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AMERICAN LEGISLATIVE EXCHANGE COUNCIL

**SOVEREIGNTY
OF THE PEOPLE
AND DEVOLUTION**

*An Agenda for the Restoration of the
Tenth Amendment*

by
State Sovereignty Committee
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May 1995

Washington, D.C.

*Sovereignty of the People and Devolution:
An Agenda for the Restoration of the Tenth Amendment*

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*Sovereignty of the People
and Devolution*

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TENTH AMENDMENT

*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.*

SOVEREIGNTY OF THE PEOPLE AND DEVOLUTION

An Agenda for the Restoration of the Tenth Amendment

EXECUTIVE SUMMARY

From Privileged Sovereignty to Popular Sovereignty. Sovereignty is supreme political authority -- the ultimate source of political power. To the extent that a government or a person is sovereign, that government or person is not subject to the orders or compulsion of outside agencies.

"Privileged sovereignty," sovereignty exercised by the few has existed throughout most of history. This produced arbitrary laws, and resulted in people becoming the servants of government. Approximately 200 hundred years ago, a world-wide revolution began, involving "popular sovereignty" -- the concept that the people, not an individual nor a privileged group, are supreme. One of the most eloquent statements of popular sovereignty is to be found in the Declaration of Independence, which proclaims that governments must derive their powers from the governed, and the governed have the right to change the way in which they are governed.

Popular sovereignty involves the following principles: 1) Fundamental rights are retained by the people -- they are not even delegated to the levels of government closest to the people; 2) People are equal under the law, and have equal access to their government; and, 3) Government depends upon the consent of the governed, and the people retain the right to alter governmental arrangements.

Popular sovereignty replaced arbitrary laws with general laws, and government as the master of the people with government as the servant of the people. Popular sovereignty brought a new and enduring political ideal, which Abraham Lincoln characterized as: *government of the people, by the people, and for the people.*

Popular Sovereignty and the U.S. Constitution. As a result of the American revolution, the states became sovereign entities, drawing their powers from their citizens. Subsequently, the states delegated some of their sovereignty -- certain enumerated and limited powers -- to the federal government, through ratification of the Constitution. The states, on behalf of the people, retain control over the Constitution through the amendment ratification process.

Popular sovereignty is a hierarchy. Fundamentally, the people are sovereign, and the people have delegated certain elements of sovereignty to the states. Yet the people retain important elements of sovereignty, such as freedom of speech, freedom of assembly, freedom of religion, choosing where to live, choosing where to work, and many others. The states have delegated certain of their powers to the federal government. Ultimately, the source of supreme political authority is the people.

The United States: A Federation, not a Unitary State. In a unitary state, all sub-national governments are creations of and under the control of the national government. The United States is not a unitary state; it is rather a federation of unitary states. Unlike a unitary state, in the U.S., all local governments and the federal government are the creations of and under the control of the states. The Constitution, under the Tenth Amendment, reserves to the states and to the people all powers that are not delegated to the federal government. The Constitution further requires that any changes to it -- constitutional amendments, must be approved by three-quarters of the states.

Federal Usurpation of Popular Sovereignty. Through the years, the sovereignty of the states and of the people has been eroded by illegitimate federal expansion. As the federal government has expanded, it has spent beyond its means and has resorted to mandating actions by state and local governments without providing the necessary funding. In enacting these mandates, the federal government has treated the states as subordinate units of government, which they are not. The federal government has no general constitutional authority to mandate actions by the states. Federal authority over the states is largely

limited to prohibitions relating to the constitutional rights of individuals, and enumerated powers under the Constitution. *To the extent that the states are sovereign, they are outside the reach of federal mandates.* Rising concern with federal expansion has generated an historic sovereignty debate.

Popular Sovereignty is Inseparable from Democratic Values. As government decision-making becomes more remote from the people, they have less control, and their sovereignty is diluted. Ever incremental dilution of popular sovereignty restores privileged sovereignty. Popular sovereignty requires that government decisions be made at the level of government closest to the people that is competent to handle the issue. Thus, while the states are sovereign, they should devolve whatever powers are appropriate to the levels of government closest to the people. Where government decisions are unnecessarily remote, the power of interests that seek private gain at common cost is increased. Moreover, as the federal government increases its power, greater waste and duplication of effort occur. Government more remote from the people than necessary violates the most fundamental democratic principles. Considerable devolution of illegitimately acquired federal power is appropriate. *Government of the people, by the people and for the people is government that is closer to the people.*

A Crisis of Governance. The original fundamental principles of the Constitution have been violated by illegitimate expansion of federal power. While there are encouraging signs that Congress will engage in some voluntary devolution, it is unreasonable to expect that the federal government will devolve itself of the powers that it has wrested from the states. The people, through the states, can restore their sovereignty by amending the Constitution to provide expeditious mechanisms for restraining the federal government.

The ALEC Sovereignty of the People and Devolution Agenda. The American Legislative Exchange Council (ALEC) has developed a "Sovereignty of the People and Devolution Agenda." The principal element is a Declaration of Sovereignty, which affirms the importance of fundamental law, proposes principles by which popular sovereignty should be restored,

SOVEREIGNTY OF THE PEOPLE AND DEVOLUTION

and outlines strategies by which such restoration might occur. The "Sovereignty of the People and Devolution agenda" also includes proposed Constitutional amendments, model resolutions and model legislation that would advance the sovereignty of the states and the people.

CHAPTER 1

**FROM PRIVILEGED SOVEREIGNTY
TO POPULAR SOVEREIGNTY**

Sovereignty is supreme political authority -- the ultimate source of political power. To the extent that a government or a person is sovereign, that government or person is not subject to the orders or compulsion of any other.

"Privileged sovereignty," sovereignty exercised by the few, has existed throughout most of history.

- Individual monarchs and dictators were considered sovereign.
- Small groups were sovereign in plutocracies, such as aristocracies or communist governments.

Such governments were limited only by the sovereign's self restraint. As a result, privileged sovereignty produced arbitrary laws and other arbitrary government actions. The governed had few rights and virtually no access to the political decision-making process. Privileged sovereignty involved a "government of men" (a limited group of people) rather than a "government of laws" (limited by fundamental principles). Privileged sovereignty relegated the people to the status of servants of government or servants of the privileged.

In the decades surrounding American independence, political philosophers suggested that sovereignty be broadened - that "popular sovereignty" should replace privileged sovereignty. Government of the few was to be replaced by government of the many. There was no more eloquent statement of the imperative for popular sovereignty than that found in the Declaration of Independence:

We hold these truths to be self-evident. That all men are created equal, that they are endowed by their Creator with

certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, governments are instituted among Men, deriving their just power from the consent of the governed.¹

Under popular sovereignty, the ultimate political authority resides with the people. Through popular sovereignty the people “loan” power to government, which the people are free to alter as they see fit.

That whenever any form of government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.²

In the ensuing centuries, popular sovereignty has spread around the world. With the fall of the absolutist communist (privileged sovereignty) regimes, popular sovereignty has expanded substantially in the last decade.

Popular sovereignty involves the following principles:

1. Fundamental rights are reserved to the people. These rights, such as freedom of speech and freedom of assembly, represent sovereignty that the people do not delegate to government, but which government is empowered to protect.
2. People are equal under the law, and have equal access to their government.
3. Government depends upon the consent of the governed, and the people retain the right to alter governmental arrangements.

By delegating sovereignty to government, the people seek to improve their lives in dimensions that would not be possible

except by common action. Through government, the people attempt to serve the common good by serving public purposes.³ Government serves the public purpose by the enactment of general laws, limited by fundamental principles, that apply to all.⁴

*What government does for one it should do for all and what government does not do for all, it should do for none.*⁵

The replacement of privileged sovereignty by popular sovereignty established radically new values. Popular sovereignty replaced arbitrary laws with general laws, government of the few with government of the many, absolute government with limited government, private purposes with public purposes, and government as the master of the people with government as the servant of the people. The rise of popular sovereignty represented the philosophical triumph of the Jeffersonian values of individual liberty, limited government, and the free market.⁶ According to Jefferson:

*...a wise and frugal government, which shall restrain men from injuring one another, which shall leave them free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned. This is the sum of good government.*⁷

Popular sovereignty brought a new and enduring political ideal, which Lincoln characterized as:

*..government of the people, by the people, and for the people.*⁸

¹ Declaration of Independence.

² Declaration of Independence.

³ See Jean Love and Samuel A. Brunelli (editors), "The Public Purpose," and "Serving the Public Purpose," *Legislative Issue Briefs, 3rd Edition*, (Washington, DC: American Legislative Exchange Council, 1995).

⁴ Friedrich A. Hayek, *The Constitution of Liberty* (Chicago, IL: University of Chicago Press: 1960).

⁵ Samuel A. Brunelli, "Serving the Public Purpose," *FYI* (Washington, DC: American Legislative Exchange Council, January 21, 1992).

⁶ Individual liberty in economic activities.

⁷ Thomas Jefferson, *1801 Inaugural Speech*.

⁸ Abraham Lincoln, *Gettysburg Address*.

CHAPTER 2

POPULAR SOVEREIGNTY AND THE CONSTITUTION

As a result of the American revolution, the states became sovereign entities, based upon a delegation of sovereignty by their citizens. According to Alexander Hamilton:

The State governments by their original constitutions are invested with completed sovereignty.⁹

At the same time, the people reserved elements of sovereignty to themselves through limits on the powers of state governments. Constitutions were thus established to guarantee the sovereignty of the people and to limit the scope of government.

As time went on, a consensus developed that the common good of the American states required establishment of a national government. The federal government was established by the states through the Constitutional Convention and the subsequent ratification process. State delegations were selected by the state legislatures. As it developed, ratification would require nine of the 13 states, and even then the Constitution would be effective in only those states that ratified it.¹⁰ In the end, all 13 states ratified the Constitution. Thus the states, on behalf of the people, delegated sovereignty with respect to some powers to the new federal government. The Preamble of the Constitution clearly recognizes the delegation of power by the people.

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

The Constitution is a prescription for limited government in which limited powers were enumerated for delegation to

the federal government. The Bill of Rights limited government still further.

The federal government became sovereign with respect to its delegated powers, to the extent that its actions remained consistent with its authority under the Constitution.¹¹

*This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land;*¹²

This limitation on federal power was explained by Hamilton, a proponent of greater federal government power:

*Every act of a delegated authority, contrary to the tenor of the commission under which it is exercised is void. No legislative act, therefore, contrary to the Constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.*¹³

The Supreme Court of the United States is popularly thought of as the final arbiter of Constitutional questions. The authority of the Supreme Court, like that of Congress and the President, is limited by the Constitution. There is no similar limitation on the people. Just as the people, through the states, delegated some of their sovereignty to the federal government, the people, through the states, remain the ultimate arbiter of Constitutional questions. Through the Constitutional amendment process, the people retain the authority to change or clarify the Constitution. Under Article V, amendments to the Constitution may be proposed by Congress.¹⁴ Alternatively, Article V provides for a Constitutional Convention, which must be called by Congress if sought by two-thirds of the states. Once proposed, a Constitutional amendment is ratified upon adoption by three-quarters of the states, either by state legislatures or by state Constitutional Conventions.¹⁵

Popular sovereignty under the Constitution involves delegations of power. The people have delegated certain elements of sovereignty to the states, yet the people retain important elements of sovereignty as guaranteed rights under the Constitution. With respect to the elements of sovereignty retained by the people, no government, federal, state or local is authorized to interfere. The states, on behalf of the people, have delegated to the federal government, certain elements of sovereignty that were previously granted to the states by the people.

