



Written by [Dennis Behreandt](#) on June 23, 2008

## Government Is Not the Problem

Surprising as it may seem to some, as a matter of law it is *impossible* for “the government” to deny Americans their rights, let alone to oppress them.

The United States and each of the Union’s constituent States is a constitutional republic. The fundamental principle of constitutionalism is that some powers are granted to the government and others withheld. At any moment, “the government” — whether national, state, or local — consists of the set of behaviors by the people in public offices that comport with the powers and absences of power (“disabilities” as lawyers say) set out in the supreme law. Where the supreme law guarantees individuals certain rights, the government lacks any power to infringe, abridge, or deny those rights. Where the supreme law imposes certain disabilities on the government, individuals enjoy rights to the fullest extent of those absences of power.



The specific foundation of America’s legal system is the Declaration of Independence. It asserts the “self-evident” truths

that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. —

That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.

Thus, any “Government[ ] ... instituted among Men” that traces its lineage to the Declaration of Independence can *never* deny men’s “unalienable Rights,” because the *only* powers it may exercise are “just powers” derived from “the consent of the governed” who delegated those powers for the sole purpose of “secur[ing] the[ir] rights.”

### Just Principles

The Constitution is structured on these principles alone. For if the people in the states did not gain their sovereignty through the Declaration of Independence, they enjoyed no authority to ordain and establish the Constitution. And if they did enjoy such sovereignty, its character must have derived from the Declaration, there being no other source. That is, the Constitution is law only because the Declaration is *prior and higher law, and only to the extent that it is consistent with the Declaration’s precepts.*



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Both as to the states and as to individuals, with respect to some rights the Constitution delegates to the General Government no power whatsoever. For example —

- “No Tax or Duty shall be laid on Articles exported from any State.” (Article I, § 9, cl. 5)
- “No Bill of Attainder or ex post facto Law shall be passed.” (Article I, § 9, cl. 3)
- “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” (First Amendment)
- “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” (Second Amendment)

Of all possible examples, the Second Amendment most strikingly illustrates how a true constitutional right is *absolutely immune* from governmental restriction. “[T]he right of the people to keep and bear Arms” is the foundation of “[a] well regulated Militia.” “A well regulated Militia” is “necessary to the security of a free State.” Therefore, the continued existence of “a free State” — and its government — depends upon “the right of the people to keep and bear Arms.” That right being the indispensable precondition for the existence of the United States and all of its constituent States as “free State[s],” neither the General Government nor the government of any state can infringe the right without destroying its own foundation, legitimacy, and authority. Inasmuch, then, as a purported power to infringe “the right of the people to keep and bear Arms” entails that self-destructive consequence, no such governmental power can possibly exist anywhere within the United States.

The same type of analysis applies to every one of Americans’ other “unalienable Rights.” Because the sole purpose of government is “to secure these rights,” government cannot abridge them without negating itself. So the notion that “the government,” as “the government” and in some legitimate manner, can deny Americans their rights is self-contradictory and absurd.

To be sure, the Constitution allows the government to restrict some rights in specific ways under particular circumstances. For example,

- “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” (Article I, § 9, cl. 2)
- “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” (Fourth Amendment)
- “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury...; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.” (Fifth Amendment)
- “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” (Eighth Amendment)

But that some restrictions may be allowable in certain defined circumstances means that those and other restrictions are *not* allowable in any and all other circumstances. For instance, “The Privilege of the Writ of Habeas Corpus” may be “suspended” for a time — but not wholly eliminated. And a “suspension” may occur only “in Cases of Rebellion or Invasion” — but even then only “when . . . the public Safety may require it.” Searches and seizures may be had — but only “upon probable cause.”



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Private property may be taken — but only “for public use” and with “just compensation.” And punishments may be inflicted — but only if they are not “cruel and unusual.”

In short, “the government” *cannot* deprive any American of his rights, because only by acting consistently with those rights, *precisely as the Constitution guarantees them*, do public officials function as “the government” at all. When any public official steps even a single Angstrom Unit outside of the government’s constitutional boundaries, his actions become *lawless and unauthorized*, and he ceases to act as or for the government, but instead acts *against and in defiance of* the government.

So what explains contemporary repetition of the mantra “the government is denying us our rights,” which treats a constitutional impossibility as if it were not only possible, but even expectable, and largely irremediable? First, too many Americans are ignorant of the true nature and operation of the Constitution, and of its source in and the limitation of its powers by the Declaration of Independence. Second, too many aspiring usurpers and tyrants are to be found among officeholders, politicians, and the special-interest groups they serve — all of them driven by amorality, arrogance, avarice, ambition, and the appetite for unlimited power. These people have been all too successful in convincing gullible Americans that public officials actually have powers which the Constitution nowhere grants, and which the Declaration of Independence asserts could never derive from “the consent of the governed” — and that these so-called “emergency powers” or “aggregate powers” or “inherent powers” entitle officialdom to deny individuals their rights, even to the point of palpable oppression. Thus, whoever uncritically parrots the wrongheaded notion that “the government is denying us our rights” is actually (if perhaps unconsciously) aiding and abetting usurpers, tyrants, and their accomplices to do exactly that.

