Written by **Joe Wolverton, II, J.D.** on January 24, 2013

Legal Experts Call Nullification Unconstitutional and Seditious

"The states can't simply choose to defy and override a valid federal law." That's law professor Allen Rostron's opinion of the spate of state efforts to thwart federal attempts to infringe on the constitutionally protected right of citizens to keep and bear arms.

Rostron makes this statement in a recent article published by the *Kansas City Star*.

The right of states to refuse to enforce unconstitutional federal acts is known as nullification.

Nullification is a concept of constitutional law recognizing the right of each state to nullify, or invalidate, any federal measure that exceeds the few and defined powers allowed the federal government as enumerated in the Constitution.

Nullification exists as a right of the states because 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 President Obama and the United Nations accelerate their plan to disarm Americans, the need for nullification is urgent, and liberty-minded citizens are encouraged to see state legislators boldly asserting their right to restrain the federal government through application of that very powerful and very constitutional principle.

One would expect that Rostron, being a professor of law, has read the *Federalist Papers*. In fairness, he probably has, but perhaps he overlooked *Federalist*, No. 33, where Alexander Hamilton explained the legal validity of federal acts that exceed the powers granted to it by the Constitution. Hamilton wrote:

> 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.]

Rostron denies that states have the right to withstand federal tyranny and argues that the Constitution declares federal acts to be the "supreme law of the land."

His comments echo a common misreading and misunderstanding of Article VI of the Constitution, the so-called 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 clause 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 usurpations" 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.

Hamilton put an even finer point on the issue when he wrote 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."

Once more legislators, governors, citizens, and law professors realize this fact, 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.

State lawmakers are catching on, and nullification bills stopping federal overstepping of constitutional boundaries have been proposed in at least two dozen states. These measures nullify not only the impending federal gun grab, but the mandates of ObamaCare and the indefinite detention provisions of the National Defense Authorization Act (NDAA), as well.

Legal analyst for *60 Minutes* Andrew Cohen sees sedition in such state acts of nullification and calls them "patently unconstitutional."

It appears that we have arrived at a time in the history of our Republic when the author of the Declaration of Independence (Thomas Jefferson) and the "Father of the Constitution" (James Madison) are considered enemies of liberty.

In the Kentucky and Virginia Resolutions, Jefferson and Madison declared their allegiance to the union, but insisted that states have the right — the duty — to interpose themselves between citizens and federal despotism.

In a blog post, Thomas Woods, author of *Nullification: How to Resist Federal Tyranny in the 21st Century*, points to Cohen's patently incorrect view of the origin of our Constitution. He writes,

> Of course, the "sedition" talk begs all the relevant questions and assumes federal supremacy as we know it today to be the correct position. It pretends the compact theory of the Union doesn't exist, or that violence could have reversed it.

The compact theory of the Union mentioned by Woods holds that the consent of the states created the Constitution and thus created the federal government. This act of collective consenting is called a compact. In this compact (or contract), the states selected delegates who met in Philadelphia in 1787 and conferred some of the powers of the states to a federal government. These powers were

enumerated in the Constitution drafted at that convention and the Constitution became the written record of the compact.

This element of the creation of the union is precisely where the states derive their power to nullify acts of the federal government that exceed its constitutional authority. It is a trait woven inextricably within every strand of sovereignty, and it was the sovereign states that ceded the territory of authority which the federal government occupies.

Again, a law professor rides to the rescue of the falsehood of absolute federal supremacy.

The U.S. Supreme Court has "made it indisputably clear that if there is a conflict between valid federal law and a state constitution, the federal law prevails," writes Stephen McCallister in an article in the *University of Kansas Law Review* published in 2011.

Actually, what is indisputably clear is that a correct understanding of the history of the creation of the union and the Constitution teaches that the people and the states retain the power to put a stop to any attempt by the federal government to revoke the right to keep and bear arms or any other inalienable right which, in the beginning, was a gift of God, not government.

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