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FUTURE OF FREEDOM

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He who moves not forward, goes backward.

— Johann Wolfgang von Goethe

FUTURE OF FREEDOM

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The Evil of the National-Security State

Part 6

by Jacob G. Hornberger

At the height of the Cold War in the early 1960s, when the U.S. government was doing everything to defeat communism and destroy communists, one of the most remarkable series of events in the history of the U.S. national-security state took place. An American claiming to love communists, communism, and Marxism — a man who ostensibly did everything he could to join America's official enemy the Soviet Union — a man who supposedly delivered top-secret information relating to national security to the Soviets — a man who campaigned openly here in the United States in favor of Cuba and communism — a man who may have visited the Soviet and Cuban embassies in Mexico with the ostensible aim of returning to the Soviet Union — sauntered across the Cold War stage with virtual immunity from adverse action at the hands of the national-security state. This phenomenal matter could well be described as a Cold War miracle. That man was a former U.S. Marine named Lee Harvey Oswald.

The official story: Oswald joined the Marines and became an avowed communist. Somehow during his time in the Marines, he taught himself Russian, a foreign language that many would agree is very difficult to learn, especially without the benefit of a language school or a tutor.

Shortly before his term in the Marines was up, Oswald secured permission to leave his military service early on the ground that his mother had been injured and needed assistance. It was a lie. Soon after being discharged, he made his way to the Soviet Union, although it is still not clear where he got the money to pay for the trip.

Once in the Soviet Union, Oswald went to the U.S. embassy, where he attempted to renounce his American citizenship. He also

told U.S. officials at the embassy that he intended to disclose everything he knew to Soviet officials, a threat that had teeth to it, given that Oswald had been stationed at a U.S. Air Force base in Japan where the U.S. government's top-secret U-2 spy plane was based.

Oswald also established contact with an anti-Castro group that was being secretly funded by the CIA.

After living in the Soviet Union for a few years, during which he married a Russian woman, he obtained permission from U.S. officials to return to the United States, even securing financial assistance from the U.S. government to make the trip home.

Moving to Dallas, Oswald found employment at a photographic center that just happened to perform classified work for the U.S. government.

Later, he moved to New Orleans, where he found employment at a company located in the heart of offices and agencies that had links to U.S. intelligence. While there, he established a local chapter of the Fair Play for Cuba Committee, a pro-Cuba organization that the U.S. government had infiltrated and was attempting to destroy. At the same time, he was making written contact with the U.S. Communist Party.

During his time in New Orleans, Oswald pamphleteered in favor of the Fair Play for Cuba Committee, even going so far as to distribute pamphlets on the street to U.S. troops disembarking from a U.S. Navy vessel. For some unknown reason, he stamped a return address on some of the pamphlets that led to the offices of a retired FBI official who had ties to U.S. intelligence.

Oswald also established contact with an anti-Castro group that was being secretly funded by the CIA and was closely supervised by a CIA agent named George Joannides, which for some reason the CIA kept secret for nearly three decades from — among others — both the Warren Commission in 1963 and the House Assassination Committee in the late 1970s. At first Oswald offered to help the group and then later shifted to his pro-Castro persona by involving himself in a public altercation with the group while distributing his Fair Play for Cuba Committee pamphlets. Jailed for disorderly conduct for that altercation, Oswald success-

fully sought a visit in jail from an active FBI agent.

Later, Oswald secured a visa to visit Mexico. Researchers have discovered that as he waited in line to secure his visa, a CIA agent stood in front of him in line, something the CIA also successfully kept secret for decades.

Then Oswald seems to have visited both the Cuban and Soviet embassies in Mexico City, seeking permission to return to the Soviet Union via Cuba. During those visits, he is said to have met with a chief assassin for the KGB.

Upon returning to Dallas, Oswald secured employment with the Texas School Book Depository, from where he is alleged to have shot John F. Kennedy on November 22, 1963. On November 25, Oswald was gunned down by a man named Jack Ruby. The Warren Commission later determined that Oswald was a lone nut who assassinated Kennedy all on his own.

How others were treated

Why does Oswald's case qualify as a Cold War miracle? Because despite the fact that he was an avowed communist who had ostensibly betrayed his country, shamed the U.S. Marine Corps, divulged secret information to America's avowed enemy the Soviet Union, openly promoted communism on the public streets of America, and visited the Soviet and Cuban embassies with the supposed intent of returning to the Soviet Union, the national-security state didn't lay a finger on the guy.

Researchers have discovered that as Oswald waited in line to secure a visa to visit Mexico, a CIA agent was in front of him.

No grand-jury subpoena. No grand-jury indictment. No illegal wiretapping of his telephone. No surreptitious delving into his sex life. No enemy-combatant incarceration. No torture. No harassment of employers. Nothing significant against a man who was supposedly one of the greatest betrayers of his country in U.S. history.

Is that the way we would expect the U.S. government to behave toward such a person? We all know that it's the exact opposite. We would expect the government to go after such a person with extreme vengeance.

Consider, for example, what it did to Daniel Ellsberg. He simply

divulged the Pentagon's lies and deceptions to the *New York Times* and, indirectly, to the American people. The government went after him with the ruthlessness that we would expect of it. It indicted him and sought to put him away in jail for many years.

But that wasn't all. Men in its service also committed a felony by breaking into Ellsberg's psychiatrist's office. For what purpose? Simply to steal information on his personal life, including personal sexual matters, designed to shame him, humiliate him, and destroy his credibility.

That's what we would expect of the government.

Recall what the government did to John Walker Lindh, the so-called American Taliban. It tortured him, it disrobed him, it posed him naked, it indicted him, it convicted him, and it sentenced him to a long jail term. What had Lindh done? He had involved himself in Afghanistan's civil war by joining the wrong side — that is, the side that would become America's enemy after the 9/11 attacks. For that, he paid a very high price at the hands of the U.S. national-security state.

The way the government treated Lindh is how we would expect it to behave.

Recall Martin Luther King Jr., who won the Nobel Peace Prize. He was a target of another principal agency within the national-security state — the FBI — and specifically of its longtime director, J. Edgar Hoover. Hoover's war against communism predated even World War II.

Martin Luther King Jr. was a target of another principal agency within the national-security state — the FBI.

Absolutely convinced that America was in danger of falling to the communists, Hoover and his FBI pulled out all the stops to prevent that from happening, from illegal wiretaps on American citizens, to surreptitious monitoring of people, to delving into the personal lives of Americans, especially their sexual activities and proclivities, to maintaining secret files on people, to infiltrating what were considered to be subversive organizations.

Among his major convictions was that the U.S. Civil Rights movement was actually a front for the international communist movement. That's how he came to focus his FBI on Martin Luther

King Jr., including secretly monitoring King's personal life and placing illegal wiretaps on his telephone conversations. Worst of all was that Hoover and his FBI attempted to provoke King into committing suicide, with the threat of disclosing embarrassing matters that had been discovered with the illegal wiretaps.

None of that should surprise anyone. That's how we would expect federal officials to behave when confronted with an American whose loyalties supposedly lay with the communists.

We all know that U.S. officials are licking their chops at the prospect of getting their hands on the founder of WikiLeaks.

Consider Bradley Manning, the U.S. soldier who is accused of having released embarrassing information about the U.S. government to WikiLeaks. He has been locked away and brutally tortured with an extended period of solitary confinement, notwithstanding the fact that under our system of justice, he is presumed to be innocent. Indeed, we all know that U.S. officials are licking their chops at the prospect of getting their hands on the founder of WikiLeaks, Julian Assange, and punishing him as a spy under the Espionage Act of 1917.

The recruit?

That's how we would expect U.S. official to behave in such a situation.

