The Lost Amendment

This is the concluding installment of the paper which won the 1964 Samuel Pool Weaver Constitutional Law Essay Competition. The first was published in our *June Issue, page 554*. In this portion Mr. Sprecher examines the few decisions that have considered the meaning of the lost amendment--the Second Amendment to the United States Constitution--and he concludes that we should rediscover the amendment and broaden the scope of its guarantee of the right of "the people to keep and bear arms".

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II

In 1833 Justice Story wrote:

> The militia is the natural defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses, with which they are attended, and the facile means, which they afford to ambitious and unprincipled rulers, to subvert the government, or trample upon the rights of the people. *The right of the citizen to keep and bear arms has justly been considered, as the palladium*[43] *of the liberties of a republic*; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.
>
> And yet, though this truth would seem so clear, and the importance of a well regulated militia would seem so undeniable, it cannot be disguised, that among the American people there is growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burthens, to be rid of all regulations. How is it practicable to keep the people duly armed without some organization, it is difficult to see. There is certainly no small danger, that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by this clause of our national bill of rights.[44]

Since the adoption of the Second Amendment, the Supreme Court has had only four direct occasions to construe it. In 1876 in *United States v. Cruikshank, 92 U.S. 542*, the Court, in holding defective an indictment under the Enforcement Act of 1870 charging a conspiracy to prevent Negroes from bearing arms for lawful purposes, said that the right of the people to keep and bear arms "is not a right granted by the Constitution" and

> ... The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes to [the state power of] ... internal police....[45]

In 1886 the Supreme Court in *Presser v. Illinois, 116 U.S. 252*, held that an Illinois statute which forbade bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law, did not infringe the right of the people to keep and bear arms. Although the Court quoted the above language from the *Cruikshank* case, it then proceeded to cast some doubt on whether the Second Amendment restricts only the Federal Government, saying:

> It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, and, in view of this prerogative of the general government, as well as of its general powers, the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people (p.666)from performing their duty to the general government.[46]

In 1894 in *Miller v. Texas, 153 U.S. 535*, the Supreme Court held that a Texas statute prohibiting the carrying of dangerous weapons on the person did not violate the Second Amendment since "the restrictions of these amendments [the Second and Fourth Amendments] operate only upon the Federal power, and have no reference whatever to proceedings in state courts".[47] In a dictum in *Robertson v. Baldwin, 165 U.S. 275, 281 (1897)*, the Court observed that "the right of the people to keep and bear arms (art. 2) is not infringed by laws prohibiting the carrying of concealed weapons...".

In 1939 the Supreme Court upheld in *United States v. Miller, 307 U.S. 174*, the *National Firearms Act of 1934* insofar as it imposed limitations upon the use of a sawed-off shotgun. The Court for the first time in 150 years had the opportunity to pass squarely on the nature of the right to keep and bear arms and it said:

> In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep

> and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.[48]

Mr. Justice Black has recently written that "Although the Supreme Court has held this amendment to include only arms necessary to a well-regulated militia, as so construed, *its prohibition is absolute* [italics added]."[49]

The course taken by the Supreme Court in recent years in its attitude toward the Bill of Rights foreshadows a possible enlargement of the scope of the right to keep and bear arms if the Court should become convinced that an enlargement serves some sound public purpose.

The Supreme Court had held in 1833 in an opinion by Chief Justice Marshall that the Bill of Rights restrained the Federal Government only and not the states.[50] The ratification of the Fourteenth Amendment in 1868 raised the question whether it did not have the effect of preventing state, as well as federal, invasion of the rights enumerated in the first eight amendments. Until recently, the answer was in the negative.[51]

Beginning as early as 1925, however, the Supreme Court itself has cast considerable doubt about that answer. In that year *Gitlow v. New York, 268 U.S. 652*, overruled *Prudential Insurance Company v. Cheek, 259 U.S. 530 (1922)*, and began a long series of decisions which hold that each First Amendment protection--the freedoms of speech, press, religion, assembly, association and petition for redress of grievances--is immune from state invasion through the Fourteenth Amendment.[52]

In 1961 *Mapp v. Ohio, 367 U.S. 643*, overruled *Palko v. Connecticut, 302 U.S. 319 (1937)*, and the Fourth Amendment's right of privacy against search and seizure has been declared enforceable against the states through the Fourteenth Amendment.

