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by Steve Krulick, Senior Civics Columnist

Bearing (Up Under) Arms (Part 3)

“It is abundantly clear both from the discussions of this amendment contemporaneous with its proposal and adoption and those of learned writers since that this amendment, unlike those providing for protection of free speech and freedom of religion, was not adopted with individual rights in mind, but as a protection for the states in the maintenance of their militia organizations against possible encroachments by the federal power.” – United States v. Tot, US Court of Appeals, 3rd Circuit, 1942.

There was NO general cry during the 1780s for federal protection of individual gun ownership; the Constitution didn't address it, *neither* prohibiting *nor* permitting it. That remained a *state* matter, which the BoR didn't change. IF the 2nd Amendment had been about protecting private gun ownership for its own sake – or for any purpose desired by the owner – the ratification debates would have been full of references to the virtues of arms ownership, or to frontier-dwellers' need to protect themselves, or to rural citizens' need to hunt game. No, the *only* concern raised constantly, since before the Constitution itself was ratified, was about militias vs. standing armies, and how much control the states would maintain over their militias in the new setup.

Madison believed in the virtue of a “universal” militia of citizen-soldiers (i.e. free, adult, property-owning white males *only*, serving *required conscript duty*), controlled by state legislatures and governors, with local officers the troops knew and trusted. He did not favor “select” militias (a smaller, better-trained elite corps) or standing armies, as the more-militarily-vetted Hamilton and Washington did. The Militia Act of 1791 fleshed out the Constitution's militia clauses using Madison's model, requiring every qualified, non-exempt adult white male to secure, *at his own expense*, a standard militia musket and supplies – making it more of a burden and tax than what we would consider a “right” – and muster himself *and register his militia weapons* each year in an *organized* state militia.

Jefferson, contrary to the belief of many, had no *direct* involvement with framing the Constitution *or* passing the Bill of Rights; he was serving as Minister to France at the time. But he kept up a vigorous correspondence with his friend, neighbor, and political protégé, and TJ's strong “approbations and objections” over the new Constitution's lack of certain protections for individuals *and* states could not be ignored by one as politically astute as Madison.

On June 19, 1802, *President* Jefferson wrote to Dr. Joseph Priestley: “I was in Europe when the Constitution was planned, and never saw it till after it was established. On receiving it I wrote strongly to Mr. Madison, urging the want of provision for the freedom of religion, freedom of the press, trial by jury, habeas corpus, *the substitution of militia for a standing army*, and an express reservation to the States of all rights not specifically granted to the Union. He accordingly moved in the first session of Congress for *these* amendments, which were agreed to and ratified by the States as they now stand. This is all the hand I had in what related to the Constitution.” [Italics mine]

Notice, for TJ, the purpose of the 2nd Amendment was *only* “the substitution of militia for a standing army,” with no mention of “guns,” or an “individual right” to one. In *each* letter, as to why a BoR is desired, the *only* concern regarding what was to become the 2nd Amendment is over “standing armies” and *never* gun ownership per se, or any perceived individual rights in that regard.

TJ said to President Washington, Sept. 9, 1792, that: “the Constitution... wanted a bill of rights” and listed most of the above, including “freedom from standing armies.”

Did TJ ask for a right for any person whatsoever to own and carry guns? NO! *Freedom from standing armies!*

Madison's draft of a *militia amendment* was based on Jefferson's request that the state militias maintain primacy over a standing army, and that the *right of the states* to maintain their pre-existing militias wouldn't be weakened or destroyed by the feds, either through action *or* inaction.

The 2nd Amendment is unique, being the only BoR amendment that *includes its reason* for existing. The 2nd Amendment is a republican-inspired “declaratory clause” confirming that, because the well-regulated militias of the *states* are necessary to *their* security, the People (of the states), *collectively*, as the enfranchised body politic (from which militias are drawn), retain the right to democratically organize, control, maintain, man, and arm those militias, free from fear the feds will *fail* to provide for arming them (as the Constitution mandates it must), to build a standing army on the ruins. It has NOTHING to do with “personal gun rights” independent of militia preservation and service!

Now, for the historical irony you weren't taught in school. Although the various BoR amendments are often touted as the triumph of Mason and the anti-Federalists, and the strong commitment of the Founders to individual liberties, it's far more convoluted than that. Yes, the anti-Feds originally pushed for them, while the Feds resisted their necessity. But after the Feds swept the first national elections, and the new Congress had bigger fish to fry, Madison's greatest fear was that remaining anti-Fed strongholds like New York and Virginia would push for a *second* Constitutional convention, undermining all his work. Plus, there was that pledge he made to support a BoR that helped him to win his seat.

As a sop to them (“removing the fears of the discontented”), he carefully selected, from over 100 various proposals sent by states (including states that had not yet ratified the Constitution), only those suggestions that would appease them without doing any *structural* harm to his strong federal government: “It is much to be wished that the discontented part of our fellow Citizens could be reconciled to the Government they have opposed, and by means as little as possible unacceptable to those who approve the Constitution in its present form.” It was likened to “a tub to a whale,” something sailors throw to the whale to occupy it so they leave the ship (the Constitution) alone.

Some anti-Fed leaders, like Richard Lee and Patrick Henry, were not fooled by “words feeble in their Nature or doubtful in their meaning! (Lee)” Henry said he “smelled a rat,” and called it Madison's soft soap; this ardent BoR supporter then *withdrew* his support, as did other leaders. So, though originally inspired by the anti-Feds, it was the *Feds* who made the BoR happen, in-between more pressing matters, and they smiled as the anti-Fed leaders squirmed.

Congressional Feds handily sank every structural alteration anti-Feds proposed that might have undermined the strong Constitution; debate became so heated it led to the first known instance of Reps challenging each other to duels! Still, the House made changes Madison disliked; he was even more displeased with further Senate cuts and changes, and Roger Sherman's success at getting the amendments put *after* the Constitution, rather than integrating each amendment internally in its logical place.

But final passage achieved his main goals: the Constitution wasn't weakened, no second convention was called, reluctant states joined the union, and “It will kill the opposition every where.” Indeed, the majority of anti-Feds deserted their strident leaders, and the party essentially vanished, replaced, eventually, by the Democratic-Republican party led by... Jefferson and Madison!

Next: If you don't know what the *words* in the 2nd Amendment meant to the elite, 19th century lawyers who wrote them, they might as well be in Chinese for you!