Yet here we have a former U.S. Marine who had lied to secure early release from the military, supposedly become an avowed communist, supposedly defected to America's Cold War enemy the Soviet Union, presumably delivered secret information to the Soviets that he had acquired during his military service, supposedly promoted communism on the streets of America, and supposedly visited the Soviet and Cuban embassies in Mexico and — not even a subpoena to testify before a federal grand jury, much less a grand-jury indictment.

What are we to make of that? It seems to me — and it has seemed to many Kennedy assassination researchers over the years — that there is only one likely explanation for the government's strange conduct toward Lee Harvey Oswald — that he was actually a secret, highly trained operative for U.S. intelligence, most likely the CIA.

The thing is that once we overlay Oswald's life with that hypothesis, the strange and unusual aspects of the government's treatment of him disappear.

How likely is it that a U.S. Marine is going to become an avowed communist?

What better place for the CIA to recruit people than from the U.S. military, especially the Marine Corps? Don't we ordinarily expect that people who join the Marines are extremely loyal to the government? If a poll were taken, most Americans would probably choose the Marines as the branch of service where you would be most likely to find loyal and patriotic military personnel.

How likely is it that a U.S. Marine is going to become an avowed communist? And if it were to happen, especially at the height of the Cold War, when the U.S. national-security state was doing its best to ferret out communists within the U.S. government and destroy them, how likely is it that the Marine Corps wouldn't be concerned about a self-avowed communist in its midst?

But if he was a CIA recruit who was being trained to be a self-avowed communist, then obviously the Marine Corps would be fully supportive. Indeed, the Marines would have cooperated fully in Oswald's learning of the Russian language during the time he was in the military.

Would it have been unusual for the CIA to be training people to appear to be genuine communists? Of course not. After all, both the FBI and the CIA were infiltrating pro-communist organizations, such as the U.S. Communist Party and the Fair Play for Cuba Committee, and planting moles in them. Those moles had to put on a good act, one in which they successfully kept secret the fact that they were actually working for the national-security state.

In fact, consider the Fair Play for Cuba Committee, an organization that included many prominent Americans, some of whom sympathized with the socialist principles of the Cuban revolution and some of whom simply opposed U.S. interference in Cuban affairs, including the U.S. embargo on Cuba. The U.S. national-security state, convinced that the organization was a communist beachhead within the United States, set out to do everything it could to destroy it, including

planting a mole within the organization.

At the same time, the U.S. national-security state was doing much the same against the U.S. Communist Party.

So ordinarily you would expect the national-security state to go ballistic over Oswald, but that's not what happened. Instead, at the height of the Cold War this former Marine who supposedly betrayed his country by becoming a communist and, even worse, went over to the side of America's Cold War enemy the Soviet Union, sauntered across the national-security stage without incurring any of the ruthlessness and vengeance that we would expect from the U.S. government.

If, however, Oswald was actually a U.S. intelligence operative, it would explain why U.S. national-security officials didn't lay a finger on him in New Orleans when this supposed betrayer of America, supposed lover of communists and communism, supposed pro-Cuba advocate tweaked the noses of U.S. national-security officials by publicly distributing Fair Play for Cuba pamphlets on the streets of New Orleans and, at about the same time, made contact with the U.S. Communist Party. In fact, it would seem that Oswald's activities could easily be construed as part of the overall operation to destroy those two organizations.

Oswald's role as an intelligence agent would also explain why a CIA agent was standing in front of him in line as he waited to get his visa to visit Mexico. It would also explain why the CIA, which closely monitored and photographed activities at the Cuban and Soviet embassies in Mexico City would do nothing to him after he supposedly visited those two places.

Ordinarily you would expect the national-security state to go ballistic over Oswald.

It would explain why the return address that was printed on some of Oswald's Fair Play for Cuba Committee pamphlets led to the office of former FBI agent Guy Bannister and why Oswald was sometimes seen visiting that office.

It would also explain why Oswald, a supposed loser, had enough influence to request and receive a visit by an FBI agent to his New Orleans jail cell when he was arrested for disorderly conduct.

It would also explain why Oswald initially offered to help the

DRE, the anti-Castro organization of Cuban exiles that was secretly being funded by the CIA and supervised by CIA agent George Joannides.

It would also explain why Kennedy's brother Robert F. Kennedy said to an anti-Castro exile after Oswald had been taken into custody, "One of your guys did it." Why would Kennedy place Oswald, a supposed pro-communist, into the camp of the anti-communists? It would seem that the only likely explanation is that he had information indicating that Oswald was in fact a U.S. intelligence agent.

The Warren Commission

On January 22, 1964, the Warren Commission held a meeting that would be kept secret from the American people. The session was called to address the rumor that Oswald was a paid undercover agent for the FBI. After the session was over, former CIA Director Allen Dulles, who was serving on the Warren Commission, stated that the transcript of the session should be destroyed. The Commission went along with Dulles's suggestion. Years later, it turned out that a court reporter's tape had survived the destruction. Its release was secured by longtime Kennedy assassination researcher Harold Weisburg.

On January 22, 1964, the Warren Commission held a meeting that would be kept secret from the American people.

How did the Warren Commission resolve the issue? They asked FBI Director J. Edgar Hoover and CIA Director Richard Helms whether Oswald was, in fact, a U.S. intelligence operative. Both of them told the Commission that he was not, and that was the end of the matter.

The Commission obviously believed it had no choice but to accept the statements of both men at face value. After all, imagine the following headlines in the mainstream press: "Warren Commission Suggests CIA and FBI Lying about Oswald."

That's what the Commission would have been doing if it decided to delve more deeply into the matter — it would have been accusing Hoover and Helms of lying about Oswald. And how would the Commission have gone about investigating the matter? Obviously, both the FBI and the CIA would never have voluntarily

turned over any documents indicating Oswald's position.

So even investigating the rumor would have required an extremely aggressive action against both the FBI and the CIA. The chance that that would happen was nil. After all, this was the height of the Cold War. A fierce battle between the Warren Commission and the U.S. national-security state would obviously have posed a grave threat to national security, especially by suggesting that the CIA and the FBI were liars and that the supposed assassin of John F. Kennedy was an operative of U.S. intelligence.

The Warren Commission looked into that abyss and quickly turned away by accepting the representations of the CIA and the FBI that Oswald wasn't a U.S. intelligence agent. After all, think about the potential ramifications if that was, in fact, what Oswald was. That would have converted Oswald from supposed lone-nut assassin to a supposed lone-nut CIA assassin. The Warren Commission would obviously have had a difficult time quickly reaching that conclusion without a serious investigation into Oswald's CIA activities.

Actually though, there was another likely reason — a much bigger reason — that the Warren Commission refused to seriously investigate whether Oswald was, in fact, a U.S. intelligence agent. That reason would also explain why U.S. officials were so adamant about preventing Kennedy's autopsy from being conducted in Dallas, as required by Texas law, and instead placing it into the hands of the U.S. military.

What was that much bigger reason? It revolved around the two most important words in the lifetimes of the American people since the end of World War II: "national security."

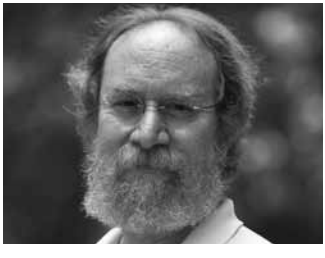
Jacob Hornberger is founder and president of The Future of Freedom Foundation.

