

The Bill of Rights

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The Bill of Rights

- ◆ Where am I coming from?
 - Retired from Biological Sciences at Purdue
 - Member of ACLU since middle 60s
 - Not an attorney; layman's views here
- ◆ ACLU
 - Formed in 20s
 - Mission: Defend Constitution and Bill of Rights
 - Not very popular, especially in Midwest
 - Persons with popular views rarely need help
 - Persons with unpopular views do need help
 - ◆ Racists
 - ◆ Neo-Nazis - Skokie - lost many members
 - But very, very important defenders of the Constitution and Bill of Rights

The Bill of Rights

- ◆ First ten amendments to the United States Constitution
 - Limit the powers of the Federal Government
 - Prevent Congress from restricting freedoms
- ◆ Based on
 - 1776 Virginia Declaration of Rights
 - 1689 English Bill of Rights
 - 1215 Magna Carta
- ◆ Initially drafted by James Madison in 1789
- ◆ Ratified by three-fourths of the states in 1791

Initially Quite Controversial

- ◆ Federalists strongly opposed
 - "Federalist Papers"
 - Alexander Hamilton: protections provided by Bill of Rights unnecessary
 - Needed to protect from King; we have no king
 - Enumerating rights would create danger of losing rights not clearly identified

Initially Quite Controversial

- ◆ Anti-Federalists strongly in favor
 - Extensive powers to government granted by Constitution must be restricted by Bill of Rights
 - Constitution probably would not have been ratified without them
 - John Adams & John Hancock: Massachusetts Compromise
 - Ratified Constitution with the understanding that Bill of Rights would be considered by Congress
 - Other states followed

What Are They, and What Do They Mean?

- ◆ Everyone agrees on *what* they are
- ◆ Considerable debate on what they *mean*, especially with some of them
- ◆ The last Administration in Washington pushed the limits on what they mean
- ◆ Let's take a look

Amendment 1

- ◆ *Congress shall make no law respecting on establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.*

What's This All About?

- ◆ Establishment of religion
 - In England, Anglican Church "Established"
 - > Official religion of the state
 - > If you weren't an Anglican, more or less a second-class citizen; could not hold public office
 - > Our Founding Fathers wanted none of that
- ◆ Free exercise thereof
 - Would seem to be self-explanatory
 - Has come into conflict with "Establishment"
 - > "Nativity Display" locally
 - > Legislative prayer in Indianapolis
 - > Ten Commandment displays in Court Houses

What's This All About, contd.?

- ◆ Freedom of Speech
 - A very precious right
 - But limited
 - > Famous "Can't shout fire in a crowded theater"
 - > Classified documents - can't disclose contents
 - ◆ Should be legitimate
 - ◆ Often used to cover up embarrassing information
- ◆ Freedom of the press
 - Ditto

Amendment 2

- ◆ *A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.*

What's This All About?

- ◆ The most enigmatic of the Amendments
 - If you focus on "Militia"
 - > Gives right to have a National Guard
 - > Makes sure they are armed
 - If you focus on "people"
 - > Any citizen should be able to be armed
 - > Unless a felon
- ◆ Even debated in the ACLU
- ◆ National Rifle Association has been very successful on sustaining broad interpretation
- ◆ Perhaps the sole unfiled Amendment in the last Administration

Amendment 3

- ◆ *No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war but in a manner to be prescribed by law.*

What's This All About?

- ◆ Was a real problem in this country at the time
 - British occupation forces threw their weight around
 - Very onerous; colonists wanted to make sure this didn't happen
- ◆ Doesn't seem to be an issue these days

Amendment 4

- ◆ *The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*

What's This All About?

- ◆ A very big issue these days
 - To make a search, have to have a warrant issued by a judge, with probable cause
 - Broader implications now than in those days: many more ways to "search"
 - > House: not just entering physically - electronic "entering"
 - > Automobile
 - > Telecommunications
 - > Snail mail and E-mails
- ◆ Past Administration pushed the envelope

Amendment 5

- ◆ *No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

What's This All About?

- ◆ Huge issues
 - Can't be tried without being indicted, unless a member of the military in time of war
 - Can't be tried twice for the same crime: No double jeopardy
 - Can't be compelled to testify against oneself ("Pleading the 5th")
 - Must have due process
 - Must be compensated justly if state takes over your property
- ◆ Take them one at a time

Can't be tried without being indicted, unless in the military in time of war

- ◆ Grand Jury or Prosecuting Attorney has to present a case
- ◆ Can't just "trump up" charges

Can't be tried twice for the same crime: No double jeopardy

- ◆ Once found innocent in a trial, can't be put on trial for the same crime again
- ◆ Onus on prosecuting attorney to be thorough
- ◆ One way to do end run here is to file civil suit, if original trial was criminal
 - O.J. Simpson acquitted in murder trial
 - Later lost a civil suit

Can't be compelled to testify against oneself (Pleading the 5th)

- ◆ Don't hear so much about this these days
- ◆ During McCarthy hearings in 50s, very prevalent
- ◆ A Catch-22 situation
 - Typically assumed that if a person "Pleads the 5th," must have something to hide
 - Problematic, but does force the prosecutor to find evidence elsewhere

Must have due process

- ◆ Due process defined by Amendments 6 and 7
- ◆ Extraordinarily important
- ◆ Right to counsel a critical part of this
 - Can be problematic
 - Look at this in a minute

Must be compensated justly if state takes over your property

- ◆ Eminent domain: State takes over your property
 - State wants to build a highway
 - State wants to revitalize an area
 - > Notorious case in Connecticut
 - * Entrepreneurs wanted to raze neighborhood, "upgrade" it
 - * Persuaded state to condemn it
 - * Big fight, and persons in neighborhood lost
 - What compensation is "just" often problematic

Amendment 6

- ◆ *In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.*

What's This All About?

