



The
Heritage Foundation
Executive Memorandum

No. 536

June 25, 1998

PRESIDENT CLINTON'S SELLOUT OF FEDERALISM

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On May 14, 1998, without much fanfare or public attention, the White House released a new executive order on federalism. President Bill Clinton's Executive Order 13083 revokes E.O. 12612, issued by President Ronald Reagan in 1987. The Clinton executive order outlines a series of new "Federalism Policymaking Criteria" that executive branch departments and agencies must follow "when formulating and implementing policies that have federalism implications." The guidelines establish broad but ambiguous and unconstitutional tests to justify intervention by the federal government in matters that typically are left to states and local communities.

E.O. 13083 follows a precedent established by President Clinton when he gutted President Reagan's Executive Order 12606 protecting the family (revoked by E.O. 13045) and E.O. 12291 mandating cost-benefit analysis of federal rules (revoked by E.O. 12866). The new executive order reverses much of President Reagan's sound policy on federalism. It pays only lip service to the benefits of the original federalist framework wrought by the Founding Fathers. Even worse, it establishes policymaking guidelines that will undermine the foundations of federalism by legitimizing unnecessary and unconstitutional national regulatory powers and actions.

ONE STEP FORWARD, TWO STEPS BACK

President Clinton's Executive Order 13083 borrows much of the language of President Reagan's E.O. 12612 to define "fundamental federalism prin-

ciples." For example, Section 2 of the Clinton executive order notes that

[T]he Constitution is premised upon a system of checks and balances. . . . The sovereign powers not granted to the Federal Government are reserved to the people or the States.

. . . Federalism reflects the principle that dividing power between the Federal Government and the States serves to protect individual liberty. Preserving State authority provides an essential balance to the power of the Federal Government. . . . The people of the States are at lib-

erty, subject only to the limitations of the Constitution itself or in Federal law, to define the moral, political, and legal character of their lives. . . . Effective public policy is often achieved when there is competition among the several States. . . .

The guidelines that the White House believes justify federal regulatory action are set out under

Produced by
The Thomas A. Roe Institute
for Economic Policy Studies

Published by
The Heritage Foundation
214 Massachusetts Ave., N.E.
Washington, D.C.
20002-4999
(202) 546-4400
<http://www.heritage.org>



“Federalism Policymaking Criteria” in Section 3. The more ambiguous and open-ended of the criteria “justifying” federal action include:

- “When decentralization increases the costs of government thus imposing additional burdens on the taxpayer.”
- “When States would be reluctant to impose necessary regulations because of fears that regulated business activity will relocate to other states.”
- “When placing regulatory authority at the State or local level would undermine regulatory goals because high costs or demands for specialized expertise will effectively place the regulatory matter beyond the resources of State authorities.”
- “When the matter relates to Federally owned or managed property or natural resources, trust obligations, or international obligations.”

ATTACKING THE FEDERALIST FRAMEWORK

Such criteria for federal action are a grotesque distortion of the Framers’ language establishing the original federalist system. Nowhere in the Constitution or Bill of Rights is there any mention of such justification for federal regulatory activity. Nor can the new criteria be justified on the grounds that such rules and regulations might be needed to protect interstate commerce.

This is not to say that there are no legitimate matters of concern for the federal government. As Ronald Reagan’s now-defunct E.O. 12612 pointed out at great length, the federal government specifically was given few, limited, and enumerated powers. The Constitution grants the federal government powers over such issues as national defense, international trade and diplomacy, immigration procedures, maintenance of the monetary system, patents and copyright enforcement, bankruptcy procedures, and the regulation of interstate commerce.

A forthcoming Heritage Foundation book entitled *The Delicate Balance: Federalism, Interstate Commerce, and Economic Freedom in the Technological Age* outlines when the federal government legitimately may exercise its authority under the Constitution, and when the states and local communities (and more important, individuals and corporations) should be left free to exercise their own discretion. Clearly, aside from those specifically enumerated powers that justify federal action in Article I, the Founders did not intend that the federal government should exercise authority over the states, local communities, or the people.

President Clinton’s new executive order on federalism is a serious affront to the federalist framework established in the U.S. Constitution. It adopts and expands the tortured logic of New Deal expansionist policymaking and jurisprudence. President Clinton’s version of federalism would make individuals more, not less, subservient to the federal government. The Founding Fathers’ version, by comparison, limits the power of the federal government over the lives and liberty of individuals.

Congress should reject the treading on the Constitution that President Clinton’s new executive order embodies. Congress should make clear, in any future legislation with federalism implications, that such guidelines are inappropriate. And it should order federal agencies to follow stricter guidelines, such as those in President Reagan’s E.O. 12612. Alternatively, Congress should take steps to codify the language of E.O. 12612 and direct that all federal agencies follow it instead of President Clinton’s E.O. 13083.

Either way, Members of Congress must make a strong statement that leaves no doubt of their commitment to resist President Clinton’s effort to eviscerate what remains of the American federalist system.

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