Written by **Joe Wolverton, II, J.D.** on January 25, 2014

Wall Street Journal Takes Notice: Nullification "Trend Is Spreading"

Although some self-described "conservatives" now claim that nullification is unconstitutional, others view nullification as a proper and constitutional approach for checking federal overreach and are working to apply this approach through state legislatures. Taking notice, the *Wall Street Journal* published an article on its website sketching the various efforts across the country to nullify unconstitutional acts of the federal government.

As the *Journal* article reports, state legislators in California, South Carolina, Tennessee, Georgia, West Virginia, Oklahoma, Missouri, and Indiana are stepping up and stopping the enforcement of various federal acts within the borders of their states.

The "trend," the author writes, is "spreading." It would need to, to match the spread of the federal kraken's tentacles into every aspect of life and into every fundamental liberty guaranteed by the Constitution.

Specifically mentioned in the *Wall Street Journal* piece are federal attempts to regulate firearm possession, to build National Security Agency (NSA) listening posts in several states, and to force Americans regardless of ability or desire to purchase an approved health insurance plan.

Regarding this last overreach, the *Wall Street Journal* reports, "Conservative lawmakers in at least seven states have proposed laws that would prohibit state agencies and officials from helping the federal government implement the federal healthcare law and would authorize the state's attorney general to sue violators."

At *The New American*, we will continue to publish and praise every attempt by state lawmakers to check federal usurpation and to nullify every one of its unconstitutional acts, every time.

In "clarification" of its article on nullification, the *Wall Street Journal* notes:

> An earlier version of this post stated that such state laws seem to implicate the U.S. constitution's Supremacy Clause, which says that federal law trumps state law when the two conflict. Rather, such laws might be allowed under Supreme Court rulings that, with some exceptions, prevent Congress from compelling state officials to execute federal law.

That update corrected half of the mistake, but revealed another error.

First, let's 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 not the supreme law of the land, it is not the law at all.

If only every journalist, every talk show host, and every state legislator could understand this simple fact: 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 "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.

The Founding Fathers understood this. For example, speaking at the convention considering ratification of the new Constitution in New York, part-time Constitutional Convention attendee Alexander Hamilton said:

> I maintain that the word supreme imports no more than this — that the Constitution, and laws made in pursuance thereof, cannot be controlled or defeated by any other law. The acts of the United States, therefore, will be absolutely obligatory as to all the proper objects and powers of the general government…but the laws of Congress are restricted to a certain sphere, and when they depart from this sphere, they are no longer supreme or binding.

He put a finer point on the subject in *The Federalist, No.* 33:

> 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.

Other founders, speaking in other state ratification conventions, expressed the same understanding of the "supremacy" of federal law.

At the Pennsylvania convention, signer of the Declaration of Independence Thomas McKean said:

> The meaning [of the Supremacy Clause] which appears to be plain and well expressed is simply this, that Congress have the power of making laws upon any subject over which the proposed plan gives them a jurisdiction, and that those laws, thus made in pursuance of the Constitution, shall be binding upon the states.

Down in North Carolina, Federalist leader and famed jurist James Iredell echoed the theme:

> When Congress passes a law consistent with the Constitution, it is to be binding on the people. If Congress, under pretense of executing one power, should, in fact, usurp another, they will violate the Constitution.

Couldn't be much clearer than that.

Next, to his credit, the author of the *Wall Street Journal* article mentions that a Supreme Court ruling "might" "prevent Congress from compelling state officials to execute federal law."

Although he doesn't identify it, the tactic referred to by the author is a well-established principle of federalism called 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).

Former Arizona Sheriff Richard Mack was one of the named plaintiffs in the latter landmark case, and on the website of his organization, the Constitutional Sheriffs and Peace Officers Association, he recounts the basic facts of the case:

> The Mack/Printz case was the case that set Sheriff Mack on a path of nationwide renown as he and Sheriff Printz sued the Clinton administration over unconstitutional gun control measures, were eventually joined by other sheriffs for a total of seven, went all the way to the Supreme Court and won.
>
> There is much more "ammo" in this historic and liberty-saving Supreme Court ruling. We have been trying to get state and local officials from all over the country to read and study this most amazing ruling for almost two decades. Please get a copy of it today and pass it around to your legislators, county commissioners, city councils, state reps, even governors!
>
> The Mack/Printz ruling makes it clear that the states do not have to accept orders from the feds!

Writing for the majority, 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."

When the federal government assumes powers not explicitly granted to it in the Constitution, it puts the states on the road toward obliteration and citizens on the road to enslavement.

Although it is encouraging to read about its growth in the pages of the mainstream press, the need for nullification to continue spreading is great. The government in Washington, D.C. is out of control and it is time for every citizen to demand that every state legislator perform his constitutionally imposed duty to protect the Constitution.

The best way to do this is to reverence our founding document by educating ourselves as to the legitimate relationship between the states and the feds and then insist that the limits on power established in the Constitution are respected and enforced.

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