Written by **Joe Wolverton, II, J.D.** on March 26, 2014

Scalia Hints at NSA Case, But is Supreme Court the Final Word?

During an appearance last week at Brooklyn Law School, Supreme Court Justice Antonin Scalia (shown) hinted that he and his colleagues are likely to soon consider a challenge to the constitutionality of the unwarranted surveillance programs of the National Security Agency (NSA).

Although he apparently believes the Supreme Court will take up the issue, he clearly said he doesn't think the justices are qualified to settle questions as critical as national security.

"The Supreme Court doesn't know diddly about the nature and extent of the threat," Scalia said. "It's truly stupid that my court is going to be the last word on it," he added later.

Reading between the lines of Scalia's other statements made at the law school event, it seems that the court's longest currently serving justice would find constitutional clearance for the NSA's dragnet collection of data that many find violates the Fourth Amendment.

A story in the *Business Insider* indicates that the Reagan appointee's possible position on the NSA's activities might include excluding telephone data from the protections provided in the Fourth Amendment. "Conversations are quite different" from the persons, houses, papers, and effects covered by the Bill of Rights, Scalia said as quoted in the article.

Though activists and journalists on both sides of the issue are berating Scalia for their own interpolations on his statements, the fact is that it should matter very little what the Supreme Court believes about the constitutionality of the NSA's searching and seizing.

The Founding Fathers believed that states should serve as the greatest check on the federal government's usurpation of powers. And, although some would deny them that right and the 17th Amendment has nearly obliterated their influence over Congress, states are on sound constitutional, legal, and historical footing when they nullify any and every unconstitutional act of the federal government, including unwarranted surveillance.

Simply put, nullification occurs when a state legislature declares that an unconstitutional act of the federal government will not be enforced within the sovereign borders of that state.

Sadly, many argue that such state laws would be themselves null and void for violating the so-called Supremacy Clause.

With an understanding of the drafting of the Constitution in mind, it's easy to dismiss this recurring and ridiculous idea that somehow any federal law "trumps state law when the two conflict."

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 it not the supreme law of the land, it is not the law at all.

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. In that case, they are, as Alexander Hamilton declared in *The Federalist Papers*, "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 of that authority.

Additionally, some still argue that there is another limit on the states' power of nullification. These people, many of whom are on the political Right, insist that when the Supreme Court rules on the constitutionality of a federal act, state nullification of that act is no longer an option.

In light of recent decisions by "conservatives" on the Supreme Court in the ObamaCare case, it is no wonder that many Americans doubt that states have a right to nullify a congressional act in the wake of a Supreme Court decision.

Thomas Jefferson had something to say in the matter. In 1804, he wrote that giving the Supreme Court power to declare unconstitutional acts of the legislature or executive "would make the judiciary a despotic branch." He noted that "nothing in the Constitution" gives the Supreme Court that right.

In this Mexican standoff of states, Supreme Court, and federal government, the last man standing is the people acting in their collective political capacity as states.

Even Abraham Lincoln recognized the lack of constitutional authority for the Supreme Court's assumption of the role of ultimate arbiter of an act's conformity with the Constitution.

Lincoln said that if the Supreme Court were afforded the power to declare whether an act of the federal government was constitutional, "the people will have ceased to be their own masters, having to that extent resigned their government into the hands of that eminent tribunal."

Renowned constitutional scholar Von Holtz explained the error in accepting the Supreme Court as the ultimate arbiter of constitutional fidelity. "Moreover, violations of the Constitution may happen and the injured cannot, whether states or individuals, obtain justice through the court. Where the wrongs suffered are political in origin the remedies must be sought in a political way," he wrote.

He continued, regarding this "aristocracy of the robe,": "That our national government, in any branch of it, is beyond the reach of the people; or has any sort of 'supremacy' except a limited measure of power granted by the supreme people is an error."

How can anyone read these statements, or the Tenth Amendment for that matter, and honestly conclude that any branch of the federal government is intended to be the surveyor of the boundaries of its own power?

Every department of the federal government was created by the Constitution — therefore, by the states — and has no natural sovereignty. No branch can define its own authority. Such a thought is ridiculous and contrary to any theory of popular sovereignty ever proposed. If courts, Congress, or presidents had such power, it would make them judge, jury, and executioner in every case in which their own act exceeding constitutional authority is at bar.

Look at it this way: If the federal government was "the decider," what purpose would the Tenth Amendment serve? Most liberty-minded people today would agree that the federal government could, would, and does rule that every act is constitutional.

This is the case today and the consolidators genuinely believe that there is nothing they can't do, no law they can't pass, and no individual or government entity that can prevent them from enforcing those fiats masquerading as laws.

The checks and balances of the Constitution and the separation of powers it establishes are meant to be the first layers of defense against tyranny, not the last or the only as the statists would have you believe. The people acting through their state governments are the final levee protecting the people as individuals from drowning under the flood of unconstitutional federal laws, regulations, and mandates.

States unwilling to be reduced to subordinates, subjects, and slaves must take as their motto: Sovereignty is not secession, rejection is not revolution, and nullification is not negation of the union.

Were this so, supposedly telltale statements and quips by a Supreme Court justice wouldn't be such big news and certainly wouldn't worry people determined to defend our Constitution.

Photo of Supreme Court Justice Antonin Scalia: AP Images

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