The Unalienable Right of Government by Consent and the Independent Agency

KERRY LEE MORGAN

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I. INTRODUCTION

The title of this article has been chosen with care. It is a little long and perhaps a bit awkward; however, it brings into focus two concepts. I want to discuss these concepts, not simply because they have long been ignored, but principally because they have not been understood. The article, therefore, is concerned with first, the right of government by consent; and second, the independent federal agency. My view on these subjects is fairly straightforward. Government by consent is an unalienable right because it is given by God to all human beings. Consequently, this right is beyond the authority or jurisdiction of any government, federal or otherwise, to impair by regulation, balancing or otherwise. The independent agency, on the other hand, is a statutory creation of the federal government. I suggest that the independent agency, as we know it today, is repugnant to the Constitution. Of more significance to those who live under the reign of such agencies, their creation and continuation is antithetical to the spirit of a free people.

The relationship between the unalienable right of government by consent and the independent federal agency ably illustrates this antithesis as well as articulates my central thesis, which is that creation of the independent agency tends to render insecure the unalienable rights of the people. Or to say it differently, as the presence, number and power of independent agencies increase, the recognition, number and security of unalienable rights decrease. Not surprisingly, the chief among these rights and the first to be impaired, is the unalienable right of government by consent.

In order to properly understand these concepts and their relationship, we must look to the nature or essence of unalienable rights and independent agencies. If these are to be understood in the context of American government, they must be considered first in light of the Declaration of Independence and its principles, and then (and only then) in light of the federal Constitution.

II. GOVERNMENT BY CONSENT

> *The exercise of delegated powers is a duty as sacred and indispensable as the usurpation of powers not granted is criminal and odious.*
>
> John Quincy Adams, First Annual Message, December 6, 1825

A. The Declaration of Independence

In 1776 representatives of the thirteen United Colonies lawfully declared their freedom and independence from tyrannical English government. Turning to the "Laws of Nature and of Nature's God," they asserted that as one people they were free to alter their monarchial form of government and to organize a new one on such principles as seemed most likely to secure their unalienable rights. Laying the foundation for a future constitutional government, the signers declared:

> When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of Mankind

> requires that they should declare the causes which impel them to the separation.[1]

By referring to the laws of nature and of nature's God in the Declaration of Independence, the fifty-six signers of that legal document stated in writing the true principle that their Creator entitled them to a corporate existence.

In 1751 the Baron de Montesquieu acknowledged the laws of nature's God when he wrote that "God is related to the universe as creator and preserver; the laws by which he has created all things, are those by which he preserves them."[2] Sir William Blackstone, writing in 1765, declared, "Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these."[3] Thomas Jefferson, reflecting on the Declaration in 1825, phrased it differently. He wrote that the essential thing was "[n]ot to find out new principles, or new arguments, never before thought of, not merely to say things which had never been said before; but to place before mankind the common sense of the subject."[4] In 1839 President John Quincy Adams looked back at the founding and declared:

> [T]heir charter was the Declaration of Independence. Their rights, the natural rights of mankind. Their government, such as should be instituted by themselves, *under the solemn mutual pledges of perpetual union*, founded on the self-evident truths proclaimed in the Declaration.[5]

The Declaration of Independence articulated at least five key principles of the laws of nature and of nature's God foundational to all legitimate civil societies. These principles were in turn practically interwoven into many state constitutions and eventually the national Constitution. First, it declared human beings are created equal by God. Second, all people are endowed by God with certain unalienable rights. Third, the people are also endowed with the right to govern themselves according to their written consent. Fourth, the people retain the right to alter or abolish an unlawful form of government as an exercise of self-government. Fifth, the people are free to organize the powers of civil government in such a way as to secure their happiness. The third, fourth and fifth of these propositions reflect the unalienable right of government by consent.[6]

B. Modern Departure

The "self-evident" truths of the Declaration of independence derived from the laws of nature and of nature's God have not been preserved in any significant way. Modem American culture has failed to retain the significance of these truths. Few families teach their children the civil virtue of self-government. Many churches have doubts as to whether they should be involved with civil affairs since doing so may jeopardize their tax-exempt status. Attorneys, judges and governmental officials seldom articulate this legal heritage, including the tradition of the law of nations so vital to its development. More importantly, our citizens are rarely able to articulate the proper relationship between the Declaration of Independence and our American Republic.

Having lost a general understanding of this heritage, our culture views the Declaration of independence and the unalienable right of government by consent as simply historical, lacking any

relevance for this age. Consequently, the Constitution, cut from the same cloth, is far removed from the thoughts of our nation's citizenry. Few today could say that knowledge of the laws of nature or the Declaration are simply common sense. It is essential, therefore, to revive the underlying principles of the Constitution as they are written in the Declaration so that "government of the people, by the people, for the people, shall not perish from the earth."[7]

C. Government by Consent

The Declaration asserted that government by consent was an unalienable right and employed it in three ways. The first involves the unalienable right to institute a government by the consent of the governed. The Declaration notes that "Governments are instituted among Men, deriving their just powers from the consent of the governed."[8] President George Washington declared, "The basis of our political systems is the right of the people to make and to alter their constitutions of government."[9] Abraham Lincoln called this "the leading principle - the sheet anchor of American republicanism."[10] This principle means that specific civil governments lawfully exist only at the behest of the people. Civil government cannot create or perpetuate itself without running roughshod over the basis of our political system. Civil government may not reorganize itself for the sake of expediency. Likewise, the federal government may exercise only those civil powers that are specifically granted to it in the Constitution. If a power is not granted, the general government does not possess it and therefore may not act as though it does possess it. Congress may not exercise jurisdiction not extended nor may it vest independent agencies with such jurisdiction.

