

No. 07-290

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IN THE  
**Supreme Court of the United States**

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DISTRICT OF COLUMBIA and ADRIAN M. FENTY,  
Mayor of the District of Columbia,  
*Petitioners,*

*v.*

DICK ANTHONY HELLER,  
*Respondent.*

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ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

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**BRIEF OF THE NATIONAL SHOOTING SPORTS  
FOUNDATION, INC., AS *AMICUS CURIAE*  
IN SUPPORT OF RESPONDENT**

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**INTEREST OF THE *AMICUS CURIAE*<sup>1</sup>**

The *amicus curiae* is the National Shooting Sports Foundation, Inc. (“the NSSF”), the trade association for the firearms, ammunition, hunting, and shooting sports industry. Formed in 1961, the NSSF is a Connecticut non-profit tax-exempt corporation with a membership of more than 4,200 firearms manufacturers, distributors, and retailers; sportsmen’s organizations; shooting ranges; gun clubs; publishers; and individuals. The NSSF provides trusted leadership in addressing industry challenges; advances participation in and understanding of hunting and the shooting sports; reaffirms and strengthens its members’ commitment to the safe and responsible use of their products; and promotes a political environment that is supportive of America’s traditional hunting heritage and firearms freedoms.

The NSSF’s interest in this action derives principally from the fact that the NSSF’s firearms manufacturer, distributor, and retailer members provide the lawful commerce in firearms that makes the exercise of Second Amendment rights possible. Members of the industry, for example, supply the United States armed forces and federal, state, and local law enforcement with the firearms they use to protect America’s national security and keep our communities safe, and also supply hunters,

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

sportsmen, and gun owners with the firearms they use for lawful purposes. More generally, as a guardian of our nation's rich hunting and shooting heritage and traditions, the NSSF believes that any interpretation of the Second Amendment must be informed by that heritage – particularly the history of firearms in colonial America before and during ratification of the Second Amendment. Because that history demonstrates that the Second Amendment protects an *individual* right to “keep and bear arms,” the NSSF submits this brief in support of Respondent and urges this Court to affirm the decision below of the United States Court of Appeals for the District of Columbia Circuit.

### **SUMMARY OF THE ARGUMENT**

The Second Amendment to the Constitution provides that, “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.” U.S. CONST. amend. II. Notwithstanding today's overheated environment, the meaning of this amendment does not present a political issue; it presents a simple question of what the Framers intended when they crafted its language.

The Framers' intent regarding the Second Amendment is obvious from the central role that firearms played in Americans' lives before and during ratification of the Constitution and the Bill of Rights. Personal ownership of firearms was, of course, often critical to survival in the 17<sup>th</sup> and 18<sup>th</sup> centuries (and long thereafter) – providing food before there were supermarkets and safety before there were police forces.

More importantly, late 18<sup>th</sup> century Americans deemed firearms to be their principal protection against tyranny – first from the British crown and then from the new national government they were creating in the Constitution. Today, one takes for granted that we have national and state governments with overlapping jurisdiction. In the late 18<sup>th</sup> century, however, this was an unprecedented concept that was being added to what was then still a radical experiment in republican government. Many Americans at the time of the Constitution’s ratification feared that this national government – to be run by an equally unprecedented office of “President” – would become a new source of tyranny, replacing the British crown they had just overthrown. Accordingly, they sought protections from potential tyranny, including freedom of religion, freedom of speech, and the right “to keep and bear arms.” While, to some, the notion may seem quaint today, the Second Amendment’s guarantee of the individual right to bear arms ensured that the new national government would not be able to oppress the American people. That guarantee cannot now be read out of the Bill of Rights simply because times have changed.

### **ARGUMENT**

It is no accident that firearms are the only product protected by the Bill of Rights. Having relied upon firearms for basic survival in the colonies, 18<sup>th</sup> century Americans found themselves well armed to fight a Revolution against Great Britain – then the world’s premier military power. The colonists won that Revolution, in part, because they had successfully resisted Britain’s multiple attempts to disarm the

colonists. Having learned that lesson, Americans ratifying the Constitution then insisted upon a provision to protect the right of individuals to “keep and bear arms.” Because this history makes clear that the Second Amendment was intended to protect an individual right, the decision below should be affirmed.

### **I. Firearms Were A Principal And Ubiquitous Tool Of Survival In Colonial America**

In the colonial era leading up to the drafting of the Constitution and Bill of Rights, firearms played a prominent role in America. No longer a privilege shared only by noblemen and the wealthy, as in Britain, firearms in America were an important means of assuring self-preservation for all classes.<sup>2</sup> Firearms were commonly viewed as essential to protecting colonists from attacks by Native Americans, insurrections by slaves, and harm from wild animals. Firearms also proved superior to other weapons in hunting, for both food and trade, the vast numbers of wild game and fowl that inhabited the New World – so much so that Native Americans, when possible, abandoned their traditional weaponry for the new firearms.<sup>3</sup>

Although it is impossible to quantify with certainty the prevalence of firearms in colonial America, academicians have been able to extrapolate estimates from probate inventory reports and contemporary

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<sup>2</sup> See LEE KENNETT & JAMES LAVERNE ANDERSON, *THE GUN IN AMERICA* 41 (1975); ALEXANDER DECONDE, *GUN VIOLENCE IN AMERICA* 17 (2001).

