One State Makes a Plan for Nullification

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- What is the proper response to government actions that violate the Constitution of the United States?
- Do the states have the legal authority to reign in their creation in Washington, D.C.?
- If the legislation currently submitted in Tennessee were to be replicated in the rest of the union, what would America look like?

I talk quite a bit about the limitations of the federal government and the need for the states to reassert their power to control their creation. Consider the number of federal agencies that do not legally exist, the fact that the supreme court does not issue rulings but offers opinions, and don't forget about the fact that the states created the federal government, not the other way around. All point to a dangerous and illegal centralization of power in the federal government. So you can probably imagine my elation to find legislation proposed in my adopted home state that codifies them doing exactly what I said all of the states need to do: Regain control of their creation in Washington, D.C. So let's take a look at this legislation, see what lessons we can learn from it, and maybe push representatives in other states to join in this march toward liberty.

I've read several pieces of legislation, but this one struck me for a few different reasons. First, the list of findings in

section 3 is a master class in the constitutional republic that is America and the role and duty of the states in such a union. Then section 5 lists the standards by which federal actions will be judged, while section 8 lists the process for challenging those actions and shows a good understanding of our history and the seriousness of any such challenge.

While there are two bills, one in the House and the other in the Senate, as of this writing both bills are identical. For this article, I will use the House version of the bill as my reference. Let's start with the findings of the General Assembly of Tennessee.

Findings of the General Assembly of Tennessee

By far the largest section of this legislation is section 2, listing the findings of the General Assembly. Since the nullifying of a federal action is a big deal, it makes sense the justification for doing so should be large as well. This section starts with the Tennessee Constitution.

(1) Article I, Section 1 of the Constitution of Tennessee (All power is inherent in the people) declares: "That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness; for the advancement of those ends they have at all times, an unalienable and indefeasible right to alter, reform, or abolish the government in such manner as they may think proper.";

Tennessee House Bill 726

The Tennessee Constitution starts right where it should, noting that power doesn't come from government but from the people. We create governments, we give them their authority, and they are there to secure our peace and happiness.

(2) Article I, Section 2 of the Constitution of Tennessee (Doctrine of nonresistance condemned) declares: "That

government being instituted for the common benefit, the doctrine of nonresistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind.";

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After pointing out that all power comes from the people, section 2 of the Tennessee Constitution points out that not resisting arbitrary power and oppression is absurd. This is important, since the entire purpose of this legislation is to resist arbitrary power exercised by the federal government.

Next HB 726 takes a look at the Constitution of the United States.

(3) When "We the People" ordained and established the Constitution of the United States of America, the people and the states granted only specific, limited powers to the federal government, with those areas of federal powers being enumerated in Article I, Section 8 of the Constitution of the United States;

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It had appeared that the concept of the federal government having limited and enumerated powers was dead. Today, however, we have several states standing up and reviving that doctrine, and Tennessee is poised to jump onto that track. They start their argument with what has become a unique look at the separation of powers doctrine.

(4) Articles I, Il, and Ill of the Constitution of the United States, respectively, vest the legislative, executive, and judicial powers to and within separate branches of the federal government (horizontal separation of powers), such that lawmaking powers are vested only in the legislative branch of the United States congress, that enforcement powers are vested only in the executive branch (president and executive

agencies), and that judicial powers are vested only in the judicial branch (supreme court of the United States and other inferior federal courts created by the United States congress);

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Why is this horizontal separation of powers so important?

(5) This horizontal separation of powers in the Constitution of the United States reflects the understanding that our federal founding fathers had derived from both scripture and experience that sinful man could not be trusted to always be virtuous and public-minded, and as such, they did not want undue power to be combined in any branch of government where, if left unchecked, it could become tyrannical;

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The Framers of the Constitution understood how dangerous the concentration of power is. Or, as Lord Acton is often quoted:

Power tends to corrupt and absolute power corrupts absolutely.