Thus, popular sovereignty is a hierarchy, which may be illustrated by an inverted pyramid (see Figure 1). Fundamentally, the people are sovereign. The people have delegated certain sovereign powers to the states. The states have delegated certain of the powers delegated to them by the people to the federal government. Ultimately, the source of sovereignty is the people: *Government of the people, by the people, and for the people.*

⁹ *The Federalist.*

¹⁰ *US Constitution*, Article VII. In fact, North Carolina and Rhode Island had not ratified the Constitution by the first presidential election (1789) and did not take part in that election.

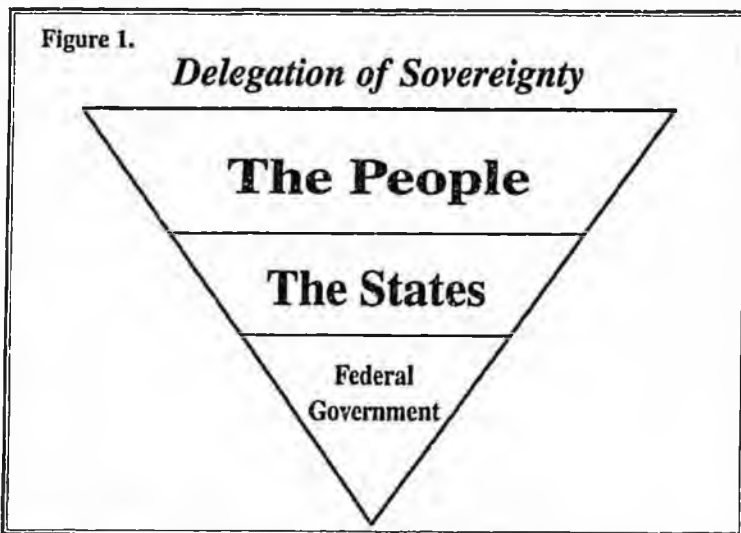
¹¹ See *The Federalist*, #33.

¹² *US Constitution*, Article VI.

¹³ *The Federalist.*

¹⁴ By a two-thirds vote of each house of Congress. Unlike the legislative process, the signature of the President is not required, and thus there is no Presidential veto.

¹⁵ The method by which the states ratify is up to the Congress. In all but one case, ratification was by the state legislatures, instead of by state constitutional conventions.



CHAPTER 3
THE UNITED STATES:
A FEDERATION, NOT A UNITARY STATE

In a unitary state (nation), all sub-national governments are subordinate to, or under the control of, the national government. The United States of America is not a unitary state, it is a federation of unitary states. The sovereignty of the federal government is granted by the people through the states. Through the Constitutional amendment process, the states retain the authority to alter the federal government. The federal government has no such power over the states.¹⁶ On the other hand, the states are unitary governments, not federations. Counties, municipalities and other local governments are creations of the states, and are subordinate to state government. Under the U.S. federal system, the national government obtains virtually all of its sovereignty from the people through the states.

Perhaps the most important sovereign power of the states is their power over the federal government. In this process, the states are equal.

□ In obtaining the requisite number of state ratifications for a Constitutional amendment, Wyoming (the state with the smallest population) is just as important as California (the state with the largest population), which has 65 times more people.

The states have sovereign power over the Congress in that they may require Congress to call Constitutional conventions.¹⁷

The sovereignty of the states and the people is demonstrated by the fact that the states in concert limited even their own ability to alter the Constitution -- that:

*...no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.*¹⁸

Through the Constitution, the States delegated certain elements of their sovereignty to the federal government, while

retaining all other sovereign powers granted to them by the people. The Tenth amendment to the Constitution specifies that:

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.¹⁹

Even before the Tenth Amendment was proposed, Hamilton strongly asserted the view that the states would retain a substantial degree of sovereignty under the Constitution:

the State governments would clearly retain all the rights of sovereignty that they before had, and which were not ... exclusively delegated to the United States. This ... alienation (removal) of State sovereignty would only exist in three cases:

Where the Constitution in express terms granted an exclusive authority to the Union;

where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and

where it granted an authority to the Union to which a similar authority in the States would be absolutely and totally contradictory and repugnant.²⁰

Thus, under even after establishment of the federal government, the people, through the states remain the ultimate repository of sovereignty.

¹⁶ While the federal government may establish new states, its authority is pursuant to the US Constitution, as authorized by the states.

¹⁷ US Constitution, Article V.

¹⁸ US Constitution, Article V.

¹⁹ US Constitution, 10th Amendment.

²⁰ *The Federalist*. Underlining indicates emphasis by Hamilton.

CHAPTER 4

FEDERAL USURPTION OF POPULAR SOVEREIGNTY

But through the years the sovereignty of the people and the states has been eroded by acts of Congress, Presidential executive orders, and regulations issued by executive departments, and the failure of the U.S. Supreme Court to curb the expansion of the federal government. Federal power could have been legitimately expanded by the states and the people through the established Constitutional processes. But that has not been the case. The dilution of sovereignty through federal expansion has been illegitimate -- it is nothing less than usurpation. Each of the three branches of the federal government have used logic that strains rationality to justify the illegitimate centralization of power at the federal level.

□ For example, a 1940s Supreme Court decision upheld a federal law that subjected to federal regulation a farmer's production of wheat for personal consumption under the dubious logic that such production impacted interstate commerce.²¹

As the federal government assumed sovereignty in excess of its authorization, its appetite for spending has greatly exceeded the available financial resources. The financial failure of the federal government is so pervasive that the very economic future of the nation is threatened.²² The nation's accumulated federal budget deficits have produced a federal government debt (national debt) nearing \$50,000 per household. Interest on the federal government debt consumes one-seventh of the current federal budget -- and that will continue to rise. The congressional Bi-Partisan Commission on Entitlement and Tax Reform reported that if current spending trends continue:²³

In less than 20 years, virtually all federal revenues will be required to pay for entitlements, such as social secu-

riety, Medicare and Medicaid, and interest on the federal government debt. Nothing will be left over for infrastructure, defense, or the multitude of other programs.

Over the next 40 years, federal tax increases of 75 percent will be required to simply maintain present federal programs because spending is escalating so rapidly.²⁴

In recent years, growing concern about the rising federal government debt and the federal deficit has made it more difficult to increase program outlays by raising federal taxes. But the federal government has continued to usurp power, especially by imposing mandates on state and local governments, while providing little or no funding for their implementation. Unfunded mandates have created substantial burdens for state and local governments.

For example, the state of California estimates that unfunded and under-funded federal mandates cost it \$8 billion per year²⁵ (approximately one-fifth of state general expenditures).

By imposing mandates on the states, the federal government has illegitimately relegated the states to a subordinate status. The United States has begun to resemble a unitary nation, rather than a federation, in contravention of the U.S. Constitution.

State and local government officials have become concerned about unfunded federal mandates. And, in just a few years, this concern has blossomed into an historic debate.²⁶ Supporters of unfunded federal mandates often suggest the importance of national standards and express concerns that federal imposition of mandates is necessary; otherwise the states will fail to act. While this concern is at least partially rooted in an arrogance that perceives state and local governments to be less competent than the federal government, there is a more important problem. *In and of itself, an apparent need for federal action does not meet the threshold to justify federal activity.* Only the Constitution can do that. The Constitution does not grant the federal government any general power to impose mandates on the states or their local levels of government.²⁷

Federal authority over the states is largely confined to prohibiting or limiting what the states may do. The federal government forbids the states to violate the Constitutional rights of individuals. It can preclude or limit state activity with respect to powers that are delegated to the federal government. But federal power to order a state to act is very limited. For example, the federal government can require the states to place their militias under federal control in time of emergency.²⁸ But, despite the limited authority of the federal government over the states, Congress has routinely imposed costly mandates on the states and their subordinate governments.

The authority of the federal government to require the states to perform activities, or to perform them in any particular way, is constitutionally limited. Hamilton, as noted earlier, viewed the states as retaining sovereignty except where particular powers were delegated to the federal government, an interpretation added to the Constitution itself in the Tenth Amendment. *To the extent that the states are sovereign, they are outside the reach of federal mandates.*

The proliferation of federal mandates raises fundamental questions of federal power in relationship to that of the states and of the people. Federal usurpation of popular sovereignty has risen to the top of the public policy agenda.

²¹ Wickard v. Filburn, 317 US 111 (1942).

²² For example, one economic report suggests that average after tax incomes may decline by nearly two thirds over the next forty years, largely as a result of escalating federal spending. See Neil Howe, "Why the Graying of the Welfare State Threatens to Flatten the American Dream --- or Worse," *National Taxpayers Union Foundation Policy Paper Number 10* (Washington, DC: National Taxpayers Union, December 30, 1994).

²³ *Bipartisan Commission on Entitlement and Tax Reform: Interim Report to the President* (Washington: August 1994).

²⁴ It is highly unlikely that this level of federal revenue increase is achievable, due to the "law of diminishing returns." In taxation, tax increases tend to discourage tax producing economic activity.

²⁵ *Governor's Budget Summary: 1995-6* (California Governor Pete Wilson: Sacramento: 1995).

²⁶ Concern about unfunded federal mandates received national attention when a coalition led by the United States Conference of Mayors (including ALEC) declared an "Unfunded Mandates Day," in October 1992.

²⁷ The Constitution contains no indication that any federal to local government relationship was to occur.

²⁸ *US Constitution*, Article II, Section VIII.

CHAPTER 5

POPULAR SOVEREIGNTY: INSEPARABLE FROM DEMOCRATIC VALUES

While the Constitution itself provides sufficient justification for the sovereignty of the states and of the people, there is also a strong practical rationale. As sovereignty is removed further from the people, popular sovereignty is diluted, and any dilution of popular sovereignty represents a shift toward privileged sovereignty. As the sovereignty of the people has been eroded, governments have illegitimately exercised greater sovereignty. In consequence, dilution of popular sovereignty represents an abdication of the most fundamental principles of democracy.

As the functions of government become more remote from the people, it is more difficult for people to exercise control over government, which means the voice of the individual voter is less forceful. This can be stated in simple terms.

- Each California voter has 13 times the influence at the state level as at the federal level.
- Each Wyoming voter exercises more than 500 times the influence in state elections as in federal elections.²⁹
- Similarly, voters in each state have more control over local government units than over state government, and individual voters in smaller municipalities have greater voice than in larger municipalities.³⁰

The Constitution delegates authority to the federal government for functions that are most appropriately handled at the national level, such as defense, international affairs, immigration, printing of currency, patents, and interstate commerce. The philosophy behind the Tenth Amendment is that power should be retained by the states with respect to issues that do

not have to be handled at the national level. As a result, the Constitution delegates authority to the federal government over such demonstrably national issues as defense, the currency, and interstate commerce. This principle ("subsidiarity"³¹) holds that governmental functions should be performed at the level of government closest to the people that is competent to perform the function. State governments should devolve to local governments all functions that can appropriately be handled at that level. And functions that can appropriately be handled by state governments should not be handled by the federal government. Similarly, powers that can be handled by the individual should not be handled by local government (or any other level of government).

