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# FUTURE OF FREEDOM

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*Socialism is the renunciation of the rational economy.*

— *Ludwig von Mises*

# FUTURE OF FREEDOM

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The Future of Freedom Foundation is a nonprofit educational foundation whose mission is to advance liberty and the libertarian philosophy by providing an uncompromising moral, philosophical, and economic case for individual liberty, free markets, private property, and limited government.

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## “A Republic, If You Can Keep It”

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by *Jacob G. Hornberger*



James Madison, the father of the U.S. Constitution, wrote that of all the enemies to liberty, war is the greatest. What he meant by that is that governments inevitably use wars and other crises and emergencies to centralize and expand their powers over the citizenry. Thus, in the process of claiming to keep the citizenry safe from external threats, the government often becomes a grave threat to their freedom and well-being.

The United States has been at war for more than 15 years, ever since the invasions of Iraq and Afghanistan in 2002 and 2003. But it's actually much worse than that. If we go back to 1941, we see that the United States has been embroiled in what has become perpetual war, including World War II, the Cold

War, the Korean War, the Vietnam War, and the violent regime-change operations in Iran, Guatemala, Congo, Brazil, Cuba, Chile, Grenada, Panama, Nicaragua, and other countries around the world.

Thus, it shouldn't surprise anyone, given Madison's dictum, that Americans now live under a regime that wields powers that are ordinarily found in countries ruled by totalitarian regimes, including assassination, indefinite detention, torture, and secret surveillance of the citizenry. All of these powers have been upheld by the federal judiciary so long as U.S. officials relate them to national security, foreign policy, or the war on terrorism. Very few Americans ever expected, when they were growing up, that they would be living under a government with such totalitarian-like powers.

There are two things to note about the state of unending war and totalitarian powers in which Americans now find themselves.

The first point is that such powers are antithetical to the principles of freedom. There is just no way that any society in which people's government is wielding such totalitarian powers can be considered genuinely free. They are the same powers, after all, that are wielded by

the communist dictatorships in such countries as Cuba, North Korea, China, and Vietnam.

Ironically, however, many Americans are convinced that they are free. They have been told that since the first grade, and they still believe it as adults. They go around singing, “I’m proud to be an American where at least I know I’m free.” Or they express thanks in sports stadiums, churches, and other venues for the troops protecting “our rights and freedoms” in overseas military activities. The plight of many Americans can best be summed up by the words of the great German thinker Johann Goethe: “None are more hopelessly enslaved than those who falsely believe they are free.”

That’s why many people are befuddled by us libertarians. They hear us saying that we are fighting to restore a free society to our land, and they just don’t get it. How can freedom be restored, they ask, if freedom already exists?

In fact, that’s why many statisticians who love big government power and hate freedom resent us libertarians. They don’t like it that we tell people they’re not free. Their position is that ignorance is bliss and, therefore, as long as Americans believe they’re free, that’s all that mat-

ters. They don’t like the fact that libertarians are telling them otherwise, even if it is the truth.

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**America’s system of unending wars and totalitarian powers is destroying our society.**

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As any psychiatrist would tell us though, living the life of a false reality or a life of a lie can have grave psychological or mental consequences. It’s no coincidence that so many Americans are engaged in drug abuse, alcoholism, irrational acts of violence, and suicide. A life based on denial of reality and on lies can produce severe psychoses.

The second point to recognize about America’s system of unending wars and totalitarian powers is just as important: It is destroying our society from within. While so many people are constantly focused on ISIS, Iran, North Korea, Syria, Yemen, Latin America, and other so-called enemies, they fail to see that it is the internal rot that is taking us down.

It’s not just the financial and economic damage that this way of life is doing to our country. That’s certainly a big factor. Federal spending and debt continue soaring out of control, with the amount of the federal debt now at \$20 tril-

lion and climbing every year. Excessive government debt has brought down empires in the past. It also brings down non-imperialist regimes, as we have seen with Greece, and, for that matter, the U.S. territory of Puerto Rico. Out-of-control federal spending and debt constitute a grave threat to the economic well-being of the American people. A big part of the reason for such spending and debt is the enormous and ever-growing expense to fund U.S. military bases and operations all over the world.

The greatest damage, however, that the warfare-state way of life is doing to our nation, however, is spiritual and moral, specifically what it's doing to people's conscience and sense of right and wrong. It's stultifying and paralyzing them. The moral compasses of the American people are off kilter, and it's because of their undying devotion to the warfare-state way of life.

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### The moral compasses of the American people are off kilter.

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A good example involves Iraq, a country whose government never attacked the United States or even threatened to do so, a country where U.S. personnel have killed, injured, or maimed hundreds of

thousands of people, destroyed homes, businesses, industries, and infrastructure, brought on a vicious and deadly civil war involving a violent group called ISIS, and instigated a massive refugee crisis.

It's all been done with little remorse, empathy, or prayers on the part of U.S. officials and many Americans for any of the victims of this U.S. initiation of violence against Iraq. That's what happens when conscience is stultified and paralyzed and when people's devotion to their warfare-state apparatus trumps everything else, including the concept of right and wrong.

### After the Cold War

Let's go back to the year 1990. Without any negotiations with the United States, the Soviet Union had unilaterally ended the Cold War, permitted the peaceful unification of Germany, withdrawn Soviet troops from Eastern Europe, and dismantled the Soviet empire.

That was all good from the standpoint of both Western and Eastern Europeans. However, the Soviet Union's actions simultaneously brought the U.S. government's official Cold War enemy, the Soviet Union, to an end. Ever since the end of World War II, that official enemy had guaranteed ever-grow-

ing budgets, influence, and power for the Pentagon, the CIA, and NSA.

Suddenly, the official enemy was gone, and people were talking about a “peace dividend,” which meant a drastic shift in military and intelligence spending to domestic welfare-state programs. The Pentagon and CIA were exclaiming, Not so fast! We still live in an unsafe world, and we are the only ones who can save you from it.

Enter Saddam Hussein, the dictator of Iraq. I sometimes wonder how many Americans realize that Saddam and Iraq were close partners and allies of the U.S. government during the 1980s, much as Joseph Stalin and the Soviet Union were U.S. partners and allies during World War II.

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### Pentagon and CIA officials helped train and support SAVAK personnel.

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During the 1980s, Iraq was waging war against Iran, and the U.S. government was helping it to kill Iranians. Why did the U.S. government want to kill Iranians? Because U.S. officials were still chafing over what the Iranian people had done in 1979. In a violent revolution, they had ousted from power the

shah of Iran, who was another partner and ally of the U.S. government.

Why did the Iranian people violently revolt and oust him from power? Because he was one of the most brutal dictators in the world. He showed no mercy toward Iranians who objected to, criticized, or opposed his brutality. To enforce his tyranny, he adopted such powers as indefinite detention, torture, and execution, without judicial interference or any semblance of due process of law — i.e., the same powers that the U.S. government now wields.

To exercise his omnipotent powers, the shah used a domestic agency named SAVAK that was a Pentagon, CIA, NSA, and FBI, all wrapped into one. In fact, Pentagon and CIA officials helped train and support SAVAK personnel.

How did the U.S. government come to partner with the shah and help him to enforce his brutal dictatorship?

In the early 1950s, Iran’s prime minister, Mohammad Mossadegh, who had been democratically elected by the country’s parliament, nationalized British oil interests. The British approached the CIA for help in getting their oil back.

At first, Harry Truman said no. But when he was replaced by Dwight

Eisenhower, the answer became yes, whereupon the CIA initiated a covert coup that removed Mossadegh from power and ensured that the shah would wield total dictatorial power within the country.

So, in the 1980s U.S. officials were still chafing over losing one of their favorite dictators, the shah, in a violent revolution. That's why they were helping Saddam to kill Iranians.

All that changed, however, in 1990, when U.S. officials lost their longtime official Cold War enemy, the Soviet Union. That's when Saddam was converted into America's new official enemy.

What happened was that Iraq and Kuwait were involved in an oil-drilling dispute. The U.S. government assured Saddam that they had no interest in the controversy. However, when Iraq invaded Kuwait to resolve the dispute, U.S. officials suddenly had their new official enemy, one that they referred to as a new Adolf Hitler. The U.S. mainstream press picked up the theme, with hardly anyone's noticing or caring that this so-called new Hitler had recently been a close partner and ally of the U.S. government when they were working together to aggress against Iran and kill Iranians.

