GOSSAMER WINGS

PART 1, 2

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In his latest series on "Secession or Declaration of Independence ", particularly Parts 4

and 5, Mr. Timothy Baldwin raises some interesting points. (see:

http://www.scribd.com/doc/29964863/Timothy-Baldwin-Secession-or-Declaration-of-

Independence)

Unfortunately, he misconstrues my meaning when he attributes to me the notion that (in his words) "as long as the [General G]overnment is executing laws, regulations, restriction, mandates, etc., 'in the name of doing good', then such a regime and such acts are not tyrannous regardless of effect". I thought I had made it clear enough in my commentaries on this subject that, if public officials were actually trying to obey the Constitution (not just going through the motions "in the name of doing good"), their actions would not constitute "tyranny" even if the effects thereof inadvertently might not satisfy with mathematical precision some hyper-technical definition of "the common defence" and "the general Welfare". This is because there must always be some "play in the gears" for any government to function. Mr. Baldwin, however, seems to contend that any such "play" amounts, at least presumptively, to "tyranny".

Presumptively may not be the half of it, either. For example, Congress may decide to build a naval base in Norfolk, Virginia, rather than in Savannah, Georgia. If Congress does this in good faith, for sufficient reasons, is it to be condemned because the construction and operation of a base in Norfolk will stimulate the local economy there, but do nothing for Savannah in that regard? Has Congress violated "the general Welfare", and thereby engaged in "tyranny", by not building a base in Savannah, too, even though "the common defence" did not require it? According to Mr. Baldwin's test, perhaps so, because the inevitable "effect"

of
Congress's action would be to create economic discrimination between the two cities deriving
directly from the location of the base. But every such decision will have such an effect, more
or less. To avoid a charge of "tyranny" with respect to "the general Welfare", then, must
Congress build half of the base in Norfolk and half in Savannah, so that each city will share
equally in the economic benefits? Yet, if it did so, would Congress not undermine "the
common defense" by making neitherd em i-base sufficient for the Navy's needs—thereby
exposing itself to a charge of "tyranny" with respect to "the common defense"? In situations of
this kind, then, are "the general Welfare" and "the common defence" mutually contradictory
and antagonistic? Will Congress be committing "tyranny" no matter what it does? Is the
Constitution psychotic? Well, if such is the consequence of Mr. Baldwin's theory, perhaps that
theory is overly broad.

Along the same lines, Mr. Baldwin later contends that "[w]here the law does not grant to the
government the power to do an act, then the government's doing that act in contradiction of
the law is tyranny". Again, he overstates the matter. Consider, for example, the following case.
The Constitution requires that "[n]o Money shall be drawn from the Treasury, but in
Consequence of Appropriations made by Law". Article I, § 9, cl. 7. Assume that Congress has

appropriated "by Law" $1,375,276.00 for some public construction project, to be paid over to
a private contractor. By mistake, a clerk causes an electronic check to be drawn on the
Treasury for $1,735,276.00 and deposited directly into the contractor's account. Without
noticing the error, the contractor's accountants start paying the contractor's employees and
suppliers on that project with funds from that account. During the period before the error is
discovered and corrected, has the General Government (or the Treasury, or perhaps the clerk)
been engaged in "tyranny"? After all, the payment was in excess of the "Appropriation[ ] made
by Law", and therefore was "in contradiction of the law". And Mr. Baldwin contends that any
act of the government (which always entails an act of some public official or employee) "in

contradiction of the law is tyranny". If, however, the posited situation does not entail "tyranny" (as common sense suggests it does not), then Mr. Baldwin's definition must be flawed.

The evident flaw is Mr. Baldwin's notion that the intent of the actor is irrelevant to whether
his misbehavior can properly be characterized as "tyranny" or not. Now, I believe every violation of a public official's "Oath or Affirmation, to support th[e] Constitution" (as required
by Article VI, cl. 3) should be punishable in some manner. That does not mean, however, that
every such violation constitutes "tyranny" and deserves the very same punishment. Consider
two cases:

[1] Congress is trying to decide whether to build a new naval base in Norfolk, Virginia, or Savannah, Georgia. The Congressmen in the committee to which the bill is assigned take a light and careless approach to their duties. They fail to study the matter sufficiently. As a result, the committee recommends Savannah, when it should have recommended Norfolk. Based upon that faulty recommendation, the bill passes. Several years later, the mistake is discovered, but by then cannot easily or inexpensively be rectified—meaning that "the common defense" has been compromised. Can this situation, as serious as it may be, be fairly
described at any stage as the embodiment or the consequence of "tyranny"? Not, I suggest,
without seriously trivializing that word.

