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## **Liberty, Power, and the Constitution**

**by Jacob G. Hornberger**

A few years ago, I was delivering a lecture on the Constitution to an assembly consisting of a couple hundred high-school students. I made the following observation, which threw the students into an uproar: “The First Amendment to the Constitution does not give people the right to free speech.” Immediately, I was pummeled by criticisms from all across the room. Of course, the First Amendment gives people freedom of speech, the students cried.

Finally, a student raised her hand and commented, “Mr. Hornberger is right.” Silence immediately spread across the room. She went on to explain that the First Amendment doesn’t give people freedom of speech but instead prohibits Congress from infringing on people’s freedom of speech. I asked her why that distinction was important, and she responded, “Because people’s rights preexist government and the Bill of Rights was enacted to make certain that the government does not take them away.”

It is that young woman’s insight that holds the key to the freedom and well-being of our country.

Underlying the Constitution and the Bill of Rights are two critically important points:

1. The greatest threat to the rights and freedoms of the American people lies with their own government officials, not with “terrorists,” as government officials so often maintain.
2. The purpose of the Bill of Rights is to serve as a protective wall, protecting the American people from the very real threat to their rights and freedom emanating from the federal government.

Those two points make many Americans very uncomfortable. In fact, when I began my presentation to those high-school students with the claim about the First Amendment, I knew full well the adverse reaction I would receive. After all, public schools are government schools. Any government schoolteacher, especially one who teaches near Washington, D.C., who tells his students that the federal government is the main threat to the rights and freedoms of the American people is not likely to survive the grinding wheels of conformity within the public-school bureaucracy.

## **Provider or threat?**

Inevitably the federal government is portrayed not as the potential threat to the people but rather as their friend and their provider. And those millions of public-school students all across the nation ultimately grow up into adults who carry that mindset into their later years. The result is a nation of people who look upon the federal government as their provider and protector rather than as the main threat to their rights and freedoms.

When confronted by the express language of the Bill of Rights — language that expressly protects the people from federal officials — many Americans become confused and conflicted, oftentimes preferring simply not to think about such uncomfortable things. After 9/11, one adult woman even advised me that the purpose of the Bill of Rights is to protect us from the terrorists. (She was referring to al-Qaeda.) She must have been befuddled when I pointed out to her that the purpose of the Bill of Rights, as reflected by its express terms, is actually to protect us from federal officials. I never heard back from her.

This mindset of government as provider/protector that has been inculcated in the American people for the past several decades, as compared to the mindset held by our American ancestors — that the federal government is the main threat to our rights and freedom — is the reason that our country has headed in a very ominous direction — in the direction of omnipotent government, dictatorial rule, and the permanent loss of liberty.

One discomfiting question that people must ask themselves is: Is the underlying philosophy of the Bill of Rights outdated? When Americans insisted on the enactment of the Bill of Rights, they were clearly viewing federal officials as one group of people and the private sector as another group. In other words, they didn't adopt the "we are the government" mindset that pervades much of America today. It is also clear that they viewed the federal group as the greatest potential threat to their rights and freedoms, which is precisely why the Bill of Rights contains so many express restrictions on the power of government officials.

But what about today? Aren't people different than they were in the 18th century? Haven't times changed? Isn't the Bill of Rights somewhat outmoded? Haven't federal officials become our friends and our providers? Don't they give us Social Security, Medicare, and Medicaid, and education grants? Don't they protect us from "the terrorists"? Isn't President Bush a good man who can be trusted to do the right thing?

The fact is that human nature hasn't changed in more than 200 years. The threat that federal officials posed to the rights and freedoms of the American people in the late 1700s, as reflected in the Bill of Rights, is as real today as it was more than two centuries ago. And unless the American people come to that realization, the United States will continue to move in the ominous direction of omnipotent government, militarism, and dictatorship.

Every American owes it to himself to closely examine the powers that President Bush and the Pentagon are now claiming, especially in the context of the Bill of Rights. For example, consider the NSA scandal, in which the president has admitted that federal officials have been recording telephone conversations of Americans without first securing a warrant from the secret FISA court that Congress established for dealing with national-security threats. Now, it's bad enough that a supposedly free society has secret courts, especially one that effectively serves as a rubber stamp for the executive branch. But the president's position is that he doesn't need to secure even those warrants because he's serving not only as a president but also as a military commander in chief in the "war on terrorism."

### **Claiming omnipotent power**

Now consider the practical application of the president's reasoning. He is not simply claiming the power to ignore just the Fourth Amendment. By implication he is claiming the power to ignore other amendments in the Bill of Rights as well, such as the First, Second, Fifth, and Sixth.

