THE GROWING THREATS TO CIVIL LIBERTIES

16. Civil Liberties in America

Congress *should*

- before passing any law, ask whether the Constitution grants Congress the power to pass the law;
- if so, ask further whether the proposed law violates the enumerated or unenumerated rights guaranteed in the Bill of Rights or unreasonably intrudes into individual, family, and community decisionmaking; and
- begin to repeal existing laws that infringe on the liberties of Americans.

The United States is the freest country in the world, yet American liberties are increasingly violated, limited, or circumscribed by government as it expands into every corner of civil society. As the chapters in this section point out, the federal government today limits our political speech, subjects us to more wiretapping than ever before, criminalizes more activities every year, interferes with the content of broadcasting, and assumes unprecedented police and prosecutorial powers.

Because the narrowing of our liberties takes place gradually, and always for noble-sounding reasons, many Americans don't realize just how many freedoms they have lost. Yet it would take *a* book to list them—James Bovard made a start in his *Lost Rights: The Destruction of American Liberty.*

Freedom is often threatened by people who seek power—as an end in itself, as a means to wealth or other goods, or to further some noble purpose. The American Constitution was designed to direct, limit, and constrain the use of power in order to protect liberty. But as the Founders knew, and as has become even more clear in modern times, liberty can be threatened by well-meaning people who seek only to do good. Justice Louis Brandeis put it well: "Experience should teach us to be most on

our guard to protect liberty when the government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."

The greatest threat to the civil liberties of Americans is one that is so obvious it is often ignored: the increase in the size and scope of the federal government. Drawing on their experience with the British government, their knowledge of history, and their understanding of the relationship between civil society and the state, the Founders wrote a constitution that carefully limited the powers of the federal government. They declared that government could have only those powers that were explicitly delegated to it by the people; they enumerated those powers in our written Constitution; and they made clear in the *Federalist Papers* and elsewhere that the federal government was limited to its enumerated powers. They also established an amendment process in case future generations should decide to change those arrangements.

When a Bill of Rights was first proposed, Alexander Hamilton wrote, "Why declare that things shall not be done which there is no power to do?" But to satisfy those who feared that the government might nevertheless expand its power—and "for greater caution," as James Madison put it—Congress and the states did adopt 10 amendments known as the Bill of Rights. The first eight specify particular rights that individuals hold against the federal government; the Ninth Amendment declares that individuals have more rights than are named in the other amendments; and the Tenth Amendment says that all powers not granted to the federal government are reserved to the states or the people.

Today, when a new federal law is proposed, many freedom-loving people on both the right and the left look to the Bill of Rights to see whether the law will violate any constitutional rights. As a first step, however, we should look to the enumerated powers to see if the federal government has been granted the power to undertake the proposed action. Only if it has such a power should we move on to ask whether the proposed action would violate any protected right.

Much, perhaps most, of what the federal government does today is not authorized by the Constitution. The federal government has assumed many powers that were never delegated by the people and are therefore not enumerated in the Constitution. It would be hard to find in the Constitution any authority for economic planning, aid to education, a government-run retirement program, farm subsidies, art subsidies, corporate welfare, energy production, public housing, or mandated V-chips in television sets.

It is an old maxim that "ignorance of the law is no excuse." But how can anyone keep up with the law today, when the *Federal Register* publishes 60,000 pages of regulations annually and legislative bodies at all levels enact 150,000 laws a year? Many federal agencies have the power to arbitrarily ensnare, intentionally or not, almost any business or individual.

If we believe not only that the federal government should legislate on any matter that seems to us to require political solution but also that it can do so notwithstanding its constitutionally limited power, then we had better accept that violations of our civil liberties will come with the territory. For the first violation—the violation of the basic principle that the government has only the power we have given it—will soon be followed by a second violation—the violation of our right to plan and live our own lives, free from government's planning them for us.

Of course, not all violations of civil liberties are innocent by-products of well-intentioned legislation. Henry Adams observed that "politics, as a practice, whatever its professions, has always been the systematic organization of hatreds." Unscrupulous politicians will always seek to gain power and position by scapegoating some citizens and pandering to others. Gays and immigrants, Japanese and Arabs, straight white men and the very rich have all served recently as pretexts for ill-advised legislation.

Perhaps even more often, politicians target a truly reprehensible group in order to pass laws that have far broader effects. When we give the government broad wiretapping powers to fight terrorists, or keys to everyone's computers to combat child pornographers, we play into the hands of those who willingly disregard individual rights.

In the past few years, the federal government's intrusion has accelerated. We could point to examples in a wide variety of areas.

