

# WHY CAN'T WE BE LIKE FRANCE? HOW THE RIGHT TO BEAR ARMS GOT LEFT OUT OF THE DECLARATION OF RIGHTS AND HOW GUN REGISTRATION WAS DECREED JUST IN TIME FOR THE NAZI OCCUPATION

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[F]ew saw the Third Reich coming until it was too late. The Second Amendment is a doomsday provision, one designed for those exceptionally rare circumstances where all other rights have failed . . . . However improbable these contingencies may seem today, facing them unprepared is a mistake a free people get to make only once.

– Judge Alex Kozinski<sup>1</sup>

## INTRODUCTION

Should the Second Amendment to the U.S. Constitution be watered down to protect little if any right of the people to keep and bear arms in accordance with European models?<sup>2</sup> Disregarding that

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1. *Silveira v. Lockyer*, 328 F.3d 567, 570 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc).

2. “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II.

the United States won its Revolution based on that very right, recent statements made by Supreme Court Justices suggest they believe so.<sup>3</sup> Part I of this Article discusses four opinions in which Supreme Court Justices opined inconsistently using the experiences of European countries as models in construing the meaning of firearms laws and determining their constitutionality under the Second, Tenth, and Fourteenth Amendments.

This same debate has been played out in Congress, where registration of firearms, supported by arguments in support of European models, has been rejected.<sup>4</sup> Part II traces the debate from the beginning of World War II in 1941 through passage of three major firearm laws in 1968, 1986, and 1993.

A guarantee of the equivalent of America's Second Amendment was considered but not adopted by the French National Assembly in the French Declaration of Rights of 1789.<sup>5</sup> As discussed in Part III, Third Estate bodies throughout France demanded that commoners have a right to possess arms, while the nobility sought continuation of their traditional monopoly of arms.

Without recognition of this right, the French government of Prime Minister Pierre Laval easily decreed the registration of firearms and firearm owners in 1935.<sup>6</sup> As Part IV notes, Laval would later become the chief architect of collaboration with Nazi Germany.

When Nazi Germany occupied France beginning in 1940, it relied on the French police and its own military might to confiscate firearms and to subject gun owners to the death penalty.<sup>7</sup> Part V traces how the police could use the firearm registration records to ferret out gun owners, evolving Nazi policies for both amnesties and executions to enforce the gun ban, and how uncertainty regarding who refused to surrender firearms made it less secure for the Nazis.

This experience exemplifies America's Second Amendment as a "doomsday provision," as Judge Kozinski articulated.<sup>8</sup> As Part VI concludes, advocates of watering down the Second Amendment by

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3. *See infra* Part I.

4. *See infra* Part II.

5. *See infra* Part III.

6. *See infra* Part IV.

7. *See infra* Part V.

8. *See infra* Part VI; *see also* *Silveira v. Lockyer*, 328 F.3d 567, 570 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc).

looking to foreign experiences would do well to consider France's tragic history.<sup>9</sup>

## I. FOREIGN LAW IN SUPREME COURT FIREARM LAW CASES

### A. *Printz v. United States* (1997): Congress May Not Commandeer the States to Administer the Federal Gun Control Act

The federal Brady Act of 1993 commanded state and local law enforcement officers to conduct background checks on handgun buyers.<sup>10</sup> The Supreme Court in *Printz v. United States* (1997) declared this conscription of the states to administer a federal regulatory program beyond the power of Congress to regulate commerce among the states and inconsistent with the reservation of powers to the states in the Tenth Amendment.<sup>11</sup>

Writing for the Court, Justice Scalia noted that dissenting Justice Breyer

would have us consider the benefits that other countries, and the European Union, believe they have derived from federal systems that are different from ours. We think such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one.<sup>12</sup>

Indeed, the Framers knew about many federal systems in history but rejected them.<sup>13</sup>

Justice Scalia continued: "Antifederalists . . . pointed specifically to Switzerland—and its then-400 years of success as a 'confederate republic'—as proof that the proposed Constitution and its federal structure was unnecessary."<sup>14</sup> He cited speeches by Patrick Henry in

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9. Before World War II, the Nazis used firearm registration records domestically to disarm political opponents and Jews in Germany itself. See Stephen P. Halbrook, "Arms in the Hands of Jews Are a Danger to Public Safety": *Nazism, Firearm Registration, and the Night of the Broken Glass*, 21 ST. THOMAS L. REV. 109, 131 (2009); Stephen P. Halbrook, *Nazism, the Second Amendment, and the NRA: A Reply to Professor Harcourt*, 11 TEX. REV. L. & POL. 113, 121 (2006); Stephen P. Halbrook, *Nazi Firearms Law and the Disarming of the German Jews*, 17 ARIZ. J. INT'L & COMP. L. 483, 529 (2000).

10. See Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 102(a)(1), 107 Stat. 1536, 1536-39 (1993) (codified as amended at 18 U.S.C. § 922(s) (2006)).

11. *Printz v. United States*, 521 U.S. 898 (1997).

12. *Id.* at 921 n.11.

13. See *id.*

14. *Id.*

the Virginia Ratifying Convention of 1788, but did not discuss their content.<sup>15</sup>

Patrick Henry, a leading Antifederalist, had argued: “Switzerland is a Confederacy, consisting of dissimilar Governments. . . . In this vicinity of powerful and ambitious monarchs, they have retained their independence, republican simplicity and valour.”<sup>16</sup> After James Madison painted a gloomy picture of the Swiss Confederation,<sup>17</sup> Henry retorted:

Switzerland consists of thirteen cantons expressly confederated for national defence. They have stood the shock of 400 years: That country has enjoyed internal tranquillity most of that long period. . . . Those virtuous and simple people have not a mighty and splendid President—nor enormously expensive navies and armies to support. . . . Let us follow their example, and be equally happy. The Honorable member advises us to adopt a measure which will destroy our Bill of Rights.<sup>18</sup>

Without discussion of Henry’s oratory, Justice Scalia concluded: “The fact is that our federalism is not Europe’s. It is ‘the unique contribution of the Framers to political science and political theory.’”<sup>19</sup> He did not analyze whether federalism in Europe may be quite diverse, an irrelevant issue given that the only issue was the meaning of the U.S. Constitution.

Justice Breyer, joined by Justice Stevens, argued in dissent that European models in which states implement laws passed by the central authority should counsel interpretation of the U.S. Constitution as a matter of policy.<sup>20</sup> “The federal systems of Switzerland, Germany, and the European Union, for example, all provide that constituent states, not federal bureaucracies, will themselves implement many of the laws, rules, regulations, or decrees enacted by the central ‘federal’ body.”<sup>21</sup> But these entities could not be more diverse: (1) Switzerland is the Confederation Helvetia, where the central government is limited and the Cantons retain great

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15. *Id.*

16. 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 966 (John P. Kaminski & Gaspare J. Saladino eds., 1990).

17. *See id.* at 994, 1030.

18. *Id.* at 1040-41.

19. *Printz*, 521 U.S. at 921 n.11 (quoting *United States v. Lopez*, 514 U.S. 549, 575 (1995) (Kennedy, J., concurring) (citation omitted)).

20. *See id.* at 976-77 (Breyer, J., dissenting).

21. *Id.* at 976.

sovereignty,<sup>22</sup> (2) Germany has federal features today but Hitler's Third Reich made the German *Länder* (States) mere puppets of the central authority,<sup>23</sup> and (3) the European Union is an unelected, centralized authority which the Swiss people voted not to join.<sup>24</sup>

Justice Breyer conceded that “we are interpreting our own Constitution, not those of other nations . . . .”<sup>25</sup> While not analyzing the text or original understanding of the Constitution, he added that the experience of the European countries “may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem—in this case the problem of reconciling central authority with the need to preserve the liberty-enhancing autonomy of a smaller constituent governmental entity.”<sup>26</sup> It remains unclear how commands by Congress to the states to administer federal laws enhances State and local autonomy.<sup>27</sup>

### B. *Small v. United States* (2005): Foreign Convictions Do Not Preclude Gun Possession

*Small v. United States* (2005) held that the federal prohibition on possession of a firearm by a person “who has been convicted *in any court* of, a crime punishable by imprisonment for a term exceeding one year”<sup>28</sup> did not apply to foreign convictions.<sup>29</sup> The “usual suspects” among the Justices were reversed in this case—Breyer wrote the opinion and was joined by Stevens, O’Connor, Souter, and

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22. See CONSTITUTION FÉDÉRALE [CST] [FEDERAL CONSTITUTION] Apr. 18, 1999, RO 101, art. 3 (Switz.), available at <http://www.admin.ch/ch/e/rs/1/101.en.pdf> (“The Cantons are sovereign except to the extent that their sovereignty is limited by the Federal Constitution. They shall exercise all rights that are not vested in the Confederation.”); *id.* art. 43a (“The Confederation shall only undertake tasks that the Cantons are unable to perform or which require uniform regulation by the Confederation.”).

23. See Armin Nolzen, *Charismatic Legitimation and Bureaucratic Rule: The NSDAP in the Third Reich, 1933–1945*, 23 GERMAN HISTORY 494, 497–99, 514 (2005).

24. In 2001, seventy-seven percent of Swiss voters rejected entering into negotiations to join the European Union. Elizabeth Olson, *Swiss Voters Solidly Reject Talks on Joining the European Union*, N.Y. TIMES, Mar. 5, 2001, at A4.

25. *Printz*, 521 U.S. at 977 (Breyer, J., dissenting).

26. *Id.*

27. While the Second Amendment was not raised in *Printz*, Justice Thomas suggested that the Act at issue could run afoul of the Amendment, and noted scholarship indicating that the right to keep and bear arms “is, as the Amendment’s text suggests, a personal right.” *Id.* at 938 n.2 (Thomas, J., concurring).

28. 18 U.S.C. § 922(g)(1) (2006) (emphasis added).

29. *Small v. United States*, 544 U.S. 385, 387 (2005).

Ginsburg, while Thomas wrote the dissent, joined by Scalia and Kennedy (Rehnquist taking no part in the decision).<sup>30</sup> Of all things, Mr. Small had been “convicted in a Japanese court of having tried to smuggle several pistols, a rifle, and ammunition into Japan,” and, after his release from prison, bought a gun when he returned to the United States.<sup>31</sup>

While involving a question of statutory interpretation without mentioning the Second Amendment, Justice Breyer noted that foreign convictions may cover conduct that domestic laws would preclude, like the Soviet prohibition on private entrepreneurship or the Cuban ban on propaganda that incites against the Communist State.<sup>32</sup> Such convictions would also include those from legal systems inconsistent with American concepts of fairness, such as where a man’s testimony equals that of two women.<sup>33</sup>

Foreign convictions “somewhat less reliably identif[y] dangerous individuals for the purposes of U.S. law,” and judges, prosecutors, and potential defendants cannot necessarily determine whether foreign law would apply.<sup>34</sup> Holding “that the phrase ‘convicted in any court’ applies domestically, not extraterritorially,”<sup>35</sup> the Court explained that “we have no reason to believe that Congress considered the added enforcement advantages flowing from inclusion of foreign crimes, weighing them against, say, the potential unfairness of preventing those with inapt foreign convictions from possessing guns.”<sup>36</sup>

Dissenting, Justice Thomas referred to the majority’s “parade of horrors” that “cherry-picks a few egregious examples” but “ignores countless other foreign convictions punishable by more than a year that serve as excellent proxies for dangerousness and culpability.”<sup>37</sup> Examples included Sweden’s ban on murder, Canada’s ban on making an automatic weapon, Mexico’s ban on terrorism by firearms or flooding, and Zambia’s ban on buying or selling slaves.<sup>38</sup> The drafters of the federal statute “would have considered whether

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30. *Id.* at 386.

31. *Id.* at 387.

32. *See id.* at 389.

33. *Id.* at 389-90.

34. *Id.* at 390.

35. *Id.* at 390-91.

36. *Id.* at 394.

37. *Id.* at 402 (Thomas, J., dissenting).

38. *See id.* at 402 n.7.

foreign convictions are, on average and as a whole, accurate at gauging dangerousness and culpability, not whether the worst-of-the-worst are.”<sup>39</sup> Nothing, however, is cited in the legislative history that indicates they did so.

Indeed, the provision at issue was first enacted in the Gun Control Act of 1968,<sup>40</sup> the chief sponsor of which was Senator Thomas J. Dodd,<sup>41</sup> a Nuremberg war crimes prosecutor who had prosecuted Nazis for, among other things, having prosecuted Jehovah’s Witnesses in the courts and sending them to concentration camps.<sup>42</sup> The provision was amended by the Firearms Owners’ Protection Act of 1986,<sup>43</sup> which was signed by President Ronald Reagan. Reagan praised Aleksandr Solzhenitsyn for exposing Soviet totalitarianism, under which Solzhenitsyn had been convicted of anti-Soviet crimes and sentenced to eight years imprisonment.<sup>44</sup> It is difficult to imagine that it would ever be a crime for such persons to buy a gun.

Justice Thomas continued that it was reasonable for Congress to count foreign convictions “as a proxy for dangerousness” based on “the facts of this very case: A week after completing his sentence for shipping two rifles, eight semiautomatic pistols, and hundreds of rounds of ammunition into Japan, Small bought a gun in this country.”<sup>45</sup> While not mentioned in the opinions, Japan has banned firearms almost completely.<sup>46</sup> Turning the historical clock back, when the British Crown banned the importation of firearms into the American colonies and began to confiscate arms in 1775, the colonists smuggled firearms to resist the Crown’s violation of what they considered to be the rights of Englishmen.<sup>47</sup> This was one of several

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39. *Id.* at 402.

40. *See* Pub. L. No. 90-618, 82 Stat. 1213, 1220–21 (1968) (codified as amended at 18 U.S.C. § 922(g)–(h) (2006)).

41. *See* 113 Cong. Rec. 3255 (1967) (introduction of S. 1, amend. 90).

42. *See* 3 INT’L MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 498 (1947), *available at* [http://www.loc.gov/rr/frd/Military\\_Law/pdf/NT\\_Vol-III.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-III.pdf).

43. Pub. L. No. 99-308, 100 Stat. 449 (1986).

44. *See generally* ALEKSANDR SOLZHENITSYN, THE GULAG ARCHIPELAGO (1974).

45. *Small v. United States*, 544 U.S. 385, 402-03 (2005).

46. *See* DAVID B. KOPEL, THE SAMURAI, THE MOUNTIE, AND THE COWBOY: SHOULD AMERICA ADOPT THE GUN CONTROLS OF OTHER DEMOCRACIES? 20–21 (1992). Japan permits limited ownership of shotguns for sport. *Id.*

47. *See* STEPHEN P. HALBROOK, THE FOUNDERS’ SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS 58-66 (2008).



attempts to disarm the Americans that later resulted in the Second Amendment.<sup>48</sup>

Based on that history, whether a “conviction for international gunrunning” is necessarily “perfectly consonant with American law,” as Justice Thomas argued,<sup>49</sup> may depend on the historical context and whether the firearms were to be used by law-abiding persons or by criminals.

But *Small* was a tempest in a teapot—only ten to twelve prosecutions based on foreign convictions had been prosecuted since the enactment of the Gun Control Act in 1968.<sup>50</sup> Moreover, the handful of cases arose primarily from convictions of Americans abroad, as foreigners with felony convictions are prohibited from entry into the United States under the immigration laws.<sup>51</sup>

### C. *District of Columbia v. Heller* (2008): The Second Amendment Really Does Guarantee the Right of “the People” to Keep and Bear Arms

The Supreme Court finally got around to analyzing the meaning of the Second Amendment in *District of Columbia v. Heller* (2008), which held that “the right of the people to keep and bear arms” includes the individual right to keep handguns in one’s home for self-defense.<sup>52</sup> The majority opinion by Justice Scalia did not address international comparisons, but it suggested that the Amendment expresses a universal human right, as it “codifie[s] a pre-existing right,”<sup>53</sup> protects “against both public and private violence,”<sup>54</sup> enables a nation “to resist tyranny,”<sup>55</sup> and is valued to allow “self-defense and hunting.”<sup>56</sup>

Only Justice Breyer made brief mention of international comparisons in his dissent. He referred to “a statistical analysis that regresses murder rates against the presence or absence of strict gun

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48. Crown authorities also restricted distribution of gunpowder, *see id.* at 65-67, engaged in search and seizure operations for arms, *see id.* at 69-72, and finally sought to confiscate arms by military force at Lexington and Concord, and then in Boston, *see id.* at 75-86.

49. *Small*, 544 U.S. at 403.

50. *See id.* at 394.

51. *See* 8 U.S.C. § 1101(a)(43)(E)(ii)-(iii) (2006).

52. *See* *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

53. *Id.* at 592 (emphasis omitted).

54. *Id.* at 594.

55. *Id.* at 598.

56. *Id.* at 599.

laws in 20 European nations. . . . That analysis concludes that strict gun laws are correlated with *more* murders, not fewer.”<sup>57</sup> Justice Breyer asked which is the cause and which is the effect—strict gun laws or higher crime rates—and noted: “The proposition that strict gun laws *cause* crime is harder to accept than the proposition that strict gun laws in part grow out of the fact that a nation already has a higher crime rate.”<sup>58</sup> The relevance of this discussion regarding the meaning of a constitutional right is unclear, just as the meaning of the right to counsel would not hinge on whether recognition thereof interferes with solving crimes and convicting the perpetrators.

