

S.Ct. Can't rule outside enumerated authority

Sheriffs, States and the Supreme Court

Posted by Brian Roberts

A bad law can become a cancer. An unconstitutional federal law that goes unchecked is a cancer that has found it's way to the lymph nodes. It makes it infinitely tougher to treat. But you must treat it, or you will die.

As Sheriffs across the country reflect on how to address a future that may ask them to participate in firearm registration and confiscation schemes more are saying with clarity "not my department". To arrive at this position, I suspect they must have considered where their loyalties lie.

Are they loyal to their local communities, state constitutions and the U.S. Constitution as written, or do they find themselves compelled to uphold arbitrary federal laws that demand a top-down obedience to politician's whims? There is needed money in the form of grants for those towing the federal line to consider. They find themselves stuck between a moral rock and an economic hard place.

I believe some sheriffs have been inspired to stand on moral grounds by the ruling in the Supreme Court case *Printz v. U.S.* from 1997 that protected state officers from a federal law that attempted to mandate Brady bill participation. Scalia's summary states:

"We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case by case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty. Accordingly, the judgment of the Court of Appeals for the Ninth Circuit is reversed. It is so ordered."

In this ruling, sheriffs can find comfort in a federal opinion that supports their power to reject, at their discretion, the enforcement of a federal law and the legal cover it provides. While this ruling prohibits federal legislation from commandeering state officers, it is important to note that Sheriffs do not require permission from a federal court to say "no" to enforcing unconstitutional laws. In the same way states do not require federal permission to nullify unconstitutional laws.

In the above opinion, Scalia used the term "dual sovereignty", stating that "such commands are fundamentally incompatible with our constitutional system of dual sovereignty." Dual sovereignty is the sharing of power between our federal branch of government and the various

state branches.

As an elected state official, Sheriffs are required to uphold their duties outlined in their state constitution in accordance with the U.S. Constitution. Naturally, as federal legislation oversteps its Constitutional bounds a conflict is created that forces state officers into the unenviable position of choosing to enforce unconstitutional mandates disguised as law, or honor their oath.

Federal attempts at limiting firearm access to law-abiding citizens is an especially polarizing issues and provides clarity. When considering gun rights, the founders drafted the second amendment to place absolute restraint on the federal government's ability to legislate gun laws, saying "shall not be infringed". The bill of rights is a limit on federal authority. States have more leeway as exemplified by the the Texas constitution's position on gun regulation. Notice that this state constitution does allow for specific regulations, but through state law, not federal law (Texas State Constitution, Article I, Section 23):

"Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime."

Today, Sheriff's in most states can take a position of "no, thanks" to unconstitutional federal laws targeting guns without much legal controversy from federal or state proponents. Even the Supreme Court agrees that state officers cannot be compelled to enforce a federal act. In fact, the feds cannot make a state enforce even a truly constitutional act. State officers have the option of assisting the feds or not, in all cases. In other words, the federal government's position on saying "no" is in alignment with the sovereign state governments.

Of course this scenario with regards to saying "no" is ideal, as all parties agree. But what happens if federal gun laws are passed that violate the constitution in a "palpable and dangerous" way and the state officer becomes duty bound to interpose, as opposed to simply refusing to act? What happens when the Sheriff must take action to stop the unconstitutional act? Federal legislation requiring registration or confiscation of firearms might provide such a catalyst.

Such a situation would put sheriffs, and the people of this country in a awkward position. Law-abiding citizens, who realize the dangers of allowing central governments to possess a monopoly on gun ownership, could find themselves relabeled as criminals overnight simply for holding their property and demanding federal adherence to a Constitution that is crystal clear on the federal government's authority to affect gun ownership. The federal government and its courts have no authority to place state officers and citizens in such a precarious position.

There is a lawful solution to such a scenario to be found in state-level nullification. If the Sheriffs take the first step in saying "no, thanks", then states, through nullification, must provide the ability to say "no way" and "get out".