<sup>3</sup> KENNETT & ANDERSON, *supra* note 2, at 41-42, 51.

accounts of observers. One recent such study estimates firearms ownership in 1774 at over fifty percent, compared with roughly seventy-seven percent clothes ownership and thirty percent money and coin ownership.<sup>4</sup> According to a review of over 5,000 probates from 1636 through 1810, “[a]pproximately 50-79% of itemized male inventories contained guns.”<sup>5</sup> These are likely conservative estimates, and firearms ownership was likely substantially higher.<sup>6</sup>

Numerous observers of life in the colonies reported the commonplace use of firearms. An Anglican minister of the era, for example, noted that “the great quantities of game, the many kinds, and the great privileges of killing make the Americans the best marksman [*sic*] in the world.”<sup>7</sup> Another commentator reported that “there is not a Man born in America that does not understand the Use of Firearms and that well. . . . It is almost the First thing they Purchase and take to all the New Settlements and in the Cities you can scarcely find a Lad of 12 years That [does not] go a Gunning.”<sup>8</sup> Yet another

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<sup>4</sup> See James Lindgren & Justin L. Heather, *Counting Guns in Early America*, 43 WM. & MARY L. REV. 1777, 1835-36 (2002).

<sup>5</sup> *Id.* at 1838.

<sup>6</sup> The probate reports are admittedly incomplete and imperfect sources of information; however, as the authors explain, the incompleteness indicates that probate reports tend to understate, rather than overstate, items possessed. For example, “unless nudity was . . . widely practiced,” one would expect clothing to be reported on every probate, which it is not. *Id.* at 1836-37. It is also possible that firearms were passed on to others before death.

<sup>7</sup> KENNETT & ANDERSON, *supra* note 2, at 42 (citation omitted).

<sup>8</sup> *Id.* (citation omitted).

noted: “[W]hen a boy was twelve ‘he then became a fort soldier, and had his port-hole assigned him. Hunting squirrels, turkeys, and raccoons, soon made him expert in the use of his gun.’”<sup>9</sup> Even non-citizens had access to firearms. Slaves, for a time, in some areas had access to firearms for hunting, although armed slave insurrections subsequently led to the disarmament of slaves and, in some regions, freed blacks as well.<sup>10</sup> Native Americans, dependent on firearms for food and defense, also came to possess significant quantities of firearms.<sup>11</sup>

Laws in effect in the colonies encouraged, even required, the carrying and use of firearms. Inhabitants in at least six colonies were required to carry firearms to church, public meetings, or while traveling, in order to repel sudden attacks by Native Americans.<sup>12</sup> More ubiquitous, however, were “militia laws,” which appeared beginning in the mid-17<sup>th</sup> century and required colonists to bear arms in common defense against Native Americans and Britain’s European enemies.<sup>13</sup> The militia laws generally required persons between specified ages (usually between sixteen and sixty) to bear arms, often at their own expense, and to provide arms for servants

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<sup>9</sup> *Id.* (citation omitted).

<sup>10</sup> See CLAYTON E. CRAMER, *ARMED IN AMERICA: THE REMARKABLE STORY OF HOW AND WHY GUNS BECAME AS AMERICAN AS APPLE PIE* 33-36 (2006) (citing South Carolina laws and customs).

<sup>11</sup> See *id.* at 46-50; KENNETT & ANDERSON, *supra* note 2, at 51.

<sup>12</sup> See CRAMER, *supra* note 10, at 9-11.

<sup>13</sup> See, e.g., *id.* at 3-11.



living within their households.<sup>14</sup> Laws encouraging hunting emerged in order to hone marksmanship skills at private expense.<sup>15</sup> By the time of the American Revolution, every colony had its own militia of private citizens,<sup>16</sup> and firearms were ingrained in the American experience.<sup>17</sup>

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<sup>14</sup> See *id.* at 3-9 (describing various militia laws and exemptions from militia service).

<sup>15</sup> See KENNETT & ANDERSON, *supra* note 2, at 46.

<sup>16</sup> See CRAMER, *supra* note 10, at 3.

<sup>17</sup> The firearms-dependent society of late 18<sup>th</sup> century America, of course, gave birth to a vibrant firearms manufacturing industry. By 1800, John Adams wrote that: “Those who recollect the distress and danger to this country in former periods from the want of arms, must exult in the assurance from their representatives, that we shall soon rival foreign countries, not only in the number, but in the quality of arms, completed from our own manufactories.” JOHN ADAMS, 9 WORKS 149 (C. Adams ed. 1854). Around the same time, Thomas Jefferson wrote that: “Our citizens have always been free to make, vend and export arms. It is the constant occupations and livelihood of some of them.” THOMAS JEFFERSON, 6 WRITINGS 252-53 (P. Ford ed. 1895). See S. DYKE, THOUGHTS ON THE AMERICAN FLINTLOCK PISTOL 7 (1974).

Today, the manufacture and sale of firearms in America remain in private hands. Indeed, as there is no government-owned arsenal, private manufacturers, most of whom are members of the NSSF, supply small arms used by the American military, law enforcement, and consumers. Moreover, because, as discussed below, the Second Amendment protects an individual right to “keep and bear arms,” the commerce that makes exercise of that right possible is necessarily cloaked in some degree of Constitutional protection. *Cf. Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853, 866-867 (1982) (plurality (Cont’d)

## II. The British Tried And Failed To Disarm The Colonists During The American Revolution

Colonial life, of course, entered a new phase in 1767, with the British Parliament's passage of the Townshend Acts. As the dispute between the colonies and the Crown escalated, the colonists' widespread possession of firearms quickly became an issue – and one that the colonists defended immediately.