Of course, the complaint that “the government is denying us our rights” does contain a modicum of practical insight: namely, that many people in public offices today *do* increasingly disregard and infringe upon Americans’ rights “under color of law.” However, although these misdeeds may be carried out ostensibly in the name of the law, and supposedly through the procedures of the law, they nonetheless remain in violation of the supreme law. Therefore, notwithstanding that the perpetrators may hold public offices, with respect to such aberrant behavior they are not acting as public officials or in the capacity of “the government” at all. For “[a]n unconstitutional act is not a law; . . . it imposes no duties; it is, in legal contemplation, as inoperative as though it had never been passed.” *Norton v. Shelby County*, 118 U.S. 425, 442 (1886). “An unconstitutional act is not a law; it binds no one.” *Huntington v. Worthen*, 120 U.S. 97, 101-102 (1887). “An unconstitutional law is void, and is as no law. An offense created by it is not a crime.” *Ex parte Siebold*, 100 U.S. 371, 376 (1880), quoted in *Fay v. Noia*, 372 U.S. 391, 408 (1963). Where their unconstitutional acts are concerned, public officials are merely private lawbreakers, subject to criminal convictions for their transgressions. See, e.g., Title 18, United States Code, §§ 241 and 242. They may be *political* hoodlums whose crimes are of national or even international scope; but they are hoodlums nonetheless.

The essential point and fundamental basis for remedial action is that, under America’s political system, oppression is not and can not be the product of a disembodied generality called “the government” that is somehow above the law because it makes, interprets, and enforces the law. Rather, oppression is always the product of identifiable individual wrongdoers in public office, all of whom are themselves wholly subject to law — whether the law of the Constitution, or the higher law of the Declaration of Independence, or the highest “Laws of Nature and of Nature’s God” upon which both the Declaration and the Constitution rest. *The responsibility for every act of oppression against the American people*



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*must be assigned specifically to these individuals, not to the public offices they happen to occupy or to "the government" as an institution.*

After all, the Declaration of Independence condemned, not monarchy as an abstract "Form of Government," but the very real person of King George III. That "[t]he history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in their direct object the establishment of an absolute Tyranny over these States" was the indictment of an individual, not an institution. It was not monarchy in general, but a particular monarch himself who had as his object "the establishment of an absolute Tyranny over these States," and who used as his means to that end "repeated injuries and usurpations." And "the good People of these Colonies" could not rid themselves of him, his ministers, and their machinations except by severing the Colonies' connection with Great Britain and changing their governments from the monarchical to the republican form.

Happily, such a radical course is not necessary for Americans to deal with the miscreants in public office who subvert and pervert governmental institutions at the national, state, and local levels today. Instead, Americans need only assert one of the most important of all checks and balances in the law: namely, that wrongdoers in public offices cannot be suffered to interpose the plea that their misdeeds were somehow acts of "government," and that therefore "the government" alone should be blamed and held accountable. For "the government" can never be punished as a matter of fact — and as a matter of law should never be charged with the crimes of individuals who misuse public offices for their own nefarious purposes. Only the wrongdoers themselves should be punished, and can be punished, and therefore must be punished — surely, swiftly, and severely.

### **"We the People"**

When wrongdoers hold public offices, though, and misuse their positions and powers to perpetrate crimes and then shield themselves from just retribution, who is to punish them? We the People. Who else is there? As the Constitution itself recites, "We the People of the United States . . . do ordain and establish this Constitution" — and therefore are ultimately responsible for insuring that whatever may be done in its name is legitimate. Moreover, We the People elect individuals to public offices — and therefore are ultimately responsible for seeing to it that those officials' behavior in the government scrupulously accords with constitutional requirements. In the first as well as the final analysis, We the People *are* the government, and therefore must take upon ourselves the responsibility for making the government — *our* government — work properly.

For a self-governing republic to survive, these duties of citizenship must be carried out in a thoroughgoing and timely fashion. Self-government is not a spectator sport. If Americans will not govern themselves, someone else will govern them — and they will not like the result. As long as Americans supinely suffer conniving politicians and greedy special-interest groups to tell them who is going to run the government and how it is going to be run — and especially what "emergency powers" public officials supposedly have, and as a consequence what rights common Americans do not have — then those unjust and abusive powers will expand exponentially, and the rights necessary for the perpetuation of a free society will diminish to nonexistence. A façade of "law" and "government" will increasingly shelter, facilitate, empower, and reward political crimes — until organized criminality replaces both law and government and America finds herself reliving her Colonial history, "a history of repeated injuries and usurpations, all having in their direct object the establishment of an absolute tyranny over these States."

Americans have come to that point "in the Course of human events" at which they must stop whining



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about how “the government is denying us our rights,” and instead stand up and secure those rights themselves in their capacity as this country’s one and only sovereign. If not now, there may never be another opportunity.

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