

From Colony to Commonwealth

The History of Article I, Section 13, of the Virginia Constitution (1776, 1971)

By Rudolph DiGiacinto

Before the first ship landed at Jamestown, Virginia in 1607, the passengers brought with them their cultural and most importantly their legal heritage including all rights and privileges as British subjects:

“Also we do, for Us, our Heirs, and Successors, DECLARE, by these Presents, that all and every the Persons being our Subjects, which shall dwell and inhabit within every or any of the said several Colonies and Plantations, and every of their children, which shall happen to be born within any of the Limits and Precincts of the said several Colonies and Plantations, shall HAVE and enjoy all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding and born, within this our Realm of England, or any other of our said Dominions.”¹

Included in this legal heritage was the British militia system on which each person relied upon for their collective and individual security and each was required to serve in.

The first representative assembly in America was given birth in 1619 as the Virginia House of Burgesses. The early surviving records dealing with the laws of the new colony state the following:

“ That no man go or send abroad without a sufficient partie well armed.” “That men go not to worke in the ground without their arms (and a centinell upon them.)” March 1623-4 --21st James 1st.²

These commands were clear and unambiguous and did not separate white colonists from black, free colonists from slave or indentured. Not until a few years later is some distinction made.

"All men that are fittinge to beare armes, shall bring their peices to church uppon payne of every effence, yf the mayster allow not thereof to pay 2 lb. of tobacco, to be disposed by the church-wardens, who shall levy it by distress, and the servants to be punished." "It is ordered and appoynted, That the commanders of all the severall plantations, doe upon holy days exercise the men under his command, and yearlie doe likewise uppon the first day of December, take a muster of their men, together with the women and children, and their ages, countryes, and towns, where they were borne..." "THE ioyninge plantations, to assisst the frontieres or their neighbours, uppon alarmns, the default to be severelie censured, and false alarmns punished. - February 1631- 2 --7th CHARLES 1st.³

All arms bearing men were required to come to the aid of their neighbors. The common or public land became an armed training ground for the militia.

"...But it is thought convenient that any man be permitted to kill deare or other wild beasts or fowle in the common woods, forests, or rivers in regard that thereby the inhabitants may be trained in the use of their armes the Indians kept from our plantations, and the wolves and other vermine destroyed..." - September 1632—8th CHARLES 1st.⁴

The British county lieutenant system is implemented as the population of the colony expanded. "And Lieuten'ts. to be appointed the same as in England, and in a more especial manner to take care of the warr against Indians. " AUGUST, 1633 --9th CHARLES 1st.⁵ Trade with the Indians for arms and ammunition is prohibited.

"IT is ordered and appoynted, That yf any person or persons shall sell or barter any gunns, powder, shott, or any armes or amunition unto any Indian or Indians within this territorie, the said person or persons shall forfeite to publique uses all the goods and chattells that he or they then have to their owne use, and shall also suffer imprisonment duringe life, the one halfe of which forfeiture shall be to him or them that shall informe and the other halfe to publique uses." - AUGUST, 1633 -- 9th CHARLES 1st.⁶

The distinction between African born inhabitants among the arms bearing population begins to emerge in 1639, with the following law:

“All persons except negroes to be provided with arms and ammunition or be fined at the pleasure of the Governor or Council.”- January 1639- 40 -- 14th CHARLES 1st.⁷

Not having arms and ammunition for white free males became a chargeable offense. The type or kind of firearm is not specified. The counties of Accomack-Northampton enforced these laws and enacted their own. The divers people who traveled without their arms and ammunition in 1641 were penalized by being forced to cut the weeds of the church grounds and pathways down, thereafter to receive a monetary penalty for disobeying. On April 28, 1643, the court pronounced, “ It is ordered that noe person or persons whatsoever within the County of Northampton Except those of the Commission shall from henceforth travel from house to house within the said County without a sufficient Fixed gun with powder and shott upon the penaltie and forfeiture of one hundred pounds of Tobacco to publique use and to bee imprisoned during the Commanders pleasure.”⁸ When the Colony of Virginia freely surrendered to Crown authority after the English Civil war in 1651, one of the required terms was the removal of all arms and ammunition, except private arms and ammunition: “13thly. That all amunition, powder and arms, other then for private vse shall be delivered vp, securitie being given to make satisfaction for it.”⁹

Royal governor Sir William Berkeley was questioned in 1670 about the state of the colony. Question 5 of the enquiries by the Lords commissioners was about the military force of the colony.

“5. What number of horse and foot are within your government, and whether they be trained bands or standing forces?

Answer. All our freemen are bound to be trained every month in their particular counties, which we suppose, and do not much mistake in the calculation, are

near eight thousand horse: there are more, but is too chargeable for poor people, as wee are, to exercise them."¹⁰

His response highlights the fact that militia service was compulsory for all freemen.

The colony of Virginia was engaged in rebellion in 1676 which became known as Bacon's Rebellion.

"THE Kings most excellent majestie takeing into his gracious and serious consideration, that Nathaniel Bacon, junr. late of this colony, decd. with diverse other ill disposed persons, his complices and adherents had raised a rebellion and levyed warre against his sacred majestie in this his said plantation".
FEBRUARY, 1676-7--29th CHARLES II.¹¹

The British militia system was put to the test as both sides used the arms bearing population to support their cause. The rebellion was defeated by the Crown's militia. The militia system not only remained intact but started to mature.

The English Civil War brought forth change and set forth rights now known as the English Bill of Rights in 1689. Two important rights emerge from this bill of rights:

"That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of Parliament, is against law;"

"That the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law;"¹²

The Church of England was the official state church which all Virginians were required to tithe to and attend services.¹³ The Church of England was a Protestant church. The Virginia House of Burgesses began to pass a series of laws for the better settling of the militia and acts for the prevention against invasions and insurrections and to execute the laws of the colony. The age of those free males required to be enlisted in the militia and to muster and train generally ranged from 16 to 60 years of age. The average life expectancy of an 18th century Virginian was about 45 years of age. There effectively was not a time in a free male's life over the age of 16 when he was not in the

militia. He was required to be armed at his own expense, to muster at least once a year, and at a moments notice to form under his officers to repel invasions or insurrections.

“That if any soldier either in horse or foot upon occasion of an incursion, invasion, insurrection or rebellion, or other alarm or surprise, shall be summoned to meet at a certain time and place and shall fail to appear accordingly, such soldier shall for such his offence be fined ten pounds current money, or suffer three months imprisonment, without bail or mainprise.” - *An Act for settling the Militia*, OCTOBER 1705. - - 4th ANNE.¹⁴

Militia laws did bring with it protection of arms against seizure and allowed the individual to keep his arms and to bear them for the Crown’s service or his own service.

