Preserving Democracy III. Civil Liberty
Michigan State University Extension Service
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The Capitol at Washington

PRESERVING DEMOCRACY

III. CIVIL LIBERTY

BY HARRY H. KIMBER

MICHIGAN STATE COLLEGE :: EXTENSION DIVISION
EAST LANSING

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British Houses of Parliament

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THE SERIES: PRESERVING DEMOCRACY

DEMOCRACY is on trial today. Never before in our history has the democratic way of life been so gravely challenged. Its rise or fall will be measured by the success or failure of our armed forces and those who work at home in the factory or on the farm.

A passive belief in a so-called democratic system of government is not enough. We shall work and fight harder if we have a thorough understanding of the origins, principles and implications of democracy. Thus, this series of bulletins is being issued.

The first two numbers in the series are:

"What is Democracy," by Marshall W. Knappen (Extension Bulletin E-240).

"Human Material for Democracy," by Milton Muelder (Extension Bulletin E-243).

Copies may be obtained from the Bulletin Office, Michigan State College, East Lansing.

Preserving Democracy

III. Civil Liberty

*By Harry H. Kimber**

THE ISSUE

TWO principles of government challenge each other for world mastery.

One is the principle of freedom: this principle rests on the idea of the indestructible individual, the right of every person to live out his life as an individual human being.

The other is the principle of slavery: this principle in the modern world rests on the idea that the individual person has no right to exist save as a creature of some social order. Herein is the issue joined between freedom and slavery in the world of today.

On the one hand, there is the kind of government which is derived from the idea of the people not as a mystical abstraction, but, to use Goethe's phrase, as "men and only men". There is the kind of government, on the other hand, which results from the idea of the state as the only reality and which, therefore, regards the individual as merely a cog in the machine.

"We hold these truths to be self-evident," says the Declaration of Independence, "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive to these ends, it is the Right of the People to alter or abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness." Says the Nazi philosophy, on the contrary, "There is no freedom of the individual, there is only the freedom of peoples, nations or races, for these are the only material and historical realities through which the life of the individual exists". In the one philosophy the state

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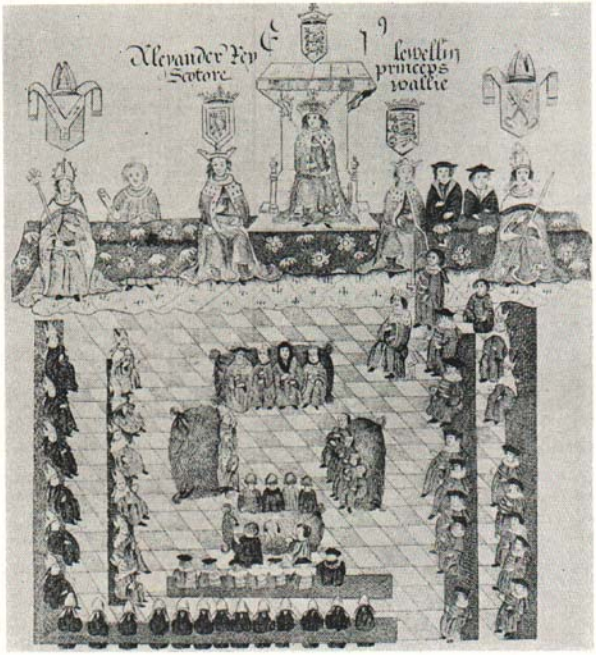
exists for the sake of the individual; in the other the individual exists for the sake of the state. In the one case, the individual is a free man or woman; in the other case, the individual is a slave of the state.

Civil liberty, or the collection of rights which the citizen possesses



This picture represents a session of one of the earliest Parliaments in English history. It sat in the reign of Edward I (1297-1307). Here are shown the barons and chief clergy sitting before King Edward I, who is flanked by the rulers of Scotland and Wales. By the close of the fourteenth century the main features of the organization and powers of a modern Parliament had appeared. In colonial America the local assemblies came to claim the powers of Parliament in this country. The organization and powers of Congress were modelled upon those of the British Parliament —the most ancient organ of representative government in the world.

