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*Economically considered, war and revolution are
always bad business.*

— *Ludwig von Mises*

FUTURE OF FREEDOM

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The National Security-State and JFK, Part 2

by *Jacob G. Hornberger*



In 1970 — twenty years after the election of Jacobo Arbenz as president of Guatemala — the Chilean people did what the Guatemalan people had done. They democratically elected a self-proclaimed socialist and communist named Salvador Allende to be president of their country. Since Allende had received only a plurality of votes, the election was thrown into the Chilean congress. However, traditionally the congress had voted to confirm as president the candidate who had the highest vote total in the general election, which was Allende.

Alarm bells immediately went off in Washington, D.C., where the president and the State Department were located, and Virginia, where the Pentagon and the CIA were

based. Allende was immediately viewed as a grave threat to national security, not only because of his socialist economic views but especially owing to his reaching out to the Soviet Union and communist Cuba in a spirit of peace and friendship, just as Arbenz had done.

The notion was that the United States and the rest of the noncommunist world were locked in an intractable war with the Soviet Union and the communist world, one in which the very survival of the United States was at stake. Given the unbridgeable ideological differences between the two countries, U.S. officials were convinced that there could never be peaceful coexistence between the two countries. It was going to be a war to the finish, one in which only one victor would be left standing at the end.

In this war to the death, neutrality of other countries was not considered an option. The U.S. mindset was: You're either with us or you're with the communists.

Immediately after Allende's election in 1970, U.S. officials conspired to prevent him from assuming the Chilean presidency by coming up with a plan that operated on two tracks. One track involved the bribing of Chilean congressmen into voting not to confirm Allende as

president. The other track involved persuading the Chilean national-security establishment to oust Allende in a coup and establish an unelected military dictatorship in his stead.

There were some serious problems with this two-track plan.

One problem was the U.S. Constitution, the document that called the federal government into existence and limited its powers to those enumerated in the Constitution. The Constitution did not contain any enumerated power authorizing U.S. officials to bribe foreign officials or to orchestrate a coup in a foreign country.

That didn't stop U.S. officials, including those in the CIA, which was spearheading the regime-change operation. The position of U.S. officials was that the Constitution was not a suicide pact. That meant that if the nation was going to fall to the communists if U.S. officials didn't break the law, then they had the authority to break the law to save the nation.

That mindset was reflected in a top-secret U.S. government report published in 1954, the same year the CIA-engineered a coup in Guatemala and the same year that the top-secret CIA assassination manual mentioned in Part 1 of this essay was published. The report, known as

“The Doolittle Report,” was a comprehensive study of the operations of the CIA conducted by U.S. Air Force Lt. Gen. James H. Doolittle.

In his report, Doolittle emphasized the dire threat that communism and the Soviet Union supposedly posed to the United States. He wrote, “It is now clear that we are facing an implacable enemy whose avowed objective is world domination by whatever means and at whatever cost. There are no rules in such a game.... If the United States is to survive, long standing concepts of ‘fair play’ must be re-considered.”

Kidnapping plot

This “break the rules” principle was demonstrated not only by the CIA's bribery scheme in Chile but also by a scheme to violently kidnap the commanding general of Chile's armed forces, a man named René Schneider.

A man of personal integrity, Schneider refused to go along with the U.S. plan to prevent Allende from assuming the presidency. His position was quite simple: He had taken an oath to support and defend the Chilean constitution, and he intended to honor that oath. The constitution of Chile, like the Constitution of the United States before

the 25th Amendment was added, provided only two ways to remove a president from office: through the next election or through impeachment. The constitution of Chile, Schneider pointed out, did not authorize a coup as a third way to prevent a person from becoming president or removing a president once he assumed office.

Realizing that a coup to prevent Allende from assuming the presidency was impossible with Schneider as commander of the Chilean armed forces, U.S. officials in Washington and Virginia conspired to have him kidnapped and removed from the scene. The task was placed into the hands of the CIA.

The Constitution did not delegate to U.S. officials the power to kidnap people.

There was obviously a big problem here. Kidnapping is a felony. So is conspiracy to kidnap. Even though the actual felony was to be carried out in Chile, there is no doubt that the conspiracy to kidnap originated in the United States.

Moreover, at the risk of belaboring the obvious, the Constitution did not delegate to U.S. officials the power to kidnap people. In fact, the Fifth Amendment specifically pro-

hibited federal officials from depriving any person of his life or liberty without due process of law.

But this was the new Cold War way of thinking that was described in the top-secret 1954 Doolittle Report. To save the United States from an eventual communist takeover, it was considered permissible, even necessary, for the U.S. government, operating through the national-security establishment, to break the law, even by committing violent felonies against innocent people.

And it's important to remember that Schneider was an entirely innocent person. He wasn't even a communist. He was simply a military man who was doing his duty. But because he was doing his duty, he had to be eliminated: by preventing the coup from going forward, he had supposedly become a threat to U.S. national security.

Of course, it was never really made clear how Chile under Allende posed a threat to the United States. It wasn't as if there was any danger that the Chilean army was going to start marching forward through South America, Central America, and Mexico and then cross the Rio Grande at Brownsville, take over Texas, and then start heading up to conquer Washington. Instead, it was that general

sense, which psychiatrists might have labeled extreme paranoia, that communism and the communists were moving closer and closer to the United States, threatening to ultimately envelop the nation.

Rather than do the kidnapping themselves, CIA officials hired local thugs to do it for them.

Pursuant to the CIA conspiracy to kidnap Schneider, the CIA secretly smuggled two high-powered weapons into the country in a diplomatic pouch, which would seem to make the State Department complicit in the felony. Rather than do the kidnapping themselves, CIA officials hired local thugs to do it for them. While the CIA has long claimed that it wasn't the kidnapping team they had hired but rather another one that ended up doing the kidnapping, the denials are not credible, especially since the CIA has lied about almost everything else relating to the Chilean regime-change operation.

In fact, in sworn testimony to Congress, CIA Director Richard Helms stated unequivocally that the CIA had played no role in the events in Chile leading up to the eventual coup in 1973. It was a direct violation of perjury law. It was another

example of the principle set forth in the Doolittle Report — that sometimes it's necessary to break the law to save the country. Helms obviously thought he would never get caught or, if he was caught, that no one would do anything about it. And neither did any other CIA official, many of whom knew he had committed perjury and remained silent about it.

When it was later discovered that Helms had lied under oath to Congress about the CIA's involvement in Chile, he was given a sweetheart deal that permitted him to plead guilty to a misdemeanor with no jail time and a nominal fine. When he returned to CIA headquarters after his sentencing, CIA personnel gave him a round of applause and passed a hat to collect the money for the fine. In their world, Helms's lies to Congress under oath about the CIA's actions in Chile made him a patriot and a hero.

Schneider was, of course, armed when his vehicle was ambushed by the kidnapping team. Undoubtedly believing that the kidnapers would ultimately kill him, he fought back by firing his sidearm at his attackers. They filled his vehicle with bullets, gravely wounding him. Schneider died a few days later, leaving a wife and two small sons.

Later, the CIA was caught having paid hush money to the kidnapers and purchasing back its high-powered weapons that had been secretly shipped into the country under cover of a diplomatic pouch.

No U.S. officials were prosecuted for the kidnapping of Schneider.

The CIA has always denied that its kidnapping conspiracy included the assassination of Rene Schneider. But of course, the CIA would deny that anyway. After all, the top-secret CIA assassination manual published in 1954 showed that the agency was studying ways to assassinate people while keeping its own role in the assassination secret or, at the very least, difficult to prove. Moreover, as a practical matter, there was no way the CIA and the kidnapers could ever permit Schneider to return to Chilean society after a coup. Thus, it is a virtual certainty that the plan called for the kidnapers to kill Schneider, at which point the CIA, if caught, would feign shock and outrage and deny that murder was part of the plan.

In what U.S. law calls the felony-murder rule, the CIA and the rest of the U.S. government were criminally liable for Schneider's murder even if they intended only to kidnap him. Under the felony-murder

rule, conspirators and participants in felonies are criminally responsible for murders committed in the course of committing the felony.

No U.S. officials were prosecuted for the kidnapping and murder of René Schneider. The episode demonstrated the new order of things in the United States, one that was ultimately confirmed by the U.S. Supreme Court, which, in a series of rulings in subsequent years, effectively immunized U.S. officials from civil liability for illegal actions committed in the name of national security. Operating through the Pentagon, the CIA, and, later, the NSA, U.S. officials were now authorized to do whatever was necessary, no matter how illegal, to protect national security, including kidnapping and assassinating officials of a foreign government, communist and noncommunist alike.

