AP Takes on Texas and Nullification

In a recent interview with the Associated Press (AP), the Tenth Amendment Center's Mike Maharrey was asked to comment on a Texas bill aimed at creating a state committee tasked with evaluating the constitutionality of federal laws.

In its report on the legislation and Maharrey's analysis of it, the AP incorrectly reported on several key constitutional concepts, including the so-called Supremacy Clause of Article VI and nullification.

Here's the AP's take on the Supremacy Clause and its impact on state law: "A proposal in the GOP-led Legislature would allow Texas to ignore federal law and court rulings and forgo enforcing national regulations. Arizona already has approved a similar policy, and other states want to follow suit, despite the Constitution's Supremacy Clause, which stipulates federal laws and treaties take precedence."

Wrong.

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. Every provision of every federal act or regulation that is not permissible under any enumerated power given to Congress in the Constitution was not made in pursuance of the Constitution, and therefore not a single syllable of those acts is the supreme law of the land.

Alexander Hamilton reiterated this interpretation of this part of Article VI when he wrote in *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.]

Next, in order to put the nail in the coffin on the ability of states to protect their people from tyranny in the central government, the AP trots out an "expert." This time, the AP's constitutional guru is Sandy Levinson from the University of Texas.

Here's Levinson's learned opinion on the constitutionality (and sanity) of nullification: "What would be special is if the Texas Legislature really and truly believes that Texas can decide on their own, 'this is unconstitutional we're not going to do it,'" Levinson said. "That's just bonkers."

Apparently, Levinson thinks keeping the federal beast inside its constitutional cage is crazy; people

should, I suppose, just sit back and allow themselves to have their property seized by the swarms of federal officers and bureaucrats without being allowed to defend themselves legislatively.

The truth is, however, that the people and their elected state representatives are not left defenseless in the battle to fight the cancer of consolidation. There is a remedy — a "rightful remedy" — that can immediately retrench the federal government's constant overreaching. This antidote can stop the poison of all unconstitutional federal acts and executive orders at the state borders and prevent them from working on the people.

The remedy for federal tyranny is *nullification*, and applying it liberally will leave our states and our people healthier and happier.

In fact, if nullification is to be successfully deployed and defended, states must remember that the Constitution is a creature of the states and that the federal government was given very few and very limited powers over objects of national importance. Any act of Congress, the courts, or the president that exceeds that small scope is null, void, and of no legal effect. No exceptions.

James Madison said it best in *Federalist*, No. 45, "The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite."

That our Founders understood this principle is demonstrated by Alexander Hamilton in *Federalist*, No. 78:

> There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

Madison, in another *Federalist* letter recommended that state legislators, in order to prevent federal abridgment of fundamental liberties, should refuse "to co-operate with the officers of the Union."

Levinson, it seems, would have the people "cooperate with the officers of the union no matter what they demand and no matter how unfair and unconstitutional the legislation."

For his part, Maharrey teaches the AP about the concept of anti-commandeering. From the article:

> Maharrey, who has recently seen a flurry of such legislation, said it's grounded in anti-commandeering doctrine, meaning the federal government cannot force states to use their resources implementing federal programs. It's also been used by blue states to promote things such as "sanctuary city" laws excusing police from enforcing federal immigration law.
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> "There are a number of bills based on this same concept, including bills pending in California and New York legislatures to create state sanctuaries," Maharrey said.

Anti-commandeering is beautifully simple and simply beautiful. States cannot be coerced into funding federal mandates out of their own state coffers.

Basically, as defined by the Supreme Court in several key decisions, anti-commandeering prohibits the federal government from forcing states to participate in any federal program that does not concern "international and interstate matters."

While this expression of federalism ("dual sovereignty," as it was named by Justice Antonin Scalia) was first set forth in the case of *New York v. United States* (1992); most recently it was reaffirmed by the high court in the case of *Mack and Printz v. United States* (1997).

Writing for the majority in the *Printz* decision, Justice Antonin Scalia explained:

> As Madison expressed it: "The local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere." *The Federalist* No. 39, at 245. [n.11]
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> This separation of the two spheres is one of the Constitution's structural protections of liberty. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."

All in all, the AP article is fairer to federalism than many other mainstream attempts to articulate the constitutional and historical concepts that protect the people from federal overreach.

Finally, state lawmakers, far from being berated from attempting to reject federal usurpations, should be reminded that Article VI actually obliges them to affirmatively protect the bright lines separating the limited authority of the federal government and the people they are intended to serve.

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.