(Photo: Rischgitz Studios, London, and British Information Service, New York)

as against the state, is not an isolated portion of the American political system, standing alone, and to be accepted or rejected at the seeming convenience of the moment. It lies, rather, at the very core of our concept of government; its origins are deep rooted in our historic struggle for liberty; and its preservation is the condition of our continuance as a free people.

ORIGINS OF THE AMERICAN TRADITION

The American way of government may be represented as the grafting together of two great roots growing side by side in the same soil and eventually joining together to lift up their branches in one mighty tree of liberty.

Our Anglo-Saxon Heritage

One of these roots is our Anglo-Saxon political heritage. Other nations have also their historic heritage of freedom but this happens to be ours. The first colonists brought to their settlements in this land the institutions of government, the political habits, and the system of laws of their native England. The idea and practice of representative government; the Common Law, with its protection of the citizen from arbitrary justice and unfair procedure; the rule of law, or the doctrine that the functions and duties of government must be performed in strict accordance with the laws of the land, that we may have a government of laws and not of men: those things and many more are derived from our Anglo-Saxon origins.

Our Philosophy of Freedom

The second root of the American tree of liberty is to be found in the development of a reasoned justification of political liberty, or, to put it in another way, in the growth of an American philosophy of freedom. The totalitarian regimes have a philosophy of slavery based on tribalism and the principle of subjection to authority. We have a philosophy of freedom which is based on individualism and the inalienable rights of the natural man. This philosophy, which was expressed by Thomas Jefferson in the preamble to the Declaration of Independence, as quoted above, holds that government originates in the agreement by which men, born naturally free, voluntarily yield certain powers over themselves to government in order to facilitate social rather than individual life. To each member of society, however, is preserved certain rights which he did not yield to government because to have done so would have been to destroy his integrity as an individual. These rights are the inalienable rights of which our historical documents so frequently speak. When government invades this

area of individual liberty which man has marked out for himself, it breaches the compact under the terms of which it possesses coercive authority, and the citizen acquires the right to defend his liberty by revolution.

This "contract theory" of government, later expounded by the French philosopher Rousseau in his essay on the "Social Contract," came into the American tradition from the pen of John Locke, the English philosopher whose reflections on the nature of political authority were published under the title of "Two Treatises on Government". This was written in the midst of the constitutional struggles of the seventeenth century in England. It was in those days that the issue of royal despotism or parliamentary supremacy, or, as we would say, representative government, was being fought out in Parliament, in the courts, and on the battlefield. Locke founded the idea of political liberty on a rational conception of the nature of man, the nature of government, and the just relations which exist between the two. Locke's theory was, of course, speculative or theoretical, rather than historical or factual, in its basis. Government, he said, exists by consent of the governed, and its powers must be exercised with due regard for the natural, or unsurrendered, rights of the citizen.

John Locke (1632-1704)

(Photo: National Portrait Gallery and B. Matthews, printer)

These speculations of Locke were employed to justify the English Revolution of 1688 (which, as it involved the American colonies was also an American revolution), by which King James II was ousted and William and Mary brought to the throne by Parliament's consent. When the American colonists saw fit to overthrow their sovereign King George III, they employed Locke's ideas to help justify their action.

The Revolutions of 1688 and 1776

Not only with respect to fundamental theory of government does the Revolution of 1688 stand in close relationship to the American Revolution of 1776; in the more specific field of civil liberties the connection is clear and direct. The Revolution of 1688 established the character of Parliament as the supreme expression of the national will. Parliamentary supremacy was vindicated as against the asser-

King William.

Queen Mary.

In 1688 the English people revolted against the rule of King James II who was accused of attempting to restore divine right monarchy. William and Mary, the rulers of Holland, were established by Parliament as the sovereigns of England on condition of their acceptance of the rights and liberties of the people as set forth in the Declaration of Rights.