“And for the encouragement of every soldier in horse or ffoot to provide and furnish himself according to this act and his security to keep his horse, arms and ammunition, when provided,

*Be it enacted, by the authority aforesaid, That the musket or ffuzee, the sword, cartouch box and ammunition of every ffoot soldier, and the horse, saddle and furniture, the carbine, pistols, sword, cartouch box and ammunition of every trooper provided and kept in pursuance of this act to appear and exercise withall be free and exempted at all times from being impressed upon any account whatsoever, and likewise from being seized or taken by any manner of distress, attachment, or writt of execution, and that every distress, seizure, attachment or execution made or served upon any of the premises, be unlawfull and void, and that the officer or person that presumes to make or serve the same be lyable to the suit of the party greived, wherein double damages shall be given upon a recovery.” - *An Act for settling the Militia*, OCTOBER 1705. - - 4th ANNE¹⁵*

The term “a well regulated militia” has legal meaning in Virginia as the term appears in the militia act of 1757. Excerpts from *An Act for the better regulating and disciplining the Militia of 1757*:

“I. WHEREAS it is necessary, in this time of danger, that the militia of this colony should be well regulated and disciplined. *Be it therefore enacted, by the Lieutenant-Governor, Council, and Burgesses, of this present General assembly, and it is hereby enacted by the authority of the same, That from and after the passing of this act every county-lieutenant, colonel, lieutenant-colonel, and other inferior officer, bearing any commission in the militia of this colony, shall be an inhabitant of, and resident in the county of which he is or shall be commissioned to be an officer of the militia.*”¹⁶

The basic concepts of a well regulated militia set forth in the act was that **militia service was compulsory** (“all male persons above the age of eighteen years, and under the age of sixty years within this colony (imported servants excepted)... That every person so as aforesaid inlisted (except free mulattoes, negroes, and Indians) shall be armed”), **the soldier had to supply his own arms** (“That twelve months shall be given and allowed to each soldier, not already inlisted, to furnish and provide himself with arms and ammunition according to the directions of this act... And if any soldier shall appear at any muster not armed, and without ammunition according to the directions of this act, it shall and may be lawful for the captain of the company to which such soldier shall belong to examine such soldier, upon oath, whether he hath any, and what arms and ammunition he really hath of his own property, and if on such examination it shall appear that such soldier hath any arms or ammunition of his own property, and hath not brought the same, or so much thereof as this act requires, to such muster, he shall be liable to the penalties inflicted by this act altho’ he hath not been inlisted twelve months... And for an encouragement to every soldier to provide and furnish himself according to the directions of this act, and his security to keep his arms and ammunition when provided. Be it further enacted, by the authority aforesaid, That the arms and ammunition provided and kept in pursuance of this act be free and exempted at all times from being impressed upon any account whatsoever”), **keep at his place of abode enough ammunition for service** (“shall also keep at his place of abode one pound of powder and four pounds of ball, and bring the same with him into the field when he shall be required”), **the soldier had to muster and train** (“That every captain shall, once in three months, and oftner if thereto required by the lieutenant or chief commanding officer in the county, muster, train, and exercise his company”), **be subject to the discipline of his officers** (“if any soldier shall, at any general or private muster, refuse to perform the command of his officer, or behave himself refractorily or mutinously, or misbehave himself at the courts martial to be held in pursuance of this act, as is herein after directed, it shall

*and may be lawful to and for the chief commanding officer, then present, to cause such offender to be tied neck and heels, for any time not exceeding five minutes, or inflict such corporal punishment as he shall think fit, not exceeding twenty lashes.”), **spend time as a militia patroller** (“*And for establishing a better method of appointing patrollers, and for declaring their duty therein. Be it enacted, by the authority aforesaid, That it shall and may be lawful for the chief officer of the militia in every county, and he is hereby required some time before the tenth day of June yearly, to appoint an officer and so many men of the militia, as to him shall appear to be necessary, not exceeding four, once in every month or oftner if thereto required by such chief officer, to patrol and visit all negroe quarters, and other places suspected of entertaining unlawful assemblies of slaves, servants, or other disorderly persons as aforesaid*”), **and to be ready to repel invasions and insurrections.***

A companion act with most militia acts gave direction and meaning for the purpose of the militia, to repel invasions and insurrections and to execute the laws of the colony. *An Act for reducing the several acts for making provision against invasions and insurrections into one act* of 1757 stated the following :

“I. WHEREAS it is necessary that the several acts of Assembly relating to invasions and insurrections should be reduced into one act, Be it therefore enacted, by the Lieutenant-Governor Council, and Burgesses, of this present General assembly, and it is hereby enacted by the authority of the same. That upon any invasion of any enemy, by sea or land, or upon any insurrection, the governor or commander in chief for the time being shall have full power and authority to levy, raise, arm and muster such a number of forces out of the militia of this colony as shall be thought needful for repelling the invasion, or suppressing the insurrection or other danger; and the same to lead, conduct, march, transport and employ, or by his lieutenants, commanders, or other officers by him commissioned, to cause to be led, conducted, marched, transported and employed, as well within the several counties and places to which they belong as into any other counties and places within this dominion, for the suppressing and repelling of all such invasions and insurrections and such forces again to discharge and disband as the cause of danger ceases.

II. *And be it further enacted, by the authority aforesaid, That every officer of the militia, to whom notice shall be given of any invasion or insurrection, shall raise the militia under his command, and send intelligence to the county lieutenant, or*

in his absence to the chief commanding officer in the county, and shall moreover immediately proceed to oppose the enemy according to the orders he shall receive from his chief commanding officer until further orders arrive from the governor or commander in chief of this dominion for the time being, and such county-lieutenant or chief commanding officer shall give immediate notice to the officers of the militia of the next adjacent counties of such invasion or insurrection, and the situation and circumstances of the enemy according to the best of his information and judgment; and such officer to whom such notice shall be given, if not the chief commanding officer of the county, shall give immediate notice to his commanding officer of the information that he shall receive, who shall immediately raise the militia of his county and march part thereof, not exceeding two-thirds, against such enemy, if the circumstances of the case shall require it, which shall be enquired into by a council of his field-officers and captains, or the major part of them, which council every such commanding officer is hereby empowered and required forthwith to summon and hold; and such commanding officer shall cause the remaining part of his militia, not so marched, to remain in arms in the county for the defence and protection thereof, until he shall receive orders from the governor or commander in chief as aforesaid: And every county lieutenant or chief commanding officer in any county to whom such intelligence shall be given of any invasion or insurrection, shall forthwith dispatch an express to the governor or commander in chief as aforesaid, notifying the danger, and shall therewith signify in the best manner he can the strength and motions of the enemy, and for that purpose such county lieutenant or chief commanding officer shall have full power to impress boats and hands, men and horses, as the service may require, for the dispatch of such intelligence.”¹⁷

The merging of these laws to establish the military force structure and its purpose can be most easily seen in the official commission of Thomas Jefferson being appointed the County Lieutenant of Albemarle, County Virginia in 1770 by Royal Governor Lord Botetourt.

