



STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

DEREK SCHMIDT
ATTORNEY GENERAL

MEMORIAL HALL
120 SW 10TH AVE., 2ND FLOOR
TOPEKA, KS 66612-1597
(785) 296-2215 • FAX (785) 296-6296
WWW.AG.KS.GOV

Testimony in Support of House Concurrent Resolution 5003

**Presented to the Senate Committee on Federal and State Affairs
By Kansas Attorney General Derek Schmidt**

March 15, 2017

Chairman LaTurner and Members of the Committee:

Thank you for the opportunity to testify in support of House Concurrent Resolution 5003. This resolution would urge Congress to propose the Regulation Freedom Amendment to the United States Constitution.

Over the past six years, my office has engaged in multistate efforts to block a number of proposed federal regulations that were not just bad ideas – we believed they were unlawfully enacted. In at least seven cases, federal courts have agreed with us that a federal agency has exceeded its authority in promulgating these regulations and blocked their implementation.

It is clear, however, that fighting these unlawful regulations through litigation is not the most efficient way for these disputes to be resolved. Rather, it would be much better if the people's elected representatives in the Legislative branch reasserted themselves as the proper check on this expansion of executive power. To that end, last summer I joined with 14 of my colleagues in asking Congress to reform the federal regulatory process. A copy of that letter is attached to this testimony. Also attached is a newspaper column on the subject of federal regulatory abuse that I submitted to the Wichita Eagle last December.

The resolution before you today, and the proposed underlying Constitutional amendment would add another tool to the Legislative branch's toolbox in restoring its check on the Executive branch. I encourage your support.

Senate Fed and State Committee
Date 3-15-17
Attachment # 2



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FOR IMMEDIATE RELEASE
December 5, 2016

Contact: Jennifer Montgomery
785-296-6115
jennifer.montgomery@ag.ks.gov

As illegal federal regulations cascaded from Washington, we held the line
By Kansas Attorney General Derek Schmidt

Just before Thanksgiving, a federal judge in Texas blocked a U.S. Department of Labor regulation imposing new overtime mandates for executive and professional employees while states, including Kansas, challenge its legality. The judge concluded the states probably are correct that the new regulation is illegal.

This marks at least the seventh major federal regulation blocked by court order because Kansas and other states persuaded federal courts that a federal agency exceeded its authority under the law. In law-talk, we call these unauthorized agency actions *ultra vires*. In plain English, we call them “power grabs.”

Never before in American history have states successfully challenged so many federal power grabs. Then again, never before have federal regulators been so willing to bypass the people’s elected representatives in Congress and ignore the law to get what they want.

Our work challenging these power grabs led some to call state attorneys general the “last line of defense” against unlawful federal executive actions.

The scope of the ends-justifies-the-means mentality in the federal bureaucracy has been breathtaking. In addition to the overtime rule, coalitions of states including Kansas currently have four other illegal federal regulations on hold by court order:

- **Waters of the United States (WOTUS):** This sweeping attempt to regulate private property use under the guise of water protection is blocked by the Sixth Circuit Court of Appeals.
- **‘Clean Power Plan’:** This brazen agency effort to rewrite the nation’s energy policy by imposing ‘cap-and-trade’ even *after* Congress rejected it – while ignoring the harm to low-income consumers – is blocked by the U.S. Supreme Court.
- **Immigration ‘executive action’:** This unprecedented executive branch move to unilaterally rewrite the nation’s immigration laws is blocked by a federal court in Texas with assent from the U.S. Supreme Court.
- **Phone charges:** A little-noticed regulation requiring state taxpayers to subsidize inmate phone calls is blocked by the Court of Appeals for the District of Columbia Circuit.

Kansas also helped persuade the U.S. Supreme Court that the EPA must follow Congress’s command to meaningfully consider the cost of regulations and a federal district court that the lesser prairie chicken should not be listed as threatened or endangered.

We currently have half a dozen other challenges pending.

In court, the federal government is a tough foe, and we’ve lost a few. Our losses – such as challenging the Dodd-Frank financial services law or the individual mandate in Obamacare – usually came when we took on an act of Congress rather than an action of a federal agency. But even then we occasionally prevailed, as when the U.S. Supreme Court ruled Obamacare’s mandated Medicaid expansion unconstitutional.

When unelected federal bureaucrats act outside the authority granted to them by the people's elected representatives in Congress, and thereby intrude on the authority of *state* governments and the people, we ask: By what authority is the federal agency acting? Government is not by the consent of the governed when the people's elected representatives at all levels are shut out of the decision-making processes of the vast regulatory state.

President Obama once pledged to bypass Congress with a "pen and a phone." I hope our new president's approach to federal regulatory power will be more restrained and respectful of the states, the legislative branch and the rule of law. Congress also should reassert its constitutional authority to rein-in federal agencies – regardless of which political party holds the White House.

We will remain vigilant. But at least the "last line of defense" held long enough for the people to have their say at the ballot box. They said, "Enough!" That is how our system of representative self-government is supposed to work.

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