Lord Acton

As we so often point out here at The Constitution Study, there's much that Congress does that's not authorized by the Constitution.

(6) Nothing in the Constitution of the United States permits congress to delegate or confer any lawmaking power to any other branch of government, because it has no enumerated powers to create lawmakers. When the president and federal courts are vested, respectively, with the executive and judicial powers, neither of those branches are granted general powers of lawmaking. Therefore, no person, agency, or department of any other branch of the federal government, not even the supreme court or the president of the United States, has any lawmaking power under the Constitution of the United

States;

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This bill takes its first jab at the federal government by pointing out the violations of the horizontal separation of powers. Article I, Section 1, Clause 1 of the Constitution of the United States says that all legislative (lawmaking) power is delegated to Congress. The President cannot make law via executive orders, and contrary to popular belief, neither can the federal courts, not even the Supreme Court, and Congress has no authority to delegate its lawmaking power to others. While that should be plenty to nullify Congress' attempts to shirk their responsibility, placing lawmaking power in the hands of unelected bureaucrats is the kind of taxation without representation that our Founding Fathers listed as a reason to declare independence.

If sub-section 6 puts the proverbial knife into the federal government's violation of the separation of powers, sub-section 7 gives it a good twist.

(7) In Article I, Section 7, paragraph 2 of the Constitution of the United States, the text describes how federal laws are to be made. Bills must be passed by both houses of congress and then approved by the president (or by a presidential veto by congress). This is the only method of lawmaking under the Constitution of the United States. Thus, contrary to popular opinion, federal executive orders, federal agency rules and regulations, and federal court opinions are not laws at all, and they are certainly not settled law or the supreme law of the land. Instead, any action by the executive branch or the judicial branch that purports to be law, or that purports to be treated as law, is a usurpation of powers not delegated to it;

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This sub-section is music to my ears. Not only does this

legislation point out that only Congress can make laws, but it goes so far as to emphasize that federal executive orders, agency rules, and court opinions ARE NOT LAW! In fact when the executive or judicial branch claims their actions are law, they are usurping the powers the people have placed in Congress. Sub-sections 8 & 9 expound on this error.

(8) It is not uncommon for congress and the federal executive branch to erroneously elevate federal court opinions to the status of "law," sometimes even regarding court opinions as having amended the language of the Constitution of the United States;

(9) It is not uncommon for congress and the federal courts to erroneously elevate federal executive orders to the status of "law," sometimes even regarding executive orders as having amended the language of the Constitution of the United States;

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If two wrongs don't make a right, then two violations of the Constitution cannot be just. Even though the three branches of the federal government may treat as law court opinions and executive orders, that does not make them so.

The idea of separation of powers is not just a federal idea, but part of the Constitution of the State of Tennessee as well.

(10) The principle of "separation of powers" is so innately representative of a republican form of government that the Constitution of Tennessee (Article Il, Sections 1 and 2) upholds and reinforces this principle of horizontal "separation of powers" within the three departments of our Tennessee state government;

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Now that we've gone through the horizontal separation of

powers, is there a vertical?

(11) When creating a federal government by ratifying the Constitution of the United States, the people and the states also designed a second, and more important, "separation of powers," that being a vertical separation of powers between the superior sovereign states and the inferior federal government;

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This is another sub-section that raises my spirits. To read a state legislature recognizes that it is superior to the federal government is something I wasn't sure would happen in my lifetime, yet here it is. Can the Tennessee General Assembly prove this point?

(12) A vertical "separation of powers" was explicitly set out in Article I, Section 8 of the Constitution of the United States, wherein only limited, enumerated, lawmaking powers were granted to the federal government;

(13) This vertical "separation of powers" was also incorporated into the United States bill of rights, whereby (a) in the first amendment, congress was specifically denied lawmaking power within those fields listed in the first amendment; (b) in the ninth amendment, the federal government was specifically prohibited from interfering with rights not mentioned in the Constitution of the United States; and (c) in the tenth amendment, the federal government was specifically denied powers not delegated to it in the Constitution of the United States;

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I'm not sure that sub-section 12 is entirely correct. While Article I, Section 8 of the Constitution enumerates powers for Congress and the First Amendment places limits on that power, I don't see how it sets out a vertical separation. Sub-section

13 item (c) on the other hand, does point out the separation of powers the Federalists claimed during the ratification debates.