The general principle of consent is found throughout the Constitution. The Preamble asserts, "We the People, of the United States ... do ordain and establish this Constitution ...."[11] The whole notion of constitutional government is predicated upon the requirement that people consent together to establish the form of civil government, and that political sovereignty is delegated directly to that government. Article I, section 1 reinforces this proposition. It notes that only the legislative powers specifically "granted" by the people of the United States may be exercised by the Congress.[12] Therefore, Congress may only legislate with respect to those objects or purposes the people extended to Congress in writing.[13]

Article IV, section 4 indicates that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government."[14] Both the national and state governments are republican in nature. Republicanism requires that the people's representatives govern only according to the people's written consent as found in the Constitution. If the people desire any branch of the national government to engage in an activity which would require the exercise of a power not enumerated or extended, or with respect to Congress, necessary and proper to carry such a power into execution, then the people need to amend the Constitution to empower the federal government to so act. This will ensure that there is no mistake as to the nature, extent and type of power given, or the proper scope of its exercise, including the branch to which it has been entrusted. This is very important to keep in mind when considering congressional creation of independent agencies with dubious constitutional jurisdiction.[15]

Article VII provided the specific means by which the people originally consented to establish a

government under the Constitution and to be governed by the Constitution. It declares that the "[r]atification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same."[16] Article VII does not provide that the consent of Congress shall be sufficient to establish another Constitution or form of government or to reorganize the federal government to accommodate independent agencies.

D. Instituting Lawful Government

Second, the Declaration asserts that when the people institute a new government, they should make it conform to the law of nature by "laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."[17] The representatives in the First Continental Congress had organized the powers of a national government in 1774 under the Articles of Association.[18] In 1777 this organization took on a different character. Drafted by John Dickinson, then a delegate from Pennsylvania who voted against the Declaration of Independence, the Articles of Confederation and Perpetual Union were put forward.[19] According to President John Quincy Adams, however, "There was ... no congeniality of principle between the Declaration of Independence and the Articles of Confederation."[20] The powers of the Confederation were organized in such a way as to undermine rather than "to provide new Guards for their future security."[21] Adams declared that the "fabric of the Declaration and that of the Confederation . . . were the products of different minds and adverse passions."[22] In an effort to revise the Articles of Confederation, a convention was called. More than revision, however, took place. Within four months the Framers had written a national Constitution reorganizing the general government. This reorganization was designed to better secure the safety and virtue of the people by a more perfect union of the states.

Each state in the union was organized upon a republican basis and form of government. Reflecting on a republican form, James Madison, writing in The Federalist No. 39, stated:

> It is evident that no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government.[23]

Building on this, the Framers of the general government set out to alter their former system of government in at least two significant ways. First, with respect to the general government, they separated its power into executive, legislative and judicial branches. Noting that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny,"[24] the Founders made each branch separate and distinct, with few exceptions.[25] As separate branches, they were also independent of one another, but still subject to the Constitution. Madison said:

> If it be a fundamental principle of free Government that the Legislative, Executive & Judiciary powers should be separately exercised, it is equally so that they be independently exercised.[26]

If one national branch exercised another's power, it would not be according to the Constitution, but by usurpation. Though every branch was independent of each other, they were never designed to be independent of the rule of law or the Constitution. This has tremendous implications for the independent agency since in many cases such agencies exercise not the power of one, but of two and sometimes of three, branches of government.

The Framers also divided civil power between the states and the national government. According to The Federalist No. 39, the jurisdiction of the national component of the federal system "extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other [civil] objects."[27] The states do not exercise national power, and the national government does not exercise state power. Each government exercises only those civil powers granted in their respective constitutions. All other power is reserved to the people. The tenth amendment affirms this understanding, and the republican government clause of article IV guarantees it.[28]

E. Abolishing lawless Government

Government by consent also focused on the unalienable right to disestablish a tyrannical or lawless government, that is, the right to alter or abolish the form of government. The Declaration asserts:

> [W]henever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.[29]

The phrase "destructive of these ends" refers to the unalienable rights which civil government is instituted to preserve. It was the right to alter or abolish the form of government which the people exercised when independence was declared. The nature of this right presumes that it is not to be exercised lightly. If wrongly employed, it could constitute treason.[30]

The Framers declared that the people were free to organize the powers of government in whatever form they considered would secure their liberty. Accordingly, the people took steps to exercise their right of government by consent and abolished their present form of English rule because it was destroying their liberty. The Framers recognized in the Declaration that "[s]uch has been the patient sufferance of these Colonies."[31] They noted that "[i]n every stage of these Oppressions We have Petitioned for Redress in the most humble terms."[32] Petitioning, however, was not a sufficient remedy in this instance, for

> when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.[33]

In other words, the people have the authority to correct, rebuke and alter their government, but not

for light or transient reasons.

Article V is an excellent example of the rule regarding alteration or abolition of the national form of government. Through amendments, the people can establish a more perfect government of the United States, that is, render it better able to accomplish its purpose of securing the God-given rights of the people.[34]

F. Summary

The unalienable right of government by consent is given by God to all people. Its legal expression is called government by consent and it has three components. The first is the right and duty of the people (not the civil government itself) to establish, institute or form a civil government. This takes into account the second component, the obligation to lay the foundation of that government on true principles, including the right to organize its civil powers in any lawful way so that it secures these and other rights. Thus the right of government by consent is not the right to merely establish a civil government, but to establish a civil government under the rule of law with the objective of establishing and organizing it in such a way as to better secure the rights of the people.

