

## **No Legislation without Representation**

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If you have been paying attention to the news, you might have noted that the Catholic Church and other religious organizations are up-in-arms about provisions in the new regulations associated with the controversial legislation known as ObamaCare. What is that all about? If you read the text of the bill, you won't find anything that these organizations objected to during the debate over the legislation. Indeed, they supported it! So what changed?

What average people may fail to realize is that, even though the Constitution clearly implies that all legislation (law) is to be written by Congress, Congress gave away some of its authority to the Health and Human Services (HHS) Secretary to write regulations that have the force of law without a final up or down vote by Congress. That's right! Unelected bureaucrats, unanswerable to the electorate, have been tasked by Congress to write regulations – laws – without Congressional oversight - and these regulations will be backed up with coercive force.

HHS bureaucrats wrote regulations that were offensive to these religious bodies - indeed a number of these new regulations are likely unconstitutional, but these matters could be tied up in the courts for years before a ruling is made. Until then, they have the same impact on the citizen as a law created by Congress, unless Congress in the meantime votes to deny the implementation of a particular regulation that is then signed by the President. Is this really how our laws are to be created, by an unanswerable, potentially tyrannical bureaucracy?

To make matters worse, these bureaucracies not only have legislative authority, they also have been delegated executive and judicial powers, permitting them to: create regulations with the force of law that criminalizes behavior (legislate); enforce the regulations, accusing and prosecuting individuals (execute); and establish guilt and levy penalties that range from fines to confiscation of property and businesses, up to imprisonment (judicial). A convicted party's recourse is to appeal to the convicting agency, unless Congress is pressured to take up the matter in the meantime and vote to remove the offending regulation. Recent news has been full of stories centered on regulatory overreach from various agencies. In many of their actions there have been little or no Constitutional safeguards in evidence. One must ask, "Are these bureaucracies even Constitutional?"

### *Separation of Powers*

Once we were all taught that our freedoms are insured by the separation of governmental power into three branches: the Legislative, the Executive and the Judiciary. Our founders wrote

extensively about this. John Adams, the delegate from Massachusetts to the Continental Congress and our 2<sup>nd</sup> President, observed that,<sup>1</sup>

“... a single assembly, possessed of all the powers of government, would make arbitrary laws to further their own interest, and adjudge all controversies in their own favor.”

The reason for this behavior was expressed by George Washington in his *Farewell Address*;<sup>2</sup>

“A just estimate of that love of power, and the proneness to abuse it, which predominates in the human heart, is sufficient to satisfy us of the truth of this position.”

The Father of the Constitution, James Madison, in Federalist No. 47, goes further than Adams, stating that,<sup>3</sup>

“The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may be justly pronounced the very definition of tyranny.”

It is clear that the founders feared concentration of all power in the hands of the few. Consequently, they adopted separation of powers as a fundamental principle of the newly written Constitution, thus described by Alexander Hamilton, in Federalist No. 9:<sup>4</sup>

“The regular distribution of power into distinct departments; the introduction of legislative balances and checks; the institution of courts composed of judges holding their offices during good behavior; the representation of the people in the legislature by deputies of their own election . . . . They are means, and powerful means, by which the excellences of republican government may be retained and its imperfections lessened or avoided.”

The separation of powers in our Constitution serves to restrain government power, which is an embodiment of the human nature of the men that control it. Delegation of powers between governmental departments weakens, and perhaps destroys this restraint.

### *The Constitution's Position on Delegation of Authority*

Given these comments by the framers of the Constitution, it should be no surprise that there is no place in the Constitution of the United States that allows any of the three branches of the national government to delegate any of their constitutionally-granted powers to other agencies or government departments. However, the opposite also appears true, that there is no phrase in the Constitution that specifically forbids this action, until one consults the 10<sup>th</sup> Amendment, considered by Thomas Jefferson to be the foundation of the Constitution:<sup>5</sup>

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<sup>1</sup> Adams, John, *Thoughts on Government*, (essay), 1776.

