

HAPPY BIRTHDAY, BILL OF RIGHTS

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PETER MACDONALD

## HAPPY BIRTHDAY, DEAR BILL OF RIGHTS

Though not quite here, the Bicentennial Celebration of the Bill of Rights is fast approaching and we as Americans should appreciate the meaning and importance of these ten short amendments to the United States Constitution.

Through a network of powers and rights, institutions were created in 1787, at the Constitutional Convention in Philadelphia, that were to "form a more perfect Union." Unlike the state constitutions of the time, however, the Constitution written in 1787 contained no bill of rights. The Federalist's argument was that there had been created a new government of delegated power. They contended that the government would not claim to exercise any power directly beyond that explicitly granted in the document. Slavery was another reason the framers of the Constitution were not very enthusiastic about specified rights in the ruling document. Bills of rights usually began with glowing images of human equality and dignity, and the long fought over issues in Philadelphia resulted in compromises that denied equality to black Americans.

Still, following this historic summer of 1787, when these momentous events were taking place, the doctrines of civil liberties became a cause for those who held some suspicion for this new Constitution. Therefore, in casting their votes for ratification of the Constitution, the state conventions, beginning with Pennsylvania, made specific provision for a bill of rights to

be drawn up and added to the Constitution in the form of amendments. Long before the power of the courts turned the Constitution into "a professional mystery", the Anti-Federalists gained valuable concessions that became known as the Bill of Rights that became part of the United States Constitution on December 15, 1791.

The fundamental rights that we refer to as civil liberties are the explicit limits on government power that we have added to the Constitution by the Bill of Rights and the subsequent sixteen amendments. They are largely restraints on Congress, but they really amount to "a sphere of individual action that is beyond the influence and review of the government." They are as specific as the Second Amendment's right to bear arms and as vague and general as the Fourteenth Amendment's that all citizens should enjoy the equal protection of the laws. The individual amendments in the Bill of Rights vary dramatically in the attention they draw, ranging from the often litigated promise of the freedom of speech to the rarely considered right to be protected against the Third Amendment's right to not have troops quartered in our homes in the time of peace.

Americans in general have a very perverse and distorted view of how the Bill of Rights and the other laws of the land should be interpreted and enforced. The general public constantly complains of criminal cases being dismissed for "legal technicalities" by liberal judges who are aided by unscrupulous lawyers. Now comes an important question -- just what are these dreaded legal technicalities? They are, of course, none other than the

amendments comprising the Bill of Rights. Unfortunately, the cases that are dismissed are usually sensational -- the horrible murder of a defenseless child or some similar egregious crime -- the dismissal results because of some fatal error in the case, such as the seizure of vital evidence resulting from an invalid search of the defendant's property, in violation of the Fourth Amendment's right to be secure from unreasonable searches and seizures. Fortunately for the criminal justice system, these cases are very rare, however, and several years ago the American Bar Association conducted a study which revealed that less than one-tenth of one percent of criminal cases were dismissed because of these inappropriately named "legal technicalities." Any complaint should not be made of the criminal justice system, but rather of the Constitution itself.

The perverse view of most Americans is that the constitutional rights enumerated in the Bill of Rights should not be extended to these horrible people who commit these horrible crimes. The rack, burning at the stake, or dismemberment until death are ~~too~~ good for these people. The Bill of Rights, they believe, was established to ensure that the "good" people did not fall prey to evil persons who might violate their rights. This same view extends to violations of the laws of local, state and the federal governments. The good, law abiding people sometimes think that it really isn't wrong to sell alcohol in private clubs on Sunday in violation of local option laws because, after all, who is being hurt? It is also permissible to drive 70 miles per hour on the highway in a 55 mile per hour zone, or to fudge just a

