnatus who sprang to arms at his nation’s call and returned to civil life at war’s end, helped to lessen American fears of the army. By 1783, however, fears were reawakened by the threat of military domination of the states. In 1780 and 1781 continental troops from New Jersey and Pennsylvania had mutinied and recruits from Pennsylvania had actually surrounded Congress to demand back pay. By March 1783 the crisis over pay created the Newburgh Conspiracy which only Washington’s mediation prevented from endangering the government. The result of all this agitation, James Madison reported in June 1783, was a "paroxism of jealousy" by the states over military power. Thus the attitude of the mutual exclusivity of militia and army remained potent to Americans.
In this highly charged atmosphere of distrust of the army and of the intentions of military nationalists, Congress in April 1783 appointed a committee to formulate a peacetime military policy for the nation. Modelled on an earlier committee in 1781 which had made general proposals for strengthening Congress (including the idea of establishing "one universal plan of equipping, training & governing the Militia"), the new committee was chaired by Alexander Hamilton, with Madison and James Wilson as two of its members. It solicited opinions from Washington, the commander of the Continental Army, and Benjamin Lincoln, the Secretary at War. Washington prepared his "Sentiments on a Peace Establishment" by combining his own ideas with those of his chief subordinates, including Baron von Steuben, Henry Knox, and Timothy Pickering. All agreed on maintaining a small peacetime army supplemented by the state militias. All agreed as well that militia could not suffice as the primary instrument of national power; even as an auxiliary and emergency force it required extensive reform. They recommended three major categories of change: uniformity of state systems; increased and more efficient training; and classification of men by age, with primary dependence on men under twenty-five. Despite his disparaging remarks on militia during the war, even Washington, with an eye for political realities and an ear for public sentiment, proclaimed the militia "the great Bulwark of our Liberties and independence" while urging thorough reform to create a truly "National Militia." In terms reminiscent of some of the state constitutions, he contended that "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 of his personal services to the defence of it." Therefore, every male citizen between eighteen and fifty should be enrolled, trained, armed and organized uniformly, and classed. Men from eighteen to twenty-five who exhibited a "natural fondness for Military parade" would form the first line of defense. Washington closed his remarks on the militia with various suggestions for establishing arsenals and appointing adjutant generals to increase the efficiency of the state systems. On June 8 he repeated some of these comments in his circular letter to the states in which he described the militia as "the Palladium of our security, and the first effectual resort in case of hostility," and urged uniformity of arms, organization, and training among all the states. In the general celebration of independence, however, it was easier to remember the former praise than the latter warning.32

The final report to Congress reflected the composite recommendations of Washington and Lincoln, as modified by the committee's own ideas heavily influenced by Hamilton. The committee urged the forming of two main classes of militiamen, married and single, with the latter receiving more training, but both serving in the field by rotation. They also suggested forming an elite corps of urban men who would voluntarily enlist for eight years' duty in peacetime, three during time of war. This corps would be the most highly trained and disciplined group and provide the primary defense force of approximately eight thousand men—in other hands a combat-ready quasi-standing army of citizen soldiers to supplement the 2600-man army.33
These opinion by the principal nationalist military leaders of the United States expressed precisely the Court image of the militia. No longer the counterpoise to the army, militia had become the army's auxiliary, its subordinate institution of local defense, and its supplier of trained military manpower. In Hamilton's plan, the elite corps of militia had become a small, compact force of voluntary reservists, serving in public pay at the disposal of the national government. In every sense the militia had been transformed into a standardized, modernized, functionally specific, institutionally differentiated force of men motivated, in the Smithian economic sense, by self-interest, who combined military professionalism with civilian concerns. In essence, as Country writers had feared and predicted, the nationalists' militia resembled to a remarkable degree the image of the standing army. No wonder then that the report of Hamilton's committee, submitted to Congress on June 18, was not brought up for consideration until October 23. The "paroxysms of jealousy" had somewhat subsided by then, five days after the Continental Army had been disbanded, leaving a "standing army" of less than 700 men. Congress rejected the plan, primarily because many members argued that the Confederation lacked legal authority to create a peacetime army, somewhat straining their interpretation of the Articles. A more practical reason was the sheer lack of money in the national treasury to finance such an army and the virtual impossibility of requisitioning funds from the states whose militias would be transformed in the process.

During 1784 the controversy over the army subsided when the remaining forces were reduced to fifty-five men at West Point and twenty
five at Fort Pitt to guard stores, and when militiamen were assigned the
duty of frontier police. Congressmen, however, did not wholeheartedly
trust even this "militia." In essence the 700 men raised from Connecti-
cut, New York, New Jersey, and Pennsylvania were regulars, enlisted for
twelve months, although in the beginning the similarity seemed unimport-
 tant in light of the elimination of the army. Elbridge Gerry, the ar-
dent opponent of the army, voiced a warning in June 1784. "If we have
no standing Army," he said, "the Militia, which has ever been the der-
nier Resort of Liberty, may become respectable and adequate to our De-
fence . . . but if a regular Army is admitted, will not the Militia be
neglected, and gradually dwindle into Contempt?" When the enlistments
expired in 1785 and England had not yet abandoned the western posts,
Congress recommended that the states raise another 700 men, this time
for three years. Gerry, supported by the Massachusetts legislature, ob-
 jected that Congress had no "right . . . to require men in time of
peace," who might become the basis of a standing army.

Among nationalists, the call was for more troops, in a more permancest establishment, under direction of a strengthened War Department.
Some feared that British influence among the Indians threatened war for
which the states, which had neglected to train their militias and to
replenish military stores, were not prepared. In 1784 Baron von Steu-
ben published the ideas on the militia and army he had submitted to
Washington the year before. Rather than a system embodying the state
militias, he advocated establishing a small "Continental Legion" with
only a limited number of men in each state required to train—a stand-
ing army by his own admission. Two years later, Henry Knox who had
recently become Secretary at War, advocated a very large militia, divided by classes into an elite and reserve corps, based upon virtual universal obligation to train and serve. Like Hamilton's elite corps, this one was designed to provide the first line of defense and the bulk of professionally trained men who would eliminate the need for a standing army. His plan envisioned a uniform national system requiring considerable expense which, unfortunately, Congress could not finance. A committee examined his report, but Congress evaded making a decision on its national implementation. Members believed that simply urging the states individually to adopt Knox's system would "not only put their Militia upon a very respectable but [also] a formidable footing."