NEXT MONTH:

"The Evil of the National-Security State, Part 7"
by Jacob G. Hornberger

The Supreme Court's Word Game Saves Obamacare

by Sheldon Richman



The Supreme Court decision upholding the health-insurance mandate in the Patient Protection and Affordable Care Act (Obamacare) had a distinct Alice-in-Wonderland feel to it. As Lewis Carroll wrote in *Through the Looking-Glass,*

> *"When* I *use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean — neither more nor less."*

Chief Justice John Roberts's opinion held that the penalty for not complying with the mandate is both a tax and *not* a tax — depending on the question. If the question is whether someone may sue to strike down the mandate, the Court says yes because the penalty is not a tax. Under the Tax Anti-Injunction Act (first passed in 1867 but updated), one may not ask for an injunction against a tax before it has been enforced. One must wait to be taxed, request a refund from the IRS, and if turned down, then sue the government. In the Obamacare case, the Court denied such an attempt to have the challenge dismissed by declaring the penalty not a tax.

But only for purposes of the Anti-Injunction Act. It was another story when the question was whether the mandate-with-penalty is constitutional.

The government made two arguments in defense of its mandate. The primary argument was that Congress may require the purchase of insurance under the Commerce Clause. If young, healthy people are free to forgo insurance, only older, sicker people who require a lot of medical care will be left in the risk pool, jeopardizing the interstate insurance market.

That clause, which among other things empowers Congress to "regulate commerce ... among the several States" has long been interpreted to refer to interstate commerce

only and to include even activities that merely *affect* such commerce. Roberts and four other members of the court (Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito) did not buy that argument. "The Framers gave Congress the power to regulate commerce, not to compel it," Roberts wrote. He rebutted in great detail the Obama administration's many arguments that penalizing people for not buying insurance was a way to regulate interstate commerce. (In a related argument, also rejected by those five justices, the government said the mandate was allowable under the Necessary and Proper Clause, which authorizes Congress to enact laws related to the carrying out of enumerated powers.)

It is long-established law that Congress may regulate action (or inaction) by taxing it — even if it may not constitutionally regulate it directly.

Fine. It does seem a stretch to claim that forcing people to engage in commerce (buying insurance) amounts to regulating commerce. As Roberts said, regulating something presupposes the existence of that something. But the mandate seeks to create commercial activity where it does not exist.

It is interesting that Roberts's four allies on this point were actually in the minority for the overall case. The other four members of the majority (Stephen Breyer, Elena Kagan, Sonia Sotomayor, and Ruth Bader Ginsburg) found the mandate perfectly consistent with the Commerce Clause. But they were too few to carry the day.

So how did Roberts form a majority with those four to uphold the mandate?

Upholding the mandate

The government had a backup argument for its claim, and this one found favor with the five. The government argued that should the Commerce Clause argument fail, the Court could think of the mandate penalty as — wait for it — a tax! Yes, a tax. Conveniently, it is long-established law that Congress may regulate action (or inaction) by taxing it — even if it may not constitutionally regulate it directly.

Thus, in that view, Congress merely passed a tax that is levied only on people who fail to buy health insurance. The Court said that since the penalty will be collected by the IRS and has other features resembling a tax (including its income-based manner of computa-

tion in individual cases), it qualifies as a tax, even though it is used as a penalty and is even called that in the statute. (To further add to the bewildering situation, in November 2009 Barack Obama vociferously objected when during an interview ABC's George Stephanopoulos called the mandate and penalty a tax. "[For] us to say that you've got to take a responsibility to get health insurance is absolutely not a tax increase," Obama said.)

Voilá! What seemed unconstitutional became constitutional. The penalty now is a tax, even though earlier in the opinion the Court said the penalty is not a tax. Justice Humpty Dumpty has spoken.

Over the last couple of decades the Court has decreed that the Commerce Clause cannot be used to justify virtually any act of Congress.

Word games aside, no new constitutional ground was broken. Over the last couple of decades the Court has decreed that the Commerce Clause cannot be used to justify virtually any act of Congress, as was permitted in preceding years. Congress once tried to outlaw the possession of guns within a thousand feet of schools under the Commerce Clause. (The Court struck down the statute.) In light of recent history, then, drawing a line at the abstention from commerce seems less than earthshaking.

On the other hand, the Court for many years has found the taxing power broad enough to permit indirect regulation of conduct by means of taxation — even if regulation, and not revenue, is the primary motive. As the Court said in *U.S. v. Sanchez* (1950), citing precedents from the 1930s,

> *It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed.... The principle applies even though the revenue obtained is obviously negligible ... or the revenue purpose of the tax may be secondary.... Nor does a tax statute necessarily fall because* it touches on activities which Congress might not otherwise regulate. *(Emphasis added.)*

The *Sanchez* Court went on to quote a 1934 case, *Magnano Co. v. Hamilton:*

> *From the beginning of our gov-*

> *ernment, the courts have sustained taxes although imposed with the collateral intent of effecting ulterior ends which, considered apart, were* beyond the constitutional power *of the lawmakers to realize by legislation directly addressed to their accomplishment. (Emphasis added.)*

This is worth pausing on. Congress may constitutionally use its taxing power to regulate action even in cases where it would not be allowed to regulate it directly. Were you under the impression you live in a constitutionally limited republic?

An all-embracing power

That is all the more remarkable when one appreciates how broad Congress's taxing powers in fact are. In the *Brushaber* case, upholding the 1916 income tax passed under the Sixteenth Amendment, the Court embraced the broadest possible interpretation of the federal taxing power — a power that, the Court said, predates the Sixteenth Amendment. The Court stated,

> *That the authority conferred upon Congress by 8 of article 1 "to lay and collect taxes, duties, imposts and excises" is* exhaustive *and embraces* every conceivable power of taxation *has never been questioned.... And it has also never been questioned from the foundation ... that there was authority given, as the part was included in the whole, to lay and collect income taxes...."*

The Court went on to acknowledge: "the conceded *complete and all-embracing* taxing power"; "the *complete and perfect* delegation of the power to tax"; "the complete and *all-embracing* authority to tax"; and "the *plenary power* [to tax]." And that was just in one paragraph. Later in the opinion we find this: "[The] *all-embracing* taxing authority possessed by Congress, including necessarily therein the power to impose income taxes…." (Emphasis added.)

> In the *Brushaber* case, upholding the 1916 income tax passed under the Sixteenth Amendment, the Court embraced the broadest possible interpretation of the federal taxing power.

Strangely, some limited-government opponents of Obamacare are rejoicing over the decision. Randy

Barnett, the constitutional law professor at Georgetown University Law Center who is credited with formulating the case against the government's Commerce Clause argument, wrote an op-ed in the *Washington Post* declaring, "We lost on health care. But the Constitution won."

How's that?

Barnett's point is that Roberts's affirmation of limits to the Commerce Clause struck a historic blow for individual liberty and against government power. Considered in isolation, one can applaud Roberts's refusal to include abstention from buying insurance under the rubric "interstate commerce." Unfortunately he didn't leave the stage after that aria. He went on to say that other constitutional grounds exist on which the government can penalize us if we fail to buy insurance.

So where's the victory for liberty? There is none here.

The government may have its way with us pretty much as it wishes. To the person being compelled, does it really matter which constitutional clause is invoked?

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NEXT MONTH:

"Don't Let the Aurora Shooting Curtail the Right of Self-Defense"
by Sheldon Richman

"Don't Trust the Feds' Happiness Index"
by James Bovard

The Federal Wetlands War

Part 3

by James Bovard

As the first two parts of this series revealed, federal bureaucrats have been using environmental pretexts to rampage against property owners since the late 1980s. Unfortunately, even after the Republicans took over Congress in 1994 and promised sweeping reforms, the outrages continued. A recent Supreme Court decision vivified that, despite many victories in federal district courts across the nation, landowners are still routinely at the mercy of power-hungry bureaucrats.