In 1963 *Gideon v. Wainwright, 372 U.S. 335*, overruled *Betts v. Brady, 316 U.S. 455 (1942)*, and the right to counsel in all criminal cases was made obligatory on the states by the Fourteenth Amendment.

In 1964 *Malloy v. Hogan, 378 U.S. 1*, overruled *Twining v. New Jersey, 211 U.S. 78 (1908)*, and *Adamson v. California, 332 U.S. 46 (1947)*, the Court stating: "We hold today that the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States."[53]

Mr. Justice Harlan's dissent in *Malloy v. Hogan* stated:

> ... While it is true that the Court deals today with only one aspect of state criminal procedure, and rejects the wholesale "incorporation" of such federal constitutional requirements, the logical gap between the Court's premises and its novel constitutional conclusion can, I submit, be bridged only by the additional premise that the Due Process Clause of the Fourteenth Amendment is a shorthand directive to this Court to pick and choose among the provisions of the first eight

> Amendments and apply those chosen, freighted with their entire accompanying body of federal doctrine, to law enforcement in the States.[54]

There exists, then, the possibility that the Supreme Court could determine that the Second Amendment declares a right which may not be infringed by either the Federal Government *or by the states*. Furthermore, it would not be difficult for the Court, in view of the kinds of arms which now exist, to convert the Second Amendment into an *absolute* right to bear arms, unhampered by any concept of arms for militia use only.

In *Cases v. United States, 131 F.2d 916 (1942)*, the Court of Appeals for the First Circuit, in upholding the constitutionality of the Federal Firearms Act of 1938, stated:

> Apparently, then, under the Second Amendment, the federal government can limit the keeping and bearing of arms by a single individual as well as by a group of individuals, but it cannot prohibit the possession or use of any weapon which has any reasonable relationship to the preservation or efficiency of a well regulated militia.[55]

The court found that the rule of the *Miller* case[56] was outdated "because of the well known fact that in the so called 'Commando Units' some sort of military use seems to have been found for almost any modern lethal weapon". (p.667) The court also speculated that under the *Miller* rule Congress could not regulate "the possession or use by private persons not present or prospective members of any military unit, of distinctly military arms, such as machine guns, trench mortars, anti-tank or anti-aircraft guns, even though under the circumstances surrounding such possession or use it would be inconceivable that a private person could have any legitimate reason for having such a weapon".

III

The rights of the individual citizen would be little different today if the Second Amendment did not exist. It has become lost for several reasons: the word "militia" long ago passed from common language; citizens rely almost wholly upon the processes of government--courts and law enforcement agencies--to protect their rights; and the rights of the other first eight amendments have been given so much judicial and popular attention that the Second Amendment has been all but overlooked.

Perhaps the people have lost a valuable right and privilege which should be cherished rather than forgotten. Perhaps the Founding Fathers, as they so often seem to have done, gave the people an enduring right which changing history does not outmode but merely places in a new context--often more compelling than the old.

What considerations could lead the Supreme Court to determine that the rights guaranteed by the Second Amendment are protected against state as well as federal infringement, and that those rights are dual--to guarantee a "well regulated Militia" and to guarantee an individual right to keep and bear arms, separate and apart from the needs of the militia?

1. The United States maintains a large peacetime standing army and what once were called State militias are now an integral part of that army. For more than one hundred years acts of Congress had prohibited a national militia, nor could the Federal Government use state militias unless permitted by state authorities. State militias provided significant forces for the 1812, Mexican, Civil and Spanish-American Wars. By 1896 most states had renamed the militia "the national guard". In 1903 Secretary of War Elihu Root procured the enactment of laws whereby the Federal Government assisted the states in organizing, training and equipping state national guards. In 1916 the national guard became a component part of the national peace establishment subject to call into the Army of the United States. In 1933 the "National Guard of the United States" was created and became a part of the Army of the United States at all times.[57]

Almost each peacetime year finds an increased National Guard enrollment and, while these forces are available to "repel invasions", particularly in the important work of maintaining and operating antimissile sites,[58] in time of war outside of the United States these former state militias are called into active service. Therefore, the states must provide for civil defense and many of them have formed stand-by home guard units for activation when the National Guard is in active service.[59] Thus militias (by whatever name) are as important as ever, and perhaps more so in the atom-and-missile age to "repel invasions".

