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Truth and roses have thorns about them.

— *Unknown*

FUTURE OF FREEDOM

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Separating Charity and Health Care from the State

by *Jacob G. Hornberger*



One of the most remarkable achievements of our American ancestors was enshrined in the First Amendment — the separation of church and state. Reflecting the notion that religious liberty was one of the natural, God-given rights to which Thomas Jefferson had referred in the Declaration of Independence, the First Amendment expressly prohibited Congress (and implicitly the entire federal government) from supporting, establishing, regulating, or interfering with religious activity.

Later, the Fourteenth Amendment was interpreted to apply the First Amendment's separation principle to the states, which means that there is also now a constitutionally

required separation of church and state at the state level. Thus, if any state or local government supports, establishes, regulates, or interferes with religious activity, people can sue in federal court and secure an injunction against the state.

It didn't have to be that way. When the American people called the federal government into existence, they could have authorized the federal government to involve itself in religious activity and then relied on elected or appointed people to run the federal church programs or regulate religion in a sound and expeditious manner.

For example, if the Constitution had authorized it, there could have been federal churches, along with compulsory church-attendance laws for all the children in the nation. There could have been subsidies to churches. Or church vouchers for the poor to enable them to attend churches that would be constructed by the rich.

But the American people at the nation's founding would have nothing to do with any of that. Rather than have a state churching system, which they knew would have inevitably produced perpetual conflict, discord, corruption, and crises, they decided to think at a higher level — toward a complete prohibi-

tion on government involvement in religious activity.

Critics could have raised objections to the idea of separating church and state: “Where will the poor go to church if the government isn’t building churches? What if everyone decides not to go to church? What if no one donates any money to churches? How will they survive? How will the ministers get paid? What will happen to moral and religious values?”

The separation of church and state has long been considered a bedrock of freedom in America.

Of course, most Americans throughout U.S. history have considered the separation of church and state to be one of the finest gifts that those early Americans bequeathed to succeeding generations of Americans. Religious liberty — that is, the separation of church and state — has long been considered a bedrock of freedom in America.

I submit that that is precisely what Americans living today should consider doing for succeeding generations — thinking at a higher level and bequeathing a grand gift of freedom to them. Rather than remain mired in the incessant and never-ending debate over how to

reform the welfare-state way of life in which we have been born and raised or over how to get “better people” into public office to resolve the never-ending conflict, discord, corruption, and crises that have come with the welfare state, Americans of today should think at a higher level, just as our ancestors did, and bequeath to succeeding generations the same type of gift that our ancestors bequeathed to us: the separation of charity and the state and the separation of health care and the state, both of which could be modeled on the First Amendment’s separation of church and state.

Separating charity and the state

I propose the following amendment to the U.S. Constitution: “No law shall be enacted by either the federal government or the state governments respecting the establishment, support, or regulation of charity, or abridging the free exercise thereof.”

Such a constitutional amendment would mean that both the federal government and the state governments would be prohibited from involving themselves in any charitable activity.

Such an amendment would constitute a revolutionary change in

the nature of our political and economic system because it would necessarily mean the end of all welfare-state programs, including Social Security.

The welfare state is founded on the concept of coerced or mandatory charity. Everyone's income becomes subject to the majority vote of people's elected representatives in Congress. The members of Congress enact laws that take money from people, mostly in the form of taxation on income, and then give it to seniors, the poor, farmers, corporations, foreign regimes, and many others.

The welfare state is founded on the concept of coerced or mandatory charity.

The notion is that welfare-state programs reflect the goodness and compassion of the American people. The members of Congress are considered good and caring people because they enact the laws. The same for the president and his welfare-state bureaucracies, who administer the welfare. The same for federal judges, who uphold the constitutionality of the welfare-state programs. The same for taxpayers, who send a portion of their hard-earned money to the Treasury. The same for the voters, who elect the

officials who bring the programs into fruition. Indeed, the same for all the American people, who are citizens in a country that has seen fit to establish a system of mandatory charity.

But important questions naturally arise: Why should people be forced to be good and caring? Why should money be forcibly taken from them and given to others? Why shouldn't people be free to decide for themselves what to do with their own money? Given that we don't force people to go to church, why should we force them to share their money with others? Isn't what a person does with his own money as much a natural, God-given right as what he chooses to do with respect to religious activity?

Critics respond: If people weren't forced to donate money to others, no one (except possibly the critic) would donate to worthy causes. The poor and the sick, they say, would be dying in the streets from starvation and illness. There would be no hospitals, schools, museums, concert halls, or charitable organizations because no one would be willing to donate to them.

Is it possible that in the absence of coerced charity everyone would be unwilling to help others in need? Of course. Indeed, it's even possible

that everyone who voluntarily donates to churches today could suddenly stop doing so, which would mean that most of the churches would have to shut down.

Surely tens of millions of people would retain their sense of care and compassion in the absence of government force.

But what is the likelihood that those things would happen? I would argue that it's nil, especially given the fact that there are millions of Americans who believe in the idea of a welfare state. Their concern for the less fortunate in society would not suddenly disappear simply because the government would lack the power to force them and others in society to care for others.

Moreover, if we consider the number of critics who say, "I would help but no one else would," surely that would add up to tens of millions of people who would retain their sense of care and compassion in the absence of government force.

However, even if people suddenly became selfish, uncaring, and self-centered once the welfare state was dismantled, the fact is that free will and freedom of choice necessarily entail the right to make the so-called wrong choice. When peo-

ple are forced to make what is considered by the government, the majority, or anyone else to be the right choice, then how can they truly be considered free?

The basic problem is that because Americans of today have been born and raised in a welfare state, they cannot imagine life without coerced charity. Many welfare recipients have become so dependent on governmental largess that they have convinced themselves that they would die without it. The idea of separating charity and state absolutely frightens many Americans to death.

The best example of this phenomenon is what may be called the crown jewel of the welfare state, Social Security, which is a classic example of coerced charity. Money is taken from the young and productive and given to seniors. The idea is that Social Security reflects the fundamental goodness and compassion of the American people. At the same time, people are ingrained with the notion that without Social Security, seniors would be dying in the streets in droves.

Many seniors have convinced themselves that Social Security is really a retirement program rather than a welfare program. Since they were forced to pay FICA taxes dur-

ing their working years, they believe that they are simply getting their own money back with this welfare-state program.

Of course, that is totally false. Social Security is no different from any other welfare-state program, including food stamps, which many seniors find objectionable. From the very beginning, Social Security was established as a welfare program. The fact that people are forced to fund the program through some sort of special tax on their income does not affect the nature of the program. It remains a welfare program even though people are being forced to pay FICA taxes to fund it.

From the very beginning, Social Security was established as a welfare program.

One of the most fascinating aspects of this is that nearly everyone in the United States, including many seniors, knows the tremendous financial difficulties that young people today are experiencing. They can't buy homes. They can't start families. They can't save any money. Many of them are living at home or with roommates in their late 20s and even into their 30s.

One of the primary reasons for that is the enormous amount of

money that is taken out of their income to fund welfare-state programs, especially Social Security, which, as the welfare-state's crown jewel, is the most expensive welfare program of them all.

Many seniors steadfastly maintain their support for Social Security, notwithstanding the horrible things it is doing to the younger generations. Some Social Security recipients even have plenty of money that they have accumulated over their lifetime. Though not needing Social Security, they maintain their support for the program, notwithstanding the horrible tax burden on young people.

Would seniors be dying in the streets if Social Security were suddenly abolished? Nonsense!