Wetlands-policy outrages have continued in part because federal agencies usually find a way around federal court decisions that purport to limit their power. For instance, in 1995 the Justice Department sued James Wilson and his development company for disturbing four little wetlands in a housing project he built in Charles County, Maryland. The Army Corps had initially approved Wilson's development plans in 1989; federal regulators subsequently changed the definition of "wetlands" and ordered him to cease and desist in 1990. He responded by suing the federal government for violating his property rights.

The feds were outraged that Wilson had some loads of dirt deposited on the land to stabilize the area where houses were to be built. At a federal trial, they conceded that Wilson's development was in an area that was far from pristine and that his action caused no evident environmental damage. As a court decision noted, the land in question was "more than ten miles from the Chesapeake Bay, more than six miles from the Potomac River, and hundreds of yards from the nearest creeks." The main evidence the feds offered that the land was involved in interstate commerce came from a fur trapper who testified at the trial that beavers and muskrat had been hunted someplace in the county in which Wilson built: no evidence linked Wilson's

site to trapping. Wilson was convicted of violating the Clean Water Act and sentenced to 21 months in prison and fined $1 million; the judge imposed another $3 million fine on Wilson's company.

In December 1997, a federal appeals court overturned the conviction, ruling that "the Corps' [sic] regulation of such wetlands is based solely on its definition of wetlands as 'waters of the United States'" — for which the court found no basis in the Clean Water Act. On May 29, 1998, the EPA and Army Corps issued a guidance memo detailing their plans to evade the court decision. The EPA and Army Corps informed agency personnel that the decision would be completely disregarded in any area outside of the jurisdiction of the Fourth Circuit Court of Appeals (i.e., Virginia, West Virginia, Maryland, North Carolina, and South Carolina). And, even within those states, the EPA and Army Corps planned to continue prohibiting owners from using their land when the feds could argue that the land would be used "by migratory waterfowl, other game birds, or other migratory birds that are sought by hunters, bird watchers, or photographers, or are protected by international treaty, [and] thereby affect interstate commerce." According to the Clinton administration, it took only a few clicks of a camera to nullify property rights.

It took only a few clicks of a camera to nullify property rights.

Wetlands fights continued to fester in the courts. In early 2001, the Supreme Court struck down one Clinton-era power grab involving Chicago-area governments that wanted to convert some land into a dump. Chief Justice William Rehnquist ruled that "permitting the [government] to claim federal jurisdiction over ponds and mud flats would also result in a significant impingement of the states' traditional and primary power over land and water use."

The most telling phrase in the decision came from the dissent. Justice John Paul Stevens and his fellow Friends of Leviathan harrumphed that the majority was guilty of a "miserly construction" of the Clean Water Act — and that the Court owed more "deference" to federal regulators. To give unlimited deference to federal regulators means creating an unlimited bias against citizens' right to live their own lives. "Miserly" is a strange term to use to condemn a decision

that slightly reduces the federal sway over private citizens. The Framers created safeguards to ensure that the federal government had only a miserly amount of power, but some current Supreme Court justices act as if today's citizens deserve only a miserly amount of freedom. Rather than serving as a bulwark to defend the Bill of Rights, many justices seem to view their jobs the same as did the ministers of King George III — doing whatever is necessary to maintain the king's prerogatives.

> Some current Supreme Court justices act as if today's citizens deserve only a miserly amount of freedom.

The 2001 ruling was interpreted largely as a victory for state and local governments. By trimming EPA and Army Corps prerogatives, however, it is also at least a marginal victory for property rights. Unfortunately, the Supreme Court refused to take up earlier cases that offered classic illustrations of the EPA's and Army Corps's trampling individual land owners.

The 2001 decision slightly trimmed the power of the Army Corps to designate wetlands. But the Army Corps has destroyed far more wetlands than any corporation. A single project that the Corps was pushing at that time in Missouri would have destroyed 36,000 acres of wetlands — which, as the *Washington Post* noted in September 2000, was "nearly twice as many as all of America's developers were permitted to touch last year." But government-destroyed wetlands were not an environmental problem because government supposedly acts in the public interest.

Defining "wetlands"

This past March, the Supreme Court struck a blow against dictatorial wetlands policies in the case of *Sackett v. EPA*. Michael and Chantell Sackett spent $23,000 in 2005 to buy a small vacant lot in a residential subdivision near an Idaho lake. After they began preparing the land to build a house, the EPA notified them that their property had been classified as a wetlands and ordered them to immediately cease construction. It also threatened a $75,000-a-day fine for refusal to comply. The EPA had not classified any other lots in that neighborhood as wetlands and did zero analysis of the soil on the Sacketts' property before slapping on the designation. The Sacketts, aided by the Pacific Legal Foundation, sued the govern-

ment. Though they lost in the Ninth Circuit Court of Appeals, they won a unanimous though narrow decision in the Supreme Court.

When he announced the Court's decision, Scalia mocked the EPA's definition of "wetlands."

The key issue before the Court was whether the Sacketts could file a court challenge to the EPA's compliance order. (The EPA issues thousands of such orders a year.) Justice Antonin Scalia declared, "There is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review." In comments to the media when he announced the Court's decision, Scalia mocked the EPA's definition of "wetlands," noting that the Sacketts have never "seen a ship or other vessel cross their yard."

Justice Samuel Alito, in a concurring opinion, captured the continuing unfairness and irrationality of federal policy:

> *The reach of the Clean Water Act is notoriously unclear. Any piece of land that is wet at least part of the year is in danger of being classified by EPA employees as wetlands covered by the Act, and according to the federal government, if property owners begin to construct a home on a lot that the agency thinks possesses the requisite wetness, the property owners are at the agency's mercy.... The combination of the uncertain reach of the Clean Water Act and the draconian penalties imposed for the sort of violations alleged in this case still leaves most property owners with little practical alternative but to dance to the EPA's tune.*

Alito concluded by urging Congress to clarify the definition of "wetlands" — and thus to set a limit once and for all to federal regulators' controls over private landowners.

Environmental groups warned of grim consequences from the Sacketts' victory. Larry Levine, senior attorney with the Natural Resources Defense Council, feared that the decision would "make it harder for the EPA to take action to promptly correct ongoing environmental harms." Levine feared that the agency will get "bogged down in court, using limited resources to fight lawsuits instead of enforcing the Clean Water Act." According to

his viewpoint, individual rights are nothing but impediments to the feds' dictating the right uses for every acre in the land. But as Scalia noted, the Court rejected "the principle that efficiency of regulation conquers all."

In the 1950s liberals helped spur a backlash against Sen. Joseph McCarthy by highlighting cases of innocent individuals who had lost their jobs as a result of his baseless accusations of left-wing associations. Vastly more Americans have lost their livelihoods as a result of federal prohibitions imposed on landowners with the flimsiest of legal pretexts. Yet there has been little uproar — and scant attention on Capitol Hill — over how bureaucratic tyranny wrecked the lives of landowners. As a result, federal agencies continue prosecuting private citizens on the basis of laws that had never been written, of memos that had never been made public, of assumptions that cannot stand the light of day.

In the Middle Ages, governments bound peasants to their land for the benefit of their lords. Today, governments bind landowners to the current use of their land, indenturing the owners to the whim of local government officials. If government officials decreed that no one was permitted to change his profession, people would widely recognize that as tyranny. Yet there is little protest when governments make a similar declaration prohibiting residents from changing the use of their property. We are increasingly turning landowners into the serfs of bureaucracies. Wetlands policies illustrate that government cannot control property without controlling people. Every extension of control over property means a decrease in citizens' ability to rely on themselves and plan their own lives. Every decrease in the sanctity of private property will mean an increase in insecurity for some citizens. To allow the government practically unlimited control and jurisdiction over private property is to give politicians and bureaucrats almost unlimited power to intervene in private lives. We face a choice of private property or political subjugation.