<sup>2</sup> George Washington, *Farewell Address*, Webster's Bunker Hill Oration, T.A. Clark, ed.

<sup>3</sup> The Federalist, A Commentary on the Constitution of the United States, Robert Scigliano, ed., The Modern Library, NY (2000).

<sup>4</sup> The Federalist, op. cit.

<sup>5</sup> Thomas Jefferson, *Opinion on the Constitutionality of a National Bank*, February 15, 1791.

”The 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.”

Since the Constitution does not specifically grant permission to one branch of the national government to delegate its power to another branch or to a separate bureaucracy, the 10<sup>th</sup> Amendment clearly implies that it is then forbidden to the national government. This activity is unconstitutional, and every politician that engages in this activity violates their oath of office!

Thomas Paine, author of the pamphlet *Common Sense*, which inflamed the colonialists with a longing for independence, was clear in stating the framers’ thoughts concerning any government division that executed an activity contrary to those authorized by the constitution.<sup>6</sup>

“A constitution defines and limits the powers of the government it creates. It therefore follows, as a natural and also a logical result, that the governmental exercise of any power not authorized by the constitution is an assumed power, and therefore illegal.”

In the words of the framers, this delegation of power is illegal and tyrannical!

### *The Creation of the Current State of Affairs*

Yet if we look carefully, this has been going on for years, with Congress delegating its authority to many alphabet-soup organizations: The Environmental Protection Agency (EPA), The National Labor Relations Board, The Consumer Financial Protection Bureau, The Community Reinvestment Act, The Federal Deposit Insurance Corporation, The Federal Reserve, The Occupational Safety and Health Administration, The Federal Aviation Administration, The Federal Communication Commission, The Patient Protection and Affordable Care Act (ObamaCare), and dozens of others. This started before the introduction of the New Deal – the era of big government - in the 1930’s, when Franklin D. Roosevelt (FDR) manipulated the country into a state of panic, leading Congress to almost completely abdicate its responsibilities to the bureaucrats within the Executive Branch.<sup>7</sup>

### *The Position of the Judiciary*

Initially, the creations of FDR’s Administration were declared unconstitutional by the Supreme Court, which had generally upheld an Originalist constitutional interpretation requiring Congress alone to make laws.<sup>8</sup> Delegation of this responsibility to unelected administrators was not condoned. For complex issues where lesser details might be filled in by others, the 1928 case of *J.W. Hampton, Jr. & Co. v. United States* set out what remains the governing standard: a “legislative action is not a forbidden delegation of legislative power” if the “Congress shall lay

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<sup>6</sup> Paine, Thomas, *Constitutions, Governments and Charters*, 1805.

<sup>7</sup> David A. Stockman, *The Great Deformation: The Corruption of Capitalism in America*, [http://www.amazon.com/The-Great-Deformation-Corruption-Capitalism/dp/1586489127/ref=sr\\_1\\_1?ie=UTF8&qid=1372868030&sr=8-1&keywords=Stockman+Deformation](http://www.amazon.com/The-Great-Deformation-Corruption-Capitalism/dp/1586489127/ref=sr_1_1?ie=UTF8&qid=1372868030&sr=8-1&keywords=Stockman+Deformation)

<sup>8</sup> Cato Handbook for Congress, Policy Recommendations for the 108th Congress, Edward H. Crane and David Boaz, eds., Chapter 8, The Delegation of Legislative Power, The Cato Institute, January 14, 2003.

down by legislative act an intelligible principle to which the person or body [to whom power is delegated] is directed to conform.”<sup>9</sup>

The Supreme Court’s position on Executive law-making changed when FDR cowed the Court with an implicit threat to ‘stack the bench,’ increasing the number of Justices until he had a majority that would rule in his favor.<sup>10</sup> Since then there has been little impetus by the Court to reverse this trend and overturn these unconstitutional acts. Indeed, with a 5-4 majority in April 2007, the Supreme Court held in *Massachusetts v. Environmental Protection Agency* that the EPA could decide whether carbon dioxide poses a health and safety risk under the Clean Air Act without congressional input.<sup>11</sup>

