PANELIST

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When I first studied the right to be armed, people used to ask me, "How did a nice girl like you get interested in a subject like this?" They don't ask any more and there are three possible reasons. Either they don't think they should refer to me as a girl anymore, they don't think I'm nice anymore, or—and this is the reason I would like to believe is the correct one—the subject no longer seems disreputable.

Different constitutional rights have periods when they wax and wane. The Second Amendment has been described as being in an emaciated condition today, just as the First Amendment was at the turn of the century. It is hard to believe this about the First Amendment now. The contrast between the two amendments was illustrated by the coverage given each in the second edition of Lawrence Tribe's constitutional law textbook. In 1988 Tribe devoted 286 pages to the First Amendment while he dismissed the Second Amendment in a footnote. This does not mean that there hasn't been a great deal of debate and attention focused on the Second Amendment, but that attention has not been helpful. Concerns about violent crime in the 1960s drew attention to the Amendment, and, for the first time, led to questions and confusion about its intent. The American Bar Association hoped to clarify matters. In 1975 it created a committee charged with looking into the legal basis of firearms ownership and the determining the intent of the Second Amendment. The committee studied the debates up to 1975 and concluded: "It is doubtful that the founding fathers had any intent in mind with regard to the meaning of this amendment." According to the Bar Association committee, therefore, the drafters had nothing in mind at all, not the rights of the militia, not the individual's right to have arms, nothing. Obviously these distinguished attorneys simply threw up their hands. All of this would have made no sense to John Marshall, our first Chief Justice. He thought interpreting the Constitution was very simple. In an opinion in 1827 Marshall wrote: "To say that the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally

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used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers. . .is all that can be necessary." So as far as Marshall was concerned there was really nothing much to argue about and, in fact, until this century there was never any doubt that the individual citizen had a right to be armed.

The problem of violent crime and a search for simple solutions changed all that. A simple solution was hit upon. Since guns were sometimes used in crime, it was argued that the easy way to reduce violence would be to eliminate guns. The individual's constitutional right to be armed was a stumbling block, however, on the road to a safer society. Much midnight oil has been burned to devise readings of the Second Amendment so the phrase "the right of the people to keep and bear arms" could be understood to exclude, or at least not protect, an individual right. All of this was well-intentioned, but ranged from wishful thinking to wilful misreading. Hence the debate began. The firearms issue has been such an emotional one that for many years there was a great deal of impassioned advocacy but little impartial scholarship. This left the courts, lawyers and the American Bar Association Committee of 1975 with very little to rely upon. Fortunately, in the last twenty years a great deal of scholarship has focused on the intellectual, constitutional and legal background that provides the context and information needed to clarify the intention of the framers. I'm not going to read the text of the amendment and you've heard at length many creative interpretations of its single sentence designed to quash any individual right—allegations that the amendment only protected a right for the militia to be armed and that the militia is today's National Guard; that the amendment embodied a transfer of military power to the state; that it was a "collective right" not an individual one. So much for "the right of the people" that was not to be infringed. The preoccupation with the Amendment's militia clause to the exclusion of its main declaration has been so intense it even spilled over into American interpretations of the right of Englishmen to be armed.

Why is the English right to be armed important? When the colonists came to America they were governed by English law and protected by English privileges. Indeed, one means of persuading colonists to venture over the ocean and set up housekeeping in a dangerous wilderness was by promising them they were to have all their rights as Englishmen. This was more than a casual promise. Their colonial charters specifically guaranteed them "all the rights of natural subjects, as if born and abiding in England." Further, the English rule of law was that the Englishman "carries as much of law and liberty with him as the nature of things will bear." If an individual-rights understanding of the Second Amendment was a stumbling block to those who wanted to ban private firearms, so too was the fact that one of those rights of Englishman the colonists inherited was a right to have arms.

This English right, incorporated into the English Bill of Rights of 1689, provides little comfort to those who argue that only the well-regulated militia have a right to be armed. In fact it never mentions the militia at all. It says that the subjects that are Protestants—that is some 90% of the English population—may have arms for their defense suitable to their condition and as allowed by law. Gun control advocates have claimed the English right was "more nominal than real;" That it was a privilege only for the nobility, or barring that, only for the rich; or that it too was a right only for militia members. In this vein one American legal scholar insisted the English guarantee that "the Subjects which are Protestants may have arms for their defence," actually meant "Protestant members of the militia might keep and bear arms in accordance with their militia duties for the defense of the realm." It was these distortions, so at odds with the historical record, that prompted me to bring my study of the development of a common law right to be armed to the attention of American legal scholars and to deploy that history to clarify the original intent of the American Second Amendment.