The third component of government by consent is the right and duty of the people to disestablish a lawless government. Lawlessness implies tyrannical or despotic government. It takes into account factors which include the duration and design of the tyranny. It also includes considerations of how long the people will tolerate being reduced to slavery before they undertake a lawful alteration, disestablishment or abolition of that government. The words "establish" and "disestablish" are employed only for contrast. The Declaration uses the phrases "institute" and "alter or abolish." Whether these words or those of "form" and "amend" are employed is not what is preeminently important. What is important is that the creation, alteration and destruction of the form of government, subject to certain procedural and substantive prerequisites, are unalienable.

III. THE INDEPENDENT AGENCY

> If the declaration of independence is not obligatory, our intire political fabrick has lost its magna charta, and is without any solid foundation. But if it is the basis of our form of government, it is the true expositor of the principles and terms we have adopted.
>
> John Taylor, *New Views of the Constitution* (1823)

A. Our Lost Heritage

It is not one of the glowing legacies of our country that government by consent has remained highly regarded and free from abuse. One of the most blatant and pervasive examples in our present scheme of government of a departure from the principles of the Declaration is the creation of independent agencies and commissions. Such "independent" entities are the embodied antithesis of government by consent. In many cases, they operate outside the direct authority of the executive and legislative branches of government. They are unaccountable in their day-to-day operations to any

constitutionally established branch of government. Likewise, these extra-constitutional entities almost always blend legislative, executive and judicial powers under the same roof.

The Declaration of Independence and the Constitution, however, rightly observe that the people can organize the power of government any way they desire, as long as they believe on good evidence that it will better secure their rights. The unalienable right to organize the powers of the federal government translated constitutionally into separate executive, legislative and judicial branches. It did not translate into extending to any of these branches the power to establish any independent agency or commission with power to exercise any rule-making authority binding on the society at large or segments thereof. Likewise, separating federal power into three constitutionally defined branches permits no combination of the power of those branches in an independent agency or commission. In short, it permits no fourth branch of general government, independent or otherwise, to be created *by the government*. The major issues regarding the organization of the federal government were settled by the people and recorded in the Constitution in 1787 and its amendments. The organization of the powers of the general government has not been entrusted by the Constitution to the general government itself.

What is meant by the assertion that these independent entities operate outside the legislative, executive or judicial branches? Certainly every agency or commission's jurisdiction is based on some congressional legislation, authorization or executive order. Their budgets are subject to presidential review and congressional approval, and the President, with the advice and consent of the Senate, generally appoints their directors or commissioners.[35] Likewise their actions are ultimately subject to judicial review, though such review is dangerously confined to non-substantive procedural notions of due process. In this sense, independent entities are not truly independent.

Independent agencies or commissions do not violate the unalienable right of government by consent because they are subject to minimal review. They violate the unalienable right of government by consent because either they are contrary to the laws of nature and of nature's God, or they are unconstitutional, or both.

The agencies and commissions that are contrary to the laws of nature and of nature's God include those which assume authority over non-civil purposes as defined by the laws of nature and of nature's God. When civil government operates in these areas, then by definition they tend to render the unalienable rights of the people insecure rather than tending toward their security. This result contradicts the very first object of civil government.

Agencies and commissions also violate the unalienable right of government by consent when they improperly combine valid federal power from constitutionally separated branches. Such a combination also tends to render insecure other unalienable rights of the people. The constitutional consent of the people to organize the federal government into three separate, independent and equal branches cannot be altered by the government itself. The government, in this case Congress, may not combine three different types of civil power in a fourth type of branch.[36]

To the modern mind, bred on twentieth-century jurisprudence, the notion that civil power and

jurisdiction is limited and not coextensive with the universe of possible action or competent to every object, is indeed alien. Then again, the modern mind is predisposed to sacrifice the basic rights of the people on the altar of governmental utility. Unless we take stock in the principles of the Declaration, there can be no rebuttal to independent agencies or their deprecating effect on the unalienable rights of men. Good liberal or conservative jurisprudence will not suffice. We must also remember that the people themselves are under these principles. They are subject to the laws of nature and of nature's God. The people may not act contrary to that law when instituting and organizing a civil government. They lack the authority to extend non-civil power to civil government.

B. Agencies That Exercise Non-Civil Power

Consider then the first of these legal objections to the independent agency or commission. The rule is that the people cannot, consistent with the laws of nature and of nature's God, lawfully consent to extend the jurisdiction of civil government over non-civil objects. Such an extension blurs the outer limits of civil jurisdiction and always tends to render imprecise the unalienable rights of the people. For instance, when civil government enters the field of charity or ideas, or begins to substitute its discretion or judgment for that of the people, then the exercise of rights by the people soon becomes impaired. This impairment occurs, first through regulation, then through licensure, and finally through criminalization. Civil government lacks competence to act beyond its lawful jurisdiction. Despite apparent short-term gains in supposed governmental efficiency, there is inevitably a long-term loss of rights. The daily paper testifies to as much for those who are willing to see.

There are numerous examples of independent agencies or commissions which violate the laws of nature and of nature's God by exercising civil authority over objects that do not fall within civil jurisdiction. These include civil government attempting to love its neighbor by engaging in works of charity,[37] civil government undertaking to be a competent judge of ideas,[38] and civil government usurping jurisdiction rightfully extended only to individuals, families or the voluntary private and business sector.[39]

When civil government undertakes any of these objects, then in one way or another, to one degree or another its interference tends to render insecure the various unalienable rights of the people. Among such rights are liberty of contract and association. The people also lose the right of private property, which includes the right to fund and subsidize *only those* charities, businesses, farmers, bankers and regions of the country according to one's own choosing and not that of the government. When civil government operates in these areas, however, the tendency is always the same. These and other rights are eventually rendered insecure in their exercise. They are alienated in their possession. This is the antithesis of why civil government is established. The independent entity is one of the powerful means by which this antithesis is carried into effect. This is the principal defect of independent entities which focus on matters that are not really legitimate civil objects. They tend to destroy the rights of the people.