***Government of the People:
Competence and Closeness***

The fundamental virtue of government that is closer to the people is its relative accountability. State and local governments are not inherently more competent than the federal government. Their greater proximity simply permits them to be more reflective of the public will, and provides incentives for them to spend more efficiently the tax money they collect from their citizens. Moreover, it is easier for the people to effect changes through the electoral process where government is closer to the people. Greater accountability is the natural and necessary consequence of government that is closer to the people.

Unwarranted centralization of power creates a "democratic deficit." This occurs when the people have less control over a government function than they should have, or when a function is performed at a government more remote from the people than necessary. When governmental functions are handled at a more remote level than necessary, the people are disenfranchised.

If there is a democratic deficit because the government becomes more remote, it is also more susceptible to political interests ("rent-seeking"³² interests) that seek favors from government for private purposes, rather than public purposes. And remote governments provide significant "economies of scale," for those seeking legislation for private purposes. For example, only one government need be lobbied at the national level, versus 50 state governments or more than 20,000 thousand local governments. Moreover, the stronger voice of the people at the state and local level makes it more difficult to enact private purpose legislation.³³ Thus, there has been considerable support for expanding federal sovereignty at the expense of the states and the people by some interests that seek private gain at the public's expense.

Centralization of power at the federal level has resulted in waste, duplication and contradictory policies as the federal government has intruded into functions that are also handled by state and local governments. The federal government, which is more remote, has imposed costly requirements on government programs that could not have been enacted in the 50 states.³⁴ State and local governments have spent more to accommodate federally funded programs than they would have if they had spent taxes raised directly from their own citizens.³⁵ States and localities, like people, are *more careful with their own money than with other people's money*.³⁶ In the final analysis, however, federal funds are not other people's money, they are the people's money. Over-reliance on the federal government and on federal funding has produced a net loss through higher than necessary taxes, imprudent investment decisions, reduced economic growth and retarded job creation.³⁷

Moreover, state and local governments themselves mimicked rent-seeking political interests as they have established expensive, duplicative and conflicting federal lobbying initiatives. This has diluted the sovereignty of the people even more, because as the lines of political authority become more obscured, it is more difficult for the people to exercise control.

To restore the sovereignty of the states and the people, it is necessary that federal usurpation of sovereignty be reversed.

This requires "devolution" of illegitimately acquired sovereignty by the federal government to state governments, which should further devolve such powers as are appropriate to their local governments. By devolving all powers that have been illegitimately assumed by the federal government, the sovereignty of the states and of the people can be restored. There is a simple test: whether a rational, unstrained reading of the Constitution grants sovereignty on an issue to the federal government. If not, then the issue is in the domain of the states.

In the final analysis, unnecessary centralization of power at the federal level is anti-democratic, because it dilutes popular sovereignty. In a very real sense:

*Government of the people, by the people and for the people is government that is closer to the people.*³⁸

²⁹ Based upon the total vote in the November 1992 general election.

³⁰ The remoteness of government from the people may be expressed in terms of the relative levels of government or the relative size of individual government units. For a description of the advantages of smaller local governments even in a metropolitan setting, see *The Organization of Local Public Economies* (Washington, DC: Advisory Commission on Intergovernmental Relations, December 1987).

³¹ The term "subsidiarity" is used for this concept in the European Union: "the powers that a State or federation wields in the common interest are only those which individuals, families, companies, and local or regional authorities cannot exercise in isolation. This common sense principle therefore dictates that decisions should be taken at the level closest to the ordinary citizen and that action taken by the upper echelons of the body politic should be limited. (author's emphasis); *The Principle of Subsidiarity: Communication of the Commission to the Council and the European Parliament*. (Brussels, Belgium: Commission of the European Communities, October 27, 1995).

³² A political economic term denoting political activity by interests to alter public policy to their own advantage, and to the disadvantage of others.

³³ There are at least two dimensions to this. In smaller governments the people have greater voice, and are therefore able to exercise greater control over their elected representatives by making their views known during the legislative process. Further, people can more readily change the makeup of their state and local legislatures during elections.

³⁴ It is estimated that federal labor mandates in mass transit are more costly than the federal aid received by state and local governments, rendering the program a net deficit in terms of the public interest. See Wendell Cox and Samuel A. Brunelli, "Up to the Challenge: Why State and Local Governments can Flourish under the Balanced Budget Amendment," *Issue Analysis*, Volume 21, Number 1 (Washington, DC: American Legislative Exchange Council, February 1995).

³⁵ For example, local governments have routinely spent more to construct federally funded waste water treatment plants, and built less reliable technology, than they have spent to construct locally funded waste water treatment plants. See Congressional Budget Office, *Efficient Investments in Waste-water Treatment* (Washington, DC: June 1985).

³⁶ Milton Friedman, "The Real Free Lunch: Markets and Private Property," *Cato Policy Report* (July-August 1993).

³⁷ It has been estimated that each additional \$1.00 in taxation destroys \$0.40 in economic growth. See Dale W. Jorgenson and Kun-Young Yun, "The Excess Burden of Taxation in the United States," *Journal of Accounting, Auditing and Finance*, September 1990.

³⁸ Speaker of the North Carolina House of Representatives Harold J. Brubaker, *The States: The Supreme Level of Government*, Address to the National Orientation Conference of the American Legislative Exchange Council (Washington, DC: December 1994).

CHAPTER 6

A CRISIS OF GOVERNANCE

Federal usurpation of popular sovereignty has generated a serious crisis in American governance. The most basic principles of the nation's fundamental law (the U.S. Constitution) have been violated. The Supreme Court has generally failed in its critical role of defending the Constitution and has instead joined Congress and the Executive branch in arbitrarily reducing the sovereignty of the states and of the people.

Of course, the three branches of the federal government could undo their wrongful expansion of power.

- Congress could repeal the laws under which it has illegitimately expanded federal power.
- The President could rescind orders and regulations that have wrongly intruded into areas of state responsibility.
- The Supreme Court could invalidate laws, regulations and executive orders that have usurped the sovereignty of the states and of the people.

And there are encouraging indications that federal initiatives will begin to devolve power to the states. But it would be overly optimistic to rely upon the federal government to willingly devolve all of the powers that it has wrested from the states. Restoration of the sovereignty of the states and the people will primarily depend upon their resolve.

The people, through the states, retain the right to reclaim their sovereignty through Constitutional amendments. The amendment process is, however, difficult and cumbersome. The people need more expeditious mechanisms for rendering Constitutional decisions. Various proposals have been made, the most promising of which include:

The *Government of the People Amendment*, where ratification by two-thirds of the states would nullify sections of federal law or regulation which have violated the sovereignty of the states; and

The *States Initiative Amendment*, which would allow three-fourths of the states to propose and ratify an amendment which would become of the Constitution unless Congress voted to disapprove amendment by a two-thirds vote within two years.

CHAPTER 7

**THE ALEC SOVEREIGNTY OF THE PEOPLE AND
DEVOLUTION AGENDA**

The American Legislative Exchange Council (ALEC) has adopted a "Sovereignty of the People and Devolution Agenda" comprised of model resolutions, model proposals for Constitutional amendments, and model legislation.

The cornerstone of the agenda is the "Declaration of Sovereignty." It is hoped that this document will represent a valuable resource to the public and public officials as this pivotal debate proceeds.³⁹

The ALEC "Sovereignty of the People and Devolution Agenda" includes the following elements:

1. **ALEC Declaration of Sovereignty:** This resolution reiterates the role of the federal government under the Constitution, outlines the extent to which the federal government has illegitimately assumed sovereignty, affirms the importance of fundamental law, proposes principles by which popular sovereignty should be restored, and outlines strategies by which such restoration might occur.
2. **Model Resolution: Declaration of Sovereignty:** The *Declaration of Sovereignty* (above) in resolution form.
3. **Model Resolution: Government of the People Amendment:** This resolution petitions the U.S. Congress to propose the *Government of the People Constitutional Amendment*, for submittal to the states for ratification. The amendment allows the states to nullify federal laws and regulations, by a two-thirds vote, when the states deem that the federal government has exceeded its Constitutional authority.
4. **Model Resolution: States Initiative Amendment:** This resolution petitions the U.S. Congress to propose the

States Initiative Constitutional Amendment to the Constitution, for submittal to the states for ratification, providing that three-quarters of the states may propose amendments to the Constitution, which are ratified if Congress, within two years of such proposal, fails to disapprove them by a two-thirds vote.

5. Model Resolution: *Restatement of State Sovereignty:* This resolution claims sovereignty under the Tenth Amendment over all powers not delegated to the federal government by the Constitution.

6. Model Legislation: *Joint Legislative Committee on Federal Mandates Act:* This model legislation establishes a joint legislative committee on federal mandates to annually review the activities of Congress and the federal government, including court rulings, with regard to any laws, regulations or other actions that may require state compliance with a federal mandate.

7. Model Legislation: *Constitutional Defense Council Act:* This model legislation establishes a Constitutional Defense Council to examine and challenge by legal action, legislation or any other legal means: federal Mandates; court rulings; The authority granted to, or assumed by, the federal government; laws, regulations and practices of the federal government; any other activity that is deemed appropriate by the Council.

8. Model Legislation: *Federal Mandate & Encroachment on State Sovereignty Act:* This legislation creates a "Federal Mandate & Federal Encroachment on State Sovereignty Auditor" to inventory all federal mandates, calculate the cost of mandates to the different levels of government; and maintain a voting record of the congressional delegation.

" It is expected that principles such as those outlined in ALEC's *Declaration of Sovereignty* will be considered at the "Conference of the States," which was, at publication, in the planning stages. ALEC has endorsed the "Conference of the States" in the belief that a comprehensive national debate is required on the sovereignty of the people and devolution.

DECLARATION OF SOVEREIGNTY

(Annotated)

I. We, the American Legislative Exchange Council, state legislators representing the states and the people hereby reaffirm the sovereignty of the states and of the people.

More than two centuries ago, the sovereign states, representing the sovereign people did, of their own volition, ratify the Constitution of the United States. In so doing, the states, in concerted action, established the federal government to perform certain limited and enumerated functions. Under the Tenth Amendment of the Constitution of the United States, the powers not delegated to the federal government were "reserved to the states respectively, or to the people."

II. Throughout the history of the United States, and especially in recent decades, the federal government has, without right, blatantly disregarded state sovereignty by arrogating unto itself powers that were to have been reserved to the states and to the people.

A. It has conscripted states and their subordinate levels of government to implement its programs through federal mandates, funded and unfunded;

NOTE: Federal authority over the states is largely limited to forbidding or limiting state action with respect to individual Constitutional rights or powers delegated to the federal government under the Constitution. Congress has virtually no constitutional authority to enact mandates on the States, much less their subordinate levels of government. To a large degree, federal mandates have arisen as the federal government has intruded into powers that were to have been reserved to the states.

Federal mandates pervade federal programs that involve state and local governments. These range from

mandates costing billions of dollars to bureaucratic rules that may be described as nuisances, but which significantly add to state and local government administrative burdens and costs.

- B. It has requisitioned officers of states and their subordinate levels of government to perform duties on its behalf, bypassing state constitutional and legislative processes;

NOTE: *Some federal laws require the states, governors, and other state or local public officials to administer federal programs. States are not administrative divisions of the federal government. State and local government officials are not employees of the federal government. It is inappropriate for the federal government to conscript states, their political subdivisions, state government officials, or local government officials to perform federal duties.*

Examples include regional planning mandates that require certain gubernatorial actions and the Ozone Transport Commission, which was established by Congress to deal with air quality issues in the Northeast. The Commission consists of governors, but excludes the state legislatures. It is inappropriate to delegate powers to state officials or agencies outside of mechanisms established under state constitutions.