Henry Lee, however, confided to James Madison that Congress had encountered too many problems to establish "a proper system"; especially difficult to overcome was "the indifference which pervades our country on this important subject." Ultimately, he felt, Knox's plan was doomed by state reluctance to act on it. 40

Nationalists faced many difficulties in 1786 stemming from this apparent indifference of the states to military readiness and concern. Because of Indian troubles, nationalists convinced Congress to augment by 1340 men the frontier defense force which was rapidly losing its character as militia. At the same time in Massachusetts, Shays's Rebellion once again demonstrated the inadequacy of the military power of the states and nation to deal effectively even with domestic problems. Knox felt that any increase in national military power would also "tend to strengthen the principles of government." By April 1787, however, Congress reversed its decision and discharged virtually all
the new troops; money simply was not available to pay them. These and
other pressures, economic and political, convinced nationalists of the
need for corrective action to modify the Articles of Confederation in
favor of increased national power.\footnote{41}

Years of criticism of the weaknesses of the Confederation had pre-
ceded the calling of a new constitutional convention. In military
affairs, Pelatiah Webster, for example, had recognized the need for
the central government to be given "full powers to unite the force of
the States." Alexander Hamilton had often observed the axiom that "an
army is essential to the American union." Nationalists also came under
the influence of foreign observers whose writings tended to reinforce
their own views.\footnote{42} In his \textit{Principles of Moral \& Political Philosophy},
William Paley argued along Smithian lines that a militia might perform
effective military service, but at a high economic cost.

\begin{quote}
\noindent Where there is no standing army ready for immediate
service [he argued], it may be necessary to call the
reaper from the fields in harvest, or the ploughman
in seed time; and the provision of a whole year may
perish by the interruption of one month's labour. A
standing army, therefore, is not only a more effec-
tual, but a cheaper method of providing for the
public safety.
\end{quote}

Paley opposed reliance on militia because of the dangers inherent in
an armed nation.

\begin{quote}
\noindent To me it appears doubtful, whether any government
can be long secure, where the people are acquainted
with the use of arms and accustomed to resort to
them. Every faction will find itself at the head
of an army. Every disgust will excite commotion,
and every commotion become a civil war. Nothing
perhaps can govern a nation of armed citizens but
that which governs an army—despotism.
\end{quote}

He recognized the dangers also presented by a standing army but felt
they could be overcome by deliberate meshing of the interest of soldier and civilian and by frequent association between them and between officers and leading families. The Abbe Mably, on the other hand, directed his criticisms to the states for their failure to implement the militia provisions of their constitutions and to the inadequacies of some of those clauses. His Remarks Concerning the Government and the Laws of the United States praised the militia and argued that Congress "should, also, enjoy the power of signifying their commands to the troops destined to bear arms against" foreign enemies. Unless the states did more to abide by their militia ideals, however, few men would answer the call. Massachusetts declared that civil power should control military power, but it had taken no steps to ensure it. New York and Pennsylvania had provided for defense by the militia but had neglected enforcement. "It seems as if the legislator," concluded Mably, "saw only the end in view, without looking to the means by which he should attain to it."44

Nationalists who advocated change also had to deal with the positive image of militia very much alive in 1787. Mably referred to the "glorious exercises of the militia" even after "the fatigues of the plough." He declared that "the people armed, as in Switzerland, and become ... the power and strength of the state, would render themselves respected" under all circumstances; even if Congress conspired against liberty, no army could avail "against the militia of your thirteen united republics."45 John Adams frequently observed to his correspondents and conversational partners that "The Towns, Militia, Schools and Churches" constituted "the four Causes of the Growth and
Defence of N. England," the means by which "The Virtues and Talents of the People" were formed. In his Defence of the Constitutions published in 1787, Adams dealt directly with the militia issue. He explored the history of armies and militia in the ancient world and examined the observations of Machiavelli and Harrington on citizen soldiers and arms. He agreed with the latter's observation that the "hand which holds" the public "sword is the militia of a nation." The problem, above all, was the composition of this "militia." An "army in the field" always proved dangerous; men ready for action who honored "the balance of property" as the source of military and societal power were never dangerous. To allow "nobility, or gentry" to "over-balance" popular government also proved disastrous. Any government, Adams concluded, was susceptible to destruction by military power.

"The public sword, or right of the militia," he argued, "be the government what it will, or let it change how it can is inseparable from the over-balance in dominion." Therefore, he accepted Marchamont Nedham's contention "'That the people be continually trained up in the exercise arms, and the militia lodged only in the people's hands, or that part of them which are most firm to the interest of liberty, that so the power may rest fully in the disposition of their supreme assemblies.'"

"The rule in general is excellent," Adams noted, including "the right of disarming" Charles I and his supporters although Adams was not completely satisfied with "the justice, policy, or necessity of this" practice. In the final analysis, "militia and sovereignty are inseparable."46
The Philadelphia Convention met in May 1787 in the immediate context of these attitudes toward the militia and in the general context of the need for further militia reform. Although only George Washington had held important command during the Revolutionary War, a large number of delegates had served in lesser capacities and were familiar with military problems. Thus, contends Richard Kohn, they had little difficulty in establishing the President of the new government as permanent commander in chief and in giving Congress the power to raise and support armies. The militia presented a different problem and required a different solution. Neither the Virginia Plan proposed by Edmund Randolph nor the New Jersey Plan by William Paterson gave much attention to militia. Each sought to depend for national strength on a force directly responsive to the central government. Alexander Hamilton recommended that all the state militias "be under the sole and exclusive direction of the United States," which would appoint and commission all the officers. Charles Pinckney also proposed some powers over militia, some of which were later incorporated into the Constitution. He suggested that Congress have authority to arm, organize, and discipline the militia and use it to suppress rebellions, execute federal law, enforce treaties, and oppose invasions. After these initial proceedings, the various proposals were submitted to a committee of detail to be constructed into a single draft for further consideration.47

Real debate began when the committee of detail reported its work. Although George Mason was already on record as opposing concentration of the powers of the sword and purse in the same hands, on August 18
he supported giving Congress 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" because he considered uniformity among the state systems as absolutely necessary. Connecticut's Oliver Ellsworth felt the power was too great. He agreed that militia-men should have the same weapons as regulars, as well as the same training and discipline while in federal service, and even accepted the need for congressional regulation if the states failed to do their duty, but he adamantly opposed giving "the whole authority over the Militia" to Congress because to do so would lead to the destruction of the states themselves. Roger Sherman, also from Connecticut, seconded the motion to deny such power to the federal legislature. Connecticut had successfully opposed the crown in the 1690's in retaining immediate control of its militia and in 1776 had renewed its commitment to charter government. Here was no mere "jealousy" of standing armies but the very fabric of charter right. The crux of this initial argument was the locus of military power. James Madison believed that "the authority charged with the public defence" should exercise full control of the militia, because it was not in the nature of military command to divide power between two distinct government. Mason suggested that a select militia could be trained and regulated by the federal government to serve as the primary defense force, leaving the bulk of the militia in state hands. Ellsworth rejected this idea because it would inevitably lead to the deterioration of the remainder of the state militias, and Sherman pointed out that the states needed the militia to oppose invasions and rebellions and enforce their own laws. Debate ended by
acceptance of Mason's original motion, which was then returned to com-
mittee for polishing.

