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2D SESSION

S. 2445

To provide that the formulation and implementation of policies by Federal departments and agencies shall follow the principles of federalism, and for other purposes.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 8 (legislative day, AUGUST 31), 1998

Mr. THOMPSON (for himself, and Mr. NICKLES, Mr. CRAIG, Mr. THURMOND, and Mr. HUTCHISON) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

A BILL

To provide that the formulation and implementation of policies by Federal departments and agencies shall follow the principles of federalism, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Federalism Enforce-
5 ment Act of 1998”.

6 **SEC. 2. FINDINGS.**

7 Congress finds that—

1 (1) federalism is rooted in the knowledge that
2 political liberties are best assured by limiting the
3 size and scope of the national government;

4 (2) the people of the States created the national
5 government when the people delegated those enu-
6 merated governmental powers relating to matters be-
7 yond the competence of the individual States;

8 (3) all other sovereign powers, except those ex-
9 pressly prohibited the States by the United States
10 Constitution, are reserved to the States or to the
11 people as the tenth amendment to the United States
12 Constitution requires;

13 (4) the constitutional relationship among sov-
14 ereign governments, State and national, is formal-
15 ized in and protected by the tenth amendment to the
16 United States Constitution;

17 (5) the people of the States are free, subject
18 only to restrictions in the United States Constitution
19 or in constitutionally authorized Acts of Congress, to
20 define the moral, political, and legal character of
21 their lives;

22 (6) in most areas of governmental concern, the
23 States uniquely possess the constitutional authority,
24 resources, and the competence to discern the senti-
25 ments of the people and to govern accordingly;

1 (7) the nature of the constitutional system of
2 the United States encourages a healthy diversity in
3 the public policies adopted by the people of the sev-
4 eral States according to their conditions, needs, and
5 desires;

6 (8) in the search for enlightened public policy,
7 individual States and communities are free to experi-
8 ment with a variety of approaches to public issues;

9 (9) acts of the national government, whether
10 executive, legislative, or judicial in nature, that ex-
11 ceed the enumerated powers of that government
12 under the United States Constitution violate the
13 principle of federalism established by the framers;

14 (10) policies of the national government should
15 recognize the responsibility of, and should encourage
16 opportunities for, individuals, families, neighbor-
17 hoods, local governments, and private associations to
18 achieve their personal, social, and economic objec-
19 tives through cooperative effort;

20 (11) in the absence of clear constitutional or
21 statutory authority, the presumption of sovereignty
22 should rest with the individual States; and

23 (12) uncertainties regarding the legitimate au-
24 thority of the national government should be re-
25 solved against regulation at the national level.

1 **SEC. 3. FEDERALISM POLICYMAKING CRITERIA.**

2 The executive departments and agencies shall con-
3 sider, to the extent permitted by law, the following criteria
4 to inform agency discretion when formulating and imple-
5 menting policies 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) There should be recognition of the distinc-
21 tion between problems of national scope (which may
22 justify Federal action) and problems that are merely
23 common to the States (which will not justify Federal
24 action because individual States, acting individually
25 or together, can effectively manage such issues).

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

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

13 (6) When undertaking to formulate and imple-
14 ment policies that have federalism implications, exec-
15 utive departments and agencies shall—

16 (A) encourage States to develop policies to
17 achieve program objectives and to work with
18 appropriate officials in other States;

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

23 (C) when national standards are required,
24 consult with appropriate officials and organiza-

1 tions representing the States in developing
2 those standards.

3 **SEC. 4. SPECIAL REQUIREMENTS FOR PREEMPTION.**

4 The executive departments and agencies shall con-
5 sider, to the extent permitted by law, the following criteria
6 to inform agency discretion when formulating and imple-
7 menting policies that have preemption implications:

8 (1) Executive departments and agencies should
9 construe, in regulations and otherwise, a Federal
10 statute 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 com-
13 pelling the conclusion that Congress intended pre-
14 emption of State law, or when the exercise of State
15 authority directly conflicts with the exercise of Fed-
16 eral authority under the Federal statute.

17 (2) If a Federal statute does not preempt State
18 law under paragraph (1), executive departments and
19 agencies should construe any authorization in the
20 statute for the issuance of regulations as authorizing
21 preemptive regulations only when the statute ex-
22 pressly authorizes issuance of preemptive regulations
23 or when there is some other firm and palpable evi-
24 dence compelling the conclusion that Congress in-

1 tended to delegate to the department or agency the
2 authority to issue regulations preempting State law.