Moreover, fundamental public policy must be based on more than a present-tense viewpoint. This Article will demonstrate that France had “strict gun laws” in 1940 and that the Nazis took advantage of them to commit crimes against humanity.

#### D. *McDonald v. City of Chicago* (2010): Application of the Second Amendment to the States

But foreign law was hotly debated in *McDonald v. City of Chicago* (2010), which held the Second Amendment to be applicable to the States through the Due Process Clause of the Fourteenth Amendment.<sup>59</sup> Writing for the plurality, Justice Alito rejected the argument that “if it is possible to imagine *any* civilized legal system that does not recognize a particular right, then the Due Process Clause does not make that right binding on the States.”<sup>60</sup> That argument assumed that “because such countries as England, Canada, Australia, Japan, Denmark, Finland, Luxembourg, and New Zealand either ban or severely limit handgun ownership, it must follow that no right to possess such weapons is protected by the Fourteenth Amendment.”<sup>61</sup> That argument was “stunning,” for example, because:

many of the rights that our Bill of Rights provides for persons accused of criminal offenses are virtually unique to this country. If

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57. *Id.* at 700 (Breyer, J., dissenting) (citing Brief of Criminologists et al. as Amici Curiae in Support of Respondent at 23, 554 U.S. 570 (2008) (No. 07-290), 2008 WL 383535 (citing Don B. Kates & Gary Mauser, *Would Banning Firearms Reduce Murder and Suicide? A Review of International and Some Domestic Evidence*, 30 HARV. J.L. & PUB. POL’Y 649, 651-94 (2007))).

58. *Id.* at 702.

59. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010).

60. *Id.* at 3044.

61. *Id.*

*our* understanding of the right to a jury trial, the right against self-incrimination, and the right to counsel were necessary attributes of *any* civilized country, it would follow that the United States is the only civilized Nation in the world.<sup>62</sup>

Concurring, Justice Scalia—perhaps the Court’s most vocal critic of using foreign law to interpret the U.S. Constitution—wrote: “No determination of what rights the Constitution of the United States covers would be complete, of course, without a survey of what *other* countries do.”<sup>63</sup> Characterizing Justice Stevens’s opinion as claiming that “our Nation is *already* an outlier among ‘advanced democracies’ [and] not even our ‘oldest allies’ protect as robust a right as we do,” Scalia noted: “Never mind that he explains neither which countries qualify as ‘advanced democracies’ nor why others are irrelevant.”<sup>64</sup>

The dissent would, according to Scalia, transform the selective incorporation of Bill of Rights guarantees in the Fourteenth Amendment into a selective incorporation of foreign law into the Amendment.<sup>65</sup> That approach “lets judges pick which rights States must respect and those they can ignore,” in that “this follow-the-foreign-crowd requirement would foreclose rights that we have held (and Justice Stevens accepts) are incorporated, but that other ‘advanced’ nations do not recognize . . . .”<sup>66</sup> It would require a judge either to “throw all of those rights overboard or, as cases Justice Stevens approves have done in considering unenumerated rights, simply ignore foreign law when it undermines the desired conclusion.”<sup>67</sup>

In his dissenting opinion, Justice Stevens wrote, “The experience of other advanced democracies, including those that share our British heritage, undercuts the notion that an expansive right to keep and bear arms is intrinsic to ordered liberty.”<sup>68</sup> He added that many such countries “place restrictions on the possession, use, and carriage of

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62. *Id.* (footnote omitted). The dissimilarity exists not just regarding procedural rights, but also substantive rights. For instance, the Fourteenth Amendment was held to incorporate the Establishment Clause, “[y]et several of the countries that municipal respondents recognize as civilized have established state churches.” *Id.* at 3045.

63. *Id.* at 3055 (Scalia, J., concurring).

64. *Id.* at 3055-56.

65. *See id.* at 3056.

66. *Id.*

67. *Id.* (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)) (noting that *Casey* made “no mention of foreign law”).

68. *Id.* at 3110 (Stevens, J., dissenting).

firearms far more onerous than the restrictions found in this Nation.”<sup>69</sup> That “[t]he United States is an international outlier in the permissiveness of its approach to guns” compared to England, Canada, Japan, and other nations suggests that the Court should not be responsible “for making our laws still more permissive.”<sup>70</sup>

While these other countries differed from the United States in “their problems with violent crime and the traditional role that firearms have played in their societies,” Stevens continued, “[t]he fact that our oldest allies have almost uniformly found it appropriate to regulate firearms extensively tends to weaken petitioners’ submission that the right to possess a gun of one’s choosing is fundamental to a life of liberty.”<sup>71</sup> He concluded that “it is silly—indeed, arrogant—to think we have nothing to learn about liberty from the billions of people beyond our borders.”<sup>72</sup>

The discussion at that point had strayed far afield from the meaning of the Second and Fourteenth Amendments. As a policy argument, it is unclear how much “liberty” exists among most of the world’s billions of people.<sup>73</sup>

Outside the Court, Justice Ginsburg noted, “I would rank as a dissenting opinion ‘appealing to the intelligence of a future day’ the criticisms Justice Stevens and Justice Breyer made of the Court’s decision in *District of Columbia v. Heller*.”<sup>74</sup> Moreover, “I would not look to the U.S. Constitution if I were drafting a constitution in the year 2012,” Justice Ginsburg told Egyptian TV, instead

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69. *Id.*

70. *Id.*

71. *Id.* at 3110-11.

72. *Id.* at 3111.

73. Although such foreign experiences are not normally discussed in litigation other than in the Supreme Court, whether onerous firearm registration requirements such as those that exist in foreign countries are consistent with the Second Amendment continues to be actively litigated in the lower courts. *See, e.g., Heller v. District of Columbia*, 670 F.3d 1244, 1258 (D.C. Cir. 2011) (“We cannot conclude . . . that the novel registration requirements—or any registration requirement as applied to long guns—survive intermediate scrutiny based upon the record as it stands.”).

74. Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 6 (2010). “The dissenters read the Amendment as establishing the right ‘to keep and bear Arms’ only in connection with service to the Nation in the Militia.” *Id.*

recommending the constitutions of South Africa and Canada.<sup>75</sup> These constitutions do not recognize the right to keep and bear arms.<sup>76</sup>

But constitution-makers might do well to consider whether such a provision may be essential to protect human rights from tyranny and criminality.

## II. THE NAZI EXPERIENCE IN CONGRESSIONAL DEBATE ON BILLS TO REGISTER FIREARMS IN THE GUN CONTROL ACT OF 1968

Forty years before the Supreme Court in *Heller* decided that the Second Amendment guaranteed the individual right to have arms and rejected the collectivist view that it only protected a State power to have a militia, the collectivist view reached its highpoint in the halls of Congress. The occasion was the passage of the Gun Control Act of 1968<sup>77</sup> together with proposed bills that would have required the registration of handguns or all firearms with the government.<sup>78</sup> Proponents of registration argued that individuals have no Second Amendment rights that the government is bound to respect or could infringe.<sup>79</sup>

The Gun Control Act passed only twenty-three years after the end of World War II. In 1941, just before Japan's sneak attack on Pearl Harbor, Congress authorized the President to requisition certain property for defense, but prohibited any construction of the act to "require the registration of any firearms possessed by any individual for his personal protection or sport" or "to impair or infringe in any

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75. *US Supreme Court Justice Ruth Bader Ginsburg to Egyptians: Look to the Constitutions of South Africa or Canada, Not to the US Constitution* (The Middle East Research Institute television broadcast Jan. 30, 2012), available at <http://www.memritv.org/clip/en/3295.htm>.

76. See Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.), available at <http://lois.justice.gc.ca/eng/Const/page-15.html>; S. AFR. CONST., 1996, ch. 2, available at <http://www.info.gov.za/documents/constitution/1996/96cons2.htm>.

77. Pub. L. No. 90-618, 82 Stat. 1213 (1968).

78. See *Federal Firearms Legislation: Hearings on S. 3691, S. 3604, S. 3634, and S. 3637 Before the Subcomm. to Investigate Juvenile Delinquency of the S. Comm. on the Judiciary*, 90th Cong. 4-17 (1968) [hereinafter *Federal Firearms Legislation*].

79. See *id.* at 566 (statement of Lawrence Speiser, Director, Washington Office, ACLU) ("[T]he right to bear arms contained in the second amendment relates to a militia rather than the individuals' rights to keep arms in their homes.").

manner the right of any individual to keep and bear arms.”<sup>80</sup> A sponsor of the bill explained:

Before the advent of Hitler or Stalin, who took their power from the German and the Russian people, measures were thrust upon the free legislatures of those countries to deprive the people of the possession and use of firearms, so that they could not resist the encroachments of such diabolical and vitriolic state police organizations as the Gestapo, the Ogpu, and the Cheka.<sup>81</sup>

But memories were short lived. As noted, in 1968, several bills were introduced to require the registration of firearms.<sup>82</sup> Rep. John Dingell (D-Mich.), a leading opponent, argued, “sportsmen fear firearms registration. We have here the same situation we saw in small degree in Nazi Germany.”<sup>83</sup> Senator Joseph Tydings (D-Md.), a bill sponsor, disputed Dingell’s inference “that registration or licensing of guns has some connection with the Nazi takeover in Germany.”<sup>84</sup> Dingell responded that the Nazis kept raising registration fees, making it uneconomical to have a gun, but “they never got around really to confiscating them”—an inaccurate statement as applied to Jews, political opponents, and other enemies of the state, who were disarmed with a vengeance.<sup>85</sup>

Tydings submitted a prepared study from the Legislative Reference Service of the Library of Congress that purported to refute the argument that “gun registration laws can create conditions conducive to dictatorship.”<sup>86</sup> It claimed that democracies like England and Switzerland had gun registration since the nineteenth century.<sup>87</sup> (This claim was inaccurate as applied to Switzerland, which

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80. Act of Oct. 16, 1941, Pub. L. No. 77–274, 55 Stat. 742; *see also* Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right to Keep and Bear Arms*, 62 TENN. L. REV. 597, 599–631 (1995).

81. 87 CONG. REC. 6778 (1941) (statement of Rep. Edwin Arthur Hall).

82. *See Federal Firearms Legislation*, *supra* note 78.

83. *Id.* at 478.

84. *Id.* at 479.

85. *Id.* *See generally* Stephen P. Halbrook, “Arms in the Hands of Jews Are a Danger to Public Safety”: *Nazism, Firearm Registration, and the Night of the Broken Glass*, 21 ST. THOMAS L. REV. 109 (2009).

86. *Federal Firearms Legislation*, *supra* note 78, at 480. Elsewhere, Tydings inserted into the record a Library of Congress study arguing that Congress had power to require registration of all firearms under the Commerce Clause. *See id.* at 737.

87. *Id.* at 480.

did not even have a federal gun control law until 1998.)<sup>88</sup> The study then argued that firearm registration laws in Europe, including those in France, did not facilitate the German occupation during World War II.<sup>89</sup>

As the study discussed, French firearms law before the German invasion was based on the law of 1885 and the decree laws of October 23, 1935 and April 18, 1939.<sup>90</sup> The law distinguished *les armes de guerre* (war weapons), which were forbidden, from *les armes de commerce* (commercial weapons), including handguns and target rifles, which were required to be registered.<sup>91</sup> Exceptions existed for hunting guns and collector's pieces.<sup>92</sup> Firearms could not be carried outside the home without authorization.<sup>93</sup>

After surveying the prewar firearms laws of France and other European countries, the Library of Congress study concluded that it was "unable to locate references to any German use of registration lists to collect firearms."<sup>94</sup> It did not try very hard, as its research included little other than reference to prewar laws rather than actual occupation policies.<sup>95</sup> It would have been curious had the Nazis not used registration records to locate, disarm, and repress anyone perceived to be a threat to or an enemy of the state.<sup>96</sup> Indeed, the study acknowledged Nazi proclamations threatening the death penalty for possession of a firearm,<sup>97</sup> and that "the possibility cannot be denied that the Germans may have used these [firearm] registration lists (or indeed hunting licenses registration), after issuing their proclamations."<sup>98</sup>

The study concluded by conceding "the profound importance the German invaders attached to the possession of firearms," and that a "totalitarian society, and particularly a totalitarian society occupying a country against its will, simply cannot permit the private possession

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88. See Stephen P. Halbrook, *Switzerland, Gun Laws*, in 2 GUNS IN AMERICAN SOCIETY: AN ENCYCLOPEDIA OF HISTORY, POLITICS, CULTURE, AND THE LAW 569-72 (Gregg Lee Carter ed., 2002).

89. See *Federal Firearms Legislation*, *supra* note 78, at 483.

90. See *id.* at 482 & n.4.

91. See *id.* at 482.

92. See *id.*

93. See *id.*

94. *Id.* at 483.

95. See *id.* at 481-83.

96. See, e.g., Halbrook, *supra* note 85, *passim*.

97. See *Federal Firearms Legislation*, *supra* note 78, at 488.

98. *Id.* at 483.

of weapons . . . .”<sup>99</sup> To paraphrase Captain Renault in *Casablanca*, should then one be “shocked, shocked to find” that the Nazi occupiers used the registration records to ferret out gun owners?<sup>100</sup> It was disingenuous to suggest that the Gestapo or other occupation authorities would hide their eyes from firearm registration lists generated under pre-occupation laws.

The 1968 registration bills were all defeated,<sup>101</sup> and since then the pendulum has continued to swing against registration. The Firearms Owners’ Protection Act of 1986 amended the Gun Control Act explicitly to prohibit “any system of registration of firearms, firearms owners, or firearms transactions or dispositions.”<sup>102</sup> The federal instant background check system that passed in 1993 includes almost identical language.<sup>103</sup> In debate on the latter, Senator Ted Stevens stated: “We have all heard, my generation did, about Hitler and how, in country after country, he read the gun registration laws and took the guns away from those who had them. This helped the Nazis take over Europe.”<sup>104</sup> And in legislation to ensure the destruction of records after a background check, Rep. Bob Barr explained: “Gun registration systems have been used in many foreign countries, and in United States jurisdictions including California and New York City, to confiscate firearms from citizens.”<sup>105</sup>

Rhetoric or reality? The answer lies in the historical record.

### III. THE FRENCH DECLARATION OF RIGHTS OF 1789: HOW THE RIGHT TO KEEP AND BEAR ARMS GOT LEFT OUT

In pre-Revolutionary France, gun control was based primarily on one’s class in the social-political order, the right to bear arms being limited to the nobility.<sup>106</sup> The 1728 edict of Louis XV forbade the carrying of *fusils* (long guns) or pistols.<sup>107</sup> “War” weapons based on

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99. *Id.* at 488.

100. *CASABLANCA* (Warner Brothers Pictures 1942).

101. *See* 114 CONG. REC. 27,422-56 (1968).

102. 18 U.S.C. § 926(a)(3) (2006).

103. *See* Brady Handgun Violence Prevention Act, Pub. L. 103-159, § 103(i), 107 Stat. 1536, 1542 (1993).

104. 137 CONG. REC. 15,732 (1991) (statement of Sen. Ted Stevens).

105. 144 CONG. REC. 27,330 (1998) (statement of Rep. Bob Barr); *see* Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, § 621, 112 Stat 2681 (1998).

106. *See* KEN ADLER, *ENGINEERING THE REVOLUTION: ARMS & ENLIGHTENMENT IN FRANCE, 1763-1815*, at 174 (1997).

107. *See* HENRI BARBIER, *LE DÉLIT DE PORT D’ARMES PROHIBÉES* 14 (1939).



caliber (and thus interchangeable ammunition) were distinguished from civilian arms.<sup>108</sup> As set forth below, in 1789 commoners demanded recognition of their right to keep and bear arms, and that right was proposed for inclusion in what became the Declaration of Rights.

### A. *Cahiers de Doléances* (Statements of Grievances)

#### 1. *The Third Estate Demands a Right to Keep and Bear Arms*

In 1788, in the wake of fiscal crisis and political uncertainty, King Louis XVI called a meeting of the Estates-General for May 1789, the first since 1614, to seek consent for new taxes and administrative changes.<sup>109</sup> As part of this process, thousands of assemblies passed Statements of Grievances (*cahiers de doléances*) and sent them to higher assemblies or to the Estates-General.<sup>110</sup> The Estates-General consisted of deputies representing the three estates—clergy, nobility, and commoners.<sup>111</sup>

The demands by commoners were stated conservatively because they had no hopes of major changes.<sup>112</sup> The *cahiers de doléances* by the Third Estate (*Du tiers-état*) demanded recognition of the right to keep and bear arms for all, while those by the nobility demanded stricter enforcement of restrictions on arms possession by commoners.<sup>113</sup>

The Third Estate uniformly demanded the right to keep arms in one's house, and in some cases, to carry arms. For instance, the province of Agenois declared that freedom gives every citizen the right to seek personal security; therefore, every citizen shall be permitted to keep arms in his house for defense of himself and his

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108. Adler, *supra* note 106, at 172.

109. See GILBERT SHAPIRO & JOHN MARKOFF, REVOLUTIONARY DEMANDS: A CONTENT ANALYSIS OF THE CAHIERS DE DOLÉANCES OF 1789, at xxvi (1998); MICHAEL P. FITZSIMMONS, THE NIGHT THE OLD REGIME ENDED: AUGUST 4, 1789, AND THE FRENCH REVOLUTION 2-3 (2003).

110. SHAPIRO & MARKOFF, *supra* note 109, at xxvi.

111. *Id.* at 101.