Now the General Assembly of the State of Tennessee looks at judicial evidence to support their claim to "nullify" certain federal actions.

(15) Any federal action that violates the horizontal "separation of powers" imposed by the Constitution of the United States, or that exceeds the jurisdictional limits imposed by the vertical "separation of powers," is therefore void, since the Constitution of the United States is the supreme law of the land;

(16) "[A] law repugnant to the Constitution is void." An act of congress repugnant to the Constitution of the United States cannot become a law. The Constitution supersedes all other laws and the individual's rights shall be liberally enforced in favor of him, the clearly intended and expressly designated beneficiary. Marbury v. Madison, 5 U.S. 137 (1803);

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I've pointed out for years that unconstitutional laws are void, but it is nice to see a state legislature do so as well. After all of the times people have misquoted Marbury v. Madison, it's nice to see it properly used here as well. There's more though.

(17) "An unconstitutional law is void and is as no law. An offense created by it is not crime. A conviction under it is not merely erroneous but is illegal and void and cannot be used as a legal cause of imprisonment." Ex parte Siebold, 100 U.S. 371 (1879);

(18) "An unconstitutional act is not law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as

inoperative as though it had never been passed." Norton v. Shelby County, 118 U.S. 425 (1886);

(19) "Where rights secured by the Constitution are involved, there can be no rule-making or legislation which would abrogate them." Miranda v. Arizona, 384 U.S. 436 (1966);

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If an unconstitutional law is void, how can someone be convicted of violating it? If that act is not law, how can it create an office, or an agency, for that matter? This basic understanding of the supremacy of the Constitution of the United States is foundational to understanding the proper role of nullification.

(20) As Thomas Jefferson explained in the Kentucky Resolution of 1798: "When- so-ever the [Federal] government assumes undelegated power, its acts are unauthoritative, void and of no force." He added, "Where powers are assumed which have not been delegated, a nullification of the act is the remedy. That every state has a natural right and duty in cases not within [the authority of the Constitution]… to nullify of their own authority all assumptions of powers by others within their own states boundaries." The Constitution of the United States binds federal lawmakers by oath to support the Constitution, and when they fail to do so, the rightful remedy is for states to nullify their usurpations and to declare their acts void;

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The Tennessee General Assembly even points back to Thomas Jefferson's Kentucky Resolution to show that unconstitutional federal actions are void. The legislation has more findings, but to avoid beating a dead horse, I want to move on to what standard the state would use to evaluate federal actions.

Evaluating A Federal Action

How the state would determine if a federal action is unconstitutional is one of the three pillars upon which any nullification legislation must stand.

When evaluating a federal action, the general assembly shall consider the plain reading and reasoning of the text of the United States Constitution and the understood definitions at the time of the framing and construction of the Constitution by the framers before making a final declaration of constitutionality, as demonstrated by:

- *(1) The ratifying debates in the several states;*
- *(2) The understanding of the leading participants at the constitutional convention;*
- *(3) The understanding of the doctrine in question by the constitutions of the several states in existence at the time the United States Constitution was adopted;*
- *(4) The understanding of the United States Constitution by the first United States congress;*
- *(5) The opinions of the first chief justice of the United States supreme court;*
- *(6) The background understanding of the doctrine in question under the English*
- *Constitution of the time; and*
- *(7) The statements of support for natural law and natural rights by the framers and the philosophers admired by the framers.*

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Look at the list of standards the state would use to evaluate a federal action: The ratifying debates, the constitutional convention, the first Congress, etc. Not a bad set of standards.