### A. At the Earliest Hostilities, Colonists Asserted Their Pre-Existing Individual Right to Keep and Bear Arms

The Townshend Acts imposed customs duties on items commonly imported into the colonies. This “taxation without representation” sparked outrage among many colonists, and led to petitions to the Crown and Parliament for redress. Because Boston was seen as the hotbed of civil unrest in the colonies, British General Thomas Gage was instructed to send military forces into the city.<sup>18</sup> When riots then erupted in Boston

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(Cont'd)

opinion) (noting, in the context of First Amendment rights, that “the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom”) (emphasis in original); *Griswold v. Connecticut*, 381 U.S. 479, 482-83 (1965) (without the “peripheral rights” to distribute, receive, read, inquire, think, and teach, the specific rights of freedom of speech and press would be less secure).

<sup>18</sup> 2 THE CORRESPONDENCE OF GENERAL THOMAS GAGE WITH THE SECRETARIES OF STATE, AND WITH THE WAR OFFICE AND THE TREASURY, 1763-1775, at 68-69 (Clarence E. Carter ed., Yale University Press 1931-33).

in 1768, the British Ministry responded by seeking to disarm the inhabitants of Boston.<sup>19</sup>

Bostonians became alarmed, and passed a resolution advising every man to arm himself “in Case of Sudden Danger.”<sup>20</sup> Although Massachusetts law had already required inhabitants to keep arms, the assembly now found compliance with this law to take on a sudden urgency.<sup>21</sup> When King George III denounced this resolution as an illegal act, Samuel Adams defended the resolution by declaring that, as “subjects of England,” the Bostonians were “entitled . . . to the right of having

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<sup>19</sup> See BOSTON GAZETTE, September 26, 1768, at 3, cols. 1-2 (reporting that the Ministry had instructed the Governor to disarm the people); VIRGINIA GAZETTE, October 27, 1768, at 2, col. 3 (same); MARYLAND GAZETTE (Annapolis), October 20, 1768, at 3, col. 1 (same); GEORGIA GAZETTE (Savannah), November 2, 1768, at 1, col. 1 (same).

<sup>20</sup> BOSTON CHRONICLE, September 19, 1768, at 363, col. 2; see also BOSTON POST POST-BOY & ADVERTISER, September 19, 1768, at 1, col. 3; NEW YORK JOURNAL, OR GENERAL ADVERTISER, Supplement, September 24, 1768, at 1, col. 3.

<sup>21</sup> The act of May 14, 1645, provided, in relevant part:

That all inhabitants, as well seaman as others, are to have armes in their houses fit for service, with powder, bullets, match, as other souldiers, & the fishermen, shipcarpenters, (the deacons) are hereby exempted from watches & wards,) & others, not exempted by lawe, shall watch or provide a sufficient man in their roome, & to traine twice a year, according to the order.

2 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 119 (Nathaniel B. Shurtleff ed., W. White 1853-54).

and using arms for self-preservation and defence.” Adams argued that the right to bear arms constituted what British jurist William Blackstone had called “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.”<sup>22</sup>

As tensions continued to rise, skirmishes between the colonists and the Redcoats culminated in the Boston Massacre on March 5, 1770. During the ensuing criminal trial of the British soldiers, both the prosecution and defense agreed that Bostonians had the right to arm themselves for self-defense.<sup>23</sup> Indeed, successfully representing the soldiers, John Adams asserted this right as follows: “Here every private person is authorized to arm himself, and on the strength of this authority, I do not deny the inhabitants had a right to arm themselves at that time, for their defence, not for offence.”<sup>24</sup>

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<sup>22</sup> 1 THE WRITINGS OF SAMUEL ADAMS 317-18 (Harry Alonzo Cushing ed., G.P. Putnam’s Sons 1904). Adams quoted *verbatim* from WILLIAM BLACKSTONE, 1 COMMENTARIES 140-41, 143-44.

<sup>23</sup> See STEPHEN P. HALBROOK, THE FOUNDERS’ SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS (Ivan R. Dee Publishers, forthcoming 2008) (manuscript at 23-25, on file with The Independent Institute).

<sup>24</sup> JOHN ADAMS, 3 LEGAL PAPERS 248 (Belknap Press/Harvard Univ. Press 1965).

## B. Britain Tried to Subdue Boston by Disarming its Residents

Three years of relative calm thereafter came to an abrupt end on December 16, 1773, with the Boston Tea Party.<sup>25</sup> Parliament responded by, among other things, revoking the Massachusetts Province Charter; appointing General Gage as governor of Massachusetts, with authority to declare martial law and suppress rebellion by force; and establishing a Massachusetts Council appointed by the Crown.<sup>26</sup>

The British were aware, however, that because Massachusetts residents were well armed, the British would have great difficulty controlling them. In the words of Lord Percy:

What makes an insurrection here always more formidable than in other places, is that there is a law of this Province, wh[ich] obliges every inhabitant to be furnished with a firelock, bayonet, & pretty considerable quantity of ammunition. Besides wh[ich] every township is obliged by the same law to have a large magazine of all kinds of military stores.