little on their income tax returns because, after all, these laws are meant to proscribe criminal behavior by evil people, and they do not consider themselves belonging to that class of people. In short, there is the presumption by many that there are, in reality, two sets of laws -- one for the good people who unintentionally err and another more draconian set for the bad people who break the law. This view is simply an aberration that distorts the real legal system. The "bad" people should not be governed or judged by a standard any different from the standard utilized for the "good" people. This view exists probably because most Americans are law-abiding citizens and we are governed by majority rule and therefore the majority should be judged by a standard different from the criminal minority. This view is contrary to the purpose of the Bill of Rights, which was not created to protect a majority of the people but rather was created to protect all of the people. Unfortunately, too many Americans take the view so clearly described in George Orwell's parody Animal Farm, in which the subject animals are initially all treated the same by the government they have established. They later find themselves, in fact, treated differently because of a change in one commandment. It was changed to read "All animals are created equal but some are more equal than others."

Now, enough for the soapbox and on to a brief discussion of the evolution of the Bill of Rights from 1791 to the present.

Today we pretty much take for granted our right to free speech, our right to counsel in a criminal proceeding, our right to religious freedom unrestricted by the government, and the other

rights enumerated in the Bill of Rights. These rights, as they exist today, have evolved a great deal in the last two hundred years and might not exist in their present condition without the creation and involvement of the American Civil Liberties Union, or ACLU. It is likely that our current status of civil liberties guaranteed by the Bill of Rights would have evolved into what they are today without the work of the ACLU but they are what they are today, in large part, because of the ACLU. The interpretation by the Courts of the Bill of Rights is constantly changing as society changes, and the ACLU has been one organization that has played a major role in these changes by providing legal assistance to parties in legal proceedings and filing amicus or advisory briefs in momentous cases.

The history of the ACLU is really the story of the United States in this century. The ACLU began because of the fight to defend free speech during World War I, and it has been at the storm center of controversy ever since. The ACLU is very controversial and the reason for this disdain for this organization is that the ACLU defends and represents individuals and groups that espouse and advocate controversial issues that, generally speaking, are repugnant to the majority of Americans.

During the 1988 presidential campaign, Republican candidate George Bush attacked his Democrat opponent, Michael Dukakis, for being a "card carrying member of the ACLU." Bush cited the organization's stand on pornography and the separation of church and state and accused the ACLU of being out of the "mainstream" of American life. He did not mention, however, that the ACLU does

not espouse positions, merely defends the positions of other individuals and groups. Bush's position contained a certain irony because during the stormy and controversial history of the ACLU it has offended and defended practically everyone. The irony is that if anyone had attempted to silence Bush for his political statements, or attempted to undermine in anyway his repeated use of them, a group that would have been quick to defend his use of them and his right to speak freely would have been the ACLU itself.

Although its name and initials are widely known and the organization is loathed and loved by many, the ACLU is understood by few.

In a formal sense the ACLU is a private voluntary organization dedicated to defending the Bill of Rights. Officially established in 1920, the ACLU now claims over 270,000 members. In addition to a national office in New York and <sup>a</sup> large legislative office in Washington, D.C., it maintains staffed affiliate offices in forty-six states. These affiliates handle eighty percent of the ACLU's legal cases. With some justification the ACLU calls itself "the nation's largest law firm." At any given moment it is involved <sup>in</sup> over one thousand cases and it appears before the United States Supreme Court more often than any other organization except the federal government. The four thousand to five thousand volunteer "cooperating attorneys", the traditional backbone of the ACLU litigation, are joined by over sixty paid staff attorneys in the national office, attorneys in the special project offices, and the attorneys in the larger affiliates. The

ACLU's Washington office, with eleven full-time lobbyists, dwarfs other civil rights interest groups.