SECTION 6. It is declared that federal laws, federal executive actions, and federal court opinions must comply with the jurisdictional limitations of the United States Constitution.

It is further declared that any federal action outside the enumerated powers set forth in the United States Constitution are in violation of the peace and safety of the people of this state, and therefore, said acts are declared void and must be resisted.

SECTION 7. The proper manner of resistance is a state action of nullification of the federal action.

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If the proper manner of resisting unconstitutional actions is nullification, how would that work in Tennessee if this becomes law?

Nullification

This legislation establishes several methods by which an unconstitutional action could be nullified.

(1) The governor may, by the governor's own executive authority, issue an executive order nullifying the same, whereby all executive departments of the state are bound by said order;

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First, the governor can issue an executive order nullifying a federal action, but that would only effect the executive branch of the state.

(2) Any member of the general assembly may introduce a bill of nullification in the general assembly. For any such proposed bill of nullification, the bill is not subject to debate or passage in committees, and proceeds directly to the floor of each house, where said bill shall, within five (5) legislative days, be scheduled for debate on the floor of each house, and thereafter, within three (3) legislative days after the debate is closed, shall be presented for a roll call vote on each floor. The bill, if passed in the same manner as other general

law, has the force and effect of law, and becomes effective immediately upon enactment. The time constraints listed in this subdivision (2) may be changed by majority vote of any house of subsequent general assemblies;

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A member of the General Assembly can introduce a nullification bill. This legislation would be fast-tracked through the process since it would by-pass the committee process and go directly to the floor. Also, limiting the time before the bill can be debated and how long after the debate a vote must be held, means that someone cannot use the process to delay the voting on the bill.

(3) Any court operating under the authority of the Constitution of Tennessee may render a finding or a holding of nullification in any case of which it otherwise has proper venue and jurisdiction, wherein the parties to said case will, upon final judgment, be bound thereby in the same manner as in other cases;

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Even the state courts could nullify an unconstitutional federal action. That means that all three branches would have the authority to nullify a federal action within their horizontal separation of powers, but that's not all.

(4) Any combination of ten (10) counties and municipalities may, through the action of the executive or through the action of a majority of the governing legislative body, submit a petition of nullification to the speaker of the house of representatives, with a copy to the office of the attorney general and reporter, and upon satisfactory proof that said petitions are valid, the speaker of the house of representatives shall proceed to introduce the bill and follow the same methods and protocols as described in subdivision (2);

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What if no one in the General Assembly introduces a nullification bill? Then what happens? A group of counties and municipalities can petition the General Assembly, and if enough valid petitions are made, the General Assembly now has a nullification bill they must treat like any other. Still, this legislation isn't done yet. Since HB 726 states that all power is inherent in the people, they get a chance to bring a nullification bill to the General Assembly as well.

(5) The signed petitions of two thousand (2,000) registered voters of this state may submit a petition of nullification to the speaker of the house of representatives, with a copy to the office of the attorney general and reporter, and upon satisfactory proof that said signatures are valid, the speaker of the house of representatives shall proceed to introduce the bill and follow the same methods and protocols as described in subdivision (2). Said voter petitions must not be submitted individually, but said petitions must be coordinated and compiled in batches, by county of voter registration, of not less than twenty-five (25) voters per county in a bundled batch.

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In other words, all components of the state have the power to call for nullification of unconstitutional federal actions.

Conclusion

I know this was a pretty long article, but there is so much good in this relatively short piece of legislation, I couldn't help but bring you the details. Of all the legislation I've reviewed here at The Constitution Study, this has to be one of the best. Yes, there are one or two small things that I'm not sure of, and I would like to see some punishment for state employees to enforce a federal action that was nullified by the state, but overall, this is a very nice piece of

legislation. Who knows, if the other 49 states use this legislation as an example, we could see a return to the land of the free and the home of the brave in our lifetimes.

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