H.R. 2245, THE FEDERALISM ACT OF 1999

HEARING

BEFORE THE

SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH, NATURAL RESOURCES, AND REGULATORY AFFAIRS

OF THE

COMMITTEE ON GOVERNMENT REFORM
HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

H.R. 2245

TO ENSURE THE LIBERTIES OF THE PEOPLE BY PROMOTING FEDERALISM, TO PROTECT THE RESERVED POWERS OF THE STATES, TO IMPOSE ACCOUNTABILITY FOR FEDERAL PREEMPTION OF STATE AND LOCAL LAWS, AND FOR OTHER PURPOSES

June 30, 1999

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H.R. 2245, THE FEDERALISM ACT OF 1999

WEDNESDAY, JUNE 30, 1999

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH,
NATURAL RESOURCES, AND REGULATORY AFFAIRS,
COMMITTEE ON GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2247, Rayburn House Office Building, Hon. David M. McIntosh (chairman of the subcommittee) presiding.

Present: Representatives McIntosh, Ryan, Terry, Walden, Kucinich, and Ford.

Also present: Representatives Moran of Virginia, and McCarthy of Missouri.

Staff present: Marlo Lewis, Jr., staff director; Barbara Kahlow, professional staff member; Luke Messer, counsel; Gabriel Neil Rubin, clerk; David Sadkin, minority counsel; and Ellen Rayner, minority chief clerk.

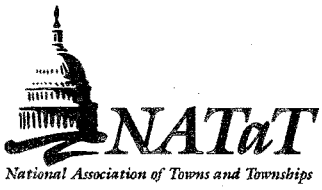
Mr. MCINTOSH. The Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs will come to order. A quorum being present, I would like to now ask unanimous consent that all Members' and witnesses' written statements be included in the record. Without objection, so ordered.

I also ask unanimous consent that my colleagues, Messrs. Moran, Portman, Condit, Castle, Davis, and Mrs. McCarthy, all of whom are original cosponsors of H.R. 2245, the Federalism Act of 1999, be able to participate in today's hearing. Without objection, so ordered.

I also ask unanimous consent that those six Members' written statements be included in the record. Without objection so ordered.

Finally, I want to inform the Members that I will hold the hearing record open until July 16th so that we can receive written comments after the close of today's hearing. Yesterday, we received a letter of support for the bill from the National Association of Towns and Townships, which comprises about one-third of all local elected officials nationally. In addition, we have a letter that we received today from six of the major State and local organizations, and I would ask unanimous consent that those two letters be included in the record. Without objection, so ordered.

[The information referred to follows:]



June 29, 1999

Chairman David McIntosh
National Economic Growth Natural Resources
and Regulatory Affairs Subcommittee
B-377 Rayburn House Office Building
Washington, DC 20515

Dear Chairman McIntosh:

I am writing to respectfully request that the National Association of Towns and Townships (NATaT) be added to the list of national organizations that represent public officials identified in H.R. 2245, the "Federalism Act of 1999." NATaT represents approximately 11,000 predominately small and rural local governments throughout the country by lobbying on their behalf on Capitol Hill. NATaT's membership comprises roughly one-third of all local elected officials nationally.

As you are well aware, there have been legislative and regulatory attempts in recent years to preempt areas of responsibility that have traditionally belonged to local government. These include the areas of taxation, local planning and zoning authority and local franchise authority. NATaT strongly opposes any legislation or regulation that attempts to compromise local authority. Therefore, it is without reservation that NATaT supports H.R. 2245 which seeks to protect state and local government authority by imposing accountability for federal preemption of state and local laws.

On behalf of NATaT I would like to thank you for your leadership on this very important issue and commend you on your efforts to ensure that local authority is not unjustly compromised. I look forward to working with you to enact this legislation. Please do not hesitate to contact me if I can be of any assistance.

Sincerely,

Jennifer Balsam
Federal Affairs Associate

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National Association of Counties
National Conference of State Legislatures
National Governors' Association
National League of Cities
Council of State Governments
International City/County Management Association

June 30, 1999

The Honorable David McIntosh
House of Representatives
1208 Longworth Building
Washington, D.C. 20515

Dear Representative McIntosh:

We are writing on behalf of the nation's state and local elected officials to thank you for your leadership, hard work, and commitment in sponsoring HR 2245, the bipartisan Federalism Act of 1999. We believe swift enactment of this legislation would significantly strengthen intergovernmental cooperation by involving state and local elected leaders as full partners in the federal legislative and regulatory process on issues that affect our mutual constituents. As we mark the fourth anniversary of the Unfunded Mandates Reform Act, we believe this legislation would address outstanding issues that impede state and local governments' unique abilities to address the public policy needs of their citizens and businesses.

