The
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A Condensed Curriculum of Constitutional Study



Clause Discussed:
- Article I, Section 8, Clause 1

Concept Discussed:
- Duties

Northern distillers protested the first imposition of domestic Duties, evading them in the *Whiskey Rebellion*.

President George Washington was displeased that an Act of Congress was being defied and court processes ignored.

In his Proclamation of August 7th, 1794, Washington commanded (in confromity with the Militia Acto fo 1792:

> "all persons, being insurgents…to disperse and retire peaceably to their respective abodes."

Washington soon mustered into service 12,000 militiamen to the primary "scene of disaffection" — the Western counties of Pennsylvania.

Such a blatant show of federal force efficiently accomplished the immediate goal of returning order, but seeds of discontent were growing.

In 1797, stamp Duties laid on Vellum, Parchment and Paper caused further frustration.

Worse yet were the notorious *Alien and Sedition Acts* of 1798, enacted in preparation for an inevitable war against France.

In that Federalist President Adams did not avail to himself the powers granted by the three Alien Acts, but did enforce the Sedition Act, the Republican's charge that the purpose of these Acts was really to quiet *them* is not altogether unfounded.

The **Sedition Act** declared it unlawful to:

> "combine or conspire together, with intent to oppose any measure...of the government of the United States...or to impede the operation of any law of the United States, or to intimidate...any person holding a place or office in or under the government of the United States."

Section 2 also stated:

> "That if any person shall write, print, utter or publish…any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government…or to bring them…into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United States…then such person, being therefore convicted…shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years."

In response to the Alien and Sedition Acts, Thomas Jefferson and James Madison penned the now-famous resolutions supporting State nullification of unauthorized federal laws.

The **1798 Kentucky Resolutions** is from where Jefferson's famous line comes:

> "In questions of power, then, let no more be said of confidence in man, but bind him down from mischief by the chains of the Constitution."

The **1799 Kentucky Resolutions**, seeking to "escape the fangs of despotism", proposed:

> "That the several states who formed that instrument, being sovereign and independent, have the unquestionable right to judge of the infraction; and, That a nullification, by those sovereignties, of all unauthorized acts done under color of that instrument, is the rightful remedy."

Jefferson and Madison did not propose *unified* action, but that States could *individually* nullify an improperly-enacted federal law within their borders.

In the strictest of terms, one must hold this principle valid, at least as a last resort prior to succession from, or war against, the Union.

Kentucky and Virginia folded their hands once other States passed resolutions indicating that they would abide by the actions of Congress.

Kentucky and Virginia did not risk the initiation of federal force against them, or succeed from the Union, but sought other lawful means of remedy.

The idea that each entity has an unlimited ability to define the extent of the union within its physical bounds is a concept fraught with inherent instability of that union.

It is true that each State willingly agreed only to cede certain specified powers. Within the express terms of the agreement, a State could not be forced to involuntarily cede withheld powers against her will (short of proper ratification of a new Amendment).

To bypass the Amendment process, however, and simply have Congress enact laws greater than allowed by the Constitution (or expressly prohibited by it), is an event to which no State ever agreed. What cannot be done legitimately can neither be done illegitimately.

The Ten-Million-Dollar-Question, of course, is how the States would be able to properly and effectively defend against that usurpation, short of the use of force. The answer points to the reason why the First Amendment (free speech and free press) is listed before the Second (right to arms).

The Courts, having no part in *enacting* law, play a primary role in the *enforcement* of it. Through such direct power, the courts have assumed the indirect power of judging the impropriety of any law when the situation so demands it.

Though no such express authority was given within the Constitution, every executive and judicial officer swears an oath or gives an affirmation to uphold the Constitution. Therefore, when any law enacted by Congress is at odds with the Constitution, every officer must uphold the Constitution.

Section 3 of the Sedition Act explicitly provided seeds of its own proper demise even outside the strict lines of government action, and possibly even before its sunset, stating that:

> "The jury who shall try the cause, shall have a right to determine the law and the fact, under the direction of the court, as in other cases."

It is perhaps surprising today that a law, especially one so expansive would declare that a jury trying a cause under it would have the right to determine not only the *facts* of the case, *but also the right to determine the validity of the law itself*.

It was not this wording that *gave* the jury such power and right, for the rights and powers of juries were established long antecedent to the Constitution.

The first case of the independent jury is provided by William Penn while still in England in 1670.

The right of the jury to try the law itself was firmly established in colonial America in the case against John Peter Zenger in 1735. Zenger, publisher of the *New York Weekly Journal*, printed articles which were critical of the New York Provincial Governor.

Zenger's attorney, Andrew Hamilton, proposed the novel concept in colonial America that:

> "Nature and the Laws of our Country have given us a Right — the Liberty — both of exposing and opposing arbitrary Power...by speaking and writing Truth."

Despite the law, and the judge's express orders that truth was no defense for lible, the jury issued the verdict "Not Guilty", freeing Zenger and setting aside the colonial libel law by the process of jury nullification.

The Sedition Act merely then quoted a principle well understood in that day; that government may enact law, but this does not invalidate a jury's ability to nullify it. That other Acts do not specifically provide this disclaimer does not remove that right.

The Alien and Sedition Acts helped cause the demise of the Federalist Party and ushered in a wave of limited government, restricting government action for the next 60 years.

A subsequent tripling of land size, a doubling of the number of States, an eight-fold increase in population, and two wars (1812 and Mexican) did not significantly alter the path of the government of the United States away from the corrected constitutional foundation.

It took the War Between the States, with the deaths of 364,511 Union soldiers (and the death of a similar number of Confederate soldiers) and at the cost of $13 billion (North only), to break the strong-hold of limited government to change the direction and future course of the United States *away* from their proper strict constitutional underpinnings.

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