Written by **William F. Jasper** on January 31, 2011

Idaho ObamaCare Nullification Bill Is Constitutional

It was originally scheduled for introduction on January 26, but several factors, including being "blind sided" by the Idaho Attorney General, a Republican, have caused a delay.

In a letter dated January 21, Brian Kane, Assistant Chief Deputy to Idaho Attorney General Lawrence G. Wasden, a Republican, opposed the effort, writing that state attempts to nullify laws passed by Congress are acts of defiance that violate "the United States Constitution as the supreme law of the land." A boldfaced subhead in Assistant Chief Deputy Kane's 4-page letter reads**:**

> **Nullification As Defiance Of Federal Law Or Enactment Is Inconsistent With A State Officer's Duty To Act In Conformity With The Federal And State Constitutions.**

The Kane letter concludes:

> There is no right to pick and choose which federal laws a State will follow. Aside from ignoring the Supremacy Clause in Article VI, Clause 2 of the United States Constitution, that contention cannot be reconciled with Article I, § 3 of the Idaho Constitution or the oath o f office prescribed in Article III, § 25.

On January 26, John Miller, Boise reporter for the Associated Press, quoted the Kane letter in a story that was crafted, beginning with the title ("GOP invokes 1700s doctrine in health care fight"), to present the nullification effort in a negative light,

The Miller/AP article opens with these lines:

> Republican lawmakers in nearly a dozen states are reaching into the dusty annals of American history to fight President Obama's health care overhaul.

They are introducing measures that hinge on "nullification," Thomas Jefferson's late 18th-century doctrine that purported to give states the ultimate say in constitutional matters.

GOP lawmakers introduced such a measure Wednesday in the Idaho House, and Alabama, Kansas, Maine, Missouri, Montana, Oregon, Nebraska, Texas and Wyoming are also talking about the idea.

"The efforts are completely unconstitutional in the eyes of most legal scholars because the U.S. Constitution deems federal laws 'the supreme law of the land,'" writes Miller, before continuing with a quote from the aforementioned Brian Kane letter:

> The Idaho attorney general has weighed in as well, branding nullification unconstitutional. "There is no right to pick and choose which federal laws a state will follow," wrote Assistant Chief Deputy Attorney General Brian Kane.

The Miller/AP article was run in Boise's *Idaho Statesman* and many of Idaho's daily newspapers (the *Lewiston Tribune* gave it the top, front-page spot) as well as hundreds of newspapers nationwide, including the *Washington Post*, the *Los Angeles Times*, and *San Francisco Chronicle*. National Public

Radio and major news web sites such as Yahoo, Google, Bloomberg, and NBC also gave it prominent display.

No "Rubber Stamp" Mandate for States in the U.S. Constitution

The sponsors of H.B. 59 responded to the uproar caused by the Attorney General's office and the media with an op-ed in the *Idaho Reporter* entitled "State within its rights to block unconstitutional Obamacare."

The op-ed, signed by Reps. Barbieri and Boyle, and Sens. Pearce, Vick and Nuxoll, declares:

> Too many people are under the mistaken impression that the state government must in every case be a mere rubber stamp of the federal government. We see this year after year and time and time again. Congress passes a law and it is the state governments' responsibility to implement it with the following result: expensive governmental bureaucracies, new entitlements, and almost naturally, restricted personal freedoms….

"Under our bill," say the legislators, "state agencies and state employees would be forbidden from expending state resources to assist the federal government with the creation of their federal healthcare scheme. Under our bill, the state would be forbidden from accepting or expending federal grants designed to support the federal government's expansion into the healthcare arena."

The sponsors of H.B. 59 continue:

> This concept, known as nullification, is not new. It is merely choosing to opt out of a federal requirement. In 1798, the states of Virginia and Kentucky passed resolutions rejecting the federal government's attempt to make it illegal for Americans to criticize their own government. The states viewed it necessary — even their duty — to interpose themselves between its citizens and a government that was bound and determined to fine and jail people who exercised their first amendment rights against their elected officials. Those state resolutions were penned by Thomas Jefferson and James Madison, people who presumably knew a thing or two about the U.S. Constitution.

