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The States Respond to ObamaCare

On March 23, 2010, attorneys general from 18 states filed suit against the national government in the United States District Court, Northern District Florida, accusing it of committing "an unprecedented encroachment on the liberty of individuals living in the Plaintiffs' respective states, by mandating that all citizens and legal residents of the United States have qualifying healthcare coverage or pay a tax penalty."

In a 22-page complaint, the plaintiffs aver that in passing and signing the Patient Protection and Affordable Care Act into law, the Congress and the Executive branch (named defendants include cabinet members Secretary of Health and Human Services, Kathleen Sebilius; Treasury Secretary Timothy Geithner; and Labor Secretary Hilda Solis) exceeded their constitutional authority by mandating that everyone legally present in the United States purchase a qualifying health insurance policy. The complaint specifically cites Article I and the 10th Amendment of the U.S. Constitution as barriers to the sweeping reform set in motion by passage of the Act.

For its part, the Justice Department, which is responsible for defending U.S. law in court, responded to the filing of the complaint by affirming that it will vigorously oppose any challenges to the new healthcare law, which it insists is constitutional. President Obama recently expressed his confidence that the suits will fail.

Curiously, those intent on foisting this ballast of socialism onto the ship of state point to the Constitution for support of their position. Particularly, the powers granted to Congress by the Commerce Clause and the transcendence of federal law over state law as supposedly manifest by the Supremacy Clause are the two pillars upon which President Obama and his lictors seek to build this temple of tyranny known as ObamaCare.

Supremacy Clause

The states joining in the suit charge the federal government with attempting to impose a top-down form of federalism that is inimical to the structure established by the Constitution wherein the sovereignty of the several states is protected and held inviolable. In writing in defense of the proposed Constitution, James Madison expressed his opinion of the relationship between national and state governments

intended by the Constitution he helped write, "each State, in ratifying the Constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act. In this relation, then, the new Constitution will, if established, be a FEDERAL, and not a NATIONAL constitution." Madison and the Founders adamantly denied the claim that the Constitution in any way reduced the scope of state authority or the sovereignty of the people.

There are several constitutional scholars who give the states' lawsuit a chance to actually reach the Supreme Court. Many, however, predictably assert that the Supremacy Clause of Article VI of the Constitution trumps the states' objections and places any law legally promulgated by Congress and signed by the president above all state laws to the contrary.

The so-called "Supremacy Clause" of Article VI reads, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

While at first blush the Supreme Clause argument may seem persuasive, there is a significant flaw in it. Consideration of the application of the Supremacy Clause in the debate is only appropriate where there is a legitimate federal statute contending with an equally legitimate state law. This is not the situation with regard to the Patient Protection and Affordable Care Act.

That is to say, a constitutionally sound act of Congress is one that comports in every way with the scope of enumerated powers set forth in the Constitution, specifically in Article 1. If an act of Congress exceeds its constitutional mandate, then it is per se unconstitutional and cannot be defended by reference to the Supremacy Clause. The key to the conundrum is the phrase "made in pursuance thereof." If the law is not made in pursuance of constitutional authority, then the very language of the Supremacy Clause expels the law from its protection.

Even a cursory reading of the Constitution reveals that there is no authority therein for Congress to legislate with regard to national health care. To merit the support of the Supremacy Clause, a law would have to at least meet the threshold requirement of "pursuance thereof." ObamaCare inarguably does not qualify.

While it is not enough to simply invoke the words of our Founding Fathers in order to buttress our position that ObamaCare is unconstitutional and that the Supremacy Clause is inapplicable, it is perfectly appropriate to discover the principles behind the precedents of our Founders.

At the Constitutional Convention of 1787 in Philadelphia, the Virginia Plan proposed by that state's delegation initially endowed the national government with the ability "to negative all laws passed by the several states contravening, in the opinion of the national legislature, the Articles of Union." When challenged as to the breadth of the scope of this power, Governor Edmund Randolph responded that his proposal never intended to give unrestricted power to the national legislature. In fact, he expressly opposed any such interpretation of the clause in question.

When the matter of the national government's ability to veto state legislation was put to a vote, seven of the assembled states voted against it. With that vote, the federal government was denied the right to exercise an unqualified negative of state laws and its will would only be supreme within the universe of its specifically enumerated powers, but in all other matters, the states retained their sovereignty.

As delegates gathered throughout the country to deliberate on the ratification of the proposed

Constitution, the Supremacy Clause had attracted the attention of friend and foe alike. Those opposed to the new document asserted that the federal government created by the Constitution swallowed up the state governments and rendered them mere minions of an all-powerful national magistracy.