(Illustration: Charles Scribner's Sons, New York)

tion of the principle of divine right absolutism. When a new king was brought to rule over the British Empire in the Old World and the New he was required solemnly to admit this fact, and certain wrongful and illegal acts of the former ruler were specifically declared illegal and certain rights and liberties of the subject were, at the same time, specifically secured. The instrument by which these things were done is called the Declaration of Rights; it was immediately written into the statute law of England as the Bill of Rights. The liberties thus enunciated were among those "rights of Englishmen" for which the American colonists declared themselves to be fighting in the War of the American Revolution.

Civil Liberty in the Constitution

When a federal constitution came to be drawn up for the new republic established as a result of that revolutionary war, these guarantees of freedom were, at first, omitted from express mention. They were assumed to be an integral part of the customary law of the land. So important were they considered, however, that this omission was regarded by many persons as a serious defect, and to obtain ratification of the Constitution it became necessary to promise that they would be added as amendments to the fundamental law. This specific

enumeration of the rights of the citizen as against the state, together with an express guarantee of all customary rights, is found in the first nine amendments to the Constitution of the United States. These amendments are known as the American Bill of Rights.

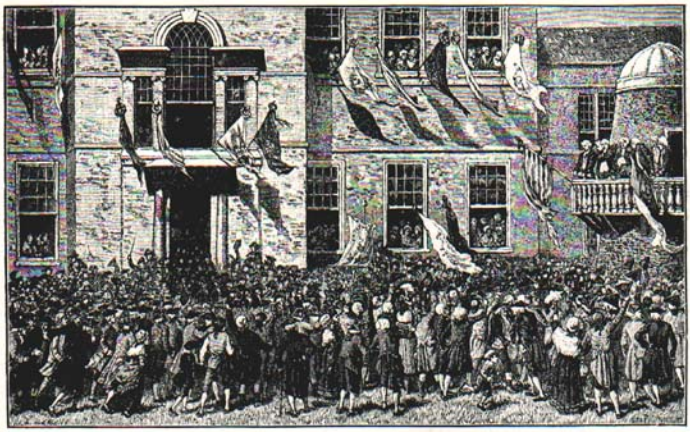
The English Bill of Rights and the American Bill of Rights have a common historical origin. They have another common factor. They are not speculative or theoretical statements of right; they are specific enunciations of rights which may be claimed and defended as matter of law in the courts of the land. The civil liberties possessed by the American citizen represent, therefore, not a program for an ideal society but actual legal rights under the system of government which we have today.

THE BILL OF RIGHTS

The First Amendment to the Constitution establishes as part of the fundamental law of the land the four great freedoms of civil liberty. These are freedom of religion, freedom of speech, freedom of assembly, and freedom of petition.

Freedom of Religion

Congress shall make no law "respecting an establishment of religion, or prohibiting the free exercise thereof." Religious toleration had been granted in England as one result of the Revolution of 1688.



An artist's conception of the scene at the first reading of the Declaration of Independence in Philadelphia.

(Illustration: Charles Scribner's Sons, New York)

but there remained an established church, conformity to which was necessary for the possession of full political and civil rights. In this amendment the Constitution of the United States describes in a peculiarly American fashion what Americans generally regard as the most essential of all civil liberties. The State shall not trespass upon the field of religion and of conscience. The free exercise of his religion is not only the personal privilege of the citizen; it is also one of the most potent weapons which he holds against the establishment of arbitrary and despotic power.

It is no mere co-incidence or dictatorial caprice that leads modern totalitarian states into conflict with religion, Christian and Hebrew, Catholic and Protestant. Religion must always reign supreme within its own sphere of thought and action. The totalitarian state, on the other hand, can brook no restriction upon its sovereignty. Nazism must possess the souls as well as the bodies of men. As has often been the case in the long history of mankind, the inability of religion to compromise its claim to jurisdiction over the human soul and matters spiritual brings the Church in our own day once more to the fore as the defender of freedom against the forces of despotism.

Every right that the citizen possesses carries with it the obligation not to misuse that right. In this sense every right carries with it its own limitations. Freedom of religion, therefore, may not be invoked to protect practices which are contrary to prevailing ideas of public morality, or which constitute an affront to the religious feelings of other citizens or cast aspersion upon them in such a way as to create public disorder. Neither can freedom of religion carry with it the right to subvert citizens from the loyalty or the duties which they owe to the state. Perhaps the greatest obligation which the right to freedom of religion implies is the obligation on the part of the citizen who enjoys it to tolerate the religion of others.

