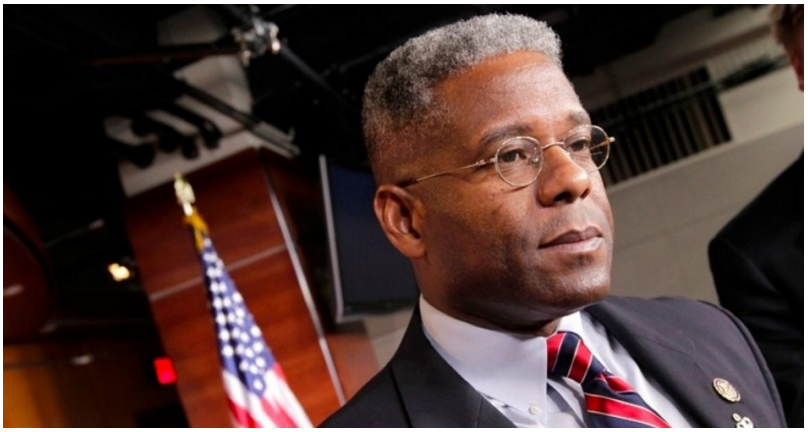
Written by **Joe Wolverton, II, J.D.** on January 4, 2014

Allen West Wrong on Nullification and Supremacy Clause



Allen West, former congressman and self-proclaimed "Guardian of the Republic," is the latest "conservative" to publicly demonstrate an unacceptable misunderstanding of nullification.

In an article published January 3 on his website, West asks his readers whether state nullification of ObamaCare is "possible." His uncertainty isn't the worst of it, however.

Later, after reporting on the efforts by 11 state attorneys general to challenge the constitutionality of President Obama's "tweaking" of the Affordable Care Act, West falls into a familiar trap — misinterpreting the so-called Supremacy Clause of Article VI. West writes, "Under the Supremacy Clause of the Constitution, federal law is superior to state law."

Constitutionalists must read this statement and wonder how many times the ersatz leaders of the ObamaCare opposition are going to repeat this incorrect declaration of federal authority to trump state laws.

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West and those who share his misunderstanding of this basic tenet of federalism seem always to point to the second clause of Article VI to portray the states' attorneys general's tack as an example of legally suspect aggression toward "settled" federal law.

The fact is the Supremacy Clause does not declare that all laws passed by the federal government are the supreme law of the land, period. A closer reading reveals that it declares the "laws of the United States made in pursuance" of the Constitution are the supreme law of the land.

In pursuance thereof, not in violation thereof. None of the provisions of ObamaCare is permissible under any enumerated power given to Congress in the Constitution; therefore, they were not made in pursuance of the Constitution, and therefore they are not the supreme law of the land.

Alexander Hamilton reiterated this interpretation of this part of Article VI when he wrote in *The Federalist*, No. 33:

> If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted [sic] to it by its constitution, must necessarily be supreme over those societies and the individuals of whom they are composed.… But it will not follow from this doctrine that acts of the larger society which are *not pursuant* to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. These will be merely acts of usurpation, and will deserve to be treated as such. [Emphasis in original.]

Supporters of the various state bills aimed at nullifying ObamaCare understand that the states retain numerous rights under the Constitution, including the right and obligation to block unconstitutional acts of the federal government.

Allen West seems determined to stack one example of erroneous constitutional interpretation on top of another. In another paragraph, he again promotes the "supremacy" of the federal government — this time, in the form of the following indefensible declarations regarding Article III of the Constitution:

"under Article III of the Constitution, the federal judiciary has the final power to interpret the Constitution"

and,

"In any event, the power to make final decisions about the constitutionality of federal laws lies with the federal courts, not the states, and the states don't have the power to nullify federal laws."

Wrong on both counts, Mr. West.

It is true, in fairness to West, that the Supreme Court has usurped power not granted it in the Constitution and its sister branches in the federal government (and state legislatures) have permitted it to continue.

For example, in 1907, former Chief Justice Charles Evans Hughes said, "the Constitution is what the judges say it is...." Or, as another tyrant once said, "L'etat c'est moi." (I am the state).

Hughes's pronouncement is compelling evidence of the federal bench's systemic disregard of any sort of objective, constitutionally-based standard of interpretation. They regularly replace such authorities as the *Federalist Papers* with their own agenda, creating a situation where the judiciary is a subjective scene of ever-changing, never consistent, "judicial review."

Surely no true conservative would support, as West seems to do in his article, such unconstitutional lawmaking on the part of a black-robed oligarchy.

Were Americans to accept West's interpretation of Article III and his overly generous grant to the courts of the power to re-write laws, we would find ourselves in the perilous situation described by Thomas Jefferson:

> At the establishment of our constitutions, the judiciary bodies were supposed to be the most helpless and harmless members of the government. Experience, however, soon showed in what way they were to become the most dangerous; that the insufficiency of the means provided for their removal gave them a freehold and irresponsibility in office; that their decisions, seeming to concern individual suitors only, pass silent and unheeded by the public at large; that these decisions, nevertheless, become law by precedent, sapping, by little and little, the foundations of the constitution, and working its change by construction, before any one has perceived that that invisible and helpless worm has been busily employed in consuming its substance.

To the point, this reporter has personal experience with the establishment's method of perpetuating the myth of judicial supremacy over the Constitution. I attended law school and for one year took a required class called (ironically) Constitutional Law. Here's a frightening fact of American legal education: in Constitutional Law we never opened the Constitution — not once. We read dozens of "key" Supreme Court decisions on constitutional issues, but we were never asked to read even a single clause of the Constitution.

No wonder, then, we find ourselves in a country where even "conservatives" believe and preach the doctrine of judicial review and ultimate judicial authority over the definitions of constitutional concepts.

Finally, although West dismisses the power and propriety of state nullification efforts, resisting federal trampling of the Constitution is not only a right of state lawmakers, it is a constitutional obligation.

Article VI, Clause 3 reads:

> The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

Simply put, this clause puts all state legislators under a legally binding obligation (assuming they've taken their oath of office) to "support the Constitution." There is no better way, it would seem, for these elected state representatives of the people to show support for the Constitution than by demanding that the officers of the federal government adhere to constitutional limits on their power.

Perhaps a greater number of these state legislators, attorneys general, and judges would be more inclined to perform their Article VI duty if the people that put them in office would sue them and hold them legally accountable for any failures to carry this burden.

Imagine, furthermore, the uproar in state assemblies across the country if every day the legislators were in session process servers showed up at their offices armed with lawsuits charging them with dereliction of their constitutional duty!

With all the respect due Allen West, he needs to study the Constitution, the *Federalist Papers*, and the writings of the Founders and acquaint himself with several key principles of liberty and federalism: namely, the correct interpretation of the Supremacy Clause, the limits on the power of Article III courts, and the power and constitutional obligation of state lawmakers to nullify every unconstitutional act of the federal government.

Photo of Allen West: AP Images

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