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<sup>25</sup> Recently passed legislation had been designed to give the British East India Company a monopoly on the trade by suppressing the trade in Dutch tea and waiving import taxes on English tea. *See* HALBROOK, *supra* note 23, manuscript at 29.

<sup>26</sup> *See id.* at 29-30; DAVID RAMSAY, 1 THE HISTORY OF THE AMERICAN REVOLUTION 99 (R. Aitken 1789) *reprinted by* (Liberty Classics 1990); BERNHARD KNOLLENBERG, GROWTH OF THE AMERICAN REVOLUTION, 1766-1775, at 136-39 (Free Press 1975), *reprinted by* (Liberty Fund 2003).

They are, moreover, trained four times in each year, so that they do not make a despicable appearance as soldiers, tho' they were never yet known to behave themselves even decently in the field.<sup>27</sup>

Accordingly, Lord Dartmouth, secretary of state for America, recommended that General Gage disarm the colonists:

Amongst other things which have occurred on the present occasion as likely to prevent the fatal consequence of having recourse to the sword, that of disarming the Inhabitants of the Massachusetts Bay, Connecticut and Rhode Island, have been suggested. Whether such a Measure was ever practicable, or whether it can be attempted in the present state of things you must be the best judge; but it certainly is a Measure of such a nature as ought not to be adopted without almost a certainty of success, and therefore I only throw it out for your consideration.<sup>28</sup>

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<sup>27</sup> Percy to the Duke of Northumberland (his father), September 12, 1774, *in* HUGH PERCY, LETTERS OF HUGH EARL PERCY FROM BOSTON AND NEW YORK, 1774-1776, at 37-38 (Charles Knowles Bolton ed., Charles E. Goodspeed 1902).

<sup>28</sup> Dartmouth to Gage, October 17, 1774, in 2 CORRESPONDENCE OF GENERAL GAGE, *supra* note 18, at 175. Moderates in Parliament, such as the Duke of Manchester also cautioned "the House to proceed with deliberation, as America had now three million people, and most of them were trained to arms, and he was certain they could now produce an army stronger than Great Britain." PENNSYLVANIA REPORTER, April 17, 1775, at 2, col. 3.

General Gage agreed that disarmament would be prudent, but he knew it had to be implemented gradually because there were simply too many armed citizens.<sup>29</sup> Accordingly, the British began their disarmament policy by prohibiting gunpowder deliveries from, and seizing the gunpowder at, the Massachusetts powder houses.<sup>30</sup>

The king and his ministers then tried to constrict the supply of munitions by banning the export of all arms and ammunition into the colonies.<sup>31</sup> The governors were

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<sup>29</sup> Gage responded: “Your Lordship’s Idea of disarming certain Provinces would doubtless be consistent with Prudence and Safety, but it neither is nor has been practicable without having Recourse to Force, and being Masters of the Country.” Gage to Dartmouth, December 15, 1774, 1 CORRESPONDENCE OF GENERAL GAGE, *supra* note 18, at 387. It was also reported in the newspaper that “the Governor [Gage] is determined not to risk any Troops in the Country, till he is reinforced, being apprehensive of their loss, from the amazing number and fury of our People, who are all provided with Arms and Ammunition, & c.” VIRGINIA GAZETTE, September 22, 1774, at 3, col. 1.

<sup>30</sup> See HALBROOK, *supra* note 23, manuscript at 32, 36-38.

<sup>31</sup> The enactments provided, in part:

[W]hereas an Act of Parliament has passed in the Twenty Ninth Year of the Reign of his late Majesty King George the Second, intituled, ‘An Act to empower his Majesty to prohibit the Exportation of Saltpetre, and to enforce the Law for empowering his Majesty to prohibit the Exportation of Gunpowder, or any sort of Arms or Ammunition, and also to empower his Majesty to restrain the carrying coastways of Saltpetre, Gunpowder, or any sort of Ammunition.’

(Cont’d)

instructed to “take the most effectual Measures for arresting, detaining & securing any Gunpowder, or any Sort of Arms or Ammunition, which may be attempted to be imported into the Province under [their] Government,” unless the master of the ship could produce a license for the shipment.<sup>32</sup>

The final step in the British disarmament plan was the direct confiscation of arms and ammunition from the citizens. Although there had been intermittent seizures

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(Cont'd)

And His Majesty judging it necessary to prohibit the Exportation of Gunpowder, or any sort of Arms or Ammunition, out of this Kingdom, doth therefore, with the advice of his Privy Council, hereby order, require, prohibit and command that no Person or Persons Whatsoever (except the Master General of the Ordnance for his Majesty's Service) do, at any time during the space of Six Months from the date of this Order in Council, presume to transport into any parts out of this Kingdom, or carry coastways any Gunpowder, or any sort of Arms or Ammunition, on board any Ship or Vessel, in order to transporting the same to any part beyond the Seas or carrying the same coastways, without Leave and Permission in that behalf, first obtained from his Majesty or his Privy Council, upon Pain of incurring and suffering the respective Forfeitures and Penalties inflicted by the aforementioned Act.

5 Acts Privy Council 401, *reprinted in* CONNECTICUT COURANT, December 19, 1774, at 3, cols. 2-3. The decree was renewed from time to time until 1783. See JAMES TRUSLOW ADAMS, REVOLUTIONARY NEW ENGLAND 1691-1776, at 412 (Atlantic Monthly Press 1923).