We are especially grateful for your efforts, and those of your staff, in working with us over the last six months to fashion this legislation. We support the intent to ensure that federal elected and appointed officials be accountable for and informed of the implications of such regulations or legislation on the intergovernmental relationship. Traditional and historic authority granted by the Constitution of the United States allows state and local governments to enact and implement local laws and policies that are in the best interests of communities. While great strides have been made by federal legislators in recognizing the implications of unfunded mandates, we are concerned about the increased prevalence of statutory and regulatory preemptions – both direct and indirect – that compromise state and local autonomy. We are hopeful that the disclosure provisions will be expanded beyond the assessment of cost. We believe it is also critically important for federal officials to understand the effects of legislative and regulatory preemptions on economic development, consumer protections, and state and local enforcement authorities. This bill offers a constructive way to help us work together and ensure that we may bring the best out of each level of government.

We look forward to working with you to ensure its enactment.

Sincerely,

Governor Thomas R. Carper
State of Delaware
Chairman, National Governors' Association

Governor Tommy Thompson
State of Wisconsin
President, Council of State Government

Commissioner Betty Lou Ward
Wake County, North Carolina
President, National Association of Counties

Representative Dan Blue
North Carolina State House of Representatives
President, National Conference of State Legislature

Mayor Clarence Anthony
South Bay, Florida
President, National League of Cities

Bryce Stuart, City Manager
City of Winston-Salem, North Carolina
President, International City/County Management Association

Mr. MCINTOSH. I want to thank Mr. Terry and Mr. Walden for coming today. Mr. Kucinich is on his way. Being Wednesday morning, there are a lot of different hearings that are going on, so you'll see Members come and go. The six Members who wanted to join us have all indicated they will be here at some point or another, and we'll be able to hear from them when they are here. Mrs. McCarthy was here earlier, and I saw Mr. Moran in the hall.

Let's get started with this hearing. I think it's an incredibly important subject. The purpose of today's hearing is to discuss the need for federalism legislation in general and the Federalism Act of 1999 specifically.

H.R. 2245, introduced by Congressmen Moran, Portman, McCarthy, Castle, Condit, Davis, and myself, is a bipartisan bill to promote and preserve the integrity and effectiveness of our Federal system of government and to recognize the partnership that exists between the Federal Government and State and local governments in the implementation of various Federal programs. This hearing will allow key State and local elected officials, the General Accounting Office, and a professor who is an expert in federalism, although I understand the professor won't be able to join us today, but his testimony will be made part of the record. He had a family emergency and is not able to be here. But it will allow us to discuss the need for federalism legislation and H.R. 2245 specifically.

[The text of H.R. 2245 follows:]

106TH CONGRESS
1ST SESSION

H. R. 2245

To ensure the liberties of the people by promoting federalism, to protect the reserved powers of the States, to impose accountability for Federal preemption of State and local laws, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JUNE 16, 1999

MR. MCINTOSH (for himself, Mr. MORAN of Virginia, Mr. PORTMAN, Ms. MCCARTHY of Missouri, Mr. CASTLE, Mr. CONDIT, and Mr. DAVIS of Virginia) introduced the following bill; which was referred to the Committee on Government Reform, and in addition to the Committees on Rules, and the Judiciary, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To ensure the liberties of the people by promoting federalism, to protect the reserved powers of the States, to impose accountability for Federal preemption of State and local laws, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Federalism Act of 1999".

SEC. 2. FINDINGS.

The Congress finds the following:

(1) The Constitution created a strong Federal system, reserving to the States all powers not expressly delegated to the Federal Government.

(2) Preemptive statutes and regulations have at times been an appropriate exercise of Federal powers, and at other times have been an inappropriate infringement on State and local government authority.

(3) On numerous occasions, the Congress has enacted statutes and Federal agencies have promulgated rules that expressly preempt State and local government authority and describe the scope of the preemption.

(4) In addition to statutes and rules that expressly preempt State and local government authority, many other statutes and rules that lack an express statement by the Congress or Federal agencies of their intent to preempt and a clear description of the scope of the preemption have been construed to preempt State and local government authority.

(5) In the past, the lack of clear congressional intent regarding preemption has resulted in too much discretion for Federal agencies and uncertainty for State and local governments, leaving the presence or scope of preemption to be litigated and determined by the Federal judiciary, producing results sometimes contrary to or beyond the intent of the Congress.