My contribution has been to try to rescue the English tradition and track its use in the development and drafting of the American Bill of Rights. I found that since medieval times ordinary Englishmen were obliged to be armed. The individual had to have weapons to help in peacekeeping. A key aspect of this responsibility was defending himself, his family and his neighbors. Moreover, if he saw a crime take place he was to raise "a hue and cry" then join in pursuit of the culprit, if necessary "from town to town and county to county." If he chose not to intervene to stop a crime or refused to pursue the criminal he was guilty of a crime himself. Weapons were also required for standing watch and ward and for militia service. All men between the ages of 16 and 60 were liable for service in the militia although in the sixteenth century some were selected for special trained bands and it was these who the kingdom ordinarily depended upon to defend it. The militia was a defensive force under command of the king and officered by lord-lieutenants, generally local aristocrats. Militia service was not popular, but it was regarded as preferable to a professional army which, in so many cases on the Continent, became a tool of absolute monarchy. Indeed, the English had a long tradition of hostility to professional soldiers. Therefore, people had an obligation to be armed. The law even spelled out the minimum weapons those in different income brackets had to have at the ready. Certainly, it was risky to allow the common people to have weapons. Nevertheless, the responsibility to defend yourself and to help enforce the law continued into modern times. In the late nineteenth century it helped bring English crime rates down to record lows.

The right to be armed was an ancient duty but only became a right in the wake of the Glorious Revolution of 1688/89 when James II fled England and William of Orange and James's daughter Mary entered. The Convention Parliament which met to determine who should sit on the English throne was de-

termined to not only "change hands but things." They were anxious to reaffirm those liberties they felt James had imperilled and set about drafting a bill of rights they hoped would be like a new Magna Carta. Among the rights they included was a right for Englishmen to have weapons for their defense. English historical records make it clear that a right for individuals to be armed was intended. An early draft of the article stated that the people "may provide and keep Arms for their common Defence." But the Convention Parliament rejected that language, instead asserting that the people "may have arms for their defence." In light of this shift it is particularly ironic that some modern American lawyers have misread the English right to have arms as merely a "collective" right inextricably tied to the need for a militia. In actual fact the Convention that drafted the right retreated steadily from such a position. Indeed, the House of Lords felt a collective right to be armed smacked of arming the mob. On the other hand language the Lords added to the final draft of the English right left "a loophole," a member of Parliament later wrote, "a Scotsman could drive a coach and four through." Tacked on to the end of the statement that Protestants may have arms for their defense were two clauses, "suitable to their condition" and "as allowed by law." These might have permitted the right to be narrowed to exclude poorer people. But court decisions, legal pronouncements and parliamentary debates in the years that followed make it absolutely clear that at the time of the American Revolution and long after there was an individual right for Englishmen to be armed. This right was not "more nominal than real." It was real.

I would like to draw attention to three among many such citations. One, a statement by the great jurist William Blackstone was already paraphrased by Stephen Halbrook. In fact it was Blackstone who realized that with their individual right to be armed Englishmen could protect all their rights should those ever be violated. After listing the rights of Englishmen in COMMENTARIES ON THE LAWS OF ENGLAND, published ten years before the American Revolution, Blackstone wrote: "But in vain would these rights be declared, ascertained and protected by the dead letter of the laws, if the constitution had provided no other method to secure their actual enjoyment." He was referring to what the American founders would have called Parchment Barriers, well-intentioned statutes that don't actually afford any protection. To avoid this Blackstone added that the English constitution had established "other auxiliary subordinate rights of the subject, which serve principally as barriers to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property." These five auxiliary rights are by no means insignificant. The first is to have a parliament, the second to limit executive prerogative, the third to appeal to the courts for redress of injuries, the fourth to petition the king or Parliament, and the fifth the right of subjects to have arms. Blackstone explained that this fifth auxiliary right of "having arms for their defence" is a "publick allowance under due restrictions of the natural right of re-

sistance and self preservation when the sanctions of society and law are found insufficient to restrain the violence of oppression."

Judicial decisions and official reports around the time of the American Revolution are explicit about the dimensions of the right. In 1780 after the terrible Gordon riots in which a violent crowd terrorized London for several days setting public buildings on fire and leading to the deaths of 450 persons, the London Recorder, the legal expert for the corporation of London, was asked his opinion of the right of individuals to be armed and to form voluntary armed groups. He replied:

> The right of his majesty's Protestant subjects, to have arms for their own defence, and to use them for lawful purposes is most clear and undeniable. It seems, indeed, to be considered, by the ancient laws of this kingdom, not only as a *right*, but as a *duty*; for all the subjects of the realm, who are able to bear arms, are bound to be ready, at all times, to assist the sheriff, and other civil magistrates, in the execution of the laws and the preservation of the public peace. And that right, which every Protestant most unquestionably possesses *individually*, may, and in many cases *must*, be exercised collectively, is likewise a point which I conceive to be most clearly established by the authority of judicial decisions and ancient acts of parliament, as well as by reason and common sense.