The essential feature and cornerstone of the ACLU is its professed commitment to the non-partisan defense of the Bill of Rights. The Bill of Rights as it exists today in writing, is no different than it was on December 15, 1791. But the rights enumerated in those sparse words were in reality hollow guarantees until this century, and even these last few decades. The right to free speech of the First Amendment was not meant for all Americans, only a majority of Americans, until the year 1964. The Sixth Amendment ensures that a criminal defendant has the right to counsel, but until the last several decades, that meant only if one could afford an attorney. Not until 1963 did the Supreme Court rule that a criminal defendant in a felony case has the right to appointed counsel, if he cannot afford an attorney. Only in 1972 did the Supreme Court hold that a defendant in a misdemeanor case has the right to an attorney even if he cannot afford to retain one. The ACLU played pivotal roles in each of these cases and, while not actually representing the defendants, it filed amicus briefs with the Supreme Court to argue its position as to the Sixth Amendment. The ACLU's non-partisan defense of the Bill of Rights means defending the civil liberties of everyone, not just members of the ruling majority. Including everyone means defending even the free speech rights of Communists, Nazis and the Ku Klux Klan. It means defending the due process rights of even the most despicable criminals. Defense of the unpopular has always been the ACLU's touchstone, its proudest



principle, and the cause of the most bitter attacks on it. The ACLU's "absolutist" position on freedom from censorship and separation of church and state has led it to oppose any censorship of pornography and, every holiday season, to fight against religious displays on government property. This last battle hits close to home with the court case last year involving the creche erected on the capital grounds in Frankfort.

It is precisely this absolutist approach that arouses the ire of its opponents, causes a great deal of despair among potential supporters, and inspires its members. It requires a subtle distinction to distinguish between the purpose of the ACLU - the absolute protection of everyone by the Bill of Rights, and the practicality of representing groups who have reprehensible goals and represent a miniscule portion of American life. The powerless and the despised have been the ACLU's most frequent clients, the reason being that they are the most frequent victims of intolerance and repression. As a result, most ACLU members have historically been liberals or people with leftist sympathies. What distinguishes ACLU members from mainstream liberals is their skepticism of government power and a willingness to challenge extensions of that power justified in the name of social betterment. What distinguishes the ACLU from the left has been its running battle with the Marxists over their habit of denying that their opponents, such as Fascists and racists, are entitled to the same freedoms that they so zealously claim for themselves. And finally, the ACLU differs from most conservatives by its

commitment to afford the protections of the Bill of Rights to everyone and not just the majority.

The unique nature of the ACLU is a result of several extremely important aspects of life in the United States: a written Constitution with a Bill of Rights, a heritage that places a premium on individual liberties, and a legal and political tradition in which the Supreme Court plays a prominent role in resolving conflict in terms of constitutional law. Critics who accuse the ACLU of taking the Bill of Rights to an extreme are, in effect, voicing a more fundamental complaint about our Constitution, our courts, and even our American heritage. The National Rifle Association also takes an absolutist position on the right to bear arms, even to the extent of advocating the use of plastic handguns and teflon bullets, but this organization is not condemned for this stance because apparently a majority of American citizens agree with the purpose and goals of the NRA.

The ACLU's origins are in the repression of free speech during World War I: On July 4, 1917, a New York Times editorial stated that freedom of speech is a fine thing and well worth fighting for, but that there were limits, and that the new Civil Liberties Bureau organized by Crystal Eastman and Roger Baldwin was a "minute minority of noisy and troublesome folk." The Civil Liberties Bureau was an offshoot of the American Union Against Militarism which in 1914 began the opposition to America's involvement in a global war. Most Americans in the summer of 1917 probably agreed that criticism of the government during wartime was improper. Because the most vocal critics of the war

were socialists, anarchists, labor radicals, and newly arrived immigrants, the general public saw the fight for free speech as a guise for everything that was un-American.