[2] Congress is trying to choose among Norfolk, Savannah, and Atlantic City, New Jersey, for
a new naval base. Other than being on the ocean, Atlantic City is totally unsuitable. Its harbor
is badly configured, its shore facilities are nonexistent, and its civilian infrastructure cannot support a huge influx of servicemen and their families. Nonetheless, the big-money boys behind the local casinos (who anticipate endless windfalls by fleecing spendthrift sailors on leave) and some big contractors in the military-industrial complex (who foresee a gravy train
of endless work, building and maintaining a base in such a poor location) suborn enough Congressmen to enact the necessary legislation. The new base is soon recognized as a monstrous boondoggle—but one that the casinos, the contractors, and their puppets in Congress find exceedingly lucrative, both economically and politically. Can this situation, at
any stage, be fairly described as the embodiment or the consequence of "tyranny"? Yes, because it exactly fits Locke's definition, that "[t]yranny * * * is making use of Power one has
in his own hands; not for the good of those who are under it, but for his own separate Advantage".

Now, what is the key difference between these two situations? Why, thein t en t of the

Members of Congress. In the first case, they did not intend to violate the Constitution. Their misbehavior sounded in negligence. Negligence may constitute a violation of their "Oath [s] or Affirmation[s], to support th[e] Constitution". But it is not "tyranny". In the second case, the

Members of Congress and their clients among the casino-owners and contractors acted in concert, knowingly and willfully, for the very purpose of doing what America's Founders considered the epitome of "tyranny".

As a former prosecutor, Mr. Baldwin knows that an actor's intent often determines the seriousness of his misbehavior, and the appropriate punishment for it. Negligence is not the same as recklessness; and recklessness is not the same as malice aforethought.

America's Founders were not unaware of those distinctions, either. The Declaration of Independence asserts

> [t]hat whenever any Form of Government becomes destructive of these ends [that is, men's unalienable Rights], 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. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But 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.

In this passage, the Declaration either does not accept Mr. Baldwin's general proposition that "[w]here the law does not grant to the government the power to do an act, then the government's doing that act in contradiction of the law is tyranny"; or, if it does accept that proposition in principle, it does not recommend that it should be ruthlessly applied in practice in every case. For the Declaration recognizes, under the counsel of Prudence, that "light and transient causes" are not enough to justify altering or abolishing "Governments long established"—obviously, because that course of action may be (and usually is) fraught with political, economic, and social discords, difficulties, dangers, and dislocations far worse

than the temporary toleration of “evils [that] are sufferable”. In the category of “light and transient causes” one could surely include public officials’ negligence.

In contrast, the Declaration asserts that “it is the[People’s] right, it is their duty, to throw off
such Government” “when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism”. That is, when (i) sufficient evidence (“a long train of abuses and usurpations”) (ii) proves the existence of a plan (“a design”) (iii) aimed directly at “tyranny (“absolute Despotism”), the People may and
should resist. The evidence supplies the factual basis from which the People can infer the plan. And inasmuch as “design[s]” do not occur in human affairs without the conscious deliberations and choices of human actors, the inference of the plan supplies the basis from which the People can infer the planners’ evil intent.

