Written by **Joe Wolverton, II, J.D.** on April 3, 2014

Missouri House Removes Gun Grab Nullification Bill's Criminal Penalties

A Second Amendment protection bill working its way through the Missouri state legislature has been stripped of a provision that would have subjected federal agents carrying out the Obama administration's gun grab to criminal prosecution.

The version of the bill already passed by the state senate included criminal penalties of up to one year in jail and a $1,000 fine for anyone, including agents of the federal government, who attempted to violate the right of Missourians to keep and bear arms.

The *St. Louis Post-Dispatch* reports that State Representative Doug Funderburk "offered the amendment at the request of law enforcement groups."

Funderburk, the sponsor of the bill, said in a statement to local media that the bill retained the authority of the individual to sue law-enforcement officials for violating the protections afforded by SB 613, the Second Amendment Preservation Act.

The majority Republican state House of Representatives voted 112-37 to remove the criminal penalties provision.

These penalties were a part of the bill as introduced in the state senate by state Senator Brian Nieves.

As *The New American* has reported, on February 20, by a vote of 20-3, senators in the Show Me state lived up to the role the Founders intended them to play by shielding citizens of Missouri from suffering federal overreach and abrogation of the rights guaranteed by the Second Amendment.

Nieves said that if enacted, his legislation would preserve the protections of the Second Amendment in his state. "This is primarily purposed to protect liberties of Missourians," he said.

Described by one observer as perhaps "the strongest defense against federal encroachments on the right to keep and bear arms ever considered at the state level," SB 613 reads in part:

> All federal acts, laws, executive orders, administrative orders, court orders, rules, and regulations, whether past, present, or future, which infringe on the people's right to keep and bear arms as guaranteed by the Second Amendment to the United States Constitution and Article I, Section 23 of the Missouri Constitution shall be invalid in this state, shall not be recognized by this state, shall be specifically rejected by this state, and shall be considered null and void and of no effect in this state.

This bill is the Missouri legislature's second attempt to nullify federal laws and regulations aimed at curtailing the right of Americans to own firearms. This latest effort seems likely to face the same fate as the previous one — veto by the governor, Jay Nixon. The Associated Press reports:

> On Tuesday, the governor reiterated his opposition to measures that attempt to invalidate federal

> laws. He described them as "protest votes" intended to make it harder for federal law enforcement officers to do their jobs.
>
> "Unless they've made significant changes, there's a long history of constitutional law that clearly says there are serious constitutional as well as policy problems with … that concept" of states nullifying federal laws, Nixon told reporters.

In the message he attached to his veto of the similar legislation that landed on his desk last year, Governor Nixon listed his objections under two headings: Supremacy Clause violation and First Amendment free speech clause violations.

The explanation given under the second section is such a stretch as to obviate any need to deconstruct. As to the first, it demonstrates a common constitutional misunderstanding and thus merits correction.

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, 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."

Federal exercise of power, as understood by James Madison and Thomas Jefferson, is legitimate only if those powers were granted to the federal government by the people and listed specifically in the Constitution.

In the Virginia Resolution, Madison described any attempt by the federal government to act outside the boundaries of its constitutional powers as a "dangerous exercise," and reminded state legislatures that they were "duty bound, to interpose for arresting the progress of the evil."

Considering, then, that the Second Amendment to the Constitution explicitly forbids the federal government from infringing on the right of citizens to keep and bear arms ("shall not infringe"), any movement by Congress or the White House in that direction certainly passes Madisonian muster for state nullification, despite media reports to the contrary.

News articles, such as the one published by the *Post-Dispatch*, commenting on the stripping of the criminal penalties provision from the Second Amendment Protection Act, claim that "courts have consistently ruled that federal laws can't be nullified by states."

That is not so. Although the Missouri bill and others like it rely generally on the 10th Amendment and the companion constitutional principle of nullification, the narrower concept of anti-commandeering supports their position, as well, as *The New American* has reported.

Anti-commandeering, as set forth in the Supreme Court decision in *Mack and Printz v. United States* (1997), prohibits the federal government from forcing states to participate in any federal program that does not concern "international and interstate matters."

Writing for the majority, Scalia explained:

> The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens. 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. [Citations removed].

Legislators in Missouri and a handful of sister states are relying, at least in part, on this description of the division of authority as set out in the *Mack/Printz* case.

The only question remaining, it seems, with regard to the future of the right to keep and bear arms in Missouri is whether the state House of Representatives will assert their constitutional authority and pass the bill a second time, and remain committed enough to the oaths of office to override a veto that is a virtual certainty.

The amended bill must be approved by the House before moving back to the state senate.

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