



Limiting Federal Agency Preemption

Recommendations for a New Federalism Executive Order

Executive Summary

The Obama administration should replace Executive Order 13132, which instructs administrative agencies to consider the federalism implications of their actions, with an Executive Order that is more protective of the legitimate interests of state governments in maintaining their traditional role in protecting the health, safety and welfare of their citizens. While the current order has some desirable features, it is inadequate to prompt the type of deliberations in which agencies should engage when they are considering whether to support the preemption of state law.

The attached paper discusses several ideas that the Obama Administration should take into account when drafting a new Federalism Executive Order to replace Executive Order 13132. These ideas include:

- Agencies should limit their attempts to preempt state law under theories of implied preemption.
- Different concerns arise when considering preemption of state positive law versus common law.
- The principles embodied in the civil justice system are critical to maintain state sovereignty and ensure consumer protection.
- The presumption against ceiling preemption and the presumption against agency preemption must be restored and implemented throughout federal agencies.
- Meaningful consultation with state and local officials, as well as their nonprofit advocacy groups, is necessary before agencies seek to preempt state law.
- A “look back” provision is required to address Bush Administration agencies’ attempts to preempt state law without express statutory authority or sufficient evidence of a direct conflict between state law and federal regulation.