Written by **Joe Wolverton, II, J.D.** on December 20, 2015

Missouri Rep Authors Bill Nullifying Unconstitutional Executive Orders

A proposed bill prefiled in the Missouri state House of Representatives would provide a means for unconstitutional executive orders to have no legal effect in the state.

State Representative Tim Remole (shown) is the author of House Bill 1791, a bill that would oblige the state legislature to "adopt and enact any and all measures as may be necessary to prevent the enforcement of regulations, rules, and memorandums issued by a presidential executive order."

Remole rightly includes in his measure a statement explaining that executive orders that are issued in defiance of the enumerated authority granted by the states to the president are "repugnant to the Constitution of the United States and the Constitution of Missouri."

Later in the legislation, Remole uses language consistent with statements by the Founding Fathers, declaring these unconstitutional presidential fiats to be "null void and of no effect" in Missouri.

In *The Federalist*, No. 78, Alexander Hamilton wrote, "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."

The Missouri bill, if it were to become law, would mandate that "no agency or political subdivision of this state shall take any action or utilize any resources to give effect to such rules, regulations, or memorandums."

In other words, unconstitutional directives issued by the president would be nullified within the sovereign borders of the state of Missouri.

Simply put, nullification is the exercise by a state government of its authority to enforce the terms of the contract that created the federal government — the Constitution.

The states created the federal government, set the boundaries of its power, and reserved to themselves all other political authority not specifically delegated to the new national authority.

Nullification, whether through active acts passed by the legislatures or the simple refusal to obey unconstitutional directives, is the "rightful remedy" for the ill of federal usurpation of authority. Americans committed to the Constitution must walk the fences separating the federal and state governments, and they must keep the former from crossing into the territory of the latter.

The Virginia and Kentucky Resolutions plainly set forth James Madison's and Thomas Jefferson's understanding of the source of all federal power. Those landmark documents clearly demonstrate what these two agile-minded champions of liberty considered the constitutional delegation of power. Jefferson summed it up very economically in the Kentucky Resolutions:

> That the several states who formed that instrument, being sovereign and independent, have the unquestionable right to judge of its infraction; and that a nullification, by those sovereignties, of all unauthorized acts done under colour [sic] of that instrument, is the rightful remedy.

As Missouri state Representative Remole seems to understand, scores of executive orders (and other similar statements issued by presidents for decades) are a corpus of presidential fiats masquerading as laws.

The history of these directives reveals that for generations, presidents have carried out a plan to consolidate all functions of government into the hands of one "unitary" executive, aggrandizing the office of the president and reducing Congress to mere plaintiffs in lawsuits challenging that all but unlimited authority.

It would do well for Americans concerned about this consolidation to study the words and warnings of our Founding Fathers and their political and philosophical influences regarding the primacy of the separation of powers in a good government.

James Madison wrote in *The Federalist*, No. 47: "The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny."

Madison himself was restating a fundamental facet of federalism that was considered to be an essential pillar of liberty. As the venerable French philosopher Baron de Montesquieu wrote in his influential treatise *l'Esprit des Lois* (*The Spirit of the Laws*), "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner."

"Centinel," the pseudonym of an anti-Federalist opposed to ratifying the new Constitution, rephrased for his readers what was already, in the 18th century, a well-known aphorism regarding good government, "This mixture of the legislative and executive moreover highly tends to corruption. The chief improvement in government, in modern times, has been the complete separation of the great distinctions of power; placing the legislative in different hands from those which hold the executive."

An anonymous anti-Federalist echoed this warning, writing: "Liberty therefore can only subsist, where the powers of government are properly divided, and where the different jurisdictions are inviolably kept distinct and separate."

Remole obviously regards the opinions of these men as a reliable standard of statism. As this reporter has written before, if these statements of our Founding Fathers are true descriptions of despotism, then "President Obama is filling the shoes of a tyrant heel to toe."

Finally, the legal principle upon which the MIssouri bill is built is sound and has been upheld by the Supreme Court (although the high court's approval is neither constitutionally required nor authorized). This principle is called anti-commandeering, and it is a powerful weapon in the states' arsenals.

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."

There is no question that the delegates of the states gathered in Philadelphia in 1787 never granted the executive the authority to issue orders that would be given the deference afforded laws passed by the people's representatives in Congress.

Therefore, according to the plain language of the Tenth Amendment, that power is "reserved to the States respectively, or to the people."

When the Missouri state legislature reconvenes in January 2016, a couple of bills aimed at nullifying unconstitutional acts of the federal government will be up for consideration. Citizens of the Show Me state are encouraged to contact their elected representatives and demand they remain faithful to their constitutional obligation "to support this Constitution."

Photos: Rep. Tim Remole; Missouri state capitol building