PANELIST

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It is a real pleasure to be here. I would like to start by asking a question. I do a little bit of appellate litigation. I'm always having to answer the questions, so maybe I could ask you a question and also do something unprecedented—to change the subject from the Second Amendment to the Fifth Amendment momentarily. How many of you remember the exception to the indictment clause of the Fifth Amendment? Does anybody remember the exception to the indictment clause of the Fifth Amendment? Probably not. It's the only obscure part of the Fifth Amendment but it bears on the subject that we are discussing tonight. The familiar part of the Fifth Amendment begins, "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury." Most of you have probably read about that in Criminal Procedure. But the Fifth Amendment goes on to state, "except in cases arising in the land or naval forces or in the Militia when in actual service in time of War or public danger." Does anybody remember that clause? Probably not, but it's another militia clause. Indeed, it is the forgotten militia clause of the Constitution. There are militia clauses in two other places, the Second Amendment and Article I, Section 8. However, this militia clause tells us something and I want to use this as an exercise to encourage you on constitutional issues to read the entire text of the Constitution, as opposed to focusing on one particular provision that might be the issue. Notice that James Madison, who was quite an ingenious wordsmith, used very precise language. Referring to "the militia, when in actual service," the Fifth Amendment goes on to say, "in time of war or public danger;" but let us focus on the militia when in actual service. Does the Second Amendment contain that language at the end of it after the "bear arms" clause? No, it does not. What if the Second Amendment read such that "the right of the people to keep and bear arms" was transformed to "the right of the militia to keep and bear arms only when in actual service?"

What I am encouraging you to do is to compare the words and the precision in which the words are used. The Second Amendment substantive guarantee refers to "the right of the people to keep and bear arms" and it doesn't say

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anything about requiring actual service. That part of the Second Amendment does not say "the militia," it says "the people." In other words, James Madison and other framers of the Constitution and the Bill of Rights could have referred to "the right of the people to keep and bear arms when in militia service," or "when in the militia," or "when in actual service." However, you don't see that language there. Now what if the language was there? What if it said that "the right of the people to keep and bear arms when in militia service shall not be infringed?"

Let us focus on the complexity of the amendment here. It is not just the right to bear arms. We frequently hear the term "bear arms" and I think maybe this symposium title refers to "the right to bear arms," but "the right to keep arms" is also there and it seems to get lost in the arguments and debates. Assume hypothetically that the Amendment was written that way. "The right of the people to keep and bear arms when in militia service." Would the phrase about "when in militia service" modify "bear arms" only or would it modify "keep arms?" Maybe the word "keep" in that context would make little sense or be redundant if it really merges into bear arms. I think the better construction, if you saw that language, was to interpret it to say "bear arms when in militia service." However, it would not make sense to say "keep and bear arms when in militia service." Either one is in service bearing arms, or if one is not in service, one would not be in a situation of not bearing arms but of keeping arms.

The word "keep" says something important. In terms of a personal right, normally the word keep refers to something a person would retain, such as at home for example. If the Second Amendment is an individual right, it would obviously protect the right to keep arms at home. Therefore, you must look at each element of the right that is guaranteed and make an independent determination of what is protected. There are two different rights talked about in that part of the Second Amendment, the right to keep arms and the right to bear arms.

There is another reference to the word "keep" in a parallel context. The Constitution says that "no State shall keep Troops" with certain exceptions for invasions, etc. Consequently, when we are talking in terms of matters that are reserved not to the states but delegated to Congress, keeping an army for example, the state is forbidden to do so. But in terms of keeping arms, the Second Amendment guarantees that the people have that right.

Now, we've heard a lot of discussion about the word "people" and I think the natural meaning of the word is individuals. If you look at the right under the First Amendment of the people to assemble and to petition the government for redress of grievances, the word "people" means individuals. I don't know how you get around an individual right there. One could say this means that the community shall have a right to petition but if you mean that somehow an individual doesn't have right to hold a petition out and get other people to sign

it, then the right is meaningless.

By the same token, with the Fourth Amendment, the people have the right against unreasonable searches and seizures. If you are not talking about an individual or individuals, I don't know who you're talking about there. Moreover, the same applies to the rights retained by the people under the Ninth Amendment. It just doesn't make sense to say these people are some kind of collective group that does not include individuals. By the same token, I think it really stretches the Second Amendment to say that the people mentioned are really not the people—you could say they're the militia, but that's not what the language says. The people and the militia are distinguished in several places by the Constitution, especially in the Second Amendment.

