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Do We Still Need the Bill of Rights?

by Jacob G. Hornberger

There are two important points to remember about the Bill of Rights. First, the Bill of Rights does not give any rights to the American people and, second, the Bill of Rights was intended to protect us from our own federal government.

Those two points often shock ordinary Americans. Throughout their schooling, especially in public schools, they gradually come to believe that their rights come from the Constitution and, more specifically, from the Bill of Rights. Why else would the police read us our “constitutional rights”? Why would the Bill of Rights be called that if it didn’t actually give us our rights?

I experienced this mindset during a speech I once delivered to about 150 students in a public high school. I began my speech by declaring that the Bill of Rights does not give anyone freedom of speech, and I asked whether anyone disagreed. Immediately, I was met by loud challenges. “Haven’t you ever heard of the First Amendment?” they asked. I stood my ground until finally one student declared, “Mr. Hornberger is right. The Bill of Rights does not give anyone rights. Instead it protects the exercise of our rights.”

Even more shocking to many Americans is the notion that the Bill of Rights is intended to protect our rights from officials and personnel of the federal government. The federal government, after all, is considered our provider and protector, isn’t it? Why in the world would we need protection from our provider and protector? Moreover, in America everyone knows that we are the government, right? Why would we need protection from ourselves?

I experienced this mindset soon after 9/11. A woman came up to me after a speech I delivered and told me how grateful we should be that the Constitution and the Bill of Rights protect us from the terrorists. She was referring to al-Qaeda.

The Bill of Rights should actually have been called a Bill of Prohibitions because that’s what it is: a list of actions that federal officials are prohibited from undertaking and a list of guarantees that federal officials are required to honor.

Keep in mind that while we, the people, are expected to obey laws enacted by the federal government, federal officials are expected to obey our law — the law of the Constitution — the

law that the citizenry imposed on them as a necessary condition to bringing the federal government into existence. That's why the Constitution is called the highest law in the land — it is a law that federal officials are supposed to obey.

This principle is often confusing to Americans because in their minds, the federal government and the American people are one and the same. Thus it befuddles them when someone treats the federal government and the private sector as two completely separate and distinct entities, as our ancestors did in the Bill of Rights.

We witness this phenomenon often with respect to foreign policy. After the 9/11 attacks, for example, many Americans simply could not process the thought that foreigners could retaliate for the policies of the U.S. government while having the utmost respect for the American people and their traditions, customs, and values. For such Americans, the federal government and the American people are one and the same. For them, hatred for the federal government automatically constitutes hatred of America.

Ironically, many foreigners don't conflate the federal government and the American people. Many years ago, while I was traveling in Cuba, one of the things that amazed me about the Cuban people was how nice, courteous, and genuine they were. I asked a cab driver, "Why is everyone so nice to me, given what my government has done to them with its embargo?" His answer: "What responsibility do you have for what your government does?"

Our American ancestors were easily able to avoid conflating the federal government and the private sector. They had learned an important lesson from history and from personal experience, a lesson that unfortunately has been lost on many modern-day Americans: the greatest threat to the freedom and well-being of a citizenry lies not with foreigners but rather with their own government, especially a government with a large standing military force.

Limited-governmental powers

So why did our ancestors bring the federal government into existence? The answer lies in what Thomas Jefferson explained in the Declaration of Independence: they believed that while people's rights exist independently of government, government is necessary to protect the exercise of such rights from those who would prevent that exercise, such as foreign invaders.

The problem, however, was obvious. Since government is the greatest threat of all to people's lives, liberty, property, and well-being but, at the same time, necessary to protect such rights from others, how do the people reach a proper balance? After all, what good would it do to call government into existence to protect people's rights if the result was the violation of such rights by the government?

The answer our ancestors came up with was the Constitution and, specifically, divided government (i.e., federalism) and the enumerated-powers doctrine. Calling the federal government into existence, the Constitution, at the same time, made a startling declaration: the federal

government's powers would be limited — and limited to those powers enumerated in the document itself.

In other words, one option would have been to call a government into existence that had general powers to do whatever federal officials believed was in the best interests of the nation. There was no way that our American ancestors would ever have done that, given their conviction that the federal government would constitute the greatest threat to their freedom and their rights.

So they did the something else. Using the Constitution to call the federal government into existence, they created a document to enumerate a relatively small list of powers that each branch of the federal government would be permitted to exercise. They then essentially declared that no other powers could be exercised. That is, if a power wasn't enumerated, it simply couldn't be employed by federal officials.

One of the most remarkable aspects of all this is that people were limiting the powers of their own government in a formal, structured way. People all over the world, whose families had lived under omnipotent government for centuries, were stunned by such an audacious experiment.

Ordinarily, that would have been the end of it. But it wasn't. Because our American ancestors, suspicious people that they were, were still not satisfied. As a condition of accepting the existence of the federal government, they demanded that the document be amended soon after ratification. The purpose of the amendments was to expressly prohibit federal officials from trampling on the fundamental and procedural rights of the people, rights that would be expressly named in the amendments.