Freedom of Speech

Congress shall make no law "abridging the freedom of speech, or of the press". The free expression of ideas and opinions is necessary to the self-respect and the happiness of man, the "thinking animal". Such a right of free expression cannot be limited to those ideas and opinions which meet with the approval of the majority of the citizens of a state, however great that majority may be. It must be applied with equal vigor to unpopular and minority views. The right of the minority to exist may well be the greatest and most important principle of the free state. The right of free speech, nevertheless, can never be absolute. It is limited by both obligations and necessary restraints. The obligations proceed from the fact that speech is in itself

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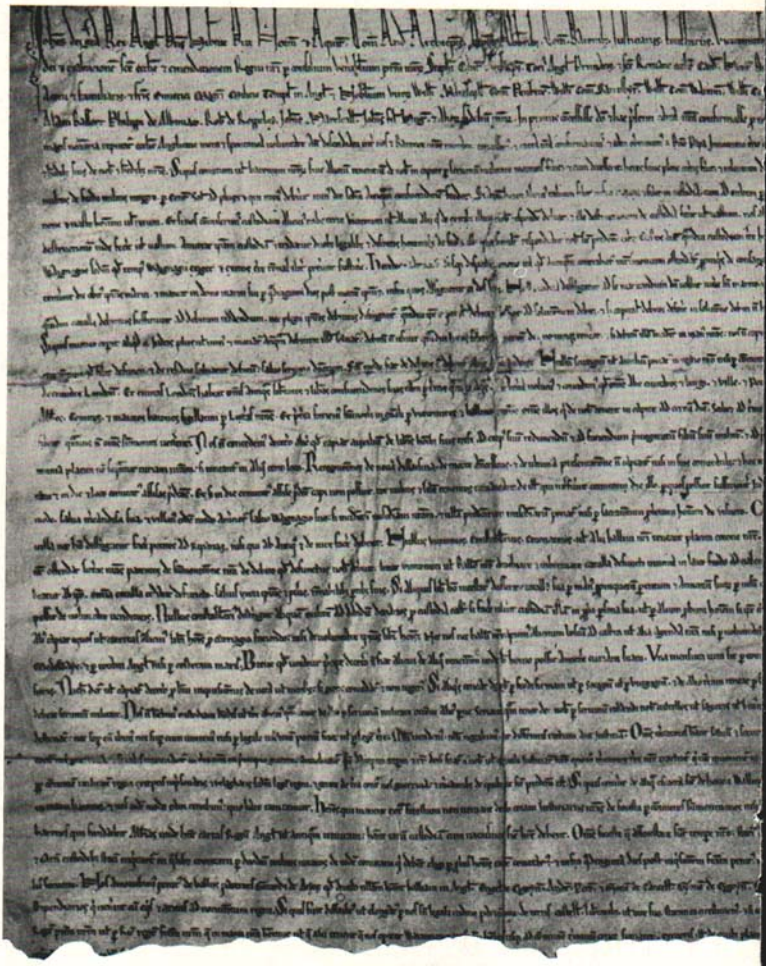

The Great Charter (Magna Charta) of 1215 was the solemn and formal manner in which King John promised his rebellious vassals that he would respect the laws which governed the power of a feudal king. The picture inset in the above reproduction is an artist's conception of John assenting to the terms of the C interpreted in respect to man this document became the sy the idea of constitutional as potic government. It establis

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(Facsimile: "Quarterly World Review" and Inter-Allied Information Center, New York)

(Inset illustration: Knight's "Popular History of England," Vol. 1)

an act, and that every act bears consequences for good or ill. Abuse of the right of free speech may bear evil results just as the careless operation of a motor vehicle may result in injury and death to others.

There are obviously necessary restaints to free speech. Libelous and scandalous statements properly subject the utterer to those penalties of the law which protect all citizens from the abuse of free speech. Licentious and blasphemous language, corrupting public morals and offending the religious sensibilities of other citizens, are properly

Zenger was a German immigrant whose acquittal by a jury on a charge of seditious libel in New York in 1735 helped to establish the right of newspapers to print the truth without fear of prosecution. The case is a landmark in the history of freedom of the press in America.

