

1 **JOINT RESOLUTION TO RESTORE THE DIVISION OF**
2 **GOVERNMENTAL RESPONSIBILITIES BETWEEN THE**
3 **NATIONAL GOVERNMENT AND THE STATES**

4 2017 GENERAL SESSION

5 STATE OF UTAH

6 **Chief Sponsor: Ken Ivory**

7 Senate Sponsor: Allen M. Christensen

8
9 **LONG TITLE**

10 **General Description:**

11 This joint resolution of the Legislature urges the President of the United States and
12 Congress to recognize state authority and take action to restore power to the states.

13 **Highlighted Provisions:**

14 This resolution:

- 15 ▶ calls upon the President of the United States to reenact President Ronald Reagan's
16 Executive Order 12612 and to create a national commission on federalism;
- 17 ▶ urges Congress to pass and adhere to the Enumerated Powers Act;
- 18 ▶ urges Congress to pass the Regulations from the Executive in Need of Scrutiny Act;
- 19 ▶ urges Congress to pass the Intergenerational Financial Obligations Reform Act;
- 20 ▶ urges Congress to direct the Government Accountability Office to conduct an audit
21 of federal programs, rules, regulations, and laws that have federalism implications;
- 22 ▶ demands that all branches of the federal government refrain from any activity that
23 limits the policymaking discretion of the states; and
- 24 ▶ encourages other states to join with the state of Utah in documenting issues of
25 federal overreach.

26 **Special Clauses:**

27 None



28

29 *Be it resolved by the Legislature of the state of Utah:*

30 WHEREAS, the genius of the United States of America lies in the liberty of our people
31 to govern ourselves at the most local level, to solve our unique problems, to foster prosperity
32 through our liberty, and to cultivate our unique endowment of human, capital, and natural
33 resources;

34 WHEREAS, America's unique structure of government known as federalism, secures
35 the local voice and liberty of the people through clear divisions of responsibility between state
36 and federal governments, as explained in Federalist 51, "the power surrendered by the people is
37 ... divided between two distinct governments"—state and national;

38 WHEREAS, the Tenth Amendment of the United States Constitution establishes the
39 overarching theory and structure of our constitutional form of government to protect the
40 people's liberty by stating, "The powers not delegated to the United States by the Constitution,
41 nor prohibited by it to the States, are reserved to the States respectively, or to the people";

42 WHEREAS, former Utah Governor Scott Matheson stated "Federalism is neither a
43 partisan issue, nor is it an issue dividing liberals and conservatives. It's a philosophical concept
44 of how the federal governmental system operates, an effort to determine the proper role of state
45 and federal governments";

46 WHEREAS, James Madison, the primary author of the Constitution, described these
47 clear and certain constitutional divisions of responsibility most plainly in Federalist 45, saying
48 the powers delegated to the national government are "few and defined," over primarily
49 "external objects," and clarified that the powers reserved to the states concern "the lives,
50 liberties, and properties of the people, and the internal order, improvement, and prosperity of
51 the State," and are "numerous and indefinite" (Federalist 45);

52 WHEREAS, in Federalist 47, Madison warned the "accumulation of all powers,
53 legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very
54 definition of tyranny," and the power delegated through the executive branch to unelected,
55 unaccountable federal bureaucrats who make, enforce, and adjudicate their own rules, as if they
56 were laws, fits the definition of tyranny that Madison described;

57 WHEREAS, Chief Justice of the Supreme Court, John Roberts stated "If no enumerated
58 power authorizes Congress to pass a certain law, that law may not be enacted, even if it would

59 not violate any of the express prohibitions in the Bill of Rights or elsewhere in the
60 Constitution" Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2577 (2012);

61 WHEREAS, absent a clear and certain division of responsibility between state and
62 national governments, the structure of federalism is undermined and the resulting power
63 vacuum is, by nature, filled by the government with the most accumulated power;

64 WHEREAS, throughout the 20th and 21st centuries, regulations, laws, executive
65 orders, and court rulings emanating from the federal government have proliferated, and have
66 been met by agreement, acquiescence, or inaction of the states, which has blurred the divisions
67 of responsibility between the federal government and the states, resulting in a power vacuum
68 that has further distorted the constitutional divisions, separations, and limits on the "few and
69 defined" powers constitutionally delegated to the national government;