With the urgent need for civil defense and particularly if the "stand-by home guard" is ever incorporated into the national army, is it not important that as wide a base of the citizenry as possible be armed and somewhat trained? Armed and trained citizens may not prevent an atomic attack but they can preserve internal order after one.[60]

2. Chief Justice Warren has written that the "subordination of the military to the civil ... is so deeply rooted in our national experience that it must be regarded as an essential constituent of the fabric of our political life". He has also noted that "military men throughout our history have not only recognized and accepted this relationship in the spirit of the Constitution, but they have also cheerfully co-operated in preserving it".[61]

If history and forecast both indicate that the future holds continuously larger standing armies and the continuous swallowing up of state militias by the federal army, can we always passively rely upon "cheerful" military leaders who will eschew the vast powers placed in their hands?

3. Up to this time neither the Federal Government nor the states have shown any particular ability or effectiveness in suppressing or controlling organized crime. A great cry of despair has arisen because it has suddenly become apparent that the "average citizen" will either retreat or quietly stand by while his fellow-citizen is attacked, maimed, raped or murdered. Before decrying this national apathy, it might be well to consider what happens to the person who intervenes. If the criminal is "organized" in the sense that he is acting as part of a group (most criminals are and the bystander has no way of distinguishing those who are not), his interference can not only lead to his own murder on the spot, but his interference or witnessing or testifying or even co-operating with the police can lead to his own murder or that of members of his family, or to constant harassment and threats, which can be equally terrifying and disastrous. The efforts of law enforcement agencies to "protect" a witness are not only ineffective but, even when effective, are as debilitating as exposure to the criminal--the witness and his family

(immediate and sometimes remote) are spirited away, often to another state, where they spend the rest of their lives in mortal fear and hiding.[62] This is the current reward for courage and for compassion toward one's fellow-man.

Perhaps the odds in favor of the individual citizen should be improved. (p.668)Perhaps the spirit of the Second Amendment should be revived. We have come to rely so heavily on the law that often we are helpless in the face of those who operate outside the law. Do we need the fact and spirit of a well-armed citizenry, a little self-help and some of the bravado of the Old West where, when two individuals stood face to face, each one had at least a chance for survival? Actually, we are traveling in the opposite direction; today many states make it a crime for a citizen to defend himself or his home with a deadly weapon against the attacker or invader. The concern for the rights of the criminal has brought us to the rather horrifying situation that if organized crime decrees one's death, neither the law nor the victim can do much about it. Hamilton argued for the guarantees of the Second Amendment to protect, among other things, against "the ravages and depredations of the Indians".[63]

Should we protect ourselves against the ravages and depredations of organized crime through the Second Amendment and perhaps at the same time halt the decaying moral effect of national apathy?

4. Does danger lurk in any consideration to broaden the concept of individual arms bearing? The federal and state restrictions on the right are substantial.

The National Firearms Act of 1934 levies a heavy tax on all transfers of machine guns, rifles, sawed-off shotguns and silencers, and requires the registration of all weapons not transferred in conformity with the act.[64] The Federal Firearms Act of 1938 regulates the movement in interstate commerce of all firearms and ammunition larger than .22 caliber, licenses all dealers and prohibits shipment to or receipt by criminals or the movement of stolen weapons.[65] Every state has some form of statute regulating either the possession, carrying, purchase, sale or pledging of firearms.[66] Criminal law doctrines militate heavily against the wrongful use of weapons. For example, the deadly weapons doctrine presumes that the commission of an unlawful act with a deadly weapon is performed with malice aforethought.[67]

Furthermore, it is the opinion of police experts that criminals obtain firearms regardless of regulation. The assassination of a President with a mail-order rifle and the subsequent killing of a police officer with a mail-order pistol may cast doubt upon the advisability of expanding the right to keep arms, but a person such as an assassin would probably obtain a firearm regardless of statutory restrictions, since he would not be concerned about the violation of statutes.[68] On the other hand, the security of the President in motorcades through large cities may best be assured by the deputizing of armed citizens along the entire route. It is conceivable that an armed witness in Dallas might have been alert enough after the first shot to have prevented the fatal shot.