The coup

Schneider's assassination boomeranged on the CIA. The anger generated by the assassination was so overwhelming that the Chilean congress confirmed Allende as president. The bribery scheme in track one of the Chilean regime-change operation had failed.

That didn't stop U.S. officials, however. They became more deter-

mined than ever to remove Allende from office through a military coup, especially after he reached out to the Soviets and the Cubans, as Arbenz had done. It is not difficult to imagine the reaction of the Pentagon and the CIA when Allende hosted Cuba's communist leader, Fidel Castro, as an official guest in Chile.

In the minds of U.S. officials, a nation's constitution is not a suicide pact.

Richard Nixon ordered the CIA to pave the way for preventing Allende from coming to power or for a coup by creating as much economic misery and suffering as possible. His words to the CIA were "Make the economy scream." And that's precisely what the CIA did. Even after Allende's socialist policies had begun sending the economy into a tailspin, the CIA knowingly and intentionally made things worse for the Chilean people. For example, in 1972 it secretly bribed truckers in the country to go on a nationwide strike to prevent food from reaching people all across the country.

Notwithstanding the removal of Schneider from the scene, there was still considerable resistance to a coup within the Chilean military.

The U.S. national-security establishment was finally able to overcome that resistance with one of the most fascinating, important, and revealing arguments in the history of the United States.

What the Pentagon and the CIA told their military-intelligence counterparts in Chile was this: When the president of a country is threatening national security with his policies and actions, it is the solemn duty of the national-security establishment to save the country by removing him from office.

Now, think about that for a minute. It is a truly extraordinary position. The U.S. Constitution certainly does not provide for that type of removal action. Neither did the Chilean constitution. That didn't matter. In the minds of the national-security establishment, a nation's constitution is not a suicide pact. If a president is taking a nation down — if, for example, he is implementing measures that are leading to socialism and communism — or if he is embracing an avowed enemy of the United States — then it becomes the solemn duty of the military-intelligence forces to do what is necessary to save the nation by removing such a president from office. That's the principle that the Pentagon and the CIA were imparting to

their counterparts in the Chilean military and intelligence agencies.

The Chilean coup finally came on September 11, 1973. The national-security branch of the government initiated a military attack on the executive branch of the government. Since Allende refused to surrender, Chilean military officials tried to assassinate him with missiles fired by Chilean Air Force jets at his position in the presidential palace. At the same time, Chilean infantry and armor surrounded Allende's position on the ground and initiated fire on him.

For a while, Allende and some of his aides fought back with guns but it soon became clear that the executive branch of the government was no match for the national-security branch of the government. Allende's aides soon surrendered to the opposing forces and Allende, knowing what might lie in store for him if he were taken captive, apparently committed suicide.

One of the most revealing events that took place after the coup involved two American men, Charles Horman and Frank Teruggi, both of whom were leftists or socialists. Teruggi had openly opposed U.S. involvement in the Vietnam War, something that U.S. officials had noted about him in a

secret file they were maintaining on him back in the United States. Horman had inadvertently discovered U.S. complicity in the coup, something that U.S. officials were steadfastly set on keeping secret. (Recall Helms's testimony to Congress, in which he stated that the CIA had played no role in the events leading up to the coup.)

The U.S. intelligence personnel who conspired to kill Horman and Teruggi got away scot-free.

The new military dictatorship, headed by Gen. Augusto Pinochet, immediately began rounding up socialists, leftists, Allende officials, Allende supporters, and people who had voted for Allende, some 50,000-60,000 people in all. Most of them were brutally tortured, raped, sexually assaulted in the most unbelievably horrific ways, executed, or "disappeared," all with the support of U.S. officials, who immediately began opening up the floodgates of U.S. foreign aid and international credits.

It was during that time that Horman and Teruggi were executed by Pinochet's national-security personnel. Yet, there is no reasonable possibility that Pinochet and his forces did that on their own. After all, the

U.S. government was their partner in the coup. It was the U.S. government that had exhorted them to act to save their country from communism and, as Horman had discovered, was standing by on the day of the coup with offshore naval forces ready to provide support if necessary. The worst thing they would have done to any undesirable American is deport him. Chilean officials would never have killed Horman and Teruggi without receiving a green light from their partner and benefactor, the United States.

And it had to be more than just a green light. The only way that Horman and Teruggi would have been killed by Chilean personnel is if U.S. officials asked them to do the killing for them. Recall, once again, the 1954 top-secret CIA assassination manual, the one in which the CIA was studying how to kill people and how to keep its role in the murder secret.

Before anyone cries “Conspiracy theory,” a secret State Department investigative report later turned up that revealed that “U.S. intelligence” played an undefined role in the murders of Horman and Teruggi. The report recommended further investigation. It is no surprise that that recommendation went nowhere. The U.S. intelligence personnel who conspired to kill Horman and Ter-

uggi got away scot-free. As the Doolittle Report had recommended, the CIA now wielded the omnipotent power to break the law, including laws against kidnapping and murdering American citizens, to save the United States from communism.

We should keep in mind the U.S. national-security’s state’s reason for violently removing Salvador Allende, Jacobo Arbenz, and Rene Schneider from office and for its willingness to kill American citizens, when we later examine the assassination of John F. Kennedy in the context of these Cold War, national-security state regime-change operations.

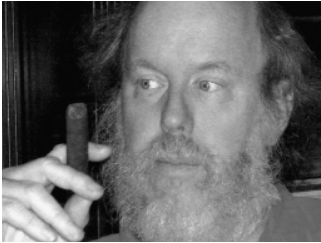
We have examined the CIA’s regime-change operation in Guatemala in 1954 and its regime-change operation in Chile in 1973. Let’s now go to a year between those two operations. Let’s go to 1960, to the CIA’s regime-change operation in Cuba.

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

NEXT MONTH:
“The National-Security State
and JFK, Part 3”
by Jacob G. Hornberger

Will Trump Reduce Federal Spending?

by James Bovard



Donald Trump's first proposed budget took a step towards draining the swamp in Washington. His proposal was the first one since the Reagan era in which a president has sought a wholesale demolition of boondoggles. On the other hand, Trump's defense and homeland-security spending increases will squander bounties that should be reserved for taxpayers, not bureaucrats.

Regardless of whether Trump can cajole Congress into buying into the cuts, Americans should welcome candor on an array of federal programs that should have been decimated or abolished long ago.

- The Housing and Urban Development budget takes one of the biggest hits — down \$6 billion or 13 percent. Trump proposes abolish-

ing Community Development Block Grants, which would save \$3 billion a year. A Heritage Foundation analysis noted that CDBG “grants have been diverted to wasteful parochial projects, which include funding a pet-shampoo company and issuing risky business loans.” The administration aims to sharply cut spending on Section 8 rental vouchers, which are notorious for redistributing violent crime from public-housing projects to previously safe urban and suburban neighborhoods. HUD's flagship HOME Investment Partnerships Program, which provides grants to states and localities is also in the budget crosshairs. That program is such a fiasco that HUD was not even aware that hundreds of projects it was bankrolling had not been built until a *Washington Post* investigation compiled hundreds of aerial photos of empty lots.

- Trump calls for abolishing both the National Endowment for the Arts and the National Endowment for the Humanities. The vast majority of spending for the arts comes from private pockets. America does not need a culture commissariat to give federal seals of approval to efforts that please Washington bureaucrats. There is no justice in taxing dishwashers in

Arkansas to subsidize programs such as Synetic Theater’s “Silent Shakespeare” — in which actors gyrate and grope in lieu of delivering the richest bounty of the English language. Brooklyn theater director David Marcus notes that subsidies cause “perverse market incentives.... The real way to succeed as an arts organization is not to create a product that attracts new audiences, but to create a product that pleases those who dole out the free cash. The industry received more free money than it did a decade ago, and has fewer attendees.”

- Trump recommends abolishing federal subsidies for the Corporation for Public Broadcasting, which would save almost half a billion dollars per year. Liberals were aghast and started a #JusticeForBig-Bird campaign on social media. But when federally financed television and radio began in the 1960s, there were vastly fewer options on the television and radio dial. Now, there are 500 television stations and networks and an endless array of radio options. Scholar Howard Husock, who is on the CPB board of directors, noted that National Public Radio “boasts that some 58 percent of NPR listeners are college graduates, and that its listeners are ‘74 percent more likely to earn more than

\$100,000.’ One NPR slide deck boasts that its programming reaches ‘cultural connoisseurs’ likely to drink four glasses of wine per week.” Considering the bounty that technology is delivering, there is no excuse for spending \$485 million a year for news and cultural programs that are consistently biased in favor of big government.