Privacy

Privacy has long been respected as a fundamental right of free people. Jurisprudence on the right to privacy has become entangled in a vague web of emanations and penumbras. A better foundation would be the old doctrine, "A man's home is his castle." That's the principle mat underlies the Fourth Amendment and other parts of the Constitution. But some people in the government have used the specter of terrorism, child pornography, and organized crime to chip away at our right to privacy.

The Clinton administration set a record in 1995 (probably broken in 1996) for the most crime-related wiretaps in a year and for the most "national security" wiretaps without establishing probable cause for be-

lieving that a crime had been committed or was about to be committed. President Clinton asked Congress for the authority to conduct "roving wiretaps''—that is, wiretaps not on a particular phone but on any phone used by a particular individual—without court approval. Although that specific provision did not pass, the 1996 terrorism bill did expand the government's wiretapping authority.

Important messages are increasingly sent electronically. Thus the privacy of electronic communications is a growing concern. No one expects us to write all our letters on postcards so postal workers can read them, and if we write letters in code, that's none of the government's business. But the federal government has tried to restrict our ability to keep our electronic communications private. It has banned the export of the most effective encryption technology. It has repeatedly proposed a Clipper Chip system under which the government would hold a key to all the data in all the computers in the United States. Of course, the government promises never to misuse its power. One might consult the innocent Americans caught in everything from Filegate to Watergate to the Tuskegee experiment about the reliability of such promises. Louis Freeh, director of the Federal Bureau of Investigation, seems to want to go further than Clipper Chip and ban encrypted communications entirely.

Widespread drug testing is a particularly ugly intrusion into privacy rights. President Clinton and his Republican opponents have competed to see who could demand drug testing of more Americans. The president may have won the latest round by proposing to mandate that states require teenagers seeking driver's licenses to submit to drug tests. Such a law would presume every teenager guilty and subject him to an intrusive search, without any evidence of wrongdoing.

Freedom of Speech

As Bradley A. Smith writes in Chapter 18, limits on campaign spending restrict the ability of individuals to advance their political ideas. Whatever the Founders might have thought about obscenity or commercial speech, the First Amendment was certainly intended to protect political speech. Yet today's edifice of campaign finance regulations is designed to limit the very speech that is essential to democracy. It may be no coincidence that the reelection rate for incumbents has skyrocketed since the 1974 Federal Elections Campaign Act.

Now the Federal Election Commission is trying to go beyond even the unfortunate speech restrictions included in that law. As former attorney

general William P. Barr wrote recently, the FEC "has mounted a sustained assault on First Amendment freedoms. It has persistently attempted to expand its authority over campaign spending limits into a sweeping license to suppress issue-oriented speech by citizens' groups." Among its most notorious cases are the lawsuits against the Christian Coalition and the National Right to Work Committee, both of which distribute voting guides mat offer information about candidates for office. In retaliation, some Republicans and conservatives have pressed the FEC to harass the AFL-CIO as well. A better solution would be to abolish the FEC and allow every American to contribute money to advance his own political ideas in a robust debate.

The FEC is not the only government agency that has a chilling effect on free speech. The attempt to enforce increasingly restrictive "civil rights" laws has led to free-speech restrictions as well. The Fair Housing Act Amendments of 1988 make it illegal to advertise a dwelling in any way that indicates a preference for a particular kind of buyer or tenant, and the Department of Housing and Urban Development takes a very expansive view of what that means. HUD regulations note, "References to a synagogue, congregation or parish may . . . indicate a religious preference. Names of facilities which cater to a particular racial, national origin or religious group such as country club or private school designations . . . may indicate a preference." In other words, it's illegal to advertise a small apartment as "ideal for couple" because that might indicate a bias against singles. It's illegal to advertise "walking distance to synagogue"—an important selling point for Orthodox Jews—because that indicates a bias against Gentiles. HUD is also prosecuting developers whose ads don't picture the right racial mix of people. Real estate agents cannot legally tell their clients about the racial, ethnic, or family makeup of a neighborhood.

During the Clinton administration, HUD began investigating and threatening community activists who objected to shelters and public housing units in their neighborhoods. In New York, Berkeley, Seattle, and other places HUD enforcers demanded correspondence, minutes of meetings, flyers, and lists of contributors on the grounds that the activists were engaged in illegal racial harassment. The government's own harassment of people for exercising their First Amendment rights surely has a chilling effect on other Americans who might consider expressing their views of the federal government's plans.