“By Virtue of the Power and Authority to me given as his majesty’s lieutenant and Governor General of this his Colony and Dominion, I, Reposing special Trust and Confidence in your Loyalty, Courage and Conduct, do hereby constitute and appoint you the said *Thomas Jefferson* to be lieutenant of the County of Albemarle. And I do give unto you full power and authority to command, levy, arm and muster, all persons which are or shall be liable to be levied and listed in the said County. You are therefore carefully and diligently to discharge the duty of Lieutenant and Chief Commander of the Militia, by doing and performing all, and all Manner of Things thereunto belonging, particularly by taking care that the said Militia be well provided with Arms and Ammunition as the Law of this Colony directs; and that all Officers and Soldiers be duly exercised, and kept in good order and discipline. And in Case of any sudden Disturbance or Invasion, I do likewise empower you to raise, order, and march all or such part of the said Militia, as to you shall seem meet, for resisting and

subduing the Enemy: And I do hereby command all the Officers and Soldiers of his Majesty's Militia, in the said County, to obey you as their Lieutenant, or Chief Commander; and you are to observe and follow such orders and directions, from time to time, as you shall receive from me, or the Commander in Chief of this Colony for the time being, or from any other your superior officer, according to the Rules and Discipline of War."¹⁸

Thomas Jefferson later wrote the following concerning the Virginia Militia when he was governor:

"Every able-bodied freeman, between the ages of 16 and 50, is enrolled in the militia. Those of every county are formed into companies, and these again into one or more battalions, according to the numbers in the county. They are commanded by colonels, and other subordinate officers, as in the regular service. In every county is a county-lieutenant, who commands the whole militia of his county, but ranks only as a colonel in the field. We have no general officers always existing. These are appointed occasionally, when an invasion or insurrection happens, and their commission determines with the occasion. The governor is head of the military, as well as civil power. The law requires every militia-man to provide himself with the arms usual in the regular service." – Thomas Jefferson, Notes on the State of Virginia, Query IX. Military Force.¹⁹

The Colony of Virginia adopted the Common Law of England in March 1661.²⁰ Under the common law the right to arm for self defense was recognized as well as other common law rights and duties inter alia; a person was **required to arrest a felon** ("*ANY private person (and a fortiori a peace officer) that is present when any felony is committed, is bound by the law to arrest the felon; on pain of fine and imprisonment, if he escapes through the negligence of the standers by*")²¹, **required to answer the Hue and Cry** ("*THERE is yet another species of arrest, wherein both officers and private men are concerned, and that is upon an hue and cry raised upon a felony committed. An hue (from huer, to shout) and cry, hutefium et clamor, is the old common law process of pursuing, with horn and with voice, all felons, and such as have dangerously wounded another.*")²², **required to assist in the suppression of riots** (*The same is the case in riots and routs by the common law; to which the pillory in very enormous cases has been sometimes superadded. And by the statute 13 Hen. IV. c. 7. any two justices, together with the sheriff our under-sheriff of the county, may come with the posse comitatus, if need be, and suppress any such riot, assembly, or rout, arrest the rioters, and record upon the spot the nature and circumstances of the whole transaction;*

*which record alone shall be a sufficient conviction of the offenders. In the interpretation of which statute it has been holden, that all persons, noblemen and others, except women, clergymen, persons decrepit, and infants under fifteen, are bound to attend the justices in suppressing a riot, upon pain of fine and imprisonment; and that any battery, wounding, or killing the rioters, that may happen in suppressing the riot, is justifiable.)*²³, **and encouraged to pursue felons** (“IN order to encourage farther the apprehending of certain felons, rewards and immunities are bestowed on such as bring them to justice, by diverse acts of parliament. The statute 4 & 5 W. & M. c. 8. enacts, that such as apprehend a highwayman, and prosecute him to conviction, shall receive a reward of 40£ from the public; to be paid to them”)²⁴ In April 1699, an act against Pirates was passed by the General Assembly which required armed persons to capture or kill the pirates.²⁵ The Colony of Virginia under Governor Spotswood eventually ends the career of Blackbeard the pirate.

Virginia citizens had the right to defend themselves in case of personal attack.

As the great Virginia jurist, and Revolutionary War soldier, St. George Tucker stated:

“The right of self defence is the first law of nature: in most governments it has been the study of rulers to confine this right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction. In England, the people have been disarmed, generally, under the specious pretext of preserving the game: a never failing lure to bring over the landed aristocracy to support any measure, under that mask, though calculated for very different purposes. True it is, their bill of rights seems at first view to counteract this policy: but the right of bearing arms is confined to protestants, and the words suitable to their condition and degree, have been interpreted to authorise the prohibition of keeping a gun or other engine for the destruction of game, to any farmer, or inferior tradesman, or other person not qualified to kill game. So that not one man in five hundred can keep a gun in his house without being subject to a penalty.”²⁶ ⁱ

The English Bill of Rights was conceived in revolution and in revolution

Englishmen defended their basic rights from the King’s Prerogative.

ⁱ This right of self-defence is founded upon the law of nature," Parrish v. Commonwealth, 81 Va. 1 (1884).

“It then stands to reason that the right to bear arms rests on three solid English rights: The right of revolution; the right of group self-preservation; and the right of self defense... These basic rights are a portion of the English Common law and had evolved prior to the landing at Jamestown in 1607. Further, these basic rights applied to all Englishmen and not merely to those living in England and personal to England.”²⁷

Virginians were entitled to these rights as free Englishmen under the Jamestown Charters. The right of group self-preservation is embodied in the compulsory militia service of the colony. The right of self-defense is derived from the law of nature. And the right to revolution they received as an ongoing practice from their English relatives and ancestors in England. Arms owning and bearing was not only encouraged it was as aforementioned a right and a duty in Virginia. "To the courthouse six miles north, however, Henry generally walked, " carrying his gun and hunting by the way" He would appear at the bar in his short hunting jacket and greasy leather breeches and between cases make plans for longer expeditions.”²⁸

What arms were available in the colony? Any arm a person could afford from entire ships outfitted with cannon called privateers²⁹, muskets, rifles, blunder busses (short barreled shotguns)³⁰, pistols, pocket pistols³¹, swivels, swords and other cutting instruments. Owning and bearing arms was not considered *Malum in se* nor was it *Malum Prohibitum* except for those people considered non citizens or a threat to the colony including Indians, slaves and Papists (Catholics). Catholics were disarmed in 1756 except those arms necessary for personal protection at the discretion of the court.

“An Act for disarming Papists, and reputed Papists, refusing to take the oaths to the government. That no Papist, or reputed Papist so refusing, or making default as aforesaid, shall, or may have, or keep in his house or elsewhere, or in the possession of any other person to his use, or at his disposition, any 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)³².

The Right to Revolution Is Invoked

Colonel George Mason founded the Fairfax County Independent Company of Volunteers on September 21, 1774. It was a collection of men outside the only recognized militia system under civilian control, the Crown's Militia. This company and other independent companies that began to spring up in reaction to the Crown and Royal Governor Lord Dunmore's rule, were closer to a paramilitary force than a militia. George Mason wrote of the Fairfax Independent Company:

"This company is essentially different from a common collection of mercenary soldiers. It was formed upon the liberal sentiments of public good, for the great and useful purposes of defending our country, and preserving those inestimable rights which we inherit from our ancestors; it was intended in these times of extreme danger, when we are threatened with the ruin of that constitution under which we were born, and the destruction of all that is dear to us, to rouse the attention of the public, to introduce the use of arms and discipline, to infuse a martial spirit of emulation, and to provide a fund of officers, that in case of absolute necessity, the people might be the better enabled to act in defence of their invaded liberty. Upon this generous and public-spirited plan, gentlemen of the first fortune and character among us have become members of the Fairfax Independent Company, have submitted to stand in the ranks as common soldiers, and to pay due obedience to the officers of their own choice. This part of the country has the glory of setting so laudable an example: let us not tarnish it by any little dirty views of party, of mean self-interest or of low ambition." - *Remarks on Annual Elections for the Fairfax Independent Company*, George Mason, April 1775.³³