70 WHEREAS, James Madison wisely noted, "There are more instances of the
71 abridgement of the freedom of the people by gradual and silent encroachments of those in
72 power than by violent and sudden usurpations";

73 WHEREAS, the assumption of power that was never delegated to the federal
74 government under the Constitution undermines the constitutional architecture of federalism
75 instituted to "secure to citizens the liberties that derive from the diffusion of sovereign power"
76 Bond v. United States, 564 U.S. 211, 221 (2011);

77 WHEREAS, "The structure of our government is central to liberty, and when we
78 destroy it, we place liberty at peril" Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566,
79 2676-77 (2012) (Scalia, Thomas, Kennedy, and Alito dissenting);

80 WHEREAS, any activity that undermines the core federalism structure of our
81 government also erodes the voice and liberty of the people in determining the destiny,
82 opportunity, creativity, and dynamism of their own lives and their unique communities and
83 states—to the detriment of the nation as a whole;

84 WHEREAS, on October 26, 1987, President Ronald Reagan signed Executive Order
85 12612 on federalism "to restore the division of governmental responsibilities between the
86 national government and the States that was intended by the Framers of the Constitution and to
87 ensure that the principles of federalism established by the Framers guide the Executive
88 departments and agencies in the formulation and implementation of policies";

89 WHEREAS, President Donald J. Trump declared in his 2017 Inaugural Address, "we

90 are not merely transferring power from one administration to another, or from one party to
91 another—but we are transferring power from Washington, D.C., and giving it back to you, the
92 American People";

93 WHEREAS, Rep. Jason Chaffetz, Chairman of the House Committee on Oversight and
94 Government Reform, has reached out to state legislatures around the country to document their
95 experiences with federal overreach and unfunded mandates with a view to restoring power to
96 the states and to the people;

97 WHEREAS, in 2013, the Utah Legislature established the Utah Commission on
98 Federalism (the Commission) to: assess overreaching federal actions; respond to actions
99 through a measured dispute resolution process; coordinate with Utah's congressional delegation
100 and with other states; and report actions and results to the Legislature;

101 WHEREAS, at the request of Utah Senate President Wayne Niederhauser and Utah
102 Speaker of the House of Representatives Greg Hughes, the Commission convened public
103 hearings throughout the 2017 legislative session to receive reports from the various Senate and
104 House standing and appropriation committee chairs, state officials, staff, and members of the
105 public concerning federal actions that constitute examples of federal overreach, erode the
106 structural guarantees of federalism, or restrain the right and liberty of our people to govern
107 ourselves;

108 WHEREAS, the Commission received the following summary of federal overreach:
109 EDUCATION

110 • Recognize that education is not a power delegated to the federal government under the
111 Constitution, it is reserved to the states;

112 • Abolish the United States Department of Education and block grant administration
113 costs and federal appropriations to the state;

114 • Repeal the mandates of the Elementary and Secondary Education Act; and

115 • Relax the overly expansive interpretation of federal regulations, which increase costs
116 and adversely affects education at all levels;

117 PUBLIC LANDS AND NATURAL RESOURCES

118 • Recognize and abide by the comprehensive federal study and 1962 General Services
119 Administration Inventory Report on Jurisdictional Status of Federal areas within the States that
120 concluded that the national government has no jurisdiction but merely a proprietorial interest