PART 2

Now, of course, (and in this I concur completely with Mr. Baldwin) the People themselves

must be the sole and final judges of whether this dire situation exists, and of how to go about

correcting it. As Blackstone taught the Founding Fathers, “whenever a question arises between the society at large and any magistrate vested with powers originally delegated by that society, it must be decided by the voice of the society itself: there is not upon earth any
other tribunal to resort to”. Com m entaries on the Law s of England , Volume 1, at 212. So, no
need can ever exist for the People to withhold corrective actions until they have consulted, let
alone sought permission from, the very rogue public officials who are attempting “to reduce
the [People] under absolute Despotism”. Nonetheless, the Declaration points to two steps which the People should take before any others:

Fir st, by “let[ting] Facts be submitted to a candid world”, the People need “[t]o prove” in the

court of public opinion and before “the Supreme Judge of the world” the “history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny”. Not generalities drawn from musty textbooks of political philosophy, but only specific “Facts” can demonstrate “the rectitude of [the People’s] intentions”. Observe, once
again, how the Declaration emphasizes the importance ofin t en t, even on the part of the victims of oppression. Perhaps this is because the Declaration recognizes that human

action
is, as modern Austrian economists emphasize,“p u r p o s ef u l b eh a v io r ”. It is not governed by
the mindless mechanism of “stimulus and response” posited by behaviorists, or by the dictates of inexorable Fate, but instead results from economic, political, and especially moral
choices worked out in the domain of intelligence and free will.

Second, the People need to attempt to rectify the situation through the “Form of

Government” that already exists. As the Declaration explains, “whenever any Form of Government becomes destructive of [men’s inalienable rights], it is the Right of the People to
alter or to abolish it”. But a whole “Form of Government” does not necessarily become so “destructive” as to warrant its own abolition simply because certain public officials—even fairly large numbers of them—turn rogue. In such a situation, the prudent and economical way to correct the problem is to remove the rogues from office and to punish them in proportion to the seriousness of their violations of the law, not to tear down the “Form of Government” entirely and erect in its place—perhaps in the midst of political economic, and
social chaos—some utterly new and untried “Form of Government” the future operation of
which is unpredictable. Much wisdom is contained in the folk adage, “If it ain’t broke, don’t
fix it!” If it isp o s s ib le for what is in principle a good “Form of Government” to provide the
means to suppress abuses, usurpation, and tyranny by rogue public officials and the corrupt
special-interest groups and factions pulling their strings, then those means should be employed. Only when those meansh a v e been tried, and have failed , will there be ap r o v en
need “to alter or to abolish” that “Form of Government”.

Now, how does “secession” relate to all of this? I presume that “secession” is one means by
which a People might exercise their right “to alter or to abolish” a “Form of Government” that
has “become[ ] destructive” of the true purpose of government. Yet, even if so, “secession”
must conform to the principles of the Declaration of Independence. So, let us test that conformity by considering two hypothetical cases:

[Case 1] The Members of Congress are ignorant, incompetent, and insouciant louts. Because
they know no better, they pass a bill that every constitutionalist recognizes as blatantly unconstitutional. The first question is, “Is this an act of ‘tyranny’?” Well, if it is truly the result
of negligence—or perhaps just industrial-strength stupidity—then it is probably not

“tyranny”.

But assume for purposes of argument that it is “tyranny”. That still leaves the second question, “Is this particular act of ‘tyranny’ sufficient grounds for ‘secession’?”

The answer to the second question should be obvious: “No”—or at least “not yet”. Because Congress is not the totality of the “Form of Government” within the United States. That “Form of Government” is federal in structure, consisting of Congress, the President, the Supreme Court, the States, and WE THE PEOPLE in various capacities. And, so far in this example, none of them other than Congress has taken any action whatsoever.

In principle, the rest of the “Form of Government” could correct Congress’s blunder. The President could veto the bill. If the President signs the bill, or Congress overrides the President’s veto, the Supreme Court could declare the purported statute unconstitutional. If the Court upholds the statute, WE THE PEOPLE could petition Congress to repeal it; and if Congress refuses, THE PEOPLE could change the composition of the House of Representatives and one-third of the Senate, and perhaps the identity of the President as well, at the next election. If not enough reform candidates are elected, the States could attempt to take action in the form of “interposition”, to prevent the statute from being enforced within their jurisdictions. And, in the final analysis, WE THE PEOPLE in their capacity as “the Militia of the several States” which are responsible for maintaining “the security of a free State” could see to it in the most direct fashion possible that the offensive statute is not enforced. Observe, though, that each of these potential form s of relief w ould take place w ithin the Constitution’s fram ew ork, not outside of it through “secession”. They would actually test in practice the ability of the present “Form of Government” to function as a true government, before they rejected the possibility of its doing so.

