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Is the U.S. Federal Government Illegitimate?

In Philadelphia during the summer of 1776, Thomas Jefferson formalized the social contract which exists between all Americans, and under which the U.S. federal government exists, when he wrote,

We hold these truths to be self-evident, 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... (Jefferson).

This particular passage, perhaps the most widely recognized from the Declaration of Independence, plays one of the most significant roles in the history of the United States, and subsequently, the world. These fifty-five words declare, as well as describe, to the world the social contract which the Founders, utilizing the social theories of John Locke, would later rely upon to form the government of the united States of America¹ under the Articles of Confederation, and once again under the Constitution for the United States of America, as one of the first truly legitimate governments in modern history. This system, a federal republic based upon democratic ideals, whose primary purpose is to protect the individual's rights as listed in

¹ Original capitalization, as per Article 1, Articles of Confederation

the aforementioned Declaration of Independence, has remained a relatively stable defender of freedom for well over two hundred years. However, in the early years of the twenty-first century and in the aftermath of the terrorist attacks of September 11, 2001, the U.S. federal government has taken a decidedly unsettling, if not downright disturbing, shift from its primary role as protector of the Social Contract and individual rights. The recent history of the U.S. federal government, because of this shift, has a large segment of the general population asking the question which no-one seems willing to answer. Does the U.S. federal government still hold legitimacy, especially in light of its recent decisions and actions? To answer this question, it will first be necessary to briefly examine, how and why a social contract is formed, as well as the significance of the social contract itself.

Human beings, absent any form of government, exist in what social philosopher Thomas Hobbes theorized, in *Leviathan*, as a state of nature governed solely by the laws of nature. Hobbes defines this state of nature as “a time of war, where every man is enemy to every man.” To describe this state of existence as a time of war is something of a misnomer because it would not include continuous combat but rather a continuous state of heightened alert due to the fact that individuals would be either under constant threat of violent attack or, in the alternate, committing violent attacks to acquire that which is necessary to survive. He further states that,

In such condition there is no place for industry, because the fruit thereof is uncertain: and consequently no culture of the earth; no navigation, nor use of the commodities that may be imported by sea; no commodious building; no instruments of moving and removing such things as require much force; no knowledge of the face of the earth; no account of time; no arts; no letters; no society; and which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short (Hobbes, 69).

While Hobbes was extremely pessimistic in his description of life in a state of nature, John Locke, the writings of whom the Founders based much of their ideas upon, was more optimistic about life in a state of nature. He thought that, even though there would be individuals who would intentionally harm others, most would cooperate with others and abide by the laws of nature which holds that “no one ought to harm another in his life, health, liberty, or possessions” (Locke, 6).

It is out of this spirit of cooperation, by individuals in a state of nature, that a social contract arises. Individuals, tired of this constant state of war, would eventually take the risk of reaching out to others in the hope that temporary security could be attained. These individuals would, necessarily, agree to honor certain terms such as not attacking or killing each other, not stealing from each other, and not interfering with each other’s liberty. In exchange for these concessions each would gain a sense of security, and thus peace. In this method, the people are removed from this state of nature and enter into a civil and political society in which a more extensive government can be formed. In short, the human experience, absent a social contract, would be nothing less than an ungoverned hellish nightmare which would never have allowed humanity the opportunity to develop to the level which it has attained.

This agreement, made between warring individuals in a state of nature, which, by definition, is a social contract “which begins and actually constitutes any political society... And this is that, and that only, which did, or could give beginning to any lawful government in the world” (Locke, 99). In essence, it is the aforementioned natural rights which the social contract, and any subsequent governments formed within it, is intended to protect. This fact becomes apparent when one considers the limitations placed upon the federal government by the

Constitution, as well as the protected rights contained within the main body of it and the Bill of Rights.

Locke postulated, in *Two Treatises of Government*, that a civil government is one in which the members of the social contract form by common agreement and, as such, said government can only possess the powers which can be derived from the laws of nature as possessed by those which formed it. For example, in a state of nature, an individual has the right to judge and punish transgressions against their natural rights, those of Life, Liberty, and Property (Pursuit of Happiness), a right which the individual surrenders and transfers to the civil society when forming or joining it. Locke further considered that certain forms of government, namely absolute monarchy and, by modern extension, absolute dictatorship “is, indeed inconsistent with civil society, and so can be no form of civil government at all” (Locke, 90). His reasoning for this is that while their subjects are within a social contract, “those persons are still in a state of nature; and so is every absolute prince, in respect of those who are under his dominion” (Locke, 90). With this information, it can be deduced that, for any government to be legitimate it must first, have the consent of those to be governed and second, exist within the social contract and not remain in a state of nature in respect to those it governs.