However, we will examine other language that is used consistently throughout the Constitution and the Bill of Rights. The word "right" always appears in conjunction with a right of the people or a person, and the word "power" is consistently used to describe those prerogatives either of the United States or the states. In Article 1, Section 8, "Congress shall have power . . ." and those powers are enumerated. The "Executive power" is vested in the President in Article 2 and the "Judicial power" in Article 3. Then we turn to the powers that the states have or don't have. The Tenth Amendment tells us that the powers not delegated to the United States are reserved to the states respectively. So the word power consistently appears in terms of the states or the United States. In the case of the Tenth Amendment, the people have powers as well. That's the only place where people are said to have powers, and I will submit that these powers include service in the jury and the right to vote. Although either term could be used, it is a power because the people are participating in the government when they vote or participate in jury service. Indeed, the people are further participating in the government when they keep and bear arms.

In any event, it makes no sense to say that the real meaning of the Second Amendment is that only states have a right to have a militia. The phrase "states' rights" was a misnomer from the very beginning. That language, I realize, was used in the early republic but it is not the language of the Constitution. The language of the Constitution demonstrates that governmental bodies have powers. Individual people, however, have rights. Therefore, if James Madison was trying to say that the states have a prerogative to maintain a militia, he would have used the word power, as opposed to the word right.

In fact, the respective Federal and state roles over the militia were described in detail within Article 1, Section 8, Clause 16 of the body of the Constitution. There it states that Congress shall have power to provide for arming and organizing the militia, reserving to the states, respectively, the appointing of the officers and training of the militia according to the discipline described by Congress.

When the states were involved in the ratification debates during the state

conventions, there were two sets of amendments proposed to the Constitution by the anti-federalists. One set of amendments was the Declarations of Rights, similar to what evolved as the Bill of Rights. Those declarations consistently referred to the rights of the people. They were worded in different ways. Samuel Adams made a proposal in the Massachusetts convention, for example, which stated that the Constitution would never be construed to allow infringement on the right to free press or to the right of peaceable United States citizens to keep their own arms. There were other states with different language, but consistently, as for the states which actually recommended amendments, you had declarations of rights being promoted. Moreover, you had separate structural amendments being demanded. Virginia, New York, and some of the other conventions, made listings that were very similar to the declarations of rights and then the structural amendments subsequently proposed.

Among those structural amendments was a provision that whenever Congress shall neglect to provide or maintain the militia, the states shall be entitled to do the same. That was the "states' right" to maintain a militia. Taken up in the Congress, the House of Representatives did not act upon that, but it was proposed in the Senate and rejected with certain other structural amendments that were being proposed at that time. It is very ironic that the proposed "right" of states to maintain militias that the Congress rejected was a completely separate proposal from what became the Second Amendment. We end up having a theory that is actually the meaning of the Second Amendment. The proposal for the power of the states to maintain the militias was rejected but now we have the theory that this is what the Second Amendment means.

If you read the debates over the Constitution and the explanation of the Bill of Rights that were made contemporaneous with this proposal, you find explanations by Tench Coxe, who ten days after the Bill of Rights was proposed by James Madison in the House of Representatives, explained each amendment concisely. Coxe was a famous Federalist writer and a very prominent Federalist writer of the time. He explained what has become the Second Amendment. He said that maybe rulers will become desperate and misuse the standing army and, therefore, the right of the people to keep and bear their private arms shall not be infringed. That was his explanation. It was published in newspapers throughout the United States. James Madison wrote him a letter agreeing with his analysis and complementing him on his promotion of the Bill of Rights.

These are the explanations that you see in those days. The collective rights theory was primarily an invention of the 20th century. We have never seen anyone setting forth such a theory in the 18th century. I think you see it for the first time perhaps in the Third Circuit case, *Tot v. United States*, in 1942. Then you see other courts citing that case, thereby creating a leapfrog process where a precedent gets started and other precedents follow it and finally you end up with lots of precedents saying the same thing. But if you take a hard

look at the very first one, it may or may not be valid.