“The real way to succeed as an arts organization is to create a product that pleases those who dole out the free cash.”

- Trump proposes a 17 percent cut for the National Oceanic and Atmospheric Administration, which includes the National Weather Service — which nowadays prefers to play therapist instead of giving taxpayers the best information available. In March, the Weather Service realized that it had greatly exaggerated likely snowfalls from winter storm Stella but refused to correct itself because it feared “confusing” folks. A headline from the New York City’s Gothamist website summarized that debacle: “National Weather Service: Sorry, You’re Too Stupid To Trust With The REAL Forecast.” That article suggested that “this ‘lie of caution’ was just a piece of Steve Bannon’s larger plan to en-

gender a total lack of trust in the state. That wouldn't be minor at all." Only in libertarian dreams. Actually, European weather forecasts are far more accurate than American forecasts, in part because the National Weather Service is a technological laggard.

- Trump calls for slashing spending for Food for Peace, America's most destructive foreign-aid program, by \$1.5 billion a year. For decades, foreign farmers have been bankrupted when U.S. government agencies dump crops in their nations at harvest time. American food dumping sparked an uproar in Haiti last year over a plan to deluge that nation with surplus U.S. peanuts — a dire threat to Haiti's 100,000+ peanut farmers. But the program works out well for the farm lobby, the merchant marine, and nonprofit groups, and its foreign victims have no lobby in Washington.

- The Homeland Security budget proposes to fritter away a couple of billion dollars on a border wall — a monument to Trump's 2016 presidential campaign that will have little or no impact on curbing illegal immigration. On the bright side, the budget favors slashing Urban Area Security Initiative grants — a howler of a program that has paid for a latrine-on-wheels in Fort

Worth, Texas, sno-cone machines in Michigan, and a "Zombie Apocalypse" show at a training seminar. Also targeted for cuts is the Transportation Security Administration's goofily-named VIPR program (Visible Intermodal Prevention and Response) — which dispatches TSA teams to pointlessly hassle bus and train passengers in "security theater" at its most absurd. Unfortunately, the budget does not call for radical downsizing of the TSA itself — which is one of the most onerous federal agencies that Americans deal with on a daily basis.

Unfortunately, the budget does not call for radical downsizing of the TSA itself.

- Another bright side of the Trump budget proposal, as Politico noted, is that "the possibility of wholesale elimination of departments terrifies government workers, as well as the unions that represent them." Federal employees are mostly overpaid and many of them have only a distant acquaintance with vigorous labor. Trump's budget proposal is probably working out very well for Washington-area therapists.

The media responded to the Trump budget proposal as if it heralded the end of Western civiliza-

tion. A CNN headline warned of “Trump’s plan to dismember government.” But “combined U.S. federal, state, and local government expenditures have zoomed from around \$3.2 trillion in fiscal year 2000 to north of \$7 trillion this year,” as *Reason’s* Matt Welch noted. Welch noted the “three iron rules of political-class reactions to any whiff of budget cuts: 1) Every previous budget ratchet will be ignored, yet taken as the minimum acceptable baseline. 2) If even 1 percent of a to-be-reduced bloc of spending can be described as keeping granny from starving to death, that will be precisely how the whole bag of money is characterized. 3) It will all be about the president, even though the president writes no budgets.”

Downside

And then there is the downside of the Trump budget. Trump proposes to devote almost all of the savings from cutting domestic programs into the Pentagon, whose budget would rise by \$52 billion, roughly 10 percent. Since 9/11, the Defense Department has been Washington’s ultimate sacred cow — regardless of how badly U.S. military interventions abroad have turned out. Presidents and Congress pour money into the military

and then take victory laps — regardless of whether the spending makes America safer.

Trump proposes to devote almost all of the savings from cutting domestic programs into the Pentagon.

A Pentagon advisory panel recently documented \$125 billion in bureaucratic waste. The *Washington Post* reported, “Pentagon leaders had requested the study to help make their enormous back-office bureaucracy more efficient and re-invest any savings in combat power. But after the project documented far more wasteful spending than expected, senior defense officials moved swiftly to kill it by discrediting and suppressing the results.”

Pentagon leaders had been complaining for years that their budget had been cut to the bone and the study did not help their tin-cup rattling on Capitol Hill. The study revealed far more outsiders on the payroll than previously suspected. For instance, “the Army employed 199,661 full-time contractors” which “exceeded the combined civil workforce for the Departments of State, Agriculture, Commerce, Education, Energy, and Housing and Urban Development.”

The report also revealed that “the average administrative job at the Pentagon was costing taxpayers more than \$200,000 [a year], including salary and benefits.”

Defense spending has been out of control for at least 15 years. The Pentagon Inspector General reported that the Army made \$6.5 trillion in erroneous adjustments to its general fund in 2015. But multi-trillion dollar “errors” have failed to hold the attention of Congress.

There is a schizophrenia at the heart of the Trump budget and entire approach to governance. The administration makes noises about wanting to reduce federal controls at home at the same time that some administration officials sound as if they lust to lead a crusade to free the world from radical Muslims or whatever. But as American experience since 9/11 shows again, crusades abroad are not compatible with limited government at home. Killing masses of innocent civilians abroad — as Trump’s stepped-up bombing campaign in Syria is doing — could eventually spur terrorist attacks here at home.

The specter overhanging Trump’s budget is the possibility that he could jettison his campaign promises and plunge the nation more deeply into foreign conflicts. There is already

talk of another troop “surge” to Afghanistan despite the dismal results of the prior 16 years of U.S. fighting in that land. If Trump plunges or blunders into more wars abroad, federal spending will quickly soar out of control, as it did in the George W. Bush administration. What is the point of draining the swamp if all the savings are poured down other budgetary rat holes?

A *Washington Post* article fretted that, under Trump’s budget, “government would be smaller and less involved in regulating life in America.” Actually, there was an election in November 2016 and the people who did not want their lives micromanaged by federal agencies won. But it remains to be seen whether Trump will honor his campaign rhetoric.

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:
“Homeland Security’s Multi-Billion-Dollar Comedy Show”
by James Bovard

Feeling Helpless Against the IRS?

by *Laurence M. Vance*



Although I enjoy looking at billboards on road trips because it breaks the monotony, I don't pay too much attention to them when I am driving around town. However, one recently caught my eye because it had to do with something I frequently write about: taxes. The billboard said, "Feeling Helpless Against the IRS?"

Since I don't like handing my hard-earned money over to the federal government, and do so only because I feel helpless against the IRS, I was intrigued by the billboard. I was so intrigued that I turned around and drove by the billboard again so I could read what the rest of it said. The only additional information the billboard provided was a website, which I looked up when I got home. It turns out that the bill-

board was just an advertisement for a local law firm. The tax attorneys of the firm specialize in "resolving your IRS problems quickly." Depending on the situation, they can "reduce the amount of back taxes you owe and work out a convenient payment plan, which you can afford." They strongly recommend that you "enlist the services of a qualified, experienced tax attorney" if you "owe more the \$10,000 in IRS back taxes," "are the victim of IRS collections," "cannot afford to pay off your IRS tax debt," or "want to negotiate a settlement with the IRS."

Although it is certainly true that some Americans feel helpless against the IRS because they owe back taxes, it is just as true that all Americans are helpless against the IRS when it comes to paying taxes in the first place.

Tax facts

From its very beginning, the U.S. tax code has sought to punish higher-income earners with a progressive income tax. Just like the first income tax in 1913, the current income tax system in the United States has seven tax brackets. But any similarity between taxation in the two periods ends with that. The original seven brackets were 1, 2, 3, 4, 5, 6, and 7 percent. The current

brackets are 10, 15, 25, 28, 33, 35, and 39.6 percent. And it's not just the tax rates that have gone up: the income thresholds of each bracket have decreased. One had to make more than \$500,000 in 1913 for his income to be subject to the maximum rate. That is more than \$12 million in today's dollars. Now the maximum rate is applied to incomes exceeding \$415,050 (\$466,950 for married filing jointly). A taxpayer is entitled to a personal exemption of \$4,050 for himself, his spouse, and each of his dependents, as well as a standard deduction of \$6,300 (\$12,600 for married filing jointly). Tax credits and other deductions are also available to taxpayers who qualify. However, certain exemptions, deductions, and credits begin to be phased out as one's income rises. And the Alternative Minimum Tax ensures that wealthy taxpayers don't avoid paying their "fair share" by using too many deductions and loopholes.