Would some seniors have to go back to work? Undoubtedly, but that's not necessarily a bad thing. In fact, recently the *New York Times* published an article about women in their 60s and 70s who were willingly going back to work even though they didn't have to. Their reason? They wanted to feel like they were in the mainstream of life, interacting with others, rather than, I suppose, staying at home with nothing to do.

What about those seniors who, because of health problems, could

not work and who lacked the resources to survive? That's where voluntary charity comes into play. Private individuals and charitable organizations, including children honoring their parents on a voluntary basis by helping them out, would have to step up to help out those who are truly in need.

And isn't that what charity and compassion are ultimately all about — the choice that comes from the willing heart of the individual rather than through the mandatory apparatus of an IRS-enforced income tax and bureaucratic welfare system?

The idea of separating charity and the state necessarily requires a radical change in thinking among the American people, one that entails a restoration of faith in freedom and free will, as well as an understanding that freedom of choice necessarily entails the right to make choices, right or wrong, when it comes to charity.

Separating health care and the state

I also propose the following amendment to the U.S. Constitution: "No law shall be enacted by either the federal government or the state governments respecting the establishment, support, or regulation of health care or abridging the free exercise thereof."

Such an amendment would necessarily entail a separation of health care and the state, just as our ancestors separated church and state. That would mean an end to all governmental involvement in health care.

With a totally free market in health care, people would be free to handle their own health-care decisions.

Medicare, Medicaid, and Obama-care? The amendment would automatically abolish them. With a totally free market in health care, people would be free to handle their own health-care decisions.

What about the longtime health-care crisis, which entails ever-increasing health-care costs that threaten bankruptcy for people? The health-care crisis that has besieged Americans for so long is rooted in Medicare and Medicaid, the two welfare-state health-care programs that were adopted in the 1960s. Prior to the enactment of Medicare and Medicaid, the United States had the finest health-care system in history. Health-care costs were reasonably priced. To insure against a major illness, people would buy an insurance policy for catastrophic-type illnesses.

What about the poor? Doctors and hospitals provided their services to the poor for free, especially since they were earning large amounts of money from the wealthy and the middle class.

I grew up in Laredo, Texas, which the Census Bureau in the 1950s said was the poorest city in the United States. Every day, the doctors' offices in Laredo were filled, mostly with poor people. Not one doctor ever turned away any person for inability to pay. They treated them all, even knowing that they would never collect from many of them. Nonetheless, the doctors were among the wealthiest people in town from the money they were receiving from people who could pay.

Today, there is no Medicare or Medicaid program for dental work for seniors or the poor. Several years ago, my dentist told me that he and other dentists entered into an arrangement by which they would treat the poor for free one day a week on a rotating basis. It was entirely a voluntary arrangement. No government coercion whatsoever.

That is undoubtedly what would happen if Medicare, Medicaid, and Obamacare were abolished. These socialistic programs succeeded in

destroying the best health-care system in history. And the crisis in health care is only going to get worse, as long as the American people choose to keep those welfare-state programs in existence.

On the supply side of health-care, state governments have long maintained a health-care racket in favor of doctors and other health-care providers in the form of occupational-licensure laws. Such laws limit the provision of health care to people who have received licenses from the state. No license, no providing of health care.

Prior to Medicare and Medicaid, the United States had the finest health-care system in history.

An artificially limited supply of doctors and other health-care providers necessarily means higher incomes for those who have been licensed by the state. It also means that people who choose to secure alternative methods of health care are precluded from doing so.

Why shouldn't people be free to get any type of health care they want? Why shouldn't they be free to provide any type of health care they want? Why shouldn't such decisions be left to consumers and suppliers rather than the government?

Critics say, “I don’t want a quack to be doing brain surgery on me.” The response to that criticism is: Then don’t. Under a free-market health-care system, no one is forced to undergo brain surgery at the hands of a quack. Instead, people are free to get brain surgery and any other type of health care they want from whomever they want, including competent brain surgeons.

A separation of health care and the state would also entail the end of all insurance regulation.

In a free-market health-care system, countless suppliers and providers would be competing in the provision of health-care services, which would tend to drive health-care prices downward. At the same time, consumers would be free to select which ones they believed were the best. That would necessarily entail research, referrals from friends and doctors, and reliance on private certifying agencies, including the American Medical Association and magazines listing the “Top 50 Doctors.”

As scary as that might sound to some people, it’s really not much different from what goes on today. It’s highly unlikely that people rely solely on the fact that a doctor has a

medical license in choosing to seek his services. Usually, they rely on recommendations from their friends, other doctors, and research they conduct, especially on the Internet.

A separation of health care and the state would also entail the end of all insurance regulation, thereby enabling insurance companies to freely provide services across state lines without having to concern themselves with the burden of complying with the detailed regulations of each state. Of course, consumers would bear the responsibility of determining which insurance companies were sound and which ones were not.

A separation of health care and the state would not only restore what was once the finest health-care system in the world, it would also be a giant step in the restoration of a free society.

To those who might assert that the ideas of separating charity and the state, and health care and the state are impractical and wouldn’t work, I would remind them of the United States of America, a country in which there was an absence of Social Security, Medicare, Medicaid, medical licensure, and other federal programs entailing mandatory charity and government in-

volvement in health care for more than a century.

In fact, that is part of what our American ancestors celebrated as freedom for more than 100 years, just as they celebrated the separation of church and state as a part of freedom. The result was the freest, most prosperous, and most charitable nation in history. What's impractical and unworkable about that?

Jacob Hornberger is founder and president of The Future of Freedom Foundation.

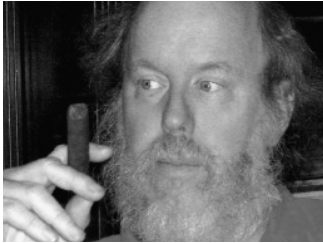
NEXT MONTH:
**“The Worst Mistake in
U.S. History”**
by Jacob G. Hornberger

Good actions ennoble us, and we are the sons of our own deeds.

— Miguel de Cervantes

Anti-War Awakening on a Bus Trip from Baltimore

by James Bovard



In the summer of 1975, I took off hitchhiking from the mountains of southwest Virginia to visit a college girlfriend in New England. Less than 300 miles into the trip, my thumb lost whatever magic it once possessed. After striking out for six hours on an Interstate ramp in Hagerstown, Maryland, I hoofed to the nearest Trailways bus station and bought a ticket to Connecticut.

Seventy-five miles later, the first bus I took expelled all passengers in the Trailways station in Charm City, USA — Baltimore, Maryland. The clientele there were not like the hipsters who ride MegaBus or Vamoose nowadays. Instead, most folks in the waiting room were purt'-near-down-and-out types who had

somehow scraped together enough change for a bus ticket. On the other hand, with my scruffy red beard and battered railroad engineer cap, I could not have passed for a Brooks Brother model.

I was 18, and my philosophical pretensions were at high tide as I surveyed the desolate scene. I pulled out my spiral notebook and jotted in my journal that cities are “a mental wasteland” where “eyes are strictly avoided.”

It never occurred to me that judging all metropolitan life on the basis of one dingy bus depot was not the fairest test of all. And Charm City was not quite representative of urban America. A few years earlier, John Waters’s film *Pink Flamingos* had luridly portrayed Baltimoreans competing to win the title of “Filthiest Person Alive.” Baltimore was in the third decade of its decline, a plummet greatly accelerated by the riots of the late 1960s.