In fact, this was perfectly demonstrated by the Pentagon's treatment of Jose Padilla, an American citizen whom the president and the Pentagon accused of terrorism. Ignoring such express guarantees as due process of law, jury trials, and right to counsel in the Bill of Rights, the president and the Pentagon took Padilla into custody and claimed the power to punish, even execute, him without any federal court interference. Again, the rationale was that, since we are at war, the president and the military can wage that war with impunity, even if that involves ignoring the Bill of Rights.

How is a regime that is operating with those types of omnipotent powers different from a military dictatorship? Of course, many people would respond that since the president is democratically elected, there can be no dictatorship, but such a claim would be nonsense. Democracy simply entails how people will be put into power. It does not address the central issue in dictatorships — the extent of the powers that the person wields after he assumes office.

What is important to note is not that President Bush, the NSA, and the Pentagon have wielded such powers against only a few Americans. What's important to note is that they claim the power to wield them against all Americans.

In other words, here is what the "war on terrorism" has brought us: a president who claims the omnipotent power to ignore the Bill of Rights and an all-powerful military that claims the power to arrest, jail, and punish any American labeled a "terrorist," including newspaper editors, government critics, and anti-war dissidents, without following the procedures set forth in the Bill of Rights.

How is that system different from that of totalitarian countries? Sure, it's possible to vote out a president, but presidential elections take place only every four years. There are lots of

innocent people who can be swept up, tortured, and executed within a four-year period of time. And as we have learned, it is always possible to find governmental personnel in the NSA, the CIA, the military, and elsewhere who are eager and willing to do the nasty work required by regimes exercising dictatorial powers.

What will happen if there is another major terrorist attack on American soil? Suppose, for example, that terrorists were to strike the Capitol or the White House with massive, devastating bombs. Does anyone doubt that the president and the Pentagon would immediately order a massive “war-on-terrorism” crackdown that would expand their NSA/Padilla powers over many more Americans? Also, don’t forget that the Supreme Court ruling that upheld the U.S. government’s concentration camps for Japanese Americans during World War II has not been overturned.

### **Terrorism and dictatorship**

Ever since childhood, we have heard people ask, “How could the German people have permitted Germany to slide into dictatorship?” Is it still so difficult to understand how? First of all, terrorists firebombed the German parliament building, leading Hitler to declare war on terrorism and to seek a temporary suspension of civil liberties to deal with the terrorist threat. On top of the terrorist threat that Germany faced was the communist threat from the Soviet Union, a phenomenon that U.S. officials also used to expand federal power during the Cold War.

How can it surprise any American that the German Reichstag gave Hitler the powers he was seeking? After all, would the august members of the U.S. Congress, most of whom enacted the USA PATRIOT Act without even reading it, have reacted any differently than the German congress reacted to the terrorist strike on the Reichstag? Has the U.S. Congress impeached the president for conducting warrantless wiretaps on Americans or for seizing Americans and denying them jury trials and due process of law? Has the Congress opposed the president’s unilateral decision to invade Iraq without the constitutionally required congressional declaration of war? Has the Congress appointed an independent counsel to investigate and prosecute everyone responsible for the torture, sex abuse, rape, and murder of prisoners and detainees in U.S. custody as well as the resulting cover-ups of that scandal by the Pentagon?

No, because the Congress is not going to oppose any expansion of federal power, not even when it is being carried out by the executive branch. After all, keep in mind that the First Amendment names Congress, not the president, as the main threat to such fundamental rights as freedom of speech, freedom of religion, and freedom of the press. The last place Americans should look to protect their rights and freedom is the U.S. Congress.

Sometimes the judicial branch shows signs of protecting the traditional American way of life but the citizenry would be foolish to put all their eggs in that basket. Unfortunately, many federal judges are former members of the executive branch, and the mindset they had before their

appointment to the bench didn't change once they assumed the bench. In their minds, the federal government remains the provider and protector rather than the threat to the rights and liberty of the people.

The ultimate answer lies with the citizenry themselves. If people will not fight to protect their rights and freedoms from governmental assault, government officials will enslave them, no matter how well-written a constitution or a bill of rights might be. That's why government officials do their best to "dumb down" the citizenry, especially by forcing them to attend government schools as children ... why they deal in falsehoods and deceptions ... why they encourage blind trust in government ... why they suppress ideas on liberty ... why they engender fear within the citizenry. They know that these are the time-honored methods to expand their powers over the lives and fortunes of the citizenry.

That's why the key to the preservation of our rights and freedoms lies in knowledge, in truth, in sound ideas on liberty, and in courage. For government officials also know that, no matter how powerful the government might be, no government will stand against a knowledgeable, aroused, and courageous citizenry who stand their ground and declare to their governmental officials, "No matter the crisis, no matter the emergency, you will not suspend or infringe our freedoms. Obey our law, the Constitution."

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