

The Breakfast Club

Constitutional Minute for 17 January 2023

Why a Bill of Rights?

Depending on how you count them, there are 25 or 26 separate rights mentioned in the U.S. Bill of Rights. You'll no doubt notice that some of these rights frequently end up in the news, and I've also written about some of them of late. But as I look back over the last year of Constitutional Minutes and even further back to the time when I was writing a weekly essay called "Constitutional Corner," I notice that there are some individual rights mentioned in the first ten amendments that I've never explored.

Beginning this week, I'm undertaking the herculean task of explaining the Bill of Rights, all of it, every single right it mentions. All these rights were deemed important to the members of the First Congress, or they would've been omitted, as indeed were some of the suggestions in Madison's initial draft.

The idea of individual rights goes way, way back. While the secular world seems to point to a Fifth Century B.C. baked-clay cylinder explaining the decrees of Cyrus the Great, the first king of ancient Persia, after he conquered the city of Babylon, as the first recorded "bill of rights,"ⁱ Jews and Christians can point to the book of Genesis (probably written about 1060 B.C.)ⁱⁱ as substantiating that individual rights are as old as mankind.

In the opening chapter of Genesis (Genesis 1:16), Adam and Eve are given permission, i.e., the right, to eat the fruit of every tree in the Garden of Eden but one. Later in the Bible (Exodus 12:37-51), we can deduce that the right to be free from bondage is a basic human right as we watch God come to the assistance of the Hebrew people fleeing Egypt.

As the concept of law developed, the idea of individual rights came with it, by implication if not overtly. If the Ten Commandments decreed it to be against God's law to murder, you could conclude from that a humans have a right to life. If it was against the law to steal someone's property, you could deduce a right to have and keep property, etc.

But inscribing individual rights in a document created expressly for that purpose remained an unknown practice for a long, long time.

Most anthologies point to *Magna Carta* (1215) as the first document drafted to enshrine individual rights. *Magna Carta's* protection against imprisonment without due process is very similar to a protection in our own Fifth Amendment, as we will cover in more detail later in this series:

"No freeman shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers or by the law of the land."

This and other clauses in *Magna Carta* set the stage for the concept of habeus corpus, trial by a jury of one's peers and even the idea of separation of powers. There were continued violations of *Magna Carta* leading to newer versions and eventually to the establishment of Parliament in 1295.

Parliament's *Petition of Right*, presented to King Charles I in 1628, provided mostly for protection for Parliament but it also contained some individual protections as well, such as:

- No taxes levied without Parliament's consent
- No English subject can be imprisoned without cause (repeating Magna Carta)
- No quartering of soldiers in citizens' homes

In 1689, Parliament required joint regents William and Mary, before they could ascend to the throne, to pledge they would adhere to the newly drafted *English Bill of Rights*. Among the rights inscribed were:

- The right to petition the king without threat of prosecution.
- *Protestants* were given the right to keep and bear arms for their personal defense.
- Members of Parliament were to have freedom of speech and debate without threat of impeachment or questioning outside of Parliament.
- Excessive bail and fines were prohibited, nor could cruel and unusual punishments be inflicted.
- Fines and forfeitures assessed before conviction were illegal (i.e., a guarantee of due process).

The original charters of each American colony granted the settlers “all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding and born, within this our Realm of England, or any other of our said Dominions.”

What these rights, these “Liberties, Franchises, and Immunities” consisted of remained unspecified.

Over time, Americans became even more jealous of their rights than their English brethren. In England there were very few limitations on Parliament; in the colonies, Americans began to see that limiting government was key to securing individual rights but that government shared the role of securing these rights. Some colonial documents which speak of individual rights included:

- 1636 – Code of Law (Plymouth)
- 1639 – Fundamental Orders (Connecticut)
- 1641 – Body of Liberties (Massachusetts)
- 1677 – Declaration of the People (Virginia)
- 1765 – Declaration of Rights and Grievances (Congress)
- 1774 – A Summary View of the Rights of British America (Jefferson)
- 1774 – Declaration and Resolves (Congress)
- 1775 – Declaration on the Causes of Taking Up Arms (Congress)

The story of how and why a Bill of Rights was added to the U.S. Constitution has been covered in previous essays (see June 7, 2021). By the time James Madison introduced his draft of what became our Bill of Rights at the First Congress (June 1789), five state constitutions had already established a Bill of Rights for their state, and all but one right of the many in our Bill of Rights -- the protection against takings without compensation -- was recommended to Madison by the state ratifying conventions.

Next week: Right #1: No National Religion.

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ⁱ <https://humansrightsworld.com/history/when-did-human-rights-start/>

ⁱⁱ <https://trumpet-call.org/2017/09/17/when-was-the-book-of-genesis-written-1060-bc/>