3 (3) Any regulatory preemption of State law
4 should be restricted to the minimum level necessary
5 to achieve the objectives of the statute pursuant to
6 which the regulations are promulgated.

7 (4) When an executive department or agency
8 foresees the possibility of a conflict between State
9 law and federally protected interests within its area
10 of regulatory responsibility, the department or agen-
11 cy should consult, to the extent practicable, with ap-
12 propriate officials and organizations representing the
13 States in an effort to avoid such a conflict.

14 (5) When an executive department or agency
15 proposes to act through adjudication or rulemaking
16 to preempt State law, the department or agency
17 should provide all affected States notice and an op-
18 portunity for appropriate participation in the pro-
19 ceedings.

20 **SEC. 5. SPECIAL REQUIREMENTS FOR LEGISLATIVE PRO-**
21 **POSALS.**

22 It is the sense of Congress that executive depart-
23 ments and agencies should not submit to Congress legisla-
24 tion that would—

1 (1) directly regulate the States in ways that
2 would interfere with functions essential to the
3 States' separate and independent existence or oper-
4 ate to directly displace the States' freedom to struc-
5 ture integral operations in areas of traditional gov-
6 ernmental functions;

7 (2) attach to Federal grants conditions that are
8 not directly related to the purpose of the grant; or

9 (3) preempt State law, unless preemption is
10 consistent with the fundamental federalism prin-
11 ciples set forth in section 2, and unless a clearly le-
12 gitimate national purpose, consistent with the fed-
13 eralism policymaking criteria set forth in section 3,
14 cannot otherwise be met.

15 **SEC. 6. AGENCY IMPLEMENTATION.**

16 (a) IN GENERAL.—The head of each executive de-
17 partment and agency shall designate an official to be re-
18 sponsible for ensuring the implementation of this Act.

19 (b) FEDERALISM ASSESSMENT.—In addition to
20 whatever other actions the designated official may take to
21 ensure implementation of this Act, the designated official
22 shall determine which proposed policies have sufficient
23 federalism implications to warrant the preparation of a
24 federalism assessment. With respect to each such policy
25 for which an affirmative determination is made, a federal-

1 ism assessment, as described in subsection (c) of this sec-
 2 tion, shall be prepared. The department or agency head
 3 shall consider any such assessment in all decisions in-
 4 volved in promulgating and implementing the policy.

5 (c) CONTENTS.—Each federalism assessment shall
 6 accompany any submission concerning the policy that is
 7 made to the Office of Management and Budget pursuant
 8 to Executive Order No. 12866, and shall—

9 (1) contain the designated official’s certification
 10 that the policy has been assessed in light of the prin-
 11 ciples, criteria, and requirements stated in sections
 12 2 through 5 of this Act;

13 (2) identify any provision or element of the pol-
 14 icy that is inconsistent with the principles, criteria,
 15 and requirements stated in sections 2 through 5 of
 16 this Act;

17 (3) identify the extent to which the policy im-
 18 poses additional costs or burdens on the States, in-
 19 cluding the likely source of funding for the States
 20 and the ability of the States to fulfill the purposes
 21 of the policy; and

22 (4) identify the extent to which the policy would
 23 affect the States’ ability to discharge traditional
 24 State governmental functions, or other aspects of
 25 State sovereignty.

1 **SEC. 7. GOVERNMENT-WIDE FEDERALISM COORDINATION**
2 **AND REVIEW.**

3 (a) IN GENERAL.—In implementing Executive Order
4 No. 12866, the Office of Management and Budget, to the
5 extent permitted by law and consistent with the provisions
6 of such order, shall take action to ensure that the policies
7 of the executive departments and agencies are consistent
8 with the principles, criteria, and requirements stated in
9 sections 2 through 5 of this Act.

10 (b) FEDERALISM CONCERNS.—In submissions to the
11 Office of Management and Budget pursuant to Executive
12 Order No. 12866, executive departments and agencies
13 shall identify proposed regulatory and statutory provisions
14 that have significant federalism implications and shall ad-
15 dress any substantial federalism concerns. Where the de-
16 partments or agencies determines it appropriate, substan-
17 tial federalism concerns shall also be addressed in notices
18 of proposed rulemaking and messages transmitting legisla-
19 tive proposals to Congress.

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