The militia clause was again considered on August 23. Mason's
provision now read: Congress had power

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 the officers,
and authority of training the militia according to the
discipline prescribed.

Rufus King of New York, a member of the committee of detail, explained
what the committee intended by the words "organizing, arming & discri-
plining the "Militia." The words meant, respectively, to establish
proportions of men, specify types of weapons, and prescribe training
procedures. To allay Elbridge Gerry's fears that Massachusetts and
the other states would be transformed into mere "drill-sergeants" by
this power, Madison declared that Congress would not actually furnish
arms or impose courts martial on the militia in peacetime. Sherman
and Ellsworth remained unsatisfied, even after Madison, Edmund Randolph,
and New Hampshire's John Langdon demonstrated that militia discipline
was essentially a national power and that the states had and undoubtedly
would continue to neglect their forces. Finally, Connecticut was sim-
ply outvoted. Madison's proposal to allow the federal government to
appoint militia generals was also easily defeated. 50

On September 14, a final attempt to amend the militia clause was
rejected. Mason and Randolph moved to preface the whole clause with
the declaration that "the liberties of the people may be better secured
against the dangers of standing armies in time of peace." Even Madison
favored it, he said, because it would help "to discountenance" armies
constitutionally, without restricting congressional power to raise them when necessary. Only Georgia, however, agreed with the Virginia delegates, and the phrase was dropped. The final, approved version of the militia provisions, after polishing in committee, changed only the initial phrase, to read that Congress was empowered "To provide for organizing, arming, and disciplining the militia," partly to clarify the committee's intent and partly to make the clause parallel in construction to the other militia clause. 51

The second militia clause had little difficulty in being accepted. Only one change was made to the original version. On August 23, the delegates agreed to amend the congressional power "To call forth the aid of the militia, in order to execute the laws of the Union, enforce treaties, suppress insurrections, and repel invasions," to the form, "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions." Treaties, it was observed, were part of the law so that separate mention was superfluous. 52

On September 17, 1787, the Constitution was approved by the convention for ratification by the states, marking the culmination of debate on governmental power begun in the late 1760's. As Gordon Wood has demonstrated, the emphasis of this debate had shifted from a basic conflict between people and rulers and between colonies and crown, to a more sophisticated competition between conflicting interests in the same society. The "people" were the constituent power in framing the state and federal constitutions, and "people" directly controlled many positions of influence in the new governments. 53
The militia clauses of the Constitution also marked the success of reformers in preparing the political base for future substantive modification of the state militia systems. By specifying that the federal government could use the militias to enforce federal law as well as to oppose invaders and rebels, and that Congress could establish rules of organization, armament, and training, the reformers established the potential for implementing the proposals of Washington, Hamilton, Knox, and others in the mid-1780's. This power over the militia represented the culmination of a legitimate revolutionary tradition of institutional reform and of nationalization of military power. Like the Continental Congress and the Articles of Confederation, one primary purpose of the new Constitution was to provide for the common defense. Since both the state bills of rights and the version of the English Bill of Rights proposed by the House of Commons had identified militia or armed citizens as the primary agents of common defense, control of the state militias by the new federal government was a logical development. Moreover, Congressional authority over militia affairs represented the direct national implementation of the colonial legislative quest for military power. The designation of the President as commander-in-chief insured both civil control of military power and continued the practice of all the states in delegating command authority to the chief executives. Finally, by allowing the states to retain the essential powers of officer selection and enforcement of military regulations, the Constitution solving the twin problems which James II had presented a century earlier, the appointment of officers unacceptable to the people and the neglect of militia training. Therefore, the militia provisions of the
of the federal Constitution were aimed at satisfying the needs of military reform to provide for an effective national defense and at allaying fears that the new government would revive the old crises over military authority so well known in the Anglo-American experience since the early seventeenth century.
NOTES


3 Art. I, sec. 8, para. 16.

4 On assembly power which continued up to the Revolution, see Jack P. Greene, The Quest for Power: The Lower Houses of Assembly in the Southern Royal Colonies, 1689-1776 (Chapel Hill, 1963), and John F. Burns, Controversies between Royal Governors and their Assemblies in the Northern American Colonies (Boston, 1923).

5 Boston Gazette, 30 Apr 1770, 27 Jan 1772, 15 Nov 1773. Boston Evening Post, 11 Jun 1770, 10 Oct 1774 (emphasis removed). Timothy Pickering, Jr., An Easy Plan of Discipline for a Militia (Salem, 1775), p. 3, mentions the Prussians' having broken with the old methods of training and exercise and the adoption of the new methods by England from 1757 to 1764.


7 JCC, II, 106, 187-190.


10 Arch Md, XI, 470, 477, 492.


15 Adams Family Correspondence, II, 6.


18 JCC, XI, 654; later attempts to empower the Continental Congress to requisition state forces were defeated; IX, 912.


20 Papers of Jefferson, IV, 130.


25 Tracts, Concerning ... Militia, pp. 65-66.


33 *JCC*, XXV, 549-551, 722-745; 703.

34 Washington was not satisfied with the committee proposal: *Writings of Washington*, XXVII, 143-144.

35 *JCC*, XXV, 722-745.


JCC, XXX, 117n, 151n. Letters of Members, VIII, 489.


Records of the Federal Convention of 1787, ed. Max Farrand (4 vols., New Haven, 1911-37), I, 21, 54, 61 (Va. Plan); 245-246 (N.J. Plan); 293 (Hamilton); III, 598 (Pincney Plan); II, 135-136, 144-145, 159, 168, 172 (Committee of Detail).


Ibid., II, 332, 331.

Ibid., II, 385, 388.

Ibid., II, 616-617; IV, 59.
52 Ibid., II, 390 (cf. 182, the 6 Aug version).

CHAPTER ELEVEN

The Bill of Rights, Militia, and the Right to Keep and Bear Arms, 1787 - 1791

The public sword, or right of the militia.

--John Adams (1787)\(^1\)

JUS MILITIAE. The right of serving in the army.

--Alexander Adam (1791)\(^2\)

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

--James Madison (1789)\(^3\)

To trust arms in the hands of the people at large has in Europe been believed, and so far as I am informed universally, to be an experiment fraught only with danger. Here by a long trial it has been proved to be perfectly harmless; neither public nor private evils having ever flowed from this source, except in instances of too little moment to deserve any serious regard. . . . The difficulty here has been to persuade the citizens to keep arms, not to prevent them from being employed for violent purposes.

