

December 15, 2016

Honorable Paul Ryan
Speaker of the House
U.S. House of Representatives
H-232 U.S. Capitol
Washington, D.C. 20515

Honorable Mitch McConnell
Majority Leader
U.S. Senate
S-230 U.S. Capitol
Washington, D.C. 20510

Honorable Nancy Pelosi
Minority Leader
U.S. House of Representatives
H-204 U.S. Capitol
Washington, D.C. 20515

Honorable Charles Schumer
Minority Leader-elect
U.S. Senate
419 Hart Senate Office Building
Washington, D.C. 20510

Dear Senators McConnell and Schumer and Representatives Ryan and Pelosi:

State and local government officials are proud of their unique role in governing and serving the citizens of this great nation. They recognize that the positions they occupy impose upon them enormous responsibility and confer upon them tremendous opportunity. Moreover, the faithful discharge of their obligations is central to the success of the Great American Experiment.

It was, after all, the people who came to form a more perfect union by creating a national government of limited and defined powers. The grant of specific responsibilities for irreducibly common interests – such as national defense and interstate commerce – was brilliantly designed to make the whole stronger than the sum of its parts.

The genius of American democracy is predicated on the separation of powers among branches of government (*viz.* the legislative, executive and judiciary) and the division of power between the federal and state governments (federalism). The federalism principle is memorialized in the Tenth Amendment, which states in its entirety, “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.”

Under the American version of federalism, the powers of the federal government are narrow, enumerated and defined. The powers of the states, on the other hand, are vast and indefinite. States are responsible for executing all powers of governance not specifically bestowed to the federal government by the U.S. Constitution. In many cases, states delegate a portion of their authority to counties and other local governments. Though local governments are diverse in structure, all are on the front lines of delivering vital services to residents.

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The reservation of power to the states and people respects the differences between regions and peoples. It recognizes a right to self-determination at a local level. It rejects the notion that one size fits all, and it provides for a rich tapestry of local cultures, economies, and environments.

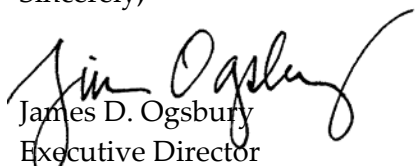
Because of the Constitutional recognition of state sovereignty within our federalist system, state and local governments have been appropriately regarded as laboratories of democracy, regularly engaging in a kind of cooperative competition in the marketplace of ideas. Indeed, state and local governments demonstrate great ingenuity in promoting innovative initiatives for improvement of their economies, environments, and quality of life.

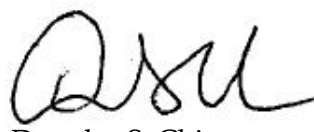
State and local government officials are excited to work in true partnership with the federal government. By operating as authentic collaborators in the development and execution of policy, the states, local governments and federal government can demonstrably improve their service to the public. By working cooperatively with states and local governments, Congress can create a legacy of renewed federalism, resulting in a nation that is stronger, more resilient and more united. Such an outcome will redound to the credit of the Congress and inure to the benefit of the American people.

Our organizations pledge that we will act as conduits to provide notice of relevant federal action to our respective members so that they may provide you with input regarding such action.


It is in a spirit of bipartisan cooperation, optimism and good will that we offer the following federalism principles for your consideration and action.

Sincerely,


James D. Ogsbury
Executive Director
Western Governors' Association


Douglas S. Chin
Attorney General of Hawai'i
Chair, Conference of Western Attorneys General


Representative Jeff Thompson
Idaho House of Representatives
Chair, The Council of State Governments West