"The state of Idaho participated in a very successful nullification effort just a few years ago," the sponsors note, referring to Idaho's 2008 rejection of the federal government's REAL ID act. The state Legislature said at that time that the REAL ID mandate "appears to be an attempt to 'commandeer' the political machinery of the states and to require them to be agents of the federal government." The vote was unanimous. And Idaho wasn't alone in that effort, they note:

> Twenty-two other states moved to block Real ID, and today, we don't carry around a national ID card.

We have a chance to do the same with federal health care. The Idaho Legislature must act, here and now, boldly and decisively. If we don't, forget it. The legislature might just as well buy rubber stamps!

Concerning Federal "supremacy" and the Constitution

It is not surprising that Attorney General Wasden's office expressed opposition to H.R. 59; it seems to look negatively on most state efforts to hold the federal government in check. Brian Kane's letter cited above gives the impression that the Attorney General supports nullification efforts "where a State acts within the system, whether through a court challenge, or through concentrated series of efforts designed to repeal or amend offending legislative provisions."

However, last year when the Legislature overwhelmingly passed the Idaho Health Freedom Act, an

effort that would appear to fit the Attorney General's definition of acceptable nullification efforts cited above, Wasden's office questioned the constitutionality of that measure too. The Idaho Health Freedom Act directs the attorney general's office to sue the federal government over an Obamacare provision that requires citizens to purchase health insurance or pay a penalty. Idaho joined its suit to that of thirteen other states that passed similar legislation. Additional states are pursuing their own separate suits and/or have joined multi-state suits. All told, 27 states — more than half the states in the union — are engaged in suits challenging the federal health care legislation.

Attorney General Wasden's office also delivered negative opinions against other state bills challenging federal actions believed to exceed authority delegated to the national government under the Constitution. One of them is the Firearms Freedom Act (FFA), which was passed by the Legislature and signed by Governor C.L. "Butch" Otter last year. Seven other states (Montana, Alaska, Wyoming, Arizona, Utah, South Dakota, and Tennessee) have passed similar legislation. Legislators in more than 20 additional states have introduced FFA bills or are intending to do so. The FFA laws declare that firearms, ammunition and firearm accessories made and retained inside the state are not subject to any federal authority under the Commerce Clause, since they are not involved in interstate commerce.

Are efforts such as the Firearms Freedom Act and the Health Freedom Act illicit attempts to evade the U.S. Constitution's "supremacy clause"? Attorney General Wasden seems to think so. And, according to AP's Miller "most legal scholars" do also, though he offers no proof of this assertion. According to Miller, this antipathy of jurists toward nullification is "because the U.S. Constitution deems federal laws 'the supreme law of the land.'"

But what does our Constitution actually say on the matter, and what did the Founders who crafted the Constitution say about this? The so-called supremacy clause can be found, as Mr. Kane correctly noted, in Article VI, Clause 2. It says:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof … shall be the supreme Law of the Land.

Does this mean that any and every law passed by Congress and signed by the President (or without the President's signature, if approved by a two-thirds supermajority in both houses) automatically becomes the "supreme law of the land," no matter even if it blatantly and openly violates expressed provisions of the Constitution itself?

Incredibly, many judges, Members of Congress, and "legal scholars" do indeed hold to such a view of federal absolutism. That is precisely the arrogant position taken by Rep. Fortney "Pete" Stark (D-Calif.) at a town hall meeting with angry constituents last year.

Responding to a woman who was upset about Obamacare and demanding to know where Congress found constitutional authority to take over health care, Rep. Stark casually replied that the rulers in Washington "can do most anything in this country."

"I think that there are very few constitutional limits that would prevent the federal government from [making] rules that could affect your private life," Rep. Stark matter-of-factly told the packed hall.

The woman, incredulous, retorted with several oppressive, intrusive details of the health care law, and asked asked: "If they can do this, what can't they do?"

"The federal government, yes, can do most anything in this country…." Rep. Stark replied nonchalantly, before being drowned out by howls of outrage and hoots of disbelief from the crowd, in response to his

public endorsement of federal absolutism.

The exchange can be seen in the video below:

Are there truly "very few constitutional limits" on the federal government, so that it "can do most anything"? Political figures such as Pete Stark and Brian Kane and reporters like John Miller insist that is the case, and they have no difficulty finding "legal scholars" today who will support that contention. Since the inauguration of the modern administrative state under Franklin Roosevelt's New Deal in the 1930s, statist politicians have enjoyed a plentiful supply of enthusiasts in the federal courts and academia cheering on the push for unlimited federal power.