(Illustration: Bettmann Archive, New York)
(Tapestry is property of Hotel McAlpin, New York)

restained. Yet the principle of political liberty is retained by allowing the representatives of the people full freedom of speech in the Congress of the nation, with accountability only to the houses of the legislature itself.

While recognizing the propriety of restraint upon complete freedom of speech, it must also be admitted that the suppression of freedom of criticism and of minority opinion is a weakness that all governments are heir to, and, therefore, free speech is an aspect of civil liberty that must always be most jealously regarded by the free man. It is chief among the instruments by which his freedom has been gained and through which it must continually be secured. If thought and its expression are checked by the suppression or the unreasonable curtailment of freedom of speech, progress not only ceases but abuses flourish unchecked by the light of criticism.

In time of war the question of freedom of speech assumes especial importance and, at the same time, unusual difficulty. No state can allow any right to be used for the purpose of its own destruction. Many things which in time of peace might be said with slight consequences will in time of war bear much more serious results. Motive is not a sufficient test for restriction of freedom of speech in time of war. Results of speech must be the controlling factor. If the consequences of expression are such, or threaten to become such, as to retard the national war effort, the suppression of such expression becomes justifiable notwithstanding the purity of intention or the patriotism of the speaker or writer. In the determination of this question the executive branch of the government must be allowed great latitude.

There is always, however, grave danger in curtailing freedom of speech even in time of war. The need for constant criticism and review of the policies of the men to whom the people have entrusted the fate of the nation is then the more acute. Many a public official is too prone to regard the publication of the record of his own shortcomings as the giving of information of value to the enemy. There is no real escape from the dilemma thus posed, but all who take it upon themselves to exercise the right of freedom of speech in time of war should not do so lightly, but speak soberly, discreetly, and honestly. They should have full realization of the measure of their responsibility as free men, not, in the words of the writer of the Petrine Epistles, "using your liberty for a cloke of maliciousness".

Freedom of Assembly and of Petition

Congress shall make no law abridging "the right of the people peaceably to assemble, and to petition the government for a redress of grievances". The rights of peaceable assembly and petition are in-

dispensable to representative government. By such means the mind of the people finds expression.

The right of assembly for the purpose of consultation on public affairs makes possible the political party. Upon the existence of political parties depends the possibility of organized opposition to the policies of government and the provision of an alternative to the government or administration of the moment. In totalitarian states, therefore, no such rights as these exist. All political parties are abolished save that one which has succeeded in seizing the reins of power. By the suppression of its rivals it perpetuates itself in office. The only recourse of the people is revolution. The right of peaceable assembly is the condition of orderly political progress in a republican system of government.

The right of petition involves making the mind of the people known directly to the executive and to the legislature. While this right has been held by judicial construction to be a guarantee of freedom of movement from one state to another it can hardly be regarded as justifying mass marches designed primarily to overawe or to intimidate the government. Actually it is taken directly from the English Bill of Rights of 1689 where it was placed as a result of the arrest by King James II on a charge of seditious libel of seven bishops of the Church of England who dared to present him with a petition protesting against one of his tyrannical acts. The right of petition may surely be thought of as implying the right to oppose the policies of government by orderly and peaceful means without incurring the guilt of sedition.