Since my soul was untainted by urban blight, I was not aloof like almost everybody else there. I soon had a guy with a brown bag and a bottle sitting next to me telling me his life story. He offered me a swig from the bag, but I declined, obeying the old maxim to never drink what I couldn’t see. Other people in the bus station shunned this guy;

perhaps they were prejudiced against drunks who sporadically sang loudly to themselves.

Bobie

His name — as he printed it in my notebook — was “Bobie.” I didn’t quibble with his spelling, or with the four different names he called me over the next few hours. (He sat next to me on the bus ride to New York City.) He was a forty-ish, gaunt white guy with sunken cheeks and tousled hair. Though he was haggard, he clearly had had a solid build in earlier decades. The Baltimore mailing address he wrote down matched that of an alcohol detox center.

He was an Army veteran who talked of being pinned down for weeks in Korea after the North Korean Army launched a surprise attack in 1950 that threw American foreign policy into chaos. Bobie finally got respite on that campaign after Gen. Douglas MacArthur carried out a massive landing at Inchon, outflanking the North Korean army. He did not say much else about the Korean War — which might have seemed like a thousand years ago to him (and to most contemporary Americans).

But it was in Vietnam where Bobie’s soul got shredded. He was

on patrol one day — part of the Johnson administration’s strategy to use U.S. troops as bait to flush out the Viet Cong and North Vietnamese regulars into firefights. Bobie said he saw a young Vietnamese girl standing nearby knee-deep in a river. He feared she had a grenade behind her back so he cut her down with his M-16. He wept uncontrollably after he and his buddies searched the scrawny ten-year-old’s corpse and discovered she was unarmed. That girl achieved eternal life in Bobie’s nightmares.

The most decorated officer in the army declared, “Vietnam was an atrocity from the get-go.... There were hundreds of My Lais.”

He said that such incidents were commonplace in Vietnam and that his own actions “make Calley look like a Boy Scout.” (Lt. William Calley had recently been convicted for massacring Vietnamese civilians at My Lai.) I had no way to verify Bobie’s statements, but it was not like people received prizes for confessing to war crimes in bus stations. Almost 30 years later, David Hackworth, a retired colonel and the most decorated officer in the Army, declared, “Vietnam was an atrocity from the get-go.... There were hun-

dreds of My Lais. You got your card punched by the numbers of bodies you counted.” American soldiers faced more legal perils for reporting atrocities than for committing them. Rank-and-file whistleblowers would be threatened with criminal charges if they tried to inform higher-ups about a massacre or other abuses.

Riding with Bobie was the first time I saw first-hand how someone could be ravaged by a war I had once supported.

Bobie spoke as if every waking hour was a supreme torment that made him wish he was dead. His mind was probably fairly sharp until he boozed his brain to obliteration. He passed out a couple times during the trip to New York, but he didn't vomit or die, so he was tolerable company.

The bus finally arrived in Manhattan's Port Authority bus terminal. Back then, the Port Authority was a dumping ground for all the maggots on the East Coast. Or maybe they weren't maggots — maybe they were only wastrels. It seemed fully stocked with beggars, muggers, and casting directors for plotless porn movies. Spending time there gave me new respect for Baltimore.

Bobie was wobblier in New York than in Baltimore — the second pint of whiskey he chugged on the ride did nothing to improve his gait. He had told me he was heading for a Veterans Administration treatment center in Albany so I tried to help him find his connection. Eventually, I had to bail to catch a bus to Connecticut. The last I saw Bobie, he was riding up an escalator, slump-shouldered and looking utterly bewildered and forlorn.

Tales of war

I had always been intrigued by war stories from combat veterans. My first girlfriend's father was one of the few American survivors of the Malmedy massacre carried out by S.S. troops during the 1944 Battle of the Bulge — the best-known clash after D-Day. When I was 16, I worked one summer on a road crew for the Virginia Highway Department. In one backwater of the county, an aged World War One veteran would drop in and regale us with stories from his time in France almost 60 years before. The older guys on the crew warned not to put much credence in anything the geezer said, but listening to his tales was better than working. Few of the American veterans of that war experienced the long-term trench war-

fare that permanently traumatized many British, French, and German troops.

But riding with Bobie was the first time I saw first-hand how someone could be ravaged by a war I had once supported. In 1968, I had been interviewed at Boy Scout Council headquarters in a nearby town and was asked, “What do you think of the Vietnam situation?” Like almost any other 12-year-old Scout, I favored taking a stand in Vietnam so that all of Southeast Asia did not fall under the sway of godless communists. The following month, our family was returning from a visit to New Jersey when my father drove past a massive anti-war protest in downtown Washington on the day before Richard Nixon’s first inauguration. I was mesmerized by the endless columns of folks carrying anti-war and anti-Nixon placards, doing their best to yank in the reins on a war machine.

My enthusiasm for the Vietnam War waned as I entered high school and as war veterans began speaking out publicly about the travesty. In 1973, the Nixon administration and Congress ended military conscription — lucky timing, since I turned 18 the following year. Nixon at that point was being exposed as a pathological liar as his administration en-

tered a Watergate death spiral. By the time he resigned, I had nothing but contempt for him.

I don’t know exactly when Bobie shot that girl in Vietnam, but both Lyndon Johnson and Nixon did all they could to cover up civilian atrocities in that war. Johnson complained in March 1967, “Any civilian casualties that result from our operations are inadvertent, in stark contrast to the calculated Vietcong policy of systematic terror.... Yet the deeds of the Vietcong go largely unnoted in the public debate. It is this moral double book-keeping which makes us get sometimes very weary of our critics.”

Lyndon Johnson and Nixon did all they could to cover up civilian atrocities in that war.

Later that year, in the Central Highlands of South Vietnam, 101st Airborne Division troops attacked to “drive peasants out of villages and into heavily guarded ‘strategic hamlets.’... Villages were bombed, burned and destroyed. As the ground troops swept through, in many cases they gunned down men, women, and children, sometimes mutilating bodies — cutting off ears to wear on necklaces,” the *New York Times* noted in 2003.

The actions were labeled a “pacification” campaign, presumably because dead people are irrevocably pacified.

Civilians

The U.S. government pretended it was not targeting innocent South Vietnamese civilians because everyone in large swaths of the country was guilty by geographic definition. The *Washington Post* reported in 1965 that American pilots “are given a square marked on a map and told to hit every hamlet within the area. The pilots know that they sometimes are bombing women and children.” And policymakers could not be blamed for the deaths of the cartographically damned. Harvard historian Sahr Conway-Lanz noted, “The U.S. armed forces deemed large parcels of the South Vietnamese countryside to be ‘enemy base areas’ or ‘enemy supply areas.’... Within this territory ... any building, vehicle, or person could be targeted.” As the war dragged on, the United States increasingly relied on B-52s to carpet-bomb many areas of South Vietnam.

Nixon, like Johnson before him, publicly insisted that the United States was careful to avoid killing innocent people. In private, Nixon had no qualms. In a 1972 conversa-

tion captured by his White House taping system, Nixon told Henry Kissinger, “The only place where you and I disagree ... is with regard to the bombing. You’re so god-damned concerned about the civilians and I don’t give a damn. I don’t care.” Kissinger replied, ‘I’m concerned about the civilians because I don’t want the world to be mobilized against you as a butcher.’ In a later conversation with Nixon, Kissinger boasted, “Once we’ve broken the war in Vietnam ... then no one will give a damn about war crimes.”

Despite the horrors of Vietnam, politicians did not hesitate to inject American troops into foreign conflicts.