The U.S. federal government has protected humanity’s natural rights, from within the social contract, and thus retained legitimacy, for over 200 years; however, a cursory look at recent legislation and executive orders demonstrate a decidedly different reality in the new millennia. The federal government’s track record for upholding the social contract began to falter due to the amendment of the Comprehensive Crime Control Act of 1984, which initially allowed for civil forfeiture of an individual’s property if said individual was convicted of committing certain drug related crimes. This Act was, originally, in accordance with the social

contract as it provided for civil forfeiture only upon conviction and an individual possesses, according to the laws of nature, the right to punish offenses against their rights, which is transferred to the government; however, the federal laws which this Act provided were later amended by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001. This amendment to the law now allows the federal government to seize an individual's property for merely being suspected of, rather than convicted of, involvement in a terrorist plot or having a connection to terrorists.

Likewise, in the immediate aftermath of the September 11, 2001 terrorist attacks, the federal government assumed other new powers, one of which is the power to kill U.S. citizens, based solely upon the determination of the executive branch without regards to due process. In an article written for CBS News, it was revealed that, "the authority to kill U.S. citizens is granted under a secret finding signed by the president after the Sept. 11 attacks that direct the CIA to covertly attack al Qaeda anywhere in the world. The authority makes no exception for Americans, so permission to strike them is understood rather than specifically prescribed" (Chan). While individuals, under the laws of nature, may have the ability to kill in defense of their selves and their property, there is no right to unjustified killing to be found, as noted by John Locke when he wrote, "This is a power, which neither nature gives, for it has made no such distinction between one man and another; nor compact can convey: for man not having such an arbitrary power over his own life, cannot give another man such a power over it" (Locke, 172)

In both of the previous examples, the federal government, either through legislation or presidential directive, assumed powers which it neither has the consent nor the right to assume. Being formed within the social contract, the federal government is, essentially, restricted to those rights which the members of the social contract possess while in a state of nature. The basis of

this claim is the principle of civil law, the English translation of which states: “no one can transfer a greater right than he himself has” (Svetlic). Since individuals in a state of nature do not have the right to kill others, the government cannot legitimately assume this ability “because the government derives its authorization exclusively from the contractors, the government simply cannot have this right under any circumstances” (Svetlic). Likewise, the same holds true for civil forfeiture in that, since individuals do not have a natural right to take property belonging to others, it is simply not possible for the government to have this right as well.

To the contrary of what many people believe, it is not the fact that violations of natural rights may occur in relation to civil forfeiture of property and presidentially ordered assassination of Americans that calls into question the legitimacy of the federal government. Abuses of an individual’s natural rights, instead, merely call into question only the justness of the government and not its legitimacy. Rather, it is the fact that the federal government has assumed and codified new powers which, according to the natural law and social contract theories, it simply cannot possess which calls into question its status as a legitimate government. In legislating against, and thus removing itself from, the social contract, the federal government has abdicated its primary role as protector of natural rights and freedom and, according to social philosopher Maeve Cooke “When a political system in its totality fails to meet its commitment to freedom, it no longer exercises authority.”

When one takes into consideration the theories of the social contract and natural law, which the federal government was founded upon, it becomes quite apparent that the federal government no longer holds legitimacy with respect to the requirement of governing from within the social contract. The question which now remains is does the federal government have the consent of the governed? The answer to this question is easily found by looking at the

population and voting statistics of the U.S, as the simplest method of demonstrating tacit consent is through voting. While it is true that not voting does not necessarily demonstrate a lack of consent, an individual cannot simultaneously vote and maintain the position that their vote was non-consensual. It is impossible for an individual to consensually vote in an election and legitimately claim to not give consent, as this would constitute a logical contradiction.

When considered as such, the numbers provided by the Census Bureau paint a rather interesting image. In 2016, the population of the United States was approximately 322,000,000 with roughly 245.5 million individuals who are legally eligible to vote (U.S. Census). Of these 245.5 million citizens who are eligible to vote, 159.6 million, or 64% of those eligible to vote, are registered to vote, out of which only 137.5 million, or 56% of those eligible to vote, actually voted in the last election (U.S. Census). These numbers show that 56% of the population has given tacit consent to be governed by the federal government and that possibly as much as 44% do not, or no longer, give their consent to be governed under the current system.

While the federal government seems to have lost its legitimacy, in respect to governing from within the social contract, it retains some legitimacy with respect to having the consent of the governed, even if only by a narrow margin. As such, the federal government can be said to still be legitimate, but in name only. This unique situation, that of the federal government maintaining the image of being legitimate, is beneficial to the possibility of the citizens restoring its actual legitimacy, as it would only be necessary to force the federal government back into the social contract, through legal methods, instead of disbanding it and instituting a new government, the subjects of which are beyond the scope of this paper.

In conclusion, when one investigates the recent actions of the U.S. federal government and considers them in relation to the social contract and natural law theories upon which it was

founded, it becomes apparent that the sole reason it retains the appearance of being a legitimate form of government is due to a narrow majority of the population which believes it to still be legitimate and, as such, give their consent to be governed by continuing to vote.

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