- C. It has, as a result of expanding power, imprudently increased spending, increased taxation, and increased regulation, which have, in consequence, reduced economic growth by unnecessarily discouraging investment and job creation;

NOTE: *Throughout history the nation has engaged in deficit spending, primarily in times of war. In recent decades, however, the federal government has routinely run deficits, and the national debt is now approaching \$5 trillion (almost \$50,000 per household).*

The federal deficit has risen largely due to insufficiently controlled federal domestic spending. Per-capita, inflation adjusted federal revenues have doubled since 1960, while federal spending has escalated at a 30 per cent greater rate than revenues.

D. It has, through deficit spending and other actions, created massive federal obligations that threaten the living standards of the people, the solvency of the states, and the future of generations yet unborn;

NOTE: *Excessive federal spending threatens the economic future of the nation.*

Recent evidence of this is provided by the Congressional Bi-Partisan Commission on Entitlement and Tax Reform. By 2012, at present rates of growth, virtually all federal revenues will be required to fund entitlements and interest on the national debt. Maintaining the present level of federal programs would require federal tax revenue increases of 75 percent over the next 40 years.

E. It has, by centralizing power in Washington, D.C., created a "democratic deficit," a condition under which the federal government has assumed control over functions of government that should have been reserved to state and local governments, making effective control of government more difficult for the people;

NOTE: *A fundamental principle of American government is that the people are sovereign (popular sovereignty).*

The people, however, have less control over a remote government than they have over government that is more proximate. Moreover, the people are able to make electoral changes more readily where government is

closer to the people. As a result, more proximate government is more responsive to the people; it is more reflective of democratic ideals.

F. It has, through unwarranted judicial intervention, interposed itself between the states and the people on matters not of federal jurisdiction;

G. It has, through imprudent judicial review, systematically expanded the power of Congress and the Executive by usurping powers that were not intended under the Constitution of the United States;

NOTE: The federal court system, and especially the Supreme Court, has allowed expansion of federal power by unreasonably permissive interpretations of the Constitution. For example:

The "commerce" clause of the Constitution has been interpreted so broadly that the authority of states within their own borders has been seriously compromised by federal intrusion.

Federal courts have imposed unreasonable requirements on the states with respect to prison operations.

H. It has evaded the restraints of the nation's fundamental law, the Constitution of the United States, and has in so doing engaged in the imposition of arbitrary laws, administrative actions, and judicial decisions.

Through these actions, the federal government has usurped the sovereignty of the states. And, through these actions, the federal government has usurped the sovereignty of the people.

III. We declare that the federal government cannot, on its own, legitimately diminish the sovereignty of the states and of the people as intended under the Constitution of the United States.

The fundamental law of the nation may only be altered in the manners prescribed by that fundamental law. We are convinced that the policy failures that have accompanied expanded central authority provide, in themselves, powerful testimony to the importance of limiting the federal government to those powers enumerated in the Constitution of the United States. To correct these failures and to secure a more favorable future for the nation, it is necessary that the powers expropriated by the federal government be returned to the states and to the people.

IV. We therefore declare the following principles as necessary to the restoration of the sovereignty of the states and of the people, as required under the Tenth Amendment of the Constitution of the United States:

A. *The federal government should be restored to the role assigned to it under the Constitution of the United States.* The powers usurped from the states and from the people by the federal government should be returned in an expeditious and orderly manner. Mechanisms exist for interstate cooperation where necessary, such as interstate compacts, voluntary uniform standards, and amendments to the Constitution of the United States.

B. *Constitutional clauses that have been the source of illegitimate federal expansion should be restored to their original meaning.* Federal expansion has often been based upon unreasonably permissive interpretations of enumerated powers under the Constitution of the United States, especially the "commerce" clause.

See II-G

C. *The federal government should not impose mandates, unfunded or funded, on the states or on their subordinate gov-*

ernments. The Constitution of the United States delineates federal responsibilities, and reserves all other responsibilities to the states or to the people. Federal mandates on state or local governments are unnecessary and inappropriate.

See II-A

D. *The federal government should be the exclusive financier of its programs.* By partially funding federal programs, such as through matching grants, the federal government distorts the priorities of state and local governments, and establishes a democratic deficit that virtually disenfranchises state and local voters. The federal government has a legal obligation to fully fund its programs, and should neither require nor entice state or local governments to participate in the funding of federal programs.

NOTE: *Much of America's crisis in governance has occurred because the lines of governmental authority have become blurred. Overlapping federal and state powers have led to massive duplication, waste and even abuse. Moreover, where authorities overlap unnecessarily, it is more difficult for people to assign blame for the failures of government, which encourages expansion of such duplicative and wasteful practices.*

If federal involvement in a government function is appropriate under the Constitution, then it is the responsibility of the federal government to administer and fully fund its programs relating to that function. In a democracy, the will of the people -- popular sovereignty -- is more effectively served where the funding and administration of a government program is the responsibility of a single level of government.

E. *All federal government relationships with local governments should be through the states.* All governments in the

United States are the creation of the states, which are the creation of the people. One government, the federal government, was created in concert by the states. All other governments are the creation of, and subordinate to the states respectively. Direct federal government-local government relationships are inappropriate, except to the extent specifically authorized by the constitution or laws of a particular state.

NOTE: Local governments are creations and political subdivisions of the sovereign states. Where the federal government bypasses state governments to establish programs with local governments, the federal government violates the sovereignty of the people as delegated through the states. The Constitution provides no authority to the federal government to establish relationships with political subdivisions of the states (local governments).

Moreover, the interests of state government and local government interests can be at odds at the federal level. Differences between governments within a state should be resolved within the state. Direct federal government relationships with local governments compromise the sovereignty of the states, because they interfere with the ability of the states to manage their own responsibilities. Moreover tax revenues are wasted by duplicative and competing lobbying efforts at the federal level.

F. *The federal government should not assign federal responsibilities to officers of state or local governments. Various federal laws designate state or local government officers to perform federal functions. The federal government should enlist state officers or departments to assist it in the performance of its duties only when specifically authorized by the constitution or laws of a particular state.*

See II-B

G. *The federal government's treaty-making power should be limited to powers that are clearly within the federal scope of responsibility. The states have delegated treaty making powers only with respect to those areas of authority that have been delegated to the federal government.*

NOTE: *In at least one federal state, the central government has used international treaty obligations, into which it had entered, as justification for pre-emption of state authority. This is inappropriate and should not be allowed to happen in the United States.*

H. *Congress should not act to displace state and local police power -- and the courts should not permit such displacement -- except where the Constitution authorizes. Congress has pre-empted entire areas of regulation that have traditionally been matters of state and local police power. In addition, the federal courts have improperly condoned these congressional assaults on local governance, under the doctrine of implied pre-emption, the so-called "dormant" commerce clause, and other constitutional provisions.*

See II-G

I. *A Constitutional mechanism should be established that would give the States a direct and dispositive role in protecting their sovereign powers against unwarranted encroachments pursuant to federal statutes and regulations. The Supreme Court of the United States, itself an organ of the federal government, has forsaken the constitutional principles of limited federal power and state sovereignty. Therefore, a constitutional amendment should be proposed by Congress and ratified by the States whereby a provision of federal law may be repealed upon the adoption by two-thirds of the states during any five year period of a "Resolution of Disapproval."*

NOTE: *The proposed Constitutional amendment, the "Government of the People" amendment, would offer the states a mechanism to render Constitutional decisions (A "Resolution of Disapproval" enacted by 2/3 of the states.) "Resolutions of Disapproval" would not be subject to judicial review.*

- V. In support of these principles, we commit ourselves to the pursuit of such remedies as may be necessary to restore the sovereignty of the states and of the people, by:
- A. Legal actions to challenge the illegitimate exercise of federal power;
 - B. Repeals of laws by which federal power has been illegitimately expanded;
 - C. Constitutional Amendments to curtail unwarranted federal power; and
 - D. Such other actions as may be appropriate.

**SOVEREIGNTY OF THE PEOPLE AND
DEVOLUTION AGENDA**

DECLARATION OF SOVEREIGNTY

I. We, the American Legislative Exchange Council, state legislators representing the states and the people hereby re-affirm the sovereignty of the states and of the people.

More than two centuries ago, the sovereign states, representing the sovereign people did, of their own volition, ratify the Constitution of the United States. In so doing, the states, in concerted action, established the federal government to perform certain limited and enumerated functions. Under the Tenth Amendment of the Constitution of the United States, the powers not delegated to the federal government were "reserved to the states respectively, or to the people."

II. Throughout the history of the United States, and especially in recent decades, the federal government has, without right, blatantly disregarded state sovereignty by arrogating unto itself powers that were to have been reserved to the states and to the people.

A. It has conscripted states and their subordinate levels of government to implement its programs through federal mandates, funded and unfunded;

B. It has requisitioned officers of states and their subordinate levels of government to perform duties on its behalf, bypassing state constitutional and legislative processes;

C. It has, as a result of expanding power, imprudently increased spending, increased taxation, and increased regulation, which have, in consequence, reduced economic growth by unnecessarily discouraging investment and job creation;

D. It has, through deficit spending and other actions, created massive federal obligations that threaten the living standards of the people, the solvency of the states, and the future of generations yet unborn;

E. It has, by centralizing power in Washington, D.C., created a "democratic deficit," a condition under which the federal government has assumed control over functions of government that should have been reserved to state and local governments, making effective control of government more difficult for the people;

F. It has, through unwarranted judicial intervention, interposed itself between the states and the people on matters not of federal jurisdiction;

G. It has, through imprudent judicial review, systematically expanded the power of Congress and the Executive by usurping powers that were not intended under the Constitution of the United States;

H. It has evaded the restraints of the nation's fundamental law, the Constitution of the United States, and has in so doing engaged in the imposition of arbitrary laws, administrative actions, and judicial decisions.

Through these actions, the federal government has usurped the sovereignty of the states. And, through these actions, the federal government has usurped the sovereignty of the people.

III. We declare that the federal government cannot, on its own, legitimately diminish the sovereignty of the states and of the people as intended under the Constitution of the United States.

The fundamental law of the nation may only be altered in the manners prescribed by that fundamental law. We are convinced that the policy failures that have accompanied expanded central authority provide, in themselves, powerful testimony to

the importance of limiting the federal government to those powers enumerated in the Constitution of the United States. To correct these failures and to secure a more favorable future for the nation, it is necessary that the powers expropriated by the federal government be returned to the states and to the people.

IV. We therefore declare the following principles as necessary to the restoration of the sovereignty of the states and of the people, as required under the Tenth Amendment of the Constitution of the United States:

A. The federal government should be restored to the role assigned to it under the Constitution of the United States. The powers usurped from the states and from the people by the federal government should be returned in an expeditious and orderly manner. Mechanisms exist for interstate cooperation where necessary, such as interstate compacts, voluntary uniform standards, and amendments to the Constitution of the United States.

B. Constitutional clauses that have been the source of illegitimate federal expansion should be restored to their original meaning. Federal expansion has often been based upon unreasonably permissive interpretations of enumerated powers under the Constitution of the United States, especially the "commerce" clause.

C. The federal government should not impose mandates, unfunded or funded, on the states or on their subordinate governments. The Constitution of the United States delineates federal responsibilities, and reserves all other responsibilities to the states or to the people. Federal mandates on state or local governments are unnecessary and inappropriate.