Despite the horrors of Vietnam, politicians did not hesitate to inject American troops into foreign conflicts where it was impossible to distinguish friend from foe — what author Robert Jay Lifton labeled “atrocious-producing situations.” The agony that Bobie went through foreshadowed the horrors experienced by many American soldiers who fought in Iraq and Afghanistan in the following century. I wonder how many of those vets plagued by Post-Traumatic Stress Disorder are

doomed to perpetually ride escalators to VA hospitals that never quite expunge their demons.

James Bovard serves as policy advisor to The Future of Freedom Foundation and is the author of an ebook memoir, Public Policy Hooligan, as well as Attention Deficit Democracy and eight other books.

NEXT MONTH:
**“Janet Reno:
Saint or Tyrant?”**
by James Bovard

A dictator may deem the conduct of the consumers rather foolish. Why should they be so crazy about individually fashioned clothes? He may be right from the point of view of his own value judgments. But the trouble is that valuation is personal, individual, and arbitrary. The democracy of the market consists in the fact that people themselves make their choices and that no dictator has the power to force them to submit to his value judgments.

— Ludwig von Mises

The Irrelevancy of Trump's Cabinet Picks

by *Laurence M. Vance*



President Trump has nominated the members of his cabinet and they have gone through the Senate confirmation process. Democrats, predictably, have been critical of many of his appointments. Conservatives, and some libertarians, have praised some of Trump's appointments for things that they have done and statements they have made that seem to be at odds with the mission of the very department or agency they have been nominated to lead.

Former Texas governor and Republican presidential candidate Rick Perry, whom Trump picked to be the secretary of the Department of Energy, suggested in one of the Republican presidential debates back in 2011 that the department should be eliminated. Former

Oklahoma state senator and attorney general Scott Pruitt, whom Trump tapped to head the Environmental Protection Agency, is known as an ally of the fossil-fuel industry and, along with other Republican attorneys general, sued the agency to stop the implementation of some of its rules. Betsy DeVos, now in charge of the Department of Education, is known as an advocate of charter schools and vouchers.

Many of Trump's cabinet appointments had no experience working in government: Rex Tillerson (State), Steven Mnuchin (Treasury), Wilbur Ross (Commerce), Ben Carson (Housing and Urban Development), and Betsy DeVos (Education). For some, this automatically rendered them unqualified. For others, their lack of government experience was viewed as their best qualification; it would enable them to better shake things up and make needed reforms.

But as "good" or as "bad" as Trump's cabinet picks are, do his cabinet appointments really matter?

The cabinet

The president's cabinet (his advisors) consists of the heads of the fifteen executive-branch departments and eight other high-ranking offi-

cial in the government. Although the term “cabinet” doesn’t appear in the Constitution, “the principal officers” or “heads” of “departments” are mentioned in the first two paragraphs of Article II, Section 2:

1. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

2. He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all

other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Although members of the cabinet serve at the pleasure of the president, they must first be confirmed by the Senate.

Additionally, the Twenty-Fifth Amendment refers to “the principal officers of the executive departments.”

Although members of the cabinet serve at the pleasure of the president, they must first be confirmed by the Senate. They generally have a hearing before an appropriate Senate committee and are then voted on by the committee. (The party with a majority in the Senate always has a majority on Senate committees.) If the nominee is approved by the committee, he is then voted on by the full Senate. A simple majority is all that is required for confirmation. If approved, nominees are sworn in and immediately begin

their duties. Incoming administrations may appoint acting cabinet secretaries from current employees of the departments they will head on an interim basis.

The federal government contains a myriad of agencies, bureaus, corporations, commissions, administrations, authorities, and boards organized under fifteen departments.

No cabinet pick has been rejected by the Senate since one of George H.W. Bush's in 1989. Those likely to be rejected because of something controversial in their background that comes up generally withdraw their name or have their name withdrawn before they are voted on. Former Sen. Tom Daschle, President Obama's nominee for secretary of the Department of Health and Human Services, withdrew his name from nomination after it was discovered that he had not been paying his taxes. Bill Clinton's first two nominees for Attorney General — Zoë Baird and Kimba Wood — both had their names withdrawn from consideration for the post when it came to light that they had hired undocumented immigrants to work as nannies. Linda Chavez, George W. Bush's first

nominee for secretary of Labor, withdrew her name from nomination, as did Donald Trump's first choice for the same position, Andrew Puzder.

The federal government contains a myriad of agencies, bureaus, corporations, commissions, administrations, authorities, and boards organized under fifteen departments. These departments are, along with the dates of their creation: Agriculture (1862), Commerce (1913), Defense (1947), Education (1979), Energy (1977), Health and Human Services (1979), Homeland Security (2002), Housing and Urban Development (1965), Interior (1849), Justice (1870), Labor (1913), State (1789), Transportation (1966), Treasury (1789), and Veterans Affairs (1989). Each department is headed by a secretary or, in the case of the Justice Department, an attorney general. Some of the departments originated with different names, and some were originally combined with others. The Department of Defense began as the Department of War (1789) and the Department of the Navy (1798). The Department of Veterans Affairs was formerly an independent agency. The current U.S. Postal System was the Post Office Department until 1971.

The other cabinet members are the vice president, the White House chief of staff, the administrator of the Environmental Protection Agency, the director of the Office of Management and Budget, the U.S. Trade representative, the U.S. ambassador to the United Nations, the chairman of the Council of Economic Advisers, and the head of the Small Business Administration. Former cabinet-level positions include the director of the Federal Emergency Management Agency, the director of the Central Intelligence Agency, and the director of the Office of National Drug Control Policy.

Departments and agencies

The Department of Agriculture provides “leadership on food, agriculture, natural resources, rural development, nutrition, and related issues.” Its mission is “to provide economic opportunity through innovation, helping rural America to thrive; to promote agriculture production that better nourishes Americans while also helping feed others throughout the world; and to preserve our Nation’s natural resources through conservation, restored forests, improved watersheds, and healthy private working lands.” It operates through “29

agencies and offices with nearly 100,000 employees who serve the American people at more than 4,500 locations across the country and abroad.” Approximately 80 percent of the department’s \$140 billion budget goes to its Food and Nutrition Service, the largest component of which is the food stamp program.

Although its mission is ostensibly to defend the country, “military servicemembers and civilians operate in every time zone and in every climate.”

The Department of Commerce “works with businesses, universities, communities, and the Nation’s workers to promote job creation, economic growth, sustainable development, and improved standards of living for Americans.” It operates through 12 bureaus — including the Census Bureau, the Patent and Trademark Office, and the National Oceanic and Atmospheric Administration — and has “nearly 47,000 employees located in all 50 states and five U.S. territories and more than 86 countries worldwide.”

The Department of Defense includes the Army, Navy, Air Force, Marine Corps, and the Guard and Reserve. Although its mission is os-

tensibly to defend the country, “military servicemembers and civilians operate in every time zone and in every climate,” and “more than 450,000 employees are overseas, both afloat and ashore.”

The Department of Education promotes “student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.” Its 4,400 employees and \$68 billion budget are dedicated to:

- Establishing policies on federal financial aid for education, and distributing as well as monitoring those funds
- Collecting data on America’s schools and disseminating research
- Focusing national attention on key educational issues
- Prohibiting discrimination and ensuring equal access to education

The Department of Energy, with its 17 national labs, works “to ensure America’s security and prosperity by addressing its energy, environmental and nuclear challenges through transformative science and technology solutions.” It maintains the Strategic Petroleum Reserve and, through the National Nuclear Secu-

riety Administration, “maintains and protects the country’s nuclear stockpile and oversees the U.S. Navy’s nuclear propulsion program.”