The U.S. government, led by George H.W. Bush, immediately declared Saddam Hussein to be the gravest threat to world peace since Hitler. Bush went to the United Nations, where he pulled together a "coalition of the willing," which consisted of foreign regimes that were willing to unite with Bush to reverse Iraq's invasion of Kuwait.

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### **Bush never secured a declaration of war against Iraq from Congress.**

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One problem, however, was that while he secured the approval of the United Nations, Bush never secured a declaration of war against Iraq from Congress. Why is that important? Because the Constitution requires a congressional declaration before a U.S. president can legally wage war against a foreign regime. That made the U.S. war against Iraq illegal under the U.S. form of constitutional government.

The U.S. intervention against Iraq was a slaughter. That shouldn't have surprised anyone, given that Iraq was a relatively poor Third World nation. Iraqi military personnel were bombed to smithereens, along with many Iraqi civilians.

But there was one fascinating outcome to what became known as

the Persian Gulf War: Once Iraqi troops exited Kuwait, U.S. officials decided to leave Saddam in office rather than sending U.S. troops to Baghdad, removing him from office, and installing another partner and ally as Iraqi dictator.

Instead, concerned that a military regime-change operation might mean a high casualty rate for American soldiers, U.S. officials hoped that Iraqis would accomplish the regime change that U.S. officials were yearning for.

The first step involved encouraging Iraqi Shi'ites and Kurds to rise up and revolt against Iraq. Thinking that the U.S. military would come to their assistance, a large number of Shi'ites did revolt. However, U.S. officials decided to stay out of the fray, and the Iraqi army easily put down the revolt.

The second step involved the imposition of some of the most brutal economic sanctions in history, sanctions that targeted the Iraqi people. The idea was that if the sanctions could make the Iraqi people suffer enough, they would rise up, oust Saddam from power, and replace him with another pro-U.S. dictator.

The sanctions process actually began during the Persian Gulf War. Concluding that the destruction of

Iraq's water and sewage treatment plants would help spread infectious illnesses among the Iraqi people, U.S. officials gave the order to the U.S. Air Force to bomb the facilities.

Once the fighting was over, the sanctions prevented the water and sewage treatment plants from being repaired. That accomplished what the Pentagon had predicted — the spread of infectious illnesses, especially from drinking sewage-infested water.

While the sanctions succeeded in destroying what little wealth the Iraqi people had, the deadliest impact was on their children. The mortality rate of Iraqi children soared, with thousands of children dying every month.

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**Once the fighting was over, the sanctions prevented the water and sewage treatment plants from being repaired.**

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In 1996, *Sixty Minutes* asked U.S. Ambassador to the United Nations Madeleine Albright whether the deaths of half a million Iraqi children were “worth it.” She replied that while the issue was a difficult one, the deaths of the children had in fact been “worth it.”

Albright's comment received no rebuke, criticism, or condemnation

from any U.S. official, including her boss, Bill Clinton. During her confirmation hearings for secretary of State, she wasn't asked to explain or account for her statement. The U.S. mainstream press remained scrupulously silent about her claim that the U.S. killing of half a million children, none of whom had ever attacked the United States, was “worth it.”

Not everyone was silent. In a crisis of conscience, two high UN officials, Hans von Sponek and Denis Halliday, resigned their posts in protest against what they called “genocide” against innocent children. U.S. officials were not disappointed. They considered both of them too soft on Iraq.

Von Sponek and Halliday weren't the only ones. A man from Seattle named Bert Sacks was so angry and outraged over the U.S. killing of innocent children that he decided to do something about it. He personally took medicine to Iraq, which caused U.S. sanctions bureaucrats to go ballistic.

Fining Sacks \$10,000 for violating their sanctions, U.S. officials went after him to collect the money with an obsession that bordered on the pathological. Sacks refused to pay the fine and U.S. officials refused to let him off the hook. Many

years later, Sacks ended up winning the case, but only on a technicality relating to the government's failing to comply with the statute of limitations.

While the *Seattle Times* and perhaps a few other mainstream papers came to Sacks's defense, most of them remained silent. Instead, the predominant view of the press throughout the 1990s was “Saddam! Saddam! Saddam! We have to get Saddam before he gets us!” As the new official enemy, Saddam Hussein became a national obsession for many Americans and remained so for more than 10 years.

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**Two high UN officials resigned their posts in protest against what they called “genocide” against innocent children.**

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The sanctions remained in place for several more years, killing more children in the process. One of the fascinating aspects of the sanctions was the indifference that that U.S. bureaucrats displayed to the deadly and destructive consequences. In their minds, after all, they were just enforcing the rules. It was a classic example of what Hannah Arendt called “the banality of evil.”

People sometimes forget that there was a terrorist attack on the

World Trade Center in 1993. Ramzi Yousef, one of the terrorists, cited the high death toll among the Iraqi children at his sentencing hearing in federal court. The death toll among the Iraqi children was also among the factors that Osama bin Laden mentioned in his fatwa against the United States prior to the 9/11 attacks.

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**To make sure federal officials got the point, the American people demanded the enactment of the Bill of Rights.**

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Notwithstanding the many years of death and economic suffering that the U.S. sanctions inflicted on the Iraqi people, they never succeeded in motivating the Iraqi people to rise up and violently revolt against the Saddam Hussein regime. It was the 9/11 attacks that finally gave U.S. officials, led by George W. Bush, the opportunity that they felt George H.W. Bush had squandered at the end of the Persian Gulf War — the opportunity to use a military invasion to accomplish what the sanctions had failed to accomplish — regime change in Iraq.

The Iraq sanctions finally came to an end after the U.S. invasion of Iraq in 2003. Little was said by editorial or op-ed writers or church

ministers across the United States about the deaths of all those Iraqi children and the economic suffering that had been inflicted on the Iraqi people, whose government had never attacked the United States or even threatened to do so.

### **An anti-militarist tradition**

How did all that come to be?

When the Constitutional Convention adjourned, a woman asked Benjamin Franklin what type of government was being given to the American people. Franklin responded, “A republic ... if you can keep it.”

What he meant by that was a government whose powers were limited to those enumerated in the Constitution itself. Since the Constitution did not empower the federal government to detain people indefinitely, torture them, or execute them without judicial process and due process of law, the federal government did not possess such powers and, therefore, could not exercise them. To make sure federal officials got the point, the American people demanded the enactment of the Bill of Rights, which expressly forbids U.S. officials from incarcerating or killing Americans and others without following long-established procedural processes, including due

process of law and trial by jury, and from inflicting cruel and unusual punishments on people.

Americans at that time hated big permanent military establishments, or what they called “standing armies,” which they considered a grave threat to their liberty and well-being. That’s why there was no military-industrial complex, foreign military bases, CIA, or NSA (and no FBI) for more than 100 years of U.S. history.

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**The war on communism ultimately morphed into the war on terrorism, a state of unending war.**

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On July 4, 1821, John Quincy Adams, who would go on to become the sixth U.S. president, delivered a speech to Congress in which he described the founding foreign policy of the United States, a foreign policy based on nonintervention in the affairs of foreign nations. The United States, he observed, does not go abroad “in search of monsters to destroy.” If it ever did, he said, there was a good chance America would turn into the dictatress of the world.

Unfortunately, however, there were Americans in the 19th century who believed that national greatness depended on a strong, power-

ful federal government, one that wielded the powers and the means to go abroad, acquire colonies, partner with brutal dictatorships, and effect regime change in faraway lands with invasions, coups, assassinations, and sanctions.

The big turn toward overseas empire and intervention occurred with the Spanish American War in 1898. It proceeded apace with interventions into World War I and World War II, during which the U.S. government partnered with and allied with the communist regime in the Soviet Union.

Immediately after the war, the Soviet Union was converted from partner and ally to new official Cold War enemy. That resulted in the conversion of the federal government from a limited-government republic to what is called a “national-security state,” a type of governmental apparatus that wields such totalitarian powers as indefinite detention, torture, and assassination.