112. *Id.* at 135 (explaining that peasants, in March 1789, asked for a reform in the lord's hunting rights, rather than their abolition, not because they have been fooled or frightened but because they feel that they can obtain no more).

113. Secondary sources note, without much detail, grievances by commoners including the nobles' exclusive privileges of hunting and bearing arms, and demands for the return of confiscated arms. See, e.g., *id.* at 146, 153, 258, 385, 393-94, 411. This Article is the first study known to the author to detail comprehensively grievances related to the right to bear arms.

property.<sup>114</sup> The commune of Auch went further, stating that security requires that the inhabitants living in the countryside be permitted to keep guns in their homes and that travelers may carry pistols openly.<sup>115</sup>

Some took permission by the authorities as a given. The county of Comminges demanded that any individual of good character with a certificate issued by the municipal officials of the place of residence be authorized to keep arms in his home; and that travelers of any class be authorized to bear arms.<sup>116</sup> The village of Lauzerte would have required authorization only for carrying arms, stating that any person with a domicile shall have the right to bear arms, subject to the obligation of obtaining permission from municipal officers, and that the said officers shall have the duty to keep a record of it.<sup>117</sup> A simple reporting requirement was also suggested.<sup>118</sup>

But most demands did not specify an authorization requirement, and the commune of Gex suggested that the right to bear arms and to

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114. *Du tiers-état d'Agénois*, 1 ARCHIVES PARLEMENTAIRES DE 1787 A 1860: RECUEIL COMPLET DES DÉBATS LÉGISLATIFS ET POLITIQUES DES CHAMBRES FRANÇAISES, PREMIÈRE SÉRIE (1789 À 1799), 1875-1888, p. 688 (Fr.) [hereinafter *ARCHIVES PARLEMENTAIRES*]. Here and below, the initial part of the citation refers to an estate of a given locality or jurisdiction. For instance, “*Du tiers-état d'Agénois*” means the Third Estate of the Province of Agénois.

115. See *Du tiers-état d'Auch*, 2 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 98; see also *Du tiers-état de Dinan*, 3 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 149 (permitting homeowners and large-scale farmers to keep guns in their houses for their personal security, both against robbers and dangerous animals, which they shall be permitted to shoot, without being allowed to carry said arms beyond their properties); *Du tiers-état du Périgord*, 5 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 343 (permitting every freeholder to keep arms at home for defense of himself and his property and that he be allowed to kill game on his own land).

116. See *Du tiers-état de Comminges*, 3 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 27; see also *Du tiers-état de Caen*, 2 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 494 (permitting inhabitants to keep a gun for their own security, as the local town council shall determine the persons who may be eligible for such authorization); *Du tiers-état d'Evreux*, 3 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 301 (permitting any farmer to keep firearms in his house for his security, subject to any conditions that the Estates-General Assembly deems necessary to add).

117. See *Du tiers-état de Lauzerte*, 5 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 494.

118. See *Du tiers-état de Rouen*, 5 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 601 (demanding the impolitic and inhumane regime that deprives the inhabitants of the countryside from keeping firearms to protect their houses and their animals be repealed, and that all farmers be allowed to have guns, subject to them reporting this fact to their parish official).

hunt were natural rights of man.<sup>119</sup> The village of Rivière-Verdun demanded the prohibition of arbitrary deprivations, which would result in the liberty of every citizen to keep arms in his house and to carry pistols openly for his security.<sup>120</sup> The town of Nérac insisted that every person be permitted to carry arms in order to defend himself against dangerous animals, and that no one be disarmed for any reason other than misuse of arms.<sup>121</sup> The right to arms was also mentioned in relation to the right to assemble,<sup>122</sup> as well as freedom from warrantless arrests<sup>123</sup> and warrantless search and seizure.<sup>124</sup>

## 2. *The Nobility Demands Gun Control*

Predictably, the Second Estate—the Nobility (*De la noblesse*)—demanded continuation of their exclusive privilege to bear arms and the strengthening of firearm prohibitions as applied to the commoners of the Third Estate. The nobility of the commune of

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119. See *Du tiers-état du Gex*, 3 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 396.

120. See *Du tiers-état de Rivière-Verdun*, 5 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 587.

121. See *Du tiers-état de Nérac*, 4 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 234. The needs of farmers to have arms for defense against criminals and wild animals were prominent. See, e.g., *Du tiers-état de Honfleur*, 5 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 614 (permitting all notables and farmers in every parish of the country to freely enjoy the right to keep guns, and any necessary arms in their houses, with the freedom to use them on the lands they cultivate, in order to protect themselves, their animals and their goods against the violence of thieves, the fury of mad dogs and the damage done by rabbits, boars and wild animals, against which one cannot defend himself); *Du tiers-état de Sedan*, 5 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 728 (permitting every Frenchman, especially the inhabitants of villages on the borders, to keep firearms at home to defend themselves and to destroy harmful animals); *Du tiers-état de Vendôme*, 6 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 123-24 (granting farmers the right to possess arms to defend their herds against wild and destructive animals).

122. See *Du tiers-état de Gray*, 1 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 780 (advocating the repeal of the law condemning to forced labor any citizens assembled and armed in a group of four without being authorized to carry arms).

123. See *Du tiers-état de Gisors*, 5 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 618 (no citizen shall be arrested, no matter who is giving the order, for bearing arms, for poaching or any other causes, without appearing before and being heard by his legal judge or the judge of the alleged misdemeanor).

124. See *Du tiers-état de Ponthieu*, 5 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 441 (being just and natural that a farmer keeps arms in his house in order to repel criminals and protect himself against wild animals, in the future he cannot be deprived of the right to keep arms at home; therefore no search can be carried out in his house, except by order of provincial governors, lords or mounted police officers, and he can only be disarmed by order of his legal judge).

Limoges implored that bearing arms would be authorized or tolerated only for military forces in uniform and to nobility in any vestment, and that police officers and whoever is authorized be enjoined to monitor, more efficiently than in the past, the enforcement of the order in this respect.<sup>125</sup>

Some demands of the nobility sought to prohibit the mere possession of any weapons by commoners, even in their houses. The nobility in the town of Béziers demanded total disarmament of any kind of arms of those not authorized to carry arms, and that such arms be prohibited with severe penalties, including increased enforcement of royal decrees to sell guns only to individuals authorized to bear arms.<sup>126</sup>

There were plenty of prohibitions on possession of arms, it was asserted, but they were insufficiently enforced.<sup>127</sup> It also appeared

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125. See *De la noblesse de Limoges*, 3 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 569; see also *De la noblesse d'Amiens*, 1 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 742 (demanding that decrees and regulations concerning the bearing of arms be reinstated, upheld and implemented); *De la noblesse de Mantes*, 3 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 665 (demanding the revision of the regulations prohibiting the carrying of firearms, within a gathering, resulting in a new updated and improved law, which clause shall be enforced in the future); *De la noblesse de Montargis*, 4 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 25 (stating His Majesty shall be besought to be willing to order, as promptly as possible, a new publication of the declaration prohibiting the bearing of arms, and particularly that of firearms, for individuals not authorized to do so).

126. See *De la noblesse de Béziers*, 2 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 349; see also *De la noblesse de Loudun*, 3 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 596 (prohibiting anyone not belonging to nobility to carry a sword, this distinguishing sign being essentially that of the nobility; prohibiting as well anyone not part of nobility and non-fief owners to keep firearms in their homes, and obliging those who have some to bring them to designated arsenals, where, upon receipt of the arms, they will be paid the amount of the estimated value, to be enforced by the mounted police).

127. See, e.g., *De la noblesse de Riom*, 5 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 567 (decrees related to bearing arms have often been published, but never enforced; the deputies must demand the police to put an end to this abuse in the countryside, especially regarding swords, which were always the prerogative of nobility); *De la noblesse et du tiers-état de Péronne*, 5 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 361 (laws regarding the bearing of arms be reenacted and vigorously enforced); *De la noblesse de Reims*, 5 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 529 (decrees regarding the bearing of arms be reenacted, and that only the nobility and military shall have the right to carry a sword); *De la noblesse de Rouen*, 5 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 596 (laws regarding bearing arms be strictly preserved and followed); *De la noblesse de Sézanne*, 5 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 766 (demanding enforcement of existing and new laws related to the bearing of arms); *De la noblesse de Dombes*, 6 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 68 (bearing of arms, especially carrying a sword, was to be retained and reserved only to the nobility and military).

that too many peasants were feeding themselves by hunting rather than working for the landlord class, requiring strict enforcement of decrees against bearing arms.<sup>128</sup> The First Estate—the Clergy (*Du clergé*)—was silent on the issue other than making a single statement supporting the nobility's monopoly on arms.<sup>129</sup>

### 3. *Mixed Demands by Various Jurisdictions*

Some towns, parishes, communities, and administrative districts supported liberalization of arms possession, while others supported restrictions.<sup>130</sup> The parish of Saint-Witz-sur-Montméliant sought the suppression of *capitaineries* (royal hunting preserves) and the establishment of the right to bear arms so that an honest citizen may buy one for a modest price.<sup>131</sup>

Demands were made by administrative districts known as *la sénéchaussée* (Seneschalsy), such as that of Rennes, that except for acceptable exemptions, every citizen shall have the right to keep arms

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128. See *De la noblesse de Montpellier*, 4 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 48 (the multitude of poachers destroying the countryside and the number of criminals increasing every day take away hands working on the lands to be cultivated; Your Majesty shall end this disorder by ensuring strict observance of decrees regarding the bearing of arms, and by giving strict responsibility for their enforcement to agents of his authority); *De la noblesse de Sens*, 5 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 756 (to resolve excess poaching, a source of many disorders and even crimes, it shall be demanded that all laws related to bearing arms be consolidated under one law to be enforced).

129. See *Du clergé de Bellay*, 2 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 484 (decrees and their enforcement prohibiting the carrying of arms be renewed, while maintaining this just prerogative to the nobility and the military; that consequently it be expressly prohibited to any commoner of any occupation to bear any arm, especially a sword, which always was the distinguishing sign of nobility).

130. One town wanted an agreement with the General Police of the State regarding the bearing and use of arms, the means to provide for the security of individual citizens of any class, both within and outside of their homes. See *De la ville de Coutances*, 3 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 56. Another noted that the disadvantages of feudal rights ruin communities and their inhabitants, and thus demanded generally permitting hunting and fishing, which are natural rights, without, however, violating decrees prohibiting the bearing of arms. See *De la ville de Forcalquier*, 3 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 354. Two parishes requested that decrees regarding the bearing of arms be reinstated. See *Paroisse D'Angervilliers*, 4 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 297. One added that arms be prohibited to any ineligible or unqualified persons. *Paroisse de Bonnelles*, 4 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 363.

131. See *Paroisse de Saint-Witz-sur-Montméliant*, 5 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 230. Another parish said that because the crow is a pest during the sowing season, it shall be appropriate to permit the use of firearms to kill them. See *Paroisse de Mesnil-Saint-Denis*, 4 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 701.

in his house to defend himself, a natural right which was violated until now by oppression and tyranny.<sup>132</sup> Lauzerte averred in favor of a decree that any person with a domicile shall have the right to bear arms, subject to obtaining permission from municipal officers, who shall have the duty to keep a record of it.<sup>133</sup>

The right to bear arms was strongly linked to the right to hunt and to protect crops from pests.<sup>134</sup> Abuses by the nobility's game wardens with firearms were decried.<sup>135</sup> Employees of the King's farms, averred the town of D'Aubagne, should be prohibited from having firearms and should be forbidden (apparently in enforcing the game laws) to search the pockets of persons, and even more from searching under women's clothes.<sup>136</sup>

The above varied demands pitting the right to keep and bear arms against the restrictions of the ancient régime were among countless others in the tug-of-war between the Third Estate and the nobility, and among the various areas and jurisdictions. Meanwhile, a revolution of more than words was boiling over.

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132. See *De la sénéchaussée de Rennes*, 5 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 545; see also *De la sénéchaussée de Saint-Brieuc*, 5 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 632 (every person shall have the right to keep at least one gun in his house for his defense).

133. See *De la sénéchaussée de Lauzerte*, 5 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 500.

134. The community of Mirabeau requested that any citizen owning lands with a value of 15,000 livres have the right to hunt on his land, that the carrying of firearms shall not be prohibited to citizens whose status and fortune preclude suspicion that they would abuse it, and that hunting violations by people allowed the right to bear arms may only be prosecuted in a civil court. See *Communauté de Mirabeau*, 6 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 357. Quimper demanded that the feudal dovecote rights be eliminated, giving to anyone the right to protect his land against pigeons—pigeons were kept by the nobility and they devoured the crops—and that bearing arms be permitted to all honest citizens; that the decree related to hunting be reformed, and that hunting be free for all persons on their land. See *De la sénéchaussée de Quimper*, 5 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 516; see also *De la sénéchaussée d'Aix: Communauté d'Esparron de Pallières*, 6 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 290 (the freedom to hunt and to bear arms in order to kill any game that destroys and devours part of the harvest).

135. See *Paroisse de Saint-Maurice-Montcouronne*, 5 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 93 (noting too many disastrous examples of firearms entrusted in the hand of 'these uncouth people,' generally without education and often without morals).

136. See *De doléances de la communauté de la ville D'Aubagne*, 6 ARCHIVES PARLEMENTAIRES, *supra* note 114, at 250.

## B. From the Storming of the Bastille to the Abolition of Feudalism

The States-General, consisting of the three estates of clergy, nobility, and commoners, assembled in May 1789 at Versailles.<sup>137</sup> In June, the Third Estate declared that it represented the nation and called itself the National Assembly.<sup>138</sup> Louis XVI sent troops to shut down the chamber where the National Assembly met, prompting the delegates to withdraw to a tennis court nearby and take an oath not to disperse until they had erected a constitution.<sup>139</sup>

The National Assembly kept meeting, but military forces concentrated around Paris, threatening to cut it off from Versailles.<sup>140</sup> Echoing similar prose from his days as pamphleteer of the American Revolution, Thomas Paine described the situation:

Every thing now was drawing to a crisis. The event was freedom or slavery. On one side, an army of nearly thirty thousand men; on the other, an unarmed body of citizens, for the citizens of Paris on whom the National Assembly must then immediately depend, were as unarmed and as undisciplined as the citizens of London are now.<sup>141</sup>

It was said that foreign mercenaries converged on Paris, sparking violent encounters with the citizenry. "Arms they had none," wrote Paine, but they hurled stones at the German cavalry, and began "providing themselves with every sort of weapon they could make or procure: guns, swords, blacksmith's hammers, carpenter's axes, iron crows, pikes, halberds, pitchforks, spits, clubs, etc."<sup>142</sup> The enormous crowds that swelled the streets shocked the Ministry, which never anticipated "that a body of unarmed citizens would dare to face the military force of thirty thousand men."<sup>143</sup>

Next came the storming of the Bastille.<sup>144</sup> The citizens managed to seize a large cache of arms from the Hospital of the Invalids, Paine wrote, and then "they marched to attack the Bastille; a vast, mixed multitude of all ages, and of all degrees, and armed with all sorts of

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137. See JOHN EMERICH EDWARD DALBERG-ACTON, LECTURES ON THE FRENCH REVOLUTION 50-55 (John Neville Figgis & Reginald Vere Laurence eds., 1910).

138. See THOMAS PAINE, RIGHTS OF MAN (1791), reprinted in 1 THE COMPLETE WRITINGS OF THOMAS PAINE 243, 308-09 (Philip S. Foner ed., 1945).

139. See *id.* at 311.

140. See *id.* at 261.

141. *Id.* at 262.

142. *Id.* at 263.

143. *Id.*

144. See *id.* at 264.

weapons.”<sup>145</sup> What Paine described as the “prison to which the new Ministry was dooming the National Assembly, in addition to its being the high altar and castle of despotism,” was assaulted and fell.<sup>146</sup>

The National Assembly now had the upper hand and would act decisively. On the dramatic night of August 4, 1789 (*nuît du 4 août*), the Assembly adopted a sweeping decree, which began: “The National Assembly abolishes the feudal system entirely.”<sup>147</sup> The second provision abolished the nobility’s exclusive right of “*fuies and dovecotes*,” which were buildings housing pigeons and doves; henceforth these nuisances to the peasants’ crops were considered prey and could be killed.<sup>148</sup> And the third provision stated:

The exclusive right of hunting is also abolished. Any landlord has the right to kill or have someone kill any kind of prey, but only on the land he owns. All administrative districts, even royal, that are hunting preserves, under any denomination, are also abolished. The preservation of the King’s personal pleasures will be provided—as long as properties and freedom are respected.<sup>149</sup>

145. *Id.*

146. *Id.* at 264-65.

147. 8 *Archives Parlementaires* 397–98 (J. Mavidal & E. Laurent eds., 1862–96), reprinted in 1 FRENCH REVOLUTION DOCUMENTS 151 (J. M. Roberts & R. C. Cobb eds., 1966).

148. *Id.* at 151-52. Alexis de Tocqueville wrote about this feudal institution:

Certain customs restrict the right of having pigeon-houses to high justiciaries; others grant it to all owners of feuds. In Dauphiné, Brittany, and Normandy, no commoner can own a pigeon-house; no one but a noble can keep pigeons. Most severe punishments, often corporal, were inflicted on those who killed pigeons.

ALEXIS DE TOCQUEVILLE, THE OLD RÉGIME AND THE FRENCH REVOLUTION 296-97 (François Furet & François Melonio eds., Stuart Gilbert trans., 1955); see also FITZSIMMONS, *supra* note 109, at 161.

