

The History of the English Militia.

By John Hurst. The Magna Carta Society.

1. Summary.

Service in the English Militia is an ancient obligation of all able bodied men. It is the main reason why the loyal subject has the lawful obligation to provide and train himself with the weapons of the soldier of the day. The other reasons are law enforcement and self defence.

It was the duty of the Parish Constable to ensure that these obligations are complied with, the Parish to keep a supply of ammunition and also a supply of weapons for those who cannot afford them and the Lord Lieutenant of each County to make arrangements for the Militia to be properly Officered and trained together ready for service in an emergency.

Those emergencies included riot, insurrection and invasion.

2. Historical background.

Our cousins in the Common law Countries often kept the customs and Rights of Englishmen better than we have in England. This article by a Canadian explains the early history:

“ A BRIEF HISTORY OF CONSTABLES IN THE ENGLISH SPEAKING WORLD
[FOR A MORE DETAILED HISTORY CLICK HERE]

Fifteen centuries ago, in 438 A.D. the Roman Emperor Theodosius appointed the chief of his royal stables comes stabuli -- "Master of the Stable." This is the origin of the word "constable" in the English language.[1] The office of constable was introduced into British common law following the Norman invasion of the British Isle in 1066 A.D. The constable was responsible for keeping the militia and armaments of the king, and those of the individual villages, in a state of preparedness for the protection of the village communities throughout England. The office eventually became an integral arm of the military throughout Britain. During the reign of King Stephen, (1135-1154) the office of Lord High Constable was established, and those who filled this position became the King's representatives in all matters dealing with the military affairs of the realm.[2]

Authority for local law-enforcement derived primarily from the Statute of Winchester (1285), which, although essentially a codification of much earlier measures, encompassed instructions on the communities' obligations regarding the possession of weapons and maintenance of the king's peace.[3] As a precaution against violent assaults, robberies and other unlawful acts, there were provisions concerning watch keeping. The statute specifically gave the power to constables and watchmen to arrest suspicious strangers, who were to be kept under guard until further investigation by the eyre justices or, as was the norm by the fourteenth century, at gaol delivery. Two constables in each hundred (a subdivision of counties), who were responsible to the county keepers of the peace, were entrusted with the inspection of arms and on two occasions each year were to check that the watchmen were armed according to their competence.[4] They held the titles of capitales constabularii et custodes pacis—"constable of hundreds and keepers of peace." [5]

The enforcement responsibilities accorded constables and bailiffs after the Black Death brought their duties into the economic sphere. The Ordinance (1349) and Statute of Labourers (1351) appointed them to control the movement, conduct and service arrangements of labourers and servants within their jurisdiction. Workers who left the village could be arrested.[6] (In nineteenth century Toronto, there remained a category of offence known as “Deserting Employment” applicable to apprentices and servants.)

From the medieval epoch until the nineteenth century, the primary proactive system of organized policing in the English speaking world, aside from the modern professional “thief takers” in London, was the watch and ward—patrols, usually at night, composed of citizens under the supervision of the High Constable, a county-level appointment. Under the concept of the watch and ward, also known as the parish watch, every citizen was compelled under penalty of law, to serve as a volunteer night sentry or watchman a certain number of days a year. Refusing a High Constable's call to report for watch and ward was punishable by fines and/or imprisonment...”.

<http://www.russianbooks.org/crime/cph1.htm>

Note in particular this:

“The constable was responsible for keeping the militia and armaments of the king, and those of the individual villages, in a state of preparedness for the protection of the village communities throughout England...”.

3. Legal Background.

Because these arrangements are the Common Law and Custom of England they remain as the Law of the Land. Halsbury's Laws of England confirms this:

“ Halsbury's Laws of England/CONSTITUTIONAL LAW AND HUMAN RIGHTS (VOLUME 8(2) (REISSUE))/7. MISCELLANEOUS FUNCTIONS OF THE CROWN/(5) EXECUTIVE POWERS IN EMERGENCIES/821. Martial law.

821. Martial law.

The Crown may not issue commissions in time of peace to try civilians by martial law¹; but when there exists a state of actual war, or of insurrection, riot or rebellion amounting to war², the Crown and its officers may use the amount of force necessary in the circumstances to restore order³....

Whether this power of using extraordinary measures is really a prerogative of the Crown or whether it is merely an example of the common law right and duty of all, ruler and subject alike, to use the amount of force necessary to suppress disorder¹¹, is not quite free from doubt¹². It is, however, clear that so-called military courts set up under martial law are not really courts at all¹³, and so an order of prohibition will not issue to restrain them¹⁴. Probably the correct view to take of martial law itself is that it is no law at all¹⁵. No state of martial law was declared in the United Kingdom during the two world wars¹⁶...”.

Note these words “the common law right and duty of all, ruler and subject alike,...”.

Here is Footnote 11: “As to this see R v Pinney (1832) 3 B & Ad 947; and Lord Justice Bowen's Report on the Featherstone Riots 1893-94 (Cd 7234)...”.

