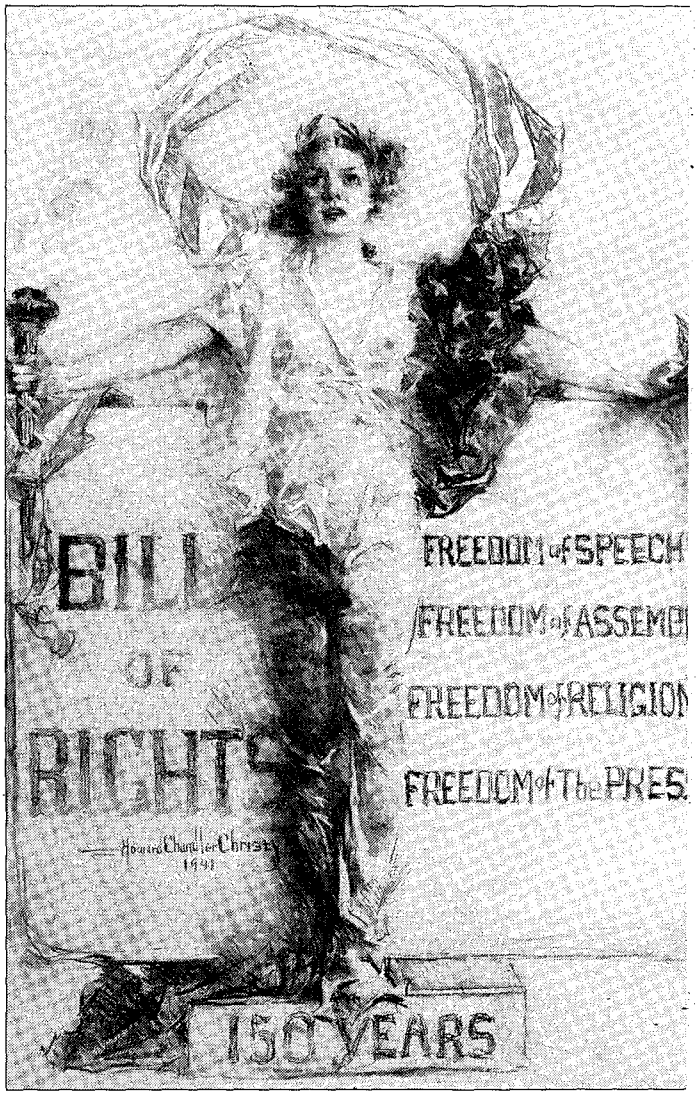
Why a Bill of Rights Is Not Enough

Talk about rights has never been more in the air, and not only because last December marked the 200th anniversary of the ratification of the U.S. Bill of Rights. Throughout the world, among the many emerging democracies, lawmakers are struggling to formulate new constitutions, and foremost among their concerns is the protection of citizens' freedoms. Even one of the world's oldest democracies, the United Kingdom, is today debating whether to adopt a written constitution, including a bill of rights. Chief Justice William Rehnquist here offers a timely reminder that guarantees of rights are meaningless—without an independent judiciary.



by William H. Rehnquist

We who have lived through the recent fanfare surrounding the bicentennial of America's Bill of Rights may find it odd that the centennial of 1891 passed with virtually no ceremony and little, if any, recognition. Newspapers and periodicals, including the *New York Times* and the *Washington Post*, made no mention of the anniversary.

Even the *Congressional Record* failed to observe the date. Perhaps this lack of attention by 19th-century Americans underscores the greater significance 20th-century Americans have attached to the Bill of Rights.