C. Agencies That Exercise Unconstitutional Power

The second type of independent agency which violates the unalienable right of government by consent differs from those previously discussed. Independent entities of this class do not generally violate the laws of nature; they violate the Constitution, which is the law of the land. These entities violate the Constitution by their organization. These independent entities combine different types of lawful civil power in the hands of the same entity. This violates the separation of powers rule. When the people consented to establish a federal government, they divided its powers, rather than combine them. Independent agencies also violate the Constitution because they are unaccountable. They are not directly subject to the authority of one branch or another in their day-to-day operations.

These independent entities must be divested of combined power and brought back under direct control of the correct constitutionally designated federal branch. it is also a law of nature just like gravity, that when the legislative, executive and judicial powers are combined under one roof, the tendency is to destroy, rather than secure the rights of the people. In due season rights are always alienated by combination of these types of power.

The Framers saw this ever so clearly. They took no solace in a benevolent ruler. They neither trusted themselves nor their posterity with combined power. What makes us think that men and women who serve in governmental agencies are any more virtuous today than those of the Framers' generation? They knew better and so should we. Show me a virtuous man with combined power and you will have the makings of a despot.

Agencies and commissions that combine two or more types of power include those which should be stripped of judicial and/or legislative power and placed within the executive branch,[40] and those which should be stripped of executive and judicial power and placed within the legislative branch.[41] This reorganization not only separates power according to the people's design in the Constitution, but brings the power back into the sphere of accountability.

Many of these agencies or commissions are also advisory, informational or research-related and lack any enforcement power (though some retain subpoena power). These are principally unconstitutional because they are not accountable to any branch of the federal government in their day-to-day operations.[42] Accountability as I have noted relates to the power of one branch to direct the actions of the agency on a day-to-day basis. To say independent agencies are accountable to Congress or the President because they can select its director or commissioner is only to say that such an individual is indebted. It is not to say they are accountable. To reason that Congress can pass a law disbanding an agency or commission and that this is proof of accountability is nonsense. Congress can always repeal any law. Congress presently retains the option of repealing the Judiciary Act of 1791 which establishes the basic system of federal courts in the United States. Would it be argued that the courts are consequently accountable to Congress? No, it would not. So too independent entities may be indebted (indeed they are), but they are not held accountable simply by virtue of potential congressional exercise of lawmaking power.

IV. CONCLUSION

The Declaration of independence acknowledges that every human being is endowed by God with certain unalienable rights, including life, liberty and the pursuit of happiness. The Declaration also observes that the people possess the right "to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."[43] This right to form and organize one's civil government is the essence of government by consent. The Declaration recognizes that the foundation and organization of civil government can only be established by the people. The Declaration does not recognize that a civil government once formed, may *reform itself or reorganize its own powers* according to its own whim or will. Nor does the Constitution, which is legally established upon and animated by the right of government by consent, recognize any such lawful power in civil government. When civil government exercises such power, the right of government by consent is abridged and other unalienable rights naturally tend to be rendered insecure and contravened.

The Constitution that created the federal government is the true reflection of the people's consent. When the people consented to the *formation* or establishment of the federal government, the framework of the "Laws of Nature and of Nature's God" articulated in the Declaration served as the principal foundation for that government. That law brought with it a body of universal limitation and defined the proper objects and ends of all civil governments. These universal limitations and objects were binding on the people and the Framers, and became binding on the federal government itself when it was established under the Constitution in 1789.

When the people consented to the *organization* of the federal government, a framework of separating the legislative, executive and judicial power from each other in the exercise of their principal functions served as one of the people's most useful organizational tools.[44] This tool brought with it both a mandate to separate these powers as well as the requirement that their exercise be accountable to the people under the organization articulated in the Constitution.

Consequently, the federal government was established and formed under the rule of the universal law of nature and organized according to the terms of the Constitution. The federal government is without any liberty whatsoever to contravene either this universal law or the law of the land. Congress, for instance, may not re-establish or reform the foundations of the federal government by establishing departments, agencies, commissions or entities, independent or otherwise, to undertake any object or end not extended to civil governments by the laws of nature and of nature's God. Entities established to undertake such objects are a violation of this law as well as a violation of the unalienable right of government by consent. The people consented to establish a federal government under the rule of this very law, and once established, they only consented to authorize its specific operation according to the express terms of the Constitution.

Furthermore neither the Congress nor the President may reorganize the structure of the federal government by establishing departments, agencies, commissions or entities (independent or otherwise) that combine within such an entity the types of civil power diffused among the three constitutionally separated branches. Congress may not reorganize the federal government by

creating civil agencies, commissions and entities, independent from and *unaccountable* to the constitutionally established branches of government, irrespective of whether or not they share executive, judicial or legislative power.

A review of the present purposes and organization of the federal government, however, reveals that the principles of the Declaration, the right of government by consent and the organizational scheme of the Constitution are principally, if not preeminently, breached. The power of the federal government to reform and reorganize itself is advanced in deprecation of the unalienable right of government by consent. This approach does not acknowledge the consent of the people. It gives no credence to the exercise of this unalienable right. The adherents of this mistaken viewpoint confuse the right of government by consent with the results of select popular opinion polls. They mistake the consent of the people with the personal policy preferences of the judiciary and with the opinions of select subcommittees of Congress. They argue that the consent of the people is synonymous with an electoral "mandate" or arises when the people demonstrate political support for the President's programs over those of Congress. In essence, the proponents of this view argue that it is acceptable to trample the rights of the people upon these mistaken pretexts.