The rise of the independent companies becomes critical to the success of the Revolution as they eventually confront Lord Dunmore's power. Patrick Henry raises the Hanover County Independent Company of Volunteers and marches them and others to Williamsburg to get back the gunpowder Governor Dunmore had stolen from

the public magazine. Lord Dunmore issued a Proclamation against Patrick Henry which stated:

“WHEREAS I have been informed, from undoubted Authority, that a certain Patrick Henry, of the County of Hanover, and a Number of deluded Followers, have taken up Arms, chosen their Officers, and styling themselves an Independent Company, have marched out of their County, encamped, and put themselves in a Posture of War; and have written and dispatched Letters to divers Parts of the Country, exciting the People to join in these outrageous and rebellious Practices, to the great Terrour of all his Majesty's faithful Subjects, and in open Defiance of Law and Government; and have committed other Acts of Violence, particularly in extorting from his Majesty's Receiver General the Sum of £.330, under Pretence of replacing the Powder I thought proper to order from the Magazine; whence it undeniably appears, that there is no longer the least Security for the Life or Property of any Man: WHEREFORE I have thought proper, with the Advice of his Majesty's Council, and in his Majesty's Name, to issue this my Proclamation, strictly charging all Persons, upon their Allegiance, not to aid, abet, or give Countenance to, the said Patrick Henry, or any other Persons concerned in such unwarrantable Combinations; but, on the Contrary, to oppose them and their Designs by every Means; which Designs must, otherwise, inevitably involve the whole Country in the most direful Calamity, as they will call for the Vengeance of offended Majesty and the insulted Laws, to be exerted here, to vindicate the constitutional Authority of Government.”³⁴

On May 15, 1776 the Virginia legislature chose to vote for independence and asked that a declaration be drawn up. George Mason became the chief author of the Virginia Declaration of Rights. The influence of the militia system and George Mason's knowledge of individual rights and the role of government is evident in the writing of his *Remarks on Annual Elections for the Fairfax Independent Company* written in April, 1775. It contains the intellectual origins of one-fourth of the Virginia Declaration of Rights. When George Mason turned to writing the clause on the militia and the military, he did not hesitate as he merely drew from his previous writing and the British militia system in which he served as well as the English Bill of Rights. This individual right was not new because it was the same right he used to form the Fairfax County Independent Company of Volunteers in September 1774. He chose the following words to describe the fundamental right:

“13. That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace, should be avoided, as dangerous to liberty: and that, in all cases, the military should be under strict subordination to, and governed by, the civil power.” – Virginia Declaration of Rights, June 12, 1776.

This became part of Virginia’s Constitution and Bill of Rights, Article I, Section 13. The strict militia system in Virginia was in marked contrast to some Northern colonies who had no militia system or men trained to arms. When given arms to defend their colony they were as much troublesome as they were of help to the Revolution. General George Washington was incredulous and irritated by the lack of a well regulated militia in New Jersey as highlighted in a letter he wrote to William Livingston in 1777. General Washington wrote;

“ Sir: The irregular and disjointed State of the Militia of this Province, makes it necessary for me to inform you, that, unless a Law is immediately passed by your Legislature, to reduce them to some order, and oblige them to turn out, in a different Manner from what they have hitherto done, we shall bring very few into the Field, and even those few will render little or no Service. Their Officers are generally of the lowest Class of People; and, instead of setting a good Example to their Men, are leading them into every Kind of Mischief, one Species of which is, Plundering the Inhabitants, under pretence of their being Tories. A Law should, in my Opinion, be passed, to put a Stop to this kind of lawless Rapine; for, unless there is something done to prevent it, the People will throw themselves, of Choice, into the Hands of the British Troops. But your first object should be a well regulated Militia Law; the People, put under good Officers, would behave in quite another Manner; and not only render real Service as Soldiers, but would protect, instead of distressing, the Inhabitants. What I would wish to have particularly insisted upon, in the New Law, should be, that every Man, capable of bearing Arms, should be obliged to turn out, and not buy off his Service by a trifling fine. We want Men, and not Money. I have the honor to be, etc.”³⁵

The first known interpretation of Article I, Section 13, of the Virginia constitution takes place just after British General Lord Cornwallis is defeated at Yorktown, Virginia in 1781. Virginia was under martial law³⁶ and the new commonwealth was still in peril,

but it did not stop the outrage on the unlawful abuses by the new government of Virginia. It was not interpreted by a court to declare the action of the government was wrong, but it was interpreted as being violated by the man who wrote the Declaration of Rights , George Mason. On December 10, 1781 George Mason wrote the letter, *The Petition of the Freeholders and other Inhabitants of the Countys of Prince William (and Fairfax) in Behalf of themselves, and their Fellow-Citizens*. George Mason wrote:

“That the good People of Virginia took up Arms, in the present Contest with Great Britain, in Defence of their Liberty and Property, invaded by an arbitrary & tyrannical Government; that as it is not merely for Names, but our essential Rights we are contending, the same Principles which first induced us to draw the Sword will again dictate Resistance to Injustice & Oppression, in whatever Shape, or under whatever Pretence, it may be offered. And altho' your Petitioners will always be ready most chearfully to contribute to the utmost of their Abilitys, everything proper & necessary in Support of the just War in which the United American States are engaged; Yet we shou'd hold ourselves unworthy the Name of Freemen, if we tamely submitted to such Injustice & oppression as hath lately been exercised over us, longer than a Meeting of the General Assembly gives us an Opportunity of laying them before our Representatives; trusting that we shall find it their Inclination, as it is most certainly their Duty, to redress our wrongs; even if they had not originated from themselves. To defend their Property by Arms, and to repel Force by Force, is inconsistent with the Character of good Citizens, until they have first tryed the legal & constitutional Modes of Redress. Impressed with these Sentiments, and to prevent the Mischiefs & Violence which might otherwise follow, we assert our Right of freely remonstrating to, and petitioning the General Assembly... That altho' the thirteenth Article of the Bill of Rights expressly declares "that in all Cases, the Military shou'd be under strict Subordination to, and governed by the Civil Power" Yet Horses & other Effects have been frequently taken from the Inhabitants by Military-Officers, and Soldiers, without authority from, or application to the Civil Magistrate, and without Appraisalment; by which many poor Familys have been ruined... Your Petitioners conceive that the Enormity & Tyranny of these Proceedings can hardly be parralled in the most despotic Governments; and that, without exemplary Punishment upon the Guilty, a Man can have no Security in his Property; or must be reduced to the fatal Necessity of punishing the Aggressor with his own Hand; as in a State without Laws, every Man has a Right to do... That this Method therefore of supplying the Public-Wants by Seizures, is of all others, the most disgusting, unequal, oppressive, & unjust; being in Fact, only another Name for public-Robbery.”³⁷

The fact that the Commonwealth was under martial law in a time of war did not abrogate the fundamental rights of the citizens. George Mason was clear that no

calamity or danger can take away those rights. It is also clear that the Virginia patriot who wrote the first Bill of Rights understood the “three solid English rights”: The right of revolution; the right of group self-preservation; and the right of self-defense. George Mason believed in the militia and the individual right to keep and bear arms when he earlier wrote the plans for the defense of Fairfax County in 1775.

