

**SPEECH: OATH KEEPERS
1/9/2010 1:30 PM, DAMON'S GRILL, WILLOUGHBY, OHIO**

IGNORING THE TENTH AMENDMENT: LIBERTY AT STAKE

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An informal poll of colleagues, friends, and acquaintances suggests that the Tenth Amendment (12/15/1791) is long-forgotten. Yet, the Tenth Amendment, according to *Thomas Jefferson*, is “the foundation of the Constitution.”

The United States is not a democracy; it is a constitutional republic. The founding document defines the government and its authority. In the constitution, federal governmental powers are delegated and enumerated (Art I, Sec 8, Clauses 1-17); some are implied (Art I, Sec 8, Clause 18); some are denied (Art.I, Sec 9); and some are reserved by the states and the people (10th Amendment). State powers are controlled by other provisions (Art. I, Sec 10; Art IV, the Full Faith & Credit, Privileges and Immunities, Extradition;) and of course, the state constitutions.

Separation of powers, checks & balances, and federalism are three structural devices in the U.S. Constitution designed to help limit the powers exercised by the national government, to prevent tyranny. Tyranny results from a power grab when one person, branch or group has all the power to make, enforce, or interpret laws.

The first structural device I mentioned, separation of powers, concentrates authority over a sphere of influence in each of the three branches of government. The legislative branch makes law. The executive branch enforces and executes the law. And the judicial branch interprets and decides the law in cases and controversies brought before it. Absolute power, even over just a portion of the government, is dangerous. Each branch's power over its sphere of influence is not absolute. Each branch was given the necessary constitutional means and personal motives to resist encroachments of the others; they were written down so no one could forget them.

The constitution prescribes a second device, a set of checks & balances, which carve out exceptions within the sphere of influence of one branch to allow another branch

to have some say in that other branch's sphere, to protect against corruption or abuse of that power. This scheme creates a government of shared powers. Even the legislative branch, being divided into two chambers, check each other, as a law cannot pass unless both the House and the Senate approve it. The system of checks and balances creates an intentional inefficiency to slow the pace of change.

Separation of powers and the system of checks and balances have fared better over the last century than the third and possibly most important structural device mentioned, federalism.

Federalism creates a shared governmental power, national and state, over each state in the land. It decentralizes policy and politics, and provides checks between layers of the national and state governments, a so-called "double security," or a compound republic. The system of federalism allows a diversity of needs to be met as the needs in each locale require. It provides government close to the people. Innovation & experimentation and diversity of policies can be pursued in different states. Federalism permits states to counterbalance the actions of the national government, allowing people in each state or community to do what their own majorities prefer. With the national government having limited enumerated powers and the sovereign states free to innovate and experiment with their laws and policies, if a citizen of one state did not like the political climate there, or if that citizen thought the government there too oppressive or tyrannical for his or her taste, he or she could freely move to another state – there were 13 others to choose from at the time, of course, now 49 others to pick from.

The Tenth Amendment to the U.S. Constitution created the concept of federalism, and 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."

It was included in the Bill of Rights to further define the balance of power between the federal government and the states. No other issue dominated the deliberations of the founders as much as this. British oppression had made the founding fathers fearful of unchecked centralized power. The founders were concerned that the new federal government might seek to exercise powers not granted, and the states might not be able

to exercise fully their reserved powers. Ratified in 1791, the Tenth Amendment embodies the general principles of federalism in a republican form of government.

Federalism is the constitutional division of powers between the national and state governments and is regarded as one of America's most valuable contributions to political science. It is the constitutional equilibrium – a tension rather than a cooperation – between the general and the state governments. According to *Alexander Hamilton*, the balance of the tension “forms a double security to the people. ... Indeed, [the federal and state governments] will both be prevented from overpassing their constitutional limits by [the] certain rivalry which will ever subsist between them.” Federalism was fashioned by the American people for the benefit of individuals and of the people as a whole. It is fundamental to liberty.

We are a union of sovereign states. The people created the federal government to be their agent for certain enumerated purposes only and the state government their agent for other purposes, as outlined in the federal and the several state constitutions. All else, the people retain.

The Tenth Amendment, in conjunction with the Ninth Amendment, was a pronouncement of the principle of popular sovereignty. The Ninth Amendment was not written to create new rights or to recognize old ones – it says that the enumeration of certain rights in the constitution does not mean that other rights are not possessed and retained by the people. It was designed to work with the Tenth Amendment to preserve the Constitution's other restrictions on federal power.

Government is slow and inefficient because it was designed to work that way. The government holds a monopoly on the legitimate use of force in our society to coerce people to do things or refrain from doing other things. Its constitutionally unauthorized use, that is, abuse, is tyranny. A fragmented government tends toward liberty: brought about by the devices of separation of powers, checks & balances, and federalism.

According to *James Madison*, the father of the Constitution, “[t]he powers delegated 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, concerns the lives, liberties, and properties of the people.”

As *Thomas Jefferson* said, the states are not subordinate to the national government, but rather the two are “coordinate departments of one simple and integral whole.” The federal government was created by the states specifically to be an agent of the states, not vice versa.

According to *Justice Sandra Day O’Connor*, “The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: ‘Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.’”