The war on communism ultimately morphed into the war on terrorism, a state of unending war that increasingly threatened America with destruction from within.

The obvious question arises: Which way of life will restore peace, prosperity, harmony, morality, conscience, and freedom to our land?

By now, the answer should be obvious. By returning to our founding principle of a limited government republic and a foreign policy of noninterventionism, the American people can lead the world to the highest reaches of freedom and prosperity ever seen by mankind.

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

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**NEXT MONTH:**  
“The Lies and Hypocrisy of  
the Civil War”  
by *Jacob G. Hornberger*

*Poverty is not a mortgage on the labor of others  
— misfortune is not a mortgage on achievement  
— failure is not a mortgage on success — suffering  
is not a claim check, and its relief is not the goal of  
existence — man is not a sacrificial animal on any-  
one’s altar nor for anyone’s cause — life is not one  
huge hospital.*

— *Ayn Rand*

## Guilt by Musical Association

by James Bovard



Should the feds be permitted to treat anyone who is not a choirboy like a criminal suspect? Unfortunately, local, state, and federal agencies have a long history of targeting, harassing, and entrapping fans of untraditional music. Because so many innocuous activities have become criminalized in recent decades, it has never been easier for the feds to tar any group they please. Precedents established against devotees of unruly music could be used in the future against peaceful libertarians.

From the 1930s onwards, the feds often went after jazz musicians in part because of their frequent use of marijuana — which was proscribed nationally by the Marijuana Tax Act of 1937. After the end of Prohibition, there were plenty of

unemployed federal agents, and the launch of a new war — spurred by films such as *Reefer Madness* — provided full employment for meddlers with guns and badges.

In the 1980s and 1990s, the feds launched vendettas against Grateful Dead fans. Although the name “Deadhead” sounds ominous, Deadheads tended to be aging hippies or naive college kids in ancient Volkswagen buses, lost souls who loved to talk about peace and nature and happiness and love. Cynics often joked that Deadheads should “Get a life!” Instead, the DEA acted as if Deadheads deserved prison sentences long enough to destroy their lives. Use of LSD — a hallucinogen — was widespread among Deadheads.

Between 1990 and 1994, LSD arrests tripled nationwide; most of those arrested were Deadheads. By 1994, roughly 500 Grateful Dead fans were serving terms for LSD violations in state prisons. Julie Stewart, director of Families Against Mandatory Minimums, observed, “In the last round of Grateful Dead concerts on the East Coast, there was a trail of people left in jail afterwards.” When the Dead played in Louisville in 1993, local police arrested 272 fans within two days. Some arrests resulted because police

scouted campsites used by Deadheads and discovering 13 persons using marijuana.

Gene Haislip, DEA's chief of LSD enforcement, told *USA Today*, "We've opened a vein here. We're going to mine it until this whole thing turns around." Yet, although federal agents are working 'round the clock to wreck hundreds of people's lives with long prison sentences for selling speckles of LSD, LSD itself killed only three people in 1992, according to the federal National Institute of Drug Abuse. Far more lives were destroyed as a result of the Deadhead crackdown than as the result of using the drug.

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**Mandatory-minimum laws dictate that a prison sentence is determined by the weight of drugs sold.**

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The purge against the Deadheads was spurred by a peculiar perversion in federal drug-sentencing laws. These laws, known as mandatory minimums, dictate that a prison sentence be determined by the weight of drugs sold.

LSD is usually sold in sugar cubes or on blotter paper. Federal prosecutors count the weight of the sugar or paper as if it were pure LSD. (The LSD dose itself is usually

smaller than a pinhead.) As a result, a person who sells a single cube of sugar — with only 50 cents' worth of LSD — faces a mandatory five years in federal prison if convicted. Someone who sells five sugar cubes faces 10 years in prison. Stanley Marshall of El Paso, Texas, was arrested in 1988 for possessing less than a gram of LSD. But, since the drug was on 113 grams of paper, Marshall got a 20-year federal prison sentence.

But it wasn't necessary to traffic in banned substances to end up in the slammer. Many busts occurred because undercover drug agents aggressively encouraged Deadheads to sell them illicit drugs. Even if someone casually referred an undercover federal agent at a concert to someone rumored to be selling drugs, the person could be convicted of being part of a conspiracy to distribute illicit drugs. Dennis McNally, the publicist for the Grateful Dead, grouched, "It's much easier to arrest some hippie kid than it is to walk into a crack den in the inner city, where somebody might open the door with a semiautomatic."

### Juggalos

After lead singer Jerry Garcia died in 1995, the Grateful Dead faded away. But new bands have

arisen that have raised the hackles of law enforcement, such as the Insane Clown Posse (ICP) — a white rapping duo out of the Detroit area. In 2011, a Federal Bureau of Investigation National Gang Threat Assessment tagged the Posse's fans — known as Juggalos — as “a loosely-organized hybrid gang, rapidly expanding into many U.S. communities.... Many Juggalos subsets exhibit gang-like behavior and engage in criminal activity and violence.” But there were only sporadic reports of Juggalo-related criminality at that time. The FBI report noted, “Crimes committed by Juggalos are sporadic, disorganized, individualistic, and often involve simple assault, personal drug use and possession, petty theft, and vandalism.” Juggalos' conduct was nothing remotely comparable to that of notorious gangs such as MS-13 or the Crips or Bloods.

The FBI report noted, “Social networking websites are a popular conveyance for Juggalo sub-culture to communicate and expand.” This may be the real source of the feds' ire. It is understandable why the Juggalos would make law enforcement nervous. The band's logo is the Hatchet Man. The band's lyrics radiate homicidal hatred towards rednecks, anyone displaying a Con-

federate flag, and plenty of other targets. The pervasive profanity in ICP's lyrics make George Carlin sound like a choirboy.

Though the band initially scoffed at the FBI gang designation, it quickly produced catastrophic results as Juggalos suffered “job losses, dismissal from military service, eviction, lost child custody and constant harassment” thanks to the Hatchet Man logo on their clothing, cars, or elsewhere. Shaggy 2 Dope, one of the band's two singers, complained in August, “We have trouble booking tours now, because no one wants gang-related shit. And if you do book a tour, it's next to impossible to get people to insure it, because it's a gang rally.”

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### The FBI gang designation quickly produced catastrophic results.

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In 2014, the Michigan branch of the American Civil Liberties Union filed suit to overturn the gang designation, noting, “The Juggalos are fighting for the basic American right to freely express who they are.... Branding hundreds of thousands of music fans as gang members based on the acts of a few individuals defies logic and violates our most cherished of constitutional rights.” The case was initially dis-

missed by a judge, revived by an appeals court, and slapped down again, and is awaiting re-hearing by a federal appeals court.

As the evidence piled up of Juggalos' lives being ruined by the federal smear, the band decided to conduct a march on Washington. This past September, thousands of Juggalos assembled in front of the Lincoln Memorial to protest the FBI gang label and to heartily cuss the government.

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The Juggalos at the rally were much friendlier than the typical attendees at a Washington formal dinner.

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The ICP and their fans believe the feds are unjustly censoring them. As Violent J (Joseph Bruce), half of the ICP duo, told the Juggalos at the Washington rally, "Taking away someone's opinion is no different than sewing a man's asshole shut." The Juggalos responded by shouting "whoop whoop!" (a trademark for the band's supporters) and various snappy anti-FBI phrases unfit for a family magazine like this one.

The protest march stirred a torrent of support for the cause in the media, including National Public Radio and the *Washington Post*. A

headline on one popular online site declared, "Juggalos have become the darlings of the left and the new face of anti-racist activism." An Antifa crew showed up at their Washington rally with a banner emblazoned, GREAT LAKES ANTIFA. One team member held up a sign proclaiming "Nazi Lives Don't Matter" (a tricky sentiment, when Antifa sometimes equates Trump supporters with Nazis). The group struck some menacing poses for photographers and then wandered off, perhaps to apply some clown face paint. But most of the attendees I spoke with were either unaware or nonsupportive of Antifa's violent antics in Berkeley or Boston.