Capital gains on investments are also subject to being taxed. Short-term capital gains are taxed at the same rate as ordinary income. Long-term capital gains are taxed at a rate of 15 percent for those in the 25–35 percent tax brackets and 20 percent for those in the highest tax bracket. There is also an additional

3.8 percent surtax on net investment income for taxpayers with adjusted gross incomes that exceed \$200,000 (\$250,000 for married filing jointly). Not even death provides an escape from paying taxes. The estate tax, also known as the death tax, is 40 percent of the value of estates exceeding \$5.45 million.

Not even death provides an escape from paying taxes.

And then there are payroll taxes for Social Security and Medicare. The Social Security tax rate is 12.4 percent (split between employer and employee) on the first \$127,500 of income. The Medicare tax rate is 2.9 percent (split between employer and employee) on every dollar of income. Thanks to health-care-reform legislation passed in 2013, there is an additional Medicare tax of .9 percent that applies to income (including non-cash fringe benefits and tips) in excess of \$200,000 (\$250,000 for married filing jointly).

Americans are helpless against the IRS when it comes to paying their taxes. Tax withholding only makes things worse. Most Americans are not self-employed. They work for businesses that are required to withhold income tax and social-insurance taxes from their

paychecks. The amounts withheld for Social Security and Medicaid are a fixed percentage. And while one can claim an excessive number of exemptions on his W-4 form to reduce the amount of income tax that is withheld, any tax owed still has to be paid at the end of the year. And there are penalties for not having enough money withheld from one's paycheck.

Corporations are also subject to income tax — at a maximum rate of 35 percent — which, of course, is ultimately borne by shareholders through lower dividends and share prices, passed along to consumers through higher prices, and paid by employees in corporations in the form of lower wages.

According to the Office of Management and Budget, the IRS collected \$3.268 trillion in taxes from Americans in fiscal year 2016 (with a budget of \$11.235 billion to do the collecting). In fiscal year 1961 (when John Kennedy was elected president), the federal government collected about \$94.388 billion in taxes. According to the Census Bureau, the population that year was about 183,691,481. That means that federal tax revenues equaled about \$514 per capita (about \$4,121 in 2016 dollars). Federal tax revenues were about \$10,114 per capita in fiscal

year 2016. That means that real federal taxes per capita have more than doubled since Kennedy was elected.

“Americans will collectively spend more on taxes in 2017 than they will on food, clothing, and housing combined.”

When you add in other federal taxes that Americans pay (e.g., excises taxes on gasoline and alcohol), the federal government will shake down Americans for about \$3.5 trillion in 2017. And according to the Tax Foundation, if you add to that the \$1.6 trillion in state and local taxes that Americans will have to pay, “Americans will collectively spend more on taxes in 2017 than they will on food, clothing, and housing combined.” Tax Freedom Day fell on April 23 this year. That means that Americans as a whole had to work the first 113 days of 2017 in order to pay the nation's tax burden.

IRS power

Because the majority of the taxes that Americans pay are to the federal government, and because of the power, and firepower, of the IRS (it was reported last year that the IRS had spent nearly \$11 million on guns, ammunition, and military-

style equipment for its special agents since 2006), it is no wonder that Americans feel helpless against the IRS.

The penalty for not paying your federal income tax on time is 5 percent of your balance due per month (or part of a month) that a return is late, not to exceed 25 percent of your unpaid taxes. Interest (compounded daily) starts accumulating on unpaid taxes one day after they are due until they are fully paid off. The current interest rate is 4.18 percent. And now, beginning in the spring of 2017, on the basis of a law passed at the end of 2015 that had nothing to do with taxes (the Fixing America's Surface Transportation Act, which provided long-term funding for transportation projects), the IRS will once again be using private debt-collection companies to collect delinquent taxes. In Section 32102, "Reform of rules relating to qualified tax collection contracts," the IRS is required to use private debt-collection companies to collect "inactive tax receivables." These are defined as any tax debt that has been:

- removed from the active inventory for lack of resources or inability to locate the taxpayer;
- for which more than 1/3 of the applicable limitations period

has lapsed and no IRS employee has been assigned to collect the receivable; or

- for which, a receivable has been assigned for collection, but more than 365 days have passed without interaction with the taxpayer or a third party for purposes of furthering the collection.

The private collection agencies are required to follow the provisions of the Fair Debt Collection Practices Act and "must be courteous and must respect taxpayer rights."

Too bad the IRS is not always courteous and respectful of taxpayer rights, especially toward those businessmen who deposit large amounts of cash. The Bank Secrecy Act, a federal law enacted in 1970, requires banks to report any deposits, withdrawals, or transfers of more than \$10,000. The law was supposed to make it easier for the government to track drug dealing, money laundering, illegal gambling operations, and other crimes in search of victims because of the likelihood that the money in question was escaping taxation. Although the law has been revised several times, the \$10,000 figure has not been adjusted for inflation. But the Bank Secrecy Act also requires banks to report to the government

any activity that might be construed as structuring deposits to avoid the reporting requirement. According to the IRS, “Structuring is the practice of conducting financial transactions in a specific pattern calculated to avoid the creation of certain records and reports required by the Bank Secrecy Act (BSA) and/or 26 USC 6050I (Form 8300).” An example would be making a series of deposits of cash of less than \$10,000 instead of making one cash deposit of more than \$10,000.

The IRS seized more than \$242 million for the non-crime of structuring from more than 2,500 cases between 2005 and 2012.

According to a 2015 report by the Institute for Justice, the IRS seized more than \$242 million for the non-crime of structuring from more than 2,500 cases between 2005 and 2012. At least one-third of the seizures “involved no other suspicions of criminal activity, aside from making cash withdrawals or deposits under \$10,000.” In 2012, armed IRS agents descended on a dairy farm in Maryland owned by Randy Sowers and announced that “the agency had seized over \$60,000 from the farm’s bank account” and “served him with a grand jury sub-

poena, raising the possibility that Randy and his wife could face criminal structuring charges.” Feeling helpless against the IRS, they took a settlement deal and “agreed to forfeit \$29,500 to the government.”

In 2013, armed IRS agents and a U.S. marshal raided a family bakery in Connecticut after seizing more than \$68,000 from the bakery’s bank account. It turns out that the owners of the bakery, the Vocaturas family, which for almost its entire history has been “operated primarily as a cash business,” had engaged in the non-crime of making “a series of cash deposits under \$10,000.” After three years, the government offered two of the family members an outrageous plea deal: forfeit the seized cash, serve 46 months in prison, and give up \$160,000 in personal assets. They declined the deal. In retaliation, “the IRS slapped the family with a grand jury subpoena, demanding eight years of bank statements, state and federal tax returns, payroll records, invoices, receipts and numerous other financial records.” It took a motion filed by the Institute for Justice before the IRS agreed to return the seized cash and withdraw its grand jury subpoena.

The IRS has the power to garnish your wages if you owe a tax debt. But unlike most other credi-

tors, the IRS can do so without first getting a judgment against you. And the IRS can take more than what regular creditors are allowed to take. Although the amount that most creditors can take from your wages is limited by law, the IRS takes all but what it deems necessary for you to pay for basic living necessities. The IRS can also seize — without first getting a court order — not only your bank account, but also your home, business, and vehicles to satisfy a tax debt.

It's no wonder that Americans feel helpless against the IRS.

Tax reform

To end or reduce this helplessness, some people, mainly conservatives, see the answer in reforming the tax code, especially its complexity. After all, even Albert Einstein is reputed to have said that “the hardest thing in the world to understand is income taxes.” Nearly every tax-reform proposal has as its main focus simplifying the tax code by reducing the number of tax brackets, deductions, and credits; moving to a flat tax with few or no deductions; or switching to a national sales tax. The idea is that making the tax code less complex will mean that Americans can more correctly figure their taxes, more easily pay their taxes,

and have less chance of any interaction with the IRS. Lowering Americans' overall tax burden is almost an afterthought.

The IRS can also seize your home, business, and vehicles to satisfy a tax debt.

Donald Trump has proposed reducing the seven tax brackets to three tax brackets of 10, 25, and 35 percent, doubling the standard deduction, providing tax relief for families with child- and dependent-care expenses, eliminating targeted tax breaks that mainly benefit the wealthiest taxpayers, repealing the Alternative Minimum Tax, repealing the estate tax, repealing the surtax on net investment income, and lowering the corporate income tax rate. House Republicans, conservative think tanks, and Trump himself have previously introduced similar tax-reform proposals.

