

The Breakfast Club

Constitutional Minute for 28 December 2021

The Kentucky and Virginia Resolves of 1798

I've mentioned the Doctrine of the Lesser Magistrate a couple of times now at Breakfast Club. In a nutshell, it is the idea that elected officials at all levels of government have a moral obligation to protect those citizens under them from the unjust or immoral use of government power.

The 56 men who signed the Declaration of Independence were operating under this principle, and they understood that they were. They appealed to the "*Supreme Judge of the world*" to judge their actions as righteous. They declared they operated under "*the Authority of the good People of these Colonies*" in separating the colonies from "*[a] Prince whose character is thus marked by every act which may define a Tyrant.*" This principle had been drummed into them for decades by colonial ministers; it was entirely Biblical.

In *The Doctrine of the Lesser Magistrates: A Proper Resistance to Tyranny and a Repudiation of Unlimited Obedience to Civil Government*, author Matthew Trewhella defines the doctrine thusly: "*The lesser magistrate doctrine declares that when the superior or higher civil authority makes unjust/immoral laws or decrees, the lesser or lower ranking civil authority has both a right and duty to refuse obedience to that superior authority. If necessary, the lower authorities even have the right and obligation to actively resist the superior authority.*"

Many Christians cite Romans 13 as contradicting this principle, arguing that we are commanded to obey all government authority. But Trewhella counters (as did many colonial pastors) that Romans 13, verses three and four, show clearly that God authorizes government "*to reward those who do good and punish those who do evil.*" But what are we to do if the government instead punishes those who do good and rewards those who do evil? Is that government still operating with the authority of God? Colonial Pastor Jonathan Mayhew, as one example, says no: "*If it be our duty... to obey our king, merely [because] he rules for the public welfare, it follows ... that when he turns tyrant, and makes his subjects his prey to devour and to destroy, ... we are bound to throw off our allegiance to him, and to resist...*"

But while common citizens are typically powerless to resist evil, magistrates are not. They have sometimes considerable power and authority they can bring to bear on the situation. One magistrate with such power is the Sheriff. The Sheriff of a jurisdiction is the Chief Law Enforcement Officer within his jurisdiction; state and federal law enforcement authorities must have the permission of the Sheriff to legally operate within his jurisdiction.

In 1798, "while the ink was still drying on the First Amendment," Congress passed, and President John Adams signed (although he didn't need to sign them for them to become law) the Alien and Sedition Acts. England and France were involved in another of their on-again-off-again wars. Half of America favored Britain due to their common heritage, half favored France due to French aid in winning the War of Independence. Each side wanted the U.S. government to come to the assistance of their favored country and were quite vocal in criticizing the government's attempts to remain neutral.

Great Britain and France, of course, did everything they could to rouse popular American support for their cause. Federalists, in the majority on Congress, saw Jefferson's Democratic-Republicans as

traitors, and vice versa.

The Alien Enemies Act permitted the government to arrest and deport all male citizens of an enemy nation in the event of war, while the Alien Friends Act allowed the president to deport any non-citizen suspected of plotting against the government, even in peacetime. The Sedition Act made it a crime to say or print anything disparaging about the government or its chief officers. Twenty Republican-leaning newspaper editors, even a Republican Congressman from Vermont, were eventually jailed; oddly, no editors of Federalist-leaning newspapers were prosecuted. Madison and Jefferson decided it was time to act and secretly authored resolutions to be introduced in the legislatures of Virginia and Kentucky, respectively.

Each took a slightly different tack. Jefferson believed the Supreme Court did not have the power to strike down an act of Congress (this was pre-*Marbury v. Madison*); therefore the states were the logical and rightful entities to declare an act of Congress unconstitutional (which the Sedition Act clearly was).

Madison based his arguments on the idea that the states had entered a compact in joining the union and had an inherent right and duty to oppose unconstitutional acts of Congress (the essence of the Lessor Magistrate doctrine). The Tenth Amendment, in Madison's view, delegated only certain and specific powers to Congress and the Sedition Act "*exercises ... a power not delegated by the constitution, but on the contrary, expressly and positively forbidden by one of the amendments*" (i.e. the First). It infringed upon "*the free communication among the people ..., which has ever been justly deemed, the only effectual guardian of every other right.*"

Madison concluded, in carefully chosen language: "*That although this commonwealth (Virginia) as a party to the federal compact; will bow to the laws of the Union, yet it does at the same time declare, that it will not now, nor ever hereafter, cease to oppose in a constitutional manner, every attempt from what quarter so ever offered, to violate that compact.*"

While neither state took overt action against the Acts, both sets of the resolves made it clear the states intended to "interpose" themselves between the national government and their citizens. Today the term "nullification" is more frequently encountered, meaning the government involved considers the offending acts to be null and void within their jurisdiction. In the prelude to the Civil War, South Carolina revived the issue in regard Tariffs of Abominations. The so-called "Sanctuary Cities" we often see today, promoted by both sides of the political aisle for different issues, are related.

The Alien Enemies Acts remains in effect today.

For further reading:

[*Nullification: How to Resist Federal Tyranny in the 21st Century*](#), by Thomas Woods.

[*Prelude to Civil War: The Nullification Controversy in South Carolina, 1816-1836*](#) by William H. Freehling

[*The Doctrine of the Lesser Magistrates: A Proper Resistance to Tyranny and a Repudiation of Unlimited Obedience to Civil Government*](#) by Matthew Trewhella.