In 1819, in the wake of the French Revolution, there were serious riots in Yorkshire and other industrial regions of England, where workers were suffering from a decline in real wages. In an effort to disperse a mass protest police fired into the crowd killing a dozen people and injuring hundreds more. To protest this so-called Peterloo massacre another mass meeting was held near Burnley. Despite warnings from magistrates not to attend, several thousand people turned out. When a cry was raised during the meeting that soldiers were approaching some of the crowd produced pikes, others pistols. The crowd dispersed but some fired their pistols into the air. Several of the organizers were later put on trial. The trial record reveals agreement about the individual's right to be armed for self-defense, but the Crown's attorney contended that while "people have a right to meet to discuss public grievances. . .by the law they cannot meet armed for the purpose of redressing or deliberating on any question." Defense counsel, however, had "heard [of] the men of England having arms for their own protection," and quoted Blackstone who, "speaking loudly and largely of the rights of the people of England," had designated this the fifth auxiliary right of the subject. The judge, Justice Bayley, was uneasy with the quotation from Blackstone, presumably because of its revolutionary tenor, and defense counsel retreated to the safer ground that "armament is lawful for self-defence." The judge's summation to the jury provides an important clarification of the individual's right to be armed and the

legality of armed crowds. Bayley cited the arms article from the Bill of Rights with its vague final clauses and asked: "But are arms suitable to the condition of people in the ordinary class of life, and are they allowed by law?" His answer gives the lie to those who would argue that the Englishman's right to be armed was more nominal than real. Justice Bayley found that "a man has a clear right to arms to protect himself in his house. A man has a clear right to protect himself when he is going singly or in a small party upon the road where he is travelling or going for the ordinary purposes of business."

This, then was the English right to be armed as it existed around the time Americans had their revolution, drafted and ratified the Constitution and Bill of Rights. It is possible, of course, that Americans decided to narrow the right to be armed they had inherited, or that they didn't feel it necessary to protect an individual right. But since their main aim had been to defend their rights as Englishmen it is highly unlikely that they would have restricted or ignored any of these coveted liberties.

The historical record is just as helpful when we turn to eighteenth-century America. Careful examination of the drafts of what became the Second Amendment and of other contemporary documents makes it clear the Americans not only wanted to preserve their English legacy, but to enlarge it. James Madison chose to include in his list of proposed rights those he felt would be unobjectionable and thus most likely to win approval. Madison's version of what became the Second Amendment stated: "The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person." He assumed amendments protecting civil liberties belonged with other individual protections within the body of the Constitution in the article which delineated the powers of Congress, section nine, between the third clause that forbade Congress passing bills of attainder or *ex post facto* laws and the fourth clause which referred to direct taxation. A committee of three—Madison, John Vining of Delaware, and Roger Sherman of Connecticut—were appointed to consider Madison's list and the numerous state proposals for amendments and report back to the House.

Nearly 200 years after their work was done a copy was found of a draft for a bill of rights that Sherman apparently drew up for the committee's consideration. Sherman's proposal for the arms article is important, not because it influenced the final language, but because it did not. Sherman never specifically mentioned the right of anyone to keep and bear arms, although this may have been implied in his second article, which referred to "certain natural rights" retained by the people, among which he listed that of "pursuing. . .Safety." Blackstone had referred to the right of Englishmen to have weapons as a "natural right of resistance and self preservation." The fifth of Sherman's eleven articles dealt with the militia but did not characterize it as "the best security"

of a free country as Madison had, nor did Sherman hint that the militia was preferable to a standing army. Arrangements for an army of unlimited size had been written into the Constitution and had caused grave consternation. Reference to the militia as "the best security" of a free country made it clear that an army was not. Instead Sherman seemed to have intended to enhance the states' control of their militia. His proposal read: "The militia shall be under the government of the laws of the respective States, when not in the actual Service of the united States, but such rules as may be prescribed by Congress for their uniform organization and discipline shall be observed in officering and training them, but military Service shall not be required of persons religiously scrupulous of bearing arms."