The Department of Health and Human Services has a mission “to enhance and protect the health and well-being of all Americans.”

The Department of Health and Human Services has a mission “to enhance and protect the health and well-being of all Americans” by “providing for effective health and human services and fostering advances in medicine, public health, and social services.” It administers Medicare, Medicaid, Temporary Assistance for Needy Families (TANF), Head Start, the Food and Drug Administration (FDA), National Institutes of Health (NIH), and the Centers for Disease Control and Prevention (CDC).

The Department of Homeland Security “secures the nation’s air, land, and sea borders to prevent illegal activity while facilitating lawful travel and trade.” It exists “to ensure a homeland that is safe, secure, and resilient against terrorism and other hazards.” Its agencies include the Citizenship and Immigration Services (USCIS), the Customs and Border Protection (CBP), the

Federal Emergency Management Agency (FEMA), the Coast Guard, and the dreaded Transportation Security Administration (TSA).

The Department of Housing and Urban Development has a mission “to create strong, sustainable, inclusive communities and quality affordable homes for all.” It works “to strengthen the housing market to bolster the economy and protect consumers; meet the need for quality affordable rental homes; utilize housing as a platform for improving quality of life; build inclusive and sustainable communities free from discrimination, and transform the way HUD does business.” The department operates numerous subsidized housing programs.

The Department of Interior “protects and manages the Nation’s natural resources and cultural heritage; provides scientific and other information about those resources; and honors its trust responsibilities or special commitments to American Indians, Alaska Natives, and affiliated island communities.” It employs 70,000 people and operates through nine bureaus, including the National Park Service, the Fish and Wildlife Service, and the Bureau of Land Management.

The Department of Justice has a mission “to enforce the law and de-

fend the interests of the United States according to the law; to ensure public safety against threats foreign and domestic; to provide federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans.” Of its many agencies, the three most well-known are the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF); the Federal Bureau of Investigation (FBI); and the Drug Enforcement Agency (DEA).

The department operates numerous subsidized housing programs.

The Department of Labor has a mission “to foster, promote, and develop the welfare of the wage earners, job seekers, and retirees of the United States; improve working conditions; advance opportunities for profitable employment; and assure work-related benefits and rights.” Its many agencies include the Bureau of Labor Statistics, which publishes employment data and tracks the unemployment rate.

The Department of State has as its mission “to shape and sustain a peaceful, prosperous, just, and

democratic world and foster conditions for stability and progress for the benefit of the American people and people everywhere.” Its Office of U.S. Foreign Assistance Resources (F) and U.S. Agency for International Development (USAID) coordinate and provide “foreign assistance resources.”

Treasury’s most notorious operating bureau is the Internal Revenue Service (IRS).

The Department of Transportation serves the United States “by ensuring a fast, safe, efficient, accessible and convenient transportation system that meets our vital national interests and enhances the quality of life of the American people, today and into the future.” The top priorities of its almost 55,000 employees are “to keep the traveling public safe and secure, increase their mobility, and have our transportation system contribute to the nation’s economic growth.” Among its agencies are the National Highway Traffic Safety Administration (NHTSA) and the Federal Aviation Administration (FAA).

The Department of Treasury is tasked with maintaining “a strong economy” and creating economic and job opportunities by “promot-

ing the conditions that enable economic growth and stability at home and abroad, strengthen national security by combating threats and protecting the integrity of the financial system, and manage the U.S. Government’s finances and resources effectively.” Its most notorious operating bureau is the Internal Revenue Service (IRS).

The Department of Veterans Affairs “administers a variety of benefits and services that provide financial and other forms of assistance to Servicemembers, Veterans, their dependents and survivors.” It “operates the nation’s largest integrated health care system” and 135 national cemeteries.

The Environmental Protection Agency (EPA) is tasked with protecting “human health and the environment.” To accomplish its mission, the agency writes and enforces regulations based on laws passed by Congress.

The Small Business Administration (SBA) “helps Americans start, build and grow businesses.” Its mission is “to aid, counsel, assist and protect the interests of small business concerns, to preserve free competitive enterprise and to maintain and strengthen the overall economy of our nation.” It has almost 4,000 employees, district of-

fices in every state, and a budget of more than \$700 million.

The Office of Management and Budget (OMB) “oversees the performance of federal agencies, and administers the federal budget.”

Under the new Constitution adopted in 1789, the federal government began with just three departments.

The Office of the U.S. Trade Representative (USTR) “is responsible for developing and coordinating U.S. international trade, commodity, and direct investment policy, and overseeing negotiations with other countries.”

The Council of Economic Advisers (CEA) advises the president on economic policy, performs economic research, and prepares the annual Economic Report of the President.

In addition, the president appoints deputy and assistant secretaries and under-secretaries within the executive departments, as well as the heads of some department agencies such as the administrators of FEMA, the FDA, and the DEA. The president also nominates the heads of independent government agencies such as the commissioner of the Social Security Administration (SSA);

the administrator of the National Aeronautics and Space Administration (NASA) and the General Services Administration (GSA); the chairman of the Securities and Exchange Commission (SEC), the Federal Communications Commission (FCC), the Federal Trade Commission (FTC), the Nuclear Regulatory Commission (NRC), and the Commodity Futures Trading Commission (CFTC); and the directors of the Consumer Financial Protection Bureau (CFPB), the National Science Foundation (NSF), National Intelligence, the Central Intelligence Agency (CIA), the Office of Personnel Management (OMB), and the Peace Corps.

The problem

Under the new Constitution adopted in 1789, the federal government began with just three departments: State, Treasury, and War. The Departments of the Navy and the Post Office were instituted a few years later. The office of Attorney General was also established in 1789, but there was no Justice Department until 1870.

The Department of State seems logical, especially since the Constitution in Article 2, Section 2 mentions making treaties with, and sending ambassadors to, other

countries. Several paragraphs in Article I, Section 8 of the Constitution seem to justify the existence of the Department of the Treasury. Congress is given the power to “lay and collect Taxes, Duties, Imposts and Excises,” pay debts, “borrow Money on the credit of the United States,” “coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures.” Article I, Section 9 speaks of money’s being “drawn from the Treasury” and the publication “from time to time” of “a regular Statement and Account of the Receipts and Expenditures of all public Money.” The Departments of War and of the Navy (or a Department of Defense) are clearly authorized by Article I, Section 8 of the Constitution. Congress is given the power to “declare War,” “raise and support Armies,” “provide and maintain a Navy,” “make Rules for the Government and Regulation of the land and naval Forces,” and to call forth, organize, arm, and discipline the Militia. The Post Office Department is clearly authorized by the Constitution in Article I, Section 8, where Congress is given the power to “establish Post Offices and post Roads.”

But just because a department is logical and constitutional it doesn’t

follow that everything it does now is defensible. Because the U.S. military fights foreign wars and maintains an empire of troops of bases around the world, the Department of Defense is today more like a Department of Offense or a Department of Empire. The Justice Department is currently tasked with enforcing thousands of federal laws that should not exist, including drug-prohibition laws. The vast majority of federal crimes — if they should be crimes at all — should be state-level crimes, given that only the crimes of counterfeiting, piracy, and treason are mentioned in the Constitution. The Treasury Department collects income taxes through the IRS. The State Department carries out a belligerent and interventionist U.S. foreign policy.