### The rousting

Despite their tattoos, wacky hair styles, and violent slogans, the Juggalos at the rally were much friendlier than the typical attendees at a Washington formal dinner. As I was walking a mile from the nearest Metro stop to the event, I saw ahead a burly, long-haired 20ish guy wearing an oversized shirt with the slogan, "Merry F\*\*\*in X-mas." I asked if he was heading to the Juggalo event and he responded warily that he was. Maybe my press pass raised his defenses. It turned out he was from the distant Virginia suburbs

and that his brother lived in my old hometown. I mentioned that that locale was originally known as “Helltown” and he replied, “It still is.” I said I had worked in the 1970s for the Virginia highway department heaving dead deer off the road and into the bushes near where his brother now lived.

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**Thanks to sovereign immunity, federal agencies can smear almost anyone or any group they please.**

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That sufficed to open him up. He told me that his name was James and that he was not wearing any clown face paint because he had heard that Virginia considered that a misdemeanor. He said he had been continually hassled by the police. Last year, he was driving home from his job when a cop lurking in his suburban neighborhood pulled him over. James asked why he was pulled over — “and I could see that he was scanning my car looking for the pretext for having pulled me over.” The cop eventually noticed that James had a small Hatchet Man metal logo dangling from his rear-view mirror. James said that Virginia prohibits anything hanging from rear-view mirrors — though that pine-scented car air fresheners

are understandably pervasive in much of the state. He related being handcuffed for no reason another time simply because he was suspected of gang affiliations.

Prior to the Washington protest, some conservative media outlets portrayed Juggalos as just another mob of violent leftists. Not this guy: he mentioned that he had a concealed-carry permit in Virginia but would never consider packing heat in the District. He was a big supporter of the National Rifle Association and was well aware of several recent firearm controversies. I asked if he considered himself at least somewhat of a libertarian. He replied, “I am my own person — I have my own beliefs.” James typified the nonpolitical nature of Juggalos at the event.

Juggalos are hopeful that the FBI will rescind its defamatory label. But the real problem is that, thanks to sovereign immunity, federal agencies can smear almost anyone or any group they please. Libertarians, constitutionalists, and gun-rights advocates have been defamed by reports from federal Homeland Security-funded Fusion Centers, which portrayed them as terrorist threats. Regardless of the lack of evidence for such charges, the allegation reverberates around

the Internet and eventually is treated with deference, if not recognized as an Officially Revealed Truth.

If the feds can vilify Deadheads and Juggalos, it could be only a question of time before Washington also tars bluegrass fans or Phish followers. The issue is not whether freaky folks with too many tattoos get unfairly vexed by petty bureaucrats. The real issue is that federal agencies have no right to demonize Americans peacefully pursuing their own vision of happiness.

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*James Bovard is a policy advisor to The Future of Freedom Foundation*

*and is the author of a new ebook, Freedom Frauds: Hard Lessons in American Liberty, published by FFF, Public Policy Hooligan, as well as Attention Deficit Democracy and eight other books.*

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**NEXT MONTH:**  
“Red-Green Delusions on  
Soviet-Bloc History”  
*by James Bovard*

*Now-a-days, men wear a fool's cap, and call it a liberty cap. I do not know but there are some, who, if they were tied to a whipping-post, and could but get one hand free, would use it to ring the bells and fire the cannons, to celebrate **their** liberty.*

— Henry David Thoreau

# The Problem with Conservatism

by Laurence M. Vance



**N**ikolai G. Wenzel has a problem with conservatism. A libertarian, Wenzel is a Research Fellow at the University of Paris Law School’s Center for Law & Economics and the coauthor (with conservative Nathan W. Schlueter) of *Selfish Libertarians and Socialist Conservatives? The Foundations of the Libertarian-Conservative Debate* (Stanford Economic and Finance, 2017).

This book is the only “debate book” between a libertarian and a conservative regarding their political philosophies that I am aware of. After a co-authored introduction, each author presents the case for his viewpoint, followed by replies to each other, case studies on three issues, and conclusions. The book showcases the problem with conservatism.

According to Wenzel, “Conservatives would violate many of their own terms by implementing their program through the state.” Conservatism

— even the limited, principled conservatism espoused by Schlueter — is arbitrary in its claims because it seeks justification for the public imposition of private preferences.

is also arbitrary in the preferences it seeks to advance, as evinced by the multitude of different conservatisms and different immoral behaviors that different flavors of conservatism would ban.

is self-defeating, as it naively deploys the coercive apparatus of the state to advance private preferences through public means while disregarding human nature and the constraints of robust political economy.

Each of conservatism’s virtues “becomes a vice when it is imposed coercively and through central planning” because “the very notion that the coercive apparatus of the state can ‘support’ virtue without

being coercive is odd and arbitrary, to say the least.” Wenzel avers that “it is no wonder that there are so many different and conflicting forms of conservatism because none is based on principle or coherence but rather on an arbitrary set of personal preferences that is imposed as the truth on everybody, through the political process.” In sum, “Conservatism has many strengths and many valuable lessons. But it is ultimately inimical to liberty — and to human flourishing.”

Those are some harsh words about a political philosophy that claims to believe in the Constitution, limited government, federalism, free enterprise, individual freedom, private property, and the free market — or at least those things are what conservatives regularly include in their mantra. But are Wenzel’s words an accurate assessment of conservatism?

### Conservatism

Schlueter is Professor of Philosophy and Religion at Hillsdale College, a notably conservative institution. Like conservative godfather Russell Kirk (1918–1994), who wrote lengthy philosophical treatises on the “canons of conservative thought” and “conservative principles,” but could never give a coher-

ent, consistent, and concise definition of conservatism, Schlueter has a hard time defining conservatism, since it “is not a specific philosophy of government but a generic term that can have a wide range of specific meanings.”

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### Conservatism “is not a specific philosophy of government.”

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Schlueter sees modern American conservatism as a version of classical liberalism that he terms “natural law liberalism.” Like classical liberalism, natural law liberalism affirms “natural rights, the free market, limited government, the rule of law, and a commitment to public reason as the ground for law and public policy” and repudiates “religious intolerance, laws of entail and primogeniture, titles of nobility, and mercantilist economics.” But unlike some forms of classical liberalism, natural law liberalism affirms “the capacity of reason to discover natural principles of justice while also holding that reason depends on, grows from, and is limited by experience, history, and tradition.” It rests on “a conception of reason” that is “moderately realist, oriented toward truth, yet conditioned and limited by experience and tradition.”

Schlueter posits that “conservatism rests on a recognition of the mutual interdependence of liberty, tradition, and reason” — what he calls the “equilibrium of liberty.” Natural law liberalism “incorporates” all three of these principles. And the “three primary strains within the conservative intellectual ‘movement’” (libertarianism, traditionalist conservatism, and neo-conservatism) each “represent” one of the principles. All three are “necessary for human flourishing,” and, although in some tension, are “interdependent.” Taken in isolation, “each of these principles not only fails to achieve its *own* end; it also tends toward monstrous consequences.” But “set in careful equilibrium,” each principle “not only *prevents* the perverse tendencies of the others but also *provides* best for their most wholesome influence and development.” This “equilibrium of liberty” is what “the principles of the American founding” rest on. American conservatism is “committed to conserving the principles of the American founding.” And “the principles of the American founding are a unique and valuable historical expression of natural law liberalism.”

The problem with this presentation of conservatism is that one can

never take it from A to B. It has little to do with the real world. How does one gather from all of this whether conservatives believe —

- that medical marijuana should be legal or illegal?
- that refundable tax credits should be continued or eliminated?
- that the government should or shouldn’t tax the rich to provide the poor with Medicaid, housing subsidies, or food stamps?
- that businesses should or shouldn’t be required to have handicapped parking spaces?
- that discrimination on the basis of race, religion, sexual orientation, or gender identity should or shouldn’t be permitted?
- that laws against price gouging and ticket scalping are legitimate or illegitimate?
- that pregnant women should have access to the WIC program or that it should be done away with?
- that foreign aid spending should be increased or eliminated?
- that the rich should receive more or fewer tax deductions and credits?
- that the government should or shouldn’t fund the education of children?
- that burning an American flag should be considered a crimi-

nal offense or freedom of expression?

- that pornographic movies should or shouldn't be prohibited in hotel rooms?
- that restaurants should or shouldn't be able to have a smoking area?