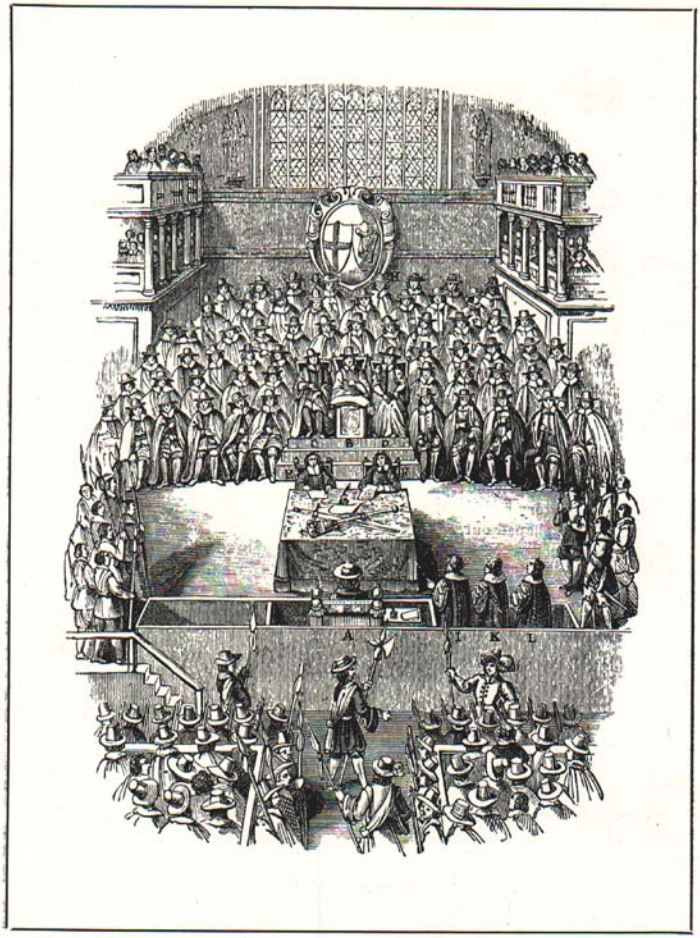
The Right to Bear Arms and the Quartering of Soldiers

The Second and Third Amendments to the Constitution of the United States, and, therefore, part of the American Bill of Rights, require interpretation in the light of history. "A well regulated militia," reads the Second Amendment, "being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed". This provision rests first upon the ancient Anglo-Saxon tradition of the tribal host. In the Anglo-Saxon community the right to bear arms was one of the distinguishing characteristics of the fully free man. The idea of a community army remained a bulwark of English liberty down to the creation of a military despotism by Oliver Cromwell on the basis of a professional standing army. One of the despotic policies of the later Stuart kings was the restoration of a standing army. At the time of the Revolution of 1688 the ruler was forbidden to maintain a standing army except by the express permission of Parliament. The idea of a militia of armed citizens as opposed to a standing army which could easily be made the agent of despotism was

This is the title page of a seventeenth century drill manual. The figure on the left is carrying an ancient weapon called an arquebus over his shoulder, and in his hand is the stand from which it was fired.

(Illustration: Charles Scribner's Sons, New York)

apparently held by the framers of the Constitution. The power of Congress to raise and support armies was granted, but with the proviso that such support should not be for longer than two years, and here in this amendment care is taken to preserve the popular militia. While such considerations as motivated the fathers of the Constitution no longer play much part in our thinking it might not be unwise



Many of our constitutional guarantees of civil liberty arise from the experience of our English ancestors in resisting the attempts of the Stuart kings to establish absolute government. This picture shows the revolutionary tribunal in 1649 which condemned Charles I to execution. Westminster Hall, an ancient part of the Houses of Parliament which is said to have escaped destruction from German bombs, was the place of the trial. The King is shown seated in a box facing the president of the court and his assistants.

(Illustration: Knight's "Popular History of England," Vol. 4)

in the present time to reflect on the problem of a large professional army in its relation to the security of constitutional government.