“Threatened with the Destruction of our antient Laws & Liberty, and the Loss of all that is dear to British Subjects & Freemen, justly alarmed with the Prospect of impending Ruin,—firmly determined, at the hazard of our Lives, to transmit to our Children & Posterity those sacred Rights to which ourselves were born; and thoroughly convinced that a well regulated Militia, composed of the Gentlemen, Freeholders, and other Freemen, is the natural Strength and only safe & stable security of a free Government... And we do Each of us, for ourselves respectively, promise and engage to keep a good Fire-lock in proper Order, & to furnish Ourselves as soon as possible with, & always keep by us, one Pound of Gunpowder, four Pounds of Lead, one Dozen Gun-Flints, & a pair of Bullet-Moulds, with a Cartouch Box, or powder-horn, and Bag for Balls, That we will use our best Endeavours to perfect ourselves in the Military Exercise & Discipline, & therefore will pay due Obedience to our officers, & regularly attend such private and general Musters as they shall appoint. And that we will always hold ourselves in Readiness, in Case of Necessity, Hostile-Invasion, or real Danger, to defend & preserve to the utmost of our Power, our Religion, the Laws of our Country, & the just Rights & Privileges of our fellow Subjects, our Posterity, & ourselves, upon the Principles of the English Constitution.” - *Fairfax County Militia Plan “for Embodying the People”, George Mason, 1775.*³⁸

“The office and purpose of the constitution is to shape and fix the limits of governmental activity. It thus proclaims, safeguards and preserves in basic form the pre-existing laws, rights, mores, habits, and modes of thought and life of the people as developed under the common law and as existing at the time of its adoption to the extent and therein stated...The purpose and object sought to be attained by the framers of the constitution is to be looked for, and the will and intent of the people who ratified it is to be made effective.” Dean v. Paolicelli, 194 Va. 219, (1952). “A fundamental right is one explicitly or implicitly implied guaranteed by the constitution.” Ballard v. Commonwealth, 228 Va. 216 (1984). It is clear that in 1776, George Mason and his Virginia colleagues believed that Article I, Section 13, of the Virginia Constitution

explicitly guaranteed the right to a well regulated militia, and implicitly guaranteed the right to keep and bear arms.

A century later the Virginia Supreme Court noted that the Virginia Declaration of Rights protected individual rights. "...but the State of Virginia, ever foremost in proclaiming principles of personal liberty and security, and providing safeguards to individual rights, was unwilling, when she assumed the attitude of an independent and sovereign State, to leave this great principle and others of kindred character subject, as at common law, to the mutations of legislative will or to the hazard of judicial discretion. She therefore thought proper, as far back as June 12th, 1776, and prior to the declaration of independence, when forming her own State Constitution, to make a solemn declaration of the rights of the good people of Virginia, 'which rights do pertain to them and their posterity as the basis and foundation of government.'" Cullen v. Commonwealth, Va. (24 Gratt), 624, p218 (1873).

The Virginia Bill of Rights Article I, Section 13, is the Parent of the Second Amendment to the United States Constitution

When the Revolution ended and the Articles of Confederation proved to be inadequate, George Mason was called to help write the Constitution of the United States. George Mason decided not to sign the new constitution that he helped to write because it did not contain a bill of rights. He and Patrick Henry became the chief agitators to demand that a bill of rights be added. It became quite evident to Virginians that the other colonies did not understand a well regulated militia under the British militia system so they had to add the explicit wording that the people had the right to keep and bear arms.

“Seventeenth, That the people have a right to keep and bear arms; that a well regulated Militia composed of the body of the people trained to arms is the proper, natural and safe defence of a free State. That standing armies in time of peace are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the Community will admit; and that in all cases the military should be under strict subordination to and governed by the Civil power.” - *Ratification of the Constitution by the State of Virginia; June 26, 1788.*³⁹

In prelude to the ratification debates two Virginians speak out and start to set the tone of the debates. James Madison in January 1788 wrote the following about the militia:

“It may well be doubted, whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops. Those who are best acquainted with the last successful resistance of this country against the British arms, will be most inclined to deny the possibility of it. Besides the advantage of being armed, 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 enterprises of ambition, more insurmountable than any which a simple government of any form can admit of. Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms. And it is not certain, that with this aid alone they would not be able to shake off their yokes. But were the people to possess the additional advantages of local governments chosen by themselves, who could collect the national will and direct the national force, and of officers appointed out of the militia, by these governments, and attached both to them and to the militia, it may be affirmed with the greatest assurance, that the throne of every tyranny in Europe would be speedily overturned in spite of the legions which surround it.”⁴⁰

Richard Henry Lee wrote in February 1788, “Whereas, to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them”⁴¹

The Virginia ratification debates on the United States Constitution commenced on June 2, 1788. On June 14, George Mason stands to defend his principles:

“No man has a greater regard for the military gentlemen than I have. I admire their intrepidity, perseverance, and valour. But when once a standing army is established, in any country, the people lose their liberty. When against a regular and disciplined army, yeomanry are the only defence—yeomanry, unskillful & unarmed, what chance is there for preserving freedom? Give me leave to recur to the page of history, to warn you of your present danger. Recollect the history of most nations of the world. What havock, desolation, and destruction, have been perpetrated by standing armies? An instance within the memory of some of this house, will shew us how our militia may be destroyed. 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 to weaken them and let them sink gradually, by totally difusing and neglecting the militia. [Here MR. MASON quoted sundry passages to this effect.] This was a most iniquitous project. Why should we not provide against the danger of having our militia, our real and natural strength, destroyed? The general government ought at the same time to have some such power. But we need not give them power to abolish our militia. If they neglect to arm them, and prescribe proper discipline, they will be of no use. I am not acquainted with the military profession. I beg to be excused for any errors I may commit with respect to it. But I stand on the general principles of freedom, whereon I dare to meet any one. I wish, that in case the general government should neglect to arm and discipline the militia, that there should be an express declaration, that the state governments might arm and discipline them.”⁴²

On June 16, 1788 George Mason rose again to explain the militia. He said:

“Mr. Chairman—A worthy member has asked, who are the militia, if they be not the *people*, of this country, and if we are not to be protected from the fate of the Germans, Prussians, &c. by our representation? I ask who are the militia? They consist now of the whole people, except a few public officers. But I cannot say who will be the militia of the future day. If that paper on the table gets no alteration, the militia of the future day may not consist of all classes, high and low, and rich and poor; but may be confined to the lower and middle classes of the people, granting exclusion to the higher classes of the people. If we should ever see that day, the most ignominious punishments and heavy fines may be expected. Under the present government all ranks of people are subject to militia duty. Under such a full and equal representation as ours, there can be no ignominious punishments inflicted. But under this national, or rather consolidated government, the case will be different.”⁴³

Patrick Henry spoke early and often on the militia and the people having arms.

On June 5, 1788 he spoke:

"The honorable gentleman who presides told us that, to prevent abuses in our

government, we will assemble in Convention, recall our delegated powers, and punish our servants for abusing the trust reposed in them. O sir, we should have fine times, indeed, if, to punish tyrants, it were only sufficient to assemble the people! Your arms, wherewith you could defend yourselves, are gone; and you have no longer an aristocratical, no longer a democratical spirit. Did you ever read of any revolution in a nation, brought about by the punishment of those in power, inflicted by those who had no power at all? You read of a riot act in a country which is called one of the freest in the world, where a few neighbors cannot assemble without the risk of being shot by a hired soldiery, the engines of despotism. We may see such an act in America.