Here is a quote from Dicey which acknowledges the loyal subjects obligation “Right and duty” in this regard relying on Pinney from an Australian source:

“Now a person, whether a magistrate, or a peace-officer, who has the duty of suppressing a riot, is placed in a very difficult situation, for if, by his acts, he causes death, he is liable to be indicted for murder or manslaughter, and if he does not act, he is liable to an indictment on an information for neglect; he is, therefore, bound to hit the precise line of his duty: and how difficult it is to hit that precise line, will be a matter for your consideration, but that, difficult as it may be, he is bound to do.

R v Pinney (1832) 5 Car & P [254], [270] (Littledale J).

THE USE OF LETHAL FORCE BY MILITARY FORCES ON LAW ENFORCEMENT OPERATIONS — IS THERE A 'LAWFUL AUTHORITY'? Rob McLaughlin

<http://www.austlii.edu.au/au/journals/FedLRev/2009/17.pdf>

A soldier is bound to obey any lawful order which he receives from his military superior. But a soldier cannot any more than a civilian avoid responsibility for breach of the law by pleading that he broke the law in bona fide obedience to the orders (say) of the commander-in-chief. Hence the position of a soldier is in theory and may be in practice a difficult one. He may, as it has been well said, be liable to be shot by a court-martial if he disobeys an order, and to be hanged by a judge and jury if he obeys it.

A V Dicey, Introduction to the Study of the Law of Constitution (10th ed, 1959) 303.

Control of the Militia was contested in the civil war period:

“In the midst of the English Civil War there was some debate as to whether the militia should be a supplement or an alternative to a standing army, and a series of ordinances were passed in attempts to replace the repealed 1558 act. These reflected the ongoing struggle for control of the militia until, in the early 1660s, new legislation established the militia under the control, through the lieutenancy, of the gentry. The legislation made it a counter to the standing army, the main bulwark against disorder and the guarantee of the political settlement.[19]...”.

[https://en.wikipedia.org/wiki/Militia_\(English\)](https://en.wikipedia.org/wiki/Militia_(English))

The Declaration and Bill of Rights 1688 settled the matter with two interlocking “Heads of Grievance” and “Subjects Rights”:

Grievances:

“Standing Army.

By raising and keeping a Standing Army within this Kingdome in time of Peace without Consent of Parlyament and Quartering Soldiers contrary to Law.

Disarming Protestants, &c.

By causing severall good Subjects being Protestants to be disarmed at the same time when Papists were both Armed and Employed contrary to Law....

The Subjects Rights:

Standing Army.

That the raising or keeping a standing Army within the Kingdome in time of Peace unlesse it be with Consent of Parlyament is against Law.

Subjects' Arms.

That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law...”.

The Second Amendment to the United States Constitution is based on these concepts:

“The Second Amendment was based partially on the right to keep and bear arms in English common law and was influenced by the English Bill of Rights of 1689. Sir William Blackstone described this right as an auxiliary right, supporting the natural rights of self-defense and resistance to oppression, and the civic duty to act in concert in defense of the state.[12]...”.

Footnote 12: “Blackstone's Commentaries on the Laws of England Book the First - Chapter the First : Of the Absolute Rights of Individuals.

http://avalon.law.yale.edu/18th_century/blackstone_bk1ch1.asp

The US Supreme Court took into account the ancient English precedents in District of Columbia v. Heller, 554 U.S. 570 (2008) and upheld the US, and therefore the English, Right to Keep and Bear Arms for Militia Duty and private defence:

“ (b) The prefatory clause comports with the Court’s interpretation of the operative clause. The “militia” comprised all males physically capable of acting in concert for the common defense. The Antifederalists feared that the Federal Government would disarm the people in order to disable this citizens’ militia, enabling a politicized standing army or a select militia to rule. The response was to deny Congress power to abridge the ancient right of individuals to keep and bear arms, so that the ideal of a citizens’ militia would be preserved. Pp. 22–28....”.

https://en.wikipedia.org/wiki/District_of_Columbia_v._Heller

Note the warning against a “Select” Militia which would allow one political faction to oppress others.

It should be noted that the routine arming of Constables is prohibited because they would be a standing army that Parliament has not authorised. Mike Burke has done research which leads him to believe that police Inspectors and above are automatically "Officers of the Militia" and as such can authorise constables to be armed when necessary for specific incidents.

4. A high point of the Militia was arguable the Militia Act 1802:

"The Militia Act 1802 (42 Geo. III, c. 90) was an Act of Parliament of the United Kingdom affecting the Militia, a locally raised force for home defence. It applied to England and Wales, with Scotland covered by the Militia (Scotland) Act 1802, and Ireland by the Militia (Ireland) Act 1802. Subsidiary acts dealt with the City of London, the Cinque Ports, and the Stannaries, which had special legal requirements.