Conservatives have for years touted the idea of a flat tax that would tax all income (usually with the exception of capital gains, Social Security benefits, interest earned, and dividends received) at a flat rate (there is no consensus on the rate) with generous personal and dependent allowances but greatly reduced (or even eliminat-

ed) tax deductions and credits. Some plans retain the refundable Earned Income Tax Credit. Social Security and Medicare taxes would remain as they are. Flat-tax supporters often talk about the simplicity of Americans' filing their taxes on a postcard and claim that there would be no more need of an IRS.

One tax reform proposal that seems to have died down is the Fair-Tax, a national sales tax of 23 percent (which actually ends up being 30%) on the final sale of all new goods and services. All new goods — including cars, houses, prescription drugs, and food — and all services — including surgeries, funerals, rent, and haircuts — would be subject to a national sales tax. This tax would replace the personal income and corporate income taxes, capital-gains tax, estate tax, Social Security tax, and Medicare tax. It would also pay out a monthly “prebate” to offset the taxes paid on basic necessities. Fair-taxers often claim that their plan would eliminate the IRS.

Abolish the IRS

There is no question that the federal tax code is too long, too complex, too intrusive, and too confusing. It is reported every year by financial magazines that a fictional tax return given to twenty or

thirty tax preparers results in twenty or thirty different calculations of the correct amount of tax due. But will shrinking and simplifying the tax code mean that the power of the IRS will be greatly diminished?

The problem with the proposals to reform the tax code is the same: there will still be an IRS.

The problem with all of the proposals to reform the tax code is the same: there will still be an IRS to ensure that taxes are collected and deposited into the U.S. Treasury. Claiming that the IRS will be eliminated is disingenuous. Renaming the IRS doesn't change anything. And neither does relocating the IRS in the Treasury Department. Even with tax “reform,” if taxes are to be collected, there are a number of things that will still exist. There will still be tax laws. There will still be IRS bureaucrats. There will still be IRS agents with badges and guns. There will still be penalties for non-compliance. There will still be federal courts to try tax evaders. There will still be laws against structuring. In other words, Americans will still be powerless against the IRS.

Without those things, government mandates that Americans pay their taxes are merely suggestions.

Without them, no one with any sense would bother to pay his taxes no matter how short the tax code was, no matter how “fair” the tax was, no matter how simple the tax forms were, no matter how few tax brackets there were, and no matter how low the tax rates were. Those who did pay would merely be making donations to the U.S. Treasury.

The only way to really stop Americans from feeling helpless against the IRS is to completely abolish the agency in its entirety and let every last one of its employees join the ranks of the unemployed. Those are layoffs that many Americans would cheer. The problem is that, for more than a hundred years, most Americans have been conditioned to believe that the IRS is a necessary evil because “taxes are the price we pay for civilized society,” as Supreme Court Justice Oliver Wendell Holmes wrote in a dissenting opinion in 1927. Yet, we certainly had a civilized society throughout the United States when Americans had no income tax, no capital gains tax, no Social Security tax, no Medicare tax, and no estate tax. The problem is that now the government “needs” the money because it has become a massive welfare/warfare state. But the actual constitu-

tional functions of the U.S. government (which are “few and defined” — to use the words of James Madison) could be funded by tariffs, lotteries, donations, and fees. The government was funded primarily by tariffs before the income tax was instituted. Only the states of Alabama, Alaska, Hawaii, Mississippi, Nevada, and Utah don’t have lotteries. The Bureau of the Fiscal Service already receives cash and gifts donated to the government to reduce its debt — almost \$3 million was given last year. And according to 31 U.S.C. §9701, federal agencies are permitted to “charge for a service or thing of value provided by the agency.”

End helplessness. Abolish the IRS.

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NEXT MONTH:
**“What Americans Should Know
About the Constitution”**
by Laurence M. Vance

The Supreme Court's Destruction of Liberty of Contract

by David D'Amato



Found in Article I, Section 10, of the Constitution, the Contract Clause is a failed attempt to prevent the government from taking actions that would compromise the integrity of contractual obligations — failed, in large part, because of the 1934 Supreme Court case *Home Building & Loan Association v. Blaisdell*. *Blaisdell* is arguably the centerpiece of the Supreme Court's Contract Clause jurisprudence; it represents, along with much of the Court's body of decisions since the New Deal era, the impotence of the Constitution's text when tested against the imperious actions of government at all levels, the near-omnipotence of modern government. Of course, the deteriorative process that the case repre-

sents was already well under way for many decades prior to *Blaisdell*. As law professor Samuel R. Olken observes, the Court had developed several “significant inroads” against the Clause in the lead-up to the case, steadily crippling its ability to meaningfully limit state action. Olken notes that the distinction “between the rights and remedies of a contract,” present even in the Marshall Court's decisions, became an early point of vulnerability for the more-robust reading of the Contract Clause. By January of 1934, when the case was decided, the poisonous fruits of those seeds, long since sown by successive decisions, were ready for harvest, for a wholesale repudiation of the Clause.

The facts from which the dispute arose concern a 1933 Minnesota state statute, the Minnesota Mortgage Moratorium Law, passed during the Great Depression and designed to relieve delinquent homeowners, many of whom were farmers, by allowing them more time to cure default. A thoroughgoing examination of the causes of the Great Depression is the subject of another article. It will suffice to point out that the Depression was brought on by a fateful blend of government oversteps, among them the looming passage of the di-

sastrously protectionist Smoot-Hawley Act, expansionary Federal Reserve policy, and the generally interventionist domestic policies of the Hoover administration. The Minnesota statute meant that the bargained-for rights of lender-mortgagees were limited by the operation of the law, which prevented them from foreclosing in ways otherwise well within their legal and contractual rights. The statute illustrates the familiar temptation to respond (really overreact) to a crisis with bad public policy, the harmful bias in favor of doing something — *anything* — rather than allowing civil society to formulate its own solutions organically.

Frantic attempts to address the defects of interventionism with more intervention prepare the ground for the next crisis.

Succumbing to this bias, policy-makers fail to realize that their frantic attempts to address the defects of interventionism with more intervention prepare the ground for the next crisis. They seem never to consider the unintended consequences of such confidently prescribed solutions. Laws like the one at issue in *Blaisdell* are sources of moral hazard and therefore risk. In studying

these aspects of the historical and policy contexts surrounding *Blaisdell*, one is naturally reminded of the most recent home-finance crisis and the misguided responses thereto. Assured a relatively painless escape, mortgagor-borrowers will be more likely to take on too much debt with too little equity, the aggregate effect of which is the kind of unsustainable systemwide risk that in time gives way to crisis. Mortgage-lenders, too, will be reluctant to finance new home purchases, robbed of their rights and remedies under properly executed contracts. As legal scholar Lawrence M. Friedman explains, “A strong mortgage law, giving creditors strong rights, was as necessary for debtors as for creditors, if only to make capital flow into real-estate investment.” One would think that a moment’s quiet reflection would yield those insights; they were, in any case, either not apparent or simply ignored by both the Minnesota legislature and the Supreme Court.

Political considerations

Writing for a 5-4 majority, Chief Justice Charles Evans Hughes affirmed the judgment of the Supreme Court of Minnesota, which had “upheld the statute as an emergency measure” legitimately “with-

in the police power of the state,” the apparent limitations provided by the Contract Clause notwithstanding. Progressives have long praised Hughes’s majority opinion for its pragmatism and flexibility. Hughes reasoned that although the mortgage agreement indeed “contained a valid power of sale to be exercised in case of default,” the Minnesota law did not fundamentally alter the character of the parties’ agreement such as to impair it within the meaning of the Contract Clause.

The law, according to Hughes, did “not impair the integrity of the mortgage indebtedness,” only extending the time within which the mortgagor could redeem. Hughes arrogated to the Court the power to balance the Constitution’s prohibition against such power, which he seemingly acknowledged, against considerations attending the emergency at hand. Yet “emergency,” Hughes insisted, “does not create power.” He reconciled this apparent contradiction by asserting that the power at issue in the case had always been within the scope of the police power, as the language of the Contract Clause was “not to be read with literal exactness like a mathematical formula.”