Americans during the last half-century have certainly been more scrupulous in commemorating anniversaries of the Bill of Rights. In 1941, on the occasion of the document's sesquicentennial, ambitious celebration plans were underway. On December 3, New York Governor Herbert Lehman issued a proclamation declaring December 15, 1941, as "Bill of Rights Day." The governor wanted New York schools "to emphasize the special blessings and benefits that flow from the freedoms guaranteed." Numerous activities were scheduled in the nation's capital. Three Supreme Court justices along with a host of other Washingtonians made plans to participate in a mass meeting on December 15. The evening's festivities were to include speeches by the justices, a round-table symposium, a coast-to-coast radio program, and a speech by President Franklin D. Roosevelt. Unfortunately, the December 7 Japanese attack on Pearl Harbor and America's entry into World War II led officials to cancel many of those activities. The December 14, 1941, edition of the *Washington Post*, in reporting that the Washington Bill of Rights ceremony had been canceled, reminded readers that the tragic turn of world events should serve as a "sharp reminder of what we are fighting to preserve."

The concept of a bill of rights is hardly unique to the United States. Many nations have constitutions containing similar declarations of rights and liberties. The genius of our system was to create not only a Bill of Rights but also a coequal judiciary, independent of the president and the Congress, to enforce those rights. Lofty-sounding declarations mean little in the absence of an institutional structure to give them meaning. Only an independent judiciary can enforce individual rights and other limits on governmental powers.

Other nations have failed in this respect. The Soviet Constitution of not-so-distant times contained a broad declaration of individual rights and liberties. But from Stalin's show trials of the 1930s to the gulag of more recent years, the pronouncements of that document failed to fulfill their promises. Similarly, the "Fundamental Rights and Duties of Citizens" of the People's Republic of China fell far short of protecting the protesters of Tiananmen Square.

Approximately 200 years ago, in 1789, France produced both a constitution and a "Declaration of the Rights of Man and of the Citizen." The Declaration proclaimed freedom of religious opinions and the right of every citizen to speak, write, and publish freely. It further provided that a person was presumed innocent until convicted, that no one should be accused, arrested, or imprisoned unless determined by law, and that punishment should only be pursuant to a law "promulgated before the offense." However, the 1789 French Constitution was conspicuous in its failure to create any institution capable of safeguarding these rights.

Four years later, the French Revolution degenerated into the Reign of Terror. One recent French historian has described the trials of this period as "judicial murder," in which not merely hundreds but thousands of people were guillotined. During the Reign of Terror from 1793 to 1795, 300,000 people were imprisoned, about 20,000 people lost their heads to the guillotine, and another 20,000 died in prison or were executed without any pretense of trial. All of this happened because the National Convention—the body composed of representatives of the people—chose to bypass the regular courts for certain criminal offenses. For those offenses, it created a "Revolutionary Tribunal," then, as now, a synonym for a kangaroo court.

The Revolutionary Tribunal had a number of peculiar qualities. Any "political offense" could be tried before it, and, as in old-time court martials, there were only two possible verdicts: acquittal or death.

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The Convention frequently changed the Tribunal's procedures, size, and composition when the "justice" it dispensed was not revolutionary enough. Judges and jurors were added and removed at the Convention's pleasure. It would be difficult to imagine a formula more certain to produce despotism. All of this happened in a country that only a few years before had adopted the ringing Declaration of the Rights of Man and of the Citizen. Obviously, something went terribly wrong between 1789 and 1793.

In the newly formed United States, events proceeded at a less dramatic pace. To be sure, the new nation did not face the same difficult circumstances as did France. It avoided foreign wars, had fewer impediments to reform, and maintained stable local governments in the form of the 13 states. Nonetheless, the successful ratification of the Constitution in 1789 and the addition of the Bill of Rights two years later should not obscure the heated ideological debate that occurred between groups holding two very different conceptions of what the national government should be.

During the entire ratification debate, many participants raised serious questions concerning how secure the basic rights of the American people would be under the new government. They focused on the absence from the Constitution of a detailed bill of rights. Those who believed the states should ratify the Constitution without additional amendments said that a declaration of rights was superfluous. Among them was Oliver Ellsworth of Connecticut, who later served as the third chief justice of the Supreme Court. Ellsworth argued that declarations of rights were "insignificant," since all political power was derived from the people. He was joined by a host of Federalists, many of whom argued that the whole constitution was a declaration of rights and, therefore, that no additions were needed. (Federalists also feared that any amendments would open the floodgates to a wholesale revision of the governing structure hammered out at the Constitutional Convention.)