President Woodrow Wilson led the attack on free speech, and censorship became relatively commonplace. The American Union Against Militarism had the single purpose of keeping the United States out of World War I. When war came to this country and the Selective Service Act was passed by Congress, with its legality upheld by the Supreme Court, the AUAM quietly disappeared and the Civil Liberties Bureau was born. Criticism of the war continued, but the majority view of America was probably best expressed by Judge Kenesaw Mountain Landis who explained, "you have a legal right to oppose, by free speech, preparations for war. But once war is declared, that right ceases." How far we have come since that view. The Civil Liberties Bureau at first concentrated on influencing public opinion, but it quickly learned that the most effective way to protect free speech was by entering the forum of the judicial system. In 1919, the Supreme court finally addressed the issue of free speech in wartime, four months after the war had ended. The result was a devastating defeat for civil liberties. The first of three major 1919 decisions involved Socialist Party General Secretary Charles T. Schenck, who had been convicted of mailing antiwar and antidraft literature to draft age men. The mailed leaflets denounced the draft as slavery and urged the young men to resist. He used the words "do not submit to intimidation . . . assert your rights." At issue was whether these words represented obstruction of the draft under the Espionage Act or

whether they were constitutionally protected free speech. On March 3, 1919 the Supreme Court unanimously upheld Schenck's conviction. Justice Oliver Wendell Holmes held that "in many places and in ordinary times the defendants . . . would have been within their constitutional rights" to express these views, but, he wrote, "the character of every act depends upon the circumstances in which it is done." He explained his point in a passage that immediately became one of the most famous in American law: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic." Holmes went on to say that "the question in every case is whether the words used in such circumstances are of such a nature as to create a clear and present danger that they will bring about the substantial evils that Congress has a right to prevent."

Over the next forty-five years this "clear and present danger" <sup>test</sup> ~~first~~ became the standard for protected free speech. As applied, it offered little protection for unpopular speech, as it allowed legislative majorities to decide what kind of speech might be considered dangerous. It was not until 1964 that free speech, as it exists today, became the law. In 1964, the case of the New York Times v. Sullivan, the Supreme Court ruled that the "central meaning of the First Amendment" is the right of the people to criticize the government freely. The Court held that under the protection of the First Amendment "debate on public issues should be uninhibited, robust, and wide open."

However, back in 1919 the Schenck case and the trauma of the war years exposed the First Amendment as an empty promise and

galvanized this small group of people into the defense of free speech. In 1920 the old Civil Liberties Bureau became the American Civil Liberties Union, or the ACLU.

The ACLU's activity has not been exclusively devoted to the advancement of free speech pursuant to the First Amendment. The ACLU was involved in the Scopes "monkey trial", the problems of the Great Depression and the resulting New Deal, the constitutionality of the internment of Japanese-Americans during World War II, racial segregation, religious exercises in the public schools, and constitutional standards of due process in criminal justice.

The Bill of Rights has been a constantly evolving document and will continue to be so, not as to its language, but as to its interpretation. The ACLU has played a major role in shaping the status of our guaranteed rights and liberties. The ACLU has earned a reputation for representing any one or any group who has a constitutional question relating to the Bill of Rights. Unfortunately for the ACLU, most of those persons or groups usually advocate a position abhorrent to the majority of Americans. However, as stated earlier, the ACLU takes the position that everyone has equal status for protection by the Bill of Rights.

The most vocal of the ACLU's critics would probably be eternally grateful for the arduous work of the organization, especially in the area of criminal justice. Yes, good people do sometimes commit crimes and a famous adage of the ACLU comes true. The adage is "sooner or later everyone needs the Bill of Rights".

A description in capsule of the perverse view, held by many people, of how the Bill of Rights should protect us all and not just the majority appears in one line in The Bonfire of the Vanities by Tom Wolfe. The book is about a wealthy Wall Street bond trader, Sherman McCoy, who, while lost in the Bronx with his mistress, accidentally hits a poor black young man. The accident occurred at night and McCoy left the scene, thinking he would never be caught. Eventually he is arrested for hit and run and must stand trial alongside the slimy drug dealing underworld figures. Wolfe describes his transformation with the line "A liberal is conservative who has been arrested."