<sup>32</sup> Dartmouth to Gage, October 19, 1774, in 2 CORRESPONDENCE OF GENERAL GAGE, *supra* note 18, at 176.



of private arms throughout this period, General Gage decided in 1775 that the time was ripe for disarming the populace in earnest. One such search-and-seizure mission led to the first military engagements of the war, the Battles of Lexington and Concord.<sup>33</sup>

Fearing rebellion at his back, General Gage then tried to disarm all inhabitants of Boston. On April 23, 1775, Gage promised a committee of Selectmen

that upon the inhabitants in general lodging their arms in Faneuil Hall, or any other convenient place, under the care of the selectmen, marked with the names of the respective owners, that all such inhabitants as are inclined, may depart from the town. . . . And that the arms aforesaid at a suitable time would be return'd to the owners.<sup>34</sup>

Given the escalation of hostilities, the military occupation, and the scarcity of provisions, many

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<sup>33</sup> See HALBROOK, *supra* note 23, manuscript at 73-74. In April of 1775, General Gage learned from informants that the Massachusetts colonists had hidden arms and ammunition at roughly thirty homes and farms in Concord. On April 18th, “[h]aving received Intelligence, that a Quantity of Ammunition, Provision, Artillery, Tents and small Arms, [had] been collected at Concord,” he ordered Lieutenant Colonel Francis Smith to “March with the Corps of Grenadiers and light Infantry, put under [his] Command, with the utmost expedition and Secrecy to Concord where [he would] seize and destroy” the munitions. KNOLLENBERG, *supra* note 26, at 231-32.

<sup>34</sup> Attested Copy of Proceedings Between Gage and Selectmen, April 23, 1775, *in* CONNECTICUT COURANT, July 17, 1775, at 4, col. 2.

inhabitants had wanted to depart Boston. Accordingly, the committee recommended “that the town accept his excellency’s proposal, and will lodge their arms with the Selectmen accordingly.”<sup>35</sup> The town unanimously accepted the report, and “the people delivered to the selectmen 1778 fire-arms [muskets], 634 pistols, 973 bayonets, and 38 blunderbusses [short-barreled shotguns].”<sup>36</sup>

Having seized the weapons, however, General Gage then reneged on his promise to let the inhabitants leave. The Boston residents thus were held hostage in their own town.<sup>37</sup>

On June 17, 1775, Bostonians fought the Battle of Bunker Hill. This proved to General Gage that his previous attempt at disarmament had been unsuccessful and led him on June 19, 1775, to renew his call for the colonists to surrender their arms:

Whereas notwithstanding the repeated assurances of the selectmen and others, that all the inhabitants of the town of Boston had *bona fide* delivered their fire arms unto the persons appointed to receive them, though I had advices at the same time of the contrary, and whereas I have since had full proof that many had been perfidious in this respect, and have secreted great numbers: I have thought

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<sup>35</sup> *Id.*

<sup>36</sup> RICHARD FROTHINGHAM, HISTORY OF THE SIEGE OF BOSTON 95 (Little, Brown, & Co. 1903).

<sup>37</sup> See HALBROOK, *supra* note 23, manuscript at 85-89.

fit to issue this proclamation, to require of all persons who have yet fire arms in their possession immediately to surrender them at the court house, to such persons as shall be authorized to receive them; and hereby declare that all persons in whose possession any fire arms hereafter be found, will be deemed enemies to his majesty's government.<sup>38</sup>

Stated otherwise, General Gage had declared the mere possession of arms and ammunition in Boston to be an act of treason.

### **C. Colonists Outside Massachusetts Successfully Resisted Disarmament**

Not surprisingly, colonists elsewhere feared that the disarmament of Boston was only the first step in a general plan to disarm all Americans. In his famed “liberty or death” speech to the Convention of Delegates of Virginia, for example, Patrick Henry proclaimed: “They tell us . . . that we are weak—unable to cope with so formidable an adversary. But when shall we be stronger? . . . Will it be when we are totally disarmed, and when a British guard shall be stationed in every house?”<sup>39</sup> Likewise, a New Hampshire patriot wrote: “Could [the Ministry] not have given up their Plan for enslaving America without seizing . . . all the Arms and

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<sup>38</sup> NEW YORK JOURNAL, August 31, 1775, at 1, col. 4. *See also* 2 AMERICAN ARCHIVES, 4th series, at 1027 (Force ed.).

<sup>39</sup> JOURNAL OF PROCEEDING OF CONVENTION HELD AT RICHMOND 34 (J. Dixon 1775); *see also* VIRGINIA GAZETTE, April 1, 1775, at 2, cols. 1-2.

Ammunition? and without soliciting and finally obtaining an Order to prohibit the Importation of warlike Stores in the Colonies?”<sup>40</sup> South Carolina’s General Committee, meanwhile, found that, “by the late prohibition of exporting arms and ammunition from England, it too clearly appears a design of disarming the people of America, in order the more speedily to dragoon and enslave them.”<sup>41</sup>

This widespread fear of disarmament precipitated renewed calls for armed self-defense throughout the colonies.<sup>42</sup> Josiah Warren of the Massachusetts Provincial Congress, for example, warned New York about Gage’s “breach of a most solemn treaty with

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<sup>40</sup> NEW HAMPSHIRE GAZETTE AND HISTORICAL CHRONICLE, January 13, 1775, at 1, col. 1, *reprinted in* 1 AMERICAN ARCHIVES, *supra* note 38, 4th series, at 1065.