Thus far, the true nature of conservatism is not clear. Schlueter says he agrees with his libertarian coauthor that "no person may be mistreated, abused, or sacrificed for the good of others, whether according to the 'greatest happiness of the greatest number,' the 'general utility,' or any other consequentialist reason," and that "economic freedom is a matter of basic justice and a necessary component of human flourishing."

But does he really?

### Moral harm

It is when Schlueter brings up the subject of moral harm that the true nature of conservatism is unmasked. He starts out on a good note:

There are some actions that directly damage intrinsic goods or indirectly undermine the conditions for the achievement of intrinsic goods. This is

most obvious with respect to wrongful actions that harm the physical persons and property of others, such as assault, murder, rape, and theft.

That is something that every libertarian who holds to the nonaggression principle would certainly agree with.

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But Schlueter doesn't stop there. "Wrongful actions" also include "actions that cause moral harm to others." He reasons,

It is unjust to present human beings (especially weaker beings like children) with powerful temptations to actions that undermine or corrupt basic goods. In the worst case, human beings seek to exploit such strong temptations in others for personal profit, as with drug pushers, prostitutes, pimps, and pornographers. Such activity is a source of moral harm to the character and integrity of other persons and to the social conditions

that support good human choices and thus an injustice that may be prohibited by law.

Actions that are purely private and have no effect on public morality are beyond the scope of human law, but immoral actions that cause moral harm to others are a matter of justice and are rightly subject to proscription.

There are also nonphysical harms that are proper objects of government action. These include harms to reputation (for example, defamatory speech, libel, and slander), harms to social order (such as open borders), and harms to moral culture (including pimps, prostitutes, drug pushers, panders). Either such nonphysical harms exist, or they do not. If they do exist, they are a proper object of political authority. If they do not exist, they are not.

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### Schlueter appeals to the American Founders for support.

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“Wrongful, noncoercive actions” that “directly harm basic goods that constitute human flourishing” and “also harm the moral character of the persons who engage in them”

include “assisted suicide, prostitution, pornography, and the sale and consumption of addictive mind-altering drugs.”

For Schlueter to explain that the purpose of human law “is not simply or exclusively to prohibit immorality but to promote the conditions for human flourishing” and that the object of political authority “is not to direct human beings to particular ends of human flourishing but to protect and promote the conditions for human flourishing” does not lessen the severity of what he is saying: “It is not wrong in principle, and indeed it is sometimes a requirement of justice, to prohibit immoral actions by law.”

Schlueter appeals to the American Founders for support: “The founders also agreed that political authority has a legitimate, if secondary, role to play in preventing moral harm and promoting good character.” And the Founders “were simply reflecting the consensus of the Western legal tradition, which rests on three salient claims”:

First, there is a class of actions involving moral harm to oneself. That is, some actions are wrong and harmful to individuals even when those individuals engage in those ac-

tions voluntarily. Second, such actions, when engaged in by consenting individuals, can also harm nonconsenting, third-party individuals. Third, laws that prohibit such actions not only prevent particular moral harms to individual parties; they also reinforce and promote general norms of behavior.

Schlueter refers us to a statement in the first Pennsylvania constitution: “Laws for the encouragement of virtue, and prevention of vice and immorality, shall be made and constantly kept in force, and provision shall be made for their due execution.”

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**Schlueter also maintains that not  
“every moral wrong must be  
legally prohibited.”**

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Schlueter insists that he “is not saying that the U.S. Constitution gives the national government power over morals legislation.” In our system of government, “These decisions are reserved to the state and local governments.” And “it was universally assumed, and never questioned, that state governments, unlike the national government, had the power to pass reasonable

legislation to protect the health, safety, welfare, and morals of their citizens.” But he also maintains that not “every moral wrong must be legally prohibited” because

there are often good and even conclusive reasons to refrain from prohibiting behavior that violates moral norms that are consequential for the rest of society. These include the strong opposition of public opinion, the public expense of enforcement that could better be spent elsewhere, the danger of abuse of public authority, the incitement to crime, and a host of other prudential considerations.

The “legal prohibition” of “immoral actions that cause moral harm” must “not result in worse harms (public expense, corruption of authority, corruption of persons through black market, and the like) than toleration of the action.”

### The problem

Recall that Wenzel, Schlueter’s libertarian coauthor, disdained conservatism because “it is internally inconsistent, it is arbitrary in its preferences, it involves an imposition of private preferences

through public means, and it is ultimately inimical to liberty and human flourishing.” To this must be added that conservatism is authoritarian, coercive, unpredictable, unprincipled, hypocritical, repressive, and statist. It requires an army of bureaucrats and a police state to enforce its prohibitions on moral harm. Conservatism basically says this: Do something immoral — even if it is peaceful and nonaggressive and doesn’t violate the person or property of someone else — and the government has every right to lock you in a cage. And never mind that we don’t treat all immoral acts equally and that we overlook some altogether.

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**Conservatism is authoritarian, coercive, unpredictable, unprincipled, hypocritical, repressive, and statist.**

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There are a number of interrelated issues here. First is the age-old question of whether the government should enforce morality. Then there is the phony conservative plea for states’ rights, the naive trust in government, the inconsistency and hypocrisy of conservatism, the confounding of vices with crimes, and the selective use of history. Let’s look at these in reverse order.

The fact that colonial Pennsylvania had morals legislation doesn’t mean that morality laws are good or right. In fact, it doesn’t mean anything, especially since Schlueter neglected to mention that the short-lived first Pennsylvania constitution (it was replaced in 1790 by a constitution patterned after the U.S. Constitution) also mandated a religious test for public office. According to section 10, each member of the legislature had to subscribe to the following declaration: “I do believe in one God, the creator and governor of the universe, the rewarder of the good and the punisher of the wicked. And I do acknowledge the Scriptures of the Old and New Testament to be given by Divine inspiration.” Does Schlueter believe there should be religious tests for public office in 2017? But why appeal to the first Pennsylvania constitution? Why not William Penn’s *Frame of Government* (1682), which included a Quaker moral code that mirrored that of Puritan New England? Colonial officials prosecuted “all such offences against God, as swearing, cursing, lying, prophane talking, drunkenness, drinking of healths, obscene words, incest, sodomy, rapes, whoredom, fornication, and other uncleanness (not to be repeated).” Additionally, “all prizes,

stage-plays, cards, dice, May-games, gamesters, masques, revels, bull-battings, cock-fightings, bear-battings, and the like, which excite the people to rudeness, cruelty, looseness, and irreligion, shall be respectively discouraged, and severely punished.”

Like most conservatives, Schlueter confounds vices with crimes. But what Lysander Spooner said in the nineteenth century is just as valid in the twenty-first century: “Vices are those acts by which a man harms himself or his property. Crimes are those acts by which one man harms the person or property of another. Vices are simply the errors which a man makes in his search after his own happiness. Unlike crimes, they imply no malice toward others, and no interference with their persons or property.” There are two particular “moral harms” that Schlueter mentions three times: prostitutes and drug pushers. Those two things are always cited by opponents of libertarianism to “prove” that libertarianism is immoral. Not because libertarians promote, defend, or practice them, but because they don’t believe the government should interfere with the voluntary, private, peaceful activity of consenting adults. Regarding prostitu-

tion, libertarians reason that if it is legal for a woman to provide free sexual services as often as she wants and to as many people as she wants, then it shouldn’t be illegal for her to charge for performing the same services. Regarding drug use, libertarians reason that it makes no sense for the government to wage war on *illegal* drugs when legal drugs prescribed and administered by physicians kill far more people every year.

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The inconsistency and hypocrisy of conservatism is legion. Every bad thing that conservatives say about drugs could be said about alcohol. Alcohol is one of the leading causes of premature deaths in the United States. It is also a factor in many fires, violent crimes, child-abuse cases, sex crimes, and accidents. Does Schlueter believe that alcohol pushers should be jailed? Does he think that alcohol should be prohibited? Of course he doesn’t.