D. The federal government should be the exclusive financier of its programs. By partially funding federal pro-

grams, such as through matching grants, the federal government distorts the priorities of state and local governments, and establishes a democratic deficit that virtually disenfranchises state and local voters. The federal government has a legal obligation to fully fund its programs, and should neither require nor entice state or local governments to participate in the funding of federal programs.

E. All federal government relationships with local governments should be through the states. All governments in the United States are the creation of the states, which are the creation of the people. One government, the federal government, was created in concert by the states. All other governments are the creation of, and subordinate to the states respectively. Direct federal government-local government relationships are inappropriate, except to the extent specifically authorized by the constitution or laws of a particular state.

F. The federal government should not assign federal responsibilities to officers of state or local governments. Various federal laws designate state or local government officers to perform federal functions. The federal government should enlist state officers or departments to assist it in the performance of its duties only when specifically authorized by the constitution or laws of a particular state.

G. The federal government's treaty making power should be limited to powers that are clearly within the federal scope of responsibility. The states have delegated treaty making powers only with respect to those areas of authority that have been delegated to the federal government.

H. Congress should not act to displace state and local police power -- and the courts should not permit such displacement -- except where the Constitution authorizes.

Congress has preempted entire areas of regulation that have traditionally been matters of state and local police power. In addition, the federal courts have improperly condoned these congressional assaults on local governance, under the doctrine of implied preemption, the so-called "dormant" commerce clause, and other constitutional provisions.

I. *A Constitutional mechanism should be established that would give the States a direct and dispositive role in protecting their sovereign powers against unwarranted encroachments pursuant to federal statutes and regulations. The Supreme Court of the United States, itself an organ of the federal government, has forsaken the constitutional principles of limited federal power and state sovereignty. Therefore, a constitutional amendment should be proposed by Congress and ratified by the States whereby a provision of federal law may be repealed upon the adoption by two-thirds of the States during any five year period of a "Resolution of Disapproval."*

V. In support of these principles, we commit ourselves to the pursuit of such remedies as may be necessary to restore the sovereignty of the states and of the people, by:

A. Legal actions to challenge the illegitimate exercise of federal power;

B. Repeals of laws by which federal power has been illegitimately expanded;

C. Constitutional Amendments to curtail unwarranted federal power; and

D. Such other actions as may be appropriate.

MODEL RESOLUTION

DECLARATION OF SOVEREIGNTY

A resolution for the purpose of declaring the sovereignty of the States and of the people, and proposing principles by which the sovereignty of the States and of the people the may be restored to their intention under the Constitution of the United States.

Be it resolved that the legislature of the State of _____, the Senate and the House of Representatives (or House of Delegates or Assembly) jointly concurring hereby adopts the following declaration of sovereignty.

Section I.

We, the legislature of the State of _____ hereby re-affirm the sovereignty of the states and of the people.

More than two centuries ago, the sovereign states, representing the sovereign people did, of their own volition, ratify the Constitution of the United States. In so doing, the states, in concerted action, established the federal government to perform certain limited and enumerated functions. Under the Tenth Amendment of the Constitution of the United States, the powers not delegated to the federal government were "reserved to the states respectively, or to the people."

Section II.

Throughout the history of the United States, and especially in recent decades, the federal government has, without right, blatantly disregarded state sovereignty by arrogating unto itself powers that were to have been reserved to the states and to the people.

A. It has conscripted states and their subordinate levels of government to implement its programs through federal mandates, funded and unfunded;

B. It has requisitioned officers of states and their subordinate levels of government to perform duties on its behalf, bypassing state constitutional and legislative processes;

C. It has, as a result of expanding power, imprudently increased spending, increased taxation, and increased regulation, which have, in consequence, reduced economic growth by unnecessarily discouraging investment and job creation;

D. It has, through deficit spending and other actions, created massive federal obligations that threaten the living standards of the people, the solvency of the states, and the future of generations yet unborn;

E. It has, by centralizing power in Washington, D.C., created a "democratic deficit," a condition under which the federal government has assumed control over functions of government that should have been reserved to state and local governments, making effective control of government more difficult for the people;

F. It has, through unwarranted judicial intervention, interposed itself between the states and the people on matters not of federal jurisdiction;

G. It has, through imprudent judicial review, systematically expanded the power of Congress and the Executive by usurping powers that were not intended under the Constitution of the United States;

H. It has evaded the restraints of the nation's fundamental law, the Constitution of the United States, and has in

so doing engaged in the imposition of arbitrary laws, administrative actions, and judicial decisions.

Through these actions, the federal government has usurped the sovereignty of the states. And, through these actions, the federal government has usurped the sovereignty of the people.

Section III.

We declare that the federal government cannot, on its own, legitimately diminish the sovereignty of the states and of the people as intended under the Constitution of the United States. The fundamental law of the nation may only be altered in the manners prescribed by that fundamental law. We are convinced that the policy failures that have accompanied expanded central authority provide, in themselves, powerful testimony to the importance of limiting the federal government to those powers enumerated in the Constitution of the United States. To correct these failures and to secure a more favorable future for the nation, it is necessary that the powers expropriated by the federal government be returned to the states and to the people.

Section IV.

We therefore declare the following principles as necessary to the restoration of the sovereignty of the states and of the people, as required under the Tenth Amendment of the Constitution of the United States:

A. The federal government should be restored to the role assigned to it under the Constitution of the United States. The powers usurped from the states and from the people by the federal government should be returned in an expeditious and orderly manner. Mechanisms exist for interstate cooperation where necessary, such as interstate compacts, voluntary uniform standards, and amendments to the Constitution of the United States.

B. *Constitutional clauses that have been the source of illegitimate federal expansion should be restored to their original meaning.* Federal expansion has often been based upon unreasonably permissive interpretations of enumerated powers under the Constitution of the United States, especially the "commerce" clause.

C. *The federal government should not impose mandates, unfunded or funded, on the states or on their subordinate governments.* The Constitution of the United States delineates federal responsibilities, and reserves all other responsibilities to the states or to the people. Federal mandates on state or local governments are unnecessary and inappropriate.

D. *The federal government should be the exclusive financier of its programs.* By partially funding federal programs, such as through matching grants, the federal government distorts the priorities of state and local governments, and establishes a democratic deficit that virtually disenfranchises state and local voters. The federal government has a legal obligation to fully fund its programs, and should neither require nor entice state or local governments to participate in the funding of federal programs.

E. *All federal government relationships with local governments should be through the states.* All governments in the United States are the creation of the states, which are the creation of the people. One government, the federal government, was created in concert by the states. All other governments are the creation of, and subordinate to the states respectively. Direct federal government-local government relationships are inappropriate, except to the extent specifically authorized by the constitution or laws of a particular state.

F. *The federal government should not assign federal responsibilities to officers of state or local governments.*

Various federal laws designate state or local government officers to perform federal functions. The federal government should enlist state officers or departments to assist it in the performance of its duties only when specifically authorized by the constitution or laws of a particular state.

G. The federal government's treaty making power should be limited to powers that are clearly within the federal scope of responsibility. The states have delegated treaty making powers only with respect to those areas of authority that have been delegated to the federal government.

H. Congress should not act to displace state and local police power -- and the courts should not permit such displacement -- except where the Constitution authorizes. Congress has preempted entire areas of regulation that have traditionally been matters of state and local police power. In addition, the federal courts have improperly condoned these congressional assaults on local governance, under the doctrine of implied preemption, the so-called "dormant" commerce clause, and other constitutional provisions.

I. A Constitutional mechanism should be established that would give the States a direct and dispositive role in protecting their sovereign powers against unwarranted encroachments pursuant to federal statutes and regulations. The Supreme Court of the United States, itself an organ of the federal government, has forsaken the constitutional principles of limited federal power and state sovereignty. Therefore, a constitutional amendment should be proposed by Congress and ratified by the States whereby a provision of federal law may be repealed upon the adoption by two-thirds of the States during any five year period of a "Resolution of Disapproval."

Section V.

In support of these principles, we commit ourselves to the pursuit of such remedies as may be necessary to restore the sovereignty of the states and of the people, by:

- A. Legal actions to challenge the illegitimate exercise of federal power;
- B. Repeals of laws by which federal power has been illegitimately expanded;
- C. Constitutional Amendments to curtail unwarranted federal power; and
- D. Such other actions as may be appropriate.”

And be it further resolved that the Legislative Clerks of the Senate and the House of Representatives transmit duly authenticated copies of this Resolution to the Speaker of the United States House of Representatives, to the President of the United States Senate, to each of the members of Congress, and the presiding officers of each legislative house of each of the other states in the Union, to the Clerk of the United States House of Representatives, to the Secretary of the United States Senate, to the President of the United States, and to members of the communications Media.

MODEL LEGISLATION

*GOVERNMENT OF THE PEOPLE AMENDMENT TO THE
CONSTITUTION OF THE UNITED STATES*

A resolution for the purpose of petitioning the Congress of the United States to propose an amendment to the Constitution of the United States for submission to the states to establish a mechanism for nullification of federal laws and regulations where the states determine that such laws or regulations exceed the authority of the federal government under the Constitution of the United States.

WHEREAS, the federal government was established by the states through ratification of the Constitution of the United States; and

WHEREAS, the federal government was granted certain limited powers under the Constitution of the United States, to act as the agent of the states and of the people; and

WHEREAS, the Constitution of the United States requires, under the Tenth Amendment that: "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;" and

WHEREAS, by the actions of Congress, the federal government has usurped powers reserved to the states and to the people; and

WHEREAS, by the actions of the Executive, the federal government has usurped powers reserved to the states and to the people; and

WHEREAS, by the actions of the Judiciary, the federal government has usurped powers reserved to the states and to the people; and

WHEREAS, by the combined actions of the Congress, the Executive and the Judiciary, the principal-agent relationship established by the Constitution of the United States has been effectively reversed, as the federal government has arrogated to itself the role of principal; and

WHEREAS, it has become customary for the federal Judiciary to possess the ultimate authority to interpret the meaning of the Constitution of the United States; and

WHEREAS, reliance upon the federal Judiciary, itself a branch of the federal government, has inappropriately delegated ultimate interpretation of the Constitution of the United States to the agent, rather than to the principal; and

WHEREAS, only the principal in a principal-agent relationship can ultimately interpret the intention of the principal; and

WHEREAS, the federal government is more distant from the people than state governments and is thereby less efficient and effective in providing for functions that, under the Constitution of the United States, were to have been reserved to the States and to the people; and

WHEREAS, to achieve government of the people, by the people and for the people, government must become closer to the people; and

WHEREAS, there is a need for an effective mechanism by which the States may provide ultimate interpretation of their intentions under the Constitution of the United States; and

NOW THEREFORE BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF (INSERT STATE), A MAJORITY OF ALL MEMBERS OF THE TWO HOUSES CONCURRING SEPARATELY HEREIN, that the Congress of the United States is hereby petitioned to propose the *Government of the People Amendment* to the Constitution of the

United States, for submittal to the states for ratification, providing for the states to nullify federal laws and regulations, in such cases as the states deem that the federal government has exceeded the limits of its authority.

BE IT FURTHER RESOLVED that to achieve the purpose expressed above that the *Government of the People Amendment* shall provide that:

1. Any act of Congress, or provision thereof shall be null and void upon the adoption of a Resolution of Disapproval by the legislatures of two-thirds of the states providing that no more than five years shall have passed from the adoption of the first Resolution of Disapproval by a state and the requisite number of adoptions.