<sup>41</sup> JOHN DRAYTON, 1 MEMOIRS OF THE AMERICAN REVOLUTION . . . AS RELATING TO SOUTH CAROLINA 166 (Charleston 1821).

<sup>42</sup> By way of example, the New York General Committee resolved “that it be Recommended to every Inhabitant, to perfect himself in Military Discipline, and be provided with Arms, Accoutrements, and Ammunition as by Law directed.” NEW YORK JOURNAL, May 4, 1775, at 2, col. 3. Similarly, the freeholders and inhabitants of Morris County, New Jersey, advised “to the inhabitants of this country, capable of bearing arms, to provide themselves with arms and ammunition, to defend their country in case of invasion.” NEW YORK JOURNAL, May 11, 1775, at 1, cols. 2-3. And the Provincial Congress of South Carolina declared: “solely for the Preservation and in Defense of our Lives, Liberty, and Properties we have been impelled to associate, and to take up Arms. . . . Our taking up Arms is the Result of Dire Necessity, and in compliance with the first Law of Nature.” NORTH CAROLINA GAZETTE, July 14, 1775, at 1, col. 1.

respect to the inhabitants of Boston when they had surrendered their arms and put themselves wholly in the power of a military commander.” He recommended that New Yorkers secure their weapons for themselves or “within a few days you should behold these very materials improved in murdering you, and yourselves perishing for the want of them.”<sup>43</sup> The South Carolina General Committee, meanwhile, “recommended, to all persons, to provide themselves immediately, with at least twelve and a half pounds of powder, with a proportionate quantity of bullets.”<sup>44</sup> Typical of the entreaties was the message of the North Carolina contingent of the Continental Congress:

It is the Right of every English Subject to be prepared with Weapons for his Defense. We conjure you . . . to form yourselves into a Militia. . . . Carefully preserve the small quantity of Gunpowder which you have amongst you, it will be the last Resource when every other Means of Safety fails you; Great-Britain has cut you off from further supplies. . . . We cannot conclude without urging again to you the necessity of arming and instructing yourselves, to be in Readiness to defend yourselves against any Violence that may be exerted against your Persons and Properties.<sup>45</sup>

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<sup>43</sup> 2 JOURNALS OF THE PROVINCIAL CONGRESS, PROVINCIAL CONVENTION, COMMITTEE OF SAFETY AND COUNCIL OF SAFETY OF THE STATE OF NEW YORK: 1775-1776-1777, at 10 (Thurlow Weed 1842).

<sup>44</sup> DRAYTON, *supra* note 41, vol. 1, at 166.

<sup>45</sup> NORTH CAROLINA GAZETTE (Newbern), July 7, 1775, at 2, col. 3.

Lest there be any doubt about how significantly the colonists viewed Britain's attempts to disarm them, the Continental Congress included disarmament in its July 6, 1775 Declaration of Causes of Taking Up Arms. Drafted by Thomas Jefferson and John Dickinson, the Declaration stated, in relevant part:

The inhabitants of Boston being confined within that town by the General their Governor, and having, in order to procure their dismissal, entered into a treaty with him, it was stipulated that the said inhabitants having deposited their arms with their own magistrates, should have liberty to depart, taking with them their other effects. They accordingly delivered up their arms, but in open violation of honor, in defiance of the obligation of treaties, which even savage nations esteem sacred, the Governor ordered the arms deposited as aforesaid, that they might be preserved for their owners, to be seized by a body of soldiers; detained the greatest part of the inhabitants in the town, and compelled the few who were permitted to retire, to leave their most valuable effects behind.<sup>46</sup>

This Declaration was made known throughout the colonies,<sup>47</sup> making clear that Britain's policy of disarmament was one of the leading causes of the American Revolution.

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<sup>46</sup> 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1779, at 151 (Worthington Chauncey Ford ed., Government Printing Office 1905).

<sup>47</sup> *E.g.*, CONNECTICUT COURANT, July 17, 1775, at 2, col. 1. *See also* HALBROOK, *supra* note 23, manuscript at 100-02.

### **III. Because The Second Amendment Derives From The Americans' Refusal To Be Disarmed, It Must Be Read To Protect An Individual's Right To Keep And Bear Arms**

Having successfully resisted disarmament, the Americans were able to defeat Great Britain in 1783. Suspicious of government, however, Americans of that era retained their fear of disarmament. Indeed, as Americans considered the ratification of a new Constitution, their refusal to permit disarmament led directly to the inclusion of an individual right to bear arms in the Second Amendment of the Bill of Rights.

#### **A. The Constitution's "Militia Clause" Renewed Fears of Disarmament**

The forces that led to the Constitutional Convention are well documented. One overarching theme, however, was the perceived need to standardize certain activities among the States – such as currency and international and interstate trade. When the Framers proposed a clause to standardize militia units across the States, however, it renewed the Americans' fear of disarmament.

During the colonial period, there were, of course, no foundries for the mass production of firearms. Rather, firearms were manufactured locally by craftsmen, who focused upon local terrain and habits.<sup>48</sup> This led to great variability in the firearms used in different geographical areas of the colonies. Frontiersmen and backwoodsmen in the South used long-range rifles, for example, while

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<sup>48</sup> See HALBROOK, *supra* note 23, manuscript at 174.