It is encouraging that some district courts have tried to take a stand. Federal District Judge Roger Vinson wrote in *U.S. v. Mills*, 1989, “A delegation doctrine which essentially allows Congress to abdicate its power to define the elements of a criminal offense, in favor of an un-elected administrative agency does violence to this time honored principle.... Deferent and minimal judicial review of Congress’ transfer of its criminal lawmaking function to other bodies, in other branches, calls into question the vitality of the tripartite system established by our Constitution. It also calls into question the nexus that must exist between the law so applied and simple logic and common sense. Yet that seems to be the state of the law.” U.S. Court of Appeals Judge Douglas Ginsberg wrote that,<sup>12</sup> “The Supreme Court, by failing to prevent delegations of legislative authority, forgoes a significant opportunity to maintain the structure of government prescribed by the Constitution. As a result, legislators may and do delegate difficult and divisive legislative issues to agencies in the executive and judicial branches far removed from political accountability.”

As observed by Thomas Jefferson in a letter to William C. Jarvis in 1820, “To consider the judges as the ultimate arbiters of all constitutional questions [is] a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy.”

### *The Consequences of Delegation of Authority*

The consequence is staggering. After all, 535 men, women and their staffs can write only so much legislation, but delegating the writing to the Executive and other bureaucracies who can hire innumerable scribes allows the generation of an incredible amount of binding regulations. In 1949 there were 19,335 pages of regulations. In 2011 there were 169,301 small-typed pages, an increase by a factor of eight over a period of 62 years.<sup>13</sup> It is impossible for the average citizen to accomplish their civic duty and keep up with the blizzard of paper, written in stilted language with thousands of internal and external links, while attempting to provide for their

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<sup>9</sup> Douglas Ginsburg, *Legislative Powers: Not Yours to Give Away*, First Principle Series, No. 2, Constitutional Guidelines for Lawmakers, The Heritage Foundation, January 6, 2011.

[http://thf\\_media.s3.amazonaws.com/2011/pdf/CGL02.pdf](http://thf_media.s3.amazonaws.com/2011/pdf/CGL02.pdf)

<sup>10</sup> Amity Shlaes, *The Forgotten Man*, Harper Perennial, New York, (2007).

<sup>11</sup> Robert A. Levy, *Who Elected Lisa Jackson?*, Cato Policy Report, The Cato Institute, <http://www.cato.org/policy-report/marchapril-2011/who-elected-lisa-jackson>, March/April 2011.

<sup>12</sup> Douglas Ginsburg, op. cit.

<sup>13</sup> Ronald Bailey, *Federal Regulations Have Made You 75 Percent Poorer*, <http://reason.com/archives/2013/06/21/federal-regulations-have-made-you-75-per>, June 21, 2013.

family. (ObamaCare alone has created more than 20,000 pages (and rising) of new regulations from a 906-page act that most if not all of our legislators could not have read due to the rush to pass the bill before a far greater majority of citizens had a chance to foresee the bill's destructive consequences and stop them.<sup>14</sup>) We have no input into this pseudo-legislative process and cannot know all the laws and regulations under which we are governed – a tyrannical state of affairs.

The financial impact of these regulations is reflected in a GDP that analyses suggest could be as high as \$54 trillion instead of the \$16 trillion we have today.<sup>15</sup> As an example, the regulations created to support ObamaCare have had a direct effect on employment. The results of a survey on ObamaCare shows 41% of surveyed businesses froze hiring because of the health care law, 19% said they have reduced employees, and 38% said they have reduced growth plans.<sup>16</sup>

The survey was taken by 603 small-business owners with under \$20 million in yearly sales. The law and subsequent regulations have also affected the hiring of full-time employees, in favor of part-time employees. Indeed, the Presidents of the *International Brotherhood of Teamsters*, the *United Food and Commercial Workers* and *UNITE-HERE*, in a letter to top Congressional Democrats, wrote that ObamaCare would, “destroy the foundation of the 40-hour work week that is the backbone of the American middle class.”<sup>17</sup> Interestingly, these three organizations supported the passage of the original bill.