149. 1 FRENCH REVOLUTION DOCUMENTS, *supra* note 147, at 152; see also *Assemblée nationale, suite de la séance de la nuit du 4 août. Suite du discours de M. le duc d’Aiguillon*, GAZETTE NATIONALE OU LE MONITEUR UNIVERSEL (Fr.), Aug. 5, 1789, at 284 (abolition of the exclusive right to hunt moved by Lubersac, the Bishop of Chartres); *id.* at 288 (assembly decreed the abolition of the privileges, explicitly ending the exclusive rights of hunting, of dovecote or pigeon-house, and of rabbit warren). Alexis de Tocqueville wrote:

The right of hunting . . . is held to be a royal right, which even men of rank cannot exercise within their own jurisdiction, or on their own feud, without the King’s permission. . . .

The right of hunting is, of all seignorial rights, the one most carefully withheld from commoners . . . . So strict is the principle that a seigneur cannot grant leave to hunt. That is the law. But in practice seigneurs constantly grant permission to hunt, not only to men of rank but to commoners.



Provisions that followed required reforms in the judicial system, abolished unequal taxes, and allowed any citizen to be eligible for ecclesiastic, civilian, or military jobs.<sup>150</sup> It has been stated that “by abolishing every vestige of servility—the *corvée*, the monopoly on hunting, *banalités*, and the like—the Assembly could legitimately believe that it had, in fact, destroyed ‘feudalism.’”<sup>151</sup>

The next day, the issue reported before the Assembly was to determine the weapons, as the liberty to hunt was recognized the day before; it was noted that there were some drawbacks to letting weapons fall into the hands of the people who lived in the countryside.<sup>152</sup> Hunting and arms were then debated on August 7. Lubersac, the Bishop of Chartres, jokingly proposed adding to the declaration of abolition of the privilege of hunting the sentence that game may be killed only with *innocent arms*. Laughter ensued.<sup>153</sup> Mr. Buzot responded:

Which man will get the liberty to carry a gun? Which man will not get this right? Will this privilege be humiliating, and will it be as unjust as the injustice you want to remedy?

... In some provinces where the liberty of hunting was never controlled and where every citizen is armed, there are never disorders; anyway, a fusil is a defensive arm and an arm which is necessary to guard a field at night, to keep away wild animals; and the National Assembly does not have the right to order a citizen not to defend his property.<sup>154</sup>

Mr. d’Ambly suggested that, following old English practice, they should decide the amount of land that a person must own if he wants

TOCQUEVILLE, *supra* note 148, at 171.

150. See 1 FRENCH REVOLUTION DOCUMENTS, *supra* note 147, at 152-54.

151. FITZSIMMONS, *supra* note 109, at 171. Thomas Jefferson, then U.S. minister to France, wrote to John Jay:

The national assembly now seriously set their hands to the work of the constitution. They decided a day or two ago the question Whether they should begin by a Declaration of rights, by a great majority in the affirmative. . . . By way of Corollary to it they last night mowed down a whole legion of abuses. . . .

Letter from Thomas Jefferson to John Jay (Aug. 5, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 334 (Julian P. Boyd ed., 1958).

152. *Assemblée nationale, suite de la séance du mercredi 5 août. Suite du rapport de M. d’Antraigues, au nom du comité des rapports*, GAZETTE NATIONALE OU LE MONITEUR UNIVERSEL (Fr.), Aug. 5, 1789, at 292.

153. See *Assemblée nationale, séance du vendredi 7 août*, GAZETTE NATIONALE OU LE MONITEUR UNIVERSEL (Fr.), Aug. 7, 1789, at 301.

154. *Id.*

to bear arms, for otherwise arms will only be in the hands of those who could use them wrongly.<sup>155</sup> “I live next to a large forest,” retorted a deputy from Brittany, “anyone can hunt, and no one abuses it.”<sup>156</sup>

Mr. Target argued that, in abolishing the exclusive right to hunt, the Assembly did not intend to determine the kind of arms which could be used to hunt; that bearing arms must be the subject of a separate debate.<sup>157</sup> Mr. de Clermont-Tonnerre agreed, but added: “Do not be afraid of the consequences of the liberty of having arms. Do not be surprised that the spring of liberty, compressed for many centuries by arbitrary power, is now in a time of impetuous slackening.”<sup>158</sup> He added that the special courts that tried hunting offenses should be abolished, and that persons imprisoned for hunting offenses should be released.<sup>159</sup> A clergyman added that the demand should include the pardon of poor wretches convicted to galleys or banishment for hunting.<sup>160</sup>

### C. The Declaration of Rights

On August 12 the Assembly appointed a *Comité des cinq* (Committee of Five) to draft a declaration of rights, with the Comte de Mirabeau as chairman.<sup>161</sup> Lord Acton would write that “Mirabeau was not only a friend of freedom, . . . but a friend of federalism,” and that “he deserves the great place he holds in the memory of his countrymen.”<sup>162</sup>

Mirabeau presented the Committee of Five’s draft to the Assembly for discussion on August 18.<sup>163</sup> Similar to the First and Second Amendments to the U.S. Constitution, it proposed a right to assembly

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. KEITH MICHAEL BAKER, *The Idea of a Declaration of Rights, in THE FRENCH IDEA OF FREEDOM: THE OLD REGIME AND THE DECLARATION OF RIGHTS OF 1789*, at 392 n.83 (Dale Van Kley ed., 1994).

162. DALBERG-ACTON, *supra* note 137, at 157-58. Mirabeau, whose actual name was Honoré-Gabriel Riqueti, has been called “The Most Symbolic Figure of the Revolution.” François Furet, *Mirabeau, in A CRITICAL DICTIONARY OF THE FRENCH REVOLUTION* 268 (François Furet & Mona Ozouf eds., Arthur Goldhammer trans., 1989); see also BARBARA LUTTRELL, *MIRABEAU* 147-58 (1990).

163. See *Assemblée nationale, séance du mardi 18 août*, GAZETTE NATIONALE OU LE MONITEUR UNIVERSEL (Fr.), Aug. 18, 1789, at 351 ¶ 42.

and a right to arms.<sup>164</sup> Article X stated: “We could not, without violating the rights of the citizens, deprive them of the right lawfully to assemble to consult for the public good, to instruct their representatives, or to petition for a redress of their grievances.”<sup>165</sup> Article XI provided: “Every citizen has the right to keep arms at home and to use them, either for the common defense or for his own defense, against any unlawful attack which may endanger the life, limb, or freedom of one or more citizens.”<sup>166</sup> Mirabeau explained the views of the Committee of Five on the arms guarantee as follows:

My colleagues all agree that the right declared in this article is self-evident in its nature, and one of the principal guarantees of political and civil freedom; that no other institution can replace it; that it is impossible to imagine an aristocracy more terrible than one which would be established in a state where only a part of the citizens would be armed, and the others would not be; that all contrary arguments are futile sophisms contradicted by the facts, since no country is more peaceful and offers a better policy, than those where the nation is armed.<sup>167</sup>

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164. *See id.*

165. *Id.* (“On ne saurait, sans attenter aux droits des citoyens, les priver de la faculté de s’assembler dans la forme légale, pour consulter sur la chose publique, pour donner des instructions à leurs mandataires, ou pour demander le redressement de leurs griefs.”).

166. *Id.* (“Tout citoyen a le droit d’avoir chez lui des armes et de s’en servir, soit pour la défense commune, soit pour sa propre défense contre toute agression illégale qui mettrait en péril sa vie, les membres, ou la liberté d’un ou de plusieurs citoyens.”). In 1788, Mirabeau had drafted a declaration of rights which included the following:

13. The people have the right to keep and bear arms for the common defense.

14. A well regulated militia is the suitable, natural and sure defense of a free government.

Gabriel-Honoré de Riquetti Mirabeau, *Aux Bataves sur le Stathouderat*, in 5 MÉMOIRES BIOGRAPHIQUES, LITTÉRAIRES ET POLITIQUES DE MIRABEAU 41 (1834).

167. *Assemblée nationale*, *supra* note 163 (“Mes collègues sont convenus tous que le droit déclaré dans cet article est évident de sa nature, et l’un des principaux garans de la liberté politique et civile; que nulle autre institution ne peut le suppléer; qu’il est impossible d’imaginer une aristocratie plus terrible que celle qui s’établirait dans un état, par cela seul qu’une partie des citoyens serait armée, et que l’autre ne le serait pas; que tous les raisonnemens contraires sont de futiles sophismes démentis par les faits, puisque aucun pays n’est plus paisible, et n’offre une meilleure police que ceux où la nation est armée.”). Mirabeau’s presentation is also available in 2 OEUVRES ORATOIRES DE MIRABEAU OU RECUEIL DE SES DISCOURS, RAPPORTS, ADRESSES, OPINIONS, DISCUSSIONS, REPARTIES, ETC., À L’ASSEMBLÉE NATIONALE (Edition Librairie de Pierre Blanchard, 1819), *available at* <http://ex.libris.free.fr/mirab170789.html>.

Acknowledging that “my proposal excites some murmurs” in the Assembly, Mirabeau continued: “However it is quite clear that the circumstances which worry you on the declaration of the natural right that every citizen has to be armed, are very momentary; nothing can console the evils of anarchy, but the certainty that it cannot last . . . .”<sup>168</sup>

Yet neither the right to assembly nor the right to arms would make the final cut in what became the Declaration of Rights. At the beginning of the Revolution, the bearing of arms was regarded as free for all citizens, and prior law forbidding it was considered implicitly modified by the abolition of privileges of the nobility in the law of August 4, 1789.<sup>169</sup> However, the decree of August 20, 1789, disarmed persons without religion, occupation, profession, or a permanent domicile.<sup>170</sup>

Meanwhile, from August 20-26, a committee of the whole Assembly debated various proposals, adopting seventeen articles that became the French Declaration of the Rights of Man and of the Citizen of August 26, 1789.<sup>171</sup> Some provisions were modeled after bills of rights of the American states, particularly Virginia.<sup>172</sup> Declaring “the natural, unalienable, and sacred rights of man,” it began: “Men are born and remain free and equal in rights. Social distinctions may be based only on considerations of the common

168. *Assemblée nationale*, *supra* note 163, at 351-52 (“du comité n’en ont pas moins rejeté l’article, et j’ai été obligé de déférer à des raisons de prudence qui me paraissent préoccuper cette assemblée même, puisque le récit de ma proposition excite quelques murmures. Cependant il est bien clair que les circonstances qui vous inquiètent sur la déclaration du droit naturel qu’a tout citoyen d’être armé, sont très passagères; rien ne peut consoler des maux de l’anarchie, que la certitude qu’elle ne peut durer . . .”).

169. *See* BARBIER, *supra* note 107, at 14.

170. *See id.*

171. Duquesnoy wrote in his journal: “The declaration of rights is finally drawn up, and although there have been proposals to add several more articles to it, the assembly has decreed that it will consider them only when the new constitution is completed.” Adrien Duquesnoy, *Journal*, in *VOICES OF THE FRENCH REVOLUTION* 81 (Richard Cobb & Colin Jones eds., 1988). But the other proposals would not be considered later. *See* Sherman Kent, *The Declaration of the Rights of Man and of the Citizen*, in *GREAT EXPRESSIONS OF HUMAN RIGHTS* 171-72 (R.M. MacIver ed., 1950); *THE FRENCH REVOLUTION AND HUMAN RIGHTS: A BRIEF DOCUMENTARY HISTORY* 15 (Lynn Hunt ed., 1996).

172. GEORG JELLINEK, *THE DECLARATION OF THE RIGHTS OF MAN AND OF CITIZENS: A CONTRIBUTION TO MODERN CONSTITUTIONAL HISTORY* 11-26 (Max Farrand trans., 1901).

good.”<sup>173</sup> That reflected the abolition of privileges of August 4, prominent among which was the right of all citizens to hunt, which implicitly included the right to have arms to do so.<sup>174</sup>

The Declaration next stated: “The aim of every political association is the preservation of the natural and imprescriptible [inalienable] rights of man. These rights are liberty, property, safety and resistance to oppression.”<sup>175</sup> A right to arms may have been implied as necessary for safety and resistance to oppression.

The Declaration included a distinctly libertarian provision: “Liberty consists in being able to do anything that does not harm others: thus, the exercise of the natural rights of every man has no bounds other than those that ensure to the other members of society the enjoyment of these same rights. These bounds may be determined only by law.”<sup>176</sup> This broad natural right to do as one pleases as long as one does not infringe on the rights of another would seemingly have included possession of arms for non-aggressive purposes.

Finally, the Declaration included a provision that seems both more and less expansive than America’s First Amendment: “The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law.”<sup>177</sup> But as noted above, the right to assembly was not included.

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173. 1789 CONST. art. I (Fr.) (“[O]nt résolu d’exposer, dans une Déclaration solennelle, les droits naturels, inaliénables et sacrés de l’Homme. . . . Les hommes naissent et demeurent libres et égaux en droits. Les distinctions sociales ne peuvent être fondées que sur l’utilité commune.”); *see also* 1 FRENCH REVOLUTION DOCUMENTS, *supra* note 147, at 172.

174. *See* Assemblée nationale, *supra* note 163.

175. 1789 CONST. art. II (Fr.) (“Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l’Homme. Ces droits sont la liberté, la propriété, la sûreté, et la résistance à l’oppression.”); *see also* FRENCH REVOLUTION DOCUMENTS, *supra* note 147, at 172.

176. 1789 CONST. art. IV (Fr.) (“La liberté consiste à pouvoir faire tout ce qui ne nuit pas à autrui : ainsi, l’exercice des droits naturels de chaque homme n’a de bornes que celles qui assurent aux autres Membres de la Société la jouissance de ces mêmes droits. Ces bornes ne peuvent être déterminées que par la Loi.”); *see also* FRENCH REVOLUTION DOCUMENTS, *supra* note 147, at 172.

177. 1789 CONST. art. XI (Fr.) (“La libre communication des pensées et des opinions est un des droits les plus précieux de l’Homme : tout Citoyen peut donc parler, écrire, imprimer librement, sauf à répondre de l’abus de cette liberté dans les cas déterminés par la Loi.”); *see also* FRENCH REVOLUTION DOCUMENTS, *supra* note 147, at 172-73.

Why were the rights to assemble and to have arms explicitly recognized in the American Bill of Rights but not in the French Declaration? The United States arose out of a revolutionary war resulting in liberation from occupation by England, a foreign power. When the United States won the war, the British troops left the country with their arms, resolving the legitimacy of the victors keeping and bearing arms—so much so that the rights to assemble and to keep and bear arms (like the other Bill of Rights guarantees) were not controversial.<sup>178</sup> But in France the ancient régime was not yet defeated, adverse factions were competing for power, and future civil war was the handwriting on the wall.<sup>179</sup> Was an explicit recognition of the rights of assembly and arms viewed with suspicion? Were these rights considered implicit in the Declaration that was adopted, but which did not purport explicitly to detail all rights? While these questions warrant further study, the result was that France had no tradition for the next century and a half of formal recognition in its Declaration of Rights of the rights to assemble and to keep and bear arms.

#### IV. 1935: PRIME MINISTER PIERRE LAVAL DECREES FIREARM REGISTRATION

Having no historical recognition of a fundamental right to keep and bear arms, it would not be difficult for the French government to require that firearms be registered, which would make it easier to confiscate them. Prime Minister Pierre Laval decreed such a law in 1935, just five years before he would become the chief collaborator with Nazi Germany of occupied France.<sup>180</sup> The firearm registration records would be available to the French police who administered Nazi occupation policies, including the death penalty for possession of firearms.<sup>181</sup>

France in the mid-1930s experienced conflict between political factions and the collapse of governments.<sup>182</sup> The most volatile disturbances rocked Paris on February 6, 1934, in which police and

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178. See HALBROOK, *supra* note 47, at 272-74, 279.

179. The ink was hardly dry on the Declaration when the monarchy called up troops, evoking fears of a restoration of tyranny. See DALBERG-ACTON, *supra* note 137, at 110-12.

180. See *infra* notes 224-5 and accompanying text.

181. See *infra* Part V.A.

182. See WILLIAM L. SHIRER, *THE COLLAPSE OF THE THIRD REPUBLIC: AN INQUIRY INTO THE FALL OF FRANCE IN 1940*, at 199-250 (1969).

Mobile Guards opened fire on civilians, killing sixteen.<sup>183</sup> One policeman was killed.<sup>184</sup> To politicians, clamping down on civilian gun ownership appeared to be a remedy.

On June 8, 1935, the Chamber of Deputies passed an enabling act that granted Prime Minister Pierre Laval, whose cabinet included moderates and Radical-Socialists, the power to rule by decree-law.<sup>185</sup> In opposition to rightist groups such as the *Croix de Feu* (Cross of Fire), the Radicals joined with the Socialists and Communists in the *Front Populaire*.<sup>186</sup> By fall, the leftist press warned that the *Croix de Feu* was planning to seize power, seeking to alarm the Radical party conference meeting held from October 24-27.<sup>187</sup> To allay that fear, the government decreed the strengthening of the *garde mobile* mandated that authorities be notified of public meetings and restricted firearm possession.<sup>188</sup>

The Laval law decree (*décret-lois*) was proclaimed on October 23, 1935, by the Cabinet without legislative action under the enabling act of June 8.<sup>189</sup> Introduced by the previous government, it was reported by Chauvin as a bill concerning demonstrations on public streets, and commerce, import and possession of arms.<sup>190</sup> Léon Bérard, Minister of Justice, and Joseph Paganon, Minister of the Interior, formally proposed the law.<sup>191</sup>

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183. *See id.* at 214-19.