New Englanders favored medium-range muskets.<sup>49</sup> One result of this variability in firearms was that ammunition was not uniform or interchangeable among individual firearms owners, except within a given locale.<sup>50</sup>

To promote uniformity and the interchangeability of firearms and ammunition across the various States, George Mason proposed a “militia clause,” which would permit Congress to “make laws for organizing, arming, and disciplining the militia, and for governing such parts of them as may be employed in the service of the United States, reserving to the states, respectively, the appointment of the officers, and authority of training the militia according to the discipline prescribed.”<sup>51</sup> James Wilson, a leading delegate to the Constitutional Convention, described the need for the militia clause as follows:

I believe any gentleman, who possesses military experience, will inform you that men without a uniformity of arms, accoutrements, and discipline, are no more than a mob in a camp; that, in the field, instead of assisting, they interfere with one another. If a soldier drops his musket, and his companion,

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<sup>49</sup> See STEPHEN P. HALBROOK, *A RIGHT TO BEAR ARMS: STATE AND FEDERAL BILLS OF RIGHTS AND CONSTITUTIONAL GUARANTEES* 26, 32, 46 (Greenwood Press 1989).

<sup>50</sup> See HALBROOK, *THE FOUNDERS’ SECOND AMENDMENT*, *supra* note 23, manuscript at 174.

<sup>51</sup> *DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA . . . VOL. V. SUPPLEMENTARY TO ELLIOT’S DEBATES* 464 (Jonathan Elliott ed., J.B. Lippincott 1845).



unfurnished with one, takes it up, it is of no service, because his cartridges do no fit in. By means of this [federal] system, a uniformity of arms and discipline will prevail throughout the United States.<sup>52</sup>

Rufus King of Massachusetts explained “that by *organizing*, the committee meant, proportioning the officers and men – by *arming*, specifying the kind, size, and calibre of arms – and by *disciplining*, prescribing the manual exercise, evolutions, &c.”<sup>53</sup>

Despite the benign purpose of standardization, the militia clause generated numerous objections following the same theme: the Antifederalists opposed federalizing the militia because they feared it would give the central government power to disarm the people. Thus, for example, John DeWitt of Massachusetts predicted that Congress “at their pleasure may arm or disarm all or any part of the freemen of the United States, so that when their army is sufficiently numerous, they may put it out of the power of the freemen militia of America to assert and defend their liberties.”<sup>54</sup> Pennsylvanian John

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<sup>52</sup> 2 DEBATES IN THE SEVERAL STATES CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 521 (Jonathan Elliot ed., J.B. Lippincott 1836).

<sup>53</sup> DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 51, at 464-65. James Madison also observed that “the ‘*arming*,’ as explained, did not extend to furnishing arms; nor the term ‘*disciplining*,’ to penalties, and courts martial for enforcing them.” *Id.*

<sup>54</sup> THE FREEMAN’S JOURNAL (Philadelphia), January 16, 1788, reprinted in THE ANTIFEDERALIST PAPERS 75 (Morton Borden ed., Michigan State Univ. 1965).

Smilie objected that “Congress may give us a select militia which will, in fact, be a standing army – or Congress, afraid of a general militia, may say there shall be no militia at all. When a select militia is formed; the people in general may be disarmed.”<sup>55</sup> In Maryland, Luther Martin protested that the proposed federal government was given power “to increase and keep up the standing army as numerous as it would wish, and, by placing the militia under its power, enable it to leave the militia totally unorganized, undisciplined, and even to disarm them.”<sup>56</sup>

Even George Mason himself, the Virginian Antifederalist who had proposed the militia clause, argued as follows:

Forty years ago, when the resolution of enslaving America was formed in Great Britain, the British Parliament was advised by an artful man [Sir William Keith], who was governor of Pennsylvania, to disarm the people; that it was the best and most effectual way to enslave them; but that they should not do it openly, but weaken them, and let them sink gradually, by totally disusing and neglecting the militia. . . . Why should we not provide against the danger of having our militia, our real and natural strength destroyed?<sup>57</sup>

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<sup>55</sup> 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 508-09 (Merrill Jensen ed., State Historical Society of Wisconsin 1976).

<sup>56</sup> 1 DEBATES IN THE SEVERAL STATES CONVENTIONS, *supra* note 52, at 372.

<sup>57</sup> *Id.*, vol. 3, at 380.

And someone writing under the *nom de plume* “Common Sense” wrote “To the People of North Carolina” in the *Wilmington Centinel* that, under the proposed Constitution, “a citizen may be deprived of the privilege of keeping arms for his own defense,”<sup>58</sup> while William Lenore, a North Carolina delegate, agreed that under the proposed Constitution, Congress “can disarm the militia.”<sup>59</sup>

**B. Seeking to Allay Fears of Disarmament, Federalists Argued that the Constitution Would Not Permit Disarmament of “The People”**

The Federalists dismissed these arguments as unfounded, because the militia comprised “the people” themselves, whom Congress had no power to disarm. In his pamphlet, *An Examination of the Leading Principles of the Federal Constitution*, for example, Noah Webster explained that, because the armed populace would remain sovereign, there was no need to fear a standing army:

Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power

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<sup>58</sup> *From the Wilmington Centinel, To the People of North Carolina*, NEW YORK JOURNAL, April 21, 1788, at 2, col. 2. This issue of the *Wilmington Centinel* is not extant. See 20 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1185 (John P. Kaminski *et al.* eds., Wisconsin Historical Society Press 2004) (App. of “Antifederalist Newspaper Articles”).

