Speech

GARRETT EPPS*

The Bill of Rights

In epic storytelling, it's traditional to start in the middle of the action.

So I am going somewhat arbitrarily to begin the story of the Bill of Rights on the afternoon of September 12, 1787. In Philadelphia, then a relatively humid and unhealthy fever port, a group of four or five dozen men was meeting in a small, closed room, made hotter because the windows were shuttered and barred. The delegates to the Federal Convention of 1787 had spent nearly four hot, difficult months in that little room. During that time they had provisionally solved some of the most vexing problems facing the new American nation. They had designed a chief executive office like none the world had ever seen before—a kind of democratic monarch called a president of the United States. They had uneasily compromised the issue of representation in the U.S. Congress. They had outlined a novel dual court system that would allow for one supreme federal law and many divergent state legal systems. Now their Committee on Style had taken the various drafts and put them into one smooth document, which was read for the first time on September 12. All that remained were a few technical questions, and their work was done. I would imagine they felt proud; I am quite sure they felt tired.

At this point, Colonel George Mason of Virginia suddenly introduced an entirely new and unwelcome issue into the conven-

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tion. According to Madison's notes of the convention debates, Mason said:

> He wished the plan had been prefaced with a Bill of Rights, [and] would second a Motion if made for the purpose. It would give great quiet to the people; and with the aid of the State declarations, a bill might be prepared in a few hours. Mr. [Elbridge] Gerry concurred in the idea [and] moved for a Committee to prepare a Bill of Rights.[1]

Reading the notes, one can almost hear a sigh of fatigue at this idea. After a desultory debate, the state delegations unanimously voted not to appoint a Bill of Rights committee. The delegates to the Philadelphia Convention in fact spent far more time considering the issue of export-inspection fees at American ports than they did the advisability of a bill of rights.[2]

During the national debate over ratification of the Constitution, many people asked why the draft included no bill of rights. The Framers offered a number of reasons: The states had their own bills of rights; the new government would have such limited powers that it would never even be able to infringe on individual rights; and anyway, a bill of rights might do harm by suggesting that the American people possessed only the rights mentioned and no others.[3]

Most official histories tend to treat the Framers' reasons for leaving out a bill of rights with great reverence. In fact, the explanation is simple. Brilliant as they were, the Framers weren't gods, they were just mortal. They were tired; they made a mistake.[4]

Leonard Levy, the leading living historian of the Constitution, put it thus:

> That supporters of the Constitution could ask, "What have we to do with a bill of rights?" suggests that they had made a colossal error of judgment, which they compounded by refusing to admit it. Their single-minded purpose of creating an effective national government had exhausted their energies and good sense, and when they found themselves on the defensive, accused of threatening the liberties of the people, their frayed

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[1] JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 630 (Adrienne Koch ed., 1984).

[2] *See* LANCE BANNING, THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC 281-82 (1995).

[3] *See* LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 14-25 (1999).

[4] *See id.* at 12-13.

nerves led them into indefensible positions.[5]

Luckily for all of us, the American people did not accept the Framers' assurances that no bill of rights would ever be needed. In fact, the Constitution was only ratified on an implicit understanding that the First Congress would immediately frame a bill of rights.[6] When that body met in 1789, James Madison introduced a draft.[7] The father of the Constitution would now be the father of the Bill of Rights—even though privately he was skeptical about the value of such a charter. In October 1788, he had written to his mentor Thomas Jefferson:

> [E]xperience proves the inefficacy of a bill of rights on those occasions when its controul is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State. . . . . What use then it may be asked can a bill of rights serve in popular Governments? . . . . The political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion.[8]

On that day in 1789, Madison introduced what would have been twelve, not ten, amendments. One, never ratified, would have forbidden states as well as the federal government to violate "the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."[9] Another was passed by Congress, lay dormant for 200 years, and was ratified in 1992. It is now the Twenty-Seventh Amendment, and it requires that an election must take place between any Congressional vote to raise its own pay and the actual increase in salary.[10]

Madison was that rare politician who took promises seriously; the Constitution had been ratified on a promise, and he wanted to keep it. But when he proposed the Bill of Rights, the First Congress reacted much like the members of the Philadelphia

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[5] *Id.* at 25.

[6] *See id.* at 31-32.