Although Schlueter maintains that not “every moral wrong must be legally prohibited,” in the end conservatives always defer to the government to decide which moral

wrongs should be prohibited and what punishment should be meted out to violators. Schlueter claims to agree with his libertarian coauthor that progressives have “an unreasonable trust in the capacity of government experts to solve complex social problems” and that “the modern administrative state” is both “unconstitutional and unjust.” When it comes to something like the war on drugs, conservatives have the same unreasonable trust in government and fully support the unconstitutional and unjust actions of the modern administrative state.

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**Conservatism is utterly devoid of any fundamental and universal principles except authoritarianism.**

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The conservative appeal to states’ rights is phony. Conservatives don’t want it left up to the states when it comes to abortion; they want federal laws against the practice. Conservatives don’t want it left up to the states when it comes to flag burning; they want a constitutional amendment to authorize laws against it. Conservatives don’t want it left up to the states when it comes to marriage; they want a federal defense of marriage act. And conservatives certainly don’t want it

left up to the states when it comes to drugs; they never call for the repeal of all federal drug laws.

The question of whether the government should enforce morality is no different from the questions of whether the government should fund education or subsidize the arts. Of course it shouldn’t. It is simply not the proper role of government to do so. The only legitimate purpose of a limited government in a free society is to keep the peace, prosecute and punish those who initiate violence against the person or property of others, provide a forum for dispute resolution, and constrain those who would attempt to interfere with people’s peaceful actions.

### Conclusion

In spite of all their talk about the Constitution, limited government, federalism, free enterprise, individual freedom, private property, natural law, classical liberalism, and the free market, conservatives are statists and conservatism is merely one of many varieties of statism. The very heart and soul of conservatism is not libertarianism, as Ronald Reagan foolishly said, but statism. Conservatism is utterly devoid of any fundamental and universal principles except authoritarianism.

For the government to station a morality officer in every home, in every place of business, on every street corner, in every elevator, in every lobby, on every beach — anywhere and everywhere where a moral harm might take place or be contracted — would not violate conservatism in the least.

F.A. Hayek was right: “It is indeed probable that more harm and misery have been caused by men determined to use coercion to stamp out evil than by men intent on doing evil.” As was C.S. Lewis: “Of all tyrannies a tyranny sincerely exercised for the good of its victim may be the most oppressive. The robber baron’s cruelty may sometimes sleep, his cupidity may at some point be satiated, but those who torment us for our own good will torment us without end for

they do so with the approval of their own conscience.”

Such is conservatism, an authoritarian philosophy that thinks people should be caged for engaging in peaceful behavior the government doesn’t approve of.

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**NEXT MONTH:**  
**“Paycheck Plus Welfare”**  
*by Laurence M. Vance*

*No good act can produce an evil result. Evil means, even for a good end, produce evil results.*

— Mohandas Gandhi

# Smith Act Tyranny Against Communists

by Wendy McElroy



When a state officially declares war on another state, it unofficially declares war on a second front: domestic dissidents. The dynamics of the latter can be seen by tracking one of the most powerful phenomena of the last century: the Red Scare(s). Anti-communist hysteria followed World War I and did not cease until the fall of the Soviet Union in 1991. One law epitomized the dynamics: The Alien Registration Act of 1940.

Most often called the Smith Act, after Congressman Howard Smith (D-Va.), the Alien Registration Act is a federal statute that required all adult non-U.S. residents to register with the Immigration and Naturalization Service; it also made it a crime to advocate the overthrow of any U.S. government, including a

“State, Territory, District or Possession thereof, or the government of any political subdivision therein.”

It said that anyone who “knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government” was liable both to fines and imprisonment for a maximum of 20 years. The prohibited methods of advocacy were printing, publishing, editing, issuing, circulating, selling, distributing, or the public display of such advocacy. The Smith Act targeted anyone who “organizes or helps or attempts to organize any society, group, or assembly of persons” who encouraged the overthrow of “government by force or violence; or [who] becomes or is a member of, or affiliates with” such groups.

Signed into law by Franklin Roosevelt, the statute negated the constitutional rights of freedom of speech and freedom of assembly.

## Nullifying constitutional rights

Briefly, those in power created a hysteria and then manipulated the resulting public panic in order to cement their authority.

The aftermath of World War I shook America to its political core, and the ideological enemies were

clearly identified: communists, anarchists, and radical labor organizations with which they associated. The 1917 revolutions in Russia had emboldened communists elsewhere to organize and to ally with trade unions and radical workers' groups. Powerful movements emerged, especially in America and Europe, where they threatened the status quo through labor unrest and an occasional bomb.

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### The aftermath of World War I shook America to its political core.

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The American government responded with the Palmer Raids. In November 1919 and January 1920, under the authority of Attorney General A. Mitchell Palmer, the Department of Justice conducted a series of raids to arrest and deport more than 500 foreign communists and anarchists. That was the first Red Scare and a stepping stone to power for 24-year-old J. Edgar Hoover, whom Palmer had appointed to head an investigation of radical groups. A rabid anti-communist, Hoover was director of the FBI when the Smith Act was passed.

Other measures and agencies rode the Red Scare wave into power; loyalty oaths became common and the House Un-American Ac-

tivities Committee was formed (1938). Under the headline "Aliens to Begin Registering Tuesday," the *New York Times* (August 25, 1940) explained, "The Alien Registration Act was merely one of many laws hastily passed in the first spasm of fear engendered by the success of fifth columns in less fortunate countries. Suddenly the European war seemed almost at our doors, and who could tell what secret agents were already at work in America?"

The Smith Act stood out from the flood "of many laws" in one regard, however. It was the first federal statute since the Alien and Sedition Acts of 1798 to turn the mere expression of political ideas into a crime.

### First they came for the socialists ...

A series of trials between 1949 to 1958 became the most infamous episode under the Smith Act. In an attempt to eliminate the Communist Party of the United States (CPUSA), communism itself was criminalized and 140 leaders were eventually indicted.

The CPUSA leaders were not the first radicals tried under the Smith Act, however. In 1941, leaders of the Socialist Workers Party (SWP) were convicted at the urging

of Roosevelt, largely because they opposed America's possible entry into World War II. The SWP was Trotskyite, which made it an ideological enemy of the CPUSA, which was Marxist; moreover, unlike the SWP, the CPUSA supported a Soviet-American effort against Nazi Germany.

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### Hoover began collecting information on the CPUSA.

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Thus, the national CPUSA refused to support the SWP and sometimes even expressed agreement with its prosecution. In his autobiography, *Advocate and Activist: Memoirs of an American Communist Lawyer* (1993), John Abt wrote, "Little did we know that in the postwar period the Smith Act would become the primary legal weapon to attack our Party and imprison its leaders. It wasn't until 1949, with the first Smith Act indictments of the Communist party, that I read the documents against the ... Trotskyists and saw that the cases against the two organizations were virtually identical. The Communists had made a terrible mistake in not defending the SWP."

During America's participation in World War II, authorities did not pursue the CPUSA, because they

wanted to maintain good relations with the Soviet Union, which was then an ally. In 1945, however, FBI Director Hoover began collecting information on the CPUSA and produced a massive report that recommended the criminal prosecution of its leaders. In 1948, Hoover encouraged Harry Truman to use the Smith Act to do so. The political atmosphere favored Hoover.

The CPUSA was declining in power but its commitment to the now-estranged Soviet Union fed into the Cold War narrative that Truman was selling. His legacy, the Truman Doctrine (1947), was a militaristic foreign policy that sought to counter the ideological and geopolitical expansion of communism. A communist domestic threat would rally public acceptance and bipartisan support. In short, it was not so much CPUSA's popularity that made it a threat to be eliminated; it was the federal government's need for a target and rallying point.

In 1948, the Department of Justice charged twelve CPUSA leaders with violation of the Smith Act. (One was not tried, owing to illness.) The charges were "advocating the violent overthrow of the government" and "belonging to an organization that did the same." No

acts of violence were alleged. Rather, the prosecution argued that the CPUSA advocated the violent overthrow of the government and it introduced works promoted by the CPUSA as evidence; for example, the *Communist Manifesto*, with its call for violent revolution, was introduced. Thus the defendants were accused of advocating violent revolution by implication as well as organizing to promote it.

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**The unconstitutionality of the Smith Act was another of several defenses presented.**

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When the defense pointed to language in the CPUSA constitution that rejected violent revolution and advocated a peaceful transition to communism, the prosecution produced undercover informants and disillusioned communists as rebuttal witnesses. One of them testified that the constitution's language was a legal ploy meant to protect members from prosecution.

