

Nullification is a serious option

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The revival of long-dormant proposals for state legislatures to adopt acts to nullify federal acts that exceed their constitutional authority has gotten the attention of some who try to discredit the proposals by mischaracterizing them. The critics seize on some of the rally rhetoric that necessarily simplifies and may seem to promise too much too soon and too easily, but serious proponents of this path of reform know that the passage of state legislation is only the first step in a long process of organized nonviolent civic disobedience that differs from past movements that have used such methods in that state government is involved in a leading role. It is state-led noncooperation.

In law "nullification" is not repeal or rescission of statutes or executive or judicial actions. It is the result of a sustained, widespread refusal to cooperate with them, until those attempting to enforce the actions are confronted with the unpalatable choice of either backing down or resorting to murderous brutality.

It is similar to what happens when a federal appeals court finds a congressional statute, or an executive action, or the decision of a lower court, to be unconstitutional. It has no power to order the statute struck from the Statutes at Large, or to order executive officials to stop enforcing it, or even to force lower courts from enforcing it. It's only power is to say that if a similar case comes before that court again, it will refuse to cooperate in enforcing the action. But that is likely to be sufficient, because ultimately federal executives need the support of federal courts to enable them to enforce congressional statutes.

State legislatures are in a somewhat weaker position, in that federal enforcers don't need to submit their cases to state bodies to get them enforced. In the early decades of this country federal officials did need the cooperation and support of state and local officials to carry out federal statutes, but they no longer do in the same way or to the same degree. That was why the Kentucky Resolutions of 1798 and 1799, authored by Thomas Jefferson, and the Virginia Resolutions of 1798, and the Virginia Report of 1800, authored by James Madison, represented such serious challenges to central government authority. Neither Jefferson nor Madison pretended such state resolutions had the legal effect of repeal or rescission, but they understood very well that sustained, widespread noncooperation with federal officials would render them impotent as a practical matter.

This is not a prelude to secession. No one is proposing the governor send the State Guard to surround Fort Hood and begin bombarding it. Now, of course, if federal agents engaged in another murderous assault on innocent Texans the way they did near Waco from February 28 through April 19, 1993, that could be another matter. We can hope that won't happen again.

Now admittedly it is not a good idea to try to adopt state legislation to nullify congressional legislation that hasn't been adopted yet, may never be, or may take an entirely different form by the time it is. A state legislature that only meets 140 days every two years is ill-prepared to respond in a timely manner to a flood of unconstitutional congressional legislation, or to executive or judicial actions that may be similarly unconstitutional. We need to establish an institution that can respond rapidly to a variety of usurpations, most of which may not be foreseeable.

I have proposed to legislators of this and several other states a measure that would address this problem, with the following components:

1. **Commission.** Establish a "Federal Action Review Commission" — a special commission with grand jury powers to meet continuously with rotating membership drawn from a pool of legal historians and constitutional scholars, appointed by the Governor, Attorney General, or Legislative Council; empowered to review the constitutionality of congressional legislation, or federal regulations or decisions, and if it finds such legislation, regulations, or decisions to be unconstitutional, to issue an edict, with the force of law, requiring that no state or local officials, employees, or contractors cooperate in the enforcement of it, and

urging state citizens to refuse to cooperate. This Commission would be established by an amendment to the Texas Constitution.

2. Structure and procedure. The Commission shall consist of 23 members, who shall serve for staggered terms of 4-8 months, drawn at random from a pool of at least 230 constitutional scholars and legal historians, who shall meet for at least one hour once a week, with a quorum of 16, and a vote of 12 required to issue an edict, based on a presumption of nonauthority of federal officials and agents and requiring strict proof of constitutionality from deductive logic and historical evidence. It shall be open to direct complaints of the unconstitutionality of federal actions from any citizen. It shall have the power to subpoena witnesses, and its deliberations shall be secret, except that it may disclose anything in its presentments. It may authorize criminal prosecution by issuing an indictment to any person, not necessarily a lawyer, upon a finding that the court cited has jurisdiction and that evidence of guilt is sufficient for trial.

3. Penalties. State and local officials, employees, and contractors shall be duly notified in writing of such edicts within ten days and shall have twenty days to comply or be subject to termination after one written warning and a second failure to refuse to cooperate with federal officials or agents.

4. Funding. Establish a state fund to pay for legal and financial support of state citizens and officials who refuse to cooperate with unconstitutional federal statutes, regulations, or decisions, with the intention to obtain judicial decisions that support the unconstitutionality of the federal actions.

“Official” nullification is already being used, and has a long history of use. For example, Congress passed the RealID Act mandating states issue state identification to federal standards, with centralized management of identification data that would allow nameless bureaucrats to decide who is an American citizen, and who may do business or make a living. Many states, urged by public resistance, have refused to comply or fund the federal act, which has become a dead letter.

An increasing number of states have adopted measures legalizing the sale, possession, and use of marijuana for medical purposes with a physician's prescription, and after threatening physicians with prosecution of the congressional statutes still on the books, the present administration has quietly said it will no longer seek to prosecute such use or the physicians who authorize it. Without actually declaring the federal statutes unconstitutional, this defiance has raised the consciousness of the public so that it is now difficult to empanel a jury in those states that will not contain some jurors who will hold out for acquittal.

Governor Perry engaged in an act of nullification by refusing federal funds for public education that would weaken Texas standards, the model for the entire country, especially in the critical subjects of American History and American Government. The State Board of Education currently has before it proposals to strengthen those subjects even further, which would be disabled by the federal program.

There has also been “unofficial” nullification, mostly by juries refusing to convict for offenses like violations of alcohol prohibition, or to return runaway slaves to their masters. Ultimately it would come down to juries, whose cooperation is critical in federal court cases. It can become nearly impossible to empanel a federal jury without including at least a few who, perhaps inspired by state leaders, refuse to go along with the opinion of the federal judge as to what is the law, and decide for themselves that the charge is unconstitutional and that their duty is to acquit.

Many who took an oath to defend the Constitution despair of getting relief for their complaints in Congress, the Executive Branch, or the federal courts. Perhaps, when state citizens refuse to cooperate, the central government will get the message.

NOTE: Jon Roland, a computer professional, is founder and president of the Constitution Society. He was the Libertarian Party nominee for attorney general in 2002 and 2006 and is seeking that nomination again this year.

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