

105TH CONGRESS  
2D SESSION

# S. CON. RES. 109

Expressing the sense of Congress that executive departments and agencies must maintain the division of governmental responsibilities between the national government and the States that was intended by the framers of the Constitution, and must ensure that the principles of federalism established by the framers guide the executive departments and agencies in the formulation and implementation of policies.

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IN THE SENATE OF THE UNITED STATES

JULY 23, 1998

Mr. COVERDELL (for himself, Mr. CRAIG, and Mr. ENZI) submitted the following concurrent resolution; which was referred to the Committee on Governmental Affairs

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## CONCURRENT RESOLUTION

Expressing the sense of Congress that executive departments and agencies must maintain the division of governmental responsibilities between the national government and the States that was intended by the framers of the Constitution, and must ensure that the principles of federalism established by the framers guide the executive departments and agencies in the formulation and implementation of policies.

Whereas federalism is rooted in the knowledge that our political liberties are best assured by limiting the size and scope of the national government;

Whereas the people of the States created the national government when they delegated to it those enumerated governmental powers relating to matters beyond the competence of the individual States;

Whereas all other sovereign powers, save those expressly prohibited the States by the Constitution, are reserved to the States or to the people as the tenth amendment to the Constitution requires;

Whereas the people of the States are free, subject only to restrictions in the Constitution itself or in constitutionally authorized Act of Congress, to define the moral, political, and legal character of their lives;

Whereas in most areas of governmental concern, the States uniquely possess the constitutional authority, resources, and the competence to discern the sentiments of the people and to govern accordingly;

Whereas the nature of 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;

Whereas acts of the national government, whether executive, legislative, or judicial in nature, that exceed the enumerated powers of that government under the Constitution violate the principle of federalism established by the framers;

Whereas policies of the national government should recognize the responsibility of, and should encourage opportunities for, individuals, families, neighborhoods, local governments, and private associations to achieve their personal, social, and economic objectives through cooperative effort; and

Whereas, in the absence of clear constitutional or statutory authority, the presumption of sovereignty should rest with the individual States: Now, therefore, be it

1        *Resolved by the Senate (the House of Representatives*  
2 *concurring),* That executive departments and agencies  
3 should adhere, to the extent permitted by law, to the fol-  
4 lowing criteria when formulating and implementing poli-  
5 cies that have federalism implications:

6            (1) There should be strict adherence to con-  
7 stitutional principles. Executive departments and  
8 agencies should closely examine the constitutional  
9 and statutory authority supporting any Federal ac-  
10 tion that would limit the policymaking discretion of  
11 the States, and should carefully assess the necessity  
12 for such action. To the extent practicable, the States  
13 should be consulted before any such action is imple-  
14 mented.

15            (2) Federal action limiting the policymaking  
16 discretion of the States should be taken only where  
17 constitutional authority for the action is clear and  
18 certain, and the national activity is necessitated by  
19 the presence of a problem of national scope.

20            (3) It is important to recognize the distinction  
21 between problems of national scope (which may jus-  
22 tify Federal action) and problems that are merely  
23 common to the States (which will not justify Federal

1       action because individual States, acting individually  
2       or together, can effectively manage such issues).

3                   (4) Constitutional authority for Federal action  
4       is clear and certain only when authority for the ac-  
5       tion may be found in a specific provision of the Con-  
6       stitution, when there is no provision in the Constitu-  
7       tion prohibiting Federal action, and when the action  
8       does not encroach upon authority reserved to the  
9       States.

10                  (5) With respect to national policies adminis-  
11       tered by the States, the national government should  
12       grant the States the maximum administrative discre-  
13       tion possible. Intrusive Federal oversight of State  
14       administration is neither necessary nor desirable.

15                  (6) When undertaking to formulate and imple-  
16       ment policies that have federalism implications, exec-  
17       utive departments and agencies should—

18                   (A) encourage States to develop their own  
19       policies to achieve program objectives and to  
20       work with appropriate officials in other States;

21                   (B) refrain, to the maximum extent pos-  
22       sible, from establishing uniform, national stand-  
23       ards for programs and, when possible, defer to  
24       the States to establish standards; and

7 (A) To the extent permitted by law, executive  
8 departments and agencies should construe,  
9 in regulations and otherwise, a Federal statute  
10 to preempt a State law only when the statute  
11 contains an express preemption provision, when  
12 there is some other firm and palpable evidence  
13 compelling the conclusion that the Congress in-  
14 tended preemption of State law, or when the ex-  
15 ercise of State authority directly conflicts with  
16 the exercise of Federal authority under the  
17 Federal statute.

18 (B) If a Federal statute does not preempt  
19 State law, executive departments and agencies  
20 should construe any authorization in the statute  
21 for the issuance of regulations as authorizing  
22 preemption of State law by rulemaking only  
23 when the statute expressly authorizes issuance  
24 of preemptive regulations or when there is some  
25 other firm and palpable evidence compelling the

1 conclusion that the Congress intended to dele-  
2 gate to the department or agency the authority  
3 to issue regulations preempting State law.

4 (C) Any regulatory preemption of State  
5 law should be restricted to the minimum level  
6 necessary to achieve the objectives of the stat-  
7 ute pursuant to which the regulations are pro-  
8 mulgated.

9 (D) When an executive department or  
10 agency foresees the possibility of a conflict be-  
11 tween State law and federally protected inter-  
12 ests within its area of regulatory responsibility,  
13 the department or agency should consult, to the  
14 extent practicable, with appropriate officials  
15 and organizations representing the States in an  
16 effort to avoid such a conflict.

17 (E) When an executive department or  
18 agency proposes to act through adjudication or  
19 rulemaking to preempt State law, the depart-  
20 ment or agency should provide all affected  
21 States notice and an opportunity for appro-  
22 priate participation in the proceedings.