- 121 over the vast majority of public lands within Utah;
- 122 • Repay to the state the nearly \$1 million appropriated by the Utah Legislature in 2013
123 to reopen the national parks, and forever refrain from closing or withdrawing public lands,
124 without the consent of the Legislature.
- 125 • Relinquish control over public lands within the state of Utah consistent with the equal
126 sovereignty and equal footing enjoyed by all other states;
- 127 • Acquire no new land within the state without the express consent of a state legislature
128 (United States Constitution, Article I, Section 8, Cl. 17);
- 129 • Amend the Antiquities Act, 54 U.S.C. Sec. 320301, to require consent of a state
130 legislature for any national monument designation;
- 131 • Recognize, restore, and respect state jurisdiction over free-roaming horses and burros,
132 livestock management, wildlife, and wildlife management within the state, and provide state
133 control over the use of federal funds for these purposes;
- 134 • Perform and finalize the maintenance backlog in the national parks, national
135 monuments, national forests, congressionally designated wilderness areas, and congressionally
136 designated wilderness study areas;
- 137 • Mitigate catastrophic fire risk on national forests and rangelands.
- 138 • Reinstate land use plans, policies, and practices that require public land management
139 for multiple use and sustained yield consistent with local resource management plans.
- 140 • Restrict the Secretary of the Interior's broad discretion over coal, mineral, oil, and gas
141 reservations, deferrals, and moratoriums;
- 142 • Revoke the United States Fish and Wildlife Service sage-grouse land use plans in
143 favor of Utah's sage-grouse management plan that maintains or increases the animal's
144 population within the state;
- 145 • Authorize and conduct a full Government Accountability Office audit of all legal fee
146 awards under the Equal Access to Justice Act and revise the act to require full disclosure and
147 transparency, as was sought in the Open Book on Equal Access to Justice Act, which would
148 require an annual report to Congress from the Chairman of the Administrative Conference of
149 the United States, would describe the number, nature, and amount of the awards and the claims
150 involved, and would be made available to the public;
- 151 • Authorize and conduct a full Government Accountability Office audit of the "sue and

152 settle" court decisions that established new management criteria for public lands, and overrule
153 all decisions lacking express ratification by Congress;

154 • End the federal prosecution of the Revised Statute 2477 road litigation and recognize
155 state and county authority of Revised Statute 2477 roads over public lands as established since
156 1866 and reaffirmed in the Federal Land Policy and Management Act of 1976; and

157 • Repeal Bureau of Land Management Planning 2.0 rule, which shifts most public land
158 use and planning decisions to Washington D.C., and away from local officials and managers on
159 the ground;

160 HEALTH AND HUMAN SERVICES

161 • Recognize, restore, and respect the jurisdiction of the state over "the conduct of public
162 utilities, of banks, of insurance, of business, of agriculture, of education, of social welfare,"
163 which "have not been surrendered to the national government by the Constitution, or its
164 amendments" Gov. Franklin D. Roosevelt, On State's Rights and Constitutional Authority,
165 March 2, 1930;

166 • Restore, where possible, through federal health care reform, state regulatory control
167 over the payment and delivery of health care;

168 • Reform Medicaid to (1) a block grant program, (2) eliminate the need for upfront
169 federal approval of state innovations that could lead to better health outcomes and improved
170 system performance, and (3) simplify and accelerate the approval process and expand the
171 ability of states to tailor Medicaid benefits and eligibility;

172 • Revise Medicaid federal participation rate formulas that are biased against states with
173 high performing, low-cost health care systems. Rates should reflect the health care needs of
174 states with diverse populations;

175 • Remove rules, regulations, or laws that deter states from developing and using health
176 claims data for health care cost and quality improvement initiatives;

177 • Eliminate unnecessary barriers to telemedicine and other health care reforms, while
178 retaining adequate privacy safeguards for patients and providers by aligning health care
179 information sharing restrictions under 42 C.F.R. with the Health Insurance Portability and
180 Accountability Act of 1996;

181 • Eliminate rules, regulations, and laws that prohibit states from engaging in credible,
182 institution-based research on the medical use of cannabis and other Schedule I drugs;

183 • Restore state powers so that states can address the opioid addiction crisis within their
184 borders, including the revision of U.S. Department of Health and Human Services regulations
185 that prohibit certified outpatient opioid treatment programs from reporting methadone,
186 suboxone, or buprenorphine use to state-run prescription drug monitoring programs; and

187 • Reform the federal financing of child welfare;

188 TRANSPORTATION

189 • Recognize, restore, and respect state and local authority over transportation matters
190 that are not national in scope and provide state control over the use of federal funds for those
191 purposes;

192 • Consolidate funding categories and block grant federal highway funding to the states;