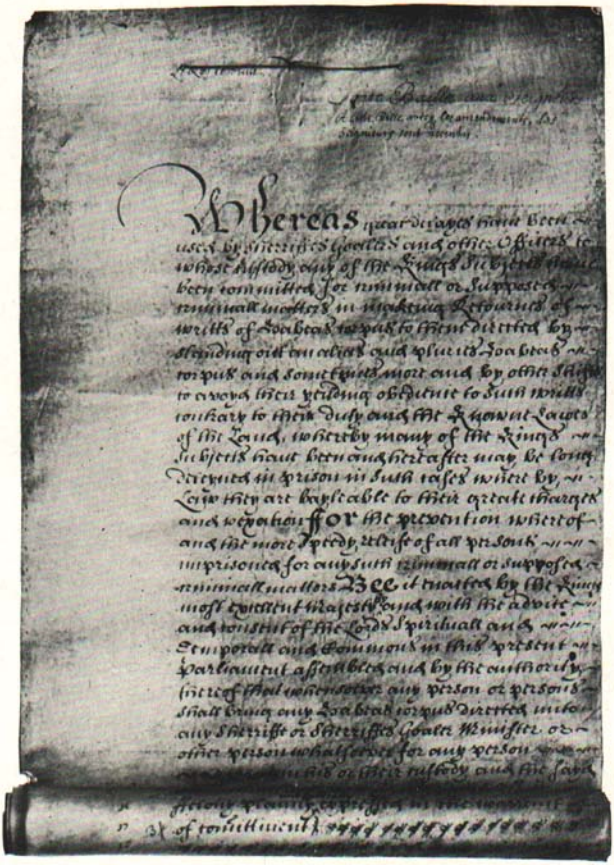
The right of the citizen to keep and bear arms has presented some difficulties in the large cities of the United States. The prohibition of unauthorized military drill, laws against the secret carrying of weapons, and other public safety measures of similar import have been held not to be violations of the right to bear arms. It remains true, however, that in the country areas of the United States there is almost universal possession of fire arms. This fact is not the least of the securities which Americans possess against the establishment in this country of regimes of despotism or dictatorship. The unreasonable curtailment of the right to keep and bear arms might well be viewed with suspicion.

Quartering of soldiers in the houses of private citizens was one of the means whereby the Stuart kings sought to overcome opposition to their rule. The device served as a means of escaping payment for the support of the army at a time when Parliament was refusing to grant supply or funds, and, at the same time, it was a means of punishment of the people of those districts which had distinguished themselves by their opposition. This prohibition against the quartering of troops without the consent of the owner of the house in time of peace and that of Congress in time of war is another of the specific provisions drawn from the experiences of English constitutional history.

Legal Rights of the Citizen

One of the remaining amendments which make up the American Bill of Rights is designed to protect those liberties which the people possess under the Common Law from being infringed upon or abrogated on the pretext that the rights enumerated in the Constitution are the only ones which they enjoy. The other five amendments specifically guarantee certain rights of the citizen with respect to the courts and the law. Taken together, they provide security for the person and for the property of the citizen against arbitrary and despotic action by agencies of government.

The Constitution prohibits unreasonable search and seizure of persons, houses, and goods, and requires specific information for the issuance of a warrant authorizing search or seizure. It gives to the accused definite rights in criminal proceedings and establishes the protection of Common Law procedure in civil cases; it forbids excessive bail and cruel and unusual punishments; it gives the right of a trial by jury, and, in another place, guarantees the citizen against arbitrary arrest by establishing the right of *habeas corpus*. This latter provision requires an immediate hearing before a court to determine the legality of an arrest. Still other provisions, to be found in the body of



Whereas [illegible] by Sheriffes Gaolers and other Officers to whose Custody any of the Kings Subjects should be committed for criminall or Supposed criminall matters in most parts of the Realme the writs of Habeas Corpus to them directed by standing out of the Clerks Office of the Court from whence the Habeas Corpus and sometimes Mittimus and by other shifts to avoyd their yielding obedience to such writs contrary to their duty and the known Laws of the Land, whereby many of the Kings Subjects have been and hereafter may be long detained in prison in such cases where by Law they are bayleable to their great charge and vexation for the prevention whereof and the more speedy relief of all persons imprisoned for any such criminall or Supposed criminall matters BEE it enacted by the Kings most Excellent Majesty and with the advice and consent of the Lords Spirituall and Temporall and Commons in this present Parliament assembled and by the authority of the same that whensoever any person or persons shall bring any Habeas Corpus directed into any Sheriffe or Sheriffes Gaoler Minister or other person whatsoever for any person [illegible] of their custody and the said

A prohibition in principle against imprisonment by personal will of the executive and without legal cause was contained in the Great Charter of 1215. The writ of habeas corpus required a person who was holding another in detention to appear in court to justify the legality of his action. The writ began to be used against king's officers in the early Tudor period. It became known as the "great writ of liberty" and was explicitly secured as a constitutional right in the Petition of Right of 1628. The Habeas Corpus Act of 1679—the literally enrolled statute is shown above—made the operation of the writ more efficient. It was regarded by the American colonists as one of the "dearest birth-rights of Britons."