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Is Social Security Welfare?

by Laurence M. Vance

Since the Department of Health, Education, and Welfare became the Department of Education and the Department of Health and Human Services in 1979, the term "welfare" has fallen into disuse. "Income security," "entitlement," or "public assistance programs" are now the usual terms for what used to be called "welfare programs." Even the food-stamp program has been renamed the Supplemental Nutrition Assistance Program (SNAP).

Regardless of what they are called, it is without dispute that in addition to SNAP, federal programs such as Head Start, Temporary Assistance to Needy Families (TANF), Supplemental Security Income (SSI), the National School Lunch Program (NSLP), Medicaid, Low Income Home Energy Assistance Program (LIHEAP), the State Children's Health Insurance Program (SCHIP), subsidized housing, and Women, Infants, and Children (WIC) are welfare programs.

Other welfare programs that are often not viewed as such include the refundable portion of tax credits, unemployment compensation, and Medicare.

Regular tax credits that provide a dollar-for-dollar reduction of the amount of income tax owed are not welfare. They may reduce the tax owed to zero, but if there is no taxable income to begin with, then no credit can be taken. But other credits that are partially (American Opportunity Credit) or fully (Earned Income Credit) refundable are certainly welfare, because if the tax-credit "payment" is more than the tax owed, the taxpayer receives a refund of money he never paid in; that is, he receives some other taxpayer's money.

The federal government imposed the unemployment-compensation program on the states by means of Titles III, IX, and XII in the Social Security Act of 1935 and the Federal Unemployment Tax Act of 1939 (FUTA). The U.S. Department of Labor oversees the

program, but it is administered and mostly funded by the states. Federal unemployment taxes are paid by employers at a rate of 6 percent on the first $7,000 of each employee's income. The 50 states likewise assess employers an unemployment tax whose maximum can range from 5.4 to 13.5 percent on a wage base of $7,000 to $37,300. (Employers that pay state unemployment taxes are allowed a credit against their federal unemployment tax liability up to 5.4 percent.) Only a few states actually levy some amount of unemployment tax on employees. But regardless of what the tax rate and wage base are, the amount of unemployment compensation received has no relation to the amount of tax paid in. And of course, the unemployed worker who receives benefits most likely never paid anything in anyway.

All of these welfare programs are clearly unconstitutional and illegitimate functions of the federal government.

Medicare is government-funded health care for Americans who are age 65 or over or are permanently disabled. It actually consists of four parts: Part A (hospital insurance), Part B (supplemental medical insurance), Part C (Medicare Advantage Program), and Part D (prescription-drug benefit). Part A is funded, at least on paper, by a payroll tax of 2.9 percent (split between employer and employee) on all of an employee's earnings. Participation in Parts B, C, and D is voluntary. They are funded by a combination of income-based beneficiary premiums and taxpayer subsidies. Less than 25 percent of the Medicare prescription-drug program is funded by premiums. There is absolutely no relation between the Medicare taxes paid and the benefits received. Enrollment in Medicare is open to all those who are U.S. citizens or have been permanent legal residents for five continuous years and who (or whose spouses) have paid Medicare taxes for a minimum of 40 quarters (ten years). Someone who has paid Medicare taxes continuously since the program began in 1966 receives the same benefits as someone who just began paying Medicare taxes 10 years ago. Someone can pay Medicare taxes his whole working life and, if he is healthy, not receive a dime in benefits or otherwise get any of his "contribution" back.

All of those welfare programs

are clearly unconstitutional and illegitimate functions of the federal government. They are socialistic, they foster dependency on the government, they are income-transfer programs, they shift responsibility from the individual and families to society and the state, they are wealth-redistribution plans, they contribute to class warfare, they are collectivist, they crowd out real charity, they are social-engineering schemes.

The mechanics of Social Security

Although Social Security is all of those things and more, rarely is it ever viewed as a welfare program.

Social Security is properly a federal Old-Age, Survivors, and Disability Insurance (OASDI) program. It provides benefits for retirement, disability, survivorship, and death to about 55 million Americans at a price to approximately 157 million taxpayers of more than $800 billion a year. The program actually consists of two separate parts. Under the Old-Age and Survivors Insurance (OASI) part of the program, monthly benefits are paid to retired workers, their families, and survivors of deceased workers. Under the Disability Insurance (DI) part of the program, monthly benefits are paid to disabled workers and their families.

> Like Medicare, Social Security is "funded" by pay-roll tax deductions from both employers and employees.

Like Medicare, Social Security is "funded" by pay-roll tax deductions from both employers and employees. After beginning at a rate of 2 percent (split between employers and employees) on a taxable wage base of $3,000, by 1990 the rate was up to 12.4 percent with a wage base of $51,300. The wage base is currently up to $110,100. But as part of a deal reached between Democrats and Republicans in late 2010 to extend the Bush income-tax cuts, the rate of the employee share of Social Security taxes rate was lowered from 6.2 percent to 4.2 percent for one year (2011). And then, after first being temporarily extended until the end of February 2012, the rate cut was extended until the end of 2012.

The original retirement age to receive full benefits was 65. For those born after 1937, the age has been gradually increased. For those born during the period of

1943–1954, the full retirement age is 66. For those born after 1960, it is 67. Reduced benefits are available for those who have reached the age of 62 and wish to begin receiving their benefits. However, the amount doesn't increase once the full retirement age is reached. Those who delay receiving benefits until after their full retirement age earn credits that increase their benefit until they reach age 70.

Also like Medicare, one must pay Social Security taxes for a minimum of 40 quarters to be eligible. Social Security benefits are figured on the basis of one's Primary Insurance Amount (PIA), the average of a worker's 35 highest years of earnings (up to a particular year's wage base), adjusted for inflation.

Social Security is the largest annual expenditure of the federal government.

But aside from the mechanics of the Social Security system that many Americans are familiar with, there are some things about the system that are unknown to most Americans or better left unsaid.

Social Security is the cornerstone of the welfare state. It is a relic from the New Deal. It is the third rail of American politics — touch it and you commit political suicide. It is the largest annual expenditure of the federal government. It has trillions in unfunded liabilities. It is the first plank in the federal government's effort to create a class of citizenry that is dependent on the government.

Social Security does not have a real trust fund. It does not have a physical lock box. It is not an insurance program. There is no contractual right to receive it. Its taxes are not actually invested. It is not a safety net. It is not funded by premiums or contributions.

Social Security is not a retirement account. It is not an investment account. It is not a pension plan. It is not an IRA. It is not a savings account. It is not a return on investment. It is not a government 401(k) or 403(b) plan. It is not an annuity.

Social Security is an intergenerational, income-transfer, wealth-redistribution welfare program. The federal government takes taxes from the youth and adult working population and spends the money on the boondoggles that 90 percent of the federal budget consists of. Then, as those populations reach retirement age, it takes new taxes from the current group

of working youths and adults and gives it to the former group and calls it Social Security benefits.

Social Security is welfare.

Most Americans would never consider Social Security to be welfare because they think that they paid, or are paying, into the system their whole working lives and therefore earned, or are earning, their benefits and are just receiving, or will be receiving, their contributions back with interest.

But there are several reasons that Social Security is welfare.

Social Security is welfare because Congress may, at will, change the Social Security benefit schedule at any time.

Some people think that Social Security isn't welfare simply because part of the payroll tax collected under the Federal Insurance Contributions Act (FICA) is listed on pay stubs as being taken for Social Security and the other part as being taken for Medicare. That's it. If the taxes extracted from Americans' paychecks were called simply "payroll taxes," then the notion that Social Security is not just another form of welfare would vanish overnight. Social Security would then be viewed as welfare for seniors, just as TANF is viewed as welfare for the poor, WIC is viewed as welfare for new mothers, and SSI is viewed as welfare for the disabled.