--Timothy Dwight (1795)\(^4\)

The Second Amendment to the Federal Constitution of 1787 guaranteed to American citizens the right to keep and bear arms and the right to maintain the institution of the militia. James Madison introduced the amendment in the new Congress as part of the Bill of Rights in June
1789. His proposal, quoted at the head of the chapter, reflected the many amendments submitted by the states for inclusion in the list of guarantees, as well as his own views of the subject. Antifederalists had been dissatisfied with three aspects of the military provisions of the Constitution. Some feared that the nationalists who would probably dominate the new government would impose heavy military obligation on the citizens of the states, especially martial law in peacetime, and thus introduce military despotism. Others argued that Congress, like James II, might neglect the militia, or define military obligation so narrowly that the majority of citizens would be disarmed and forbidden to train and that a federal standing army would be justified. Most commonly, Antifederalists complained that federal power to tax and to control the militia eliminated two major attributes of sovereignty from the state legislatures, and thereby from the people. Such federal authority they feared would destroy the states by upsetting the theoretical balance between popular or legislative power and the power of the executive. They equated the former with the states and the latter with the federal government. Their insistence upon the right to keep and bear arms and the militia therefore sought to perpetuate the sovereignty of the states as the collective will of the people, to prevent disarming even if Congress redefined military obligation, to guarantee the right of collective military service to guard against the standing army, and to limit the use of martial law to prevent abuse. The first three points comprise the Second Amendment; the last is part of the Fifth Amendment.
To many Federalists these arguments were reactionary and contrary to the development of a strong political union. In fact, Antifederalist notions of political balance and sovereignty were anachronistic and irrelevant to the new constitutional system. Since 1776 the very basis of political understanding had been transformed. Fundamental changes had affected the concepts of sovereignty, representation, and balance. Antifederalists clung to the traditional tripartite division of political authority (democracy, aristocracy, monarchy). They failed to recognize the basic assumption of the Constitution, that all power rested ultimately in the people, and that the people could delegate portions of their sovereignty to state and to federal government. Antifederalist fears of the loss of the states were based on the axiom that sovereignty could not be divided; therefore, powers granted to the federal government were permanently alienated from the states. Under the theory of people "as constituent power," however, sovereignty could be shared. The states would not disappear but would retain significant power of internal administration. Militia might continue to balance the army in practical terms, but constitutionally the federal government controlled both and could reform them to meet national needs. Finally, given national responsibility for national defense, the redefinition of sovereignty, and the representation of the people in Congress, the necessity and legitimacy of medieval restrictions on militia service vanished.  

Antifederalist arguments, regardless of their theoretical irrelevance, were based upon historical experience and estimates of the goals of the Federalists. Since one function of any government was to protect individual rights, and since government could exist only with the
political and military support of the people, the Antifederalists perceived that a threat to either partner in this relationship threatened the whole. To deny citizens the classical Jus Militiae, the right of military service, sapped the strength of the state. To disarm or neglect the militia destroyed military potential. Equally serious were attempts to eliminate state military authority, whether in defining military obligation and geographical limits of service or in specifying organization, arming, and training requirements. Since the end of the War of Independence, Federalists had given Antifederalists much to make them apprehensive for the militia. Congressional committees, generals, and executive officers had made sweeping proposals to reform the militia and to bring it securely under national control. Nationalists at the Philadelphia convention had made their position clear. The militia must be controlled by Congress. To a large degree, their plan succeeded but not without a fight. Elbridge Gerry and George Mason and others had prevented the complete elimination of state power by reserving to the states the selection of officers and the actual enforcement of the training obligation. Federalists considered this compromise a betrayal and an obstacle to effective reform. Antifederalists considered it insufficient to prevent federal domination. In this context, the Constitution came before the states for ratification. Opponents criticized virtually every provision; the almost unlimited power of taxation, the authority to raise and support armies, and the power over the militia seemed to presage the destruction of the state governments and the liberties of the people. Antifederalists sought by argument and
these twin powers amounted to "cutting a man in two in the middle, to prevent his hurting himself." Ellsworth also pointed out a major inconsistency in the arguments of the Antifederalists.

One hour you sported the opinion that Congress, afraid of the militia resisting their measures, would neither arm nor organize them, and the next . . . that they would harass them by long and unnecessary marches, till they wore down their spirit and rendered them fit subjects for despotism.

Archibald Maclaine in North Carolina made a similarly telling blow to the Antifederalists. If they feared federal military despotism, why were they not as much afraid of our state legislature; for they have much more power than we are proposing to give this general government. They have unlimited control over the purse and sword; yet no complaints are made . . . . The idea of the militia being made use of, as an instrument to destroy our liberties, is almost too absurd to merit a refutation.7

Yet the Antifederalists did fear, sometimes with convincing historical experiences to support their case. Both Cromwell and Charles II, as described in Chapters One and Two, used the militia as a police force to crush resistance, to disarm potential rebels, and to enforce royal order as well as Parliamentary statute. A militia could thus be used quite effectively "to destroy our liberties" if it were properly composed, commanded, and controlled. This militia of the Major Generals and of the Restoration, of course, differed from the American model. It had contained few men in relation to the adult male population; it received public pay, used public arms, served virtually at call; and it was commanded by officers thoroughly loyal to Protector or King. Washington, Knox, Steuben, and the Hamilton committee members, all
amendment to retrieve power over the militia in order to protect themselves from federal and military oppression.

In Pennsylvania, the scene of the first intensive confrontation, James Wilson set the scope of nationalist arguments. In October 1787 he told his audience that an army was necessary to the government. "No man, who regards the dignity and safety of his country, can deny the necessity of a military force, under the control and with the restrictions which the new Constitution provides." Even in times of peace, he argued, no nation "has not found it necessary and useful to maintain the appearance of strength" which only an army could provide. An army might prove expensive, observed Anthony Wayne in December, but "the expenses of a standing army, are nothing to the present expense of the militia." Besides, argued others, the Massachusetts militia had failed to suppress Shays' Rebellion. Therefore the militia required national control. "Men without an uniformity of arms, accoutrements, and discipline," another Federalist declared, "are no more than a mob in a camp; ... in the field, instead of assisting, they interfere with one another." In the final analysis, a good, effective militia might even "supersede the necessity of raising, or keeping up, standing armies" and really become the "bulwark of internal strength" which the Commonwealth ideology had so long claimed.6