While he refrained from an explicit alignment with either political faction, Thomas Jefferson's views on a bill of rights placed him in the Anti-Federalist's ideological camp. On December 20, 1787, from his post as the American minister to France, Jefferson wrote to James Madison stating that, "a bill of rights is what the people are entitled to against every government on earth...." Samuel Chase, a noted Maryland lawyer and politician who later became an associate justice of the Supreme Court, also initially opposed ratification of the Constitution. During the course of the Maryland ratification convention, Chase cautioned an Annapolis audience to beware of the Constitution, since in his opinion it was certain to abolish the Maryland state constitution and bill of rights. Like Chase, George Mason, author of the Virginia Declaration of Rights and sponsor of a defeated resolution to add similar guarantees at the Constitutional Convention, opposed ratification. The first line of his "Objections to the Proposed Federal Constitution," proclaimed, "[T]here is no declaration of rights."

Others took up this rallying cry. Although the state conventions in Delaware and New Jersey ratified the Constitution by unanimous vote, in other states the ratification debate was protracted and acrimonious. Criticisms were particularly severe in Massachusetts and in Virginia. After several caucuses and considerable compromise, both the Massachusetts and Virginia conventions voted for ratification. Nonetheless, both states' delegates attached recommended lists of amendments, thereby initiating a movement toward a bill of rights.

In March of 1789, after the Constitution was ratified by 11 states, the first Congress assembled in New York. Three months later, Virginia Representative James Madison introduced the subject of amendments in the House—one of the first instances of an American politician fulfilling a campaign promise. Initially opposed to a bill of rights during the Constitutional Convention, Madison converted, whether because of political expediency or a true change of heart is not entirely clear. The Senate took up the matter in August. Then, on September 25, 1789, Congress submitted 12 articles of amendment to the states for ratification. The first two proposed amendments addressed the number of congressmen and their salaries. They were rejected and have

passed into the mists of history. Not so the remaining 10. Two years later, by mid-December 1791, the requisite 11 states had given their approval.

At the time of their ratification, the constitutional amendments were little more than contingent promises awaiting the development of governmental institutions to promote and enhance them. Astute statesmen of the era recognized the vital role the Bill of Rights could play, if there existed an independent judiciary to enforce it. Jefferson stated that a bill of rights would place a "legal check" in the hands of the judiciary, particularly the Supreme Court, which he characterized as the "guardian of citizen rights" whose role was to "resist every encroachment upon those rights."

One particularly illustrative episode early in the nation's history was the 1805 impeachment and trial before the United States Senate of Samuel Chase, then an associate justice of the Supreme Court. Chase's narrow escape from conviction in the Senate exemplifies how close the development of an independent judiciary came to being stultified.

As a young Maryland lawyer and politician, Chase fit the anti-Federalist profile, but by the time of his appointment to the Supreme Court in 1796 he had become a staunch Federalist. Even while he sat on the bench, Chase continued to play an active role in Federalist politics. According to one contemporary account, the opening of the August term of the Supreme Court in 1800 had to be delayed because Chase was absent stumping in the state of Maryland to urge the reelection of John Adams as president. He presided over two controversial trials in 1800, and his conduct during both would later be the subject of articles of impeachment against him.

The political scene in the United States changed dramatically as a result of the presidential election of 1800, in which Thomas Jefferson and his Republican Party defeated John Adams and the Federalists. In what historians call the "second American Revolution," the Republicans, led by Jefferson and Madison, captured both the executive and legislative branches of the federal government from the Federalists, who had controlled them during the first 12 years of the new nation.