Social Security is welfare because there is no connection between the taxes paid and the benefits received. Take two men who are the same age and have identical incomes. One works for exactly 35 years, reaches full retirement age, and then retires. The other works for 45 years, reaches full retirement age, and then retires. Since Social Security benefits are based on the average of a worker's 35 highest years of earnings, as related above, the benefit amount that these two men receive every month will be substantially the same. The fact that each man paid vastly different amounts into the system yet received basically the same benefits is irrefutable proof that there is no connection between Social Security taxes and benefits.

Social Security is welfare because Congress may, at will, change the Social Security benefit schedule at any time. According to Title XI, section 1104 of the Social Security Act, "The right to alter, amend, or repeal any provision of this Act is hereby reserved to Congress."

That means that Social Security taxes can be changed at any time with no change in Social Security benefits; conversely, Social Security benefits can be changed at any time with no change in Social Security taxes. According to the Social Security Administration website,

> • *Your earnings may increase or decrease in the future.*
> • *After you start receiving benefits, they will be adjusted for cost-of-living increases.*
> • *Your estimated benefits are based on current law. The law governing benefit amounts may change because, by 2036, the payroll taxes collected will be enough to pay only about 77 percent of scheduled benefits.*
> • *Your benefit amount may be affected by military service, railroad employment or pensions earned through work on which you did not pay Social Security tax.*

When the Social Security tax rate was lowered to 4.2 percent beginning in 2011 (and where it will probably stay, since neither party wants to be seen as raising taxes on low-income Americans), no one's Social Security benefits were cut, nor will future benefits be cut because of the reduction in the tax rate (although benefits may be cut for other reasons). Social Security taxes exist simply for the purpose of raising revenue. And they have been increased some 20 times since the program began.

Social Security is welfare because there is no contractual right to receive benefits. The Supreme Court already ruled as much many years ago. In the case of *Helvering v. Davis* (1937), the Court ruled that "the proceeds of both [employee and employer] taxes are to be paid into the Treasury like internal revenue taxes generally, and are not earmarked in any way." In *Fleming v. Nestor* (1960), the Court held,

> *The noncontractual interest of an employee covered by the Act cannot be soundly analogized to that of the holder of an annuity, whose right to benefits are [sic] based on his contractual premium payments.*
>
> *To engraft upon Social Security a concept of "accrued property rights" would deprive it of the flexibility and boldness in adjustment to ever-changing conditions which it demands and which Congress probably*

had in mind when it expressly reserved the right to alter, amend or repeal any provision of the Act.

Title VIII, section 807, of the Social Security Act simply reads, "The taxes imposed by this title shall be collected by the Bureau of Internal Revenue under the direction of the Secretary of the Treasury and shall be paid into the Treasury of the United States as internal-revenue collections." This tax collection began on January 1, 1937. The so-called Social Security Trust Fund was not instituted until January 1, 1940.

Roosevelt falsely promoted Social Security to Americans as a "savings account for the old age of the worker."

Social Security should be considered welfare because it is not an investment with a rate of return. Roosevelt falsely promoted Social Security to Americans as a "savings account for the old age of the worker" with contributions made by employers and employees through payroll taxes "held by the government solely for the benefit of the worker in his old age." The first beneficiary to receive a Social Security check was Ida May Fuller in 1940. After paying in just $24.75 in Social Security taxes, she went on to collect $22,888 in benefits. According to a 2002 Congressional Research Service report on "Social Security Reform," workers who retired at full retirement age in 1980 got back all they paid into Social Security, with interest, in 2.8 years. On the other hand, someone can pay into the system his whole working life and, if he dies upon retirement without dependents, his "savings account" dies with him. Even George W. Bush recognized the nature of the system:

Some in our country think that Social Security is a trust fund — in other words, there's a pile of money being accumulated. That's just simply not true. The money — payroll taxes going into the Social Security are spent. They're spent on benefits and they're spent on government programs. There is no trust. We're on the ultimate pay-as-you-go system — what goes in comes out.

Social Security is welfare because the government can tax up to 85 percent of Social Security benefits. Although Social Security

benefits are generally not taxable, individuals have to pay income tax on 50 percent of their benefits if the total of one-half of their benefits and their other income (including nontaxable interest income) is between $25,000 and $34,000 ($32,000 and $44,000 if married filing jointly) and on 85 percent of their benefits if their combined income is above $34,000 ($44,000 if married filing jointly). If an American is entitled to Social Security benefits because he earned them by paying Social Security taxes his entire working life, then what is the government doing taxing them just as it taxes unemployment benefits?

Conclusion

Social Security should not be saved, reformed, or privatized. The Social Security system is currently, has always been, and will forever be a system where money is taken from those who work and is given to those who don't. Taking someone's income in order to give it to someone else, whether the government takes it or a thief takes it, whether the taker has a good motive or evil intentions, or whether the receiver needs or just wants the money, is unethical, immoral, and criminal.

Social Security must be recognized for what it really is before it can ever be humanely, efficiently, and completely eliminated.

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Reflections on the Torture Debate

by Joseph Margulies

What remains to be said of the torture debate? I asked myself this question because March 28 was an anniversary of sorts. On that date 10 years ago the United States cast the first person into a CIA black site. In time, he was subjected to each and every one of the Bush administration's "enhanced" techniques. Waterboarding, of which there was a great deal, was in many ways the least of it. Today he is at Guantanamo. His name is Abu Zubaydah. I represent him.

Like much in the so-called war on terror, torture has fallen from prominence, replaced by other matters that have elbowed their way to the most visible regions of the public square. Much has been written and said about torture in the past decade. Religious, historical, and pragmatic arguments have all been aired, but little has been settled. Those who like it (and there are many) will continue to like it. They have resolved the matter in their own minds and have hardened themselves to the evidence against it.

There is no reason to believe this state of affairs will change anytime soon. As a result, the debate has taken on the character of a long-running but unfinished argument between siblings: at some point, the shouting just stops — not because anything has been resolved, but because everyone knows what the others will say.

It is time to move past this stalemate and examine whether the torture controversy will have any lasting impact. Indeed, it is precisely because torture is no longer the hot-button issue it used to be that we can finally begin to assess its enduring effect on American life.

Every controversy associated with September 11 has been characterized as an imagined contest between liberty and security. But it makes much more sense to think of torture as a tri-cornered tension involving limited government, individualism, and community — three

values that are all essential elements of American identity. The question posed by torture is whether we are willing to empower the government to sacrifice the dignity and integrity of the individual for the perceived benefit of the community.

At least since the rise of modern conservatism in the late 1960s, the welfare of the individual has taken on almost religious significance in this country. The iconoclastic libertarian Ayn Rand, author of *The Fountainhead* and *Atlas Shrugged,* mocked the very notion that there was a "common good" and ridiculed the suggestion that "everybody is responsible for everybody's welfare."

Traditionally, libertarians broke with social conservatives over the issue of limited government. Social conservatives had always been less alarmed about centralized authority as long as it was used to protect an idealized community from marauding "Others." Prior to the Civil Rights movement, that meant African Americans; afterwards it meant "gang-bangers," juvenile "superpredators," sex offenders, or drug dealers. Today it means Islamic terrorists.

Fragile unity

The great success of modern conservatism came about when social conservatives adopted the libertarian language of individualism. The emphasis on community began to disappear from conservative rhetoric. Controlling "Others" became a matter of individual and not community welfare. The right of a person to run a business without being robbed; to sleep at night without being burgled; to walk the streets without being accosted — these were individual interests, not community concerns. The rhetorical shift allowed social conservatives to build a bridge to libertarians.

The great success of modern conservatism came about when social conservatives adopted the libertarian language of individualism.