Other consequences of a regulatory state were described by Tocqueville,<sup>18</sup> who toured our country and wrote about U.S. Democracy in the early 1830's, “It rarely forces one to act, but it constantly opposes itself to ones acting; it does not destroy, it prevents things from being born; it does not tyrannize, it hinders, compromises, enervates, extinguishes, dazes, and finally reduces [the] nation to being nothing more than a herd of timid and industrious animals of which the government is the shepherd.”

Specifically, the regulations are contradictory (e.g. ICE agents attempt to arrest and deport illegal aliens while the Dept. of Labor attempts to ensure they are safe and protected on the job site,<sup>19</sup> and the Dept. of Agriculture attempts to give them food stamps<sup>20</sup>), they are loosely written allowing myriad interpretations (try getting the same answer on any single issue from two

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<sup>14</sup> John Stossel, *Train Wreck Ahead*,

[http://www.realclearpolitics.com/articles/2013/05/01/train\\_wreck Ahead\\_118194.html](http://www.realclearpolitics.com/articles/2013/05/01/train_wreck Ahead_118194.html), May 1, 2013.

<sup>15</sup> Ronald Bailey, op. cit.

<sup>16</sup> Peter Suderman, *Survey Finds that 41 Percent of Small Business Owners Have Frozen Hiring Because of Obamacare*, <http://reason.com/blog/2013/06/21/survey-finds-that-41-percent-of-small-bu>, Jun. 21, 2013.

<sup>17</sup> Kris Maher, *Union Fears ‘Destructive Consequences’ From ObamaCare*, <http://blogs.wsj.com/washwire/2013/07/19/union-fears-destructive-consequences-from-obamacare/>, July 19, 2013.

<sup>18</sup> Alexis de Tocqueville, *Democracy in America*, Wordsworth Classics, Hertfordshire, (1998).

<sup>19</sup> Michelle Malkin, *The U.S. Department of Illegal Alien Labor*, [http://www.realclearpolitics.com/articles/2010/06/25/the\\_us\\_department\\_of\\_illegal\\_alien\\_labor\\_106093.html](http://www.realclearpolitics.com/articles/2010/06/25/the_us_department_of_illegal_alien_labor_106093.html), June 25, 2010.

<sup>20</sup> Judicial Watch, *Case Worker: Illegal Aliens Got Food Stamps by the “Vanload,”* <http://www.judicialwatch.org/blog/2013/04/case-worker-illegal-aliens-got-food-stamps-by-the-vanload/>, April 30, 2013.

different IRS agents!) that change based on the political goals of an administration.<sup>21</sup> No one can know all the regulations that apply to their situation, and we all are likely to be violating at least one regulation a day without our knowledge. Yet lack of knowledge of the law is not an acceptable excuse to these bureaucracies, and can result in fines, wage garnishment and potentially imprisonment. James Madison appears to have been prescient when he said in his speech to the Virginia Ratifying Committee on June 16, 1788, “I believe there are more instances of the abridgement of freedom of the people by gradual and silent encroachments by those in power than by violent and sudden usurpations.”

Necessarily, the growth of this regulatory burden on the country has been accompanied by a growth in the size, scope and cost of the national government, and a consolidation of power primarily in the hands of the Executive. Thomas Jefferson said that, “Our country is now taking so steady a course as to show by what road it will pass to destruction, to wit: by consolidation of power first, and then corruption, its necessary consequence.” The recent announced political and ethical corruption within the IRS,<sup>22, 23, 24</sup> the NSA,<sup>25</sup> and the EPA<sup>26, 27, 28</sup> and their impact on the liberties of the citizenry and the waste of citizen resources confirms Jefferson’s remarks.

