



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

January 21, 2011

The Honorable William Killen
Idaho State Representative
VIA HAND DELIVERY

Re: State Nullification of Federal Law – Our File No. 11-35557

Dear Representative Killen:

This letter is in response to your recent inquiry regarding the theory of State nullification of federal law. Nullification generally is considered to take one of two forms. The first is 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. The second form is most simply described as outright defiance of the law; in other words, a State simply would ignore a federal provision, or a decision of a federal court.

Nullification, If Meant As A Term Through Which Offending Legislation or Judicial Decisions Are Overturned By Working Within The Existent Constitutional And Legal Framework, Is Permissible And Encouraged By Our System of Checks and Balances.

Idaho has historically participated in a number of these efforts including the current challenge to the Healthcare Reform Law, as well as various resolutions addressed to the Federal Government with respect to the state sovereignty and specific federal legislative enactments. (*See HCR 64, 44, and SJM 106 (2010)*). These examples reflect how a State can work within the constitutionally designed system to overturn or amend a provision that offends a State's notion of sovereignty and federal overreaching.

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.

Nullification is generally the argument that States have the ability to determine the constitutionality of a federal enactment, and if a State finds the enactment

unconstitutional it can ignore or otherwise refuse to adhere to the federal requirements. The basis for this argument is that the States came together to create the federal government, and therefore the States retain the ultimate discretion as to the reach of federal authority.¹ The adoption of these Resolutions in some respects represents the apex of the ongoing argument between Alexander Hamilton and Thomas Jefferson over the scope and influence of the fledgling federal government.²

These arguments arose cyclically throughout the Nation's early history, reaching a virtual breaking point in 1828-1833 in what was referred to as the "Nullification Crisis." President Andrew Jackson expressly rejected the theory of nullification as incompatible with the existence of the Union and destructive to the very purpose of the the Constitution.³ Southern State nullification advocates nevertheless continued to press their cause, and their arguments formed a central justification for the Civil War.

The Legal Difficulty Of Idaho's Nullification Claim.

As an historical matter, many of the original States came into existence first as English colonies and then as sovereign parties to the Articles of Confederation. Idaho's road to state status followed a much different path.

Virtually all land within Idaho is the result of the United States making a claim to the land, which was disputed by the British until the adoption of several treaties leading ultimately to the creation of the Oregon Territory.⁴ Congress then created the Territory of Idaho and, ultimately, the State of Idaho. Once Idaho was admitted as a State⁵ it acquired all of the privileges and immunities held by each of the other States, but as reflected above, the right of nullification, the right of secession, and the compact theory had all been rejected by the United States by the time of statehood.

The framers of the Idaho Constitution were acutely aware of that fact. Article I, § 3 of our Constitution states:

¹ See *Kentucky Resolutions*, Thomas Jefferson, (November 16, 1798 & December 3, 1799) and *Virginia Resolution*, James Madison, (December 24, 1799).

² Hamilton actually suggested sending the Army into Virginia as a pretext—thus even the earliest arguments for nullification were viewed as latent arguments for civil war. See also Jonathon Elliot, *Answers of the Several State Legislatures: "State of New Hampshire" Debates in the Several State Conventions on the Adoption of the Federal Constitution*, pp. 538-539. (1907).

³ Jackson also expressly rejected the right to secede, noting that the Constitution forms a government, not a league of States. *President Jackson's Proclamation Regarding Nullification*, December 10, 1832.

⁴ Joint British and United States Claim was provided for in *Treaty of 1818. The Oregon Treaty* (1846) established the boundary between United States claims and British Claims at the 49th Parallel. The territory of Oregon was created on August 14, 1848. The territory of Idaho was created on March 4, 1863 (12 Stat. L. 808, ch. 117).

⁵ Reviewing the Idaho Admission Bill, §19 specifically applies the laws of the United States. See 26 Stat.L. 215, ch. 656; am 1998, P.L. 105-296.

State inseparable part of Union.—The State of Idaho is an inseparable part of the American Union, and the Constitution of the United States is the supreme law of the land.

The framers therefore expressly recognized Idaho's status as a part of the United States and the supremacy of the United States Constitution. Consistent with this recognition, every legislator is required to affirm "that I will support the constitution of the United States and the constitution of the State of Idaho."⁶ Legislators and other state officials, in other words, pledge to carry out their duties in a fashion that directly conflicts with the second form of the nullification theory.

The alpha and omega of the nullification theory, in sum, rest upon rejecting the principle that the United States Constitution as the supreme law of the land.⁷ The theory runs contrary to the very purpose of the federal constitution and Idaho's express constitutional acknowledgment in Article I, § 3 of that supremacy.

Courts Have Expressly Rejected Nullification

Our history is replete with federal enactments that were unpopular in one State or another, or even within regions. Taking the logic of the nullification theory to its natural extension, federal law would become a patchwork of regulation depending upon which States chose to comply. It is hardly surprising, given this specter, that no court has ever upheld a State effort to nullify a federal law.

The most instructive case on nullification is likely *Cooper v. Aaron*⁸ This case arose out of a belief by the State of Arkansas that it was not bound to follow the Supreme Court's decision in *Brown v. Board of Education*.⁹ Arkansas, through its governor and legislature, claimed that there is no duty on the part of state official to obey federal court orders based upon the Court's interpretation of the federal constitution.¹⁰ The governor and the legislature, in practical effect, were advancing the theory that the States were the ultimate arbiters of the constitutionality of federal enactments and decisions.

The Court expressly rejected this argument stating: "No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it."¹¹ The Court went further: A governor who asserts power to nullify a federal court manifests that the fiat of a state governor, and not the Constitution of the United States, would be the supreme law of the land.

⁶ Idaho Constitution, Article III, § 25 (Oath of Office). See also Idaho Code § 59-401.

⁷ Article 6 § 2, U.S. Constitution.

⁸ 358 U.S. 1, 78 S.Ct. 1401 (1958).

⁹ 343 U.S. 483, 74 S.Ct. 686 (1954).


¹⁰ 358 U.S. at 4, 78 S.Ct. at 1403.

¹¹ *Id.* at 18, 78 S.Ct. at 1410.

Conclusion

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 of office prescribed in Article III, § 25. I hope this brief analysis responds adequately to your inquiry.

Sincerely,

A handwritten signature in black ink, appearing to read 'B. Kane', with a long horizontal flourish extending to the right.

BRIAN KANE
Assistant Chief Deputy

BK/tjn