For a brief period in the 1960s, Democrats were relatively enthusiastic about using the federal government to protect the rights of those among us whose voices were not as loud and did not reach as high. In later years, however, and particularly since the Clinton years, they have generally thrown in their lot with social conservatives in the

belief that it was better to protect crime victims than criminals. Unlike social conservatives, however, they defend this sentiment in terms of the common good and the welfare of the community.

Libertarians are aghast, since torture is the ultimate denial of the individual at the hands of the State.

The result was a fragile accommodation: Libertarians place the welfare of the individual above other interests and are suspicious of centralized authority; social conservatives (who are overwhelmingly Republican) embrace centralized authority in order to protect the rights of some individuals; and Democrats welcome centralized authority in order to promote some individual rights but not others. That has led them to favor crime control as long as there remains at least a rhetorical nod to the rights of the accused. Each group has its own motivations for supporting different policies.

The unity broken

Now toss state-sanctioned torture into the mix. Libertarians are aghast, since torture is the ultimate denial of the individual at the hands of the State, worse even than capital punishment because of its calculated brutality. That explains why libertarians have been the staunchest foes of torture. Social conservatives have been most willing to accept it, since it fits with their historic willingness to use centralized authority in order to protect an idealized community from the dangerous "Others." That has been part of the fissure that has split the Right since September 11.

And Democrats have been most confronted by the intellectual and moral limits of their philosophy. Do they protect the dignity of the individual, which would align them with libertarians? Or do they protect the welfare of the imagined community? As liberalism has been defined since Bill Clinton, that would align them more with social conservatives.

Or do they use the torture debate (and other post–9/11 controversies) as the opportunity to redefine their philosophical commitments? One reason that torture appeals to so many people who are not at all social conservatives is that post–1960s liberalism has painted itself into an intellectually bankrupt corner and therefore cannot provide a coherent argument for why torture is categorically wrong.

In a word, modern liberalism has foundered because it has embraced an artificial conflict between the individual and the community. The defense of individual rights is not achieved, as Clinton supposed, at the expense of the community. Instead, it is in recognition that the individual is part of a community, and we protect his rights in order that he may remain so. Community welfare and individual rights are, and ought to be, joined and inseparable. Government serves the welfare of the community by protecting the dignity and rights of the individual, for it is the individual with dignity and rights who makes the ideal citizen and provides the most value to the community.

If Democrats were to redefine their philosophy along those lines, the torture debate would no longer be a conundrum. The government must never be allowed to sacrifice the dignity and integrity of the individual for the perceived benefit of the community because there can be no community as long as the government is allowed to sacrifice the individual. That is a choice no government should ever be allowed to make, and no Democrat should ever endorse.

Joseph Margulies is the author of Guantánamo and the Abuse of Presidential Power *and is finishing a new book on the effect of September 11 on national identity.*

The passing of an unjust law is the suicide of authority.

— Pastoral Letter of the American Roman Catholic Hierarchy [February 1920]

The U.S. War Machine

by Anthony Gregory

The American Way of War: Guided Missiles, Misguided Men, and a Republic in Peril by Eugene Jarecki (New York: Free Press, 2008); 336 pages.

Many supporters of Barack Obama are disappointed that he has not reversed the war policies of his predecessor. He did his best to continue the U.S. occupation of Iraq. The Afghanistan war rages far beyond what was seen under George W. Bush. Obama has also proved militaristic in operations in Libya, Yemen, and Pakistan, and in the sanctions against Iran. The attacks on civil liberties and human rights continue on the same path that Bush forged.

Obama gave indications early on that that would be his trajectory. He always promised to expand the Afghanistan war. He never vowed to cut and run from Iraq any faster than was established policy by the time Bush signed the Status of Forces Agreement in late 2008. As a U.S. senator, he voted to legalize Bush's warrantless wiretapping program, foreshadowing his future sellouts as president on the civil-liberties front.

Yet the reason for the continuity of militarism transcends anything that can be found in Obama himself. The sad truth is that Bush's two terms were never quite the aberration that they were widely characterized as being. His neoconservative advisors were particularly belligerent in some avenues of foreign-policy theory, but they never represented a hard break from American traditions going back several generations.

On the eve of the Iraq war, Bush partisans joyously pointed out that Bill Clinton too had waged war, just as unilaterally, in Serbia less than four years before. They insisted that most of Bush's policies at home and abroad had plenty of precedent. They were right.

Throughout American history we see many precursors for U.S. warmaking. Ever since World

War I, the United States has maintained an active role in global affairs, at the cost of many thousands of American lives and many domestic freedoms. Two decades earlier, the United States was internationally belligerent in the 1898 war with Spain. Long before that, American warmaking had plenty of opportunities to show itself in the century between the Constitution's adoption and the dawn of the Progressive Era — an invasion of Canada, war with Mexico, and Abraham Lincoln's war against the South drenched the nineteenth century in statism and blood.

Executive secrets and conspiracy in World War II

Yet much more recently than any of those antecedents to the modern war machine, a major shift took place. And that was World War II, the "Good War," the last clear-cut and most widely celebrated military victory enjoyed by the United States, the one to which liberals unfavorably compare Bush's adventures and conservatives invoke as precedents for their own preferred war policies. It was in World War II that the U.S. warfare state blossomed into its modern form.

How fitting, then, that it is the event that marks the chronological beginning of Eugene Jarecki's narrative in his exciting and compelling book, *The American Way of War: Guided Missiles, Misguided Men, and a Republic in Peril.* He sets up the story appropriately:

> *At first glance, George W. Bush, Franklin D. Roosevelt, and the wars each presided over might seem to have little in common. Roosevelt is widely seen as a national hero who oversaw a military, moral, and leadership triumph; Bush is the reverse on all counts. Yet there are parallels to how each president guided America into conflict and transformed the country's foreign policy profile. Before there was "a new Pearl Harbor," there was the original.*

That is a refreshingly insightful point. And while the allied war effort and the war on terror are seen as very different animals, especially by liberals, Jarecki notes the important similarities. First, there is that question of Pearl Harbor. "If Roosevelt had a Richard Perle," the author writes, "it would have to have been Commander Arthur McCollum." McCollum, a top naval officer who favored U.S. entry into World

War II, formulated a memo describing eight policies the Roosevelt administration could pursue that would encourage Japan to initiate war. Roosevelt's officials "understood long before Pearl Harbor ... that without such an attack, America could not be put on a war footing." In addition to McCollum there was War Secretary Henry Stimson, who wrote in his diary on November 25, 1941, "[The] question was how we should maneuver them into the position of firing the first shot without allowing too much danger to ourselves." Jarecki does not go so far as to completely adopt the revisionist line on Roosevelt's possible foreknowledge of the Pearl Harbor attack, but he draws thoughtful attention to the major works — in particular, Robert Stinnett's *Day of Deceit* (2000).

It was in the crisis of World War II that the U.S. warfare state blossomed into its modern form.

The immediate effect of the Pearl Harbor attack was U.S. entry into World War II, which introduced "increasing militarism into the nation's daily life." That cultural shift was actively advanced by Washington, which colluded with Hollywood and others to disseminate pro-war propaganda. The military encouraged Frank Capra to produce his *Why We Fight* series of films, which "cast America's role in World War II in terms of the larger global conflict between freedom and slavery, light and dark, good and evil."

The war also transformed American government from its essentially republican nature. While noting that Roosevelt had already expanded and abused presidential power with such antics as his New Deal court-packing scheme, Jarecki finds even greater aggrandizement of executive authority during the war, particularly in Executive Order 9066, which "resulted in the internment of 120,000 people of Japanese descent, roughly 60 percent of whom were American-born citizens." Perhaps even bolder was "the secrecy with which the now infamous Manhattan Project was implemented" — "nothing on FDR's watch was more challenging to the separation of powers."

