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Tennessee to Consider Nullifying Executive Orders and Supreme Court Decisions

Where shall I make complaint, Fathers of the Senate, that our country is being rent asunder and is the victim of all the most reckless of men; to whom shall I appeal? Shall I turn to the Roman people, who are so corrupted by largess that they offer themselves and all their fortunes for sale? Shall I appeal to you, Fathers of the Senate, whose authority is the plaything of all the basest and most criminal of men? — "Invective Against Marcus Tullius," attributed to Sallust

President Obama has seized power not granted to the executive branch and the Congress seems full of "representatives" determined to act as his accomplices in the obliteration of the Constitution.

In order to check this abuse, the state legislature of Tennessee might soon have the opportunity to render all unconstitutional executive orders and Supreme Court decisions null and void within the borders of that state.

A pair of companion bills working their way through the two houses of the state legislature (HB 1828 and SB 1790) would amend the Tennessee state code to prohibit "state and local governments from enforcing, administering, or cooperating with the implementation, regulation, or enforcement of any federal executive order or U.S. supreme court opinion unless the general assembly first expressly implements it as the public policy of the state."

Beyond the potential protections this bill affords for the right of citizens of the Volunteer State to keep and bear arms (as guaranteed by the Second Amendment and threatened by President Obama's flurry of fiats), it could stop at the state borders enforcement of numerous unconstitutional programs and policies of the federal government.

These proposals are, of course, consistent with the intent of the Founders. The Constitution as drafted and ratified created the federal government and granted to it a very limited sphere of authority. Power over those areas not specifically enumerated as federal prerogatives were reserved to the states and to the people, as set out in the 10th Amendment.

James Madison explained the process in *Federalist*, No. 45, where he counseled states to "refuse to cooperate with officers of the Union" when those officers are trying to carry out federal mandates not within the narrow purview of the central government.

This act of refusal by states to cooperate in violating the Constitution is called nullification.

Nullification is, as Thomas Jefferson wrote, the "rightful remedy" to federal overreach and on November 10, 1798, the Kentucky state legislature adopted the following resolution regarding the legitimate scope of federal authority and the power of the states to keep the former within its appropriate, constitutionally delegated boundaries:

> That the several states composing the United States of America, are not united on the principle of unlimited submission to their general government; but that by compact, under the style and title of a Constitution for the United States, and of amendments thereto, they constituted a general government for special purposes, delegated to that government certain definite powers, reserving, each state to itself the residuary mass of right to their own self-government; and that whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force: That to this compact each state acceded as a state, and is an integral party, its co-states forming as to itself, the other party: That the government created by this compact was not made the exclusive or final judge of the extent of the powers delegated to itself; since that would have made its discretion, and not the Constitution, the measure of its powers; but that, as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infractions, as of the mode and measure of redress.

While the Supreme Court is certainly not empowered in the Constitution to overturn the will of the people, it did issue a couple of opinions that correctly restated the constitutional relationship between the states and the federal government created by them in the Constitution. The doctrine they described is anti-commandeering.

Put simply, 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).

The *Mack/Printz* ruling makes it clear that the states do not have to accept orders from the feds.

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.
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> "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."

Even a Founder as fond of a powerful central government as was Alexander Hamilton understood that, under the Constitution, the authority of that government would be limited. In *Federalist*, No. 33 he wrote, "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.)

In other words, acts not authorized under the enumerated powers of the Constitution are "merely acts of usurpations" and deserve to be disregarded, ignored, and denied any legal effect.

More state legislators need to learn this. Familiarity with these facts are fundamental to a reclaiming of

state authority and removing the threat to liberty posed by the centralization of power in the federal government.

Until state lawmakers act to reclaim the sovereignty their states theoretically retain, there will be no end of the demands placed upon them by the federal government, and such demands will get more and more difficult to comply with and will thus justify increasing federal control over the apparatuses of state government.

The trajectory is easy to see and follow into the future. The federal government will, mandate by mandate, regulation by regulation, grant program by grant program, devolve into a central government after the model of the so-called European democracies.

Fortunately for Tennessee, there are some state legislators who are willing to ride to the defense of the Constitution and the liberties it was created to protect.

As of February 2, both bills are awaiting action by their respective committees. Approval by those committees is necessary before lawmakers may take them up for consideration.