In the following months nationalists elsewhere reiterated, embellished, and added to these arguments. Oliver Ellsworth in Connecticut asked "if ever there were a government without the power of the sword and the purse?" Congress, unlike Parliament, consisted of "men appointed by yourselves, and dependent upon yourselves." To deny them
Federalists in 1787, had advocated a national militia under federal control whose elite corps was composed of men in public pay, using public arms, serving at call, and commanded by men who owed their allegiance and loyalty to the national government. The parallels did not escape the Anti-Federalists. Little wonder that Federalists played down militia reform during the ratification process. Enough memory and suggestions of the reform proposals of earlier years remained, however, to give relevance to Anti-Federalist criticism. In October 1787 a Pennsylvanian accused the nationalists of imposing on the nation "A Prussian militia." Timothy Pickering, a Federalist, had indeed published a plan of militia training in 1775 which had praised the Prussian system of exercise, had implied that the English reformed militia had adopted that system after 1757, and had proposed that the American militias make use of a simplified version of it. Alexander Hamilton and others, in seeking to allay fears that Congress would impose heavy military obligation on all adult males who made up the existing state militias, played upon the other fears of an oppressive militia. "There must be a select corps," he told the New York ratifying convention in July 1788; "the whole people can never be fully trained." Even George Mason in his opposition to comprehensive federal control of the militia advocated the federal use of a select corps to fulfill the constitutional functions of the whole militia.⑧

Richard Henry Lee in Virginia objected to the reform proposals because Congress might use its power of taxation and of "modelling the militia" to deprive the states of their political strength.

Should one fifth or one eighth part of the men
The Antifederalist minority at the Pennsylvania Convention also recognized that "a select corps . . . will best answer the purposes of government." With the officers of the militia, whether select or reserve corps, constitutionally required by oath to uphold the Federal Constitution, little remained in the way of national dominance of the militia. John Smilie in Pennsylvania tied the concepts of militia and arms together. "When a select corps is formed," he declared, "the people in general may be disarmed." 9

Given the Federalist proposals for creating a select corps and Antifederalist fears that this new "militia" might be used against them, the other Antifederalist arguments fall into place. The apparent inconsistency hung only upon a definition. What was the militia? George Mason at one point, in good colonial and ideological tradition, declared that "the militia . . . consist now of the whole people, except a few public officers." Federalists treated the militia as those men actually in training and prepared for war, a select corps of about 10,000 and certainly fewer than 50,000 men. When the Antifederalists often accepted the more restrictive definition, the Federalists traded positions and attacked their arguments with ridicule. By substituting "select corps" for "militia" in many of their debates, however, the absurdness disappears if obvious rhetorical exaggeration is ignored. 10
Antifederalists claimed that the government might impose excessive military obligation and discipline on the "militia." Samuel Bryan informed fellow Pennsylvanians in November 1787 that the Constitution allowed Congress to "subject the citizens of these States to the most arbitrary military discipline: even death may be inflicted on the disobedient." In the "character of militia," therefore, citizens "may be made as mere machines as Prussian soldiers." A select corps, argued the Pennsylvania minority, would be most liable to fines being "levied in a military manner," to "corporal punishments of the most disgraceful and humiliating kind, and to death itself, by the sentence of a court martial." Luther Martin, a leading Maryland Antifederalist who had briefly attended the Philadelphia Convention, exaggerated his claim that Congress might subvert state power by "call[ing] out the whole of its militia, without regard to religious scruples, or any other consideration," keeping the men in service "as long as it pleases, thereby subjecting the freemen of a whole state to martial law and reduce them to the situation of slaves." "Nor is the suggestion unreasonable," he observed, "that the government might improperly oppress and harass the militia," simply "to reconcile them to the idea of regular troops."¹¹

On the other hand, and for the same motive of introducing a standing army, the federal government might neglect the militia. In this case "militia" referred both to the "whole people" and to the select corps, depending upon the direction of the argument. Neglect of organizing and training militiamen meant a collapse of state military power. Neglect of arming meant a loss of military potential. Luther Martin again provided a key argument:
When a government wishes to deprive its citizens of freedom [he told the Maryland legislature], and reduce them to slavery, it generally makes use of a standing army for that purpose, and leaves the militia in a situation as contemptible as possible, lest they might oppose its arbitrary designs.

The powers which the Constitution placed in Congress over the militia, he noted, "enable it to leave the militia totally unorganized, undisciplined, and even to disarm them." The citizens themselves, "so far from complaining of this neglect," would accept it to escape "the burden of militia duties." Thus excessive obligation and institutional neglect went hand in hand to destroy popular military power. Patrick Henry added the final point. The power to arm implied the power to disarm. If the traditional common law requirement for militiamen to find their own weapons were abandoned in favor of the use of federally-supplied ones, the result would be dangerous to the states. "Of what service would militia be to you, when, most probably, you will not have a single musket in the state?" asked Henry, "for, as arms are to be provided by Congress, they may or may not furnish them."^12

At the base of these objections, Antifederalists feared the loss of state sovereignty. Sovereignty in this sense differed in degree from the view expressed by Thomas Jefferson and James Madison in the Virginia and Kentucky Resolutions in 1798 that the states acted as guarantors of the liberty of citizens against federal encroachment. Unlike nineteenth-century States Rights advocates who wished the states to have ultimate power to block federal actions not in their interest, Antifederalists in the 1780's emphasized the collective sovereignty of the people expressed through their popularly elected state legislatures.
Under most state constitutions, the governor had little real authority in relation to the assembly, a consequence and culmination of the quest for power which the lower houses had pursued in the late colonial period. It was this power which the Antifederalists sought to protect from federal encroachment. Two major attributes of sovereignty were endangered by the Federal Constitution, the powers of taxation and of the militia, the power of the purse and the power of the sword. Congress had virtually no limit on its authority to tax but had two significant limits on its militia authority. It could not select militia officers or enforce training regulations. But Congress could "provide for organizing, arming, and disciplining the militia" and "for calling [it] forth" to suppress insurrections, repel invasions, and, significantly, to enforce federal law. Both sets of powers seemed to Antifederalists to presage the doom of state legislative power and the states themselves.