Conveniently, then, determination of the exact contours of the re-

straint on the government’s power falls to judges equipped with some special insight as to what the Constitution *really means*. Well-established principles of construction, Hughes said, must guide this mysterious exercise. The process of judicial construction to which he refers is, of course, inherently informed by political considerations, that is, by the normative political theory that every judge carries with him into his work. Even conclusions about the meaning of the judicial pragmatism Hughes so assuredly recommends must be based on some extralegal reasoning process, some set of assumptions about the likely *empirical* result of a particular application of the law.

The process of judicial construction to which Hughes refers is inherently informed by political considerations.

For example, the *Blaisdell* opinion cannot be regarded as pragmatic in any sense worth defending if its effect *as a matter of fact* is to aggravate the economic problems at the heart of the case’s facts. This, as noted above, is precisely what libertarians argue, quite apart from the fact that the Minnesota law and the Court’s decision represent an af-

front to individual liberty. Whether a particular course of action is pragmatic depends not on its departure from strict free-market principles, as big-government Progressives such as Hughes seem to believe, but on its relative ability to bring about a particular desired end. It never occurs to such Progressives that adherence to free-market principles — and, accordingly, strong judicial protection of contracts — may actually be the pragmatic response.

Sutherland stressed that the Constitution's plain language could not be suspended merely because it seems to be inexpedient.

Some members of the Court knew that the pragmatism of the decision was indeed a false, self-defeating one. In a letter to his sister, Justice Willis Van Devanter, a nominee of William Howard Taft and a general opponent of the overbearing, overreaching government of the New Deal, remarked that the decision could be a source of “incalculable harm and instability.” Van Devanter joined the dissent in *Blaisdell*, along with the three other members of the so-called Four Horsemen, Justices Pierce Butler, James Clark McReynolds, and

George Sutherland, all of whom fought in vain for the classical liberal ideals of constitutionally limited government and individual liberty. Sutherland's dissent begins with the observation that “few questions of greater moment ... have been submitted for judicial inquiry during this generation.” In the majority's opinion, Sutherland presciently saw “the potentiality of future gradual but ever-advancing encroachments.” He stressed that the requirements of the Constitution's plain language could not be suspended merely because they seem to be inexpedient, that the very purpose of a written constitution dissolves if its dictates change with the vagaries of either public opinion or events.

It is, moreover, not as if the possibility of economic emergency had been ignored in the debates of the Constitutional Convention and the drafting of the document's language. Those debates specifically addressed the likelihood that the Contract Clause would limit the government's ability to act in a time of crisis. In point of fact, Maryland Anti-Federalist Luther Martin opposed the inclusion of such a clause for that very reason. The objection had been raised and its reasoning rejected with the Constitution's rat-

ification. Just as the First Amendment's protection of free speech is tested primarily when the speech at issue is of a kind that many or most would find objectionable, unworthy of legal safeguarding, so is the guarantee embodied in the Contract Clause most important in times of great economic crisis. As political scholars Lee Epstein and Thomas G. Walker observe in their discussion of *Blaisdell*, "After all, legislatures would have little reason to pass such a statute in good economic times."

The Society of Status

The lessons of Isabel Paterson's libertarian manifesto, *The God of the Machine*, illuminate a proper understanding of *Blaisdell* and cases like it. "In the Society of Status," Paterson explained, "nobody has any rights." In such a society, the rule of law is no rule at all, the arbitrary prerogative power of the state determining right and wrong according to its whim and caprice. The rights of the individual may be abolished by the stroke of a pen. There can be no expectation that one will be secure in his property or in his contracts, and thus no foundation for prosperity. The durability of contracts — confidence that one's agreements will be enforced — is

among the bedrock legal preconditions of a free and prosperous society. To undermine the enforcement of voluntarily executed agreements is to imperil commerce itself, for one could never be sure that his business arrangements will not be annulled in favor of some apparent political expedient. Home-loan agreements and the liens associated therewith provide for the possibility of both missed payments and default.

"In the Society of Status,"
Isabel Paterson explained,
"nobody has any rights."

The Contract Clause forbids any state action that would impair such contractual obligations. Those who authored the document understood the importance of preempting the reach of the politically powerful into this integral area of economic life. They believed that the very point of the previous decade's war was to throw off the rule of a Society of Status and inaugurate a Society of Contract. And indeed, the language of the Contract Clause appears to contemplate the very same distinction between these two possible bases of society, status and contract, including in that Clause (as well as elsewhere) an explicit

prohibition against the grant of “any Title of Nobility.” Certainly it is more than a mere accident or coincidence that such a prohibition should appear alongside the Constitution’s expression of respect for contracts; its drafters understood well that kings and the various lesser lords of the Old World held themselves above the dirty, mundane world of commerce and contract, their titles allowing them special license to disregard the rights and interests of the common people.

In contrast to this Old World philosophy, Paterson argued that “the primary postulate of the Society of Contract” is its respect for the “axiom of the Declaration Independence that all men are endowed by their Creator with the inalienable right to life.” Contracts instantiate the agreements of free men, equally possessed of natural rights

and forswearing the use of force to attain their ends. In the Society of Status, arbitrary, unaccountable power and its symbols predominate. Today, both halves of the political establishment favor such power, seduced by the promise it holds out to enrich them and their friends. The Supreme Court has, as it did in *Blaisdell*, long deferred to assumptions of power fundamentally inimical to a free society. The friends of liberty, meanwhile, hold out the hope for Paterson’s Society of Contract.

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The *Quirin* Decision of 1942 Revisited

by Joseph R. Stromberg



In *Ex Parte Quirin* (1942) the U.S. Supreme Court justified the trial by military commission of eight German soldiers “captured” on American soil. Edward S. Corwin called the case “a ceremonious detour to a predetermined goal” (*Total War and the Constitution*, 1947). Louis Fisher notes the “common perception ... that *Quirin* was a contrived decision without anchoring itself in any legal precedent” (“Military Commissions,” *Boston University International Law Review*). Dissenting in *Hamdi* (2004), Justice Antonin Scalia wrote that *Quirin* was not the Court’s “finest hour.” *Quirin* was little cited until lawyers under George W. Bush embraced it to justify their treatment of suspected terrorists, a maneuver that finally

made it important. In *Hamdi and Rasul* (2004) the Court revisited *Quirin* to rationalize its deference to executive power and for other purposes.

In June 1942, U-boats dropped off eight German soldiers on the East Coast, four near New York City and four near Jacksonville. Abandoning their uniforms, they went inland under orders to find targets for sabotage. Two U.S. citizens were among the saboteurs. One of the German-Americans, Ernest Peter Burger (who hated the German government) and the team leader, George John Dasch, agreed to abort the mission by informing U.S. authorities, which they did soon after landing in New York. Naturally, J. Edgar Hoover credited the FBI with clever sleuthing.

A lower federal court had the case in hand when Franklin Roosevelt — strongly opposed to trial in a normal court — established a special military commission. The administration pressured the Supreme Court and directly tampered with the case. Jonathan Turley writes, “The level of collusion, dishonesty, and prejudice that appeared in the Supreme Court may be unrivalled in its history.” The Court upheld the commission’s legality in a *per curiam* order of

July 31, 1941, saying it would publish its full opinion later. Turley calls the ensuing military trial “a sham proceeding in which command influence was openly applied and rules of evidence discarded.” By the time the Court’s final judgment appeared, six prisoners had been electrocuted (a typical American barbarity) and Burger and Dasch sentenced to life imprisonment. (See Jonathan Turley, “Art and the Constitution,” *Cato Supreme Court Review*.)

The decision itself

Turley characterizes the Court as achieving “the preferred outcome and then desperately searching for a methodology or theory to justify it.” Andrew Kent suggests that the Court mildly rebuked the president because several pro-New Deal justices feared presidential overreach and renewed attacks on the Court (“Judicial Review for Enemy Fighters,” *Vanderbilt Law Review*). Even allowing for executive pressure, Justice Harlan F. Stone’s opinion in *Quirin* seems unusually jumbled. With little textual guidance on hand, earlier friends of war powers had long ransacked American history looking for usable unwritten legal principles. Because *Quirin* preserved such discoveries,

the history was not very good and assertions resting on it probably do not succeed in shoring up its weak structure.

Turley characterizes the Court as achieving “the preferred outcome and then desperately searching for a methodology or theory to justify it.”

Roosevelt’s commission had tried the prisoners for “offenses against the law of war and the [U. S.] Articles of War” (#81, aiding or communicating with the enemy, and #82, “defining the offense of spying”) and conspiracy to commit the offenses. Affirming the commission’s legality, the Court reiterated its right of review. A history of U.S. wars and courts martial ensued, relating the commission’s actions to some supposed American “common law” of war.

