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Two Checks on Tyranny

by Jacob G. Hornberger

The purpose of the Bill of Rights was twofold: first, to ensure that certain fundamental rights were protected from federal infringement and, second, to ensure that the American people were expressly guaranteed certain procedural rights in federal criminal prosecutions. While all of the rights and guarantees enumerated in the Bill of Rights — as well as those that were not enumerated — are critically important to a free society, it is worth noting that two rights — one fundamental and one procedural — are intended to provide the citizenry with a means to resist federal tyranny should such ever befall our land.

These two rights are the right to keep and bear arms and the right to trial by jury. The gun right is found in the Second Amendment and the jury right is contained in the Sixth Amendment.

We begin with the basic underlying assumption of the Bill of the Rights, which is that the greatest threat to the freedom and well-being of the American people is the federal government. Not terrorists. Not communists. Not Muslims. Not drug dealers. Not immigrants. The federal government is the greatest threat to the American people.

After all, it doesn't take a rocket scientist to figure out whom the crafters were addressing with the Bill of Rights. They were confronting the president and the Congress, along with everyone else in the executive and legislative branches. The reason that the First Amendment, for example, expressly names Congress is simple: the crafters of the First Amendment understood that in the absence of express protection, members of Congress would do what government officials do in other lands — punish citizens for criticizing government officials.

The reason for expressly prohibiting government officials from making gun ownership illegal and for guaranteeing trial by jury was to ensure that the American people could resist, violently or peacefully, the imposition of tyranny by the president, the Congress, or both. Implicit in protecting the exercise of such rights was the assumption that tyranny could conceivably come to the United States.

Tyranny and gun control

There are those who argue that the right to keep and bear arms has to do with hunting and self-defense against robbers and burglars. While guns are an important part of those activities, they are not the primary reason the Second Amendment was enshrined in the Bill of Rights. The main reason for the Second Amendment is one that government officials are usually uncomfortable talking about: the right and the ability of the citizenry to forcibly resist government officials, including those in the FBI, the CIA, the military, and the police, who are carrying out tyrannical orders of their superiors.

This important rationale for the right to keep and bear arms — the ability to resist tyranny — was pointed out by the U.S. Supreme Court in the recent Washington, D.C., gun-ban case, *District of Columbia v. Heller*. The Court stated,

There are many reasons why the militia was thought to be “necessary to the security of a free state.” See 3 Story §1890. First, of course, it is useful in repelling invasions and suppressing insurrections. Second, it renders large standing armies unnecessary — an argument that Alexander Hamilton made in favor of federal control over the militia. The Federalist No. 29, pp. 226, 227 (B. Wright ed. 1961) (A. Hamilton). Third, when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny.

The Court was, of course, referring to tyranny at the hands of the federal government — and to the right and ability of the American people to employ violence against government officials in the event of such tyranny. The point is that if the worst happens, the American people have an option that people in many other countries don’t have — the option of meeting force with force. In the absence of gun ownership, Americans would have but one option: submit and obey. Submission and obedience were the only options that most German Jews had in Nazi Germany. Weapons would have provided them with another option.

One of the best expositions on the critical importance of the right to keep and bear arms was given by Judge Alex Kozinski, a federal appellate judge in the Ninth Circuit, in the case of *Silveira v. Lockyer*:

All too many of the other great tragedies of history — Stalin’s atrocities, the killing fields of Cambodia, the Holocaust, to name but a few — were perpetrated by armed troops against unarmed populations. Many could well have been avoided or mitigated, had the perpetrators known their intended victims were equipped with a rifle and twenty bullets apiece, as the Militia Act required here. If a few hundred Jewish fighters in the Warsaw Ghetto could hold off the Wehrmacht for almost a month with only a handful of weapons, six million Jews armed with rifles could not so easily have been herded into cattle cars.

My excellent colleagues have forgotten these bitter lessons of history. The prospect of tyranny may not grab the headlines the way vivid stories of gun crime routinely do. But few 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 — where the government refuses to stand for reelection and silences those who protest; where courts have lost the courage to oppose, or can find no one to enforce their decrees. However improbable these contingencies may seem today, facing them unprepared is a mistake a free people get to make only once.