Ultimate sovereignty over the federal government (and the state governments) rests with the people, not the states. As such, state politicians cannot waive federalism in exchange for federal economic incentives or threats.

Article IV of the U.S. Constitution provides that the constitution and laws of the United States, made in pursuance thereof, and the treaties made shall be the supreme law of the land; judges in every state shall be bound thereby, anything in the constitution or laws of any of the states to the contrary notwithstanding. Congress, the state legislatures, and all executive and judicial officers of the U.S. and of the states shall be bound by oath to support this constitution.

This political system of federalism worked well until around the beginning of the 20th Century. State sovereignty markedly eroded under presidents, congresses, and courts comprised of both major political parties, enabled by an uninformed and apathetic electorate, enamored by the name “Progressive.”

That erosion has exponentially accelerated in the last two decades. Extreme spending programs, bailouts, the states being threatened and forced to accept federal stimulus dollars, the explosive creation of money out of thin air by the Federal Reserve, unfunded federal mandates, the nationalization of banks and other corporations, the unconfirmed executive appointment of scores of czars governing every aspect of our lives

and our property, cap and trade, and universal health care, are examples of the continued buildup of power within the federal government at the expense of the states and the people.

The erosion occurred because people are ignorant of the constitution – our children are not taught the constitution or the differences between tyranny and liberty. The people and the courts let congress and executive branch get away with it and, aided by an irresponsible media, became their partners in crime. All branches of government, and the people, have shown utter contempt for the U.S. Constitution. Fully 90% of federal laws are probably unconstitutional: regulating labor, farming, education, social security, medicare, entitlement programs, federally-guaranteed student loans, universal health care, and on and on and on. Democrats & Republicans are to blame. Liberals are guilty of being blind to the importance of the 10th Amendment, and conservatives are guilty of doing the same to the 9th Amendment. Both sides fail to understand the constitution.

As the central government usurps ever increasing powers at the expense of the states and the people, our form of government becomes less federal and more national. The evil is “nationalism,” not “federalism.” *Justice O’Connor* feared, “Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell.” *Lord Acton* once said: “Power tends to corrupt, and absolute power corrupts absolutely.” The concentration of all power in a central government will absolutely corrupt that government and its political operatives. Under nationalism, all of the states would be the same politically – it would essentially be one government, everywhere, with total control over everyone’s life, liberty, and property.

The Tenth is possibly the most important amendment ever written to the Constitution, yet it is nearly never enforced. Federalism, and other safeguards, are built into our governing process to prevent willful encroachment on our constitutional rights. Our framers instituted a federal system to preserve immense and sovereign rights to local communities. We must restore the balance of liberty in this nation, that is, the balance of power between the states and the federal government.

George Washington said this in 1788: “The national government was given no more powers than are indispensably necessary to perform the functions of a good government;

and consequently, no objection ought to be made against the quantity of power delegated to it. These powers are so distributed among the three branches into which the national government is arranged that it can never be in danger of degenerating into a monarchy, an oligarchy, an aristocracy, or any other despotic or oppressive form, so long as there shall remain any virtue in the body of the people.” What wisdom he and the other framers had. Where is the virtue in the body of the people?

What action can states or the people take? The last time the states asserted nullification of federal laws was 1832, and the tension between the states and the federal government ultimately resulted in the Civil War. Hopefully, history will have taught us something and the issues this nation now face will be addressed peacefully before those forces become so extreme no other choice is possible but violent conflict.

It is the duty of all Americans to diligently and jealously guard the U.S. Constitution and all of its guarantees. According to *Alexander Hamilton* in *The Federalist*, No. 16, having established the Constitution, the people are its natural guardians. *George Washington* said that government is a force that “never for a moment should be left to irresponsible action.” The force of the people at the ballot box is required to hold elected officials to their oaths of office to uphold and obey the constitution. But voting is not enough. Americans must be informed of how we are being represented, vocalize our will and dismay to our elected representatives, and be ready to remove from office those who would tread upon the very foundation of our nation. We must insist our children be taught about the constitution and what it means to their lives, liberty, property, and pursuit of happiness. They cannot be natural guardians over things they know nothing about. All Americans should be concerned that the Tenth Amendment is ignored by the federal government, which has assumed additional powers not granted to it by the Constitution.

Washington, Adams, Jefferson, Franklin, Madison, Hamilton and the other Founding Fathers all would be appalled & are probably rolling over in their graves over what has happened to their handiwork. It’s been said that eternal vigilance is the price of liberty. Sadly, apparently most Americans do not know freedom’s value.

Our federal government has a limited governmental mission. Absolute and complete authority to fashion its vision of utopia for this nation was purposely withheld in

recognition of political fallibility and the dangers of too strong a central government. Nothing in human nature or our political experience so far alters anything in that wisdom. "The greatest tyrannies are always perpetrated in the name of the noblest causes," according to *Thomas Paine*.

We must return to our federalist form of government. We cannot hope that they will change on their own. The time is now to bring needed political pressure on Congress, the president, and the courts, and force them to preserve, protect, defend, and obey the Constitution. Our liberty depends on it.

God bless us and the United States of America and help us all keep our oaths to the constitution.

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