193 • Expand nationwide waivers to Buy America requirements for certain commercially
194 available off-the-shelf items;

195 • Rescind duplicative and overly burdensome rules and regulations, such as:

196 • guidance issued by the Federal Highway Administration that prohibits issuance of
197 a Record of Decision under the National Environmental Policy Act (NEPA) until the project
198 sponsor has fully identified project funding; and

199 • current rules for performance measures regarding greenhouse gas emissions to
200 establish certain national performance management measures;

201 • Restore regulatory authority to "grandfather" highway and transit projects that
202 previously demonstrated air conformity;

203 • Amend Sec. 319 of the Clean Air Act, 42 U.S.C. Sec. 7619(b), to include "stagnation
204 of air masses or meteorological inversions" as an exceptional event for air quality monitoring
205 purposes; and

206 • Require the Federal Transit Administration, the Federal Highway Administration, and
207 the Federal Aviation Administration to develop the "one NEPA" platform;

208 LOCAL GOVERNMENT

209 • Recognize, restore, and respect the jurisdiction of the state over "the conduct of public
210 utilities, of banks, of insurance, of business, of agriculture, of education, of social welfare,"
211 which "have not been surrendered to the national government by the Constitution, or its
212 amendments" Gov. Franklin D. Roosevelt, On State's Rights and Constitutional Authority,
213 March 2, 1930;

214 • Respect state authority to administer programs in the most cost-effective manner (e.g.,
215 eliminate the Davis-Bacon Act, eliminate the Disadvantaged Business Enterprise, and restore
216 state control over storm water and waste water management, etc.);

217 • Recognize and respect local zoning and planning authorities and refrain from
218 interfering with local government flexibility to address the housing needs of individuals within
219 their communities;

220 • Review and restrain federal agencies from interfering in areas of traditional state
221 jurisdiction, such as elections (e.g., the Elections Assistance Commission, originally
222 established to assist states to comply with the Help America Vote Act, should not become a
223 regulatory body in the area of elections); and

224 • Refrain from coercing state policy through the threat of withholding federal funds.

225 **LAW ENFORCEMENT**

226 • Recognize that the general power of governing, or the "police power," is "possessed
227 by the States but not by the Federal Government" see, e.g., Nat'l Fed'n of Indep. Bus. v.
228 Sebelius, 132 S. Ct. 2566, 2578 (2012); United States v. Morrison, 529 U.S. 598, 619 (2000);

229 • Recognize and abide by state jurisdiction related to road closures, patrols, and search
230 and rescue operations and other enforcement activities not specifically under federal
231 jurisdiction;

232 • Recognize and abide by the sheriff's authority as the chief law enforcement officer in a
233 county;

234 • Recognize and abide by the Utah Division of Wildlife Resources' scope of authority
235 on wildlife and hunting enforcement and protection of various game animals, fowl, or fish;

236 • Clarify the state versus the federal share of assets resulting from a federal asset seizure
237 within the state;

238 • Reduce and consolidate federal law enforcement agencies to become more
239 comparable and compatible with state law enforcement agencies;

240 • Pass and sign the Regulatory Agency Demilitarization Act, which stems the trend of
241 federal regulatory agencies developing SWAT-like teams; and

242 • Prohibit executive activities that pursue "bulk collection" surveillance of American
243 citizens;

244 **REVENUE AND TAXATION**

- 245 • Recognize that nonuniform federal tax policy threatens the structure of federalism.
- 246 • Enact legislation to solve the remote sales tax issue;
- 247 • Maintain the tax-exempt status of municipal bonds;
- 248 • Eliminate restrictions that prevent state legislatures from governing the sharing of
- 249 state income tax return data;
- 250 • Fully fund federal mandates or release states from compliance with the federal
- 251 mandates;

- 252 • Recognize all unreported liabilities in the federal financial statements and formally
- 253 include all obligations in national debt computations;

254 WHEREAS, the increasing use of federal administrative action and laws consolidated
255 absolute power of the federal government in a manner that the United States Constitution was
256 designed to prevent; and

257 WHEREAS, the Commission engaged Utah Valley University's Center for
258 Constitutional Studies to produce a federalism curriculum presented by a national assembly of
259 constitutional experts, including George Washington School of Law Professor Jonathan Turley
260 who warned of the consequences of federal overreach: "People have become reliant on the
261 federal government. The result is that federalism seems like a quaint concept. What's dangerous
262 about that is it's a protection of individual liberty. The degree to which people become passive
263 about the increasing power of the federal government, they can watch the greatest protection of
264 their individual liberty simply dissipate".