Provisions of the Act

The Act brought together a number of the Militia Acts which had been passed during the French Revolutionary Wars (1794-1802), repealing them but broadly re-enacting their content. It provided for an "Old Militia" with a total strength of 51,489 in England and Wales (including the City of London, Cinque Ports, and Stannaries), and allowed for a "Supplementary Militia" of half as many again which could be raised with Parliamentary approval.[1]

Each county's Lord Lieutenant would set the amount of militiamen to be raised from the various areas of their country (for example, dividing it by hundreds), and parish constables would draw up lists of all eligible men between 18 and 45. Men were divided into five classes:

Under 30, no children

Over 30, no children

All men, no living children under 14

All men, one child under 14

All other men

Men were to be drawn from the classes in order - if a quota could be filled only from the first and second classes, the third, fourth and fifth were untouched. A class could be taken in its entirety if it was below the absolute quota, but if larger than the number required, a ballot was to be used. Any man who was taken into service through this process was known as a "principal", and was sworn in to serve as a private soldier for a term of five years, after which they were exempt until a fresh ballot was made, or could volunteer for further service. Instead of serving themselves, they could arrange to provide a "personal substitute" who was willing to serve in their stead; this could be a volunteer already on the local ballot, or someone from elsewhere in the county (or a neighbouring county), and it was expected that they would receive a bounty of a few pounds to encourage them to volunteer. Parishes could also arrange to provide parochial substitutes in lieu of their quota of men, and were allowed to levy a parish rate in order to pay bounties to these substitutes. Finally, any balloted man could pay a fine of £10 and avoid service, though he would be liable to be balloted again after five years. The fines were used to hire substitutes and any surplus would go to regimental funds.[1]

A wide range of men were exempt - most obviously, officers and men of the Army, Navy and Marines, but also peers, clergymen, teachers, university students, constables, sailors, apprentices, or

men working in royal arsenals or dockyards. A poor man (defined as one with assets of less than £100) with more than one legitimate child was exempt, as was any poor man physically unfit for service, or any man at all less than 5'4" tall. A man worth more than £100 but unfit for service was still liable to pay his fine or provide a substitute. Quakers were not allowed to avoid service through paying a fine, but were required to find a substitute in lieu of service; if they did not do so, the county was empowered to hire one on his behalf and if necessary seize his property to pay for it.[1]

Any men who died or were discharged as unfit would produce a second ballot of the county (in practice, probably of his local parish) to find a replacement. Should the county fail to provide enough men, it would be fined £10 per head of the annual deficit; this money was to be raised locally and could be used to hire substitutes, but if this failed to achieve the desired result, it was paid to the Treasury.[1]...”.

https://en.wikipedia.org/wiki/Militia_Act_1802

This Act, and others relating to the Militia, were repealed by the Territorial Army and Militia Act 1921.

https://en.wikipedia.org/wiki/Territorial_Army_and_Militia_Act_1921

It is important to note that the City of London has retained its Militia to the present day.

5. Notwithstanding the 1921 Act, the loyal subjects military responsibilities are part of the English Common Law and custom. As such, they are protected by the Coronation Oath.

We submit that the time has come for the examples of our wise ancestors to be reinstated:

"The right of His majesties subjects to have arms for their own defence, and to use them for lawful purposes, (such as hunting) is most clear and undeniable. It seems, indeed, to be considered, by the ancient laws of the Kingdom, not only as a right, but as a duty... And that this right which every (subject) most unquestionably possesses individually may, and in many cases must, be exercised collectively, is likewise a point which I conceive to be most clearly established...

It seems to follow, of necessary consequence, that it cannot be unlawful to learn to use them (for such lawful purposes) with safety and effect. For it would be too gross an absurdity to allege that it is not lawful to be instructed in the use of anything which is lawful to use...

"The lawful purposes for which such arms may be used (besides immediate self defence) are the suppression of violent and felonious breaches of the Peace, the assistance of the Civil Magistrates in the execution of the laws, and the defence of the kingdom against foreign invaders".

To strengthen the civil power, and to keep themselves at all times prepared for a vigorous and effectual discharge of their duty as citizens ... are, in my view, sufficient visible and legal objects for the continuation of the London Association".

The Recorder of London, 1795.

(From "The Origins and Development of the Second Amendment". David T. Hardy. 1995). The London Association was ancestral to the volunteer movement of the Victorian period which led to the establishment of the National Rifle Association.

The "London Association" was very much part of the establishment:

"Sir James Sanderson, Lord Mayor 1792-3. He played a major role as chairman of the London Association for aiding the Civil Powers in suppressing seditious meetings, for which he received his baronetcy. He was very active in preparing the city for possible invasion following the declaration of war by France on the 1st February 1793, promoting the Volunteer Corps Act and the City Militia Act. He was founder of the Revolution Society, an organisation established to celebrate anniversaries of the 1688 revolution...".

6. Disclaimer. This essay is not legal advice. We are in the age of the Internet. Research has never been more accessible.