*Can one conclude that this Delegation of Authority is Tyrannical?*

To conclude that delegation of authority leads to tyranny, one needs to look no further than our Declaration of Independence for a description of tyrannical behavior:

“... altering fundamentally the Forms of our Governments,”

“... depriving us in many cases of the benefits of Trial by Jury,”

“...subject(ing) us to a jurisdiction foreign to our constitution...,”

“... erected a multitude of New Offices, and sent hither swarms of Officers to harass our people...,”

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<sup>21</sup> John A. Allison, *The Financial Crisis and the Free Market Cure*, McGraw Hill, New York (2013), pp. 43-49.

<sup>22</sup> Daniel Greenfield, *100 Percent of Tea Party Groups Targeted by the IRS*, <http://frontpagemag.com/2013/dgreenfield/100-of-tea-party-groups-targeted-by-the-irs/>, June 27, 2013.

<sup>23</sup> Richard Swier, *IG Report: Millions in tax refunds to illegal aliens to insure “job security” for IRS employees*, <http://watchdogwire.com/florida/2013/06/22/report-irs-sent-millions-in-tax-refunds-to-illegal-aliens-to-insure-job-security-for-irs-employees/>, June 22, 2013.

<sup>24</sup> Fox News, *IRS credit cards used for wine, pornography, IG report says*, <http://www.foxnews.com/politics/2013/06/25/irs-credit-cards-used-for-wine-pornography-ig-report-says/>, June 25, 2013.

<sup>25</sup> Declan McCullagh, *NSA spying flap extends to contents of U.S. phone calls*, [http://news.cnet.com/8301-13578\\_3-57589495-38/nsa-spying-flap-extends-to-contents-of-u.s-phone-calls/](http://news.cnet.com/8301-13578_3-57589495-38/nsa-spying-flap-extends-to-contents-of-u.s-phone-calls/), June 15, 2013.

<sup>26</sup> Shawn, Eric, *EPA accused of singling out conservative groups, amid IRS scandal*, <http://www.foxnews.com/politics/2013/06/04/epa-accused-singling-out-conservative-groups-amid-irs-scandal/>, June 4, 2013.

<sup>27</sup> Katie Pavlich, *Senators Call Out the EPA For Leaking Private Info of Farmers to Radical Environmental Groups*, <http://townhall.com/tipsheet/katiepavlich/2013/06/07/why-is-the-epa-leaking-private-farm-info-to-radical-environmental-groups-n1615456>, June 7, 2013.

<sup>28</sup> Arnold Ahlert, *The EPA’s Disturbing Human Experiments*, <http://frontpagemag.com/2012/arnold-ahlert/the-epas-disturbing-human-experiments/>, October 2, 2012.



“... made Judges dependent on his Will alone, for the tenure of their offices...,”

“For suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.”

### *Why Have the Citizens Permitted Congress to Delegate its Authority?*

This unconstitutional and tyrannical behavior has been permitted by the citizenry to continue likely because the view towards government has been changed by the perceived positive intervention by the national government during the depression. FDR convinced the populace that big problems required big government solutions, though a convincing case can be made that government intervention by the Federal Reserve, created in 1913, led directly to the depression and that continued meddling by FDR's big government prolonged it.<sup>29</sup> Prior to this time, most viewed government as did James Madison, who said that, “The essence of Government is power; and power, lodged as it must be in human hands, will ever be liable to abuse.”

The citizenry is also likely to have permitted this unconstitutional behavior to continue because the legislature addresses large complicated issues that could be argued the legislature should not address. By their very nature, these complex issues appear to fall into the realm of experts with intimate knowledge of the subject, expertise that a senator or representative is likely not to have. (58 of 100 senators are lawyers and 172 of 435 representatives list their occupation as public service/politics.<sup>30</sup>) Logically, citizens might think that it would be appropriate to turn the drafting of the bill pertaining to the issues over to these experts, who are potentially idealists with ideas outside the mainstream of society. The consequence of this activity has been address in works by Hayek<sup>31</sup> and Mises<sup>32</sup> and shall not be addressed further here.