184. *See id.*

185. *See* GEOFFREY WARNER, *PIERRE LAVAL AND THE ECLIPSE OF FRANCE* 86 (1968).

186. *See id.* at 88.

187. *See id.* at 112.

188. *See id.* (citing *Lois et Décrets du 25 octobre 1935* [Laws and Decrees of October 25, 1935], *JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE* [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 25, 1935, pp. 11,202-4, 11,214).

189. *Décret portant réglementation de l'importation, de la fabrication, du commerce et de la détention des armes du 24 octobre 1935* [Decree of October 24, 1935 on the regulating the importation, manufacture, trade, and possession of weapons] *JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE* [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 24, 1935.

190. *See* Jean Hutin, *Un projet pour réprimer les tentatives de désordre 'd'où qu'elles viennent* [A project attempts to repress disorder, whatever the origin], *L'ECHO DE PARIS* (Fr.), Oct. 23, 1935, at 2, available at <http://gallica.bnf.fr/ark:/1218/bpt6k815700d/fs.image>; *Décret-loi portant réglementation des mesures relatives au renforcement de l'ordre public* [Decree regulating measures for strengthening the maintenance of the public order], *L'ECHO DE PARIS* (Fr.), Oct. 24, 1935, at 1, available at <http://gallica.bnf.fr/ark:/12148/bpt6k815701s/f1.image>.

191. *Au Conseil des Ministres, De nouveaux décrets-lois ont été adoptés hier* [At the Council of Ministers, decrees were adopted yesterday], *L'HOMME LIBRE* (Fr.), Oct. 24, 1935, at 1.

The decree defined and restricted “war” weapons, restricted importation of firearms, extended recordkeeping requirements by firearms manufacturers and dealers, including the keeping of daily registers, and prohibited sale of firearms by flea market vendors.<sup>192</sup> Its most radical provisions required registration of firearm owners and punished violators without regard to any evil intent. Specifically, Article 9 stated:

Each person in possession of a firearm at the enactment of the present decree must make a declaration of it to the prefect or the sub-prefect of the place of his residence within the time limit of one month.

Anyone after the enactment of the present decree who receives a firearm must make a declaration of it to the prefect or the sub-prefect of the place of his residence within the time limit of 8 days.

Receipts of the declarations referenced in the two previous paragraphs will be delivered to the concerned parties.

Each violation of the requirements of the first two paragraphs of the present article shall be punishable by a fine of 100 to 1,000 Francs. The court in addition will order the forfeiture of the weapon . . .

Failure to comply with this order shall be punishable with imprisonment of from six months to two years. . . .<sup>193</sup>

192. Décret portant réglementation de l'importation, de la fabrication, du commerce et de la détention des armes du 24 octobre 1935 [Decree of October 24, 1935 on the regulating the importation, manufacture, trade, and possession of weapons] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 24, 1935. The decree was widely publicized. *See, e.g., Décret-loi relatif à l'importation et à la vente des armes* [Decree-law on the import and sale of weapons], L'ECHO DE PARIS (Fr.), Oct. 24, 1935, at 3; *Le commerce et le port des armes* [The trade and carrying of weapons], LE FIGARO (Fr.), Oct. 24, 1935, at 3; *Le décret-loi relatif au renforcement du maintien de l'ordre* [Decree-law on closer policing], L'HOMME LIBRE (Fr.), Oct. 24, 1935, at 3; *Trois décrets-lois relatifs au maintien de l'ordre* [Three executive orders relating to policing], LE FIGARO (Fr.), Oct. 24, 1935, at 1.

193. Décret portant réglementation de l'importation, de la fabrication, du commerce et de la détention des armes du 24 octobre 1935 [Decree of October 24, 1935 on regulating the importation, manufacture, trade, and possession of weapons] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 24, 1935 (“Tout détenteur d'une arme à feu à la promulgation du présent décret devra en faire la déclaration au préfet ou au sous-préfet du lieu de sa résidence dans le délai d'un mois. Quiconque postérieurement à la promulgation du présent décret deviendra détenteur d'une arme à feu devra en faire la déclaration au préfet ou au sous-préfet du lieu de sa résidence dans le délai de 8 jours. Récépissé des déclarations prévues aux 2 alinéas précédents sera délivré à l'intéressé. Toute infraction aux dispositions des deux premiers alinéas du présent article sera puni d'une amende de 100 à 1.000 Fr. Le tribunal prescrira en outre la



However, the registration requirement did not apply to hunting guns or to historic or collectable firearms.<sup>194</sup>

It was prominently publicized that the decree requires anyone in possession of arms to declare his place of residency to the prefect or his assistant.<sup>195</sup> The deadline for registration of arms was one month, expiring on November 24, 1935.<sup>196</sup>

Regulations to implement the above decree were promulgated on November 22, 1935.<sup>197</sup> Registration of a firearm included one's name, date and place of birth, nationality, profession, domicile, and description of the firearm—type, caliber, manufacturer, and serial number if it existed.<sup>198</sup> Registrations were transmitted to and kept by prefectures.<sup>199</sup>

Excepted from the registration requirement were governmental agents—various officials, the police, and persons required to possess firearms.<sup>200</sup> Antique and obsolete rifles and carbines were excepted, including percussion weapons 6mm and lower, and—for persons in approved associations—two obsolete service rifles, the Fusil Gras and the Lebel.<sup>201</sup> The Fusil Gras Modèle 1874 M80, a single-shot blackpowder cartridge rifle, had been replaced by the then equally-obsolete Lebel bolt-action rifle in 1886.<sup>202</sup>

The decree-law of October 23, 1935, had distinguished authorized weapons from unauthorized weapons. Unauthorized weapons were designated by the Minister of War on January 16, 1936 to include pistols, automatic and military pistols, and revolvers of a higher caliber than 6.5 millimeters, or of which the barrel length is over ten centimeters, as well as all other rifled firearms of six millimeter

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confiscation de l'arme et ordonnera sa remise au greffe dans un délai de 3 jours nonobstant toute voie de recours. Le refus de déféré à cette injonction sera puni d'un emprisonnement de six mois à deux ans. . .").

194. *See id.* at art. 10.

195. *See Le décret-loi relatif au renforcement du maintien de l'ordre* [*The decree on the strengthening of law enforcement*], L'HOMME LIBRE (Fr.), Oct. 24, 1935, at 3.

196. *See Le délai pour la déclaration des armes* [*The deadline for the declaration of weapons*], LE FIGARO (Fr.), Nov. 1, 1935, at 4.

197. JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Nov. 23, 1935.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. IAN V. HOGG & JOHN WEEKS, *MILITARY SMALL ARMS OF THE 20TH CENTURY* 128-29 (1985).

caliber and above.<sup>203</sup> Exceptions, as included in the regulation of December 16, 1935, included hunting, competition, salon, and fair arms.<sup>204</sup>

While requiring the registration of firearms facilitates the confiscation thereof from persons who abide by the law, a timeless truism is that it fails to prevent homicide by a determined individual. Herschel Grynszpan, a teenage Polish Jew infamously illustrated this failure on November 7, 1938, by failing to register the revolver he had just bought and using it to shoot an attaché at the German Embassy in Paris.<sup>205</sup> His ostensible motive was to avenge the mistreatment of Polish Jews, including his relatives, who were expelled from Germany.<sup>206</sup> The death of the attaché provided the Nazis with the welcome excuse to mount the pogrom known as the Night of the Broken Glass (*Reichskristallnacht*).<sup>207</sup> Weeks before, Nazi Germany had already been disarming German Jews, including those who had registered firearms, and had been taking other actions as if to anticipate the pogrom.<sup>208</sup>

The decree-law on war matériel, arms, and munitions of April 18, 1939 combined previous enactments.<sup>209</sup> It provided in part that the acquisition and possession of weapons or ammunition from the first or fourth category were prohibited unless authorized.<sup>210</sup> “War weapons” were in the first category, and they included any firearm that could fire ammunition used in any military weapon, and “defensive arms” were in the fourth category.<sup>211</sup> Hunting, competition, and antique arms were not included.<sup>212</sup>

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203. BARBIER, *supra* note 107, at 100 (citing JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 15, 1936).

204. *Id.*

205. See GERALD SCHWAB, THE DAY THE HOLOCAUST BEGAN: THE ODYSSEY OF HERSCHEL GRYNZSPAN 1-6, 59-76 (1990).

206. *Id.* at 3.

207. *Id.* at 6.

208. See Halbrook, *supra* note 85, at 115-34.

209. See Loi du 18 avril 1939 fixant le régime des matériels de guerre, armes et munitions [Law of 18 April 1939 laying down the rules of war materials, weapons and ammunition], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 13, 1939, pp. 7463-66. The same law with amendments through 1992 may be viewed at <http://www.securite-sanitaire.org/anciensite/armesafeu/d180439.htm>.

210. See *id.* art. 15.

211. See *id.* arts. 1 & 2.

212. See *id.* art. 2.

Few could have anticipated the hell that would break loose a year later.

## V. THE NAZI OCCUPATION

### A. Twenty-Four Hours to Surrender Firearms or Face the Death Penalty

Imagine that you are sitting in a movie house in Germany in May 1940, and the German Weekly Newsreel comes on to show you the Wehrmacht's blitzkrieg against Holland, Belgium, and France.<sup>213</sup> As panzers and troops cross the border, the film shows German soldiers nailing up a poster proclaiming that all firearms must be surrendered within twenty-four hours to the nearest German post, and that the mayors must accept full responsibility for complete implementation.<sup>214</sup> Firearm registration records obviously would have facilitated the confiscations.

An example of this poster put up by order of the German Army Commander in Chief in soon-to-be occupied France is entitled Decree Concerning the Possession of Arms and Radio Transmitters in the Occupied Territories.<sup>215</sup> It states in part:

1) All firearms and all sorts of munitions, hand grenades, explosives and other war materials must be surrendered immediately.

Delivery must take place within 24 hours to the closest "Kommandantur" [German commander's office] unless other arrangements have been made. Mayors will be held strictly responsible for the execution of this order. The troop commanders may allow exceptions.

2) Anyone found in possession of firearms, munitions, hand grenades, or other war materials will be sentenced to death or forced labor or in lesser cases prison.<sup>216</sup>

This poster, today on display at the Museum of the Order of the Liberation in Paris, is relatively small and inconspicuous. It has no

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213. See *Die Deutsche Wochenschau*, No. 506, (UfA Ton-Woche broadcast May 15, 1940), reproduced in THROUGH ENEMY EYES, VOLUME 2 (International Historic Films).

214. *Id.*

215. *Ordonnance concernant la détention d'armes et de radio-émetteurs dans les territoires occupés*, available at [http://www.stephenhalbrook.com/registration\\_article/pic4.jpg](http://www.stephenhalbrook.com/registration_article/pic4.jpg). The poster is on display at the Musée de l'Ordre de la Libération, Paris, Fr.

216. *Id.*

information on the time or even date of its issuance. A Frenchman would have had no idea when the clock started ticking—a firearm surrendered a day or even an hour late could have subjected its possessor to the death penalty.<sup>217</sup>

In a matter of weeks, the German war machine overran the French army, entering Paris and causing the French government to flee to Bordeaux.<sup>218</sup> The reins of government fell into the hands of eighty-six-year-old Philippe Pétain, the World War I hero who now sought to negotiate an armistice with Hitler.<sup>219</sup> The newspaper *Le Matin* commented that Marshall Pétain, the new president of the Council of the French Republic, announced in a radio broadcast to the French people that France must give up their arms.<sup>220</sup>

The Franco-German Armistice Agreement was signed on June 22 at Compiègne, in the same railway car where the Germans signed the armistice ending the Great War.<sup>221</sup> France was divided into the German-occupied zone, including northern and western France, and the unoccupied zone, which would be ruled by Pétain from Vichy.<sup>222</sup> The agreement required French collaboration with the occupation force:

In the occupied parts of France the German Reich exercises all rights of an occupying power[.] [T]he French Government obligates itself to support with every means the regulations resulting from the exercise of these rights and to carry them out with the aid of French administration.

All French authorities and officials of the occupied territory, therefore, are to be promptly informed by the French Government to comply with the regulations of the German military commanders and to cooperate with them in a correct manner.<sup>223</sup>

Collaboration, in which the French police and bureaucracy would enforce German commands, would make for an easier occupation. Direct German military rule, such as that which existed in conquered Poland, was infinitely harsher, involving the physical elimination of

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217. *See id.*

218. *See* SHIRER, *supra* note 182, at 776-802.

219. *See id.* at 861-62.

220. *A France Doit Mettre Bas Les Armes déclare le maréchal Pétain* [France Must Put Down Weapons Marshal Pétain says], LE MATIN (Fr.), June 18, 1940, at 1.

221. *See* SHIRER, *supra* note 182, at 878-87.

222. Armistice Agreement Between the German High Command of the Armed Forces and French Plenipotentiaries, Compiègne, Fr.-Ger., June 22, 1940, arts. I, III, available at <http://avalon.law.yale.edu/wwii/frgearm.asp>.

223. *Id.* art. III.

entire classes of persons.<sup>224</sup> But collaboration would entail its own costs, moral and human, and would enlist the collaborators in the Nazi cause.<sup>225</sup> The most prominent collaborator would be none other than Pierre Laval, who had decreed firearm registration in 1935.

The National Assembly in Vichy conferred full powers on Marshal Pétain as Chief of State and Prime Minister, who appointed Laval as Minister of State and Deputy Prime Minister.<sup>226</sup> Laval told French senators that the constitution must be “modelled upon the totalitarian states,” including the introduction of concentration camps.<sup>227</sup>

France was quickly becoming just that. The *New York Times* observed:

The best way to sum up the disciplinary laws imposed upon France by the German conqueror is to say that the Nazi decrees reduce the French people to as low a condition as that occupied by the German people. Military orders now forbid the French to do things which the German people have not been allowed to do since Hitler came to power. To own radio senders or to listen to foreign broadcasts, to organize public meetings and distribute pamphlets, to disseminate anti-German news in any form, to retain possession of firearms—all these things are prohibited for the subjugated people of France, as they have been verboten these half dozen years to the people of Germany.<sup>228</sup>

*Le Matin* published a notice headlined “Possession of Arms in the Occupied Territory” beginning in mid-August.<sup>229</sup> It was in the form of a “Communiqué from the Prefecture of Police,” demonstrating French complicity with the German occupation authorities.<sup>230</sup> It stated: “The decree concerning the possession of arms in the occupied region, dated May 10, 1940 . . . gave orders to the French people to deliver, without delay, any arms of the types listed, as well as

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224. See MARK MAZOWER, *HITLER'S EMPIRE: HOW THE NAZIS RULED EUROPE* 89-96 (2008).

225. See *id.* at 416-45.

226. See PIERRE LAVAL, *THE DIARY OF PIERRE LAVAL* 63 (1948); see also WARNER, *supra* note 185, at 428-29.

227. WARNER, *supra* note 185, at 197.

228. *Topics of the Times: Their Common Fate*, N.Y. TIMES, July 2, 1940, at 17.

229. *La Detention D'Armes Dans La Region Occupee* [*Possession of Arms in the Occupied Territory*], LE MATIN (Fr.), Aug. 13, 1940, at 1. Reprinted in issues dated Aug. 27 and Sept. 3 and 10, 1940.

230. *Id.* (“La prefecture de police communique.”).

ammunition.”<sup>231</sup> A further decree dated June 20, 1940 “also ordered the surrender of all hunting guns.”<sup>232</sup> The message sought compliance of the people with “their obligation to surrender their firearms,” warning that “offenders shall face serious punishments . . . .”<sup>233</sup>

The German occupation authorities enlisted the French police in the arms confiscations. A situation report of the Military Administration in France for August noted the activity of the German military police involving weapons searches, and supervision of French police regarding surrender of weapons.<sup>234</sup> A situation report in September stated that bookstores were searched for illegal books and weapons were confiscated.<sup>235</sup> It added:

There have been more reports that weapons failed to be surrendered. Most of the time, such reports concern farmers who have not turned over their hunting guns. Sometimes they hide their guns under hay or straw, sometimes they do not bother hiding them. Sentences range from one month to one year in prison.<sup>236</sup>

That was lenient given that the death penalty could have been ordered, but that policy would not last. A further report noted: “We are making progress with the disarmament of civilians regarding

231. *Id.* (“Le décret concernant la detention des armes dans la region occupée, en date du 10 mai 1940 . . . ordonné à la population française de livrer sans retard toutes les armes qui étaient énumérées, ainsi que toutes les munitions.”).

232. *Id.* (“ordonnait également à la population française de livrer, de même, tous les fusils de chasse”).

233. *Id.* (“[I]l est indispensable d'attirer à nouveau l'attention de la population sur l'obligation qu'elle a de livrer ses armes, en lui rappelant par la même occasion que les contrevenants encourent les graves peines . . .”).

234. *See* LAGERBERICHT DES CHEFS DER MILITÄRVERWALTUNG IN FRANKREICH, KOMMANDOSTAB, FÜR DEN MONAT AUGUST 1940 [SITUATION REPORT OF THE HEADS OF MILITARY IN FRANCE, COMMAND STAFF, FOR THE MONTH OF AUGUST 1940], BA/MA RW 35/4 (Ger.). “BA/MA” refers to the Bundesarchiv-Militärarchiv, Germany’s Military Archives, located in Freiburg. “RW 35/4” and similar designations refer to record groups and document identifications. Copies of archival documents cited herein are in the possession of the author.