5. The few modern writers on the subject of the right to keep and bear arms are sharply divided as to whether the right is personal or relates solely to the militia. Some conclude that the right runs only "to the people collectively for the common defense against the common enemy,

foreign or domestic"[69] and "has reference only to matters of common defense and relates to military affairs and not to private brawls".[70] One commentator questions whether *any* such right exists and whether "the Constitution would protect the right to keep and bear arms, if there were such a right, but that it does not exist".[71]

On the other hand, one writer finds that "the affirmative side of the use of firearms by the private citizen is substantial.... Hunting and target-shooting are popular and wholesome recreations.... There is still much need for self-help, especially against robbery and burglary.... A valuable military asset lies in the reservoir of persons trained to use small arms."[72] And he concludes that the "Supreme Court has admitted there are *exceptions* to the right to bear arms" [italics added], thus impliedly recognizing the right and that "the logical result is that the terms militia and people were thought to be separate in nature and preserving two distinct rights".[73]

6. The key seems to lie in the fact that the Second Amendment differs from the other first eight amendments in that it is not a right which people enjoy per se--that is, the average person does not derive any inherent satisfaction from the mere keeping of a firearm and perhaps most people would rather not keep one--but it is a right which tends to insure, protect and guarantee the other and fundamental rights to life, liberty and property. If we can always be certain that the law will enforce the fundamental rights, the Second Amendment becomes superfluous. Hamilton was not convinced that we could always rely upon the law (and this means the law among nations as well as within the United States). He wrote that "The idea of governing at all times by the simple force of law (which we have been told is the only admissible principle of republican government), has no place but in the reveries of those political doctors whose sagacity disdains the admonitions of experimental instruction."[74]

The Universal Declaration of Human Rights of the United Nations, adopted in 1948, does not refer to any "right to bear arms", yet it declares, among other things that:

> Article 3
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> Everyone has the right to life, liberty and security of person.
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> Article 4
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> No one shall be held in slavery or servitude; ...
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> Article 12
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> No one shall be subjected to arbitrary interference with his private family, home or correspondence, nor to attacks upon his honor and reputation....(p.669)
>
> Article 13
>
> 1. Everyone has the freedom of movement and residence....
>
> Article 17

2. No one shall be arbitrarily deprived of his property.

These rights are protected by law. Article 12 concludes, "Everyone has the right to the protection of the law against such interference or attacks", and Article 8 provides that "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law."

If we can ever be certain that we have for all time reached the ideal of universal existence based upon law, world disarmament would follow and the Second Amendment would be without any meaning. Until that happens, the Second Amendment may prove to have been another remarkable insight by the Founding Fathers into our needs for a long period of history. We should find the lost Second Amendment, broaden its scope and determine that it affords the right to arm a state militia and also the right of the individual to keep and bear arms.

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[43] The Palladium was a statue of Pallas Athena which stood on the citadel of Troy, on which the safety of the city was supposed to depend. Hence, the word came to mean anything believed to afford effectual protection or safety. *The American Collegiate Dictionary (1954)*. The word *palladium* was frequently used in Colonial times. Hamilton, for example, said that "the friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government." *The Federalist No. 83, at 542-543 (Modern Library ed. 1937)* (Hamilton).

[44] *3 Commentaries on the Constitution of the United States § 1890, pages 746-747 (1833)*.

[45] *92 U.S. at 553*.

[46] *116 U.S. at 265*.

[47] *153 U.S. at 538*.

[48] *307 U.S. at 178*.

[49] *Black, The Bill of Rights, 35 N.Y.U.L. Rev. 865, 873 (1960)*.

[50] *Barron v. Mayor of Baltimore, 7 Pet. 243*.