[7] *See id.* at 35. Madison introduced his proposed amendments on June 8, 1879. *Id.*

[8] Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* 11 THE PAPERS OF JAMES MADISON 295, 297-99 (Charles F. Hobson & Robert A. Rutland eds., 1977).

[9] James Madison, Speech in Congress Proposing Constitutional Amendments (June 16, 1789), *in* JAMES MADISON, WRITINGS 437, 443 (Jack N. Rakove ed., 1999).

[10] U.S. CONST. amend. XXVII.

Convention. They said, in effect, in the accents of Joe Pesci in *My Cousin Vinnie,* "What, you were *serious* about that?" Only because of Madison's insistence did Congress finally rewrite and pass the amendments that we know as the Bill of Rights. Even as they did so, they tended to insist that they really weren't needed.[11]

So there is something a bit haphazard, reluctant and even back-handed about the American Bill of Rights. The people who framed it were designing a charter for a national government. They were far more concerned with making sure that the government had enough power to survive than with ensuring that it recognized the rights of the people. And when we read the Bill of Rights today, we are struck by this back-handed tone, and by several other things. First, these are what the twentieth century philosopher Isaiah Berlin called negative liberties—they are things government is not supposed to do to us; they give us no right that government do anything for us.[12] Second, the word "equal" or "equality" appears nowhere in the original Bill of Rights. This was a set of limitations on the government of a republic that permitted vast inequality set by law on the basis of class, sex and race. The concept of civil equality does not appear in the Constitution until the addition of the Fourteenth Amendment in 1868.[13] That amendment, in essence, makes the United States what we today would call a democracy in a way that the original Constitution did not.

Third, the language is often indeterminate and even vague: Only a few of the amendments seem to be absolute. The First says that "Congress shall make *no* law" abridging freedom of the press, speech, or peaceable assembly.[14] The Third says that troops shall be quartered in private homes only in time of war (this language is so clear that the Third is probably the most successful of all the amendments).[15] The Fifth absolutely prohibits compelled testimony by a criminal accused, and retrying criminal defendants after an initial acquittal.[16]

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[11] *See* LEVY, *supra* note 3, at 37-43.

[12] *See* Isaiah Berlin, *Two Concepts of Liberty, in* ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY 118, 121-22 (1969).

[13] U.S. CONST. amend. XIV, § 4.

[14] U.S. CONST. amend. I (emphasis added).

[15] U.S. CONST. amend. III. *See* Engblom v. Carey, 677 F.2d 957 (2d Cir. 1982) (only recorded case involving the Third Amendment).

[16] U.S. CONST. amend. V.

But far more common is language that invites debate, interpretation, compromise and even evasion. The Second Amendment is so vague that it defies the efforts of the best legal minds to give it a definite meaning.[17] The Fourth Amendment prohibits "unreasonable" searches and seizures.[18] The Fifth provides that government "may" deprive persons of life, liberty and property—if it provides "due process of law."[19] The Sixth provides for a "speedy" trial.[20] The Eighth forbids "excessive" bail and fines, and "cruel and unusual" punishment.[21] The Constitution itself provides no definition of any of these terms.

Next, note that the document looks backward, not forward. The Seventh Amendment, for example, draws upon the English common law tradition for its meaning, stating that "the right of trial by jury shall be *preserved,* and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the *rules of the common law*."[22] The framers of the Bill of Rights, unlike the French revolutionaries a few years later, did not see themselves as proclaiming new rights; they were simply providing that the new government would not take away rights the people already enjoyed.

Finally, the list is far from complete. Any group could quickly think of basic rights that are not mentioned at all. Madison himself recognized this, and submitted what became the Ninth and Tenth Amendments. The Ninth provides that no one should argue that a right doesn't exist just because Congress forgot to put it into the Bill of Rights.[23] The Tenth provides that powers not explicitly granted remained with "the states respectively, or to the people."[24]

This, then, is our Bill of Rights: a partial list of the treasured liberties traditionally enjoyed by British subjects, to be read explicitly against a background of the English common law, and to

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[17] U.S. CONST. amend. II. For general background on debates concerning interpretation of the Second Amendment, see, e.g., Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139 (1996); Kenneth Lasson, *Blunderbuss Scholarship: Perverting the Original Intent and Plain Meaning of the Second Amendment*, 32 U. BALT. L. REV. 127 (2003).

[18] U.S. CONST. amend. IV.

[19] U.S. CONST. amend. V.