2. Any regulation, administrative directive or provision thereof shall be null and void upon the adoption of a Resolution of Disapproval by the legislatures of two-thirds of the states where no more than five years shall have passed from the adoption of the first Resolution of Disapproval by a state and the requisite number of adoptions.

BE IT FURTHER RESOLVED that the *Government of the People Amendment* shall require a Resolution of Disapproval to declare the causes that impel the Resolution.

BE IT FURTHER RESOLVED that the *Government of the People Amendment* shall contain reasonable limitations on the use of Resolutions of Disapproval with respect to issues of national security.

BE IT FURTHER RESOLVED that the *Government of the People Amendment* shall prohibit judicial review of any matter with respect to the *Government of the People Amendment* or its implementation or operation.

MODEL RESOLUTION

*STATES' INITIATIVE AMENDMENT
TO THE CONSTITUTION OF THE UNITED STATES*

A resolution for the purpose of petitioning the Congress of the United States to propose an amendment to the Constitution of the United States for submission to the states to provide the states a method of offering amendments to the Constitution of the United States.

WHEREAS, the ratification of the Constitution of the United States by the states created a balance of power between the federal government and the states; and

WHEREAS, the federal government was granted certain limited powers under the Constitution of the United States; and

WHEREAS, the Constitution of the United States requires, under the Tenth Amendment that: "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;" and

WHEREAS, by the combined actions of the Congress, the Executive and the Judiciary, today, power is concentrated in the federal government; and

WHEREAS, the original checks and balances created by the founders have been eroded and the national government has consolidated power and authority; and

WHEREAS, the federal government is more distant from the people than state governments; and

WHEREAS, to achieve government of the people, by the people and for the people, government must become closer to the people; and

WHEREAS, there is a need for an effective mechanism by which the states can offer amendments to the Constitution of the United States;

NOW THEREFORE BE IT RESOLVED, BY THE LEGISLATURE OF THE STATE OF {INSERT STATE}, A MAJORITY OF ALL MEMBERS OF THE TWO HOUSES CONCURRING SEPARATELY HEREIN, that the Congress of the United States is hereby petitioned to propose the *States' Initiative Resolution* as an amendment to the Constitution of the United States for ratification by state legislatures. This resolution shall be submitted to the states for ratification, providing for the states a method through which they may amend the Constitution of the United States.

BE IT FURTHER RESOLVED, that to achieve the purpose expressed above, the *States' Initiative Amendment* shall provide that: Whenever three-fourths of the legislatures of the states deem it necessary, they shall propose amendments to this Constitution. These proposed amendments are valid for all intents and purposes two years after they are submitted to Congress. The said amendments will be invalid if both houses of Congress, by two-thirds vote, disapprove them within two years after their submission.

BE IT FURTHER RESOLVED, that the Secretary of State of the State of {insert state} transmit copies of this Concurrent Resolution to the President of the United States, the President of the United States Senate, the Speaker of the United States House of Representatives, the President of the Senate and the Speaker of the House of Representatives of each state's legislature of the United States of America, and the {insert state} Congressional Delegation.

MODEL RESOLUTION

Restatement of Sovereignty

WHEREAS, the Tenth Amendment to the Constitution of the United States reads as follows: "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;" and

WHEREAS, the Tenth Amendment defines the total scope of federal power as being that specifically granted by the United States constitution and no more; and

WHEREAS, the scope of federal power defined by the Tenth Amendment means that the federal government was created by the states specifically to be an agent of the states; and

WHEREAS, State authority has been eroded primarily by four developments: (1) Federal assumption of powers reserved to the states under the Tenth Amendment: (2) Interpretations of the "commerce clause" which go beyond any reasonable conception, and in effect authorize federal pre-emption with respect to any issue for which some faint or circuitous connection can be made to interstate commerce; (3) By threat of withholding, withdrawing, or diverting federal funds to coerce compliance with federal policies; (4) Failure on the part of the states to challenge federal intrusions. Indeed state governments have endorsed federal usurpation by seeking additional federal funding and by accepting federal delegations of power.

WHEREAS, today, in {insert year}, the states are demonstrably treated as agents of the federal government; and

WHEREAS, numerous resolutions have been forwarded to the federal government by the State of {insert state} without any response or result from Congress or the federal government; and

WHEREAS, many federal mandates are directly in violation of the Tenth Amendment to the Constitution of the United States; and

WHEREAS, the United states Supreme Court has ruled in New York v. United States, 112 S. Ct. 2408 (1992), that Congress may not simply commandeer the legislative and regulatory processes of the states; and

WHEREAS, a number of proposal from previous administrations and some now pending from the present administration and from Congress may further violate the United states Constitution;

NOW THEREFORE BE IT RESOLVED, that the State of {insert state} hereby claims sovereignty under the Tenth Amendment to the Constitution of the United States over all powers not otherwise enumerated and granted to the federal government by the United States Constitution.

BE IT FURTHER RESOLVED, that this serve as Notice and Demand to the federal government, as our agent, to cease and desist, effective immediately, mandates that are beyond the scope of its constitutionally delegated powers.

BE IT FURTHER RESOLVED, that copies of this Resolution be sent to the president of the United States, the Speaker of the United States House of Representatives, the President of the United States Senate, the Speaker of the House and the President of the Senate of each state's legislature of the Untied States of America, and {insert state} Congressional delegation.

MODEL LEGISLATION

*Joint Legislative Committee on
Federal Mandates Act*

Section 1. {Title.} This act shall be known as and may be cited as the *Joint Legislative Committee on Federal Mandates Act*.

Section 2. {Legislative findings and declarations.} The legislature finds and declares that:

A. The Tenth Amendment to the Constitution of the United States reads as follows: 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.

B. The number of federal mandates imposed upon the states by the United States Congress has alarmingly increased in recent years.

C. The members of the legislature of {insert state} desire to personally protect state sovereignty from federal encroachment as well as communicate with the {insert state} delegation to the United States Congress concerning this critical problem so that our representatives may be completely cognizant of the effect the actions of the federal government have at the state legislative level and may be more sensitive to federal usurpation of state authority.

Section 3. {Joint legislative committee on federal mandates; members; powers and duties.}

A. A joint legislative committee on federal mandates is established consisting of the president of the senate, four members of the senate appointee by the president of the

senate, the speaker of the house of representatives and four members of the house of representatives appointed by the speaker of the house of representatives. No more than three members of the Senate or House of Representatives, including the President and Speaker, shall be from the same political party. Members shall serve two year terms ending on the Convening of the regular session of the Legislature each Odd-Numbered year.

B. The Committee shall meet on the call of the President of the Senate or the Speaker of the House of Representatives, and a majority of the members constitutes a quorum for the transaction of business.

C. The committee shall:

1. Review each year the activities of Congress and the federal government including court rulings with regard to any laws, regulations or other actions that may require their state to comply with any federal mandate.

2. Take any action necessary to protect this state's constitutional rights and sovereignty against federal mandates.

3. Arrange for and conduct an annual joint session of the Legislature or a meeting of the Committee and request the attendance of all members of the {insert state} congressional delegation to discuss issues relating to federal mandates and the appropriate use of federal power to influence state policy.

D. The Committee may utilize legislative staff for research and other services required by committee.

Section 4. {Severability clause.}

Section 5. {Repealer clause.}

Section 6. {Effective date.}

MODEL LEGISLATION

CONSTITUTIONAL DEFENSE ACT

Section 1. {Title.} This act shall be known as may be cited as the *Constitutional Defense Council Act*

Section 2. {Legislative findings and declarations.} The legislatures finds and declares that:

A. The Constitution of the United States of America envisions sovereign states and guarantees the states a republican form of government in which decisions are made by the elected representative of the people.

B. The power of state and local government of {insert state} to better the lives of their citizens are being encroached upon by the federal government.

C. With increasing and alarming frequency, important decisions affecting our lives that should be left to the states are being made by the federal government in Washington, DC.

E. Federal mandates are being imposed on the states without the accompanying tax dollars necessary to implement the mandated programs.

F. The impact of federal mandates threatens the fiscal integrity of our State as well as our right of self determination.

G. The intent of this legislation is to restore, maintain, and advance the State's Sovereignty and Authority over issues that affect the state and the well being of its citizens.

Section 3. {Members; Powers; Staff.}

A. The defense council shall consist of the following members: **{To be determined by State.}**

B. The Defense Council shall meet at times at the call of the chair.

1. A majority of the membership on the defense Council is required for a quorum to conduct council business. A majority of the quorum is required for any action taken by the Defense Council.

Section 4. {Powers & Duties.}

A. The Council, in the name of the state or its citizens, may examine and challenge by legal action, legislation or any other legal means:

1. Federal Mandates.
2. Court Rulings.
3. The Authority granted to, or assumed by, the federal government.
4. Laws, regulations and practices of the federal government.
5. Any other activity that is deemed appropriate by the Council.

Section 5. {Appropriations.}

A. A council fund is established in the state treasury for deposit of appropriations, gifts, grants and other council monies. Monies in the Council fund are continuously appropriated.

B. The sum of {insert amount} is appropriated from the state general fund in fiscal year {insert year} to the Constitutional Defense Council for the purpose provided in this act.

Section 6. {Severability Clause.}

Section 7. {Repealer Clause.}

Section 8. {Effective Date.}

MODEL LEGISLATION

*FEDERAL MANDATE AND FEDERAL ENCROACHMENT ON
STATE SOVEREIGNTY ACT*

Section 1. {Short Title.} This act shall be known and may be cited as the *Federal Mandate/Federal Encroachment on State Sovereignty Act*.

Section 2. {Legislative Declarations.} The Legislature finds and declares:

A. The Tenth Amendment to the Constitution of the United States reads as follows: 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.

B. Today, with increasing frequency important decisions affecting the lives of individuals in the state are being made by the federal government and the states are demonstrably treated as agents of the federal government.

C. State sovereignty and authority over issues that affect the state and the well being of its citizens must be restored.

Section 3. {Definitions.} The following terms mean:

A. Congressional Delegation - all members of the United States Senate and House of Representatives from {insert state}.

B. Federal Encroachment on State Sovereignty - any exceedence of federal authority over state.

C. State Sovereignty - as related to the Tenth Amendment: The powers not delegated to the United States by the Con-

stitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

D. State - all agencies of the state including independent agencies, state colleges and universities.

F. Federal Mandate - a provision of federal law or regulation that is mandated on the state.

Section 4. {Designation of Federal Mandate/Federal Encroachment on State Sovereignty Auditor Powers & Duties.}

A. The federal mandate/federal encroachment on state sovereignty auditor shall make an inventory of all federal mandates and federal encroachment on the state. The federal mandate/federal encroachment on state sovereignty auditor shall make a calculation of the cost of these federal mandates to the different levels of government.

B. The federal mandate/federal encroachment on state sovereignty auditor shall issue a report by January 30th of each year, which shall contain:

1. A summary of the cost of federal mandates on the state as well as full detail on cost by program and agency;
2. A review of federal laws that exceed federal authority.
3. The voting records of each member of the state's congressional delegation on all bills containing federal mandates and exceedences of federal authority.
4. The report prepared pursuant to this section shall be sent to:

- a. The Governor;
- b. The state's United States Senators and Representatives;
- c. All members of the state legislature.