It is the retort of the advocates of the new charter that reveals the true and proper reading of the provision in question. William Davie, a delegate to the Constitutional Convention from North Carolina and supporter of the fruit of that body, allayed the fears of the so-called anti-federalists by declaring:

> This Constitution, as to the powers therein granted, is constantly to be the supreme law of the land. Every power ceded by it must be executed without being counteracted by the laws or constitutions of the individual states. Gentlemen should distinguish that it is not the supreme law in the exercise of power not granted. It can be supreme only in cases consistent with the powers specially granted, and not in usurpations.

Again, the standard for the subordination of state law to federal law is reiterated: the contending federal law must be within the enumerated, specifically granted powers allotted to the federal government in the Constitution itself. In the present consideration, the laws promulgated as part of the ObamaCare revolution unquestionably fail to meet even the threshold requirements for Supremacy Clause validation as there exists nowhere in the Constitution authorization for federal control of this aspect of human life.

Nullification

While the effort of state attorneys general to fight the federal government in court is noble and worth the struggle, it is not the only option available to proponents of the right of states to govern themselves. Perhaps the most effective weapon in the war against the national legislature's plan to exercise unchecked and absolute dominion over the states and the people is the nullification of unconstitutional federal legislation by the governments of the states.

Simply stated, nullification is the principle that each state retains the right to nullify, or invalidate, any federal law that a state deems unconstitutional. Nullification is founded on the assertion that the sovereign states formed the union, and as creators of the compact they hold ultimate authority as to the limits of the power of the central government to enact laws that are applicable to the states and the citizens thereof.

As cited above, James Madison is clear on his opinion as to the relative positions of the states and national government created by the Constitution. The states, he assured readers, are sovereign and they retain that sovereignty under the provisions of the national constitution. No clause or phrase of the Constitution may be accurately interpreted to enshrine the national government in a superior position to that of the state governments. In *The Federalist*, Number 46, Madison reasoned that "the federal and state governments are in fact but different agents and trustees of the people, instituted with different powers and designated for different purposes." He continues in the same paper, Tthe ultimate authority, wherever the derivative may be found, resides in the people alone." There is no more fixed expression of the intent of our founders as to the locus of ultimate sovereignty in the United States.

Apart from his designation as the "Father of the Constitution," Madison may also rightly be called the Father of Nullification. Madison and Thomas Jefferson united in their opposition to the expansion of the federal government's powers and gave expression to their stance in the Kentucky and Virginia Resolutions of 1798. The impetus for the drafting of these resolutions was the passage by the national government of the Alien and Sedition Acts. The unvarnished aim of these laws was to squash political

dissension and silence foes of the administration then in power.

In the resolutions they penned and offered to the legislatures of Kentucky and Virginia, Madison and Jefferson insisted that American jurisprudence and principles of good government preserved to the states the constitutional and natural law right to firmly resist federal encroachments into the realms of their own sovereignty and further to void any acts of the national government they deemed unconstitutional. Additionally, those state legislatures were justified in refusing to implement any congressional mandate not made in pursuance of the specifically enumerated powers granted Congress by the Constitution of the United States.

Both the Kentucky and Virginia legislatures passed the resolutions written by Jefferson and Madison respectively. Other state governments followed suit, as well. In Massachusetts, while the legislature did not pass the resolution, the highest court of that state in invalidating the Embargo Act of 1807 expressed effectively the spirit of nullification:

> A power to regulate commerce is abused, when employed to destroy it; and a manifest and voluntary abuse of power sanctions the right of resistance, as much as a direct and palpable usurpation. The sovereignty reserved to the states, was reserved to protect the citizens from acts of violence by the United States, as well as for purposes of domestic regulation. We spurn the idea that the free, sovereign and independent State of Massachusetts is reduced to a mere municipal corporation, without power to protect its people, and to defend them from oppression, from whatever quarter it comes. Whenever the national compact is violated, and the citizens of this State are oppressed by cruel and unauthorized laws, this Legislature is bound to interpose its power, and wrest from the oppressor its victim.

Happily, there are currently at least 30 states whose legislatures have declared their intent to resist the mandates forced upon them by the various ObamaCare provisions. While not all of these efforts truly seek to nullify federal laws, in one way or another they do represent a bold reclamation of the right of states to refuse to bow to a federal government intent on establishing itself as the emperor of 50 petty suzerainties.

Constitutionalists and proponents of freedom around the country and the world should exult in the attempts of state lawmakers and executives to withstand the onslaught of federal power mongers and to repel the battering ram of absolutism from the ramparts of state sovereignty. The good people at the Tenth Amendment Center have drafted a model nullification bill for use in the various state legislatures. And, the John Birch Society is currently working on its own version of a nullification statute to be offered to like-minded constitutionalists in the various statehouses. (Since this article was published, the John Birch Society has posted its "Model Federal Health Care Nullification Act for State Legislatures.") All such endeavors merit the support of Americans devoted to the preservation of liberty and the restoration of constitutional checks, balances, and limited government. The war against the unfettered expansion of the national government is not over, it is now being waged on a new front and all able allies of liberty must ride to the sound of the guns.

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