A standing army we shall have, also, to execute the execrable commands of tyranny; and how are you to punish them? Will you order them to be punished? Who shall obey these orders? Will your mace-bearer be a match for a disciplined regiment? In what situation are we to be? The clause before you gives a power of direct taxation, unbounded and unlimited, exclusive power of legislation, in all cases whatsoever, for ten miles square, and over all places purchased for the erection of forts, magazines, arsenals, dockyards, &c. What resistance could be made? The attempt would be madness. You will find all the strength of this country in the hands of your enemies; their garrisons will naturally be the strongest places in the country. Your militia is given up to Congress, also, in another part of this plan: they will therefore act as they think proper: all power will be in their own possession. You cannot force them to receive their punishment: of what service would militia be to you, when, most probably, you will not have a single musket in the state? for, as arms are to be provided by Congress, they may or may not furnish them.

Let me here call your attention to that part which gives the Congress power "to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States — reserving to the states, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress." By this, sir, you see that their control over our last and best defence is unlimited. If they neglect or refuse to discipline or arm our militia, they will be useless: the states can do neither — this power being exclusively given to Congress. The power of appointing officers over men not disciplined or armed is ridiculous; so that this pretended little remains of power left to the states may, at the pleasure of Congress, be rendered nugatory. Our situation will be deplorable indeed: nor can we ever expect to get this government amended, since I have already shown that a very small minority may prevent it, and that small minority interested in the continuance of the oppression. Will the oppressor let go the oppressed? Was there ever an instance? Can the annals of mankind exhibit one single example where rulers overcharged with power willingly let go the oppressed, though solicited and requested most earnestly? The application for amendments will therefore be fruitless. Sometimes, the oppressed have got loose by one of those bloody struggles that desolate a country; but a willing relinquishment of power is one of those things which human nature never was, nor ever will be, capable of."⁴⁴

On June 14, 1788 Patrick Henry stated, " The militia, sir, is our ultimate safety...The great object is, that every man be armed..."⁴⁵ Henry continues on June 24,

1788 about the bill of rights including the Virginia Bill of Rights,

"The honorable member must forgive me for declaring my dissent from it; because, if I understand it rightly, it admits that the new system is defective, and most capitally; for, immediately after the proposed ratification, there comes a declaration that the paper before you is not intended to violate any of these three great rights — the liberty of religion, liberty of the press, and the trial by jury. What is the inference when you enumerate the rights which you are to enjoy? That those not enumerated are relinquished. There are only three things to be retained — religion, freedom of the press, and jury trial. Will not the ratification carry every thing, without excepting these three things? Will not all the world pronounce that we intended to give up all the rest? Every thing it speaks of, by way of rights, is comprised in these things. Your subsequent amendments only go to these three amendments.

I feel myself distressed, because the necessity of securing our personal rights seems not to have pervaded the minds of men; for many other valuable things are omitted: — for instance, general warrants, by which an officer may search suspected places, without evidence of the commission of a fact, or seize any person without evidence of his crime, ought to be prohibited. As these are admitted, any man may be seized, any property may be taken, in the most arbitrary manner, without any evidence or reason. Every thing the most sacred may be searched and ransacked by the strong hand of power. We have infinitely more reason to dread general warrants here than they have in England, because there, if a person be confined, liberty may be quickly obtained by the writ of habeas corpus. But here a man living many hundred miles from the judges may get in prison before he can get that writ.

Another most fatal omission is with respect to standing armies. In our bill of rights of Virginia, they are said to be dangerous to liberty, and it tells you that the proper defence of a free state consists in militia; and so I might go on to ten or eleven things of immense consequence secured in your bill of rights, concerning which that proposal is silent. Is that the language of the bill of rights in England? Is it the language of the American bill of rights, that these three rights, and these only, are valuable?... In my weak judgment, a government is strong when it applies to the most important end of all governments — the rights and privileges of the people. In the honorable member's proposal, jury trial, the press and religion, and other essential rights, are not to be given up. Other essential rights — what are they? The world will say that you intended to give them up. When you go into an enumeration of your rights, and stop that enumeration, the inevitable conclusion is, that what is omitted is intended to be surrendered."⁴⁶

Another relatively unknown Virginia delegate, Zachariah Johnson rose to speak,

"The people are not to be disarmed of their weapons. They are left in full possession of them. The government is administered by the representatives of

the people, voluntarily and freely chosen. Under these circumstances, should any one attempt to establish their own system, in prejudice of the rest, they would be universally detested and opposed, and easily frustrated. This is a principle which secures religious liberty most firmly. The government will depend on the assistance of the people in the day of distress."⁴⁷

A bill of rights to the United States Constitution was introduced by James Madison in Congress and finally adopted in 1791. Amendment II of the Bill of Rights states:

"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. Constitution, Amendment II.

This amendment is similar, but not the same as the Virginia Constitution Article I, Section 13, as they are worded differently. "A fundamental rule of statutory construction requires that every part of a statute be presumed to have some effect, and not be treated as meaningless unless absolutely necessary." - Raven Coal Corp. v. Absher, 153 Va. 332, 149 S.E. 541 (1929). The Virginia Constitution requires that the militia be composed of the body of the people and trained to arms. The United States Constitution does not require that the militia be composed of the body of the people nor that they be trained to arms. The Virginia militia system since the founding of Jamestown until 1776 demanded compulsory service and that the people be armed with their own weapons and trained with them.

The First State Court Interpretations of Their New Constitutions – Kentucky/Virginia

Kentucky was a county of Virginia in 1776 and therefore was much like Virginia in culture and law. Kentucky became a state in 1792 and in 1822, its state high court interpreted its own state constitution declaring a concealed weapon law

unconstitutional.

“That section provides, “that the right of the citizens to bear arms in defence of themselves and the state, shall not be questioned.”

The provision contained in this section, perhaps, is as well calculated to secure to the citizens the right to bear arms in defence of themselves and the state, as any that could have been adopted by the makers of the constitution. If the right be assailed, immaterial through what medium, whether by an act of the legislature or in any other form, it is equally opposed to the comprehensive import of the section. The legislature is no where expressly mentioned in the section; but the language employed is general, without containing any expression restricting its import to any particular department of government; and in the twenty-eighth section of the same article of the constitution, it is expressly declared, “that every thing in that article is excepted out of the general powers of government, and shall forever remain inviolate; and that all laws contrary thereto, or contrary to the constitution, shall be *void*. It was not, however, contended by the attorney for the commonwealth, that it would be competent for the legislature, by the enactment of any law, to prevent the citizens from bearing arms either in defence of themselves or the state; but a distinction was taken between a law prohibiting the exercise of the right, and a law merely regulating the manner of exercising that right; and whilst the former was admitted to be incompatible with the constitution, it was insisted, that the latter is not so, and under that distinction, and by assigning the act in question a place in the latter description of laws, its consistency with the constitution was attempted to be maintained.