<sup>59</sup> 4 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 52, at 203.

in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretence, raised in the United States.<sup>60</sup>

And Tench Coxe, writing under the name “A Pennsylvanian,” made the same argument:

Who are the militia? are they not ourselves. Is it feared, then, that we shall turn our arms each man against our own bosom. Congress have no power to disarm the militia. Their swords, and every other terrible implement of the soldier, are the birth-right of an American. . . . [T]he unlimited power of the sword is not in the hands of either the federal or state governments, but, where I trust in God it will ever remain, in the hands of the people.<sup>61</sup>

Zachariah Johnson, meanwhile, observed that the new Constitution could not result in oppression because “[t]he people are not to be disarmed of their weapons. They are left in full possession of them.”<sup>62</sup>

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<sup>60</sup> NOAH WEBSTER, AN EXAMINATION OF THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION 43 (Philadelphia 1787).

<sup>61</sup> PENNSYLVANIA GAZETTE, February 20, 1788, *reprinted in 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION*, *supra* note 55, (microfilm supplement), at 1778-1780.

<sup>62</sup> 3 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 52, at 646.

Finally, and perhaps most authoritatively, during the ratification process, James Madison wrote that “the advantage of being armed, which the Americans possess over the people of almost every other nation” formed “a barrier against the enterprises of ambition.”<sup>63</sup>

These debates surrounding the militia clause reflect fundamental differences over which governmental body should be permitted to “arm” the militia. Significantly, however, both sides to the debate agreed that the government did not have the power to “disarm” the people. Indeed, in 18<sup>th</sup> century America, it is difficult to conceive how anyone could have seriously advocated such a position.

### **C. The Second Amendment Was Proposed and Designed to Guarantee Individuals Their Right to Keep and Bear Arms**

Notwithstanding the arguments of the Federalists, the Antifederalists remained concerned about even the possibility of disarmament. Accordingly, the Antifederalists ensured that what became the Second Amendment – guaranteeing the pre-existing right of an individual to keep and bear arms – be included within the Bill of Rights.

The drafting of the Second Amendment – like the history that preceded and informed it – strongly supports the view that the Amendment guarantees an *individual* right to keep and bear arms. Pennsylvania’s

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<sup>63</sup> 15 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 58, at 492-93.

Dissent of the Minority, for example, had proposed that the guarantee be worded as follows:

That the people have a right to bear arms for the defense 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. . . .<sup>64</sup>

Samuel Adams proffered the following language: “And that the said Constitution be never construed to authorize Congress . . . to prevent the people of the United States, who are peaceable citizens, from keeping their own arms.”<sup>65</sup> The New Hampshire ratifying convention, meanwhile, recommended this language: “12th. Congress shall never disarm any citizen, unless such as are or have been in actual rebellion.”<sup>66</sup>

In the Congressional debates over the final form of the Second Amendment, the fear of a power to disarm the populace is again obvious. The House committee, for example, had considered the following language: “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

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<sup>64</sup> 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 55, at 623-24.

<sup>65</sup> *Id.*, vol. 6, at 1453.

<sup>66</sup> *Id.*, vol. 18, at 188; *see also* 1 DEBATES IN THE SEVERAL STATES CONVENTIONS, *supra* note 52, at 326.

bear arms.”<sup>67</sup> Elbridge Gerry opposed the inclusion of the “conscientious objector clause,” however, because he believed it would permit the government to disarm the people:

Now, I am apprehensive, sir, that this clause would give an opportunity to the people in power to destroy the constitution itself. They can declare who are those religiously scrupulous, and prevent them from bearing arms.

....

Whenever Government 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. This was actually done by Great Britain at the commencement of the late revolution. They used every means in their power to prevent the establishment of an effective militia to the eastward. The assembly of Massachusetts, seeing the rapid progress that administration were making to divest them of their inherent privileges, endeavored to counteract them by the organization of the militia; but they were always defeated by the influence of the crown.<sup>68</sup>

Following this debate, Congress ultimately approved the Second Amendment in its current form.

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<sup>67</sup> THE COMPLETE BILL OF RIGHTS 169 (Neil H. Cogan ed. 1997).

<sup>68</sup> 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 1285-86 (Bickford *et al.* eds.). See also 1 ANNALS OF CONGRESS 750 (Gales and Seaton 1834).

The NSSF will leave it to others to dissect the language of the Second Amendment as ratified. There can be no question, however, that the Amendment was ratified by members of an 18<sup>th</sup> century society that had i) relied upon firearms for their day-to-day existence, ii) possessed and used firearms in a widespread and common manner we would not recognize today, iii) resisted attempts by the world's greatest military power to disarm them, and iv) used their firearms to achieve their freedom from a tyrannical government. Their history and experiences gave them a profound fear of disarmament, and they had their pre-existing common law right to keep and bear arms guaranteed and enshrined in the Second Amendment of the Bill of Rights. This history proves strongly that the Second Amendment was intended to protect an *individual* right to "keep and bear arms" and, for that reason, this Court should affirm the decision below.



**CONCLUSION**

In accordance with the intent of the Framers that the Second Amendment protect an individual right to “keep and bear arms,” this Court should affirm the decision below of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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