- ◆ In criminal cases, due process requires:
 - Speedy and public trial
 - Impartial jury
 - Trial held in place where crime occurred
 - Accused be informed of nature and cause of accusation
 - Witnesses for and against accused
 - Lawyer to provide defense for accused

Speedy and Public Trial in Criminal Cases

- ◆ These days, actually have to ask for speedy trial
 - Otherwise, can languish in County Jail for months or even years
 - Sometimes delay is good strategy for defense
 - > Hostile witnesses might move away or even die
 - > Public outrage can die down
- ◆ Must be public: no “Star Chamber” proceedings

Impartial Jury

- ◆ Can be difficult to obtain in cases of notorious crimes
- ◆ Change of venue may be requested
 - Conflicts with injunction that trial be in district where crime occurred
 - But can be good strategy for defendant
- ◆ Choosing jury now a well-honed science
 - Prosecutors try to eliminate “bleeding hearts”
 - Defense attorneys try to eliminate vindictive persons

Be Informed of Nature and Cause of Accusation: Habeas Corpus

- ◆ Literally: You (shall) have the body
 - Somewhat obscure connection to what it really means
 - Provides crucial means to protect from detention without being told why being detained
 - Demand to be brought before a court and be told why being held in prison
- ◆ Burden on state to show authority to imprison person

Be Informed of Nature and Cause of Accusation: Habeas Corpus

- ◆ *Habeas corpus* extremely crucial
- ◆ Without knowing charges, Alice in Wonderland situation for the defense
- ◆ This has been ignored in Guantanamo cases
 - Military Commissions Act
 - Due process denied
 - ACLU arguing in courts

Have Witnesses For and Against Defendant

- ◆ Also extremely crucial
 - Must be able to face accusers
 - Have witnesses to aid defense
- ◆ Also problematic in “non-combatant” cases
 - In many instances, no charges, even
 - *Habeas Corpus* non-existent
 - Cases in limbo

Have Lawyer to Present Defense

- ◆ Also crucial
 - “He who represents himself in a trial has a fool for a client”
 - But just because a person has a law degree, it doesn’t guarantee competence
 - Public Defenders for indigent persons
 - > Overworked
 - > Underpaid
 - “Liberty and justice for all” . . . who can afford it

Amendment 7

- ◆ *In suits at common law, where the value in controversy shall exceed twenty dollars, 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.*

What's This All About?

- ◆ Civil cases involving more than \$20
 - Right to trial by jury
 - Governed by *Common Law*
 - Developed in England
 - Based on custom and precedent
 - When an issue not covered by existing law, Judge can create law
 - Basis of United States legal system, except in Louisiana, where judges can not create law

Amendment 8

- ◆ *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

What's This All About?

- ◆ Let the punishment fit the crime
- ◆ Prohibits excessive bail or fines
 - What's excessive?
 - Subject to debate in each particular case
- ◆ Prohibits cruel and unusual punishment
 - No more being drawn and quartered, or burned at the stake
 - Electric chair generally deemed cruel & unusual
 - But lethal injection?

Amendment 9

- ◆ *The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.*

What's This All About?

- ◆ Just because a right isn't mentioned in the Bill of Rights or the Constitution doesn't mean that such a right would be excluded
 - Recognized that it's impossible to make a complete list of rights
 - Dealt with the criticism of the Federalists that enumerating the rights would preclude recognizing other rights in the future
- ◆ Persons now making statements that since such-and-so isn't mentioned in the Constitution or Bill of Rights, such-and-so isn't protected are ignoring this

Amendment 10

- ◆ *The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.*

What's This All About?

- ◆ Matters not listed in the Constitution or the Bill of Rights
 - Up to the States to decide: "State's Rights"
 - Up to the people to decide
- ◆ Similar, in a way, to Amendment 9
 - Deals with unmentioned issues
 - Deals with one of the Federalists' objections

Post Civil War Amendments

- ◆ 13th abolished slavery
- ◆ 14th gave citizenship to former slaves
 - But did more than that
 - > Established that the Bill of Rights applies to all the States
 - ★ Before that, only applied to Federal issues
 - ★ In Massachusetts, for instance, Congregationalism was the Established Religion until 1833
 - > Thereby established "Equal Protection"

Equal Protection Very Crucial

- ◆ Persons or groups similarly situated must be similarly treated
- ◆ Basis for
 - Furnishing municipal services
 - Distribution of welfare benefits
 - Prohibition of sexual discrimination
 - Brown v. Board of Education
- ◆ Extremely broad and important protections

So There You Have It

- ◆ Fundamental to our society
- ◆ Constantly have to guard against erosion
- ◆ Hope you will be a part of this vigilance
- ◆ Thank you for giving me this chance to talk with you
- ◆ What are your questions?