Far from being chastened by their defeat, the Federalists determined to strike one last blow at their Republican enemies. Though Federalist control of the executive and legislative branches would cease on March 4, 1801, neither President Adams nor the lame duck Federalist Congress sat idly by during their last days of power. Congress passed the Judiciary Act of 1801, abolishing the circuit-riding duties of the Supreme Court justices and creating 16 new circuit judges and a number of new justices of the peace. In calmer times, the act would have been judged a significant measure of judicial reform. But from the perspective of the incoming Republicans, it looked like a transparent Federalist patronage scheme. It was said that John Adams stayed up until midnight in his last days in office signing commissions to the new judicial positions, and the judges were henceforth referred to as the "Midnight Judges." One of the justices of the peace so appointed, William Marbury, later sued Secretary of State James Madison for his commission, and in the celebrated case of *Marbury* v. *Madison* (1803), the Supreme Court under John Marshall would establish the doctrine of judicial review.

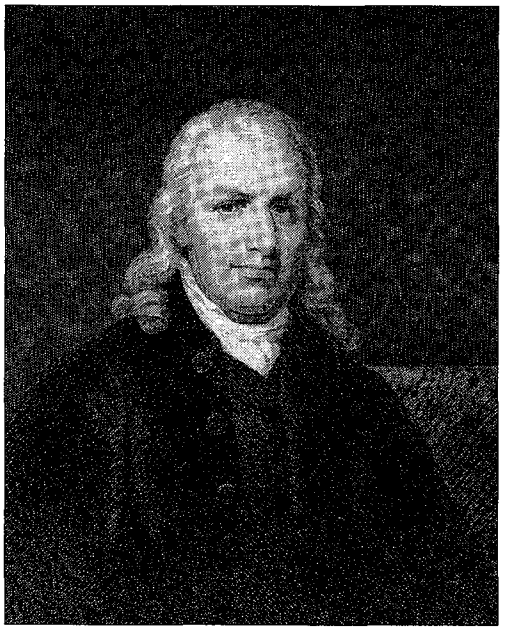
When the Republicans came into power in March 1801, they set about to undo the work of the Federalists and repealed the Judiciary Act of 1801. But the actions of the Federalists continued to rankle. Thomas Jefferson wrote to a friend that "the Federalists have retired into the judiciary as a stronghold . . . and from that battery all the works of Republicanism are to be beaten down and erased."

Thus when Jefferson heard in May 1803, of a charge that Justice Samuel Chase had given to a grand jury in Baltimore denouncing some of the Republican policies, he quickly penned a letter to one of the Republican leaders in the House of Representatives, Joseph Nicholson:

> Ought this seditious and official act on the principles of our Constitution, and on the proceedings of a State, to go unpunished? And to whom so pointedly as yourself will the public look for the necessary measures? I ask these questions for your consideration, for myself it is better that I should not interfere.

The House of Representatives first investigated possible charges against Chase, and then voted to impeach him. The articles of impeachment included not merely Chase's charge to the Baltimore grand jury but also accusations that in 1800 he had shown a high degree of partiality in presiding over the respective trials of John Fries in Philadelphia, and of James Callender in Richmond.

Fries had been the leader of an uprising called Fries's Rebellion, in which farmers in northeastern Pennsylvania had risen up against federal tax assessors and prevented them from carrying out their duties. Today, Fries would probably be charged with obstruction of justice, but then he was charged with treason, tried before Chase, and sentenced to hang. John Adams, to his great credit, and against the unanimous advice of his cabinet, pardoned Fries.



Samuel Chase

James Callender was tried in Richmond under the hated Sedition Act of 1798. He was indicted for publishing a book entitled *The Prospect Before Us*, in which it was said that he brought President Adams into disrepute by accusing him of being a monarchist and a toady to British interests.

When Chase's trial before the Senate opened on February 4, 1805, in the raw new capital of Washington, D.C., interest naturally focused on the principals in the forthcoming drama. The vice president of the United States and presiding officer of the Senate was Aaron Burr. Burr was a small, dapper man with piercing black eyes and an elegant bearing that belied the fact that he himself was a fugitive from justice. During the preceding summer, in Weehawken, New Jersey, Burr had killed Alexander Hamilton in a duel. Indictments against him for murder in New Jersey and a lesser offense in New York were outstanding, leading one wag to remark that although in most courts the murderer was arraigned before the judge, in this court the judge was arraigned before the murderer!