Some Antifederalists foresaw the complete collapse of the states as a result of their loss of essential powers. John Adams, in Defence of the Constitutions, had provided them with the key axiom: "The militia and sovereignty are inseparable." To Luther Martin, the militia provided "the only defence and protection which the State can have for the security of their rights against arbitrary encroachments of the general government." To take militia power "away from the States," he warned, "ought to be considered the last coup de grace to the State governments." Richard Henry Lee reiterated this conclusion. "Unless the people shall make some great exertions to restore" their powers over internal taxation, the militia, and exclusive court jurisdiction,
he wrote, "the State governments must be annihilated, or continue to exist for no purpose." Thomas Tredwell asked the New York convention "What sovereignty, what power is left to [the state] when the control of every source of revenue, and the total command of the militia, are given to the general government? That power which can command both the property and the persons of the community, is the sovereign, and the sole sovereign." The loss of power led to the loss of liberty, the defense of which had been the primary function of state government. Patrick Henry opposed ratification because the Constitution had eliminated "the means of defending our rights, or of waging war against tyrants." "Have we the means of resisting disciplined armies," he asked, "when our only defence, the militia, is put into the hands of Congress?" 13

One Antifederalist argument which Federalists and military historians have disparaged, that of marching the entire militia out of the state to destroy liberty elsewhere, represented a very real threat to state legislative sovereignty. During the late colonial period the lower houses had successfully imposed the medieval statutory restraints on using militia outside the bounds of each colony without legislative consent. Under the Federal Constitution Congress had the undefined power of "calling forth the militia," thus negating an important military restriction. Moreover, if "militia" in the Antifederalist writings is interpreted as "select corps," the validity of their arguments is clear. William Lenoir told the North Carolina convention that Congress might march the "militia" to the District of Columbia and keep it there for "life." While the "whole people" could not be so
treated, North Carolina's quota of a 10,000-man select corps might be, under army guards. In fact, the whole corps could conceivably have been imprisoned while the army, if properly motivated, might have overcome opposition in the states. New York's "Cato" argued that "the militia of the most remote state may be marched into those states situated at the opposite extreme of this continent," or, as the Pennsylvania minority warned, only into neighboring states "to quell an insurrection occasioned by the most galling oppression."¹⁴

Federalists answered these objections both honestly and with ridicule and political rhetoric. The most highly developed and forceful arguments came from the pens of James Madison and Alexander Hamilton directed toward ratification in New York. Their Federalist papers had direct influence in New York and some influence outside as a result of reprinting of their newspaper writings. Hamilton represented the Federalism of strong central government and ultimate consolidation of the states. Madison emphasized the concurrent nature of governmental power, the sharing of attributes of sovereignty delegated by the people through the Constitution. Madison's opinions had the greater force because of his participation in the Virginia ratifying convention.¹⁵

On military power, Hamilton took a strongly nationalist and functionalist position. An army was more appropriate and necessary to national power, in his mind, because it was more responsive than the militia to the needs of the federal government in times of domestic unrest and foreign invasion. An army was generally more reliable and more suitable to peacetime garrison duty on the frontier, a major duty which the army performed. A militia might be useful as a reserve force if
under strong executive command and well armed and disciplined. But, like Adam Smith, Hamilton rejected a large militia because of the actual and hidden expense. To insist upon universal training would "abridge the mass of labour and industry to so considerable an extent" as to be "unwise." It would also "be a real grievance to the people, and a serious public inconvenience and loss." Hamilton's observations in this vein were neither polemical nor rhetorical. He, like the Anti-federalists, represented a legitimate tradition of thought on militia and military power, drawing its inspiration from the process of military and economic modernization affecting Europe, England, and America. Anti-federalist opposition to the idea of a select corps, which Hamilton proposed, seems to have been based more on a conservative and ideological base than on realistic considerations of national defense. Throughout the colonial period, men had evaded or ignored militia obligations. Only when their self-interest was threatened, as on the Pennsylvania frontier, did they respond. Hamilton sought to use self-interest to build an army and a militia reserve, but he continually met the Country opposition which emphasized virtue and duty rather than self-interest. Thus, despite the seriousness of his concern for military modernization, his arguments persuaded few Anti-federalists. The ideology of militia prevailed.16

Madison too presented serious arguments in favor of ratification. Although he had been a member of Hamilton's committee on the peace establishment in 1783, he did not argue for a select militia but stressed the shared nature of sovereignty, and consequently of military power. An "essential object" of the union of states whether
under Constitution or Articles of Confederation, and "one of the primitive objects of civil society," he wrote, was national military authority. In this Madison differed little from other Federalists. But to him, the militia presented an important safeguard to states and people. A nation with militia obligation covering half a million men could easily defeat any army the federal government could afford. An unarmed people, as in Europe, had no military potential, but an armed citizenry, organized in militia units, and commanded by state officers had an inherent potential for successful resistance. Madison did not wish the states destroyed nor the militia entirely in federal control.

Besides the advantage of being armed [he wrote], which the Americans possess over the people of almost every other nation, the existence of subordinate governments to which the people are attached, and by which the militia officers are appointed forms a barrier against the enterprizes of ambition more insurmountable than any which a simple government of any form can admit of. 17

Unlike Hamilton, Madison opposed depending upon a standing army. Therefore, it had been proper for the Constitution to specify that militia would enforce federal law. "The people," he told the Virginia convention, "ought unquestionably to be employed to suppress [insurrections] and repel [invasions], rather than a standing army." Therefore, the militia had to be placed "on a good and sure footing" under effective federal control.

The most effectual way to guard against a standing army [he continued], is to render it unnecessary. 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.
The "most arbitrary despot," Madison wrote in answer to Antifederalist objections to loss of medieval statutory restraints, would not abuse the militia such as moving it "unnecessarily to an immense distance" simply because these actions would excite "the universal indignation of the people." To allow the states to maintain the old restrictions would not only "give them a pretext for substituting a standing army" (which England had done when confronted by colonial restrictions) but would also destroy national power and, in turn, the states. Governments existed to protect citizens and their rights, not to destroy them. Although every possibility of abuse could not be eliminated, the Constitution had provided many safeguards, part of which were the states themselves. In military as in many other aspects of the Constitution, state and federal government shared power and sovereignty concurrently. Congress did not have exclusive power to train or arm the militia. If Congress failed in its duty, nothing prevented the states from doing so. From experience, however, the states themselves had often neglected in "this most essential object" of enforcing the requirements for militia arms. 18

Had Madison presented his views earlier and on a more national scale, his reassurances and logic might have swayed more Antifederalists than they did in New York and Virginia. Had he and the convention delegates drafted a bill of rights, the ratification process would not have encountered so many difficulties. The call for a declaration of rights became a standard argument, and a number of states made their ratification contingent upon adoption of a bill of rights.
Antifederalist proposals for militia and arming amendments to the Constitution and articles of the bill of rights reflect the entire range of their objections to the Constitution. They also provide a convenient summary and transition to the drafting of the bill by Congress in 1789. All proposals for amendments to the Constitution concerning militia and arms were drafted in a military context. The right of "private self-defence," in John Adams's words, did not appear. Many proposals sought to prohibit or limit the size of standing armies, the traditional nemesis of the militia. Virginia, for instance, suggested that a two-thirds majority vote be required in Congress to raise a peacetime army. Other proposals dealt with the militia. The Pennsylvania Antifederalists proposed that the states retain power to organize, arm, and discipline the militia but would allow Congress the authority to adopt training regulations. Furthermore, Congress could not "call or march any of the militia out of their own State, without the consent of the State, and for such length of time only as such State shall agree." "Agrippa" in Massachusetts wanted each state to keep "the command of its own militia." New York agreed with Pennsylvania, but would have made state consent necessary only for expeditions lasting more than six weeks. North Carolina urged that the states arm the militia if Congress failed to do so. Finally Maryland urged that martial law not be imposed on the militia "except in time of war, invasion, or rebellion."\(^{19}\)

Proposals for military and arming guarantees in the Bill of Rights reflect not only Antifederalist concerns but also the experiences of each state. In keeping with its own bill of rights and with historical
precedents, the Pennsylvania Antifederalists submitted the most inclusive arming guarantee and the most explicit one.