The most notorious infringement on free speech in 1996 was the Communications Decency Act, passed by Congress, signed by the president,

and defended in court by the Justice Department. That act criminalizes any use of a computer network to display "indecent" material, unless the content provider uses an "effective" method to exclude people under 18. There is no centralized, affordable, effective way to restrict children's access to particular sites on the Internet. If this law is upheld by the Supreme Court, Congress will have mandated that the greatest communications tool in history be restricted to material that would be appropriate for kindergartners. Of course, since Congress's authority does not extend to content providers in Denmark, the Cayman Islands, or Hong Kong, what the law may do is move the discussion of "inappropriate" topics outside the United States—a poor way to enhance U.S. leadership in software and information.

Another threat to free speech is the continuing campaign to outlaw the desecration of the American flag. As outrageous as flag burning is, the test of our commitment to freedom of speech is our willingness to tolerate offensive speech. The Founders put freedom of speech in the Constitution because they knew that we would all be tempted at one time or another to ban some kind of speech or expression, so it's best that everyone be unable to do so. It's interesting to speculate whether the flag-bedecked ties, hats, and other paraphernalia sported by Pat Buchanan and the delegates at the Republican National Convention would be legal under the flag-desecration amendment they favor.

Prevented by the courts from banning flag burning by statute, some members of Congress want a constitutional amendment to forbid desecration. Some advocates of campaign finance regulation likewise understand that such restrictions fall afoul of the First Amendment and want a new amendment to bring about *their* preferred exception. Maybe those new amendments should be numbered Amendment I(a), Amendment I(b), and so on, to keep all the exceptions in close proximity to the original First Amendment.

The Federalization of Almost Everything

President Clinton proclaims that "the era of big government is over." Former senator Bob Dole waved the Tenth Amendment at campaign rallies. Yet members of both parties have been quick to pass federal laws to deal with whatever seemed to capture the voters' imagination, regardless of whether the Constitution authorized federal activity in that area or whether centralized decisionmaking was appropriate. One of the great

advantages of a federal system is that different solutions to problems can be tried; good solutions can be copied, and bad choices have limited impact.

The impulse to impose uniform solutions or eliminate "inequities" among regions is strong. President Clinton said in 1995, "As president, I have to make laws that fit not only my folks back home in Arkansas and the people in Montana, but the whole of this country. And the great thing about this country is its diversity, its differences, and trying to harmonize those is our great challenge." A *Washington Post* columnist says that America "needs badly . . . a single education standard set by—who else?—the federal government." Kentucky governor Paul Patton says that if an innovative education program is working, all schools should have it, and if it isn't, none should.

But why? Why not let local school districts observe other districts, copy what seems to work, and adapt it to their own circumstances? And why does President Clinton feel that his challenge is to "harmonize" America's great diversity? Why not enjoy the diversity? The problem for centralizers is that appreciating diversity means accepting that different people and different places will have different situations, different approaches, and maybe even different values. A fundamental question is whether centralized systems or competitive systems produce better results—that is, arrive at more solutions that, although not perfect, are better than they might have been. Our experience with competitive systems—democracy, federalism, free markets, or the vigorously competitive Western intellectual system—shows that they find better answers than do imposed, centralized, one-size-fits-all systems.

The Constitution specifically establishes only three federal crimes, yet today there are more than 3,000 federal crimes—and Congress keeps adding more. Congress has declared such clearly local crimes as carjacking, stalking, and church burning to be federal offenses. Why? Are local police incapable of handling such crimes? No, Congress's impulse seems to be to respond to popular pressure rather than fulfill its constitutional responsibility and engage voters in a discussion of the Constitution, federalism, and the role of Congress.

In 1995 the Supreme Court ruled that the passage of the Gun-Free School Zones Act exceeded the constitutional authority of the federal government. Banning the possession of a gun on or near school grounds probably makes sense—which is why almost all states did it before Congress made such possession a federal crime. But after the Supreme Court struck down the law, Congress—despite its rhetoric about the Tenth

Amendment—passed the law again, claiming to find authority in the much-abused commerce clause.

Local crimes weren't the only things Congress tried to federalize in the last session. The Defense of Marriage Act for the first time declared that the federal government would define marriage, rather than deferring to the several states. (It also declared that each state could refuse to recognize same-sex marriages performed in other states, probably in violation of the full faith and credit clause of the Constitution.) If the principle of federalism means anything, it means that on matters like marriage, the people most directly concerned with the issue should decide. In the case of American federalism, that means that marriage should be defined by the states or even by local communities, not by a federal override of state prerogatives.