Section 5. {Ad Hoc Reports.}

Upon request of the Governor, the Speaker of the House, the President Pro Tem of the Senate, or the minority leaders of the House or Senate, the federal mandate auditor/encroachment of state sovereignty auditor shall prepare ad hoc reports estimating the cost of federal mandates to the state government and exceedence of federal authority in any proposed federal legislation. These reports shall be sent to all officials listed in subsection (3) of Section (5) of this act.

Section 6. {Severability Clause.}

Section 7. {Repealer Clause.}

Section 8. {Effective Date.}

CREDENTIALS

The model resolutions and model legislation included in the ALEC "Sovereignty of the People and Devolution" Agenda were developed and adopted by the ALEC Board of Directors Committee on State Sovereignty and ALEC Task Forces. "Sovereignty of the People and Devolution" was written by Wendell Cox, ALEC Director of State Legislation and Policy, and Samuel A. Brunelli, ALEC Executive Director.

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AMERICAN LEGISLATIVE EXCHANGE COUNCIL

The American Legislative Exchange Council (ALEC) was founded in 1973 by a small group of Democratic and Republican state legislators who shared a common commitment to the Jeffersonian principles individual liberty, limited government, and the free market.

Today, ALEC has grown to become the nation's largest bipartisan, association of state legislators, with nearly 3,000 members. Nearly one-third of ALEC's members hold leadership positions in their legislatures, including 29 lower house speakers and 26 senate presidents or senate presidents and senate presidents *pro tems*. More than 125 million Americans are represented by the citizen legislators of ALEC.

ALEC brings the states and the nation together through conferences, seminars, publications, and its fifteen National Task Forces. Each provides a unique vehicle for legislators to communicate across state lines, share experiences and ideas, and work in unison with the private sector to create effective public policies.

ALEC's goal is to ensure that its legislative members are fully armed with the information, research and ideas they need to win in the legislative arena. ALEC publications keep members up-to-date on emerging trends and provide in-depth analyses of issues. ALEC conferences and meetings promote colleague to colleague communication by linking like-minded legislators together. ALEC National Task Forces provide a forum in which legislators and the private sector discuss issues, develop policies and write model legislation.

Unlike other state legislative organizations, ALEC believes that business should be an ally, not an adversary, of state legislators. ALEC provides the private sector with an unparalleled opportunity to have their voices heard, their perspectives appreciated, and their interests put before the nearly 3,000 pro-free market state legislators of ALEC. Through ALEC, legislators and the private sector work in a dynamic partnership to develop public policies that harness the immense power of free markets to encourage economic growth, increase the nation's competitiveness, and improve the quality of life for all Americans.

ALASKA STATE HOUSE OF REPRESENTATIVES

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State Capitol
Room 416

REPRESENTATIVE JOHN COGHILL

Date: January 28, 2000
To: Representative Beverly Masek, Co-Chair
House Resources Committee
From: Representative John Coghill
Re: HB 311

A handwritten signature, likely of Representative John Coghill, written in dark ink.

I respectfully request that HB 311, "An Act eliminating a requirement that a social security number be provided by an applicant for a hunting or sport fishing license or tag," be heard in the House Resources Committee at your earliest convenience.

Thank you for your assistance.

ok for Masek

-weds

FISCAL NOTE

No: 1

Bill Version: CSHJR 44 (WTR)

(H) Publish Date: 2/25/00

STATE OF ALASKA
2000 LEGISLATIVE SESSION

Revision Date: 2-8-00
 Title: Re: mandates other conditions imposed on states by fed gov
 Sponsor: OGAN
 Requester: H WTR

Dept. Affected _____
 BRU _____
 Component _____
 Component Serial No. _____

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 01	FY 02	FY 03	FY 04	FY 05	FY 06
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES						
--------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
1091 Designated Program Receipts						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0


Estimate of any current year (FY00) cost: _____

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This resolution would not have a significant fiscal impact on any state agency.

Prepared by Donald M. Riehle WTR staff


Phone 465-6643
 Phone _____
 Date 2-8-00



REPRESENTATIVE SCOTT OGAN

Alaska State Legislature

House District 27 • Palmer • Greater Palmer • Sutton • Chickaloon • Sheep Mountain

HJR - 44

Sponsor Statement

I have introduced this resolution to show our support for the 10th amendment to the United States Constitution and to encourage those in Congress and the Federal Government to take violations of it more seriously.

No state has felt the incursion of the federal government more severely than Alaska. It is important that we along with other states, send a message to Congress that the 10th amendment is constantly being violated and that such violations injure not only our states, but our citizens as well.

I urge your support for this Resolution.

Thank you.



A Heartland Perspective

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(EDITOR: Please consider this *Heartland Perspective* for the op-ed page or for broadcast as a guest editorial. Reprint permission is granted.)

FOR IMMEDIATE RELEASE
November 10, 1995

CONTACT: Diane Carol Bast
708/202-3060

The Devolution Revolution

by Joseph L. Bast

The winds of change are howling through the halls of American federalism. The states are clamoring to take responsibility for billions of dollars of social welfare programs now controlled by the federal government. Wisconsin Governor Tommy Thompson has said "We're seeing a rebirth of [state power], and I'm totally comfortable with the states' ability to handle it." Even the devoutly pro-establishment *National Journal*, in its July 29th issue, noted that recent Supreme Court decisions have "fueled the fires of federalism."

At the root of the devolution movement is the Tenth Amendment to the U.S. Constitution, which reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states

"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."

Tenth Amendment

respectively, or to the people." Intended by the founding fathers to be a bulwark against the concentration of power and resources in the hands of the central government, the Tenth Amendment historically has been ignored by politicians as well as judges. Instead, the

- more -

The Devolution Revolution
Joseph L. Bast
Page 2

national government has been allowed to dominate the states, becoming far more involved in matters of commerce and conscience than the founding fathers ever intended.

In recent months, the Supreme Court has helped push along the call for less federal authority and more state and local autonomy. In *U.S. v. Lopez*, for example, the Court invalidated a federal law barring possession of guns near school grounds, marking the first time in sixty years that the courts have found a limit to federal power granted under the Constitution's commerce clause. }

The Court is dusting off the Tenth Amendment partly because of the convictions of a new and passionate member of the Court, Justice Clarence Thomas. But it is also being pressured to act by a surge of litigation on issues of federal-state relations. The Brady Law, which requires local police departments to conduct background checks on gun buyers, has been successfully challenged on Tenth Amendment grounds in five district courts around the country. A half-dozen states have filed suits challenging the constitutionality of the 1994 National Voter Registration Act. States are launching legal action against the federal government over the Endangered Species Act, the Clean Air Act, and other federal programs.

State and local governments have become more litigious because unfunded federal mandates have become unbearable. Michael Pompili, assistant commissioner for health of Columbus, Ohio, says new environmental protection mandates are being imposed on local government at "a torrid pace." In a recent issue of *Regulation* magazine, he writes: "The cumulative impact of these mandates with other non-environmental mandates makes it virtually impossible for any community, large or small, to remain in compliance without neglecting other essential local governmental services."

The Devolution Revolution
Joseph L. Bast
Page 3

Still another factor fueling the devolution movement is dwindling public confidence in the federal government. Media coverage of the disasters in Waco, Texas, Oklahoma City, Oklahoma, and Ruby Ridge, Idaho revealed that millions of Americans are afraid of their own government. Even more shocking, this fear is reasonable. With alarming frequency, the activities of agencies such as BATF, IRS, DEA, and EPA cross the line between law enforcement and assaulting constitutionally protected liberties.

Dr. Mary J. Ruwart, a scientist, author, and long-time libertarian activist, believes the devolution revolution must reduce the use of violence by all levels of government. She locates the roots of the Oklahoma City bombing in the fact that using force to achieve social and political ends has become commonplace in America. "In this manner," writes Ruwart, "violence against others has become an acceptable option. Since this violence is largely perpetrated through government, the average individual rarely thinks consciously about its true nature. Unconsciously, however, the seeds of violence have been sown. Those seeds have borne fruit."

The alternative to devolution could be the loss of the federal system of government our founding fathers gave us, and the rise of domestic terrorism to levels previously unknown in America. With so much at stake, surely it is time to consider restoring the protections of the long-neglected Tenth Amendment.

###

Joseph L. Bast is president of The Heartland Institute, a nonprofit research organization based in Palatine, Illinois. Nothing in his *Heartland Perspective* should be construed as reflecting the views of The Heartland Institute, nor as an attempt to aid or hinder the passage of pending legislation.



AMERICAN LEGISLATIVE EXCHANGE COUNCIL

Volume 22, Number 7

October 1996

The State Factor

**THE TENTH
AMENDMENT:**
*The Promise
of Liberty*

*Strategies to Restore the
Balance of Power Between the
Federal and State Governments*

Board of Directors' Committee on Federalism

910 17th Street N.W. ■ Fifth Floor ■ Washington, D.C. 20006
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ABOUT THE AUTHORS...

Charles J. Cooper concentrates his practice in the areas of civil litigation and administrative law. From 1985-1988, he served as Assistant Attorney General in the Department of Justice's Office of Legal Counsel. As Assistant Attorney General, he provided the President and the departments of the executive branch with formal legal opinions and informal legal advice. Prior to that appointment, he served as Deputy Assistant Attorney General in the Civil Rights Division, supervising all appellate litigation from 1981-1985. Since leaving the Department of Justice in 1988, Mr. Cooper has been in private practice, litigating cases in the banking, civil rights, First Amendment, and other federal administrative areas. Last year, he served on the Scholars Advisory Committee on Federalism which was created by the States' Federalism Summit Steering Committee. The Scholars Advisory Committee presented proposals to restore balance to the federal system at the States' Federalism Summit held in Cincinnati, Ohio in October 1995.

During his tenure with the Department of Justice, Mr. Cooper also served as Chairman of the Domestic Policy Council's Working Group on Federalism, as well as a member of the National Security Council's Policy Review and Planning and Coordinating Groups.

From 1978-1979, Mr. Cooper clerked for Justice (now Chief Justice) William H. Rehnquist of the United States Supreme Court. The previous year, he clerked for Judge Paul H. Roney of the United States Court of Appeals for the Fifth (now Eleventh) Circuit.

Mr. Cooper, who graduated first in his law school class in 1977, earned his B.S. and J.D. degrees from University of Alabama. Among his many law school honors, he was inducted into the Order of the Coif. He served as Editor-in-Chief of the *Alabama Law Review* from 1976-1977 and, since then, has been a frequent contributor to policy and legal journals.

David H. Thompson is a constitutional lawyer in Washington, D.C. He has participated in cases challenging federal encroachment of state sovereignty in contravention of the Eleventh Amendment and has been an advocate for the restoration of federalism. He received both his undergraduate degree and his law degree from Harvard University.

The State Factor: The Tenth Amendment: The Promise of Liberty
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MODEL RESOLUTION

GOVERNMENT OF THE PEOPLE AMENDMENT
TO THE CONSTITUTION OF THE UNITED STATES

A resolution for the purpose of petitioning the Congress of the United States to propose an amendment to the Constitution of the United States for submission to the states to establish a mechanism for nullification of federal laws and regulations where the states determine that such laws or regulations exceed the authority of the federal government under the Constitution of the United States.