It is also argued as somehow relevant that the federal government may give the people what they want when the people "desire" the Congress or the President to reform or reorganize federal power. Such a claim, however, is inherently suspect. It is animated by the spirit of self-adulation and avarice, and not by the consent of the people well embodied in the written terms of the Constitution. If the desire of the people is lawful and truly politically irresistible, let the people, not that branch which stands to gain the most power, clearly designate which branch is to exercise exactly what power and under what circumstances and limitations.[45]

We have all welcomed, and perhaps encouraged in one way or another the federal government in general, and Congress in particular, to reform and reorganize its own power. We do not seem deeply concerned that the federal government, through the mechanisms of the independent agency or commission, has re-established itself on terms that collectivize its powers and make it unaccountable. Nor do we seem particularly aware that such action has rendered insecure a variety of our rights. Far more than the right of government by consent has been lost. Indeed, the federal government now concerns itself with many objects and ends not authorized by the Declaration's incorporation of the laws of nature and of nature's God. It has combined within one civil entity, legislative, executive and judicial power and created entities that are not directly accountable to any one of the three constitutionally established branches. Each of these activities is contrary to the original consent of the people and has impaired their rights.

The consent of the people, however, in terms of the formation and organization of the federal government is only to be found in the principles of the Declaration of Independence and the federal Constitution. It is the duty and challenge of each generation to recall the unalienable right of government by consent to public remembrance and to hold the federal government to its political observance. Civil government, once formed, is not free to alter, expand or disregard this mandate. Such a government is simply a creation of the Constitution. Its breath and life are derived from fidelity to that document. The government cannot give itself life or alter its features on its own

strength or conviction. It is not relevant that a constitutionally authorized means such as a statute or executive order is employed to accomplish the particular objective. No permissible means can breathe life into an impermissible object.

Let the form and organization of government originally selected by the people control the federal government, rather than the federal government controlling its original form and organization. The original form and organization is the best means by which the unalienable rights of the people can be secured. If the people do not act to secure the right to consent to establish a government, it is only a question of time before that government opposes their unalienable right to disestablish it.

Banning the importation of semi-automatic firearms, creation of a federal drug czar with questionable powers and the use of the special prosecutor are but three examples that have even gone beyond the independent agency in ruthless abridgement of unalienable and constitutional rights. These examples dwarf the abuses of the independent agency. We all desire peace and safety, but there will be only the insecurity of rights if this trend continues.

Indeed, if this government does not feel obliged to control itself, the people will be obliged to establish a new government which will remain faithful to its enumerated objects, principles and organization.[46] In the meantime, the independent agency or commission must be abolished as inconsistent with the laws of nature and of nature's God, the intent of the Framers and the limited objects constitutionally entrusted to the federal government by the people.[47]

NOTES

1. The Declaration of Independence para. 1 (U.S. 1776).

2. B. de Montesquieu, The Spirit of laws 99 (D. Carrithers ed. 1977) (1750 trans.).

3. 1 W. Blackstone, Commentaries *42.

4. Letter from Thomas Jefferson to Henry Lee (May 8, 1825), reprinted in 16 The Writings of Thomas Jefferson 117, 118 (A. Lipscomb ed. 1905).

5. J. Q. Adams, The Jubilee of the Constitution: A Discourse Delivered at the Request of the New York Historical Society (Apr. 30, 1839), reprinted in 6 J. Christian jurisprudence 1, 4 (1986).

6. Many state governments have expressly incorporated the Declaration's recognition of these principles. Congressional acts providing for the admission of various states to the Union have dearly articulated the paramount legal force of the Declaration. Many such acts provide that the state constitutions "shall be republican, and not repugnant to the Constitution of the United States and the principles of the Declaration of Independence." See E. Dumbald, The Declaration and What It Means Today 62-63 (1950).

7. A. Lincoln, Gettysburg Address (Nov. 19, 1863), reprinted in 7 The Collected Works of Abraham Lincoln 23 ®. Basler ed. 1953) [hereinafter Collected Works].

8. The Declaration of Independence para. 2 (U.S. 1776).

9. G. Washington, Farewell Address (Sep. 17, 1796), reprinted in 1 Messages and Papers of the Presidents, 1787-1897, at 205, 209 0. Richardson ed. 1897) [hereinafter Messages and Papers].

10. Address by Abraham Lincoln at Peoria, Illinois (Oct. 16, 1854), reprinted in 2 Collected Works, *supra* note 7, at

247, 266.

11. U.S. Const. preamble.

12. U.S. Const. art. I, § 1, cl. 1.

13. Government by consent is also reflected in article I, section 9, clauses 7 and 8, and article I, section 10. At no time may a judicial body exercise legislative power whatsoever. The ninth and tenth amendments reaffirm this perspective.

14. U.S. Const. art. IV, § 4.

15. The jury trial provisions of the sixth and seventh amendments reflect government by consent in the context of a judicial case or controversy. The jury literally must consent to the state proceeding against a peer, or in civil suits, by determining liability and assessing damages.

16. U.S. Const. art. VII.

17. The Declaration of Independence para. 2 (U.S. 1776).

18. The Association of the Continental Congress (Oct. 20, 1774), reprinted in 1 Documents of American History 84-87 (H. Commanger 9th ed. 1973).

