Written by **Alex Newman** on March 12, 2018

On Nullification, Sessions and DOJ Get it Wrong

In announcing his legal crackdown against the state government running California, U.S. Attorney General Jeff Sessions drew widespread applause — but he also made a huge legal and historical blunder on the topic of nullification. So significant is the falsehood pushed by Sessions that, if the erroneous belief were to become more widely held, it could threaten the very foundation of America's federalist system of constitutional government. Fortunately for liberty and the Tenth Amendment, though, both liberals and conservatives are increasingly recognizing that nullification is as American as apple pie — and are therefore using the important constitutional tool to rein in a bloated federal government that countless Americans from across the political spectrum have said for years is "out of control."

Last week, Attorney General Sessions announced that the Department of Justice had filed a lawsuit in federal court against the State of California. Specifically, the Trump administration argues that state and local law enforcement in California have impeded efforts of U.S. Immigration and Customs Enforcement (ICE) to enforce federal laws against illegal aliens. The DOJ lawsuit against California seeks to overturn a trio of 2017 state laws that purport to turn California into a "sanctuary state" for illegal immigrants who violated federal immigration law and are in the country illegally. His lawsuit may have merit, experts say, as California's laws do indeed appear to hinder federal agents in the enforcement of constitutional federal laws.

But Sessions also made a number of outrageous claims in a speech about the lawsuit that fly in the face of what America's Founding Fathers believed. And those errors could have terrifying implications for the future of constitutionally limited government, if left unchecked. "California, absolutely, appears to me, is using every power it has — powers it doesn't have — to frustrate federal law enforcement," Sessions said at the annual California Peace Officers Association gathering in Sacramento. "There is no nullification. There is no secession. Federal law is the supreme law of the land. I would invite any doubters to go to Gettysburg, or to the tombstones of John C. Calhoun and Abraham Lincoln. This matter has been settled."

Unfortunately, DOJ Office of Public Affairs Director Sarah Isgur Flores doubled down on Sessions' factually challenged anti-nullification comments. In a statement regarding California Governor Jerry Brown's hysterical statements blasting Sessions for "basically declaring war" against his state, Flores made a lot of great points. But like Sessions, she got a key point wrong. "John C. Calhoun, who popularized the theory of nullification before the Civil War, also thought enforcing federal law was an

'act of war,' but every student of American history (except the Governor of California it would seem) knows that debate was settled at Appomattox Courthouse," said Flores.

In reality, state nullification of federal laws was — ironically — one of the key reasons that the South offered for seceding from the union! In South Carolina's "Declaration of Immediate Causes" regarding its reasons for secession from the union, for example, the state blasted Northern states for nullifying federal statutes requiring that fugitive slaves be deprived of due process rights and sent back to their owners. The Declaration stated that "an increasing hostility on the part of the non-slaveholding States to the institution of slavery, has led to a disregard of their obligations, and the laws of the General Government have ceased to effect the objects of the Constitution."

In particular, the Southerners blasted Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, Pennsylvania, Illinois, Indiana, Michigan, Wisconsin, and Iowa. Those states "have enacted laws which either nullify the Acts of Congress or render useless any attempt to execute them," the Southern secessionists declared, blasting nullification. "In many of these States the fugitive is discharged from service or labor claimed.... Thus the constituted compact has been deliberately broken and disregarded by the non-slaveholding States."

In other words, Sessions and Flores have it wrong, historically. They also have it wrong legally.

The DOJ and Sessions are basing their comments and much of the lawsuit on the U.S. Constitution's so-called "Supremacy Clause" contained in Article VI. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land," the document states. While it does make clear that federal laws are supreme over state laws, it also has a crucial limitation — those laws must be "in pursuance thereof," not in violation of the Constitution. The Tenth Amendment also makes explicit the fact that powers not delegated to the federal government by the Constitution are reserved to the states or the people.

Obviously, then, if the federal government usurps powers that were never delegated to it under the Constitution, those acts cannot be the "supreme law of the land," or even legitimate laws at all. More than a few of America's Founding Fathers involved in creating the Constitution made that crystal clear when advocating for its ratification. In fact, even the most radical proponents of centralized federal power were adamant that unconstitutional "laws" were neither supreme nor even laws. "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," wrote Alexander Hamilton in *The Federalist*, No. 78. "No legislative act, therefore, contrary to the constitution, can be valid."

Hamilton made a similar argument in *The 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 to it by its constitution, must necessarily be supreme over those societies, and the individuals of whom they are composed," he wrote. "But it will not follow from this doctrine that acts of the large 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." In short, unconstitutional acts of usurpation should be treated as such.