The people have a right to bear arms for the defence of themselves and their own State, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals.20

New Hampshire sought to forbid Congress "to disarm any citizen unless such as are or have been in Actual Rebellion."21 Virginia and North Carolina presented identical proposals. Unlike the Virginia bill of rights, this suggestion included reference to arms; unlike the Carolina bill, it mentioned militia. The articles declared

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.22

The proposals also listed standing armies and civil control of the military as had the state constitutions. Virginia also sought to exempt pacifists from military duty.

Any person religious scrupulous of bearing arms ought to be exempted, upon payment of an equivalent to employ another to bear arms in his stead.23

Even New York, whose constitution contained no bill of rights or reference to arms, proposed a similar guarantee,

That the people have a right to keep and bear Arms; that a well regulated Militia, including the body of the People capable of bearing Arms, is the proper, natural and safe defence of a free State.24

After the drafting of amendments and proposals for the Bill of Rights, the business of ratification awaited the meeting of the first federal Congress in the spring of 1789. In military affairs, the
national government had to establish the army and militia by statute to implement the constitutional provisions. The militia particularly had to be placed on a national footing, with organization, arms, and training adopted to insure uniformity, and regulations drawn for use of the state forces during emergencies. During the first session, however, Congress did little more than appoint a militia committee to examine the alternatives. Madison described their work as an "arduous task" which probably would not be completed very soon. In the meantime Congress turned to the more pressing concerns of establishing a source of revenue, a judicial system, executive departments, and drafting the Bill of Rights.25

One fear which had dominated Antifederalist opposition to the Constitution had been that the new Congress would use its extensive powers to rule despotically. As the first session proceeded, however, congressmen acted with "moderation and liberalty," thus, wrote Madison, "extinguishing the honest fears which considered the system as dangerous to republicanism." Madison himself had introduced the motion to begin consideration of the Bill of Rights on June 8. Combining the various proposals for a guarantee of arms and the militia, he suggested that

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

Unlike the militia and arms provisions of the state bills of rights which were merely declarative of civil rights, this provision was cast in legally restrictive language which forbade federal infringement.26
By August 17 when the House of Representatives had begun to debate the proposed amendments, the militia article had changed form. The militia clause was moved to the first phrase, and "free country," a neutral term, was dropped in favor of "free state," thereby associating the guarantee with the states. The new provision was introduced by Elias Boudinot, a New Jersey Federalist. It read

A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms.27

Elbridge Gerry, an Antifederalist delegate at the Philadelphia Convention, provided the opposition view of the purpose and value of the amendment. This provision, he observed, was "intended to secure the people against the mal-administration of the Government." Ever suspicious, Gerry hesitated to allow even this clause. "The people in power," he warned, might "destroy the Constitution itself" by declaring "who are those religiously scrupulous, and prevent them from bearing arms" in order to justify raising an army:

What, sir, is the use of a militia? It is to prevent the establishment of a standing army, the bane of liberty. Now, it must be evident, that, under this provision, together with their other powers, Congress could take such measures with respect to a militia, as to make a standing army necessary. Whenever Governments mean to invade the rights and liberties of the people, they always attempt to destroy the militia, in order to raise an army upon their ruins.

Therefore, he sought to modify the grounds of religious exemption. Debate touched on the practices of the states, of the possibility of specifying commutation fees or hiring substitutes. Roger Sherman and Egbert Benson, of Connecticut and New York, suggested leaving the
the matter of exemptions to the states who would "have the government of the militia, unless when called into actual service." At this point, the committee of the whole rejected the motion to strike the last clause, but the full house later accepted the idea.28

The ambiguity of the first clause of the proposal troubled Gerry and Aedanus Burke of South Carolina. Gerry argued unsuccessfully that the phrase should read, "a well regulated militia, trained to arms," in order to emphasize federal duty of ensuring militia effectiveness. Burke, on the other hand, went straight to the heart of the issue.

A standing army of regular troops in time of peace [he moved to add to the amendment] is dangerous to public liberty, and such shall not be raised or kept up in time of peace, but from necessity, and for the security of the people, nor then without the consent of two-thirds of the members present of both Houses; and in all cases the military shall be subordinate to the civil authority.

The proposal was defeated by a large majority. The House was simply not willing to restrict its own authority so greatly.29

Richard Henry Lee, one of Virginia's senators, also believed the House had made a mistake in omitting reference to the standing army. "Centinel," writing in the Philadelphia Independent Gazetteer, seconded Lee's opinion. Congressional power over both purse and sword was so unlimited and "perfectly independent" of the states that both the army and militia had become dangerous to public liberty. The threat from the army was well known. Congressional power to subject militiamen to martial law and heavy fines, as well as its authority to march them anywhere, could also make the militia an instrument of tyranny, especially in conjunction with the army. Thus, without a prohibition
against unnecessary standing troops and a clearer definition of militia power, the Constitution might itself be used to destroy all liberty. 30 In the Senate at this time was proposed an additional amendment to the bill of rights then under consideration,

That each State respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whenever 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 to the United States 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 the State. 31

It was immediately rejected, partly because militia power was already accepted as being concurrent and partly because the Fifth Amendment dealt with martial law.

At the close of the session, Senators and Representatives met in conference to work out their differences. The future Fifth Amendment protected militiamen from court martial sentences "for a capital, or otherwise infamous crime" except "in time of war or public danger."