19. The Articles of Confederation (U.S. 1777).

20. J.Q. Adams, *supra* note 5, at 7.

21. The Declaration of independence para. 2 (U.S. 1776).

22. J.Q. Adams, *supra* note 5, at 7-8.

23. The Federalist No. 39, at 111 (J. Madison) (R. Fairfield 2d ed. 1966).

24. The Federalist No. 47, at 139 (J. Madison) (R. Fairfield 2d ed. 1966).

25. For instance, the President's veto power noted in article I, section 7 extends to the Executive a check on legislative authority. The Senate, as a check on the other branches, is granted a measure of judicial authority to try impeachments according to article I, section 3. This includes impeachment of judicial officers as noted by Alexander Hamilton in The Federalist No. 81.

26. Debate by James Madison at the Constitutional Convention (July 19, 1787), in 2 J. Madison, The Debates in the Federal Constitution of 1787, at 285 (G. Hunt & J. Scott eds. 1987).

27. The Federalist No. 39, *supra* note 23, at 117.

28. Article 1, section 8 lists most of the powers that have been granted to the national legislature. The tenth amendment affirms the division of powers between the state and national governments by declaring, "Me powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people." This division reflects an underlying commitment to self-government as well as reaffirming that the national government has only a few powers best handled by the people as one nation. The vast bulk of civil power rests constitutionally with the people acting through state and local governments according to state constitutions, and in their capacity as individual citizens.

29. The Declaration of Independence para. 2 (U.S. 1776).

30. U.S. Const. art. 111, § 3, cl. 1.

31. The Declaration of Independence para. 2 (U.S. 1776).

32. Id. at para. 30.

33. Id at para. 2.

34. Many of the Founders recognized that negro slavery, as practiced in the United States at the time of independence, was an affront to the principles acknowledged in the Declaration. During the Constitutional Convention, the delegates could not arrive at a consensus completely conforming the Constitution to the principle of equality in this context. Abraham Lincoln noted that the spirit of the Founders toward the principle of slavery "was hostility to the PRINCIPLE, and toleration, ONLY BY NECESSITY." Address by Abraham Lincoln at Peoria, Illinois (Oct. 16, 1854), reprinted in 2 Collected Works, *supra* note 7, at 247, 275. Article I, section 9, clause 1 contemplated a move toward conformity to the Declaration principle by permitting Congress to impose taxes upon the slave trade and to abolish it altogether after 1808.

In the period preceding the Civil War, many persons separated the interpretation and implementation of the Constitution with regard to slavery from the principles of the Declaration of Independence. By making this separation, these men attempted to transform a tolerated evil into a positive right. This is the essence of the Supreme Court's holding in *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857). Chief Justice Taney wrongly concluded that because some of the Declaration's Framers had slaves, their practices, rather than the standard of equality, should govern. While it is always proper to consider the factual situation existing at the founding, it is the rule of law which controls, not the sometimes inconsistent practice of men.

35. See generally United States Government Manual (1988/89). Some Commissions, such as the United States Commission on Civil Rights, operate with a split appointment schedule for commissioners. The President appoints four and the Congress appoints four. They serve for fixed terms. 42 U.S.C. § 1975(b) (1988).

36. I have not touched on federal departments within the executive or legislative branches, which are either contrary to the laws of nature or are unconstitutional or both. These include executive departments such as Agriculture, Education, Energy, Health and Human Services, and Housing and Urban Development.

37. Each of the following agencies exercises non-civil power in one way or another. The objects or concerns of these entities are by definition charitable. They do not deal with furthering some legitimate civil object. In essence they usurp the jurisdiction of private, religious and philanthropic organizations:

Action. This agency is charged with administering volunteer service programs. Civil government is barred by the laws of nature from assisting or administering programs designed to further philanthropic objects.

Peace Corps. This agency is established to promote world peace and friendship by increasing a better understanding of the American people in foreign countries. Civil government lacks jurisdiction to undertake a philanthropic object.

The African Development Foundation and **The Inter-American Foundation**. Both foundations employ the finances of civil government to execute a philanthropic object better left to the private sector. If this is actually a legitimate civil function based on a treaty, then its function should be transferred to the Department of Commerce or State.

The Federal Mediation and Conciliation Service. Through persuasive techniques alone this service seeks to prevent disruption in labor-management disputes. Civil government, however, is not by the laws of nature charged with the authority to render opinions as an arbiter in disputes unless it is also empowered to carry its decision into execution. It must act as a judge, not as an advisor. If labor and management need help in how to resolve private disputes, the courts are open if the private sector can provide no remedy.

38. The following entities exercise non-civil power by deciding which ideas get into the market place and which do not, all at taxpayers' expense:

The Board for International Broadcasting. This independent agency oversees the operation of Radio Liberty and Radio Free Europe. Civil government lacks jurisdiction over the propagation of ideas. Overseeing a radio network designed to articulate any ideas contradicts this principle. These functions are better suited to the multiplicity of private sector options.

Commission on the Bicentennial of the United States Constitution. This commission is designed to encourage private organizations to celebrate the bicentennial of the Constitution. Civil government, however, is not established to encourage ideas. It does not have authority to tax the people to propagate a given point of view. If the people are so ignorant of the Constitution, it is unlikely that the federal government, which ignores it in principle by

establishing independent commissions, is competent to encourage the private sector to familiarize themselves with it. By competent 1 do not mean unknowledgeable, but rather without civil jurisdiction to educate the general public about its government. (See Morgan, The Declaration of Independence and American Education, 6 J. Christian jurisprudence 77 (1986).)

Federal Communications Commission. This commission regulates interstate communications by wire, radio, T.V. and satellite, including licensing and grant authority. Civil government, however, is not a competent judge of ideas. It lacks jurisdiction to decide which type of ideas should be regulated or licensed, and those which should not be so subjected. This is hard to accept until one realizes that the domination of the "big three" modern media networks over the minds of American television viewers for example, is the illegitimate child of federal licensing and control "in the public interest.'