[Case 2] The Members of Congress are not ignorant, incompetent, and insouciant louts, but instead clever men and women of truly evil dispositions. Precisely because they know the bill is an unconstitutional assault on society, they pass it. Clearly, then, this is an act of “tyranny”. That, however, still leaves open the question, “Is ‘secession’ the right remedy?”

Once again, the answer is “no” or “not yet”. If as in [Case 1] other branches of the “Form of

Government” can intervene on behalf of the Constitution, the problem can be solved without
even asking that question.

But what if the Presidency and the Supreme Court are also populated with aspiring usurpers
and tyrants? No relief can be expected from them. And what if the electoral process has been
thoroughly subverted—through the manipulation of “public opinion” by the oligopolistic big
media and the employment of fraudulent voting machines—so that the old remedy of
“throwing the bums out” accomplishes nothing more than bringing in a new bunch of bums?
Even were all that true, just as in [Case 1] the States could attempt to invoke “interposition”;
and WE THE PEOPLE in their capacity as “the Militia of the several States” could prevent the
statute from being enforced. And each of these two possible forms of relief would take place
within the Constitution’s framework, not outside of it through “secession”.

Of course, one may posit the further complication that the States are unable to engage in
effective “interposition”. Or that the States do not have “well regulated Militia”. Or both. Fair
enough. But, if one or both of those circum stances exists, how w ould “secession”be possible,

except on paper in the form of som e toothless declaration?

As modern American “secessionists” employ the term, “secession” involves action by an
existing State. If the State desiring to “secede” is so feckless, though, that she cannot succeed
even in “interposition” in a single instance, how can she expect to succeed in “secession”
across the board? If the “seceding” State has no “well regulated Militia”, how can she expect to
protect her citizens against retaliation from rogue public officials in the Disgrace of
Columbia? And if the “seceding” State has not adopted an alternative sound currency, how
can she “secede” economically from the Federal Reserve System and thes u p r a -national
financial crime syndicate that controls paper currency and bank credit? On the other hand, if
for these reasons “secession” will require the creation of some entirely new political entity to
break away from the present federal “Form of Government”, what sort of entity will that

be,
and how will it be created?

In short, the more I read about contemporary advocacy of “secession”, the more the whole
business seems to me to be nothing less than a charming romantic fantasy: In Cole Porter’s words, “just one of those fabulous flights... a trip to the moon on gossamer wings... just one of
those things”. But if I were asked to participate in a long-drawn-out project aimed at such a
fabulous undertaking, before I invested much time or effort I should ask to see the engineering studies on the wings, to examine the prototype, and then to watch a test flight—
perhaps not all the way to the moon, but at least from the roof of the proponent’s house to the
roof of the house across the street. And if, as I suspect would happen, the pilot crash-landed
onto his own front lawn, I should go back to the rather more pedestrian efforts in which I have been engaged these many years.

Of course, one cannot expect from “secessionists” a full set of plans for “gossamer wings”. Yet
a reasonably complete set of plans for “secession” itself is not too much to demand. These plans should include at least the following information:

(1) how the people in a “seceding” State would be educated, mobilized, and organized in support of “secession”;
(2) how individuals favorable to “secession” would come to occupy the positions in the State’s
governmental apparatus vital to the project’s success;
(3) what legal method would be employed to declare “secession”, whether it be a repudiation
of the State’s ratification or other adherence to the Constitution, a State convention, a State
constitutional amendment, simple legislation, and so on;
(4) how the economy of the “seceding” State would become independent of the Federal Reserve System (that is, what new monetary and other financial arrangements would be introduced); and
(5) how the “seceding” State would guarantee “homeland security” for her citizens, whether
by a proper Militia or some other means.

Doubtlessly, the readers of this commentary could add many other entries to this list.

Discussions about “tyranny” and “secession” can go on forever in the realm of political theory.
Americans do not have forever, though, to debate these matters in the abstract. They must very soon be prepared to struggle through some exceedingly hard times. To overcome the

difficulties that will arise will require hard thinking and even harder work. Perhaps "secessionists" can do the former so that other patriots can then do the latter. I, for one, am willing to encourage them to try. But this country cannot afford to wait too much longer for practical results.

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