There were those who said that no such amendments were necessary. After all, the enumerated-powers doctrine meant that if a power wasn't enumerated, it couldn't be exercised. Thus, since the Constitution did not delegate to Congress the power to suspend freedom of speech or freedom of religion, for example, Congress simply could not do so.

Why a Bill of Rights?

That wasn't good enough for the American people. They demanded express prohibitions and express guarantees of rights. Why? The answer is obvious. They believed that federal power would inevitably attract people with pro-tyranny mindsets, including people with good intentions and zeal.

There were those who pointed out the obvious risk involved with a bill of rights. If the bill enumerates some rights, government officials down the ages might conclude that unlisted rights were not worthy of protection. To solve that problem, the Ninth Amendment was included. It says that the list of enumerated rights should not be construed to be all-inclusive.

An important question arises: Is the Bill of Rights still necessary? After all, many Americans do not view the federal government with the same suspicion and distrust that their

American ancestors did. As pointed out earlier, in the minds of many present-day Americans “we are the government.” Moreover, in modern times the federal government has become our provider, especially with respect to our retirement, health care, education, food stamps, business subsidies, protection from competition, and other forms of government welfare.

So why not simply abolish the Bill of Rights and give federal officials, once and for all, the full power to enact any measures that they believe are in the best interests of the nation and the nation’s security. Surely, when we give our provider and protector full powers, we can count on it to do the right thing and not infringe our rights and liberties, right? In fact, why do we even need a Congress? Why not simply let the president rule by decree? We can count on our (democratically elected) president to do the correct thing, right? After all, he is an American and we did elect him, right?

Unrestrained government

Well, let’s examine how U.S. federal officials operate when not constrained by the Constitution to get a hint of what life would be like here in the United States without the Constitution and the Bill of Rights. Let’s examine federal conduct in Cuba, where federal officials built the Guantanamo Bay prison camp and a special judicial system in the expectation that the U.S. Constitution would not apply.

It is easy to recognize one important thing about Gitmo — how different its judicial system is from the one that our American ancestors established. When federal officials had the unrestrained power to construct an independent judicial system for the world to marvel at, here is what they came up with in Cuba:

- No trial by jury. Trial by jury is a fundamental precept of America’s federal criminal-justice system. If the government accuses a person of a crime, he doesn’t have to accept a trial in which the judge, who might well be as crooked as a dog’s hind leg, is deciding his guilt or innocence. He can choose to have ordinary people in the community judge his guilt or innocence. We know how federal officials feel about the right of trial by jury by the fact that it is one of the rights that the accused are denied at Gitmo. The last thing that Pentagon officials are going to permit at Gitmo is a trial by a jury of one’s peers. Instead, the deciders of guilt or innocence are military officials, all of whom are ultimately answerable to their superiors in the Pentagon.
- No right to counsel. While it’s true that the Guantanamo prisoners now have access to lawyers, it wasn’t always that way. In the beginning, U.S. officials took the position that prisoners in their system accused of terrorism did not have the right to an attorney. It was only after the federal judiciary ordered otherwise that federal officials gave in.
- No right to confront witnesses. Convictions at Guantanamo can be based on hearsay evidence. If Person A tells Person B that Person A saw the accused commit a crime, the Gitmo system, unlike the American system, permits Person B to testify about the statement. The

defendant and his attorney are denied the right to confront and cross-examine Person A, the actual person who is making the accusation.

- No right to be free from cruel and unusual punishments and no right to be free from self-incrimination. At Guantanamo Bay, military officials have tortured and sexually abused prisoners, with the intent of using their statements at trial. The use of such statements is now in doubt only because of U.S. judicial intervention, not because the Pentagon changed its view of what it considers to be a model judicial system.

- No right to freedom of speech. Criminal defendants at Gitmo are not permitted to speak to the press or to their families, not even to voice complaints about mistreatment. At Gitmo, government power is omnipotent.

The list, of course, goes on. It would be even worse if we were to consider U.S. actions in Iraq, where U.S. officials have, by and large, been able to operate without constitutional constraints. We also shouldn't forget the suspension by Congress, at the request of the president, of the centuries-old privilege known as habeas corpus for foreigners at Gitmo. Habeas corpus is the linchpin of a free society, which is perhaps why Congress suspended it. Our American ancestors who demanded the enactment of the Bill of Rights would not have been surprised, especially given that the First Amendment, by specifically mentioning Congress, implies that that political body is the greatest threat to such fundamental rights as freedom of speech, freedom of the press, and freedom of religion.

What U.S. officials have done in Cuba confirms the wisdom of our American ancestors. They knew that in the absence of the Bill of Rights, U.S. officials would do the things that the Bill of Rights prohibits. They were right. We need the Bill of Rights as much as they did, if not more so. Thank God for their wisdom, courage, and foresight.

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