The Corporation for Public Broadcasting. This is a government corporation designed to provide telecommunication service to all parts of the United States. It is not the object of civil government to provide the mechanisms by which ideas may be conveyed. Anyone familiar with the virtual uniformity of ideas conveyed by National Public Radio (NPR) or Public Broadcasting Stations (PBS) can attest to the singular use to which government financed and built communications centers have been selectively used.

National Foundation on the Arts and Humanities. This independent agency was established to encourage and support national progress in the humanities and arts by financial support. It is not the object of civil government to support by premiums or provisions, creative ideas or artistic impressions. The lure of federal funds often charts "progress" in the humanities and arts according to the direction which the civil entity seeks to go. This channels art into pre-approved directions and results in the demise of creativity. The recent use of federal funds to promote profane, blasphemous and obscene "art" is only the tip of the iceberg.

Science Foundation. This agency promotes science and engineering by financial support and educational programs. Except as such support can be justified for a military purpose, promotion of science and engineering is beyond the objects of civil government for the very same reasons as noted above.

Smithsonian Institution. The Smithsonian Institution is designed for the increase and diffusion of selective knowledge among men. Civil government is not a competent entity to diffuse knowledge for its own sake, let alone only that knowledge which civil government deems worthy of diffusion. This entity would have been better left in private hands. It did not need the federal government to survive and should be returned to the private sector for funding.

39. Entities that usurp jurisdiction of other institutions include:

The Appalachian Regional Commission. This commission is concerned with the economic, physical and social developments of the thirteen-state Appalachia region. The development of industry is a private sector undertaking which can utilize dollars more efficiently and effectively.

Export-import Bank of the United States. This independent agency facilitates and acts in financing exports of U.S. goods and services. Aiding exporters and private banks by extending appropriate financing in order to permit them to operate without "undue risk" in the large volume export area is not the purpose of civil government. They lack jurisdiction to subsidize select industry in the sale of products. This is purely a private sector proposition.

Farm Credit Administration. This watchdog of the farm credit system is designed to make long-term loans on farm or rural real estate. Civil governments may not enter the farm and agricultural markets on the same principles noted above, namely special treatment or favors in the form of loans to select private enterprises. This tends to impair these entities in the long run. The farm crisis in this country is a classic case of rendering the rights of the people insecure.

Federal Deposit Insurance Corporation. This agency is designed to promote and preserve public confidence in banks and insure bank deposits. The field of banking and insurance is not a legitimate civil object. Civil government is not instituted for the purpose of "confidence" in the banking industry. The recent rash of bank failures is not due to an organizational or confidence problem, but rather to the inherent incompetence of civil government to act the part of an infinitely wealthy insurance company.

Federal Home Loan Bank Board. This independent agency in the executive branch was established to encourage thrift and economical home ownership. Civil government is not instituted to help families be better homeowners. Stewardship of private property is not extended to civil government, but to families. The present debacle of the savings and loan industry which falls under the supervision of this entity demonstrates the folly of civil government

undertaking these types of objects.

Federal Maritime Commission. As it relates to control and regulation of rates charged by common carriers on water, this agency impairs the liberty of contract.

Interstate Commerce Commission. This agency is designed to regulate interstate surface transportation by certification, rates, service, purchases and mergers, thus assuring fair and reasonable rates to the public. Civil government lacks authority to set the terms of private contracts or impair the obligation of contracts. Reasonableness of rates is a function of market conditions, not arbitrary designation by civil government.

National Credit Union Administration. This agency creates and controls federal credit unions. Civil government is not established to engage in the "credit" business - unless federal credit is a means to secure a legitimate constitutional end.

Nuclear Regulatory Commission. The NRC licenses and regulates the civilian uses of nuclear energy. Regulation in "the public interest" is inconsistent with securing the rights of the people to engage in private business ventures, including liability for negligence in its operation.

Pension Benefit Guaranty Corporation. This corporation guarantees certain private pensions. The field of insurance is not a civil object.

Small Business Administration. This agency provides aid, counsel, assistance and loans to small businesses. The field of business is not a civil object.

Tennessee Valley Authority. This corporation is designed to advance economic growth in the Tennessee Valley region. Promoting economic growth in select regions is not a civil object.

Legal Service Corporation. This quasi-official agency provides financial assistance to qualified programs furnishing legal assistance to eligible clients. Subsidization of the legal profession is not the purpose of civil government.

40. Entities to be transferred to the executive branch after being divested of their legislative and/or judicial powers include:

Equal Employment Opportunity Commission. Repeal the EEOC's judicial function, transfer its investigatory power to the Department of justice and prosecute complaints before an article III court.

Federal Labor Relations Authority. Repeal the FLRA's judicial function, repeal its investigatory power, recognize the suitability of article III courts to resolve cases and controversies arising within the federal employment context.

Merit Systems Protection Board. Repeal the MSPB's judicial function, repeal its investigatory power, recognize the suitability of article III courts to resolve cases and controversies arising within the federal employment context.

Federal Reserve System. Transfer the execution of monetary policy functions to the executive office of the President.

National Mediation Board. Repeal the NMB's judicial function, recognize the suitability of article III courts to resolve cases and controversies arising between rail and air carriers and organizations representing their employees.

Federal Election Commission. Consolidate its functions within the Department of Justice.

Commodities Future Trading Commission. Transfer enforcement functions to the Department of Justice.

Environmental Protection Agency. Consolidate functions related to research and monitoring the environment on federal lands in the Department of the Interior, consolidate enforcement functions with respect to same within the Department of justice, transfer standard-setting function to Congress, repeal all functions as they affect all lands not held by the federal government (i.e., state and private property), recognize the suitability of article III courts to resolve cases and controversies arising within the context of pollution, etc.

