Written by **Joe Wolverton, II, J.D.** on November 18, 2018

Acting AG Whitaker: States Can Nullify Unconstitutional Federal Acts

Media elites have gone into full-throated freak-out over the fact that acting Attorney General Matthew Whitaker (shown) supports the right of states to refuse to enact unconstitutional acts of the general government.

Known as nullification, this principle recognizes the retention by the states of all aspects of sovereign authority not granted by them to the federal government in the Constitution. The Constitution is the document wherein the states set out the metes and bounds of the national government's "few and defined" powers. Beyond those constitutional boundaries, the national government was powerless, leaving the states with their undelegated "numerous and indefinite" powers intact.

In a speech delivered in 2013, Whitaker said of nullification:

> As a principle, it has been turned down by the courts and our federal government has not recognized it. Now we need to remember that the states set up the federal government and not vice versa. And so the question is, do we have the political courage in the state of Iowa or some other state to nullify Obamacare and pay the consequences for that?

"The federal government's done a very good job about tying goodies to our compliance with federal programs, whether it's the Department of Education, whether it's Obamacare with its generous Medicare and Medicaid dollars and the like. But do I believe in nullification? I think our founding fathers believed in nullification. There's no doubt about that," he added.

Ignoring the ignorance of CNN, *USA Today*, and other self-professed "news" outlets, let's analyze AG Whitaker's claims regarding the Constitution.

First, Whitaker asserted that the states "set up the federal government." There is no logical way to dispute that historical fact.

When the Articles of Confederation (our first constitution) came under criticism from influential statesmen, Congress was compelled to invite delegates to a convention to be held in Philadelphia "for the sole and express purpose of revising the Articles of Confederation."

Congress' invitation was sent not to the people, but to the state governments. The state legislatures were invited to send a delegation to help repair rips in the constitutional fabric. This historical fact is irrefutable evidence that a functioning agreement for a government of the United State was the goal. That government, if it was to exist at all, would be the creation of the states that participated in the

formation of it.

Additional evidence of the claim that the states were the only interested parties in the compact of the Constitution is found in the way votes were taken and recorded at the convention in Philadelphia. Representatives voted as states, not as individuals. In fact, the journal where those votes were recorded catalogs the yeas and nays according to the name of state, not the name of the delegate.

Another clue to the identity of the parties to the Constitution, is found in Articles V and VII of the document itself.

Article V requires that amendments be "ratified by the legislatures of three-fourths of the states or by conventions in three-fourths thereof." Not only was the Constitution a binding contract among the states, but any alterations of the provisions of that contract had to be signed off by a super majority of the parties.

Next, the prose and purpose of Article VII makes the issue so clear as to permit no reasonable alternative interpretation. In this brief statement the role of the states as the *sine qua non* of the Constitution is established. Article VII reads, "The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same."

Plainly and purposefully the framers of the Constitution recognized that the document they signed in September 1787 was an agreement among the states represented. Every article was written by the states, voted on by the states, accepted or rejected by the states, ultimately approved by the states, and it would only become binding upon states who ratified it.

Why were the people not polled or asked to vote up or down on the Constitution? Because this was neither a popular nor a national compact; it was a compact creating a confederation of sovereign states.

As constitutional attorney Kent Masterson Brown explains, "The idea that the constitution that they [the framers] had drafted and ratified was entered into 'by the people,' as opposed to the states, and was irrevocable once ratified was absolutely unknown to the framers and ratifiers."

I would add that had these men been convinced that such an arrangement was advocated or even so much as contemplated by those pushing for acceptance of the Constitution, it never would have been ratified by the requisite number of states, and the embryonic American republic would have been stillborn in Philadelphia.

If nullification is to be successfully deployed and defended, states lawmakers must remember that the Constitution is a creature of the states and that the federal government was given very few and very limited powers over objects of national importance. Any act of Congress, the courts, or the president that exceeds that small scope is null, void, and of no legal effect.

Not once during the deliberations at the Constitutional Convention was there a proposal that their work be presented for approval to the body of the populace acting as individuals. From the beginning of the process that culminated on September 17, 1787 with the signing of the Constitution, it was understood that the ratification by at least nine states was the *sine qua non* of the start of the new government.

Still, the establishment and their media mouthpieces obstinately deny one irrefutable fact: The Constitution never would have gone into legal effect and the federal government never would have been created if state conventions had not met and ratified the document.

In fact, the first congress would never have considered a single bill if their authority was recognized by a supermajority of Americans, but rejected by the state ratifying conventions. Not even the most

zealous supporter of the Constitution would have assumed the new government would have been authorized to act by an affirmative popular vote.

On to Whitaker's second assertion: that states may constitutionally refuse to enact all all acts of the federal government that exceed its delegated authority. This claim is equally as easy to prove from a cursory perusal of the historical record.

If an act of Congress is not permissible under any enumerated power, it is 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.

Alexander Hamilton put a fine point on the matter in *The Federalist*, No. 33:

> 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.

Acts not authorized under the enumerated powers of the Constitution are "merely acts of usurpations" and deserve to be nullified by states.

Thomas Jefferson summed up the relationship very succinctly in the Kentucky Resolutions:

> That the several states who formed that instrument, being sovereign and independent, have the unquestionable right to judge of its infraction; and that a nullification, by those sovereignties, of all unauthorized acts done under colour [sic] of that instrument, is the rightful remedy.

James Madison did likewise in his companion bill that would be offered in the Virginia state legislature, known as the Virginia Resolution:

> That this Assembly doth explicitly and peremptorily declare, that it views the powers of the federal government, as resulting from the compact to which the states are parties; as limited by the plain sense and intention of the instrument constituting that compact; as no farther valid than they are authorised by the grants enumerated in that compact, and that 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.

Finally, Whitaker said in his 2013 speech that "there was no doubt" that "the Founders believed in nullification."

Despite the anti-states' rights agitprop broadcast by the Establishment media, unbiased investigators into the historical record will find one after the other statement by the varsity squad of Founding Fathers promoting the power of state governments to force the federal beast back inside its constitutional cage.

In addition to the several statements of Jefferson, Madison, and Hamilton, included above, I'll add the voice of Patrick Henry to the chorus of Founding Fathers who understood the proper relationship of the states and the federal government.

During the Virginia ratifying convention, Patrick Henry spoke of a time when Congress and the courts would collude to rob states of sovereignty and citizens of liberty. Said Henry:

> If there be a real check intended to be left on Congress, it must be left in the state governments.

> There will be some check, as long as the judges are incorrupt. As long as they are upright, you may preserve your liberty. But what will the judges determine when the state and federal authority come to be contrasted? Will your liberty then be secure, when the congressional laws are declared paramount to the laws of your state, and the judges are sworn to support them?

To constitutionalists, it is encouraging that acting Attorney General Michael Whitaker recognizes that the creature has grown so large that it threatens to consume the creator. If it isn't brought to heel soon, this beast will devour all within its grasp, leaving nothing behind but the bleached bones of our once valued liberty.

If we are to remain united and free, all future and former unconstitutional acts of Congress can (and must!) be nullified by state legislators and governors. The power to negate any act of the federal government that exceeds the constitutional scope of its power, though dormant, is yet possessed by the states.

Photo of acting Attorney General Matthew Whitaker: AP Images