Violations of the “laws of war” (Stone wrote) “distinguished” the saboteurs’ case from *Milligan* (1866). Without uniforms and insignia, the defendants were “unlawful belligerents” and this fact established the military commission’s jurisdiction. Despite never actually sabotaging anything, they had entered U.S. territory with “hostile purpose.” (This point seems intend-

ed to justify ruling out civil treason trials for German-Americans Haupt and Burger and, for the six others, similar trials involving breach of temporary allegiance.)

Under the Fifth Amendment (Stone continued) defendants in courts martial do not enjoy presentment by grand jury, and *therefore*, those defendants could not have *any* jury when tried by military commission. (Note the conflation of courts martial and military commissions.) Like American military personnel, they had almost no rights. After discussing dead Revolutionary War spies, Stone's opinion left military commissions unscathed but somewhat tangential to the Constitution. Stone asserted "that the Fifth and Sixth Amendments did not restrict *whatever authority was conferred* by the Constitution to try offenses against the law of war by military commission" (italics added). Civil War material cluttered the Notes, with numerous "spies" "lurking" until dispatched by military commissions.

An original understanding

But "whatever authority" was the whole point. For perspective, let us canvass here the views of the famous Maryland lawyer Reverdy Johnson, senator (1845-1849) and

U.S. attorney general (1849-1850). In June 1865 he was acting as counsel for Mary Surratt, accused of aiding the assassins of Abraham Lincoln. Andrew Johnson had created a military commission for earliest disposal of the accused. Reverdy Johnson, a War Democrat and Unionist, denied the commission's jurisdiction and its right to exist.

Abstract "war powers" cannot furnish Congress with extraconstitutional powers.

His argument ran as follows. The military has courts martial, occasionally called military commissions. They can only try military personnel for crimes "provided for ... the articles of war" adopted by Congress, and only Congress. The defendants, if not under that law, must be dismissed (for civil trial). Commissions could never try non-military persons. Under the Fifth Amendment, no one could be tried "for a capital or otherwise infamous crime, unless on a presentment of a grand jury, *except* in cases *arising in the land or naval forces*" (italics added). (The same exception must apply in the Sixth Amendment, which was otherwise "a dead letter.")

Abstract "war powers" (Johnson went on) cannot furnish Congress

with extraconstitutional powers, or rewrite Congress's articles of war. No legislation had ever mentioned military commissions prior to acts of 1862 and 1863, which arose from the ongoing war. Unknown war powers ascribed to the commander in chief did not legitimize this military commission, nor could the president's role, *if any*, in suspending *habeas corpus* during invasion or rebellion. Suspension cannot erase a prisoner's other substantial rights, but only shields an official who ignores the writ from later lawsuit. Civilian prisoners must be tried in proper courts, or be released. Suspension can only work a delay.

Unknown war powers ascribed to the commander in chief did not legitimize a military commission.

The commission charged the prisoners with "traitorous conspiracy" to assassinate Lincoln and others "in aid of" the Confederate States. Some people, Johnson added, were saying that "there exists with us the offense of military treason" (i.e., refusal of provisional allegiance to an occupying power, i.e., *Kriegsverrat*). He could not find that European notion in Anglo-American law. (Francis Lieber, Lin-

coln's laws-of-war theorist, was German.) But treason must be tried in a civil court — of the District, or of Maryland. Johnson doubted that American law meant for every personal right "to depend for its enjoyment upon the war power."

The civilian defendants in the Lincoln assassination trial were not under articles of war or subject to un-court-like tribunals. Neither would a real court allow the commission's vague speculations about motives. Even Jefferson Davis, thought to be the Booth conspiracy's mastermind, was about to be tried in a real court. If the law were what the commission claimed, why have a trial at all? If the commander in chief could put anyone under court martial, "he may punish upon his own unassisted judgment." (It might be rude to bring up drones at this point.) Johnson reiterated that under the Fifth Amendment, no one could be tried "for a capital or otherwise infamous crime, unless on a presentment of a grand jury, except in cases arising in the land or naval forces" ("Argument on the Jurisdiction of the Military Commission," at <http://www.surrattmuseum.org/proceedings-of-the-conspiracy-trial>).

The words "arising in" would have a very busy future.

Milcoms

Between 1861 and 1865, military and legal advisors of the Union government invented and deployed historical claims of the kind accepted in *Quirin*. They collected Revolutionary War “precedents” and constructively stretched constitutional and statutory language past breaking. Some of their speculations involved spies.

Since anything anyone did might conceivably affect the military, Holt concluded that anyone could be tried by commission.

During the U.S. Revolution, the states dealt with civilians caught spying as traitors, and tried them in civil courts. Having no legislative power and few functionaries, Congress necessarily left the matter to the states. George Washington deferred to state civil courts and overstepped only once or twice (immediately after the Benedict Arnold conspiracy). This bare handful of anomalies makes a poor pedigree for military commissions and sheds little light on the Articles of War adopted by Congress after 1789 (closely based on those of 1775 and 1776).

Spies found in U.S. army camps were generally killed out of hand.

That was customary and *spying* as such did not violate “laws” of war (nor did conspiracy) — whatever the Court that decided *Quirin* may have thought.

Broadly speaking, U.S. practice between 1789 and 1861 answered to Reverdy Johnson’s account of the law. Confederates largely continued those rules. The Union invented new ones. U.S. Judge Advocate General Joseph Holt went mad with military commissions; by 1863 he imagined they were older than God. Since anything anyone did might *conceivably* affect the military, Holt concluded that *anyone* could be tried by commission, if his act was done anywhere near a base, or battle. If so, it could be seen as “*arising in the land or naval forces.*”

Citing *Dynes* (1858), Holt took the “grand jury exception” in the Fifth Amendment to mean no jury whatsoever for defendants before military commissions. But note how deploying the *unproven assumption* that military commissions can try civilians *in some cases* cleverly upends things, yielding the deduction that no one so tried can have a real jury, since military personnel do not. (*Milligan* and *Quirin* let this stand.) Such juridical legerdemain peaked during the trial of Lincoln’s assassins. Thereafter,

Holt's assistant, Col. William Winthrop (the "Blackstone" of American military law), fine-tuned the new doctrines and variations on "arising in."

(For most of the above points, see Martin S. Lederman, "If George Washington Did It ..." *Georgetown Law Journal* [forthcoming].)

From 1861 to the present, politicians and others have mined early American history in aid of smuggling military commissions into the legal order.

Interesting enough, the Union Navy commission dealing with blockade runners admitted in early 1864 "that no persons except such as are in the military or naval service of the United States are subject to trial by military courts, spies only excepted; and that except in districts under martial law [that murky notion], a military commission cannot try any person whatsoever not in the U.S. military or naval service for any offense whatever" (Mark Neely, *The Fate of Liberty*).

From 1861 to the present, politicians, lawyers, officers, and others have mined early American history in aid of smuggling military commissions (artfully confounded with courts martial) into the legal order.

But absent any *constitution* or federal *law* between 1775 and 1781, perhaps they had *no place*. There is, moreover, a certain lack of institutional continuity between the Continental Congress, the Articles of Confederation, and the present Constitution (1789).

In any case, courts martial under the Articles of War are tools of the executive, established by Congress, to maintain discipline through near-certain conviction. Conflating them with military commissions, Lincoln, Roosevelt, and George W. Bush sought to extend military despotism to civilians. "Copperhead" Henry Clay Dean described such a commission as "a committee of military vagabonds" — adding, "If ... a war power may exist, independent of written constitutions, then we have no government, but are simply ruled by arbitrary power" (*Crimes of the Civil War*).

As of 2016, arbitrary power (shielded in particular by the Argument from Lincoln's Greatness) is doing rather well. By leaving military commissions unexamined and unharmed, both *Milligan* and *Quirin* opened a royal road to martial law and the like under a screen of "necessity," with the latter determined by those acting in its name.

One often hears these days that wartime cases “clarify” the Constitution by demonstrating its “flexibility” in crises. The opposite is surely true, although the flexibility of those claiming additional powers does come into view.

On such matters, the jury — if one is allowed — seems to be out.

As for the saboteurs, there were certainly alternatives to subjecting

six of them to American electrical engineering and the other two to life sentences. (They were released early.) Two that come to mind are holding them as prisoners of war and allowing them trials in a real court (state or federal).

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The moment the idea is admitted into society that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence. If “Thou shalt not covet” and “Thou shalt not steal” were not commandments of Heaven, they must be made inviolable precepts in every society before it can be civilized or made free.