235. *See* DURCHSCHRIFT FÜR DEN CHEF DES KOMMANDOSTABES, 20 SEPTEMBER 1940 [COPY FOR THE CHIEF OF COMMAND, 20 SEPTEMBER 1940], BA/MA RW 35/1254 (Ger.).

236. LAGERBERICHT SEPTEMBER 1940, CHEF DES MILITÄRVERWALTUNGSBEZIRKS B, SÜDWESTFRANKREICH, GERICHT [SITUATION REPORT OF SEPTEMBER 1940, THE CHIEF OF MILITARY, DISTRICT B, SOUTHWEST FRANCE, COURT], BA/MA RW 35/1254 (Sept. 22, 1940) (Ger.) (“Ansonsten laufen noch Anzeigen wegen Nichtablieferung von Waffen ein. Heist handelt es sich um Bauern, die ihre Jagdgewehre nicht abgeliefert haben. Die Gewehre sind manchmal im Heu oder Stroh versteckt, manchmal aber auch nicht verborgen. Die Strafen erstreck sich von 1 Monat bis zu 1 Jahr Gefängnis.”).

military weapons. However, compared to the large number of individuals who used to have the right to hunt, we seem to have confiscated few hunting guns."<sup>237</sup> French hunters were perhaps not taking the threat of the death penalty seriously, or thought they would not be detected, as hunting guns were not registered.

Military Administrative District A in St. Germain reported numerous cases, especially concerning "old hunting guns and rusty pistols that had not been surrendered out of fear. The weapons were found in the course of house searches conducted as retaliatory measures for cut cables."<sup>238</sup> That meant that sabotage was occurring, but the only death sentence reported concerned a man who fired a shot at a German soldier.<sup>239</sup>

German Military District Paris reported a good relationship with the French gendarmes and police, stating that cooperation with both groups was excellent and that they are fully at the service of the German offices.<sup>240</sup> This cooperation would have included ferreting out "illegal weapons possession," of which only a dozen or so were reported.<sup>241</sup> However, of "Confiscated or Secured Objects," all districts reported rifles and pistols and sizable quantities of ammunition (ranging up to 30,000 rounds in one district), and one

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237. LAGERBERICHT DES CHEFS DER MILITÄRVERWALTUNG IN FRANKREICH, KOMMANDOSTAB, FÜR DEN MONAT SEPTEMBER 1940, [SITUATION REPORT OF THE HEADS OF MILITARY IN FRANCE, COMMANDS FOR THE MONTH OF SEPTEMBER 1940], BA/MA RW 35/4 (Ger.) ("Die Entwaffnung der Zivilbevölkerung bezüglich der Militärwaffen schreitet gut vorwärts, jedoch erscheint die Beschlagnahme der Jagdwaffen mit Munition bei der ungeheueren Masse der früheren Jagdberechtigten noch gering.").

238. LAGEBERICHT FÜR DEN ZEITRAUM VOM 20. SEPTEMBER BIS 20. OKTOBER 1940, ST. GERMAIN [SITUATION REPORT FOR THE PERIOD OF 20 SEPTEMBER TO 20 OCTOBER 1940, ST. GERMAIN], BA/MA RW 35/1198 (Oct. 20, 1940) (Ger.) ("Im Bereiche der Feldkommandantur 722 handelt es sich durchwegs nur um leichtere Fälle und zwar um alte Jagdwaffen und verrostet Pistolen, die aus Angst nicht abgeliefert worden waren. Die Auffindung dieser Waffen ist auf Hausdurchsuchungen zurückzuführen, die im Rahmen von Vergeltungsmaßnahmen wegen Kabeldurchschneidungen durchgeführt worden sind.").

239. *See id.*

240. *See* LAGE UND TÄTIGKEITSBERICHT DES CHEFS DES MILITÄRVERWALTUNGSBEZIRKS PARIS, KOMMANDOSTAB, STABSOFFIZIER DER FELDGENDARMERIE, FÜR DIE ZEIT VOM 13.11. BIS 12.12.1940 [SITUATION AND ACTIVITY REPORT OF THE CHIEF OF MILITARY ADMINISTRATIVE DISTRICT PARIS, COMMAND STAFF, STAFF OFFICER OF THE MILITARY POLICE, FOR THE PERIOD FROM 13 NOVEMBER TO 12 DECEMBER 1940], BA/MA RH 36/565, Tgb. Nr. 454/40 (Dec. 19, 1940) (Ger.).

241. *Id.*

district reported 850 hunting guns.<sup>242</sup> “Captured Property” included 1,300 rifles, 35 pistols, and 53 slashing and thrusting weapons.<sup>243</sup>

Space does not allow summaries of numerous other reports of firearm confiscations and praise for the cooperation of the French police in nabbing gun owners. Yet there seems to be an iron law in history that no matter how harsh the punishment, many persons will not give up their firearms. Since the threat of the death penalty could not induce persons to surrender their firearms, debate ensued on whether they should be enticed to do so with promises of amnesty.

### **B. Amnesty or Execution? The Dilemma After a Year of Non-Compliance**

After a year of occupation, many Frenchmen had not surrendered their firearms, and the Germans knew it. Dr. Grohmann, Counselor to the Military Commander in France, rejected amnesty proposals in a mid-1941 memorandum, explaining:

There is no need for the Military Commander to make another appeal for the surrender of weapons without punishment in the entire occupied territory. The surrender imposed with the order dated May 10, 1940, was an absolutely necessary measure that needed to be enforced strictly to protect the advancing troops. Because of that need for protection, the surrender deadline was set at twenty-four hours and some violations were punished by death. It is likely that several of those death sentences were executed. Given this situation, it is not advisable a year later to set a new surrender deadline with the promise of an amnesty. Such an order would be difficult to explain given the death sentences imposed so far.<sup>244</sup>

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242. *Id.*

243. *Id.*

244. MILITÄRBEFEHLSHABER IN FRANKREICH, VERWALTUNGSSTAB, ABTEILUNG VERWALTUNG, VERORDNUNG ÜBER DEN WAFFENBESITZ IM BESETZTEN GEBIET VOM 10. MAI 1940 [MILITARY COMMANDER IN FRANCE, ADMINISTRATIVE STAFF, DEPARTMENT OF MANAGEMENT, REGULATION CONCERNING THE POSSESSION OF WEAPONS IN THE OCCUPIED AREA OF 10 MAY 1940], BA/MA RW 35/544 (July 5, 1941) (Ger.) (“Zu einer nochmaligen Aufforderung zur Ablieferung mit Zusicherung der Straffreiheit für das ganze besetzte Gebiet durch den Militärbefehlshaber ich keinen Anlass. Die in der Verordnung vom 10.5.1940 verlangte Ablieferung war eine beim Vormarsch unbedingt notwendige Massnahme, die zum Schutz der Truppe mit der erforderlichen Strenge durchgeführt werden musste. Damals wurde aus diesem Schutzbedürfnis eine Ablieferungsfrist von 24 Stunden gesetzt. Zuwiderhandlungen wurden zum Teil mit dem Tode bestraft. Ein Teil dieser urteile ist aller Wahrscheinlichkeit nach auch vollstreckt worden. Bei dieser Sachlage erscheint es nicht möglich, jetzt nach einem Jahr eine neue Ablieferungsfrist mit gleichzeitiger



Death sentences sharply escalated after the fatal shooting on August 21, 1941 of German Naval Cadet Alfons Moser by the young Communist Pierre Georges at the Barbès subway station.<sup>245</sup> Hitler demanded reprisals that included execution of multiple enemies of the Reich.<sup>246</sup> If resisters were not apprehended, local officials would submit proposed hostages to General Otto von Stülpnagel, the Military Commander in France, who, with guidance from Berlin, would decide whom to shoot.<sup>247</sup> Notice of the executions would be widely publicized to intimidate the population.<sup>248</sup> Newspapers warned that the possession of firearms and war materials of any kind was prohibited and subject to the death penalty or imprisonment; they further cautioned that as of the date of publication, anyone who possessed weapons or war materials contrary to this order would be subject solely to the death penalty.<sup>249</sup>

The above was a dramatic change in policy. *Le Temps* published a notice that the German troop Commander in Chief in France ordered an increase in the severity of sanctions against civilians with unauthorized possession of firearms; it also noted that from then on, the possession of firearms and war equipment of any kind can lead to the death sentence.<sup>250</sup>

The *New York Times* reported that German authorities in Paris placarded on walls and published in newspapers the threat that continued acts of violence would lead to the execution of an increasingly large number of hostages.<sup>251</sup> The hostages to be shot would include not just Communists but also members of all groups of the population, indicating that resistance was broad.<sup>252</sup> Police in the occupied zone of France conducted house-to-house searches for

Gewährung von Straffreiheit zu bestimmen. Sie würde mit der Vollstreckung der bisher ergangenen Urteile nur schwer in Einklang zu bringen sein.”).

245. See IAN OUSBY, OCCUPATION: THE ORDEAL OF FRANCE, 1940-1944, at 223-32 (2000).

246. See *id.* at 227.

247. See *id.* at 227-30.

248. See *infra* note 255 and accompanying text.

249. See ABDRUCK AUS “PARISER ZEITUNG” VOM 13.9.1941, BEKANNTMACHUNG [REPRINTED FROM “PARIS NEWSPAPER” ON 13 SEPTEMBER 1941, NOTICE], BA/MA RW 35/1 (Ger.); see also A/MA RW 35/544, *Avis*, LE MATIN (Fr.), Sept. 13, 1941.

250. See *La détention des armes dans la zone occupée* [Possession of arms in the occupied zone], LE TEMPS (Fr.), Sept. 14, 1941, at 4.

251. See Lansing Warren, *Nazis Threaten People of Paris: Warn That Anyone May Be Shot as Hostage—Homes Are Searched For Arms*, N.Y. TIMES, Sept. 18, 1941, at 1, 8.

252. See *id.*

arms.<sup>253</sup> In Paris, the French and German police conducted such searches together, such as in a working class neighborhood where a supposed terrorist headquarters existed.<sup>254</sup>

General von Stülpnagel announced that ten hostages were shot following acts of violence in Paris against members of the German Army.<sup>255</sup> *Le Figaro* commented that the hostages shot were Jews and communists.<sup>256</sup>

Stülpnagel issued another announcement or “*Avis*” days later headlined in bold type in the French press, that twelve hostages had been executed in retaliation for the cowardly killing of a German soldier, threatening that in the event of subsequent offenses, a much greater number of hostages would be executed.<sup>257</sup> Besides six identified as Communists and two who attacked German soldiers, four were executed for possession of arms.<sup>258</sup>

Sometimes Stülpnagel gave details in the published reports about the types of firearms possessed by those who were executed. Marcel Piongery, from Orly-Saint-Loup, had a French infantry rifle, a German rifle, two hunting guns, two small caliber rifles, four revolvers, and ammunition, which he had hidden under the roof of his house.<sup>259</sup> René Baudet had a double-barrel shotgun with two spare barrels, a rifle, a revolver, and over 200 cartridges.<sup>260</sup>

While the history of the French Resistance is beyond the scope of this Article, factions were deeply divided on the wisdom of armed attacks. Charles de Gaulle broadcast from BBC in London that Germans should not be killed yet because, “at the moment, it is too easy for the enemy to respond by massacring our fighters, who are for the time being unarmed.”<sup>261</sup>

253. *See id.*

254. *See id.*

255. *See Dix Otages Fusillés en zone occupée* [Ten hostages shot in occupied zone], LE FIGARO, Sept. 18, 1941, at 1 (Fr.).

256. *Les otages fusillés à Paris* [Hostages shot in Paris], LE FIGARO, Sept. 19, 1941, at 1 (Fr.).

257. *See A VIS*, LE MATIN (Fr.), Sept. 22, 1941, at 1.

258. *See id.* (naming Pierre Guignois [also for “possession of communist tracts”], Georges Masset, Daniel Loubier, and Maurice Peureux). A week later, it was announced that Eugène Devigne and Mohamed Moali were executed for “possession of prohibited arms.” *A VIS*, LE MATIN (Fr.), Sept. 29, 1941, at 1.

259. *A VIS*, LE MATIN (Fr.), Oct. 20, 1941, at 2.

260. *Id.* at 1.

261. OUSBY, *supra* note 245, at 232. The broadcast was on Oct. 23, 1941.

The Germans meant to keep them unarmed. A new amnesty was announced for turning in hunting guns with a deadline of October 25, 1941.<sup>262</sup> Newspapers announced that arms would be surrendered in neighborhoods to the ward police stations, and in the suburbs to the district police stations.<sup>263</sup> Each gun would be tagged and, on request, a receipt issued.<sup>264</sup> It ended with the usual threat—that anyone who did not take advantage of this last opportunity to get rid of the prohibited arms risked the most serious punishment.<sup>265</sup> Indeed, death sentences continued to be issued and carried out during the amnesty period.<sup>266</sup>

According to German military authorities, the amnesty proved to be a great success because many hunting guns—which were considered a threat to the occupation—were surrendered:

The fact that French citizens were given a new deadline of October 25, 1941, to surrender hunting guns and weapons parts led to the surrender of large numbers of weapons and amounts of ammunition. However, the results vary greatly from department to department. That may be due to the fact that the prefects did not all issue the same orders to the police. But the success of this action showed that we were correct in executing it. The security of the occupying forces was enhanced because the population surrendered a large number of weapons.<sup>267</sup>

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262. See, e.g., *Derniers Délais Pour La Remise Des Armes* [*Last Deadline for Surrendering Arms*], LE MATIN (Fr.), Oct. 15, 1941, at 1; *Le Retournement des Bras dans la Zone Occupee* [*The Turning Over of Arms in the Occupied Zone*], LE TEMPS (Fr.), Oct. 15, 1941, at 2. For shorter versions, see VEROEFFENTLICHUNG “PARISER ZEITUNG,” 15.10.1941 [PUBLICATION “PARIS NEWSPAPER,” 15 OCTOBER 1941], BA/MA, RH 20-6/999 (Ger.); and MILITÄRBEFEHLSHABER IN FRANKREICH, VERWALTUNGSSTAB, ABTEILUNG VERWALTUNG, LETZTE FRIST ZUR ABLIEFERUNG VON WAFFEN, 1941 [MILITARY COMMANDER IN FRANCE, ADMINISTRATIVE STAFF, DEPARTMENT OF MANAGEMENT, LAST DEADLINE FOR THE DELIVERY OF WEAPONS, 1941], BA/MA RW 35/544 (Ger.).

263. See *Derniers Délais Pour La Remise Des Armes* [*Last Deadline for Surrendering Arms*], LE MATIN (Fr.), Oct. 15, 1941, at 1.

264. See *id.*

265. *Id.*

266. The execution of Pierre Lerein from Floirac (Gironde) occasioned the comment that anyone who kept arms “is doing so only with dark ideas in mind,” and thus “[i]t is therefore just that he be punished as such . . . .” *AVIS*, LE MATIN (Fr.), Oct. 24, 1941, at 1.

267. LAGEBERICHT DES MILITÄRVERWALTUNGSBEZIRKS B, VERWALTUNGSSTAB, VERWALTUNGSGRUPPE, FÜR DIE ZEIT VOM 16. SEPTEMBER BIS 15. NOVEMBER 1941 [SITUATION REPORT OF THE MILITARY ADMINISTRATIVE DISTRICT B, ADMINISTRATIVE STAFF, MANAGEMENT GROUP, FOR THE PERIOD 16 SEPTEMBER TO 15 NOVEMBER 1941], BA/MA RW 35/1264 (Ger.) (“Die nochmalige Ermöglichung

Data on the arms confiscated were compiled in a report entitled “Surrender of Weapons in the Occupied Territory” from the Military Commander in Paris, signed by Dr. Werner Best, Head of War Administration.<sup>268</sup> The report noted that, under the order issued October 9, large numbers of French civilians used the opportunity to surrender weapons without risking punishment by the deadline of October 25, 1941.<sup>269</sup> The results were as follows:

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der Ablieferung von Jagdwaffen und Waffenteilen bis zum 25.10.41 hat zur Erfassung grosser Mengen von Waffen und Munition geführt. Die Ergebnisse in den einzelnen Departements sind allerdings z.T. sehr unterschiedlich. Dies dürfte auf die Art der Weisungen zurückzuführen sein, die die frz. Polizeibehörden von den Präfekten erhalten haben. Der Erfolg hat jedenfalls die Richtigkeit der eingeleiteten Aktion bewiesen und durch das Herausziehen grösserer Waffenmengen aus der Bevölkerung zur Erhöhung der Sicherheit der Besatzungsmacht beigetragen.”).

268. MILITÄRBEFEHLSHABER IN FRANKREICH, VERWALTUNGSSTAB, ABTEILUNG VERWALTUNG, ABLIEFERUNG DER WAFFEN IM BESETZTEN GEBIET, 10.12.1941 [MILITARY COMMANDER IN FRANCE, ADMINISTRATIVE STAFF, DEPARTMENT MANAGEMENT, DELIVERY OF WEAPONS IN THE OCCUPIED TERRITORY, 10 DECEMBER 1941], BA/MA RW 35/544 (Ger.). Best was a high Gestapo official who was instrumental in disarming the German Jews before the war. *See* Halbbrook, *supra* note 85, at 126.