[20] U.S. CONST. amend. VI.

[21] U.S. CONST. amend. VIII.

[22] U.S. CONST. amend. VII (emphasis added).

[23] U.S. CONST. amend. IX.

[24] U.S. CONST. amend. X.

be interpreted by—by whom? Nothing in the Constitution makes clear who, if anyone, is to enforce the Bill of Rights. In 1789, it was far from clear that courts would have that responsibility.

We can understand why the framers were less than thrilled to be setting out limits on their own power. They were overwhelmingly concerned with the task of governing a new and weak country in a dangerous world. Many had been firebrands in 1776; but now it was 1789, and age cools revolutionary zeal. They were also elected officials of a government, and elected officials tend to see the task of government as being—well—to govern. There is an old saying that to a man with a hammer, everything looks like a nail. The First Congress had a federal structure to build, and they wanted to drive those nails.

So perhaps it's not surprising that within a decade the new government—whose designers had promised that it would never become powerful enough to threaten anyone's freedom—had in essence outlawed political dissent. The Sedition Act made it a crime to "combine or conspire together, with intent to oppose any measure or measures of the government of the United States," or to "write, print, utter or publish . . . any false, scandalous and malicious . . . writings . . . with intent to . . . bring [the government, Congress or the president] into contempt or disrepute."[25] Congress enthusiastically approved this language even though the minority cited the plain language of the First Amendment. Federalist sponsors of the measure explained that "freedom of speech" was the same as "freedom of action"—you are free to walk around, but if you go somewhere you shouldn't go, you can be arrested; you are free to say or print what you want—but if you say something you shouldn't, you can be put in jail.[26] Executive officials of the Adams administration gleefully used the law to prosecute, threaten and silence its political opponents—even including elected members of Congress.[27] Federal judges, whom we sometimes imagine to be bulwarks of liberty, joined in the sport, jailing the editors of leading newspapers, including Benjamin Franklin Bache, editor of *The Philadelphia Au-*

[25] Sedition Act, ch. 74, 1 Stat. 596 (repealed 1801). The Sedition Act is quoted *in* JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 441-42 (1956).

[26] *See* SMITH, *supra* note 25, at 138-39. For general information on the Congressional debate surrounding passage of the Sedition Act, see *id.* at 131-55.

[27] *See id.* at 187.

rora, the grandson of Benjamin Franklin.[28]

The story of the Alien and Sedition Acts illustrates an important theme in the story of the Bill of Rights. Federalist officials were content to observe freedom of speech, assembly and so forth as long as everything was going smoothly. But in 1789, the United States stumbled into what was called a "quasi-war"—what we today would call a cold war—with the terrifying, atheistic, communistic revolutionary regime in Paris. In time of war or quasi-war, they argued, it was treason, worthy of death, for anyone—even the vice president of the United States, Thomas Jefferson—to question the wisdom and motives of the president or the government.[29] Many years before, the Roman orator Cicero had propounded the maxim that *Inter arma silent leges*—in time of war, the laws are silent. Many Americans believed that then, and many, many believe that now—that freedom is fine in good times, but that when there is danger to the nation, no mere provision of law should obstruct the government's quest for absolute security.

The Alien and Sedition Acts had a happy outcome. The Virginia and Kentucky Legislatures passed resolutions opposing them as violations of the Constitution,[30] and the public turned against President Adams and the Federalist Party. They were swept out of office by the "Revolution of 1800." The new Democratic-Republican Congress allowed the Sedition Act to expire, and the new president, Thomas Jefferson, pardoned all who had been convicted and jailed for their criticism of Adams.[31]

But that happy ending was not inevitable. John Adams could have survived the controversy and probably preserved the Acts simply by allowing the cold war with France to turn hot. His own party was more than ready to go to war, and they were furious at him when he chose instead to negotiate. It was the right choice, it was the responsible choice, and it almost certainly cost him his re-election.[32]

The Bill of Rights usually finds war—or even the rumor of war—a near-death experience. To illustrate this, let us move forward many years.

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[28] *See id.* at 181-84.

[29] *See id.* at 3-21.

[30] *See id.* at 263.

[31] *See id.* at 268, 431-33.

[32] *See* RALPH ADAMS BROWN, THE PRESIDENCY OF JOHN ADAMS 175-94 (1975).