Recall the scene early in the movie *Braveheart* in which the Scottish bride was required to submit to the British law requiring her to have sexual relations with a British lord on her wedding night. Since the Scots lacked the means to resist British troops enforcing the law, the husband and his wife had but one choice — obey and submit. Swords and shields would have provided another option.

The right to keep and bear arms is essentially an insurance policy. Like many insurance policies, people will probably never have to make a claim on it. But if the worst happens, it's nice to know that one has the insurance.

Jury nullification

The right of trial by jury, enshrined in the Sixth Amendment, provides the American people with a nonviolent means to resist tyranny. Trial by jury provides the citizenry with the means to acquit people who are prosecuted by U.S. officials for violating tyrannical laws.

In federal criminal prosecutions, the accused is guaranteed the option of having a group of ordinary citizens decide his guilt or innocence. Those people are chosen at random from the community.

At the trial, the accused is presumed innocent and federal prosecutors have the burden of providing sufficient evidence to convince the jury beyond a reasonable doubt that the accused is guilty of the crime. The accused himself has the right to present evidence showing that he is not guilty of the offense.

After both sides have presented their evidence, the federal judge instructs the jury that its duty is simply to weigh the evidence and decide whether the accused is guilty. The judge's duty, he explains, is to provide the jury with the applicable law in the case.

What federal judges (and, for that matter, state judges) never explain to the jury, however, is the full extent of its powers. Every jury, whether it realizes it or not, actually has the power to judge the law itself. If the jury decides that the law itself is unjust, immoral, or tyrannical, the jurors can vote to acquit the accused and there is nothing the federal prosecutors or the federal judge can legally do about it.

Once the verdict of acquittal is announced, the judge must discharge the defendant, enabling him to immediately walk out of the courtroom a free man. The jury itself is discharged as well, and neither the prosecutors nor the judge can retaliate against the jurors. The jury verdict is final.

Many years ago, a man in my hometown of Laredo, Texas, was on trial in federal court for a drug offense. He took the witness stand and admitted having sold the drugs, explaining that his family had been in dire financial straits and that he deeply regretted his actions. The jury knew that if they convicted the man, the judge would surely send him to the penitentiary for a long time. They voted to acquit him.

When the verdict of acquittal was announced, the federal judge flew into a rage. He castigated the members of the jury, telling them that they were the dumbest group of people who had ever served as jurors in his court. He ordered that all 12 of them be removed from the jury list and barred from ever serving again in his court. But at the end of his tirade, he had but one choice: to discharge the defendant and the jury. All of them walked away in freedom. The jury's verdict was final.

When our American ancestors demanded the inclusion of trial by jury in the Bill of Rights, they knew that judges or other federal officials could not be relied on to serve as ultimate checks against tyranny. They knew that when it came to interpreting laws, judges would be bound more by the rulings of the appellate courts than by their conscience.

Not so with ordinary citizens, however. If the citizenry believed that laws that were being enacted were tyrannical, immoral, or unjust, that sentiment could be quietly expressed by the refusal of juries to convict people of such offenses.

Consider, for example, the case of Hans and Sophie Scholl, a brother and sister who were attending college at the University of Munich during World War II. They secretly began publishing anti-government and anti-war pamphlets as part of an informal group called the White Rose. Since that was a serious crime under German law, the SS caught them and arrested them. They were immediately brought to trial before the "People's Court," a special court that Hitler established because of his dissatisfaction with a verdict that had been issued in a terrorism case by a duly constituted court.

The Scholl trial was conducted before a panel of judges, and the verdict was never in doubt. As the investigators and judges pointed out, the law is the law and people are expected to obey it. And the nation was at war, after all. Since Hans and Sophie admitted to having violated the law, the judges felt that they were doing their legal (and patriotic) duty by convicting them and sentencing them to death.