(Facsimile: "Quarterly World Review" and Inter-Allied Information Center, New York)

the Constitution, secure the citizen from being tried for actions which were legal when they were performed, and from being tried a second time on a charge of which he once has been acquitted.

These rights are not only valuable legal rights; they are political rights as well. By the arbitrary and personal justice which prevails in totalitarian countries the citizen may not only be unjustly deprived of his liberty and of his property but the administration of justice may be made an instrument of political persecution and repression by which fear and terror may be instilled into the minds of the populace as a whole. Political opposition is met by legal persecution.

Nor in our own country should these legal rights be too lightly regarded as guarantees of political liberty. The jury may not be the most efficient means of adminstering criminal justice, for example, but it is a powerful bulwark against unpopular and tyrannical government. Frequently in English and in American history juries have refused to convict persons accused of the violation of unpopular laws or when an impression was created that the prosecution of an accused man was in itself an act of political persecution.

CIVIL LIBERTY AND THE FREE STATE

The rights of citizenship which we call civil liberties are not mere conveniences. They constitute the indispensable condition under which free government can exist. To remain free the individual must retain for himself certain rights which he does not surrender to the state.

The modern form of despotism is not monarchical but dictatorial. The dictator presumes to act in the name of the people as a whole and sanctifies his assumption of power by reference to the common good just as the absolute monarch of old claimed to rule by the grace of God. He claims jurisdiction over every department of the life of the nation and of its inhabitants. There are no rights or liberties which the citizen possesses as against the state; there are no areas of life and activity which belong to the citizen as a human being and which stand outside the scope of political authority. Such is the totalitarian state. The suppression of civil liberty is the inescapable consequence of despotism.

In a free government the citizen must first of all be free. He must be free to exercise the duties and the responsibilities of citizenship. To that end he must understand, he must cherish, and he must defend his civil liberties. His most solemn obligation as a citizen is to transmit undiminished to the future that inheritance of freedom which he has received from the past.

St. Bride's Church, London, England. This view shows the interior as it was before the Blitzkreig attacks of 1940-41. The church was designed by Sir Christopher Wren to replace an earlier St. Bride's destroyed in the Great Fire of 1666.

Here is shown the effects of German bombs and fire on Wren's lovely creation. It is a symbol of the destruction wreaked by Nazism on the Christian culture of Europe.

(Photographs: National Buildings Record, London, and British Information Service)

Stephen Vincent Benet, in his poem *Nightmare at Noon*, has written the following lines:

"There are certain words,
Our own and others', we're used to—words we've used,
Heard, had to recite, forgotten,
Rubbed shiny in the pocket, left home for keepsakes,
Inherited, stuck away in the back-drawer,
In the locked trunk, at the back of the quiet mind.

"Liberty, equality, fraternity,
To none will we sell, refuse or deny, right or justice.
We hold these truths to be self-evident.

I am merely saying—what if these words pass?
What if they pass and are gone and are no more,
Eviscerated, blotted out of the world?
We're used to them, so used that we half-forget,
The way you forget the looks of your own house
And yet you can walk around it in the darkness.
You can't put a price on sunlight or the air,
You can't put a price on these, so they must be easy.
They were bought with belief and passion, at great cost.
They were bought with the bitter and anonymous blood
Of farmers, teachers, shoemakers and fools
Who broke the old rule and the pride of kings.
And some never saw the end and many were weary,
Some doubtful, many confused.

* * * * * * *

It took long to buy these words,
It took a long time to buy them and much pain.

Thenceforward and forever free.
Thenceforward and forever free.
No man may be bound or fined or slain till he has been judged by his peers.
To form a more perfect Union.

The others have their words too, and strong words,
Strong as the tanks, explosive as the bombs.

The State is all, worship the State!
The Leader is all, worship the Leader!
Strength is all, worship strength!
Worship, bow down or die!