Ask yourself whether the framing generation could have imagined a time when the nation would be ruled not by citizen-statesmen but by professional politicians united into parties. A time when one party would seek to enforce its religious and moral vision on a large and diverse nation. A time when this minority faction would proclaim a war not against a foreign enemy but against traitors within; when American citizens would be arrested by military authorities, held without charge or bail in military prisons, and tried without due process by military commissions responsible to the president alone; when the military would become involved in domestic politics, spying on citizens and supporting one of the two major parties; when the most brilliant general in the officer corps would be so appalled by the new administration that he would resign his commission to run against a president who had only been elected because of a bitter and futile split in the Democratic party.

You recognize I am sure the time I am speaking of. It is 1864.

In 1861, the constitutional order collapsed into bloody civil war. President Abraham Lincoln decided to ensure the Union's survival by any means necessary. These years are quite rightly described as the absolute nadir of civil liberty in our history. Lincoln suspended the writ of habeas corpus throughout the country. His military provost marshals entered public meeting halls, private homes and even churches to arrest opponents of the administration. Political prisoners—"prisoners of state," as they were called—were tried by military commissions without juries or the right of appeal to civilian courts. In fact, Lincoln invented the military commission.[33] For all his greatness, Lincoln had little regard for civil liberties. His responsibility, he told Congress, was to "take care that the laws be faithfully executed."[34] Honoring habeas corpus would make that harder. "[A]re all the laws, *but one,* to go unexecuted, and the government itself go to pieces, lest that one be violated?" he asked.[35] Lincoln was a great man; but he was a politician and he had nails to drive.

This story also has a happy ending: The Union was saved, slav-

[33] *See* DAVID HERBERT DONALD, LINCOLN 303-04 (1995). For a detailed discussion of the effect that the Lincoln presidency has had on civil liberties, see MARK E. NEELY, THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES (1991).

[34] Abraham Lincoln, *Message to Congress in Special Session*, July 4, 1861, *in* ABRAHAM LINCOLN, SPEECHES AND WRITINGS 1859-1865, 246, 252-53 (1989) (quoting U.S. CONST. art. II, § 3).

[35] *Id.* at 253.

ery was destroyed; and after the war, the courts—including judges appointed by Lincoln himself—held repeatedly that the use of military justice against American citizens is unconstitutional, in war or peace, as long as the civilian courts are functioning.[36] And the Framers of the Fourteenth Amendment, at long last, put language in the Constitution applying the guarantees of the Bill of Rights to states as well as the federal government.[37] After another near-death experience, the Bill of Rights emerged stronger than before.

And so the story has gone since that day. *Inter arma silent leges*, to be sure—in time of war, our government acts, often vindictively and lawlessly; in time of peace, society and eventually the courts repent. In World War I, Congress passed a new Sedition Act and President Wilson, with the consent of the courts, jailed opponents of the war.[38] After the war, the dissenters were pardoned and the courts began to forge the modern doctrine of freedom of press and speech.[39] In World War II, President Roosevelt, with the consent of Congress, interned Japanese and Japanese-Americans on the West Coast without a hint of due process, and the Supreme Court approved.[40] After the war—many years after—the government apologized and compensated the survivors.[41] During the Cold War and the McCarthy era, careers and lives were ruined by baseless suspicion; free discussion was curtailed; political spying and official blackmail became routine government policy. But after the Cold War began to thaw, the federal courts entered a truly glorious springtime when they enunciated free-speech and civil-liberties guarantees that enrich all our lives today.[42]

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[36] *See Ex parte* Milligan, 71 U.S. 2 (1866).

[37] U.S. CONST. amend. XIV.

[38] *See* Sedition Act of 1918, ch. 75, 40 Stat. 553 (repealed 1921). For background on the Sedition Act of 1918, see William M. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of* Dennis v. United States, 2001 SUP. CT. REV. 375 (2001).

[39] *See* Dennis v. United States, 341 U.S. 494 (1951); Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925).

[40] *See* Korematsu v. United States, 323 U.S. 214 (1944).

[41] The U.S. government apologized for the internment of Japanese-Americans, and compensated the surviving detainees, in 1988. *See* Katherine Bishop, *Day of Apology and "Sigh of Relief"*, N.Y. TIMES, Aug. 11, 1988, at A16.

