Written by **Joe Wolverton, II, J.D.** on July 31, 2013

Is Nullification Gaining Mainstream Momentum?

Are states ready to flex their constitutional muscle and restrain the federal behemoth with the chains of the Constitution?

Maybe.

In an article published by Politico on July 27, Tal Kopan wrote, "Infuriated by what they see as the long arm of Washington reaching into their business, states are increasingly telling the feds: Keep out!"

And, in May, *The New American* reported on a Rasmussen poll where 44 percent of those who participated in the survey believe states retain the right to nullify any act of the federal government they deem constitutionally invalid.

Simply stated, nullification is the exercise by a state or states of the right to hold as null, void, and of no legal effect any act of the federal government that exceeds the boundaries of the powers given to it by the states in the Constitution.

And it must be pointed out that despite opponents' cries of "anarchy," nullification is not the right of states to nullify any federal act. Rather, it is the right of states to choose to not enforce any federal act that fails to conform to the constitutionally established limits on the authority of the federal government.

Nullification presupposes that there are myriad areas over which the Constitution has given limited purview to the federal government: defense, naturalization, foreign relations, interstate commerce, etc.

When Washington decides to go walkabout, however, and start legislating (or issuing edicts, in the case of President Obama) in areas not within its constitutional boundaries (healthcare, education, gun ownership), the states reserve the right to check that usurpation by refusing to afford such acts the power of law. Conversely, it would be a usurpation on the part of the states should they attempt to disregard federal laws that are constitutionally sound.

Americans, it seems, are getting the message that Thomas Jefferson and James Madison sent out over 200 years ago in the Kentucky and Virginia Resolutions.

As Madison wrote in the Virginia Resolution of 1798, "In case of a deliberate, palpable, and dangerous exercise of other powers, not granted by the said compact, the states who are parties thereto, have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them."

And:

> that a spirit has in sundry instances, been manifested by the federal government, to enlarge its powers by forced constructions of the constitutional charter which defines them; and that implications have appeared of a design to expound certain general phrases … so as to destroy the meaning and effect, of the particular enumeration which necessarily explains and limits the general phrases; and so as to consolidate the states by degrees, into one sovereignty, the obvious tendency and inevitable consequence of which would be, to transform the present republican system of the

> United States, into an absolute, or at best a mixed monarchy.

The issue, while not new, has regained prominence recently as the federal government has enacted ObamaCare and various gun control restrictions. Opponents of these efforts point to the fact that the authority to do neither of these things is granted to the federal government in the Constitution. Therefore, states are flexing their sovereign muscles, nullifying these and other attempts by the federal government to constrict the scope of liberty.

Politico points to several state efforts to resist the federal government's consolidation of all power over all issues — federal, state, and local.

> In at least 37 states, legislation has been introduced that in some way would gut federal gun regulations, according to the Brady Center to Prevent Gun Violence. The bills were signed into law this spring in two states, Kansas and Alaska, and in two others lawmakers hope to override gubernatorial vetoes. Twenty states since 2010 have passed laws that either opt out of or challenge mandatory parts of ObamaCare, the National Conference of State Legislatures says. And half the states have approved measures aimed [at] knocking back the Real ID Act of 2005, which dictates Washington's requirements for issuing driver's licenses.

Brady Center Legal Director Jon Lowy is quoted in the Politico piece calling those who advocate for nullification "dangerous." He went so far in his criticism of this exercise of state sovereignty as to say that nullification "would greatly threaten public safety" and that proponents of the practice (particularly with regard to federal acts infringing upon the right to keep and bear arms) have "little concern for public safety."

This smacks of the scare tactics of Republican Governor Chris Christie of New Jersey, who similarly called liberty-minded members of his party "dangerous."

Later in his quoted statement, Lowy says he's not worried about the long term effects of nullification, however, because such state efforts are "patently unconstitutional."

Although he doesn't specify what article or amendment of the Constitution state nullification efforts are violating, he is likely referring to the "Supremacy Clause."

The "Supremacy Clause" (as some wrongly call it) of Article VI does not declare that federal laws are the supreme law of the land without qualification. What it says is that the Constitution "and laws of the United States made in pursuance thereof" are the supreme law of the land.

Read that again: "in pursuance thereof," not in violation thereof. If an act of Congress is not permissible under any enumerated power given to it in the Constitution, it was not made in pursuance of the Constitution and therefore not only is not the supreme law of the land, it is not the law at all.

Constitutionally speaking, then, whenever the federal government passes any measure not provided for in the limited roster of its enumerated powers, those acts are not awarded any sort of supremacy. Instead, they are "merely acts of usurpation" and do not qualify as the supreme law of the land. In fact, acts of Congress are the supreme law of the land only if they are made in pursuance of its constitutional powers, not in defiance thereof.

Alexander Hamilton put an even finer point on the issue when he wrote in *The 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."

Robert Levy of the Cato Institute doesn't agree with Messrs. Madison, Jefferson, and Hamilton, however. Levy is also quoted in the Politico piece, calling state and local legislation nullifying unconstitutional federal acts "radical proposals."

Perhaps Levy is correct. Perhaps it is time for the "radicals" in every state not only to introduce measures rejecting any federal act that demolishes the borders of its powers, but to tear up the checks from Washington, D.C. and refuse to be moved, mocked, bribed, or berated.

Once more legislators, governors, and the citizens who elect them embrace this "radical" response to tyranny, they will more readily and fearlessly accept that the states are uniquely situated to perform the function described by Madison above and reiterated in a speech to Congress delivered by him in 1789. "The state legislatures will jealously and closely watch the operation of this government, and be able to resist with more effect every assumption of power than any other power on earth can do; and the greatest opponents to a federal government admit the state legislatures to be sure guardians of the people's liberty," Madison declared.

Joe A. Wolverton, II, J.D. is a correspondent for The New American *and travels frequently nationwide speaking on topics of nullification, the NDAA, and the surveillance state. He can be reached at jwolverton@thenewamerican.com*