It had been left to Aaron Burr as the presiding officer of the Senate to outfit the chamber in a manner befitting the occasion, and Burr spared nothing to accomplish this objective. On each side of the president's chair at one end of the chamber were two rows of benches with desks, entirely covered with crimson cloth. Here would sit the 34 senators who would pass judgment on Chase: two from each of the 13 original states, and two each from Vermont, Tennessee, Kentucky, and Ohio. All of this was done in order to recreate as nearly possible the appearance of the House of Lords at the time of the impeachment trial of Warren Hastings in England at the end of the 18th century.

Samuel Chase was more than six feet tall and correspondingly broad; his complexion was brownish-red, earning him the nickname of "Old Bacon Face." He was hearty, gruff, and sarcastic; one would rather have him as a dinner companion than as a judge in one's case.

Chase had had a distinguished and successful career at the bar, and in 1791 became chief judge of the Maryland General Court. In 1796 George Washington appointed him to the Supreme Court of the United States. His legal ability was recognized by all, but his impetuous nature made him something of a stormy petrel. Joseph Story described him as the "living image" of Samuel Johnson, "in person, in man-

ners, in unwieldy strength, and severity of reproof, in real tenderness of heart; and above all in intellect." One of the federal district judges with whom Chase sat had a more negative reaction:

> Of all others, I like the least to be coupled with him. I never sat with him without pain, as he was forever getting into some intemperate and unnecessary squabble. If I am to be immolated, let it be with some other victim or for my own sins.

Chase's principal counsel was his friend Luther Martin. One of the great lawyers in American history, Martin was also one of the great iconoclasts of the American bar. He was the first attorney general of Maryland, serving in that office for over 20 years. He was a member of the Continental Congress, member of the Constitutional Convention, and was for a while a state judge in Maryland. He had a weakness for the bottle, but at least in the short run intoxication did not seem to impair his performance in court. He was described by the American historian Henry Adams as "the rollicking, witty, audacious Attorney General of Maryland, . . . drunken, generous, slovenly, grand; bull-dog of Federalism, . . . the notorious reprobate genius."

The last of the *rarae aves* in the cast of characters that assembled for the trial of Samuel Chase was the principal manager for the House of Representatives, John Randolph of Roanoke. He had been elected to Congress from his Virginia district while still in his twenties, and became in effect the administration's leader in the House of Representatives after the Republican victory of 1800. William Plumer described Randolph, not yet 32 at the time of the Chase trial, as a "pale, meagre, ghostly man" who had "the appearance of a beardless boy more than a full grown man." The epitome of the southern tobacco planter, he patrolled the House of Representatives in boots and spurs with a whip in hand.

The presentation of evidence before the Senate took 10 full days, and more than 50 witnesses testified. The charges against Chase with respect to the Fries trial did not, judged from the perspective of history, amount to much. The charges against him in connection with the Callender trial were a mishmash of minor claims of error together with serious charges of bias and partisanship. In Chase's charge to the Baltimore grand jury, he had criticized the repeal of the Judiciary Act of 1801 and also those pending amendments to the Maryland Constitution that would have granted universal male suffrage without property qualifications.

The closing arguments to the Senate began on February 20 and lasted several days. On March 1, the Senate convened to vote on the counts against Chase; Senator Uriah Tracy of Connecticut was brought into the chamber on a stretcher to cast his vote.

Since the names of the senators were called individually on each of the eight counts, the roll call went slowly. At this time there were 25 Republicans and nine Federalists in the Senate, and it was clear that if the senators voted along party lines, the necessary two-thirds vote to convict Chase could be had.