265 NOW, THEREFORE, BE IT RESOLVED that the Legislature of the state of Utah
266 echoes the warning of Justice Anthony Kennedy that the increasing assumption and
267 centralization of power to the national government is destroying the federalism structure of our
268 government and placing the liberty of our people "at peril."

269 BE IT FURTHER RESOLVED that the Legislature of the state of Utah calls on
270 President Donald J. Trump to reenact Executive Order 12612 with additional provisions
271 sufficient to ensure and enforce compliance with the order.

272 BE IT FURTHER RESOLVED that the Legislature of the state of Utah calls upon
273 President Donald J. Trump to create a national commission on federalism, comprised of
274 representatives of the 50 states (chosen by the state legislatures) and representatives of the
275 federal government.

276 BE IT FURTHER RESOLVED that the Legislature of the state of Utah urges Congress
277 to pass and strictly adhere to the Enumerated Powers Act, which would require any bill
278 introduced in Congress to specify the constitutional authority under which the bill would be
279 enacted.

280 BE IT FURTHER RESOLVED that the Legislature of the state of Utah urges Congress
281 to direct the Government Accountability Office to conduct an audit of federal programs, rules,
282 regulations, and laws that have federalism implications as provided in Executive Order 12612.

283 BE IT FURTHER RESOLVED that the Legislature of the state of Utah calls upon
284 Congress to pass, and the President to sign, the Regulations from the Executive in Need of
285 Scrutiny Act, as the first step to restrict administrative agencies from exercising the Article I
286 powers of Congress and the Article III powers of the Judiciary.

287 BE IT FURTHER RESOLVED that the Legislature of the state of Utah recognizes that
288 the increasing federal debt and unfunded obligations directly imperil the states and our citizens
289 and urges Congress to pass the Intergenerational Financial Obligations Reform Act, which
290 would require the federal government to conduct fiscal gap accounting and generational
291 accounting on an annual basis.

292 BE IT FURTHER RESOLVED that the Legislature of the state of Utah demands that
293 all branches of the federal government refrain from any action that limits the policymaking
294 discretion of the states without clear and express constitutional authority for the action, and that
295 any such action by the federal government must be necessitated by the presence of a problem of
296 national scope, as provided in Executive Order 12612.

297 BE IT FURTHER RESOLVED that the Legislature of the state of Utah invites and
298 encourages the legislatures of all other states to join with the Utah Legislature to document the
299 issues of federal overreach, to demand that actions be taken by the federal government to
300 restore the divisions and limits of federal power, and to restore the vibrancy of American
301 federalism for the protection of our people's liberty.

302 BE IT FURTHER RESOLVED that the Legislature of the state of Utah recognizes that
303 the restoration of our federalism structure will require extensive cooperation among the 50
304 states and with our federal counterparts, and calls upon all state and national government
305 leaders to engage toward achieving a new nationwide consensus for decentralizing
306 governmental power in the United States.

307 BE IT FURTHER RESOLVED that the Legislature of the state of Utah views a
308 restoration of American federalism and decentralization of power and authority from the
309 federal government to states, local communities, neighborhoods, families, and individual
310 citizens, beginning with the actions enumerated in this resolution, as essential to the structural
311 protection of the liberties of our people.

312 BE IT FURTHER RESOLVED that a copy of this resolution be sent to the President of
313 the United States, the Majority Leader of the United States Senate, the Speaker of the United
314 States House of Representatives, the governor of each state outside of Utah, the Senate
315 President or President Pro Tempore and the Speaker of the House as of March 1, 2017, of each
316 state legislature outside of Utah, and to the members of Utah's congressional delegation.

Legislative Review Note
Office of Legislative Research and General Counsel