[42] Supreme Court cases from this period expanded guarantees of civil liberties. *See*, *e.g.*, N.Y. Times v. Sullivan, 376 U.S. 254 (1964) (limiting libel liability); Brandenburg v. Ohio, 395 U.S. 444 (1969) (holding that the government may only proscribe speech as incitement if that speech is intended to, and is likely to, incite

This is the pattern. America is, if nothing else, a bold promise to history—that here, the people shall rule; that here, we are not afraid of free discussion; that here, as Madison himself once said, "the censorial power is in the people over the Government and not in the Government over the people."[43] From time to time, we reaffirm this promise and try to make it real. But always there follows the time of war and danger, and always new voices arise to warn that we must now trade liberty for safety. *Inter arma silent leges*—in panic and haste, laws and lives are broken. Then when the danger passes, repentance comes, and freedom emerges stronger than before.

What morals can we draw from this history to guide us during a very difficult time—a time perhaps as dangerous to liberty as the quasi-war or even the Civil War? First, let us note that whatever happens in the long run, in the short run a national panic usually harms the most vulnerable among us. Often, as in 1798, 1917, 1942, and today, the chief victims are those who have done nothing more than come to this country to share in American freedom, whom we are quick to brand as enemies. The lawless measures adopted by the Justice Department today against many immigrants in 2001 will one day be seen as among the worst of these abuses.

Second, we can see that the other target is free speech. From the Jeffersonians in 1798, to college professors and others facing ruin today, the government often targets those who offer knowledgeable criticism of its policies. The attack may begin with the "fringes"—but it works its way inward very quickly.

Third, we can learn that there is no power "out there" to save our freedoms. Congress, as Madison foresaw, is usually a partner with the executive in repressive measures, though members of Congress often come to realize they were wrong to trust the good faith of executive officials. The courts have usually sided with the hammer rather than the nails, at least until all sense of danger is past. The eventual happy ending of the story comes only because the people themselves have kept alive the idea that there are some things government should not do, even in moments of

imminent lawless action); Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that criminal defendants are guaranteed the right to counsel).

[43] 4 ANNALS OF CONG. 934 (1794). Madison's statement is quoted in RICHARD BUEL, SECURING THE REVOLUTION: IDEOLOGY IN AMERICAN POLITICS, 1789-1815, 134 (1972).

danger. Madison's handiwork has succeeded so far as a teaching tool, as what he called "the fundamental maxims of free Government,"[44] and that, far more than any statute or judicial decision, has been its triumph.

The key to the defeat of the Sedition Act was the opposition from the people and from state legislatures. Civil liberty was vindicated after the Civil War because of the political opposition Lincoln's measures stirred among ordinary people. The key to the flowering of civil liberties under the Warren Court was the persistent, patient pressure of the Civil Rights and Antiwar movements. "Power," the great Abolitionist Frederick Douglass once said, "concedes nothing without a demand."[45] In that context, let us note that the movement by cities across the country, including Eugene, Oregon, to adopt resolutions opposing the USA PATRIOT Act is very much in the mainstream of the American tradition—and it has had a truly profound effect on the tone of public debate and has shaken the Bush Administration.

Finally, I believe we can take from our history caution as well as hope. Each dark moment in our history has ended well so far; but that does not make a happy ending inevitable in our time. Over and over, fear and hatred assault freedom, and one of these days the wounds may prove fatal. All it will take is a government determined to drive every nail, and a people so frightened and divided that they will accept the hammer. The great Judge Learned Hand once warned against placing our hopes for freedom in judges; hope must, he said, lie in ourselves: "a society so riven that the spirit of moderation is gone, no court *can* save; . . . a society where that spirit flourishes, no court *need* save."[46]

The Bill of Rights belongs not to officials, not to lawyers, and not to judges. The hard work of supplying the meaning of those vague and indeterminate terms—"unreasonable," "excessive," "cruel and unusual"—falls to you and me, not as specialists but as citizens. What we do with our Bill of Rights today, tomorrow, and in days to come, will determine whether it survives.

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[44] MADISON, *supra* note 8, at 298.

[45] FREDERICK DOUGLASS, *The Significance of Emancipation in the West Indies* (Aug. 3, 1857), *in* 3 THE FREDERICK DOUGLASS PAPERS 183, 204 (John W. Blassingame ed., 1986).

[46] Learned Hand, *The Contribution of an Independent Judiciary to Civilization* (1944), *reprinted in* THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 172, 181 (Irving Dilliard ed., 1952).