Harry Truman took over America's nuclear "arsenal of democracy" upon Roosevelt's death, and won the distinction as the first and so far only political leader to launch nuclear weapons against civilians. The author cites numerous U.S. leaders

who looked upon the bombings of Hiroshima and Nagasaki as unnecessary and immoral. He gives fair attention to various theories why Truman dropped the bombs if they were not necessary, and without giving a definitive answer he notes,

> *From a foreign policy perspective, the use of the bombs killed two birds with one stone — ending the war with Japan while firing the first shot in the Cold War against the Soviet Union.... [The] bombings of Hiroshima and Nagasaki are an extreme case of the kind of self-perpetuating militarism feared by the framers.*

The Cold War entrenchment of the military-industrial complex

So Truman ended World War II and began the Cold War with an apocalyptic bang. What's more, he framed the beginnings of America's conflict with the Soviet Union in ways that changed America. The domino theory that gained ground in his administration had lasting effects on U.S. diplomacy and anti-communist concerns at home. It became "the foundation of his argument for a new U.S. foreign policy" as the Truman doctrine was forged in response to the threat of communist influence in Turkey and Greece. The new policy represented

> *a sea change, the most significant expansion of American foreign policy since the Monroe Doctrine of 1823. Monroe had broadened America's military mandate from self-defense to the defense of all free peoples in the western hemisphere. The Truman Doctrine went further, interpreting a threat to free people anywhere as a threat to America.*

The late 1940s also featured a major rearrangement of power relations within the U.S. defense establishment. Authority shifted from the State Department to new authority centers in the Defense Department, the CIA, the National Security Council, and the newly created independent Air Force. Some of the changes were put in place by a Republican Congress determined to "reverse elements of FDR's executive tilt." Yet "while the State Department was surely weakened ... — perhaps excessively — it would be hard to argue, sixty years later, that the effort to rein in the power of the executive has succeeded."

Another failure of the Republi-

cans to stem the imperialist tide came in the Eisenhower administration. While "departing from the traditional Republican isolationism" in his 1952 campaign, Eisenhower still represented a less-activist war policy than the two hyperinterventionist Democratic presidencies he followed. He feared that "in a determined effort to outproduce the Soviet Union, the United States had begun to spend a disproportionate amount on defense in comparison with other areas of its national life." He was "repulsed by profligate spending on defense." His withdrawal from Korea and introduction of the New Look policy showed a measure of restraint." But it was also on Eisenhower's watch that "the United States entered the era of covert activity," with coups in Guatemala and Iran and a general expansion of CIA influence under its director, Allen Dulles.

The late 1940s also featured a major rearrangement of power relations within the U.S. defense establishment.

Yet for most of the Cold War the CIA proved very limited in its supposed main activity, gathering intelligence:

> *It failed to predict the Soviet detonation of the atom bomb in 1949, the 1950 invasion of South Korea, popular uprisings in Eastern Europe during the 1950s, the placement of Soviet missiles in Cuba in 1962, the 1973 Arab-Israeli War, the 1979 Iranian revolution and Soviet invasion of Afghanistan, [and] the 1989 collapse of the Soviet Union.*

The so-called "bomber gap" and "missile gap" and other Cold War frauds are also discussed in *The American Way of War,* and there is a bit of discussion of Vietnam and other hot conflicts, although they are not the focus. All in all, Jarecki very nicely explores the new principal role of covert war in U.S. policy along with the general solidification of the permanent warfare state and military-industrial complex during the Cold War and its immediate "peacetime" aftermath, preparing the reader for the next major era of U.S. militarism.

A war of terror at home and abroad

It will always be important to understand the specific ways the Bush administration stretched executive power and built up the warfare state in the years following

9/11. Yet his national security policies followed the logic of previous excursions and institutional orientations.

While the neocons were champions of the somewhat novel foreign-policy philosophy behind Iraqi regime change, the operation represented militarily something more in line with establishment designs. Even the military tactics of the Bush years demonstrate both the continuity with and retreat from the past. Shock and Awe, the opening bombing campaign in Iraq in 2003, signaled the beginning of

> *a fulfillment of Eisenhower's fears of runaway American militarism. Yet, to its planners, the opening strike seemed a natural extension of America's expanding foreign policy role since World War II and of the technological advances made possible by the American way of war.... Despite the defense secretary's apparent collaboration ... there is no evidence from Rumsfeld's history that he was inclined toward the kind of Pax Americana the neocons advocate. To him, [Shock and Awe] more narrowly represented the fulfillment of a technological military ideal, one that had emerged over the decades of his military-industrial career.*

To the extent the Iraq war has symbolized a break from previous traditions, it has often been establishment voices condemning its betrayal of the limits of U.S. power. "Ultimately, the Iraq War's descent from a technocrat's fantasy of transformational war into a quagmire ... has vindicated those who opposed Rumsfeld's approach in the first place: General Shineki, General Schwarzkopf ... General Franks." The Iraq War's hubristic goals coupled with poor planning and execution "undermined the very strategic precepts [the war] was meant to demonstrate."

The very doctrine of preemptive war was not completely new, except in the overtness of it all.

Other elements of Bush's war on terror are defined by their building on older U.S. practices while deviating in important ways from past experience. The very doctrine of preemptive war was not completely new, except in the overtness of it all, which "departed from [American] traditions so brazenly [and] makes yesterday's aberration today's stan-

dard operating procedure." This tendency was further seen in the administration's flouting of "vital checks on its conduct of office" in handling intelligence running up to the Iraq war, and in its gross attacks on the separation of powers and civil liberties, in each case building on past precedents to break new ground in presidential prerogative.

The administration's gross attacks on the separation of powers and civil liberties in each case built on past precedents to break new ground in presidential prerogative.

Bush's NSA wiretapping program was "a far-reaching attack" on both congressional and judicial authority with only a few parallels in the past, and although "past administrations have asserted [executive privilege] from time to time, the Bush administration has done so with unprecedented vigor." Bush's "firing of eight U.S. attorneys" in 2006 "represented both a politically motivated purge [and] a preemptive attack on the judicial system" — and although the administration's "scorn for certain judges is not an altogether new phenomenon," wrote former Supreme Court Justice Sandra Day O' Connor, "the breadth and intensity of rage currently being leveled at the judiciary may be unmatched in American history."

On detention policy, although Bush is "not the first American president to [use an enemy-combatant doctrine], and although he was empowered by the precedents of Lincoln and Roosevelt, no administration has ever asserted more unilateral discretion over and to what extent the country will abide by the constitutional requirement to uphold the writ of habeas corpus." In the whole discussion of a "balance" between liberty and executive-pursued security, the Bush administration leaned toward the latter, as is discussed in Jarecki's fine treatment of the legal philosophy put forth by high Justice Department official John Yoo.

The Bush stance on national security — largely adopted by the Obama administration — raises two points that do not contradict one another but require nuance and balance to be understood in concert. First are the many ways the Bush years were not a retreat from past U.S. experience, the many ways that expansions of presidential power, deception, imperial muscle flexing, and a permanently influential defense establishment were en-

trenched American traditions for three generations before the planes hit the World Trade Center.

The second point is the key ways in which the Bush years built and expanded on past precedents and broke new ground. Although Bush was not the first imperial president, he was an important one in the history of the U.S. warfare state's development. Jarecki tells this story very well, in exciting prose and with something of a fair mind given to both revisionist and official versions of U.S. diplomatic history. *The American Way of War* is a solid addition to the critical literature about U.S. wars and foreign policy since the 1940s.

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The Fourth Amendment and the personal rights it secures have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.

— Supreme Court Justice Potter Stewart

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