Just because a department is logical and constitutional it doesn’t follow that everything it does now is defensible.

The existence of the other federal departments is, constitutionally, either highly dubious or completely unjustified.

The Department of Transportation can only scarcely justify its existence by appealing to the power of Congress “to establish Post Offices

and post Roads.” The only possible justification for the Department of Commerce is two mentions in Article I of the Constitution (Sections 8 and 9) of Congress’s regulating commerce. Yet, the government “needed” no Commerce Department until after it established the Interstate Commerce Commission in 1887 and began regulating the railroads.

The Department of the Interior can barely be warranted by the Constitution’s mention in Article I, Section 8 of the land that would become the District of Columbia and the power of Congress to exercise authority “over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.” But if the federal government didn’t engage in the clearly unconstitutional activities of providing water and producing hydroelectric power and didn’t own more than 25 percent of all the land in the United States (more than 50 percent in some states), no Interior Department would be needed.

Obviously, the Department of Veterans Affairs would appeal to the existence of millions of military veterans to justify its existence. The

newest federal department — Homeland Security — justifies its existence on the necessity to secure the homeland after the 9/11 attacks. Any legitimate functions of those departments (the second- and third-largest in terms of the number of employees) — which would certainly not include FEMA or the TSA — could be carried out by the Department of Defense, since the military and defense are, in essence, what those departments relate to.

The government “needed” no Commerce Department until after it established the Interstate Commerce Commission in 1887.

The remaining departments of Agriculture, Education, Energy, Health and Human Services, Housing and Urban Development, and Labor cannot be justified in any way by the Constitution. Nowhere in the Constitution is the federal government authorized to have anything to do with agriculture, food, education, energy, health, housing, urban development, or employment. Those departments are the main administrators of the welfare state: Medicare; Medicaid; State Children’s Health Insurance Program (SCHIP); food stamps; farm subsidies; Women, Infants,

and Children (WIC); Section 8 housing vouchers; Temporary Assistance to Needy Families (TANF); public housing; Pell grants; subsidized student loans; Head Start; Healthy Start; community health centers; school breakfast and lunch programs; Commodity Supplemental Food Program (CSFP); Low Income Home Energy Assistance Program (LIHEAP); homeless assistance grants; Community Development Block Grants (CDBG); Elderly Nutrition Program; job training programs; and Special Milk Program (SMP).

The majority of what the federal government does is both unconstitutional and an illegitimate function of government.

Most of the alphabet soup of federal agencies (EPA, SBA, SSA, NASA, SEC, FCC, FTC, CFTC, CFPB, NSF) are likewise unconstitutional and should not exist. The OMB would be much smaller if it had fewer federal agencies to oversee and a smaller federal budget to administer. The CEA is unnecessary because the federal government should not be performing economic research and setting economic policy. The market should be free of government interference.

The USTR is unnecessary because the federal government should not be developing, coordinating, or negotiating international trade. Trade should be free of government interference.

The U.S. government is not just massive; it is unfathomably monstrous. The vast majority of what it does is both unconstitutional and an illegitimate function of government. The head of a department or agency can try to reform, alter the direction of, or change the emphasis of the department or agency, but at the end of the day, he is still the head of a department or agency that either should have substantially less to do or should not exist in the first place. This is why Trump's cabinet appointments are irrelevant. Has any of them expressed the desire to preside over the dismantling of his department? Has any of them said that he would like to lay off thousands of his employees? Has any of them called for Congress to cut his agency's budget? Has any of them explained how the very existence of his department or agency violates the Constitution?

The solution

The federal government is an invasive, parasitical, inefficient, bungling, destructive monstrosity

with no resemblance to the very limited government envisioned by the Founders.

The solution is not to get conservatives, “libertarian-leaning” Republicans, businessmen, intelligent people (Trump has boasted that his cabinet has by far the highest IQ of any cabinet ever assembled), or the “right” people to be in charge of the government’s departments, agencies, bureaus, corporations, commissions, administrations, authorities, boards, and programs. The solution is not to make government more efficient, streamline departments, slow the growth of government, reduce waste, reorganize bureaus, improve government effectiveness, enact a sequester, reform agencies, balance the budget, consolidate agencies, eliminate redundancies, or restructure programs.

The solution is to limit government to its legitimate and constitutional functions by eliminating, abolishing, shutting down, and can-

celing illegitimate and unconstitutional government agencies, programs, and regulations. Whoever heads government agencies, manages government programs, and issues government regulations is irrelevant if he is not charged with dismantling, ending, and rescinding them.

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NEXT MONTH:
“An America
First Foreign Policy”
by *Laurence M. Vance*

Whoever fairly faces the question must admit that the same set of arguments which condemns a national religion also condemns a national system of education. It is hard to pronounce sentence on the one and absolve the other. Does a national church compel some to support a system to which they are opposed? So does a national system of education. Does the one exalt the principle of majorities over the individual conscience? So does the other. Does a national church imply a distrust of the people, of their willingness to make sacrifices, of their capacity to manage their own affairs? So does a national system of education. Does the one chill and repress higher meanings and produce formalism? So does the other.

— *Auberon Herbert*

The Legal Origin of the State Secrets Doctrine

by David D'Amato



In the United States, a citizen may sue the government. It is fortunate that it should be so, because, as libertarians like to point out, government is society's single worst offender. The ability to hold it to account in the courts helps safeguard the rights of the individual, the consistent protection of which is the meaning of a free society. Robust judicial review of government actions is an expression of the idea that no one should be above the law, that ours is a country of laws not men, a principle enshrined in the Declaration of Independence and in the Constitution's three-branch structure. If justice is in fact blind, as we're taught, then she cannot see that a defendant in court is an agent of the state, blazoned with its sym-

bols of power. In practice, though, the eyes of justice are not only open to those symbols but impressed by them, content to acquiesce in government malfeasance. The War on Terror has aggravated the problem of judicial capitulation to an assumptive and autocratic executive branch. Since the events of September 11, the federal courts have been still more susceptible to executive-branch legal arguments and interpretations, giving the government a free hand to violate individual rights. In its prosecution of the baneful War on Terror, the government has leaned heavily on the state secrets privilege, articulated in the Supreme Court's opinion in *United States v. Reynolds*; this case has thus become one of the key legal instruments of injustice in the twenty-first century.

The *Reynolds* story begins at an Air Force facility in southeastern Georgia. In the early 1950s, the Air Force was testing new equipment on a Boeing B-29 bomber when the plane's engine caught on fire, resulting in a crash that killed six of the nine crewmembers on board. The widows of three civilian contractors who died in the crash brought a lawsuit against the federal government and requested that it produce official Air Force accident reports.

The government's first attempt to justify withholding the documents, based on an appeal to Air Force regulations, failed to persuade the trial court. As the Constitution Project's Louis Fisher observes, the authority relied on was a 1789 "housekeeping" statute that merely instructed federal agencies to maintain official records; it neither "authorize[d] the withholding of documents from plaintiffs or the courts," nor empowered the government to unilaterally determine which of its own records were privileged. The court held that the plaintiffs had demonstrated "good cause for production," ordering the government to produce the subject reports. It was the government's response, its subsequent refusal to produce, and the arguments attached thereto, that were the source of the *Reynolds* case's notoriety.

The Third Circuit's decision emphasized the dire separation-of-powers implications of the government's position.

Refusing to hand over the records, the government argued that they were the subject of a special evidentiary privilege, just as, for example, communications between an attorney and his client. Eventually

reaching the Supreme Court and decided in 1953, the case marks a sweeping reformulation of the now-infamous state secrets privilege, so frequently invoked since September 11 to frustrate accountability and undermine the rule of law.