[51] Decisions that guarantees provided by the first eight amendments were not safeguarded against state action by the Fourteenth Amendment:

First Amendment: *United States v. Cruikshank, 92 U.S. 542, 551 (1876)*; *Prudential Insurance Company v. Cheek, 259 U.S. 530, 543 (1922)*.

Second Amendment: *Presser v. Illinois, 116 U.S. 252, 265 (1886)*.

Fourth Amendment: *Weeks v. United States, 232 U.S. 383, 398 (1914).*

Fifth Amendment: *Hurtado v. California, 110 U.S. 516, 538 (1884)* (requirement of grand jury indictments); *Palko v. Connecticut, 302 U.S. 319, 328 (1938)* (double jeopardy).

Sixth Amendment: *Maxwell v. Dow, 176 U.S. 581, 595 (1900)* (Jury trial).

Seventh Amendment: *Walker v. Sauvinet, 92 U.S. 90, 92 (1876)* (jury trial).

Eighth Amendment (prohibition against cruel and unusual punishment): *In re Kemmler, 136 U.S. 436, 448-449 (1890)*; *McElvaine v. Brush, 142 U.S. 155, 158-159 (1892)*; *O'Neil v. Vermont, 144 U.S. 323, 332 (1892).*

[52] See *New York Times Company v. Sullivan, 376 U.S. 254 (1964).*

[53] *378 U.S. at 6.*

[54] *378 U.S. at 15.*

[55] *131 F.2d at 922; cert. denied 319 U.S. 770 (1943) sub nom. Velazquez v. United States.*

[56] *United States v. Miller, 307 U.S. 174 (1938).*

[57] *15 Encyc. Brit. 484*; *16 Encyc. Brit. 145 (1961).*

[58] See, for example, *Encyc. Brit. yearbooks for 1962, 1963 and 1964 under "National Guard".*

[59] *1964 Encyc. Brit. Yearbook 786.*

[60] No one yet has challenged the constitutionality under the Second Amendment of Section 92 of the Atomic Energy Act of 1954 making it unlawful "for any person to transfer or receive in interstate or foreign commerce, manufacture, produce, transfer, acquire, possess, import, or export any atomic weapon". *42 U.S.C. § 2122.*

[61] *Warren, The Bill of Rights and the Military, 37 N.Y.U.L. Rev. 181, 186 (1962).* See also, *Reid v. Covert, 354 U.S. 1, 23*: "The tradition of keeping the military subordinate to civilian authority may not be so strong in the minds of this generation as it was in the minds of those who wrote the Constitution."

[62] See, for example, *Arnbrister, The Price of Getting Involved, Saturday Evening Post, September 26, 1964, page 81.*

[63] *The Federalist No. 24, at 151 (Modern Library ed. 1937)* (Hamilton).

[64] *26 U.S.C. Chapter 53.*

[65] *15 U.S.C. §§ 901-909.*

[66] For a catalogue of all state laws regulating the possession and use of firearms, see *Note, Restrictions on the Right To Bear Arms: State and Federal Firearms Legislation, 98 U. Pa. L. Rev. 905 (1950).*

[67] *Oberer, The Deadly Weapon Doctrine--Common Law Origin, 75 Harv. L. Rev. 1565 (1962).*

[68] The Warren Commission apparently made no recommendation regarding the restriction of the availability of firearms.

[69] *Emery, The Constitutional Right To Keep and Bear Arms, 28 Harv. L. Rev. 473, 477 (1915).*

[70] *Haight, The Right To Keep and Bear Arms, 2 Bill of Rights Rev. 31, 42 (1941).*

[71] *McKenna, The Right To Keep and Bear Arms, 12 Marq. L. Rev. 138, 149 (1928).*

[72] *Note, Restrictions on the Right To Bear Arms: State and Federal Firearms Legislation, 98 U. Pa. L. Rev. 905, 905-906 (1950).*

[73] *Hays, The Right To Bear Arms, A Study in Judicial Misinterpretation, 2 Wm. & Mary L. Rev. 381, 405-406 (1960).*

[74] *The Federalist No. 28, at 171 (Modern Library ed. 1937)* (Hamilton).