The Second Amendment, without the exemption of pacifists and the prohibition on standing armies or other impediments to federal power, read,

A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

On September 28 Congress transmitted twelve proposed amendments to the states for ratification. In the following two years the states approved ten of the articles which were ratified in December 1791 as the federal Bill of Rights. 32

In that period President Washington and Congress took additional steps to settle the national militia and establish the army. In
January 1790 Secretary of War Henry Knox presented his 1786 plan for an extensive militia to Congress. Washington had reviewed it, added some points, and approved it as the basis for a militia statute. Like his earlier plan and those of nationalists generally, the report advocated a large select corps under close federal control. Antifederalists objected in the same terms they had used earlier and emphasized the expense and the danger of federal encroachment on the states. The report became buried during House consideration of Hamilton's funding and assumption proposals. Only on July 1 did a bill emerge from committee, but it had little resemblance to the Knox Plan.33

When the third session of the first Congress met in December 1790, the fate of the Bill of Rights had not yet been settled. Therefore, the debates of the House of Representatives on establishing the national militia were desultory and inconclusive. To create a strong select corps, a feature still remaining in the bill, might frighten Antifederalists into rejecting the Bill of Rights. The remarks on arming give a convenient summary of opinions in Congress concerning the meaning of the Second Amendment and the militia clauses of the Constitution. The bill required each militiaman to find his own musket and accoutrements, in good republican ideological tradition despite the inefficiency of the practice in the colonial period. In England, declared James Jackson, "the arms put into the hands of the militia, in the different cities, rendered them formidable to the Barons; and these Barons, on the other hand, when supported by arms of their countrymen, extorted from king John, the great charter of liberty." Jeremiah Wadsworth, a nationalist perhaps seeking to allay fears of federal tyranny, made the key
point. What person, he asked, "wished to have so large a proportion of the community armed by the United States, and liable to be disarmed by the government, whenever it should be thought proper"? The House finally approved the traditional method. On the question of exemptions, debate bogged down in details. After considerable discussion, therefore, the entire bill was tabled and lost with the close of the first Congress in March 1791.34

The Second Congress brought many newly elected members to Philadelphia in October 1791, but no news of any further ratifications of the Bill of Rights since June 1790. By December 15, with approval by Virginia and Vermont, recently admitted as a state, the amendments went into effect. The militia bill was reintroduced but was not considered until February 1792 and not passed until May. On May 2 and 8, respectively, Congress enacted regulations to call out the militia to enforce federal law and to organize and train the state forces. The latter act, with provisions for militiamen to provide their own weapons, but without a select corps, fines, or other means for the federal government to enforce training requirements or even organization, remained on the statute books until 1903. Federalist proposals for a select corps had made Antifederalists suspicious of nationalist intentions. With strong opposition in the House of Representatives to implementing these proposals when the Bill of Rights was in doubt, the possibility of a strong national militia was unlikely. With the creation of a federal army on the western frontier, the need diminished. Finally, with ratification of the Second Amendment, the plan for a select corps virtually disappeared. The Militia Act did allow men to continue to
establish independent companies which helped compensate for the loss of the more formal corps of light infantry which Washington had sought.\textsuperscript{35}

What, then, did the Second Amendment mean to Americans in the early 1790's? The explanation requires at least two separate and in many ways inconsistent and incompatible answers. To Antifederalist writers and politicians, steeped in the tradition of Commonwealth ideology and of revolutionary resistance, the militia provided a major attribute of state sovereignty to prevent the consolidation of the state governments into a single union. At the same time the militia provided the only viable counterpoise to any standing army Congress might create. The right to keep and bear arms insured that the people would retain the military potential of resistance against governmental tyranny. To Federalists who advocated a strong national army and a militia reserve force, the Second Amendment was merely declarative of a traditional ideological and constitutional right, of no practical effect on their plans. The states and colonies had never fully developed their military potential; militia obligation had often been totally neglected. Federalists could accept the amendment without fearing loss of national power. To them "free State" equally represented the nation as a whole (Madison's contention) or the individual states. A third body of opinion is generally ignored in analysis of the amendment. The men who were liable to the militia obligation of service, training, and providing arms frequently sought to evade those duties by paying fines or ignoring the requirements. Contrary to the general view, before the nineteenth century, not all men owned firearms.
Militia musters repeatedly noted the deficiency of any type of weapon among men who mustered. Timothy Dwight, quoted at the head of the chapter, made note of this problem. As late as the 1830's militia duties of all kinds had become onerous, especially to city laborers who could afford neither arms nor fines. How, then, did the Second Amendment affect them? They were assured of a Jus Militiae which they did not seek, of a right to keep arms which they did not own. Thomas Jefferson in the Virginia convention in 1776 had unsuccessfully tried to insure their freedom to use their weapons without restriction but failed to get recognition of that right even on their own property. The Second Amendment did not approach that degree of liberty. John Adams, considering the use of arms generally, had written in 1787,

It must be made a sacred maxim, that the militia obey the executive power, which represents the whole people, in the execution of laws. To suppose arms in the hands of citizens, to be used at individual discretion, except in private self-defence, or by partial orders of towns, counties, or districts of a state, is to demolish every institution, and lay the laws prostrate, so that liberty can be enjoyed by no man—it is a dissolution of the government. The fundamental law of the militia is, that it be created, directed, and commanded by the laws, and ever for the support of the laws. 36

By common law and American statutory law, individuals could not use weapons indiscriminately. Even the right of revolution assumed a rational goal of deposing tyrants, and then only when all known law had ceased to exist. Absolute freedom of arms had its being only in the mythical state of nature. Some Americans may have looked to the Second Amendment to justify arms use in the "state of nature" of the American wilderness. The majority, however inconsistently towards one another's views,
looked to the Anglo-American traditions of common and statutory law, legal obligation to serve in the militia or posse comitatus, ideological balancing of dangerous government power, military and economic modernization, and constitutional theory to define the meaning of the Second Amendment.
NOTES


2 Alexander Adam, *Roman Antiquities: or, an Account of the Manners and Customs of the Romans* (2nd ed., Edinburgh, 1792), p. 63: subsequent American editions (e.g., New York, 1826) reprinted this manual verbatim. The entire clause reads as follows (under the general title of "Public Rights of Roman Citizens"), "JUS MILITIAE. The right of serving in the army. At first none but citizens were enlisted, and not even those of the lowest class. But in after times this was altered; and under the emperors soldiers were taken, not only from Italy and the provinces, but also at last from barbarous nations, Zosim. iv. 30. & 31."


Federalist, pp. 269, 321-322 (long quotation).


Antifederalists, p. 36.


Antifederalists, pp. 430-431.

Ibid.

Bill of Rights ... Reader, II, 912.


28 Ibid., I, 749-750, 750.

29 Ibid., I, 751.


32 The original First and Second Amendments did not receive the required number of ratifications.


34 Philadelphia, Pennsylvania Packet, 18 Dec 1790 (this version of debates varies from that in Annals of Congress) (emphasis removed).

35 The Public Statutes at Large of the United States of America, ed. Richard Peters (8 vols., Boston, 1853), I, 264 (May 2 Act), 271 (May 8). The Militia Act was replaced in 1903 by the first National Guard Act. The only adequate treatment of the congressional proceedings on the militia statute is in Richard H. Kohn, Eagle and Sword: The Federalists and the Creation of the Military Establishment in America, 1783-1802 (New York, 1975), pp. 128-138. Kohn, however, reveals his bias against the traditional militia and the Antifederalists; he entitles the chapter "The Murder of the Militia System [1792]."

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