To tackle this we must first understand the supremacy clause, which states that the Constitution is the law of the land and federal law is supreme when the law is constitutional. This means that a federal law must fall within the tight confines of the enumerated powers of the Constitution, or it is null and void. This is a simple concept that is clearly stated as such in the Constitution; but many distort this and make the claim that any federal law, regardless of constitutionality, automatically becomes the law of the land. That's simply incorrect, the law must be constitutional.

In addition, the Constitution itself does not grant the judicial branch of the general government any authority to rule on the constitutionality of a federal law over the judgements of the sovereign states. The Constitution does not designate that a Supreme Court ruling saying "you will" is any more legitimate than a sovereign state saying "we will not" or "you will not enforce that here".

James Madison confirms:

"But it is objected, that the judicial authority is to be regarded as the sole expositor of the Constitution in the last resort; and it may be asked for what reason the declaration by the General Assembly, supposing it to be theoretically true, could be required at the present day, and in so solemn a manner.

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On this objection it might be observed, first, that there may be instances of usurped power, which the forms of the Constitution would never draw within the control of the judicial department; secondly, that, if the decision of the judiciary be raised above the authority of the sovereign parties to the Constitution, the decisions of the other departments, not carried by the forms of the Constitution before the judiciary, must be equally authoritative and final with the decisions of that department. But the proper answer to the objection is, that the resolution of the General Assembly relates to those great and extraordinary cases, in which all the forms of the Constitution may prove ineffectual against infractions dangerous to the essential rights of the parties to it. The resolution supposes that dangerous powers, not delegated, may not only be usurped and executed by the other departments, but that the judicial department, also, may exercise or sanction dangerous powers beyond the grant of the Constitution; and, consequently, that the ultimate right of the parties to the Constitution, to judge whether the compact has been dangerously violated, must extend to violations by one delegated authority as well as by another—by the judiciary as well as by the executive, or the legislature."

As a check on power at the federal level, the state's ratified a Constitution that included very specific, limited powers for the federal government. Clearly, the Supreme Court is authorized by the Constitution to rule on the application of laws that fall within the bounds of the enumerated powers, but that is a different matter than ruling on whether the laws themselves are constitutional.

Jefferson warned of a supreme court with such a power:

“...To consider the judges as the ultimate arbiters of all constitutional questions is a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy. Our judges are as honest as other men and not more so. They have with others the same passions for party, for power, and the privilege of their corps...and their power is more dangerous as they are in office for life and not responsible, as the other functionaries are, to the elective control. The Constitution has erected no such tribunal, knowing that to whatever hands confided, with the corruption of time and party, its members would become despots....”

When authority taken by the federal government falls outside of the enumerated powers, it makes no sense to ask the federal government to rule on whether the federal government has the power or not. Politicians continue to pass legislation counter to the bill-of-rights and then they run to the Supreme Court for validation, and conclude “see, its all good, or crazy infringements have been approved by those that we appointed, now turn ‘em over.” As historian Tom Woods points out, if the federal government is allowed to hold a monopoly on determining the extent of its own powers, we have no right to be surprised when it keeps discovering new ones.

Discovering the authority to register or confiscate firearms is the whisper in the halls. It is not within the parameters of the original design to allow the federal government to discover such inventions and claim authority. Our system is unique because the states are authorized as parallel sovereign governments and thus empowered to provide a strong check on federal malintent. When states and state officers disagree with the constitutionality of federal laws, then they are “duty bound to resist” according to Madison. They are required by conscious to nullify such laws and deny the enforcement in their state.

I’d suggest that the increasing number of Sheriffs that refuse to comply (225 and the time of this writing) and the growing number of State’s that are introducing second amendment nullification legislation (15 at this time) is a testament to this message. It is a natural migration from one check on power, (the three branches in the federal government), to another (the dynamic between state government and the federal government). It’s a vote of “no confidence” on the federal government’s ability to restrain itself.

Saying “no way” and “get out” is sometimes necessary. For those uncomfortable with a little confrontation, relax, it’s just “we the people” using the checks and balances provided by our founders to demand liberty as guaranteed by the Constitution.

Brian Roberts is a long-time volunteer with the Texas TAC and a regular contributor to the Tenth Amendment Center website.