Commissioner Doug Breidenthal
President
Western Interstate Region of NACo


Matt Morrison
Executive Director
Pacific NorthWest Economic Region

Principles to Clarify and Strengthen the State-Federal Relationship

A. Fundamental Federalism Principles

1. The structure of government established by the United States Constitution is premised upon a system of checks and balances.
2. The Constitution created a federal government of supreme, but limited and enumerated, powers. The sovereign powers not granted to the federal government are reserved to the people or to the states, unless prohibited to the states by the Constitution. The constitutional relationship among sovereign governments, state and federal, is memorialized in the Tenth Amendment to the Constitution. Under this Constitutional framework, states also confer governmental powers to counties and local governments.
3. Our constitutional system encourages a healthy diversity in the public policies adopted by the people of the several States according to their own conditions, needs, and desires.
4. Effective public policy is achieved when there is competition among the several states in the fashioning of different approaches to public policy issues. The search for enlightened public policy is advanced when individual states and local governments are free to experiment with a variety of approaches to public issues. One-size-fits-all national approaches to public policy problems can inhibit the creation of effective solutions to those problems.
5. In the absence of clear constitutional or statutory authority, the presumption of sovereignty should rest with the individual states. Uncertainties regarding the legitimate authority of the federal government should generally be resolved in favor of state and local authority and regulation.
6. To the extent permitted by law, federal executive departments and agencies should not construe, in regulations and otherwise, a federal statute to preempt state or local authority unless the statute contains an express preemption provision or there is some other firm and palpable evidence compelling the conclusion that the Congress intended preemption of state or local authority, or when the exercise of state or local authority directly conflicts with the exercise of federal authority under the relevant federal statute or U.S. Constitution.
7. When an executive department or agency proposes to act through adjudication or regulatory action to preempt state or local authority, the department or agency must provide all affected states and local governments notice and an opportunity for

appropriate participation in the proceedings [as outlined in B(2)].

8. With respect to federal statutes and regulations administered by states and local governments, the federal government should grant states and local governments the maximum administrative discretion possible. Any federal oversight of such state and local administration should not unnecessarily intrude on state and local discretion or create undue burdens on state and local resources.

B. Actions by Federal Agencies That Should Be Covered by Federalism Executive Order / Consultation

1. Actions having federalism implications include federal regulations, proposed federal legislation, policies, rules, guidances, directives, programs, reviews, budget proposals, budget processes and strategic planning efforts that have substantial direct effects on the states and/or local governments or on their relationship with the federal government, or the distribution of power and responsibilities, between the federal government and the states and local governments.
2. "Consultation" -- Each federal executive department / agency should be required to have a clear, consistent and accountable process (see Section C below) to provide states and localities with early, meaningful and substantive input in the development of regulatory policies that have federalism implications.
3. Independent regulatory agencies should be required to comply with the same federalism-related requirements that other executive departments and agencies are required to follow.

C. Federalism Review Process

1. The head of each federal executive department and agency should be required to designate an official responsible for ensuring that the federalism consultation process is executed appropriately and completely.
 - a. Regulatory actions [see B(1)] with federalism implications should trigger preparation of a federalism assessment. Such assessments should be considered in all decisions involved in promulgating and implementing the policy.
 - b. Each federalism assessment should accompany any submission concerning the policy that is made to the Office of Management and Budget pursuant to Executive Order No. 12291 or OMB Circular No. A19, and:

- i. contain the designated official's certification that the policy has been assessed in light of the principles, criteria and requirements contained in this document;
 - ii. identify any provision or element of the policy that is inconsistent with the principles, criteria, and requirements stated in this document;
 - iii. specifically identify the extent to which the policy imposes additional costs or burdens on state or local governments, including the likely source of funding for the state and local governments and the ability of the states and impacted local governments to fulfill the purposes of the policy; and
 - iv. specifically identify the extent to which the policy would affect impacted governments' abilities to discharge traditional state and local governmental functions, or other aspects of state sovereignty and local government authority.
2. No executive department or agency should promulgate any regulation that is not authorized by federal statute. Where regulations are appropriate, authorized and Constitutional, but have federalism implications or impose substantial direct compliance costs on states or localities, the executive department or agency must:
 - a. Ensure that new funds sufficient to pay the direct costs incurred by the state or local government in complying with the regulation are provided by the federal government to the impacted state and local governments for the duration of the impact; and
 - b. Prior to the formal promulgation of the regulation:
 - i. in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provide to the Director of the Office of Management and Budget a description of the extent of the executive department / agency's prior consultation with representatives of affected states and local governments, a summary of the nature of their concerns, and the executive department / agency's position supporting the need to issue the regulation; and
 - ii. makes available to the Director of the Office of Management and Budget any written communications submitted to the agency by states or local governments.

D. Increasing Flexibility for State and Local Waivers

1. Agencies should review the processes under which states and local governments apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes.
2. Each agency should, to the extent practicable and permitted by law, favorably consider any application by a state or local government for a waiver of statutory or regulatory requirements in connection with any program administered by that agency. In general, federal agencies should operate with a general view toward increasing opportunities for utilizing flexible policy approaches at the state or local level in cases in which the proposed waiver is consistent with applicable federal policy objectives and is otherwise appropriate.
3. Each agency should, to the extent practicable and permitted by law, render a decision upon a complete application for a waiver within 120 days of receipt of such application by the agency. If the application for a waiver is not granted, the agency should provide the applicant with timely written notice of the decision and the reasons for the application's rejection.
4. This process would apply only to statutory or regulatory requirements that are discretionary and subject to waiver by the agency.