(6) State and local governments are full partners in all Federal programs administered by those governments.

SEC. 3. PURPOSES.

The purposes of this Act are the following:

(1) To promote and preserve the integrity and effectiveness of our federalist system of government.

(2) To set forth principles governing the interpretation of congressional intent regarding preemption of State and local government authority by Federal laws and rules.

(3) To recognize the partnership between the Federal Government and State and local governments in the implementation of certain Federal programs.

(4) To establish a reporting requirement to monitor the incidence of Federal statutory, regulatory, and judicial preemption.

SEC. 4. DEFINITIONS.

In this Act:

(1) DEFINITIONS IN 5 U.S.C. 551.—The definitions under section 551 of title 5, United States Code, shall apply.

(2) BILL.—The term "bill" includes a joint resolution.

(3) DIRECTOR.—The term "Director" means the Director of the Congressional Budget Office.

(4) LOCAL GOVERNMENT.—The term "local government" means a county, city, town, borough, township, village, school district, special district, or other political subdivision of a State.

(5) PUBLIC OFFICIALS.—The term "public officials"—

(A) means elected officials of State and local governments; and

(B) includes the following national organizations that represent such officials:

(i) The National Governors' Association.

(ii) The National Conference of State Legislatures.

(iii) The Council of State Governments.

(iv) The United States Conference of Mayors.

(v) The National League of Cities.

(vi) The National Association of Counties.

(vii) The International City/County Management Association.

(6) STATE.—The term "State"—

(A) means a State of the United States and an agency or instrumentality of a State;

(B) includes—

(i) the District of Columbia and any territory of the United States, and an agency or instrumentality of the District of Columbia or such territory; and

(ii) any tribal government and an agency or instrumentality of such government; and

(C) does not include a local government of a State.

(7) TRIBAL GOVERNMENT.—The term "tribal government" means an Indian tribe as that term is defined under section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e)).

SEC. 5. DEFERENCE TO STATE MANAGEMENT PRACTICES.

(a) EXPENDITURE AND ACCOUNTING OF FEDERAL FUNDS.—A State shall expend and account for covered Federal grant funds in accordance with requirements and procedures under the laws of the State governing State expenditure of and accounting for State funds, subject to any requirement that expressly applies under any other Federal statute.

(b) USE, MANAGEMENT, AND DISPOSAL OF PERSONAL PROPERTY ACQUIRED WITH FEDERAL FUNDS.—A State shall use, manage, and dispose of personal property acquired with covered Federal grant funds in accordance with requirements and procedures under the laws of the State governing State use, management, and disposal of personal property acquired with State funds, subject to any requirement that expressly applies under any other Federal statute.

(c) PROCUREMENT WITH FEDERAL FUNDS.—In procuring any personal property or service with covered Federal grant funds, a State shall follow the same requirements and procedures that apply under the laws of the State governing State procurement with State funds, subject to any requirement that expressly applies under any other Federal statute.

(d) DEFINITIONS.—In this section:

(1) COVERED FEDERAL GRANT FUNDS DEFINED.—The term "covered Federal grant funds" means amounts provided as Federal financial assistance, other than assistance under a grant program to which the Grants Management Common Rule (53 F.R. 8034) does not apply on the date of the enactment of this Act.

(2) PERSONAL PROPERTY.—The term "'personal property" means property other than real property.

SEC. 6. PERFORMANCE MEASURES.

Section 1115 of title 31, United States Code, is amended by adding at the end the following:

"(g) The head of an agency may not include in any performance plan under this section any agency activity that is a State-administered Federal grant program, unless the performance measures for the activity are determined in cooperation with public officials.".

SEC. 7. REQUIREMENTS FOR AGENCY RULEMAKING.

(a) NOTICE AND CONSULTATION WITH POTENTIALLY AFFECTED STATE AND LOCAL GOVERNMENTS.—Not later than the date of publication of an advance notice of proposed rulemaking for a rule promulgated by an agency, or the equivalent date if such notice is not published, the head of the agency shall notify and consult with public officials who may potentially be affected by the rule for the purpose of identifying any preemption of State or local government authority that may result from issuance of the rule.

(b) IDENTIFICATION OF PREEMPTION AND FEDERALISM IMPACTS.—

(1) IN GENERAL.—The head of an agency shall—

(A) publish with each proposed rule issued by the agency a proposed federalism impact assessment under paragraph (2);

(B) publish with each interim final rule issued by the agency a proposed federalism impact assessment under paragraph (2); and

(C) publish with each final rule issued by the agency a final federalism impact assessment under paragraph (2).