From crime to welfare, from health care to marriage to environmental policy, Congress has increasingly usurped local decisionmaking and imposed uniform national rules on a large and diverse country.

Unequal Rights

One of the fundamental principles of the rule of law is equal treatment under the law for all citizens. Justice doesn't require equality of outcomes—indeed, only massive injustice could seek to achieve such a result—but it does require equal legal rights. "Civil rights" should certainly mean equality under the law. No one should be given legal preferences or disadvantages on the basis of such characteristics as race, gender, religion, or sexual orientation.

A Congressional Research Service study found in 1995 that there were 160 federal programs that offered preferences on the basis of race. The commitment of President Clinton and Congress to eliminating racial preferences from the law resulted in repeal of only 1 of those 160 laws. Congress should heed the message of the California Civil Rights Initiative—which is the message of Thomas Paine, William Lloyd Garrison, Frederick Douglass, *Brown v. Board of Education,* and Martin Luther King Jr.—and repeal all laws that consider race, religion, or gender in granting or denying federal benefits or contracts.

The debate over the Defense of Marriage Act showed Congress's confusion about equal rights. While 85 senators voted to deny equal marriage rights on the basis of sexual orientation, at the same time 49 senators voted to forbid private employers from discriminating on the basis of sexual orientation. Although such discrimination is usually irrational, it is very dangerous to inject the clumsy hand of government in the complex

web of relationships that make up the American economy. We have learned from the well-intentioned effort to outlaw discrimination on the basis of race, religion, and gender that the attempt to enforce such a law easily leads to investigations, quotas, and an explosion of litigation. All taxpayers have a right to an efficient government that hires on the basis of job-related characteristics alone, so the federal government should not discriminate in its own hiring and contracting decisions on the basis of race, religion, gender, or sexual orientation; but we should be very cautious about extending the regulatory apparatus of anti-discrimination law to voluntary association.

The War on Drugs

Those who prosecute failing wars often tell us that there is light at the end of the tunnel, and so it is with the long-running war on drugs. If a government is involved in a war and isn't winning, it has two basic choices: de-escalation and withdrawal or escalation. We've seen quite a bit of the latter in the war on drugs. The federal government spends some $12 billion a year on the drug war—more than 10 times as much, adjusted for inflation, as it spent on the prohibition of alcohol. We make more than 1 million drug arrests a year. The president's Office of National Drug Control Policy boasts that we interdict more drugs entering this country every year, and yet "there has been no direct effect on either the price or the availability of cocaine on our streets."

The desperate attempt to "win" the drug war has led to increasing restrictions on individual rights. A law review article a few years ago was titied' 'Crackdown: The Emerging 'Drug Exception' to the Bill of Rights.'' Continuing frustration leads public officials to propose or enact laws that would require such things as random drug testing of federal employees, mandatory drug testing of all teenagers seeking driver's licenses, surveillance flights over private property, and even shooting down unidentified planes that might be carrying drugs.

One of the most notorious escalations of the war on drugs has been the increased and expanded use of "civil forfeiture." Forfeiture law currently enables law enforcement personnel to stop motorists and seize their cash on the spot and to destroy boats, cars, homes, airplanes, and businesses in often fruitless drug searches. The law is based on the idea of a legal proceeding against *property* that "facilitates" the commission of a crime. Thus when law enforcement personnel doubt that they can prove a defendant's guilt beyond a reasonable doubt, they can still seize his property

under the much weaker standard appropriate to civil proceedings. Even without the horror stories and abuses that have become rampant as a result of such forfeiture, this doctrine is a signal example of a government out of control and unbound by the rule of law.

Congress should reconsider the constitutionality and effectiveness of the entire war on drugs. But pending that, it should at the least reform civil forfeiture law. Congress should also refrain from trying to override or undermine the decisions of the people of Arizona and California to alter our current prohibition policies ever so slightly by allowing sick people to use marijuana medicinally on the advice of a doctor and by substituting treatment for incarceration of first-time drug offenders.

Conclusion

As the following chapters demonstrate, the largest and most complex government in history has broadened its reach far beyond what either the Constitution allows or prudence would recommend. No government can wield so much coercive power in so many different ways without intruding into more and more aspects of individual liberty. From wiretapping to data collection, from Internet regulation to the growing militarization of federal law enforcement, Congress should carefully examine the impact on civil liberties of its laws and those who enforce them. The best way for Congress to protect civil liberties is to rein in its breathtaking view of the scope and power of the federal government and begin to return the federal government to its constitutional limits.

Suggested Readings

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Heilemann, John. "Big Brother Bill." *Wired,* October 1996.

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