

Resolution 1
In Support of the Efforts by the U.S. Congress to Promote Respect for Principles of Federalism and Separation of Powers

WHEREAS, the Conference of Chief Justices, in fulfilling its leadership role for state judicial systems, has traditionally taken positions to defend against proposed policies that threaten principles of federalism or that seek to preempt proper state court authority; and

WHEREAS, recent actions by federal agencies have led to a growing concern by the Conference of Chief Justices about federal regulatory agency efforts to preempt federal and state statutes and common law through the promulgation of proposed rules; and

WHEREAS, Executive Order 13,132 (August 10, 1999) confirms fundamental federalism principles and instructs federal agencies to construe federal law to preempt state law only where the statute contains an express preemption provision or there is some other clear evidence that Congress intended the preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal Statute?; and

WHEREAS, Executive Order 13,132 (August 10, 1999) requires in Section 6 that each agency shall have an accountable process to ensure meaningful and timely input by State and local governments in the development of regulatory policies that have federalism implications; and

WHEREAS, Executive Order 13,132 (August 10, 1999) is not binding or enforceable absent codification by Congress; and

WHEREAS, on September 12, 2007, the Judiciary Committee of the United States Senate held a public hearing on "Regulatory Preemption: Are Federal Agencies Usurping Congressional and State Authority?" disclosing a pattern of conduct by federal agencies to use preamble statements in proposed rulemaking to circumvent or nullify established state public policy and common law; and

WHEREAS, the concern regarding regulatory preemption of state law is shared by the legislative as well as the judicial branches of state government as demonstrated by the President of the National Conference of State Legislatures (NCSL) who testified at the September 12, 2007 hearing on behalf of the entire NCSL concerning the growing lack of federal/state consultations in federal rulemaking; and

WHEREAS, federal agencies continue to assert the authority to preempt state law, as exemplified by the proposed rule published by the U.S. Department of Health and Human Services in January 2008 regarding the labeling of FDA-approved drugs, biologics, and medical devices;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices urges Congress to enact: (1) the federalism protections contained in Executive Order 13,132; (2) a requirement that a federalism assessment of proposed legislation having federalism implications be included in every Congressional committee and conference report; and (3) a rule of statutory construction to resolve any ambiguities in favor of state law in order to improve and encourage respect by the executive branch of the federal government for the principles of federalism and separation of powers.

Adopted as proposed by the CCJ/COSCA Government Affairs Committee at the 31st Midyear Meeting on January 30, 2008.