In 1768, when British troops were trying to occupy Boston, there was quite a reaction by patriots such as Samuel Adams, John Adams and others. There were many articles published in the pro-patriot newspaper, THE BOSTON GAZETTE under various pen names. One of the articles made the statement that there were three most oppressive possible conditions that we expect to ensue: the ministry has made it a threat to take people away to be tried in England and not be tried by a jury of their peers. It listed another item and then said that the inhabitants are to be disarmed. If you start at that point and read the colonial newspapers until the war for independence started, you'll see many references of the same type.

Examining Blackstone's commentaries, we see that Blackstone had written that there are certain underlying manners in which the personal rights of private property, personal security, and personal freedom or liberty are protected. One of those rights was to have and use arms for self-preservation and defense. Referring to an individual right to resist criminal attacks, a right to be armed permits an individual to do so. He linked adjunct rights to the primary rights of protection of personal liberty and personal security.

Now, we have the same rights being talked about. Mind you, it starts with Blackstone and then Samuel Adams talking about those rights as a criticism of British policy in America. After the Civil War, during the beginning of the Reconstruction period, we see those rights being referred to again in legislation passed by Congress.

When the war ended and the slaves were freed, the Southern states began reenacting the slave codes. They became known as the Black Codes. They had many oppressive conditions. The Codes had to do with requiring a person to get the permission of an employer to leave a plantation, disallowing political speech or religious exercise. Furthermore, they prohibited black persons from owning firearms or possessing firearms. When the Black Codes were reenacted, Congress passed the Civil Rights Act of 1866 and tried to put a stop to it and also enacted the Freedman's Bureau Act of 1866. It was vetoed initially by the President. At the same time, the Fourteenth Amendment was working its way through Congress. The Fourteenth Amendment, in many respects, is a reflection of the Civil Rights Act and the Freedman's Bureau Act.

When the Fourteenth Amendment was introduced in the Senate, Senator Jacob Howard proposed it and explained its meaning. He stated explicitly that the amendment would protect from state depravation the personal rights in the Bill of Rights, and he explicitly went on to quote the right of the people to keep and bear arms.

It takes two-thirds of Congress to propose an amendment to the states. By coincidence, during the same brief period in which the Fourteenth Amendment passed Congress by over two-thirds, the second Freedman's Bureau Act was proposed in Congress and it was passed by an over two-thirds vote because it

had been vetoed before. The Freedman's Bureau Act mirrored the language of the Civil Rights Act, but it actually went a bit farther and using language from Blackstone, it adapted to that legislation and stated that among the rights of persons, are the rights of personal security, personal liberty, and personal property, including "the constitutional right to bear arms." Why was that important at that time of the Reconstruction Congress? It was important because of the Black Codes that were passed that allowed states to disarm Black people. And who was enforcing those laws? It was the militia. Militia units in the Southern States were going around on a rampage using these gun control laws as an excuse to break into the cabins of the freedmen to search for arms and steal property and commit other abuses.

Consequently, the Reconstruction Congress took steps to act against this abuse. One of the things it did was to abolish the Southern militias, the state militias in the Southern States. According to the Reconstruction Congress, in other words, the right to keep and bear arms was a lot more important than maintaining state militias. If the Second Amendment protected anything, it protected a right to keep and bear arms that, at that time, was being violated by the state militias. One thing we have to do is read the Constitution through the eyes of the Reconstruction period because that made fundamental changes to the way we look at our Constitution. I think it obviously minimized the controversial militia clause, which one could interpret one way or the other. In other words, the same Congress that proposed the Fourteenth Amendment passed the statute, adopted by over two-thirds, providing that the rights to personal security and personal liberty encompass "the constitutional right to bear arms." They were not talking about bearing arms in militias; they were talking about a personal right to bear arms and to keep arms in the home for the protection of family and also for the higher federal objective of militia usage.

In conclusion, when examining any constitutional issues, I would encourage you to take a textural analysis of the Constitution, to read it as a whole, to find provisions where something was said in a certain way at one place but not in that same way in another place. Maybe that means that some provisions don't mean the same thing. We also look at the Constitution as a document reflecting later historical periods. I don't think of any period that is more important than the Reconstruction period. I think that time made a fundamental change in the way we look at the Bill of Rights and particularly the application of the Bill of Rights to the states.

I think I will end my remarks at this point and I want to thank all of you for coming out tonight.