The unconstitutionality of the Smith Act was another of several defenses presented. A defense motion to dismiss read that “this statute (a) violates the First Amendment to the United States Constitution, (b) invades the freedom of association of political and personal

rights guaranteed by the Ninth and Tenth Amendments to the Constitution.”

The trial, which lasted ten months, was the longest federal trial in U.S. history to date and one of the most controversial in American history. Outside the courtroom, there was an air of public hysteria, with radicals protesting in behalf of the defendants and violent counter protests. Four hundred policemen were assigned to keep the peace on the trial's opening day.

Part of the frenzy was whipped up by the sensationalized coverage provided by an overwhelmingly hostile media that functioned as megaphones for political officials. Part of it sprang from world events; for example, the Soviet Union tested its first nuclear weapon. A few voices with perspective spoke out, however. An article in the *New York Times* (July 22, 1948) opened, “Henry A. Wallace, Third Party Presidential candidate, today assailed the New York indictments of top Communist leaders as an unconstitutional attempt by the Truman Administration and ‘bipartisans’ to create fear in order to stay in power.” Interesting enough, the SWJ offered the defendants its solid support.

In the end, ten defendants were fined \$10,000 each; they each re-

ceived five-year prison sentences, with four of them forfeiting their bails by absconding. The eleventh defendant was sentenced to only three years because of his distinguished war record. The five defense attorneys (six if you count a defendant who acted as his own) were cited for contempt and spent prison time ranging from 30 days to six months. Two were disbarred; that dissuaded other attorneys from defending communists in the coming years.

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**The court ruled that radical speech was protected by the First Amendment unless it created “a clear and present danger.”**

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In 1951, an appeal of the original decision reached the U.S. Supreme Court in the form of *Dennis v. the United States*; Eugene Dennis was one of the ten defendants who received a five-year term. In a 6-2 decision, with Justices Hugo Black and William O. Douglas dissenting, the court confirmed the conviction. In his dissent, Black noted that the petitioners were not charged with attempting or acting to overthrow the government or any act. No matter how the indictment had been worded, Black called it “a virulent form of prior censorship of speech

and press, which I believe the First Amendment forbids. I would hold ... the Smith Act authorizing this prior restraint [as] unconstitutional on its face...”

### More trials of CPUSA members

In 1957, the U.S. Supreme Court heard *Yates v. United States*. The case concerned 14 lower officials of the CPUSA who had been convicted under the Smith Act. This time, the court ruled 6 to 1 that radical and reactionary speech was protected by the First Amendment unless it created “a clear and present danger.”

In 1958, Junius Scales became the last CPUSA official to be convicted under the Smith Act and the only one convicted after the *Yates* ruling. The conviction came because Scales did advocate political violence and taught martial arts. Another Supreme Court judgment upheld the conviction.

By the time persecution of the CPUSA ceased, 144 people had been indicted and 105 convicted with cumulative sentences of 418 years imposed. Fewer than half served jail time and many of the convictions were overturned. In her book *The Age of McCarthyism: A Brief History with Documents*, Ellen Schrecker observed that “prosecutors relied on the testimony of

professional ex-Communists and undercover agents. Many of these people lied. Over the years, the unreliability of the government's witnesses was to invalidate many convictions, as appellate judges increasingly began to raise questions about the veracity of the professional informers."

Nevertheless, Hoover had realized his goal of destroying the CPUSA, which never recovered. Truman had succeeded in silencing opponents of the Cold War and in cementing support for it. He was so successful that the Cold War raged until 1991 with the collapse of the Soviet Union.

## Conclusion

The persecution of the CPUSA serves as a cautionary tale on the use of state force against ideas. A primary engine driving such legal prosecutions is war: the political use of its aftermath, the justification of additional wars, and the continuation of military policies even in peacetime. The Red Scare(s) allowed a war atmosphere to spread through the 20th century, from 1919 to 1991.

The Palmer Raids led to the Smith Act, which ushered in the most infamous expression of the Red Scare(s): McCarthyism. In the

early 1950s, Sen. Joseph McCarthy, presided over the American version of Soviet show trials, all of which hinged on the question, "Are you now, or have you ever been, a member of the Communist party?"

Then, in 1954, McCarthy made two fatal mistakes. In televised interrogations, the senator turned his focus on the U.S. Army, including decorated war heroes. The attorney representing those under attack finally asked McCarthy the famous question, "At long last, have you no sense of decency left?" The first mistake was to attack the military, which the Red Scare was meant to strengthen. The second was to publicly display the vicious inner workings of the Red Scare that did not respect innocence, due process, or decency. The suppression of political dissent worked only if the public believed it was justified and moral. The collapse of McCarthyism demonstrated the only force strong enough to counter a campaign of fear whipped up by the politically powerful: the common decency of average people.

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# Limited Government and a Free Society, Part 1

by Gregory Bresiger



Presidential use of the executive order, along with its relative, the executive agreement, has become the “very definition of tyranny.” The use of executive orders has dramatically increased over time. George Washington issued about one executive order a year. However, by the 1960s, Richard Nixon and Lyndon Johnson were averaging about 60 a year. The numbers went down under George W. Bush and Barrack Obama to about 35 a year. Just a few months into his presidency, Donald Trump has already issued some 30, according to the American Presidency Project (APP), as Trump, frustrated by Congress, has sought, as so many other presidents, to ignore Congress and use executive orders to govern unilaterally.

## A short history of executive orders

Executive orders have been much debated since George Washington issued the first one. These orders, which were not specified in the Constitution, were initially used by presidents for several things: to designate certain lands for military use or for the disposition of public property or as presidential proclamations. Controversy began when presidents started issuing them under their powers as commander in chief to maneuver the nation into wars that were not approved by the public or by Congress. (For example, Trump has ordered U.S. forces into war situations and is now ready to take the nation to war with North Korea without any approval from Congress.)

Executive orders, along with the expansion of other executive powers, have given presidents the power to push the country into war without the consent of Congress or the people. These are presidential wars. They are wars not backed by a congressional declaration of war, they are often in contravention of public opinion. They have been some of the most disastrous wars in our history.

There are several types of executive orders that can have legal force. They include presidential procla-

mations that can be directed toward agents of the executive branch, those in connection with the president's role as commander in chief, and those pursuant to congressional authorization.

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**The executive order power is not specifically granted in the Constitution.**

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Since the executive order power is not specifically granted in the Constitution, presidents issue them by virtue of their general power as head of the executive branch and commander of the armed forces. And here — as the powers have broadened, as presidents have attempted to preclude discussion on controversial issues — is the source of a bitter debate. The controversy is over the use, or misuse, of executive orders and agreements, which have become essential parts of an imperial presidency

Disagreement over executive orders by the last two presidents is nothing new. That's because executive orders, executive agreements, and the general expansion of presidential powers can give presidents prerogatives as dangerous as those wielded by Charles I, whose violations of the British constitution and whose attempt to destroy the pow-

ers of Parliament led to the English Civil War. Charles began it by marching his soldiers into Parliament with orders to arrest some of its leaders, John Hampden and John Pym, who challenged the claimed prerogatives of the king by denying him funds. Charles said as king he was above the law. By the way, that is similar to a claim of presidential power made by former president Richard Nixon in an interview with TV talk-show host David Frost. (Nixon, facing certain impeachment, had resigned in 1973.)

Parliament, under Charles I faced up to this tyranny the way every legislature, parliament, or Congress can and should if it follows the principles of limited government and of government under law: Cut off money to the king, or the president, or the prime minister, until the leader obeys the meta-law, a nation's constitution. Still, presidents have had many tools to ignore laws, especially in foreign affairs, which is one reason why America seems perpetually at war in the era of the imperial presidency.

Executive agreements, like their cousins, executive orders, are used in lieu of treaties. They are not subject to Senate advice and consent limitations. Then there is no need for

Congress. It is the same approach the last two presidents have taken on immigration reform. The danger of these practices is that they have at times come to be defended by leaders of both major parties. They are similar to certain entitlements that can never be revisited by either party, even if they could be leading the country to unheard-of red ink, with entitlements potentially one day swallowing all government revenues, as detailed in the Kerrey-Danforth Entitlement Report of 2000. The foreign-policy precedents of executive orders and agreements, backed by the power of the modern president and unchallenged by the Congress and the courts, have become crushing.