Federal Trade Commission. Transfer enforcement functions to the Department of justice, repeal all judicial functions including the power to issue cease and desist orders, recognize the suitability of article III courts to resolve cases and controversies arising within the context of monopoly, restraint of trade and deceptive trade practices.

National Labor Relations Board. Transfer enforcement functions to the Department of justice, recognize the suitability of article III courts to resolve cases and controversies arising in the context of labor practices involving employers and labor organizations.

Securities and Exchange Commission. Repeal the SEC's judicial functions, transfer enforcement functions relating to mergers, etc., to the Department of justice, recognize the suitability of article III courts to resolve cases and controversies arising within the context of fraud upon investors, etc.

41. Entities to be transferred to a congressional advisory office on proposed legislation include:

Postal Rate Commission.
Federal Reserve System. Repeal supervisory and regulatory powers, transfer functions to congressional advisory office charged with recommending needed statutory amendments to banking laws, etc.
Environmental Protection Agency. Transfer standard setting function to a congressional advisory office charged with recommending needed statutory amendments to environmental laws.
Federal Trade Commission. Transfer trade regulation rule-making function to congressional advisory office charged with recommending needed statutory amendments to federal trade laws.
Commodity Future Trading Commission. Transfer functions relating to rules under which exchanges may operate to a congressional advisory office charged with recommending needed statutory amendments to commerce laws.
Consumer Products Safety Commission. Transfer functions relating to safety standards to a congressional advisory office charged with recommending needed statutory amendments to consumer safety laws in context of commerce, recognize the suitability of article III courts to resolve cases and controversies arising within context of hazardous consumer products.
National Transportation Safety Board. Transfer functions relating to safety in transportation to a congressional advisory office charged with recommending needed statutory amendments to safety matters within congressional jurisdiction.
Securities and Exchange Commission. Transfer functions relating to rule-making in securities context to a congressional advisory office charged with recommending needed statutory amendments to securities matters within congressional jurisdiction.

42. Such advisory independent entities include:

American Battle Monuments Commission. Transfer functions to the Department of Defense or the Department of Interior.
Administrative Conference of the United States. Transfer functions to the Department of Justice.
Commission on Civil Rights. Transfer functions to civil rights offices in various federal departments; repeal the subpoena power.
General Services Administration. Transfer functions to the executive office of the President or Vice President.
Federal Emergency Management Agency. Consolidate functions in the executive office of the President or Vice President.
National Archive and Records Administration. With respect to executive records and presidential libraries, transfer functions to the executive office of the President or Vice President.
National Capital Planning Commission. Transfer functions to the executive office of the President or Vice President.
Pennsylvania Avenue Development Corporation. Repeal its corporate status and transfer its functions to the executive office of the President or Vice President.
United States Postal Service. Consolidate functions in the executive office of the President or Vice President.
Selective Service System. Transfer to the Department of Defense.
United States Arms Control and Disarmament Agency. Consolidate all functions including negotiating authority within the State Department.
United States Information Agency. Consolidate all functions within the State Department.
United States International Development Cooperation Agency. Transfer the agency for International Development functions to the State Department, repeal the functions exercised by the trade and development program and the Overseas Private Investment Corporation for the reasons cited with respect to the Export-Import Bank of the United States in footnote 39 *supra*.
United States International Trade Commission. Transfer functions to the executive office of the President, Office of U.S. Trade Representatives.

43. The Declaration of Independence, para. 2 (U.S. 1776).

44. Another essential tool was Federalism. See *supra* notes 27-28 and accompanying text.

45. When faced with a Congress which sought to expand its power for "the sole purpose of the people," President Monroe observed that:

> In cases of doubtful construction, especially of such vital interest, it comports with the nature and origin of our institutions, and will contribute much to preserve them, to apply to our constituents for an explicit grant of power. We may confidently rely that if it appears to their satisfaction that the power is necessary, it will always be granted.

J. Monroe, First Annual Message (Dec. 2, 1817), reprinted in 2 Messages and Papers, *supra* note 9, at 580, 587.

The principle of limited and enumerated constitutional authority in Congress, acknowledged by former Presidents, was also recognized by President Andrew Jackson. In the context of congressional appropriations from the federal treasury for roads and canals without first resorting to an amendment, Jackson stated that:

> If it be the wish of the people that the construction of roads and canals should be conducted by the Federal Government, it is not only highly expedient, but indispensibly necessary, that a previous amendment of the Constitution, delegating the necessary power and defining and restricting its exercise with reference to the sovereignty of the States, should be made.

A. Jackson, Veto Messages (May 27, 1830), reprinted in 3 Messages and Papers, *supra* note 9, at 1046, 1054-55.

Jackson also noted:

> In no government are appeals to the source of power in cases of real doubt more suitable than in ours. No good motive can be assigned for the exercise of power by the constituted authorities, while those for whose benefit it is to be exercised have not conferred it and may not be willing to confer it.

Id. at 1055.

46. The Declaration of Independence para. 2 (U.S. 1776); see *supra* note 29 and accompanying text.

47. Footnotes 37-42 *supra* describe a great many agencies and commissions. Not everyone will agree with all the conclusions reflected therein. What is more important, however, than agreement on the conclusions is acceptance of the principles. That is where agreement is essential. The particular ramifications follow from the principles and that is where debate should be centered.

Other publications by Kerry Lee Morgan:

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Brief and Manifesto Against A Mandatory State Bar (co-author)

The Constitution and Federal Jurisdiction in American Education

The Federal Government: To Alter or To Abolish?

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