Now, imagine that trial by jury had been a guaranteed right under the German system. A jury of ordinary German citizens, rather than a panel of appointed judges, would have been deciding the fate of the Scholl siblings. While it would be entirely possible that the jury would

none-theless have convicted them of publishing the pamphlets, at least the possibility would have existed that the jury, out of conscience, would have voted to acquit, on the ground that the law under which the Scholls were being prosecuted was tyrannical, immoral, and unjust.

Under the right of trial by jury, Hans and Sophie Scholl, along with jury, could have walked out of that German courtroom free people. With trial by tribunal, they never had a chance.

Some people have argued that trial by jury leads to anarchy, a rather silly suggestion, given that the right of jury nullification has existed since enactment of the Bill of Rights and yet the federal government is still in existence. Keep in mind that a jury verdict in a particular case does not serve as any type of precedent for other cases. It simply serves as a message that a particular jury in a particular case voted to acquit the accused.

Resistance to tyranny today

Are the Second Amendment right to keep and bear arms and the Sixth Amendment right of trial by jury still relevant today?

Well, consider how U.S. officials behave in the absence of constitutional restraints and a Bill of Rights. Don't they engage in the conduct that the Constitution and the Bill of Rights expressly prohibit?

When U.S. personnel invade a foreign country, what's the first thing they do? Confiscate guns and impose gun control. Why? To prevent the citizenry from violently resisting what is certain to follow — tyrannical measures. Moreover, when the United States occupies another country, notice that you never see it establish a judicial system that guarantees such things as trial by jury, the right to confront witnesses, the presumption of innocence, or due process of law.

Consider, for example, how the U.S. military has conducted itself in Iraq, where the military operates without the constraints of the U.S. Constitution or the Bill of Rights. The military is holding some 20,000 people in jail indefinitely without charges. U.S. soldiers barge into people's homes and search their personal effects without a warrant. Prisoners are tortured and sexually abused, as the Abu Ghraib photos documented. U.S. officials guide Iraqi officials into holding kangaroo trials whose outcome is preordained and where the defendant is denied important procedural guarantees, as in the trial of Saddam Hussein. Curfews are imposed. Gun control is implemented. The press is muzzled.

Or consider Guantanamo Bay, the Pentagon's infamous prison camp, where it has established what it considers to be a model "judicial" system for handling terrorism cases. Unlike proceedings in the United States, in the Gitmo proceedings the accused is denied trial by jury, defendants are presumed guilty, coerced confessions and evidence acquired by torture can be used to convict the accused, and there is no protection against self-incrimination. Cruel and unusual punishments, including torture and sex abuse, are permitted and even encouraged. In fact, the ultimate farce of the entire proceedings is that even if the accused is acquitted, a highly

unlikely possibility, given that military personnel are serving as prosecutor, judge, and jury, the defendant can still be kept in custody for the rest of his life.

If it weren't for the Constitution and the Bill of Rights, who doubts that the president, the Pentagon, and Congress would be doing the same things here in the United States? Those people look upon constitutional restrictions on their power with disdain and disgust. Why else, for example, did they establish their prison camp in Cuba, rather than in the United States, if not to escape the applicability of the Constitution and the Bill of Rights and any interference from the federal judiciary?

Freedom can never be taken for granted, especially in times of crises, real or contrived, and especially in an era when the president is executing signing statements to avoid congressional laws; entering into illegal partnerships with private businesses for the purpose of illegally spying on the citizenry; declaring war on foreign nations in violation of the Constitution; implementing an independent judicial system designed to easily secure criminal convictions; and claiming a wartime power to arrest, torture, sexually abuse, and indefinitely imprison Americans as enemy combatants, all with the support of Congress.

If the worst were to happen — if Americans were subjected to the sort of tyranny under which the Scots, Germans, Russians, Chinese, and other people have suffered, at least Americans have two means of resistance that most people in history have been denied. Thanks to the courage, wisdom, and foresight of our ancestors, Americans have the right to keep and bear arms and the right of trial by jury.

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