That the provisions of the act in question do not import an entire destruction of the right of the citizens to bear arms in defence of themselves and the state, will not be controverted by the court; for though the citizens are forbid wearing weapons concealed in the manner described in the act, they may, nevertheless, bear arms in any other admissible form. But to be in conflict with the constitution, it is not essential that the act should contain a prohibition against bearing arms in every possible form; it is the *right* to bear arms in defence of the citizens and the state, that is secured by the constitution, and whatever restrains the full and complete exercise of that right, though not an entire destruction of it, is forbidden by the explicit language of the constitution. If, therefore, the act in question imposes any restraint on the right, immaterial what appellation may be given to the act, whether it be an act regulating the manner of bearing arms or any other, the consequence, in reference to the constitution, is precisely the same, and its collision with that instrument equally obvious.

And can there be entertained a reasonable doubt but the provisions of the act import a restraint on the right of the citizens to bear arms? The court apprehends not. The right existed at the adoption of the constitution; it had then no limits short of the moral power of the citizens to exercise it, and it in fact consisted in nothing else but in the liberty of the citizens to bear arms. Diminish that liberty, therefore, and you necessarily restrain the right; and such is the

diminution and restraint, which the act in question most indisputably imports, by prohibiting the citizens wearing weapons in a manner which was lawful to wear them when the constitution was adopted. In truth, the right of the citizens to bear arms, has been as directly assailed by the provisions of the act, as though they were forbid carrying guns on their shoulders, swords in scabbards, or when in conflict with an enemy, were not allowed the use of bayonets; and if the act be consistent with the constitution, it cannot be incompatible with that instrument for the legislature, by successive enactments, to entirely cut off the exercise of the right of the citizens to bear arms. For, in principle, there is no difference between a law prohibiting the wearing concealed arms, and a law forbidding the wearing such as are exposed; and if the former be unconstitutional, the latter must be so likewise." - Bliss v. Commonwealth, 2 Litt. 90, 12 Ky. 90, 13 Am. Dec. 251 (1822).

In a little known Virginia case not dealing with Article I, Section 13, of the Virginia Constitution, the Virginia court stated the following in an 1824 case, "Upon the second alleged error, the Court are clearly of opinion, that there is nothing in the Constitution or Bill of Rights, repugnant to the power which the Legislature has exercised in the punishment of this crime. Notwithstanding the general terms used in the Bill of Rights, it is undeniable that it never was contemplated, or considered, to extend to the whole population of the State. Can it be doubted, that it not only was not intended to apply to our slave population, but that the free blacks and mulattoes were also not comprehended in it? The leading and most prominent feature in that paper, is the equality of civil rights and liberty. And yet, nobody has ever questioned the power of the Legislature, to deny to free blacks and mulattoes, one of the first privileges of a citizen; that of voting at elections, although they might in every particular, except color, be in precisely the same condition as those qualified to vote. The numerous restrictions imposed on this class of people in our Statute Book, many of which are inconsistent with the letter and spirit of the Constitution, both of this State and of the United States, as respects the free whites, demonstrate, that, here, those instruments have not been considered to extend equally to both classes of our population. We will only instance the restriction upon the migration of free blacks into this State, and upon their right to

bear arms." - John Aldridge v. The Commonwealth, 4 Va. 447; Va. (2 Va. Cas.) 447, (1824).

In 1847 a conscription or draft case came before the Virginia Supreme court in which it noted, "The President, under the act of May 1846, had power to call out the militia, of which the appellee, by the laws of Virginia, was one...During the war of the revolution, sixteen was the military age. All of that age were enrolled in the militia, subject to be drafted, or called out en masse; as was the case in our last war with England, in some of the lower counties of Virginia. In the war of the revolution, too, commissions were given to many who were not twenty-one years of age. I myself received a commission as first lieutenant in Col. Harrison's regiment of artillery, before I was seventeen years of age, whilst I was at school; and served three years, to the end of the war. The military age absolved all from the control of parents, guardians, or masters, as to military engagements and service, as of higher obligations to the country." - United States v. Blakeney, Va., 3 GRATT, (1847).

When the Confederacy fell in 1865, the first act of the reconstruction government was to destroy the Virginia Militia system. In violation of the Virginia Constitution the reconstruction government made the new militia an all volunteer militia as well as an active and inactive militia in 1872 to emulate the same ineffective Northern militia system that General George Washington had held in contempt. "The active militia shall be composed of volunteers...The organization of the active militia shall conform generally to the provisions of the laws of the United States regulating the militia..."⁴⁸ The Virginia Bill of Rights as written by George Mason does not recognize the concept of an active or inactive militia. Militia service was compulsory and was composed of the body of the people trained to arms. It was not an all volunteer military structure. "And on the same day Burroughs received from the Governor of Virginia a certificate

exempting him from all military service, except ordinary militia duty...An army is a body of men whose business is war: the militia a body of men composed of citizens occupied ordinarily in the pursuits of civil life, but organized for discipline and drill, and called into the field for temporary military service when the exigencies of the country require it...A well regulated militia has (as is stated in one of the amendments) always been regarded as necessary to the security of a free state. Burroughs v. Peyton, 57 Va. (16 GRATT), 470, p179, 178, 181(1864).

The degradation of the Virginia militia starts to become apparent at the beginning of the 20th century. Mob rule in race relations begins to take place and the all volunteer militia fails to accomplish its task as described in a court case involving venue and a fair trial.

“ That, notwithstanding the presence of the military at Onancock, your petitioner was compelled to remain in hiding for several days longer, to protect himself from the feeling which had been aroused against him... Your petitioner has been informed that it has been deemed necessary by the authorities of the county of Accomac, since said riot, to keep a portion of the military forces of the state of Virginia at Onancock up to and including the 1st day of September, 1907, for the purpose of preserving public peace and order, so great is the feeling and indignation of the citizens of Onancock towards your petitioner and other persons of his race at Onancock...Your petitioner further alleges that so great is the public indignation and feelings in the county of Accomac against him that the judge of this honorable court has deemed it necessary to protect your petitioner from violence to cause the sheriff of Accomac county to summon and carry with him to the city of Norfolk an armed posse of twenty citizens from the county of Accomac, to protect your petitioner and others from violence of the citizens of said county of Accomac, and he was, on September 5, 1907, brought back from the city of Norfolk, Va. to the said county of Accomac by said body of armed citizens, and was by them placed in jail all night, and he was, on the 6th day of September, 1907, brought into your honor’s court, closely guarded by said posse of armed citizens in order to afford him the protection to which he is entitled to by law, and he is now being guarded by said posse.” Uzzle v. Commonwealth, 107 Va. 919; 60 S.E. 52, 53; (1908).

The militia failed to secure a safe environment for the accused and the legal power of the posse comitatus had to be invoked to protect the individual by a force of

armed citizens. The militia was no longer composed of the body of the people and as George Mason warned, “the militia of the future day may not consist of all classes, high and low, and rich and poor.”

The Contemporary Amendment to the Virginia Constitution

In more contemporary times the Virginia General Assembly acted to clarify its understanding of the right to keep and bear arms through House Joint Resolution No. 21. *Concerning the inherent right of citizens of this Commonwealth to own and bear arms.*, in January 1964. It is important to note that this joint resolution was passed just two months after President John F. Kennedy was assassinated in November 1963. The Resolution states in part:

“Whereas, from the landing at Jamestown on to the expansion of this nation to the Pacific coast, a peaceful society developed in the area that was wrested from the wilderness by sturdy riflemen armed with their personal weapons and skilled in their use; and

Whereas, the history of this great nation bears witness to the many benefits derived by a citizenry, free to own - bear - and become skilled in the use of rifles and other firearms and among these historic occasions, to mention but a few, were the following: Valley Forge, Yorktown, New Orleans, the Alamo, Manassas, Chateau Thierry, Tarawa and Iwo Jima; and

Whereas, the right of the citizen is entwined in the very roots of the founding of this Commonwealth when it was not only the individual's right to bear arms but his duty to bear arms in the defense of his community...