The first roll call was on the charges growing out of the Fries trial, and on this count the vote was 16 to convict, and 18 to acquit. All nine Federalist Senators voted to acquit, and they were joined by nine of the 25 Republicans. On the next series of counts, growing out of the Callender trial, there was a majority of 18 to 16 to convict, but the two-thirds rule was not satisfied. The final vote was on the charge to the Baltimore grand jury, and on this count the Republicans came the closest to success: 19 Senators voted to convict, and 15 voted to acquit, still not a two-thirds majority.

The significance of the outcome of the Chase trial cannot be overstated. Although the Republicans had expounded grandiose theories about impeachment being a method by which the judiciary could be brought into line with prevailing political views, the case against Chase was tried on a basis of specific allegations of judicial misconduct. Nearly every act charged against him had been performed in the discharge of his judicial office. His behavior during the Callender trial was a good deal worse than most historians seem to realize, and the refusal of six of the Republican Senators to vote to convict even on this count surely cannot have been intended to condone Chase's acts. Instead it represented a

judgment that impeachment should not be used to remove a judge for conduct in the exercise of his judicial duties. The political precedent set by Chase's acquittal has governed the use of impeachment to remove federal judges from that day to this. But the precedent would be sharply tested only two years after the Chase trial.

Presiding over the Chase trial in the Senate was Aaron Burr's last official act as vice president. He left office on March 4, 1805, and rode off into what was then the western wilderness: the Ohio and Mississippi Valleys. Historians have never completely agreed on what he was up to in the next two years, but it appears that he was up to no good. In the fall of 1806, President Jefferson issued a proclamation warning Americans in this part of the new nation against a conspiracy to cause the states beyond the Appalachians—Tennessee, Kentucky, Ohio—to secede from the Union, or to mount an armed expedition against Spain, which then owned what was called Spanish Florida. Pressed by Congress for information as to the leadership of the conspiracy, Jefferson in January 1807 declared that Aaron Burr was the leader and that "his guilt was placed beyond question."

Burr, then at a place in Mississippi territory near Baton Rouge, Louisiana, sought to flee in disguise but was apprehended and taken to Richmond, Virginia, for trial before Chief Justice John Marshall. Marshall was sitting, as did members of the Supreme Court at the time, as a trial judge. The grand jury in Richmond indicted Burr for treason (a capital offense) and also for a high misdemeanor. But Article III of the Constitution contains very specific limitations on the method by which the government can charge and convict for treason. Treason consists only of levying war against the United States or of adhering to its enemies. Since the United States was not at war at the time, the government had to show that Burr had "levied war" against the United States. The Constitution also contains an additional evidentiary safeguard: For conviction of treason, there must be two witnesses to the same "overt act" of the defendant.

All of these provisions were laudable protections against the violation of rights, but if the judge trying the case had proved to be a mere minion of the chief executive, the accused would have stood little chance of a fair trial. In this instance, Thomas Jefferson, the chief executive of the United States, had announced that Burr was guilty. Fortunately, John Marshall was anything but a minion of Thomas Jefferson, although like most prominent Virginians of that day they were distant relatives. Marshall had come from the Federalist Party—the opposite side of the political fence from Jefferson—and he and Jefferson had a deep dislike for each other.

Sifting through the evidence offered by the government at Burr's trial, Marshall ruled in effect that the government had not proved an overt act on the part of Burr, and the jury acquitted him on the charge of treason. Marshall went on to rule that Burr should be held to answer on a charge of organizing an expedition against Spain—a mere misdemeanor—but Burr was never brought to trial on the charge. Thomas Jefferson was bitterly disappointed with the result of the Burr trial and in one of his typically ambiguous messages to Congress suggested the possibility of some sort of action against John Marshall. But Congress very sensibly let the matter lie.

This bit of history shows, I think, as no amount of argument can, that a constitution's impressive catalogue of individual rights or limitations on government power is not enough. It took an independent federal judiciary, fought for at the time of the trials of Samuel Chase and Aaron Burr nearly 200 years ago, to make the principles of the Bill of Rights the living reality that they are today.