The committee obviously found Sherman's omission of a stated right to have weapons and his attempt to enhance state authority unsatisfactory. Its own article failed to mention state powers over the militia but did proclaim and protect "the right of the people" to have weapons. The committee described the militia as "composed of the body of the people" but omitted a stipulation of Madison's that the militia be "well-armed." Later, in the course of tightening the language of the arms amendment, the House dropped the description of the militia as "composed of the body of the people." The Senate considered and flatly rejected an amendment to add "for the common defense" after the phrase "to keep and bear arms." In this they followed the precedent of the drafters of the English right a century earlier. Had the aim of Congress been to transfer power over the militia to the states Sherman's proposal, or something like it, would have been accepted. Had the aim been to ensure that the militia was well-armed, that description would not have been eliminated. Had the aim been to rely upon the militia which, while preferable to an army was commanded by the federal and state governments, to protect individual and community rights they would not have omitted the stipulation that the militia be composed of the body of the people. And finally, had the right to be armed an exclusively, or even primarily, collective aspect Senators would have approved the amendment to add "for the common defense." Congress had the opportunity to incorporate into the language of the amendment the meanings the collectivist school has tried so hard to read into it. But Congress stuck with the intent of their English legacy, protecting an individual's right to have arms and relying upon armed individuals to defend their other rights *in extremis*. On the other hand, Congress broadened the language of the English right. English practice had made the right to weapons near-universal, but the Americans took no chances. Their language made no reference to the right to arms being exclusively for Protestants, or that arms be appropriate to the condition of an individual and as allowed by law, language with which the framers were perfectly familiar. Instead they insisted the right "of the people" should "not be infringed." And to make it clear that the militia was safer for a republic than an army, they described it as "necessary to the security of a free state."

Contemporary comment about the new amendment reinforces this intention. The PHILADELPHIA EVENING POST of Thursday, June 18, 1789, in an article later reprinted in New York and Boston, explained each of the proposed amendments to be sent to the states for ratification. The aim of the amendment which became the Second Amendment was explained this way: "As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed. . .in their right to keep and bear their private arms." The militia is not mentioned, the arms protected and the protections they afford are private weapons. If this was an incorrect interpretation there would have been some demurrer at the time. There was none. The protection the amendment granted was a blanket one. William Rawle, George Washington's candidate for the nation's first attorney general, described the scope of the Second Amendment's guarantee. "The prohibition," he wrote, "is general." "No clause in the constitution could by any rule of construction be conceived to give congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both."

You wouldn't guess it from much of the discussion on this panel, but today the impressive evidence that an individual right is incorporated into the Second Amendment has led to a new consensus. Even Lawrence Tribe has changed his mind. He had dismissed the Second Amendment in the 1978 and 1988 editions of his constitutional law text mentioned earlier, as devised solely to prevent "federal interferences with the state militia as would permit the establishment of a standing national army and the consequent destruction of local autonomy." On that basis he judged "the inapplicability of the second amendment to purely private conduct." But in August, 1999 when the latest edition of his book appeared he not only upgraded the Second Amendment from a footnote to ten pages of analysis, but changed his mind about its meaning. He now finds that the amendment "recognizes a right. . .on the part of individuals to possess and use firearms in the defense of themselves and their homes." Leonard Levy, dean of American constitutional historians, in his new book on the bill of rights agrees that the Second Amendment guarantees an individual right to be armed. No wonder in a recent HARPERS MAGAZINE article Daniel Lazare, a gun control advocate, reluctantly concluded: "The truth about the Second Amendment is something that liberals cannot bear to admit: The right wing is right. The Amendment *does* confer an individual right to bear arms." He recommends drastic action to amend it, even, if necessary, summoning a second constitutional convention. This is drastic indeed. It would be better to admit there is an individual right to be armed and shift the debate to the issue of its reasonable use.

Why, in the face of overwhelming evidence and a growing consensus that an individual right was intended, does the present debate on original intent persist? I think Tribe has put his finger on the reason for the unwillingness of many people to recognize facts. He refers to the "true poignancy" of the topic of gun control and

> the inescapable tension, for many people on both sides of this policy divide, between the reading of the Second Amendment that would advance the policies they favor and the reading of the Second Amendment to which intellectual honesty, and their own theories of constitutional interpretation, would drive them if they could bring themselves to set their policy convictions aside.

My own experience confirms this. For example, at a dinner party some time ago an English friend asked what I was working on. When I answered the origins of the right to be armed and the intent of the Second Amendment, she asked what I had discovered. I replied that I found there was an individual right to be armed. Well, she said, in that case you really should keep quiet about it. But truth is important. And there are social costs to trying to distort or erase a right, and, in this case, to insist upon a government monopoly of firearms. As A.V. Dicey advised his countrymen: "Discourage self-help, and loyal subjects become the slaves of ruffians." The English have ignored Dicey's warning and their strict firearms laws and curb on all potentially offensive weapons have helped produce a spiralling rate of violent crime and an assault rate now twice that of America's.

But the greatest cost of misinterpreting a right because its protections seem inconvenient is the dangerous precedent that creates. I would like to close with a comment by Justice Benjamin Cardoza:

> The great ideals of liberty and equality are preserved against the assaults of opportunism, the expedience of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions, and consecrating to the task of their protection a body of defenders.

All of us, in particular attorneys, judges and historians must be among those defenders.