But they cannot rightfully claim to be champions of the Constitution; the men of the founding era who crafted that document would disavow any relation to them and their subversive doctrines.

James Madison, commonly referred to as the father of the Constitution, famously writes, in The Federalist Papers, No. 45:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce …. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State. (Emphasis added).

Again: the federal government's powers are "few and defined." *Few and defined.* Moreover, Madison reminds us, they are "delegated" powers, a fact all too frequently ignored, though pregnant with great import. A superior delegates to an inferior. In this case the States and the people (the superiors) delegate certain "few and defined" powers to their creation (the federal government). And the States and the people "reserved" all other powers to themselves.

It is in this context that the "supremacy clause" must be read. Again, it states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof … shall be the supreme Law of the Land." When Congress passes a law which exceeds the authority delegated to it in the Constitution, that law clearly has not been "made in Pursuance thereof," and, therefore is not the "supreme Law of the Land." In fact, it is not a law at all and is, as we shall see, null and void.

Madison addresses this subject similarly in *Federalist* No. 14:

> In the first place it is to be remembered that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any. The subordinate governments, which can extend their care to all those other subjects which can be separately provided for, will retain their due authority and activity. (Emphasis added.)

Those "enumerated" delegated powers to which he refers are chiefly to be found in the seventeen clauses of Article 1, Section 8, which include the power to borrow money, establish Post Offices and Post Roads, coin money, fix the standard of weights and measures, declare war, raise armies, maintain a navy, and to establish laws concerning patents, copyrights and bankruptcies.

Alexander Hamilton, writing in *Federalist* No. 78, states:

> 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. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

Yes, that seems pretty clear, but apparently not to many who hold law degrees from some of our most prestigious law schools. "A constitution is, in fact," notes Hamilton, the "fundamental law" which trumps subsequent laws that run afoul of it. In case of a conflict between the two, Hamilton says, "the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents." That also appears to be an elementary concept that should be capable of grasp by even a first year law student.

Not only the authors of the Federalist Papers (Madison, Hamilton and Jay), but virtually all of our nation's founders, held to this view. And so strong was this belief among the people at large that they insisted upon a Bill of Rights, which concludes with the 10th amendment, recapitulating this all-important principle. It states:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

And what are the States to do, when the federal government exceeds its delegated powers, as it so frequently does, and tramples the reserved powers of the States and the people? It would seem, from the monitories of the Founders, that among the courses of action they approve are "interpositions" by State legislators, such as the nullification effort aimed at Obamacare.

Mr. Hamilton, writing in *Federalist* No. 26, places hope in "the State legislatures, who will always be not only vigilant but suspicious and jealous guardians of the rights of the citizens against encroachments from the federal government, will constantly have their attention awake to the conduct of the national rulers, and will be ready enough, if any thing improper appears, to sound the alarm to the people, and not only to be the VOICE, but, if necessary, the ARM of their discontent." (Emphasis in the original.)

Thomas Jefferson asserted that "the government created by this compact [the Constitution] was not made the exclusive or final judge of the extent of the powers delegated to itself." Moreover, he wrote, in his draft of the Kentucky Resolutions, that "Where powers are assumed which have not been delegated, a nullification of the act is the rightful remedy."

This is the Constitutional remedy that Idaho State legislators, such as Barbieri, Boyle, Pearce, Vick and Nuxoll are attempting to apply. It would seem evident that they are not frivolously attempting to block a law with which they merely personally disagree, but one that manifestly exceeds the delegated powers enumerated in the Constitution and clearly violates both the letter and the spirit of the 10th Amendment.

Assistant Chief Deputy Attorney General Kane's opinion to the contrary notwithstanding, the nullification proponents are in good constitutional company. Madison, Hamilton, and Jefferson may be considered by certain sophisticates to be irrelevant voices from the "dusty annals of American history," but most Americans will probably place greater trust in the opinions of these esteemed Founders than in the self-serving claims of current politicians, judges, journalists, and so-called "legal scholars."

Thumbnail photo at top: Idaho State Senator Monty Pearce

Related articles:

Nullify Now! Tour Heads to Phoenix

Nullifying Federal Nullification: Time for States to Stand Tall

6 New States Make 25 Joining Fla. Lawsuit Against ObamaCare

Virginia Judge Finds ObamaCare Individual Mandate Unconstitutional

Our Contemptible Congress