WHEREAS, the federal government was established by the states through ratification of the Constitution of the United States; and

WHEREAS, the federal government was granted certain limited powers under the Constitution of the United States; and

WHEREAS, the Constitution of the United States requires, under the 10th Amendment that: "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;" and

WHEREAS, the Constitution of the United States established a system in which the states only ceded certain powers to the federal government; and

WHEREAS, the framers recognized that separation of powers is essential and ensured that the rights of the people would be protected by establishing checks and balances not only between the branches of the federal government, but also between the federal government and state governments; and

WHEREAS, the legislative, executive and judicial branches of the federal government have by many actions usurped powers reserved to the states and to the people; and

WHEREAS, by the combined actions of the legislative, executive and judicial branches of the federal government, the relationship between the federal government and state government established by the Constitution; and

WHEREAS, the federal Judiciary, itself a branch of the federal government, has failed to stop many of these federal excesses; and

WHEREAS, the federal government is more distant from the people than state governments and is thereby less efficient and effective in providing for functions that, under the Constitution of the United States, were to have been reserved to the States and to the people; and

WHEREAS, to achieve government of the people, by the people and for the people, government must become closer to the people; and

NOW THEREFORE BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF (INSERT STATE), A MAJORITY OF ALL MEMBERS OF THE TWO HOUSES CONCURRING SEPARATELY HEREIN, that the Congress of the United States is hereby petitioned to propose the *Government of the People Amendment* to the Constitution of the United States, for submittal to the states for ratification, providing for the states to nullify federal laws and regulations, in such cases as the states deem that the federal government has exceeded the limits of its authority.

AMERICAN LEGISLATIVE EXCHANGE COUNCIL

BE IT FURTHER RESOLVED that to achieve the purpose expressed above that the *Government of the People Amendment* shall provide that:

1. Any act of Congress, or provision thereof shall be null and void upon the adoption of a Resolution of Disapproval by the legislatures of two-thirds of the states, provided that two-thirds of the states have adopted without subsequently rescinding resolutions of disapproval within any seven-year period.
2. Any regulation, administrative directive or provision thereof shall be null and void upon the adoption of a resolution of disapproval by the legislatures of two-thirds of the states, provided that two-thirds of the states have adopted without subsequently rescinding resolutions of disapproval within any seven-year period.

BE IT FURTHER RESOLVED that the *Government of the People Amendment* shall contain reasonable limitations on the use of resolutions of disapproval with respect to issues of national security and foreign policy.

BE IT FURTHER RESOLVED that the Secretary of State of the State of (insert state) transmit copies of this Resolution to the President of the United States, the President of the United States Senate, the Speaker of the United States House of Representatives, the President of the Senate and the Speaker of the House of Representatives of each state legislature in the United States, and each member of Congress from the state of (insert state).

MODEL RESOLUTION**STATES' INITIATIVE AMENDMENT
TO THE CONSTITUTION OF THE UNITED STATES**

A resolution for the purpose of petitioning the Congress of the United States to propose an amendment to the Constitution of the United States for submission to the states to provide the states a method of offering amendments to the Constitution of the United States.

WHEREAS, the ratification of the Constitution of the United States by the states created a balance of power between the federal government and the states; and

WHEREAS, the federal government was granted certain limited powers under the Constitution of the United States; and

WHEREAS, the Constitution of the United States requires, under the 10th Amendment that: "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;" and

WHEREAS, by the combined actions of the Congress, the Executive and the Judiciary, today, power is concentrated in the federal government; and

WHEREAS, the original checks and balances created by the founders have been eroded and the national government has consolidated power and authority; and

WHEREAS, the federal government is more distant from the people than state governments; and

WHEREAS, to achieve government of the people, by the people and for the people, government must become closer to the people; and

WHEREAS, there is a need for an effective mechanism by which the states can offer amendments to the Constitution of the United States;

NOW THEREFORE BE IT RESOLVED, BY THE LEGISLATURE OF THE STATE OF (INSERT STATE), A MAJORITY OF ALL MEMBERS OF THE TWO HOUSES CONCURRING SEPARATELY HEREIN, that the Congress of the United States is hereby petitioned to propose the *States' Initiative Resolution* as an amendment to the Constitution of the United States for ratification by state legislatures. This resolution shall be submitted to the states for ratification, providing for the states a method through which they may amend the Constitution of the United States.

BE IT FURTHER RESOLVED that to achieve the purpose expressed above, the *States' Initiative Amendment* shall provide that: Whenever three-fourths of the legislatures of the states deem it necessary, they shall propose amendments to this Constitution. These proposed amendments are valid for all intents and purposes two years after they are submitted to Congress. The said amendments will be invalid if both houses of Congress, by two-thirds vote, disapprove them within two years after their submission.

BE IT FURTHER RESOLVED that the Secretary of State of the State of (insert state) transmit copies of this Concurrent Resolution to the President of the United States, the President of the United States Senate, the Speaker of the United States House of Representatives, the President of the Senate and the Speaker of the House of Representatives of each state's legislature of the United States of America, and the (insert state) Congressional Delegation.

MODEL RESOLUTION

ACCOUNTABILITY IN GOVERNMENT AMENDMENT
TO THE CONSTITUTION OF THE UNITED STATES

A resolution for the purpose of petitioning the Congress of the United States to propose an amendment to the Constitution of the United States for submission to the States to prohibit the federal government from imposing: (1) regulatory mandates on the States or their political subdivisions; (2) unfunded mandates on state and local governments; and (3) spending conditions that are unrelated to the actual expenditures of funds allocated by Congress.

WHEREAS, the federal government was established by the States through the ratification of the Constitution of the United States; and

WHEREAS, the federal government was granted certain limited powers under the Constitution of the United States and the Tenth Amendment to the United States Constitution provides that "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 the people;" and

WHEREAS, state authority has been increasingly eroded through federal assumption of powers reserved to the States under the Tenth Amendment; and

WHEREAS, the federal government has impermissibly expanded its power beyond its constitutional bounds at the expense of the state and local governments by imposing federal mandates and conditional spending grants on unrelated federal policies; and

WHEREAS, federal encroachment on state authority obscures the lines between state and federal policy, thereby decreasing the political accountability of elected officials of both governments. To ensure political accountability, the People must be able to discern which governmental actors are imposing obligations and expenses upon them; and

WHEREAS, the United States Supreme Court has ruled in New York v. United States, 112 S. Ct. 2408 (1992), that Congress may not simply commandeer the legislative and regulatory processes of the States; and

WHEREAS, federal mandates are being imposed at an alarming rate on the States without the accompanying tax dollars necessary to implement the mandated programs; and

WHEREAS, the impact of unfunded federal mandates threatens the fiscal integrity of the States as well as the States' right of self determination;

NOW THEREFORE BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF (INSERT STATE), A MAJORITY OF ALL MEMBERS OF THE TWO HOUSES CONCURRING SEPARATELY HEREIN, that the Congress of the United States is hereby petitioned to propose the *Accountability in Government Amendment* to the Constitution of the United States, for submittal to the States for ratification, prohibiting the federal government from: (1) imposing regulatory mandates on the States or their political subdivisions; (2) imposing unfunded mandates on state and local governments or mandates that are not enacted pursuant to the enumerated powers of the federal government; (3) imposing spending conditions that are unrelated to the actual expenditures of funds allocated by Congress.

BE IT FURTHER RESOLVED that to achieve the purpose expressed above that the *Accountability in Government Amendment* shall provide that:

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1. No State shall be obligated, without its consent to enact or enforce any State law or regulation, or to administer any federal regulatory program imposed by or pursuant to a law enacted by Congress acting pursuant to its enumerated powers.
2. Any obligation imposed upon a State by or pursuant to a law enacted by Congress shall not be enforceable against such State unless the federal government has acted pursuant to its enumerated powers and has provided the State with the funds needed to pay the States' cost of compliance with the obligation.
3. No condition on the receipt of federal funds by a State, imposed by or pursuant to a law enacted by Congress is valid unless such condition is clearly stated, directly related to and does no more than specify the purposes for which, or manner in which, the funds are to be spent.

BE IT FURTHER RESOLVED that the Secretary of State of the State of {insert state} transmit copies of this Concurrent Resolution to the President of the United States, the President of the United States Senate, the Speaker of the United States House of Representatives, the President of the Senate and Speaker of the House of Representatives of each state's legislature of the United States, and the {insert state} Congressional Delegation.

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MODEL RESOLUTION

RESOLUTION REQUESTING CONGRESS OF THE UNITED STATES TO ENACT LEGISLATION THAT REQUIRES CONGRESS TO SPECIFY THE CONSTITUTIONAL AUTHORITY FOR THE ENACTMENT OF LAWS

A resolution for the purpose of petitioning the Congress of the United States to enact legislation that requires Congress to specify the constitutional authority for the enactment of law; prohibits federal agency rules or regulations from preempting or otherwise interfering with state or local powers without express statutory authority; and requires a list of factual findings, establishing a substantial nexus between the regulatory effect of the proposed law and interstate commerce if Article 1, Section 8, Clause 3, of the Constitution is identified as the Constitutional provision granting authority to Congress for its proposed law.

WHEREAS, the federal government was established by the states through the ratification of the Constitution of the United States; and

WHEREAS, the federal government was granted carefully limited powers under the Constitution of the United States and the Tenth Amendment to the United States Constitution provides that "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"; and

WHEREAS, the Constitution of the United States established a system in which the states ceded only certain powers to the federal government; and

WHEREAS, the framers recognized that separation of powers is essential and ensured that the rights of the people would be protected by establishing checks and balances not only between the branches of the federal government but also between the federal government and state governments; and

WHEREAS, the legislative, executive and judicial branches of the federal government have by many actions usurped powers reserved by the Constitution of the United States to the states and to the people; and

WHEREAS, by the combined actions of the legislative, executive and judicial branches of the federal government, the relationship between the federal government and state governments established by the Constitution of the United States has been severely unbalanced; and

WHEREAS, the federal judiciary, itself a branch of the federal government, has failed to stop many of these federal excesses; and

WHEREAS, less federal preemption means states can act as true laboratories of democracy, seeking novel social and economic policies without risk to the nation; and

WHEREAS, to restore the balance of power between the federal government and state governments intended by the framers of the Constitution of the United States, the federal government must carefully consider, and be accountable for, the constitutional boundaries of its jurisdiction to protect the states and the people from the unwarranted assumption of power by the federal government.

NOW THEREFORE BE IT RESOLVED by the Legislature of the state of {insert state}, a majority of all members of the two houses concurring, that the One Hundred and Fourth Congress of the United States enact legislation requiring the Congress of the United States to cite the section of the Constitution that grants Congress the authority to enact proposed laws. The {insert state} Legislature supports the inclusion in such legislation:

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- (a) That Congress be required to state explicitly the extent to which the proposed section of law preempts any state, local or tribal law, and if so, an explanation of the reasons for such preemption.
- (b) That Federal agency rules or regulations may not preempt or otherwise interfere with State or local powers without express statutory authority. Agencies must allow states notice and an opportunity to be heard in the rule-making process.
- (c) That if Article I, Section 8, Clause 3, of the Constitution of the United States, is identified as the Constitutional provision granting authority to Congress for its proposed law, Congress must report a list of factual findings establishing a substantial nexus between the regulatory effect of the proposed law and interstate commerce.

BE IT FURTHER RESOLVED that the Secretary of State of the State of (insert state) transmit certified copies of this Resolution to the President of the United States; and to each Member of the Senate of the United States; and the House of Representatives of the United States; and to the Speaker of the House of Representatives and the President of the Senate of each state legislature in the United States.



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