### *Who benefits when authority is delegated?*

Congress benefits from maintaining this system. Congress gets the glory for passing a bill that solves a perceived problem, and the bureaucratic organization gets the blame for its failure. Once delegated, quickly forgotten. The Executive or the Semi-independent Bureaucracies benefit through the consolidation of power in the hands of a few. Additionally, since the regulations can be loosely written, the Executive has the opportunity to re-interpret them to accomplish a particular political goal (reward a constituency).<sup>33</sup> The lobbyist benefits since it is easier to influence a bureaucrat than it is to influence a majority of Congress.

### *Possible Solutions*

What can be done? On an individual level:

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<sup>29</sup> David A. Stockman, op. cit.

<sup>30</sup> Peter Florn, *What Is the Occupation of the Majority of Most Members of Congress?*, [http://www.ehow.com/facts\\_6882009\\_occupation-majority-members-congress\\_.html](http://www.ehow.com/facts_6882009_occupation-majority-members-congress_.html).

<sup>31</sup> F.A. Hayek, *The Road to Serfdom*, The Definitive Edition edited by Bruce Caldwell, University of Chicago Press, (2007) (original published in 1944).

<sup>32</sup> Ludwig von Mises, *Bureaucracy*, Libertarian Press, Inc., Grove City, PA, (1983) (original published in 1944).

<sup>33</sup> John A. Allison, op. cit.

1. Elect representatives that will honor their oath to protect and defend the Constitution, who will oppose delegation of legislative powers and who will work to reverse the trend.
2. Let your current representatives and senators know that you do not approve of their unconstitutional behavior.
3. Strongly encourage your senators to only confirm appointed judges/justices that will uphold separation of powers.
4. Tell the President that you wish him/her to veto any bill that erodes separation of powers.
5. If you are unfortunate enough to experience a dispute with any of these organizations that reaches a point where you are ordered to appear in their 'court,' notify them that you will be willing to pursue adjudication of the matter within a courtroom authorized by Article III of the U.S. Constitution.

James Madison, in Federalist No. 62,<sup>34</sup> commented that, "It will be of little avail to the people that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be to-morrow." As noted above, bills are too long; they are passed without proper vetting by both the legislators and the public, and they lead to much more voluminous regulations. There is almost no bill that needs to be passed within a few days of completion.

6. Bills should be made public for citizens' review and comment for a period of at least a month prior to a vote in either house of Congress.
7. Since the number of pages of regulations generated by the passage of a bill appears to be at least an order of magnitude (10 times) greater than the length of the bill, shorten each bill and address one topic per bill. Perhaps no bill should contain more words than the constitution.
8. Allow Congress to delegate the activity of writing the regulations to a bureaucracy, however ensure that the final regulations are reviewed and approved by Congress after a 10-month citizen-review period and prior to being sent to the President for signature or veto. Any future changes would also require final approval by Congress with an equally appropriate review period. This ensures that Congress, now accountable directly to the people, is solely responsible for the final package of regulations.
9. The Executive branch of government is there to execute the laws created by Congress. All bureaucracies created by these laws should be directly under the control of the Executive with Congressional oversight. This forbids the creation of government-sponsored enterprises and bureaucracies that have at best tenuous oversight by a body answerable directly to the people.
10. Finally, all judicial functions should be removed from the control of the bureaucracies and passed directly to the Judicial Branch of government.

And how do we deal with the current regulatory bureaucracies?

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<sup>34</sup> The Federalist, op. cit.



11. The Executive should be required to put together appropriate plans, subject to Congressional approval, to dismantle these bureaucracies and rebuild them in accordance with the format given above with the final form of each being subject to the approval of Congress.

### *Parting Thought*

The question before us is - do we wish to remain citizens with the gift of liberty as presented to us by our founders, or do we wish to continue a slide into servitude as subjects of a petit royalty comprising a small, unanswerable bureaucracy? Delegation of power is unconstitutional and tyrannical. As Thomas Jefferson said, "All tyranny needs to gain a foothold is for people of good conscience to remain silent."

### **Recommended Readings**

Our Founding Documents: *The Declaration of Independence, the Constitution of the United States of America, and the Federalist Papers.*

Larry P. Arnn, *The Founder's Key*, Thomas Nelson, Nashville, 2012.

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