The *Reynolds* decision represented a significant departure from the precedent, redefining what had been a far more modest standard. Several previous cases had held that the privilege, once invoked, did not foreclose further judicial inquiry, and the traditional common-law rule had placed all questions about evidence squarely with the court, not with an interested party. Indeed, it is noteworthy that at the intermediate appeal in *Reynolds*, before the case had reached the Supreme Court, the Third Circuit held that accepting the government's argument would yield a "sweeping privilege" so strong as to be "contrary to a sound public policy."

The Third Circuit's decision emphasized the dire separation-of-powers implications of the government's position, which it said would mean forcing the courts to "abdicate the judicial function" — to allow the federal government to usurp a judge's rightful power. The Supreme Court, of course, fatefully disagreed, satisfied that the govern-

ment could be trusted to police its own claims of privilege. This judgment turned out to be an enormous (and embarrassing) error with far-reaching consequences.

Aware that the files would demonstrate its negligence, the government dishonestly retreated to the state secrets privilege.

When the documents were declassified decades later, they betrayed the government's pretextual appeal to the state secrets privilege. It turned out that the government's statements in the case amounted to a fraud on the court: it withheld the accident reports not because they contained sensitive military secrets, but because they revealed the truth behind the plane crash — that the Air Force had failed to properly maintain the B-29 and knew that it had a faulty engine. Aware that the files would demonstrate its negligence, the government dishonestly retreated to the state secrets privilege. As Fisher notes, the government's brief to the Supreme Court took advantage of slippery language to avoid the pivotal question of whether the withheld reports actually contained sensitive military secrets. By making no representations one way or the other about the

character of the files' contents, the government could later argue that it never actually lied to the court.

Extraordinary rendition

Through the *Reynolds* doctrine, the government became its own judge, exempt from scrutiny and granted license to violate the Constitution and international law with impunity. Such is the peremptory power of kings and emperors, of despots positioned safely beyond the law's reach. More accurately still, their will becomes the law. In its opinion in *Reynolds*, the Court rather unashamedly subordinated the rule of law to the will of U.S. government agents. Since 9/11, the government has wielded this powerful privilege to devastating effect, striking a major blow at the constitutional separation of powers by thwarting the judicial branch in the exercise of its legitimate role. The judiciary has arguably been quite complicit in this, the War on Terror's process of constitutional degeneration. Too often the courts simply take the government's assertions at face value, declining to undertake any independent inquiry, satisfied with the apparently decisive incantation "national security."

The government has called on the state secrets privilege in several

high-profile extraordinary rendition cases. In one such case, decided by the Ninth Circuit in September 2010, the plaintiffs sued Jeppesen Dataplan, Inc., a Boeing subsidiary based in California, alleging that the company assisted the CIA in transporting them to be illegally tortured and imprisoned. Surreptitiously blindfolded, shackled, and shuttled to nightmarish military black sites, the plaintiffs were then interrogated and subjected to a variety of torments, both physical and psychological. One plaintiff, an Ethiopian man named Binyam Mohamed, was, according to his lawyers at the ACLU, severely beaten and frequently drugged, his attackers breaking several of his bones, cutting his genitalia with a scalpel, threatening him with rape, and detaining him in a room with open sewage. Mohamed lived in this hell for a year and a half.

Another of the five plaintiffs, Abou Elkassim Britel, an Italian citizen rendered to Morocco, was bound by his hands and feet, hung from the walls or the ceiling, and interrogated for hours on end while his torturers threatened his family members with rape. Britel's interrogators also used "bottle torture," whereby a bottle was forced into his anus.

This illegal process of arrest and removal to foreign countries in which torture is carried out is known as extraordinary rendition; the torture itself is no less euphemistically termed "enhanced interrogation." The U.S. government has also employed rendition to secretly kidnap foreign nationals in other countries so that they may be subjected to the jurisdiction of American courts, usually after they have already been tortured abroad. Since 9/11, extraordinary rendition has become a central feature of the United States's anti-terror repertoire, despite the Obama administration's pretense of opposition to torture.

The Jeppesen Dataplan case represents the alarming lawlessness that is the practical result of these ambiguities.

Extraordinary rendition allows the U.S. government to outsource torture at a time when the legal parameters surrounding the prosecution of the War on Terror are in a state of flux. The Jeppesen Dataplan case represents the alarming lawlessness that is the practical result of these ambiguities. The government, intervening in behalf of the defendant, made its formal claim of priv-

ilege through Michael Hayden, erstwhile director of Central Intelligence. Hayden's public declaration contended that virtually any conceivable question of fact that would arise at trial was within the privilege. Litigating the case, Hayden said, "could be expected to cause serious — and in some instances, exceptionally grave — damage to the national security of the United States." The Ninth Circuit, pointing to *Reynolds*, agreed with the government and passed the buck to Congress "to enact remedial legislation ... to address claims like those presented here."

The executive branch no longer considers itself bound by either the elected representatives of Congress or the courts.

In dismissing the case, an almost evenly divided Ninth Circuit, sitting *en banc*, held that "any effort by [the defendant] to defend would unjustifiably risk disclosure of state secrets." So while the Ninth Circuit's opinion in the case stated that invocation of the state secrets privilege should not result in the dismissal of a case *per se*, its judgment shows that as a practical matter the ironclad protection of the privilege will almost certainly preclude liti-

gation. Indeed, the privilege thus defined, it becomes difficult to imagine any military or intelligence matter that would fall outside of its protective ambit.

For the Jeppesen Dataplan plaintiffs, like those in *Reynolds*, an appeal to the nation's highest court was their last hope. But in May 2011, the Supreme Court denied certiorari and, in so doing, denied the five CIA victims a day in court, the mere chance to present their case. "The courts," wrote the ACLU's Susan N. Herman in 2011, "have been failing terribly." Herman noted further that the Supreme Court seems to be interested in civil-liberties lawsuits only when the government has lost in the lower court.

Critics of such expansive interpretations of the state secrets privilege do not necessarily argue that it should be abolished altogether, that it doesn't have its place in protecting sensitive military information. They rather contend that it is the right of the judge presiding over a given matter to make that determination on the basis of a careful and independent review of the documents in question. For the government to decide for itself is a perverse deformation of a structure that contemplates a separate judicial review of government actions

and arguments. It is the independence of the third branch that is supposed to impart impartiality to it. Of course, the detached objectivity with which we credit the court system is a fiction insofar as courts are themselves government bodies. It is clear that the sprawling administrative state that is the executive-branch no longer considers itself bound by either the elected representatives of Congress or the courts. It flouts the law and the authority of the other two branches. And executive-branch power grabs, developing through the twentieth century and propelled by the Bush administration's post-9/11 policies, have persisted in the Obama years. As Hayden said in an interview in 2010, "Obama has been as aggres-

sive as President Bush in defending prerogatives about who he has to inform in Congress for executive covert action."

A free society cannot last where even the possibility of justice is foreclosed, where a citizen is prevented from looking to the legal system for redress. The state secrets privilege makes a mockery of genuine judicial scrutiny and makes American less safe, not more.

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There is no liberty to men who know not how to govern themselves.