### Mocking Montesquieu

Executive orders and agreements continue to be used when imperial presidents want to go around Congress and public opinion. But the frequent use of executive orders and agreements to avoid controversial issues is a mockery of one of the basic principles of the original Constitution: the separation of powers. It was designed as a protection against the abuse or monopolizing of power by any one official, party, or branch: The separation of powers was explained by, among others,

Montesquieu in his book *The Spirit of the Laws*.

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**The president could not legally take the country to war without Congress's approval.**

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He wrote, “Il faut que le pouvoir arrete le pouvoir.” (It is necessary that power stops power.) That principle, now often violated by presidents who want to go to war or take other action with little or no discussion, was embodied in the original Constitution. The war power was “separated.” The president was the commander in chief. But the president could not legally take the country to war without Congress's approval.

### Separation eroded and tyranny enthroned

“The doctrine of separation of powers is fundamental to the American system,” writes Leanna M. Anderson in the *Hastings Constitutional Review of 2002* (Hastings Constitutional Law Quarterly). In her article, “Executive Orders. The Very Definition of Tyranny,” she poses a series of disturbing questions about how this vital principle of liberty could be destroyed.

“The Constitution vests legislative power in Congress, judicial

power in the courts, and executive power in the President. But what if the President were to usurp legislative powers? What if the common law made it almost impossible for citizens and state and local government officials to challenge the exercise of these powers?" she writes.

Executive orders are presidential actions that often have legislative effects, but such orders are frequently shielded from review in the courts, she warned. Worse than that, many courts don't think they have any right to review illegal commander-in-chief actions, yet such actions result in presidential wars. To be sure, the courts are often blocking Trump's executive orders. But what about what the actions of his national-security state? When will the courts block or stop an illegal war?

Courts have generally shied away from taking a position on the legality of presidential wars. They have tended to agree with Chief Justice John Marshall in the case that established judicial review, *Marbury v. Madison*. Presidential war powers, he held, were beyond the reach of the courts. The president, Marshall noted, is "accountable only to his country in his political character, and to his own character."

Some 160 years later, Chief Justice Warren Burger also denied that

the courts had jurisdiction over war cases. He said it was difficult to imagine "an area less suited for juridical action." He warned that suitors seeking relief from the courts for the excesses of presidential war powers were wasting their time. Still, others have looked to the courts to stop presidential wars.

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**Courts have shied away from taking a position on the legality of presidential wars.**

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In 1990, some 55 members of Congress led by Rep. Ronald Dellums (D-Calif.), tried to prevent George H.W. Bush from launching the Gulf War without approval of Congress. They sought the intervention of a federal district court. The court turned them down because they represented only 10 percent of Congress. That implied, said John Lehman in the book *Making War*, that, if "a majority had joined, it [relief] might have been granted." But if a majority of members of Congress had agreed with Dellums, then the Congress could have blocked Bush's attempts to go to war by cutting off war funding. That is a critical factor in keeping wars going, as we will see later when will discuss America's most unpopular war, the Vietnam War.

But the majority of Congress didn't agree with Dellums. And, by the beginning of this century, the excesses of presidential warmaking had become blatant. They are accepted by some as an inevitable by-product of an electronic age in which decision-making must be quicker and quicker.

### "Isolationism" defeated

Leanna Anderson was writing a decade after the Gulf War. Since then we continue to see more examples of presidents who think they can ignore Congress and act unilaterally in both domestic and foreign-policy issues. In the Gulf War of 1991, George H.W. Bush said he had the executive power to wage war without the approval of Congress. Although Congress narrowly authorized him to make the decision on whether to go to war, Bush claimed he had the right to wage such a war without Congress's authorization. The president insisted that his administration, in its victory in that short war, had accomplished something else. It had, he said, put an end to "isolationism," as he wrote in the book *A World Transformed*, co-written with former national security adviser Brent Scowcroft.

In celebrating the victory, Bush gave this justification for waging

war: "Our nation can no longer afford to retire selfishly behind its borders as soon as international conditions seemed to recede from crisis, to be brought out again only by the onrush of the next great upheaval," he wrote. "The was a pattern I was determined to break as we moved beyond the Cold War, and it is one we must continue to put behind us."

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**Bush and his associates — and their successors, both Democrat and Republican — continue to erode the protections of the separation of powers.**

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But aside from the debate over whether the United States should be the policeman of the world and whether the president has the power to decide when to exercise that power unilaterally, Bush's comments raised the issue of whether he and his successors, both Republican and Democrat, are determined to break the separation of powers by using executive orders and other implied executive powers. Bush and his associates — and their successors, both Democrat and Republican — continue to erode the protections of the separation of powers; they make war with little or no debate in Congress and

certainly without a congressional declaration of war, as mandated by the Constitution.

That seemed not to be a serious concern for the Bush administration in the Gulf War. This “Congress is not needed to make war” sentiment was supported by his Defense secretary, Dick Cheney. Later serving as vice president under George W. Bush, Cheney also defended executive actions in the disastrous Iraq War of 2003. We will later see that he offered his own rationale for the president to make presidential war.

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**In writing the Constitution, the Framers called for the division and subdivision of powers.**

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The original Constitution was written by men who were often students of history, which George H.W. Bush certainly is not. Most feared the power of imperial rulers. The power of Louis XIV, Charles I, and Roman emperors, among others, was a danger to liberty, they believed. In writing the Constitution, they called for the division and subdivision of powers. The president was the commander in chief, but only Congress could declare and fund war. This idea, that all powers

should be divided and limited, is one of the basic principles of government in a free society. The tradition of limited government, of the subdivision of power, is based on centuries of tradition and continued to be relevant in the 19th century.

### **A warning from a friend of liberty**

“The first lesson of liberty is that liberty depends on the division of power,” Lord Acton wrote in letters to his friend British Prime Minister W.E. Gladstone and his daughter Mary in the Victorian Era. Acton, the great multilingual opponent of tyranny, also affirmed that “la liberte, c’est la remede de tous les maux.” Liberty is the cure of all that is bad, said Acton, as quoted in a book by Mary Drew, *Acton, Gladstone and Others*.

These ideas of liberty, of limited government, of government under law, of the Ninth and Tenth Amendments to the Constitution — which reserve all unenumerated rights to the people and the states — divide and subdivide power as a vital protection of liberty. Yet this principle seems forgotten when Americans debate actions of the imperial presidency across partisan lines, often ignoring the bigger issue: the fight to restore the idea of government under law. The latter is the belief of

philosophers of liberty from Cato to Kant to Acton to Hayek.

Why is the principle of the separation of liberty endangered today?

Most Americans, debating the use of executive orders and their relationship to the imperial presidency, ignore history and focus on party. They don't seem to care about the bigger issue: the protection of liberty. Democrats tend to object to the abuse of executive power by Trump. Republicans, sensitive to its use by Obama, didn't understand that it is an institutional, not a partisan, problem.

The idea of a government under law was once alive and honored in the United States. When President U.S. Grant tried to act without Congress, he was stopped by a group of senators led by Charles Sumner and Carl Schurz, Republicans opposing the imperial overreach of a Republican president. They fought against the imperial presidency in the crisis over the acquisition of and intervention of U.S. forces in Santo Domingo (today's Dominican Republic) in 1870 without Congressional approval. Here was Schurz, as a U.S. senator, speaking against Grant's efforts to send the Navy to Santo Domingo:

Sir, that simple provision of the constitution that Congress shall have the power to declare war cannot by any rule of construction be interpreted to mean anything less than Congress, and not the president alone, shall define the contingencies in which the belligerent powers of the United States are to be used.

As Robert L. Beisner pointed out in his book *Twelve against Empire, the Anti-Imperialists of 1870–1900*, the fear that imperialism would lead to “a ruinous end for either American principles or the American constitutional system remained the cardinal point of Schurz's case.”

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**NEXT MONTH:**  
“Limited Government and a Free Society, Part 2”  
by Gregory Bresiger

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