

The Breakfast Club
Constitutional Minute for 13 December 2022
Musings on the Bill of Rights

It's interesting to notice which historical events we celebrate and which we largely ignore. Sometimes on radio shows you'll hear a commentator groping for content do a piece on "This Day in History." *"On this day in 1952, Elmer Jenkins rolled a peanut 2 miles using only his nose to earn donations for the Red Cross."* (Note: full disclosure here, I made that up; don't go looking it up on Wikipedia!)

Most patriotic Americans remember "Constitution Day," September 17th, the day in 1787 when the Constitution was signed; but I don't know anyone who even remembers, let alone celebrates "Ratification Day," June 21st, the day in 1788 when New Hampshire's ratification put the Constitution in operation. On September 17, 1787, the Constitution was just a piece of paper (actually four pieces of parchment), just like any other draft document. As opposed to most legal documents which are put into effect with signatures, signing the Constitution had no legal effect whatsoever. Ratification did, at least when nine states had done so. So why don't we celebrate Ratification Day with fireworks and concerts the way we do Independence Day? Asking for a friend.

Another day we should celebrate, and don't, is December 15th, especially here in Virginia. On that day in 1791, Virginia's ratification of ten of the twelve articles proposed by Congress to "amend" the Constitution, put what we now call the Bill of Rights into effect (it wasn't routinely called the Bill of Rights until after the Civil War, when Amendments 13-15 were added).

The debate over the idea of adding a "Bill of Rights" to the Constitution didn't even come up until 5 days before the convention adjourned. George Mason thought it a good idea (*"It would give great quiet to the people"*); others saw no need for it, most of the state constitutions in effect at the time had declarations of rights, a federal one would be redundant. Mason's motion to form a committee to draft a Bill of Rights (BoR) was defeated and its absence became the primary reason Mason and two other gentlemen refused to sign the finished document. At the Virginia Ratification Convention in 1788, Patrick Henry chided the Federalists over the omission: *"Would it consume too much paper?"*

Massachusetts is the state that actually started the ball rolling on a BoR. In exchange for the Anti-Federalists votes to ratify the Constitution, the Federalists at Massachusetts's convention promised them they would be allowed to submit recommendations for both amendments to the Constitution and articles for a new Bill of Rights. After Massachusetts "broke the ice" most other states followed Massachusetts's example and submitted their ideas along with their ratification certificate.

James Madison, “Father of the Constitution” (a title he argued was inappropriate) is in fact solely responsible for creation of the Bill of Rights. Had he lost the election to the First Congress, I’m certain a Bill of Rights would today not exist. Congress was busy building a government from the ground up and had no interest in adding a Bill of Rights, but Madison’s dogged determination to fulfill a campaign promise he made to the Baptists of Orange County, Virginia met with success. Wikipedia has [a very comprehensive page](#) on the Bill of Rights, showing the various iterations the articles went through as it worked its way through Congress; it is worth the read.

As a testament to the success of the Bill of Rights we now have myriad copycats: “Patient’s Bill of Rights,” “Passenger Bill of Rights,” “Cell Phone Bill of Rights,” “Children’s Outdoor Bill of Rights.” Might there be a “Ferret-owners Bill of Rights” being drafted as I write this?

Franklin Delano Roosevelt famously proposed adding a [Second Bill of Rights](#) in 1944. Americans, he thought, had a “right” to a decent job, an adequate income, freedom from unfair competition and monopolies, a decent house, adequate medical care, social security (of course) and a right to an education. If people had trouble providing these accoutrements for themselves, government would provide them. Congress didn’t take the bait (thank goodness) and propose the various amendments necessary to bring FDR’s idea to fruition and the proposal died. But you’ll occasionally encounter people today trying to resurrect it.

I think I’ve mentioned that from 2013 to 2017 I was writing a weekly column called “Constitutional Corner” and sending these at times lengthy essays (sometimes they would run to 8 pages or more) to an extensive subscriber list. I’m going to put my “pen” down for the remainder of December and enjoy the holidays, but I can’t countenance any of my faithful readers suffering from Constitutional Minute “withdrawal,” so, in keeping with our Bill of Rights Day theme I will send you on or before 20 and 27 December, essays I wrote on 18 and 21 December 2014 entitled: “Life Without the Bill of Right” Parts 1 and 2. I hope you enjoy them (warning, there might be some dated material therein).

I think we can all agree that the contention of the Federalists in 1787 that a Bill of Rights was unnecessary (“*Why declare that things shall not be done which there is no power to do*”ⁱ), have turned out to be shockingly wrong. Without the Bill of Rights, America would today be a far different place in terms of individual freedom. The Supreme Court has given the federal government powers it created out of thin air or through expansive interpretations of ambiguous language; and without the Bill of Rights..... Well, you’ll see in the next two essays.

Have a very Merry Christmas and don’t forget the “Reason for the Season.” See you next year.

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ⁱ Alexander Hamilton writing in Federalist 84