Other Founding Fathers, including James Madison, widely regarded as the "Father of the Constitution," were equally clear on this crucial issue. In *The Federalist*, No. 46, Madison explained that state governments possess a "means of opposition" to federal overreach: "refusal to cooperate with the

officers of the Union." A decade later, Madison went even further, arguing that states have a duty to nullify unconstitutional usurpations. "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," he wrote in the Virginia Resolution of 1798.

The jurisprudence on this issue goes back almost two centuries, too. And despite some flawed legal opinions by federal courts purporting to make the feds the sole arbiters of constitutionality, even the federal courts have consistently held that states may refuse to participate in enforcing federal statutes. In 1842, for example, the U.S. Supreme Court ruled in *Prigg v. Pennsylvania* that the feds had no power to force state governments to help capture fugitive slaves. "The states cannot be compelled to enforce the fugitive slave clause," explained Justice Joseph Story, writing for the majority. A number of more recent decisions, including *Printz v. United States* dealing with gun control, have upheld that important legal principle, sometimes referred to as the "anti-commandeering doctrine."

And of course, states — both liberal and conservative — have been busy nullifying unconstitutional federal acts since the beginning of the American republic and the Alien and Sedition Acts. Already, almost 30 states have nullified federal statutes purporting to ban marijuana by making it available under state law for medicinal purposes. Almost 10 mostly liberal-leaning states have even nullified federal statutes and United Nations treaties by ending prohibition on recreational marijuana as well. Ironically, even federal supremacist and radical leftist Eric Holder, Obama's disgraced attorney general who was held in criminal contempt of Congress, acknowledged limits to federal powers on the subject during congressional testimony.

Conservatives have been making regular use of nullification, too. Indeed, Sessions' home state has been at the forefront. In 2012, the state nullified a broad range of so-called "sustainable development" policies pushed by the federal government and the UN dubbed "Agenda 21." The next year, Alabama lawmakers passed legislation declaring all unconstitutional federal gun-control schemes to be "null and void" within the state. Numerous other states have passed similar nullification laws treating unconstitutional federal gun-control schemes as what they are: illegitimate usurpations that must be resisted. And the resurgence of nullification as a viable tactic to preserve liberty and constitutional government is just getting started.

Indeed, the non-partisan Tenth Amendment Center, which supports nullification of unconstitutional federal acts by liberal and conservatives states, ridiculed Sessions for his comments on California. "Although it will be good to point out just how much Jeff sounds like [far-left MSNBC host] Rachel Maddow — she used the same arguments against our efforts to nullify Obamacare — it's just going to have to wait a little bit," the group said in a statement. "Why? We're too busy nullifying." And in fact, the organization was very busy indeed posting about the latest nullification victories in states all across America.

Tenth Amendment Center leader Michael Boldin recently explored the topic further on the issue in an interview with Mises Institute chief Jeff Deist. Among other concerns, Boldin expressed disgust at Sessions' claim that the Civil War ended the debate on nullification. "He's basically saying, 'Well, Stalin was right, because he killed people'," Boldin explained, noting that far-left MSNBC Maddow host was making similar arguments against nullification during the Obama years. "That to me is intellectually weak, and it's dangerous." Boldin emphasized that nullification was crucial to reining in lawless and

unconstitutional federal usurpations, and that this should be a non-partisan view.

How much power over immigration is delegated to the federal government remains the topic of heated debated among constitutional scholars. But clearly, the Constitution delegates power over naturalization to the feds. And states may not, in fact, nullify constitutional laws. Sessions, then, may end up victorious in court. However, even if the feds win this one — and most conservatives hope they will — that does not negate the fact that states, as the creators of the federal government, have not just the right, but the duty, to resist unconstitutional usurpations of power. After eight years of federal lawlessness under Obama, Sessions, of all people, should know better.

Photo of Attorney General Jeff Sessions: AP Images

Alex Newman is a correspondent for The New American*, covering economics, education, politics, and more. He can be reached at anewman@thenewamerican.com. Follow him on Twitter @ALEXNEWMAN_JOU or on Facebook.*

Related articles:

Trump DOJ Sues California Over Its Immigration and Sanctuary Policies

New Marijuana Policy Triggers Bipartisan Love for 10th Amendment

State vs. Federal: The Nullification Movement

Pastor Educates Lawmakers on Biblical Duty to Resist Tyranny

States Aim to Nullify Obama Gun Control

On Pot Nullification, AG Holder Admits Limits to Federal Power

The Search for Federal Immigration Authority

Alabama Adopts First Official State Ban on UN Agenda 21

Ron Paul: Right of Secession 'Destroyed by Civil War'

N.Y. Times: Libertarians Soft on Slavery, Confused About Civil War