...Resolved by the House of Delegates, the Senate concurring, That the right to keep and bear arms guaranteed by the second amendment to the Constitution of the United States and which right is an inalienable part of our citizens' heritage in this State shall not be infringed; that any action taken by the General Assembly of Virginia to interfere with this right would strike at the basic liberty of our citizens; that no agency of this State or of any political subdivision should be given any power or seek any power which would interfere with, restrict, or

prohibit the purchase, possession, or use of firearms by any citizen of good standing for the purpose of personal defense, sport, recreation or other non-criminal activities; and be it further

Resolved, That the Clerk of the House of Delegates be instructed to send a copy of this resolution to every member of the Virginia Delegation in the Congress of the United States as a reminder of the fact that laws cannot prevent tragedies but bad laws can bring on in their train even greater tragedies.⁷⁴⁹

The Virginia constitution Article I, Section 13, is eventually amended in 1971 to add the explicit wording, “therefore, the right of the people to keep and bear arms shall not be infringed.” The adoption of this wording takes place by popular vote by the qualified voters of Virginia who went to the polls in 1970 and consented to its passage. “The Constitution is the fundamental law of Virginia. It is the charter by which our people have consented to be governed; it sets forth the basic rights and principles sought to be maintained and preserved in a free society;” Coleman v. Pross, 219 Va. 143. 152. (1978). No new fundamental rights were enumerated in the 1971 constitutional amendment that did not already exist as a fundamental right on June 12, 1776.

¹ 1 Hening’s Statutes at Large, p. 64.

² Ibid, p. 127.

³ Ibid, p. 174.

⁴ Ibid, p. 199.

⁵ Ibid, p. 224.

⁶ Ibid.

⁷ Ibid, p. 226.

⁸ Ames, Susie M., *County Court Records of Accomack-Northampton, Virginia, 1640-1645*, University Press of Virginia Charlottesville, P105, 268 (1973).

⁹ 1 Hening’s Statutes at Large, p. 365.

¹⁰ 2 Hening’s Statutes at Large, p. 511-517.

¹¹ Ibid, p. 366.

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- ¹² <http://www.yale.edu/lawweb/avalon/england.htm>
- ¹³ 2 Hening's Statutes at Large p. 48, 84.
- ¹⁴ 3 Hening's Statutes at Large, p. 340.
- ¹⁵ Ibid, p. 339.
- ¹⁶ 7 Hening's Statutes at Large, p. 93.
- ¹⁷ Ibid, p. 106-107.
- ¹⁸ <http://memory.loc.gov/master/mss/mtj/mtj1/001/0100/0177.jpg>
- ¹⁹ Peterson, Merrill D., *The Portable Thomas Jefferson*, p. 129. (1987).
- ²⁰ 7 Hening's Statutes at Large, p. 43.
- ²¹ Tucker, *Blackstone's Commentaries*, Vol 5. Chapter 21. (1803).
- ²² Ibid.
- ²³ Ibid, Chapter 11.
- ²⁴ Ibid, Chapter 21.
- ²⁵ 8 Hening's Statutes at Large, p. 176-179.
- ²⁶ Tucker, *Blackstone's Commentaries*, Vol 1. Note D. (1803).
- ²⁷ Hays, Stuart, R., William and Mary Law Review, *The Right to Bear Arms, A Study in Judicial Misinterpretation*, Vol. 2:381, 388. (1960).
- ²⁸ Mayer, Henry, *A Son of Thunder, Patrick Henry and the American Republic*, p.102. (1991).
- ²⁹ http://www.pastportal.com/cwdl_new/VA_Gazet/Images/VG/1746/0072hi.jpg
- ³⁰ http://www.pastportal.com/cwdl_new/VA_Gazet/Images/D/1779/0139hi.jpg
- ³¹ http://www.pastportal.com/cwdl_new/VA_Gazet/Images/D/1777/0223hi.jpg
- ³² 7 Hening's Statutes at Large, p. 36.
- ³³ The Papers of George Mason, Gunston Hall Plantation, (Rutland, Vol I, p.229-232)
- ³⁴ [http://memory.loc.gov/cgi-bin/query/r?ammem/rbpe:@field\(DOCID+@lit\(rbpe1780130d\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/rbpe:@field(DOCID+@lit(rbpe1780130d)))
- ³⁵ [http://memory.loc.gov/cgi-bin/query/r?ammem/mgw:@field\(DOCID+@lit\(gw070064\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/mgw:@field(DOCID+@lit(gw070064)))
- ³⁶ 10 Hening's Statutes at Large, p. 411.
- ³⁷ The Papers of George Mason, Gunston Hall Plantation, (Rutland, Vol II, p.700-711)
- ³⁸ The Papers of George Mason, Gunston Hall Plantation, (Rutland, Vol I, p.215-216)
- ³⁹ <http://www.yale.edu/lawweb/avalon/const/ratva.htm>
- ⁴⁰ Federalist No. 46., January 29, 1788. http://thomas.loc.gov/home/histdox/fed_46.html
- ⁴¹ Richard Henry Lee, The Pennsylvania Gazette, Feb. 20, 1788.
- ⁴² The Papers of George Mason, Gunston Hall Plantation, (Rutland, Vol III, p.1074-1075)
- ⁴³ The Papers of George Mason, Gunston Hall Plantation, (Rutland, Vol III, p.1080-1081)
- ⁴⁴ Elliot, Jonathan, *ELLIOT'S DEBATES, THE DEBATES IN THE CONVENTION OF THE COMMONWEALTH OF VIRGINIA, ON THE ADOPTION OF THE FEDERAL CONSTITUTION.*, Thursday, June 5, 1788, p51-53. http://www.constitution.org/rc/rat_va_04.htm
- ⁴⁵ Elliot, Jonathan, *ELLIOT'S DEBATES, THE DEBATES IN THE CONVENTION OF THE COMMONWEALTH OF VIRGINIA, ON THE ADOPTION OF THE FEDERAL CONSTITUTION.*, Thursday, June 14, 1788, p385-386. http://www.constitution.org/rc/rat_va_12.htm
- ⁴⁶ Elliot, Jonathan, *ELLIOT'S DEBATES, THE DEBATES IN THE CONVENTION OF THE COMMONWEALTH OF VIRGINIA, ON THE ADOPTION OF THE FEDERAL CONSTITUTION*, Tuesday, June 24, 1788, p587-589, 594. http://www.constitution.org/rc/rat_va_20.htm

⁴⁷ Elliot , Jonathan, *ELLIOT'S DEBATES, THE DEBATES IN THE CONVENTION OF THE COMMONWEALTH OF VIRGINIA, ON THE ADOPTION OF THE FEDERAL CONSTITUTION.*, Wednesday, June 25, 1788, p646. http://www.constitution.org/rc/rat_va_21.htm

⁴⁸ Acts of Assembly, Chap I, p. 391. (1872).

⁴⁹ House Joint Resolution No. 21., Journal of the House of Delegates, p. 98. (1964).