269. *See* MILITÄRBEFEHLSHABER IN FRANKREICH, VERWALTUNGSSTAB, ABTEILUNG VERWALTUNG, ABLIEFERUNG DER WAFFEN IM BESETZTEN GEBIET, 10.12.1941 [MILITARY COMMANDER IN FRANCE, ADMINISTRATIVE STAFF, DEPARTMENT MANAGEMENT, DELIVERY OF WEAPONS IN THE OCCUPIED TERRITORY, 10 DECEMBER 1941], BA/MA RW 35/544 (Ger.).

Table 1.<sup>270</sup>

Kind of weapons and ammunition surrendered	Dist. A	Dist. B	Dist. C	Dist. of Bordeaux	Total	Comment
Machine guns	38	8	45	5	96	
Military rifles	4,191	1,163	5,940	see comment	11,294	Plus 16,500 military and small caliber rifles reported as total number by Bordeaux
Hunting guns	10,189	3,250	9,152	see comment	22,591	
Small caliber rifles	1,814	-	1,185	see comment	2,999	
Rifle parts	243	91	see comment	-	334	District C reported large numbers of weapons parts, but no specific numbers
Pistols and revolvers	3,485	1,345	4,795	2,460	12,085	
Other weapons	-	-	1 grenade launcher, 12 signal pistols	-	-	District Bordeaux reported large amounts of military and hunting ammunition, but no specific numbers
Rifle ammunition	12,069	3,948 plus 4 cases	50,000	-	66,017 plus 4 cases	
Pistol ammunition	-	2,321	6,000	-	8,321	
Hunting ammunition	77,422	13,505	281,503	-	372,430	
Hand grenades	-	6 plus 4 cases	188	-	194 plus 4 cases	
Explosives, etc.	-	6 cases plus 25 kg of powder	25 kg of powder	-	6 cases plus 50 kg of powder	
Bombs	-	11	8	-	19	
Ammunition parts	-	45 kg of pellets	620 kg of lead	-	-	
Side arms	2,149	1,209	10,109	370	13,837	

270. *See id.*

The above table did not include arms confiscated in Paris, because the Commander of Greater Paris reported that he had been unable to count the material surrendered because of the huge volume of arms there.<sup>271</sup> The following were received: twelve trucks with guns of all kinds and caliber; three trucks with pistols; two trucks with ammunition, powder, and explosives; and nine trucks with side arms (bayonets and edged weapons).<sup>272</sup> The following were (supposedly) counted: 4,100 hunting guns, 150,000 rounds of hunting ammunition, 3,000,000 cartridge cases, 350 kilograms of shot, 1,600 parlor and Tesching rifles, 317 barrels for double-barreled shotguns, 162 shoulder stocks, and 170,000 rounds of parlor rifle ammunition.<sup>273</sup> The report concluded: "The French police have not finished their delivery of weapons surrendered in Paris. It is estimated that the numbers reported so far represent only half of the surrendered weapons."<sup>274</sup>

Meanwhile, the United States had just been dragged into the war by the Japanese sneak attack on Pearl Harbor on December 7. Exemplifying awareness in the United States of German policies, the magazine of the National Rifle Association of America reported:

From Berlin on January 6th [1942] the German official radio broadcast—"The German military commander for Belgium and Northern France announced yesterday that the population would be given a last opportunity to surrender firearms without penalty up to January 20th and after that date anyone found in possession of arms would be executed."

....

How often have we read the familiar dispatches "Gestapo agents accompanied by Nazi troopers swooped down on shops and homes and confiscated all privately-owned firearms!"

What an aid and comfort to the invaders and to their Fifth Column cohorts have been the convenient registration lists of privately owned firearms—lists readily available for the copying or stealing at the Town Hall in most European cities.

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271. *See id.*

272. *Id.*

273. *Id.*

274. *Id.* ("Die Uebergabe der in Paris abgelieferten Waffen durch die franz. Polizei ist noch nicht abgeschlossen. Schätzungsweise stellen die bis jetzt mitgeteilten Zahlen nur die Hälfte der abgelieferten Waffen dar.").

What a constant worry and danger to the Hun and his Quislings have been the privately owned firearms in the homes of those few citizens who have “neglected” to register their guns!<sup>275</sup>

The New Year had hardly begun before the routine “Avis” from the Commander of Greater Paris announced that the Parisian Lucien Gourlot was executed for possession of arms and ammunition.<sup>276</sup> Noting other executions for the same crime, a German report stated that illegal weapons possession still represented the core of criminal activities of the French and that it appeared almost impossible to get rid of it.<sup>277</sup> Yet another admonition to surrender arms and promise of immunity with no formal procedure was issued on January 18, 1942.<sup>278</sup> Gun owners must have wondered whether the Nazi promises could be trusted and whether they would be subject to interrogation, if not torture or execution. Indeed, the Commander of Greater Paris regularly announced executions for arms possession, which were prominently published.<sup>279</sup>

Allied intelligence provided additional insights. It was reported to the American Consulate in Geneva that the recent entry of the United States into the war encouraged anti-Axis sentiment in the population. A bank manager in Dijon in the Occupied Zone provided the following information:

There are daily searches for arms, and those in whose houses arms are found are shot—an average of about one a day in this particular town. The banker exhibited several issues of the local newspaper announcing executions to substantiate his assertion. Only a very small percentage of the arms concealed, he stated, are ever discovered. There are huge quantities ready for use when the opportunity comes. Hatred of the Germans is becoming fiercer as time passes and executions continue. Arms concealment is no

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275. Editorial, *The Nazi Deadline*, AMERICAN RIFLEMAN, Feb. 1942, at 7.

276. *AVIS*, LE MATIN (Fr.), Jan. 13, 1942, at 1.

277. See LAGEBERICHT DES MILITÄRVERWALTUNGSBEZIRKS B, SÜDWESTFRANKREICH, FÜR DIE ZEIT VOM 16. NOVEMBER 1941 BIS 15. JANUARY 1942 [SITUATION REPORT OF THE MILITARY ADMINISTRATIVE DISTRICT B, SOUTHWESTERN FRANCE, FOR THE PERIOD 16 NOVEMBER 1941 TO 15 JANUARY 1942], BA/MA RW 35/1264 (Nov. 19, 1942) (Ger.).

278. ETAT FRANCAIS [FRENCH STATE], BA/MA RW 35/544 (Jan. 18, 1942) (Ger.).

279. *E.g.*, *2 More Executed in Paris: Berne Reports Nazi Reprisals-Total is 5 in 3 Days*, N.Y. TIMES, Jan. 26, 1942, at 3; *Henri Bourbon from Paris*, LE MATIN (Fr.), Jan. 26, 1942, at 3; *Louis Blaise from Paris*, LE MATIN (Fr.), Jan. 24/25, 1942, at 3; *Lucien Michard from Livry (Seine-et-Oise)*, LE MATIN (Fr.), Jan. 23, 1942, at 1.

longer just a matter of individual initiative, but there is a very efficient organization directing it.<sup>280</sup>

Indeed, the Military Commander in France reported that in Paris in January 1942, eighty-eight Frenchmen were sentenced to death, fifty-two for illegal arms possession.<sup>281</sup> Of seventy-eight prison sentences of over five years, seventy-three were for the same offense.<sup>282</sup>

### C. The Death Penalty for Not Denouncing Others in Possession of Firearms?

In early 1942 drafts were circulated of a new weapon surrender order prepared by Dr. Grohmann.<sup>283</sup> As explained below, section three of the draft required a person with knowledge that another possessed a firearm to denounce such person to German or French authorities, with the death penalty for failure to comply.<sup>284</sup> An exception was made for spouses, children, the elderly, and siblings.<sup>285</sup>

Dr. Werner Best recommended against the proposal to the Military Commander.<sup>286</sup> He advised that adopting the “denunciation provision” without a new deadline for the surrender of weapons “would result in a much more difficult situation for those French officials who are cooperating with us and are willing to request a new surrender deadline” and “would increase the number of criminal proceedings for weapons possession.”<sup>287</sup>

280. Paul C. Squire, Political Notes for American Consulate, Geneva, Switzerland, reporting to Washington (Jan. 29, 1942), *in* LIBERTY, INDEPENDENCE, NEUTRALITY 172 (Luzi Stamm et al. eds., 2006).

281. MILITÄRBEFEHLSHABER IN FRANKREICH, LAGEBERICHT DEZEMBER 1941/JANUARY 1942 [MILITARY COMMANDER IN FRANCE, SITUATION REPORT DECEMBER 1941/JANUARY 1942], BA/MA, RW 35/12 (Jan. 31, 1942) (Ger.).

282. *Id.*

283. *See infra* notes 291-94 and accompanying text.

284. *See infra* notes 287, 297, 300-02 and accompanying text.

285. *See infra* notes 302-06 and accompanying text.

286. *See* KRIEGSVERWALTUNGSCHEF, STAATSMINISTER, AN MILITÄRBEFEHLSHABER IN FRANKREICH, 13. FEBRUAR 1942 [WAR ADMINISTRATIVE CHIEF, MINISTER OF STATE, MILITARY COMMANDER IN FRANCE, 13 FEBRUARY 1942], BA/MA RW 35/544 (Ger.).

287. *Id.* (“Würde aber die Verordnung ohne die Festsetzung einer Ablieferungsfrist erlassen werden, so würde sie durch den ‘Denunziations-Paragrafen’ eine Verschärfung des gegenwärtigen Rechtszustandes bringen, ohne der Bevölkerung des besetzten Gebietes die Möglichkeit einer straflosen Ablieferung zu geben. Hierdurch würde die Stellung der gutwilligen Kräfte in der französischen Regierung, die nach der Anregung des Militärbefehlshabers eine französische Bitte um eine neue Ablieferungsfrist herbeiführen wollen, sehr erschwert. Ausserdem



But the French Military Administrative Counselor opposed any new amnesty to surrender arms, noting, "If we repeat our orders too many times and repeatedly assure people that they will not be punished even though hundreds of them have been executed, we will end up losing all respect and authority."<sup>288</sup> He added the following revealing comments:

As proposed by section three of the new draft, the extension of penalties to persons who have knowledge of the weapons possession of others will lead to a great increase of denunciations. Housekeepers, maids, or wives will all report their knowledge of illegal weapons possession not during the grace period, but when and if they get into an argument with the owner of the weapons and wish to take revenge. We have had enough of these cases already.

A new proclamation that weapons are prohibited, subject to a grace period, may result in the surrender or dumping into the Seine of thousands of pistols and rifles and tens of thousands of rounds of ammunition. But weapons and explosives kept in hiding or newly procured for the purpose of attacking the occupying forces will not be surrendered.<sup>289</sup>

In short, the French official warned, the proposal would prompt increased denunciations, resulting in death sentences to harmless people, while terrorists and organized nationalists would ignore the new order the way they ignored the old one.<sup>290</sup>

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würde die Verordnung ohne Festsetzung einer neuen Ablieferungsfrist auf Grund des § 3 nur zu einer Vermehrung der Strafverfahren wegen Waffenbesitzes führen.")

288. *Id.* ("Wer seine Befehle allzu haeufig wiederholt und wer wiederholt Straffreiheit zusichert fuer Vergehen, die nun schon zu hunderten von Malen tatsaechlich mit dem Tode bestraft worden sind, verliert letzten Endes jegliches Ansehen und jegliche Autoritaet.").

289. *Id.* ("Die in dem neuen Entwurf (§ 3) vorgesehene Ausdehnung der Strafandrohung auf diejenigen Personen, die von dem unerlaubten Waffenbesitz eines Anderen Kenntnis haben, muss zu einer ungeheuren Vermehrung der gemeinen Angebereien fuehren. Die Haushaelterin, das Dienstmaedchen, die Ehefrau werden von ihrer Kenntnis eines unerlaubten Waffenbesitzes nicht waehrend der Schonfrist, sondern dann Gebrauch machen, wenn sie mit dem Waffenbesitzer Krach bekommen haben und sich an ihm raechen wollen. Wir haben unerfreuliche Vorgaenge dieser Art schon genug gehabt. Eine Wiederholung des Waffenverbots unter Festsetzung einer Schonfrist mag den Erfolg haben, dass meinewegen noch tausende von Pistolen und Gewehren und zehntausende von Schuss Munition abgeliefert oder in die Seine geworfen werden. Aber nicht abgeliefert werden diejenigen Waffen und Sprengmittel, die zum Zwecke der Veruebung von Attentaten gegen die Besatzungsmacht bisher verborgen gehalten oder neubeschafft worden sind.").

290. *See id.*

Dr. Grohmann wrote a detailed account of discussions with Dr. Jean-Pierre Ingrand, Prefect and State Council of the French General Delegation.<sup>291</sup> Ingrand advised that the French, particularly in the countryside, “still possess[] ‘thousands of hunting guns.’ These people will only surrender their weapons if they are given assurances that they will receive the weapons back once the occupation ends.”<sup>292</sup> Issuance of a receipt would thus be necessary. However, persons possessing military weapons would not surrender them as “owners of such arms tend to be opposed to the occupying forces.”<sup>293</sup>

Ingrand also expressed the French government’s concern about the provision contained in the order of the Military Commander in Belgium and Northern France regarding the duty to report third persons who are known to possess weapons, as it would result in denunciations and greatly expand the circle of persons who might be subject to the death penalty.<sup>294</sup>

A new decree would be issued on March 5 without the denunciation provision.<sup>295</sup> To publicize the decree, the German Justice Group (if ever there was a misnomer) urgently directed the Propaganda Group to arrange for the French press to comment on this order and to generate repeated references to it on the French radio.<sup>296</sup> The Justice Group explained:

291. *See* MILITÄRBEFEHLSHABER IN FRANKREICH, VERWALTUNGSSTAB, ABTEILUNG VERWALTUNG, VERORDNUNG ÜBER ABLIEFERUNG VON WAFFEN [MILITARY COMMANDER IN FRANCE, ADMINISTRATIVE STAFF, DEPARTMENT OF MANAGEMENT, REGULATION ON THE DELIVERY OF WEAPONS], BA/MA RW 35/544 (Feb. 27, 1942) (Ger.).

292. *Id.* (“Man kann annehmen, dass sich noch ‘tausende von Jagdwaffen’ im Besitz der frz. Bevölkerung, insbesondere auf dem Lande, befinden. Die Ablieferung dieser Waffen wird aber nur zu erreichen sein, wenn die Eigentümer die Zusage erhalten, dass sie die Waffen nach Beendigung der Besatzungszeit wiedererhalten.”).

293. *Id.* (“Wer jetzt noch Waffen dieser Art besitzt, wird sie auch im Falle einer neuen Amnestie behalten, da es sich hierbei im Gegensatz zu den Besitzern von Jagdwaffen um Leute handeln dürfte, die die Waffen aus einer feindseligen Einstellung gegen die Besatzungsmacht aufbewahren.”).

294. *See id.*

295. *See* MILITÄRBEFEHLSHABER IN FRANKREICH, VERWALTUNGSSTAB, ABTEILUNG VERWALTUNG, BEKANNTGABE DER NEUEN WAFFENVERORDNUNG DURCH DIE FRANZÖSISCHEN BEHÖRDEN IM BESETZTEN GEBIET [MILITARY COMMANDER IN FRANCE, ADMINISTRATIVE STAFF, DEPARTMENT OF MANAGEMENT, ANNOUNCED THE NEW WEAPON REGULATION BY THE FRENCH AUTHORITIES IN THE OCCUPIED TERRITORY], BA/MA RW 35/544 (Mar. 18, 1942) (Ger.).

296. *See* GRUPPE JUSTIZ AN GRUPPE PROPAGANDA, VERORDNUNG ÜBER DEN BESITZ VON WAFFEN [JUSTICE GROUP TO GROUP PROPAGANDA, REGULATION ON THE POSSESSION OF WEAPONS], BA/MA RW 35/544 (Mar. 23, 1942) (Ger.).

1. The new order provides the last opportunity to surrender weapons and war materials without punishment. The duty to surrender applies in particular to hunting guns and firearms. . . . Anybody who does not take advantage of this new opportunity, which will expire on April 1, 1942, will be prosecuted to the fullest extent. In the future, anybody found to possess weapons illegally will be sentenced to death.

2. Up until today, we informed the public about death sentences for failure to surrender weapons. These publications served to remind the population of their duty to surrender weapons. In the future, there will be no more reminders. Executions will no longer be published.<sup>297</sup>

The decree was duly published by French authorities,<sup>298</sup> and reprinted in the French newspapers.<sup>299</sup> The decree forbade the possession of any kind of firearms, including hunting arms (section one); provided that anyone in possession thereof shall be sentenced to death or, in less serious cases to forced labor or jail (section two); and that arms must be turned in to the *Feldkommandanturen*, or to French city halls, police or gendarme stations (section three).<sup>300</sup> This was the same iron fisted approach tried for the past two years that obviously had not worked.

While the final decree deleted the provision imposing the death penalty for failure to inform on another who possessed a firearm,<sup>301</sup>

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297. *Id.* (“1. Die neue Verordnung sieht eine letzte Möglichkeit zur straffreien Ablieferung von Waffen und Kriegsgerät vor. Die Ablieferungspflicht gilt hierbei auch für Jagd- und Schusswaffen. Dies ist besonders hervorzuheben. Wer von dieser neuen Möglichkeit, die bis einschliesslich 1.4.42 besteht, keinen Gebrauch macht, kann künftig mit keiner Nachsicht mehr rechnen. In Zukunft wird grundsätzlich bei verbotenen Waffenbesitz nur noch auf Todesstrafe erkannt werden. 2. Bisher wurden die Todesurteile, die wegen Nichtablieferung von Waffen vollstreckt worden sind, der Oeffentlichkeit jeweils mitgeteilt. Die Oeffentlichkeit wurde dadurch immer wieder von neuem auf die Ablieferungspflicht aufmerksam gemacht. In Zukunft werden auch diese Hinweise nicht mehr erfolgen, da die Vollstreckungen nicht mehr veröffentlicht werden.”).