— Henry Ward Beecher

Militarism or Isolationism?

by Stephen Wertheim



Under Donald Trump, American foreign policy is returning, many commentators say, to the isolationism that preceded World War II. This line of interpretation (and often attack) emerged during the election: While Hillary Clinton warned that her opponent would “tear up our alliances,” an array of experts supplied such fears with a historical pedigree. As Council on Foreign Relations president Richard Haass put it, Trump stood for a “new isolationism,” a revival of the 1930s dream of “turning away from global engagement.”

The problem is, Trump isn’t an isolationist. He is a militarist, something far worse. And calling Trump an isolationist isn’t an effective critique.

The term “isolationism” was coined in the 1930s to caricature Americans who wanted to stay strictly neutral in the looming war. They scarcely sought to “disconnect from the world,” as Vox’s Zack Beauchamp recently wrote. In fact, most favored peaceful forms of overseas involvement, such as trade, and insisted on defending the Americas from foreign intervention — no small feat. What united them was their opposition to entering the Second World War after the devastation of the First. Judging the United States capable of repelling any outside invasion, they wanted to steer clear of armed entanglement in Europe and Asia. To breach that tradition would embroil Americans in “perpetual war for perpetual peace,” in the words of historian and participant Charles Beard.

The first America Firsters, then, were anti-war more than anti-Semitic or pro-fascist, strains that recent critics of Trump overemphasize. True, the group’s spokesman, aviator Charles Lindbergh, railed against “Jewish influence” months before Pearl Harbor. But the diatribe crippled the movement rather than advanced it, and few America Firsters favored the Axis. Rather, it was the anti-war appeal — the notion that involvement in European

conflict was unnecessary for U.S. safety — that attracted millions across the political spectrum, including pacifist-socialist Norman Thomas and future presidents Gerald Ford and John F. Kennedy.

Of course, Pearl Harbor sealed their fate and launched the United States to global preeminence. Ever since, foreign-policy elites have deployed the “isolationist” tag to expel anti-interventionists from the bounds of legitimate debate.

Rather than seeking to withdraw from the world, Trump vows to exploit it.

It’s often an unfair label, but it’s especially nonsensical when it comes to the current commander-in-chief: Trump is no isolationist, whether caricatured or actual. Rather than seeking to withdraw from the world, he vows to exploit it. Far from limiting the area of war, he threatens ruthless violence against globe-spanning adversaries and glorifies martial victory. In short, the president is a militarist.

Scholars define militarism, broadly, as the excessive use and veneration of force for political ends, or even for its own sake, extending at times to full military control of the state. (Trump has ap-

pointed two Marine generals, Jim Mattis and John F. Kelly, to his cabinet.) Militarism, the pioneering historian Alfred Vagts wrote in 1937, promotes values “associated with armies and wars and yet transcending true military purposes.” Militarism can be a policy and an ethos, corrupting the pursuit of rational goals.

A winning brand

Vagts, a former German army officer who fled the Nazis, wrote with his home country in mind. Scholars continue to locate militarism “over there” — in the Kaiser’s Germany, the Third Reich, imperial Japan, and perhaps the Soviet empire. Only occasionally have they attributed militarism to the United States. That charge has been more likely to come from activists. In 1967, for instance, Martin Luther King Jr. decried the “militarism” of his government, ranking it with the evils of racism and poverty. Still, most Americans have seen their country as a force for peace, even when it goes to war.

Trump calls this assumption into question. Start with his baseline view of a world plagued by clashing civilizations and inescapable conflict. Trump rose to power by presenting a horror show of en-

emies, from Mexico to Iran to China to radical Islamic terrorism (and sometimes Islam itself). Not even the European Union escapes Trump's zero-sum squint: He casts it as a German vehicle to "beat the United States on trade," not an effort to secure peace after two world wars. Peace, indeed, seems fragile and anomalous to Trump. "A lot of bad 'dudes' out there!" he summed up in a tweet.

Previous presidents — Theodore Roosevelt, Richard Nixon — have scorned non-Western cultures and accentuated divergent interests among states. But Trump is unique in seeing America as a victim nation, a net global loser that must now fight back. His single most consistent political conviction is that other countries have exploited the United States. In 1987, contemplating a presidential run, he took out a full-page newspaper ad accusing Japan, Saudi Arabia, and other nations of "taking advantage" of American largesse. Last year, when he charged that China was committing "rape" and "theft" against the United States, the main novelty was that he'd updated his nemesis.

Trump's sense of abuse and humiliation is potent. "The world is laughing at us," he endlessly repeats. It's a cry more common to revolu-

tionary states and movements than to the world's sole superpower. Imperial Japan and Nazi Germany did not conquer territory for the thrill of it; their leaders acted out of perceived desperation, believing that they were losing a ruthless competition for power and status.

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Facing a vicious world, Trump promises to turn the tables, not turn his back. He talks of grabbing wealth from other countries, most vividly in his mantra to "take the oil" in Iraq. "Maybe we'll have another chance," he said in a speech at the CIA. Trump may be posturing, but the posture is militaristic. To announce a lust for oil, to chest-thump about torture, to envisage military parades down Pennsylvania Avenue — these do not achieve strategic objectives so much as exalt brute force. "I'm the most militaristic person there is," Trump said in the primaries. Perhaps he was telling the truth.

Trump's cultural militarism bears watching, even if it never translates into foreign policy. Drawing a moral equivalence between

the United States and Vladimir Putin's Russia, Trump rejects America's traditional identity as an exceptional nation shining the light of freedom to the world. What identity does he offer instead? While ignoring the Founding Fathers, he constantly invokes the "old days of General MacArthur and General Patton," the most extreme generals of the mid 20th century. In Trump's imagination, the generals demanded absolute victory, ensuring that "we never lost a war" before Vietnam. Trump's mythologizing recalls the veneration that imperial Germany bestowed upon its army, which had forged the nation by defeating France in 1871. MacArthur and Patton are Trump's new founders.

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And Trump may not be posturing. He may pursue a program of intervention the world over. Tactics could begin with bluster and tariffs. Where they would end is anyone's guess, but Trump's disavowal of nation-building offers little comfort. His predecessors said the same during their presidential campaigns.

Trump will avoid large-scale conflict only if he sets limited objectives and acts prudently.

Thus far, he has signaled the opposite. "Our military dominance must be unquestioned," the White House declared on Day One, and Trump plans to build up America's already supreme military. How will he use it? In his inaugural address, he pledged not only to take on "radical Islamic terrorism" but to "eradicate [it] from the face of the Earth." Last year Trump's chief strategist, Stephen K. Bannon, professed "no doubt" that "we're going to war in the South China Sea in five to ten years" — and that's on top of the "global war against Islamic fascism" that he believes to be in its opening stages.

The anti-Trump resistance may backfire without an adequate understanding of how the president and his voters see the world. When election commentators called Trump an isolationist, they affirmed precisely what made him popular enough to reach the White House: that he rejects the stale platitudes of elites. Worse, they placed him in an American tradition opposed to overseas conflict. It was a winning brand for a war-weary public, and Trump capitalized. He condemned the Iraq War at every

turn and warned that his rivals would start “World War III.”

When critics seem to assail Trump for being too peaceful, for questioning military alliances and hoping to cooperate with Russia, they reinforce his message. They verify that he’s against not only the establishment but costly wars to boot. With spokesmen like those, who needs Kellyanne Conway? Better to call Trump the militarist he

shows every indication of being. That’s a brand he should fear: a peace candidate turned warmonger, a populist outsider serving arms dealers and autocrats.

Stephen Wertheim is a Fellow in History at King’s College, University of Cambridge, and is writing a book on the birth of American world leadership in World War II.

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— Hubert H. Humphrey

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