— John Adams

Freedom of Contract: A Bedrock of Freedom

by George Leef



Freedom of contract used to be understood as a cornerstone of civilization and a crucial element in economic progress. The Constitution's Framers included in Article 1, Section 10, a clause stating that Congress was forbidden to enact any law impairing the obligation of contracts. And in the Civil Rights Act of 1866, Congress included the freedom to enter into contracts among the rights that were to be protected against state action.

However, owing to the malign influence of Progressivism and its abhorrence of individual rights, today the freedom to enter into contracts — or to decline to — has been badly circumscribed. What freedom remains is being whittled away steadily by officials who want control over the lives of others.

A case arising out of an ordinance passed in Seattle is illustrative of the trend.

On January 1, a new law took effect there, mandating that landlords rent available apartments to the first prospective tenant who meets “all the screening criteria necessary for the approval of the application.” Under Seattle’s “first in time” rule, landlords cannot see if several people apply and then choose the one they prefer. If a landlord were to do that, he would now be guilty of an “unfair practice” and subject to both city fines and suit from any aggrieved renter.

That law continues and extends the politicization of the housing market, with government officials exercising their coercive power and turning landlords into vassals. It does so by depriving landlords of their freedom of contract. They are compelled to enter into a contract with someone with whom they might not want to enter into a contract.

The first thing a student learns about contract law is that to form a contract, voluntary consent is needed from both parties. Under the common law, prospective sellers had a perfect right to say “no” to any offer, just as prospective buyers had a perfect right not to make an offer.

If common law still prevailed in Seattle, landlords would be free to decline to rent to someone for reasons sufficient only to themselves: because the person looks unreliable; because the person smokes, because the person is wearing a Make America Great Again cap, and so on.

The common law also disallowed any use of coercion to make a person enter into a contract.

And that right would be symmetrical with the right of all prospective renters to look at the properties available on the market and pass any of them by for reasons of their own: because the apartment is not in a good-enough area; because other tenants look unpleasant; because the owner wears a Make America Great Again cap, and so on.

Note that whether outside parties might regard either side's reasons for not wanting to contract good or bad (invariably called "discrimination" these days) is irrelevant. In a free society, people are entitled to peacefully act or not act according to their own beliefs and values.

The common law also disallowed any use of coercion to make a person enter into a contract. If a purported contract had been procured by threats or violence, it was not a

contract at all. Thus, if a renter who wanted to rent a vacant apartment used threats of violence to force a landlord to rent a unit, the law would treat the resulting "agreement" as having no legal force. But here, Seattle uses the threat of government force to make landlords obey its commands to rent to the first applicant. Morally, that is every bit as objectionable as an individual's use of threats to get his way, but, being a government, Seattle's city council presumes that it can get away with it.

Sad to say, there is little left of the common law of contracts in the United States. Governments have been dictating to people how they must contract for many decades, and recently they have even taken to punishing people for choosing not to make a contract.

Challenge

At least there is hope that Seattle will not get away with its further destruction of freedom of contract. Its law is being challenged in court by a family that wants to preserve what's left of their contractual freedom.

MariLyn Yim and her husband own one duplex and one triplex in Seattle. They and their three children live in a unit of the triplex and rent the other two. They do not want to give up the right to choose

which tenant will move in and live next to them. Compatibility and safety are of great concern to them. The Yims state in a March 9 press release by the Pacific Legal Foundation, “We are, literally, mom-and-pop property owners renting out our home to make Seattle affordable for our family.... We aren’t corporate landlords sitting on large capital reserves or with hundreds of rentals to spread our risk. One bad tenant could take us years to recover from financially.”

The city’s aggression here lies in its abrogation of the fundamental right to say “no.”

Pacific Legal is representing the Yim family and other plaintiffs in a suit challenging the legality of Seattle’s “first in time” mandate. Their argument is that the ordinance violates Washington’s state constitution, specifically its provision that private property may not be taken without payment of just compensation.

Pacific Legal’s attorney handling the case, Ethan Blevins, argues, “By telling landlords, including mom-and-pop property owners, that they have basically no say in who can live in their rental units, Seattle is stripping them of a fundamental right.... This amounts to a taking of

private property rights and government can’t do that without reimbursing the property owner.”

I hope the plaintiffs and PLF triumph in the case, but notice that they are not bringing the case under the theory that Seattle has violated the rights of the plaintiffs to freely enter into contracts, but rather under a takings theory. That choice is regrettable because the city isn’t actually taking the property of landlords for some public use; what it is doing, rather, is dictating to them how they must contract with would-be renters. That is what ought to be the central issue in the case.

The city’s aggression here lies in its abrogation of the most fundamental right of any contracting party, namely the right to say “no.” But like so many other cases of government coercion to deprive individuals of freedom of contract these days, the defense against it is not based on the right of each person to make or decline to make contracts according to his individual values, but under some other legal theory.

The wrong rights

What has happened to the law of contract in America?

The Constitution does have a provision (in Article I, Section 10) declaring that states may not pass

laws that “impair the obligation of contracts.” The Contract Clause, however, has been rendered almost a dead letter by generations of legal decisions saying that government may indeed impair contracts (i.e., rewrite them so as to benefit one party) if the law doing so can be said to somehow protect the health, safety, or morals of the people under state “police power.”

Emergencies do not create new governmental power under the Constitution.

Those “police power” exceptions, however, have become so numerous that they almost entirely swallow the rule. (For an excellent exposition of that, I recommend a 2016 book, *The Contract Clause: A Constitutional History*, by James W. Ely Jr.) That trend began in the 19th century and reached flood stage in the 20th, especially during the New Deal era.

One of the key decisions of the Supreme Court was *Home Building and Loan v. Blaisdell* (1934), where it upheld a Minnesota law that tore up mortgage contracts by protecting people who hadn’t paid from being evicted under the terms of the agreement. Minnesota’s statute obviously impaired the contract by

changing a key term, but Chief Justice Charles Evans Hughes and a majority of the Court held the law valid. He acknowledged that emergencies do not create new governmental power under the Constitution, then proceeded to create a vague, multi-part test for when they do.

In dissent, Justice George Sutherland wrote that the majority opinion carried the ominous potential for “future gradual but ever-advancing encroachments upon the sanctity of private and public contracts.” Never was a jurist more right.

U.S. courts have sometimes decided to protect contractual freedom. The most famous case is *Lochner v. New York* (1905), where a majority struck down a statute putting a limit on the number of hours a baker could contract to work in a week. That case, however, was not argued under the Contract Clause, but instead under the Fourteenth Amendment’s provision that no state may deny a citizen life, liberty or property without due process of law. Justice Rufus Peckham’s opinion held that contractual freedom to decide how many hours you want to work is part of the liberty protected under that amendment.

Unfortunately, using the Fourteenth Amendment to shield people against laws that deprive them of the

freedom to enter into contracts as they see fit — or decline to do so — has been out of jurisprudential style since the 1930s. Today, *Lochner* is widely reviled by constitutional scholars because the Court alleged to have substituted its values for those of the people’s elected representatives in the legislature. But all the justices did was to keep those politicians from imposing their values on workers who wanted more hours of work than the legal maximum.

The essence of freedom of contract is that each person is entitled to act according to his own values. Unfortunately, freedom of contract has so fallen out of constitutional favor that it would be simply astounding if any court today used a Fourteenth Amendment due process rationale to strike down a law that deprives Americans (such as the Yims) of their contractual freedom.

Thus we are left with arguments that attacks on it are unconstitutional because they violate the Fifth Amendment (as in this case), or the First Amendment’s free speech or free exercise of religion clauses. Consider another recent case in Washington, *Ingersoll v. Arlene’s Flowers*. The state imposed a large fine on a florist because the owner,

Baronelle Stutzman, declined to contract to provide the floral arrangements for a gay wedding. The case against the legality of the state’s punishment was argued on First Amendment religious freedom grounds — unsuccessfully.

I have no reason to doubt the sincerity of Stutzman’s religious convictions against gay marriage, but the fundamental defect in what the state has done to her deprives her of freedom of contract — the freedom to say “no” to offers she does not care to accept.

Lawyers think they must hunt for First Amendment reasons to combat the spread of anti-discrimination laws because the “mere” right to choose with whom you’ll contract is no longer given any weight. What those arguments miss is the fact that contractual freedom is every bit as essential to a civilized nation as are property rights, freedom of speech, and freedom of religion.

It will be a fine day for America if we ever get back to just protecting freedom of contract straight up, for everyone.

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