298. See VERORDNUNGSBLATT DES MILITÄRBEFEHLSHABERS IN FRANKREICH, JOURNAL OFFICIEL CONTENANT LES ORDONNANCES DU MILITÄRBEFEHLSHABER IN FRANKREICH, NR. 56 [OFFICIAL GAZETTE OF THE MILITARY COMMANDER IN FRANCE, OFFICIAL JOURNAL CONTAINING ORDERS OF THE MILITARY COMMANDER IN FRANCE, No. 56], BA/MA RW 35/544 (Mar. 18, 1942) (Ger.).

299. See, e.g., *Une Ordonnance Concernant La Détention Des Arms*, LE MATIN (Fr.), Mar. 18, 1942, at 3; see also *Paris Extends Arms Ban*, N.Y. TIMES, Mar. 19, 1942, at 8.

300. VERORDNUNGSBLATT DES MILITÄRBEFEHLSHABERS IN FRANKREICH, *supra* note 298.

301. See *id.*

the Military Commander noted an increase of cases where Armed Forces courts sentence defendants to death after their own relatives turned them in for weapons possession.<sup>302</sup> While “it is necessary to prosecute these cases without leniency in order to confiscate as many hidden weapons as possible,” he added that “the death penalty is odious in cases where the French person makes the report based on ulterior motives (revenge, jealousy, etc.) and uses the German legal system to get rid of an unwanted family member.”<sup>303</sup> This could be rectified in less serious cases if defendants were sentenced to jail or prison instead of to death, when close relatives reported the defendant.<sup>304</sup> He concluded that this solution would still allow the courts to impose the death penalty in severe cases reported by family members (e.g., possession of numerous weapons or explosives) or cases reported by family members with a valid motive for their report.<sup>305</sup>

Accordingly, the reference in section two of the decree to “less serious cases” was amended to add that the same disposition would apply to an offender denounced by a spouse, parent, child, or brother or sister.<sup>306</sup>

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302. *See* MILITÄRBEFEHLSHABER IN FRANKREICH, VERWALTUNGSSTAB, ABTEILUNG VERWALTUNG, ÄNDERUNG DER VERORDNUNG ÜBER DEN BESITZ VON WAFFEN VOM MAY 3, 1941 [MILITARY COMMANDER IN FRANCE, ADMINISTRATIVE STAFF, DEPARTMENT MANAGEMENT, CHANGE OF REGULATION CONCERNING THE POSSESSION OF WEAPONS ON MAY 3, 1941], BA/MA RW 35/544 (Ger.); ANZEIGE DES TÄTERS DURCH ANGEHÖRIGE [DENUNCIATION BY CULPABLE RELATIVES OF THE OFFENDER], BA/MA RW 35/544 (May 6, 1942) (Ger.).

303. *Id.* (“Unter dem Gesichtspunkt der möglichst restlosen Erfassung verborgener Waffen durch die Besatzungsmacht ist eine nachdrückliche Verfolgung auch solcher Fälle unentbehrlich; andererseits wirkt die Todesstrafe gerade hier, wo der französische Anzeiger in der Regel lediglich aus minderwertigen Motiven (Rachsucht, Eifersucht usw.) handelt, mit dem Ziel, mit Hilfe der deutschen Rechtspflege ein ihm unbequemes Familienmitglied zu beseitigen, häufig odios.”).

304. *See id.*

305. *Id.*

306. VERORDNUNGSBLATT DES MILITÄRBEFEHLSHABERS IN FRANKREICH, JOURNAL OFFICIEL CONTENANT LES ORDONNANCES DU MILITÄRBEFEHLSHABER IN FRANKREICH, NR. 64 [OFFICIAL GAZETTE OF THE MILITARY COMMANDER IN FRANCE, OFFICIAL JOURNAL CONTAINING ORDERS OF THE MILITARY COMMANDER IN FRANKREICH, NO. 64], BA/MA RW 35/544 (May 6, 1942) (Ger.).

#### D. From the Occupation of Vichy France Through the Allied Invasion

In response to the U.S. invasion of North Africa, German forces occupied Vichy France on November 11, 1942.<sup>307</sup> The French government, at the request of the German Commander in Chief West, ordered the surrender of all weapons in private possession to the pertinent prefects.<sup>308</sup> Apparently referring to enforcement by Vichy French authorities, it was announced that the crime of possession of arms would be tried by the Special Court and sentences would be death or imprisonment.<sup>309</sup> French police in the previously-unoccupied zone engaged in brutal repression at the behest of German authorities.<sup>310</sup>

As the screws tightened, the danger increased that the Nazis would dispense with the formality even of a secret trial and shoot anyone who possessed a firearm on the spot.<sup>311</sup> The French Resistance was becoming increasingly active, although its members were always short of arms.<sup>312</sup> They started with a few civilian arms from before the war and military arms left from the battles of 1940.<sup>313</sup> The Allies began dropping arms by parachute, allowing the Resistance to escalate its activities involving sabotage and even direct combat.<sup>314</sup> The Military

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307. See WARNER, *supra* note 185, at 336.

308. See BRIEF DER KONTROLLINSPEKTION DER DWSTK, GRUPPE II AZ.:D, NR. 3110/43, AN DIE DEUTSCHE WAFFENSTILLSTANDSKOMMISSION WIESBADEN [LETTER OF CONTROL INSPECTION OF DWSTK, GROUP No. II: D, No. 3110/43, THE GERMAN ARMISTICE COMMISSION AT WIESBADEN], BA/MA RH 31/29 (Mar. 13, 1943) (Ger.).

309. See *Le délit de détention d'armes sera jugé par le tribunal spécial qui condamnera à mort ou à la réclusion*, LE MATIN (Fr.), Jan. 25, 1943, at 1.

310. See MAZOWER, *supra* note 224, at 438-41.

311. As provided by the January 12, 1943, order signed by Belgium Military Governor Alexander von Falkenhausen: "Persons who are found, without valid authorization, in possession of explosives and military firearms, pistols of all kinds, sub-machine guns, rifles, *et cetera*, with ammunition, are liable in future to be shot immediately without trial." 6 INT'L MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 381 (1947), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/NT\\_Vol-VI.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-VI.pdf). Commenting on this order at the Nuremberg Trials in 1946, French prosecutor M. Charles Dubost stated:

This order and others analogous to it continued to be executed even after the allied landing in the west of Europe. These orders were even carried out against organized forces in Belgium as well as in France, although the Germans themselves considered these forces as troops to a certain extent.

*Id.*

312. See, e.g., HENRI FRENAY, THE NIGHT WILL END 202, 204, 332 (Dan Hofstadter trans., 1976).

313. See OUSBY, *supra* note 245, at 241-42, 261.

314. See, e.g., FRENAY, *supra* note 312, at 231-32, 237-38, 311.

Commander in France reported for January and February, 1944, that 4,698 “terrorists” were arrested and 447 were killed in battle.<sup>315</sup> Large quantities of weapons, ammunition, explosives, parachutes, and vehicles were seized.<sup>316</sup>

That did not mean that the occupiers were wholly focused on military matters. Since 1940, it was German policy to loot everything that could be looted, art and wine being prominent.<sup>317</sup> Numerous archival documents concern the securing of confiscated firearms in depots where German soldiers could buy them and take advantage of seasonal hunting in France. For instance, an early 1944 document from the Garrison Commander in Angers reported that 10,000 hunting guns that had belonged to private French citizens had been sold to Wehrmacht soldiers.<sup>318</sup>

The Allied invasion at Normandy on D-Day, June 6, 1944, prompted the French Resistance to escalate armed struggle against the Wehrmacht.<sup>319</sup> Attacks and reprisals were brutal and bloody.<sup>320</sup> But nothing equaled the massacre of 642 men, women, and children at the village of Oradour-sur-Glane on June 10.<sup>321</sup> Troops of Der Führer Regiment of the Second Waffen-SS Panzer Division, Das Reich, shot all the men, forced all the women and children into the church, set it afire and burned them alive.<sup>322</sup> The commander, Adolf Diekmann, claimed that searches of houses revealed large numbers of arms, proving that the men were Resistance fighters who should thus

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315. MILITÄRBEFEHLSHABER IN FRANKREICH, ABTEILUNG IA, NR. 1160/44 G.KDOS., EINSATZBERICHT FÜR DIE MONATE JANUAR UND FEBRUAR 1944 [MILITARY COMMANDER IN FRANCE, DEPARTMENT IA, NO. 1160/44 G.KDOS., USE REPORT FOR THE MONTHS OF JANUARY AND FEBRUARY 1944], BA/MA RW 35/30 (Mar. 15, 1944) (Ger.).

316. *See id.*

317. *See* LYNN H. NICHOLAS, THE RAPE OF EUROPE: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR 119-51 (1994). *See generally* DON KLDSTRUP & PETIE KLDSTRUP WITH J. KIM MUNHOLLAND, WINE AND WAR: THE FRENCH, THE NAZIS, AND THE BATTLE FOR FRANCE'S GREATEST TREASURE (2001).

318. STANDORTBEFEHL NR. 10 DER STANDORTKOMMANDANTUR ANGERS, FEB. 21, 1944 [POST INSTRUCTION NO. 10 GARRISON COMMANDER OF ANGERS], BA/MA RH 34/3 (Ger.).

319. *See* OUSBY, *supra* note 245, at ch. 6.

320. *See id.*

321. *See* Michael Williams, ORADOUR-SUR-GLANE 10TH JUNE 1944, <http://www.oradour.info> (last visited Oct. 29, 2012).

322. *See* Michael Williams, *In a Ruined State: Chapter 2*, ORADOUR-SUR-GLANE 10TH JUNE 1944, <http://www.oradour.info/ruined/chapter2.htm> (last visited Oct. 29, 2012).

be shot, and that the church caught fire from other burning buildings and from ammunition stored in the church.<sup>323</sup> However, witnesses later testified in war-crimes trials that no evidence existed of arms or ammunition in the village.<sup>324</sup>

But the tables were turning. French Jews, previously the victims of deportation and Holocaust policies, now struck back in armed partisan bands.<sup>325</sup> A fighter in a Jewish Marquis ambushing a German train in August 1944 remembered:

We pounced on them, I tearing a revolver from the belt of a German major (I have that gun to this day) and shouting: 'Wir sind Juden! Wir sind Juden!' ('We are Jews!') They turned quite white. We made them line up, and they were sure we were going to kill them right then and there. But we only made prisoners of them.<sup>326</sup>

By now the Germans began to mistrust the French police with whom they had previously collaborated so nicely. German SS and Police authorities ordered that seized and confiscated arms held by the French police must be surrendered to the Germans.<sup>327</sup> It seems that weapons held by the French police had been stolen by terrorists.<sup>328</sup>

The handwriting was on the wall, and it was fitting that the battle to liberate Paris was sparked when policemen joined with hundreds of armed civilians to seize the Prefecture of Police (located just across from Notre Dame).<sup>329</sup> Photographs of the struggle depict civilians with revolvers, semiautomatic pistols, and rifles shooting from

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323. See Michael Williams, *In a Ruined State: Chapter 6*, ORADOUR-SUR-GLANE 10TH JUNE 1944, <http://www.oradour.info/ruined/chapter6.htm> (last visited Oct. 29, 2012).

324. See Michael Williams, *In a Ruined State: Chapter 5*, ORADOUR-SUR-GLANE 10TH JUNE 1944, <http://www.oradour.info/ruined/chapter5.htm> (last visited Oct. 29, 2012); Michael Williams, *In a Ruined State: Chapter 7*, ORADOUR-SUR-GLANE 10TH JUNE 1944, <http://www.oradour.info/ruined/chapter7.htm> (last visited Oct. 29, 2012).

325. See, e.g., ANNY LATOUR, *THE JEWISH RESISTANCE IN FRANCE (1940-1944)* 265-66. (Irene R. Ilton trans., 1970).

326. *Id.* at 245.

327. See STANDORTKOMMANDANTUR LIMOGES, STANDORTBEFEHLE NR. 59-88, FEB.-AUG. 1944 [GARRISON COMMANDER OF LIMOGES, POST INSTRUCTION NO. 59-88, FEB.-AUG. 1944], BA-MA RH 34/342 (Ger.).

328. See *id.*

329. See LARRY COLLINS & DOMINIQUE LAPIERRE, *IS PARIS BURNING?* 107-08 (2000).

buildings or at the barricades.<sup>330</sup> Paris was liberated on August 25, 1944.

### CONCLUSION: BE CAREFUL WHAT YOU WISH FOR

The suggestion has been made in Supreme Court dissents in Second Amendment and firearm law cases that European models are superior to that of the United States.<sup>331</sup> Similar arguments have been made in debate in Congress on bills to register and restrict firearm ownership.<sup>332</sup> The historical experiences of France do not present a rosy picture for emulation.

Guarantees of the right to keep and bear arms were demanded by the Third Estate in France and were considered, but not adopted, in the French Declaration of Rights of 1789.<sup>333</sup> No constitutional tradition existed in France of a right of commoners to possess arms.<sup>334</sup>

Without such a tradition, it appears to have been relatively easy for the French government, under the leadership of Pierre Laval, simply to decree the registration of firearms in 1935.<sup>335</sup> Just five years later, France fell to Nazi Germany, which decreed the death penalty for possession of a firearm unless turned in within twenty-four hours.<sup>336</sup> The 1940 armistice provided that the French authorities collaborate with the Wehrmacht, and the French police obliged by arresting gun owners and confiscating firearms.<sup>337</sup> Pierre Laval returned to power and became France's chief collaborator with Germany.<sup>338</sup>

Five years of Nazi occupation occurred with the potential of the death penalty hanging over the head of every French person who refused to surrender his or her gun.<sup>339</sup> That historical experience teaches two lessons about gun control that modern prohibitionists seem to ignore.

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330. *See, e.g.*, CHRISTINE LEVISSÉ-TOUZÉ, PARIS LIBÉRÉ, PARIS RETROUVÉ 3 (1994); *Le Journal de la Libération de la France*, L'ÉVÉNEMENT DU JEUDI, August 18-24, 1994, at 21, 25, 30 (Fr.).

331. *See supra* Part I.

332. *See supra* Part II.

333. *See supra* Part III.

334. *See id.*

335. *See supra* Part IV.

336. *See supra* Part V.

337. *See id.*

338. *See id.*

339. *See id.*



First, requiring the registration of firearms creates the risk that in the future those in power will confiscate them, while those who refuse to register have less of a chance of being detected. Second, if at least some element of the gun-owning population will not be swayed by the threat of capital punishment, what does that say about the effectiveness of laws that threaten only felony convictions and incarceration?

In debate over the U.S. Constitution, James Madison contrasted the armed populace of America with the kingdoms of Europe, where “the governments are afraid to trust the people with arms.”<sup>340</sup> That remained true in 1935 when the French government decreed that firearms must be registered and that “military” firearms were prohibited to civilians.<sup>341</sup> In a mirror image, citizens who refused to comply were as distrustful of the government as the government was of them. Their instincts proved correct. In the disaster of Nazi occupation, the French police had access to the registration records, and could easily confiscate the arms, of those who were gullible enough to have registered them.<sup>342</sup> That only made it more difficult for the Resistance actively to oppose the Nazis. Americans in that epoch were informed in the media about what was happening in occupied countries such as France, and that remembrance would serve in later years to influence the defeat of gun registration bills in Congress.<sup>343</sup>

Modern gun prohibitionists may argue that an armed populace is of no use to prevent occupation by a foreign tyranny, and that only standing armies are of any use. Yet the French standing army proved of little use in 1940, when the German Wehrmacht smashed it in just a few weeks. True, armed French civilians could not liberate France without the help of foreign armies, but the Resistance was certainly impeded by the French gun registration policies which made it easier to confiscate firearms.

The existence of even a partially-armed populace, an unknown number of civilians who did not surrender their firearms, remained an element of uncertainty and a threat to the perceived security of the occupation forces. The Nazis were thus forced to utilize more troops

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340. James Madison, *The Federalist No. 46*, reprinted in 15 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 492-93 (John P. Kaminski & Gaspare J. Saladino eds., 1984).

341. *See supra* Part IV.

342. *See supra* Part V.

343. *See supra* Part II.

and resources than they would have needed to occupy a country that was relatively more “gun free.” Disregarding armed resistance by civilians, the sheer existence of unknown armed civilians led the Germans to expend resources and to decrease the number of forces available to fight the Allied armies. The mere existence of anonymous gun owners, even disregarding actual resistance activities, thus contributed to the anti-Nazi effort.

In short, everyone who, whether actively or passively, opposed the German occupation—from private citizens with unregistered firearms who thereby created insecurity for the occupation forces, to members of the Resistance who carried guns while committing acts of sabotage, to the members of the Allied armed forces in the great battles following the Normandy invasion—contributed to the defeat of Nazism.

To those who would discard the Second Amendment and emulate European models of firearm registration and prohibition, the historical experience of France suggests a telling lesson: Be careful what you wish for.