(2) FEDERALISM IMPACT ASSESSMENT.—A proposed or final federalism impact assessment under this subsection shall include with respect to the proposed, interim final, or final rule concerned an identification of—

(A) any provision of the rule that is a preemption of State or local government authority;

(B) the constitutional basis for each such preemption;

(C) any provision of statute under which the rule is issued that is an express preemption of State or local government authority, and any provision of any other statute that expressly states that the Congress intended such preemption;

(D) any provision of the rule that establishes a condition for receipt of grant funds that is not related to the purpose of the grant program under which the funds are provided;

(E) any other provision of the rule that impacts State or local governments, including any provision that constitutes a Federal intergovernmental mandate (as that term is defined in section 421 of the Congressional Budget and Impoundment Control Act of 1974);

(F) any regulatory alternatives considered by the agency;

(G) the estimated costs that will be incurred by state and local governments as a result of issuance of the rule; and

(H) the extent of the agency's consultations with public officials who may potentially be affected by the rule.

(c) PUBLICATION.—The head of an agency shall include, in a separately identified part of the preamble to each proposed rule, interim final rule, and final rule published by the agency in the Federal Register, a summary of the proposed or final (as applicable) federalism impact assessment prepared under this section.

SEC. 8. LEGISLATIVE REQUIREMENTS.

(a) IN GENERAL.—The report accompanying any bill of a public character reported from a committee of the Senate or House of Representatives, or the joint explanatory statement accompanying a conference report on any such bill, shall include a statement that—

(1) identifies each section of the bill or conference report that constitutes an express preemption of State or local government authority, or asserts that the bill does not contain any such section; and

(2) describes the constitutional basis for any such preemption;

(3) sets forth the reasons for each such preemption; and

(4) includes the federalism impact assessment by the Director under subsection (b).

(b) FEDERALISM IMPACT ASSESSMENT BY CONGRESSIONAL BUDGET OFFICE.—

(1) PROVISION OF BILL OR CONFERENCE REPORT TO DIRECTOR.—When a committee of the Senate or the House of Representatives orders reported a bill of a public character, and before a conference committee files a conference report thereon, the committee or conference committee shall promptly provide the bill to the Director and shall identify to the Director each section of the bill that constitutes a preemption of State or local government authority.

(2) FEDERALISM IMPACT ASSESSMENT.—(A) For each bill of a public character reported by any committee of the Senate or the House of Representatives, and for each conference report thereon, the Director shall prepare and submit to the committee or conference committee a federalism impact assessment that describes the preemptive impact of the bill or conference report thereon on State and local governments, including the estimated costs that would be incurred by State and local governments as a result of its enactment.

(B) In the case of a bill or conference report that authorizes a Federal grant program, the federalism impact assessment shall also identify any provision that establishes a condition for receipt of funds under the program that is not related to the purposes of the program.

(c) ABSENCE OF COMMITTEE REPORT OR STATEMENT OF MANAGERS.—In the absence of a committee report or joint explanatory statement in accordance with subsection (a) accompanying a bill or conference report thereon, respectively, the committee or conference committee shall report to the Senate and the House of Representatives a statement described in subsection (a) before consideration of the bill or conference report.

SEC. 9. RULES OF CONSTRUCTION RELATING TO PREEMPTION.

(a) STATUTES.—No Federal statute enacted after the effective date of this Act shall preempt, in whole or in part, any State or local government law, ordinance, or regulation, unless the statute expressly states that such preemption is intended or unless there is a direct conflict between such statute and a State or local law, ordinance, or regulation so the two cannot be reconciled or consistently stand together.

(b) RULES.—No Federal rule issued after the effective date of this Act under any provision of law enacted after that effective date shall preempt, in whole or in part, any State or local government law, ordinance, or regulation, unless the statute under which the rule is issued, or another statute, expressly states that such preemption is intended.

(c) FAVORABLE CONSTRUCTION.—Any ambiguity in this Act, or in any other Federal rule issued or Federal statute enacted after the date of the enactment of this Act, shall be construed in favor of preserving the authority of State and local governments.

SEC. 10. REPORTS ON PREEMPTION.

(a) OFFICE OF MANAGEMENT AND BUDGET INFORMATION.—Promptly after the expiration of the second calendar year beginning after the effective date of this Act, and every 2 years thereafter, the Director of the Office of Management and Budget shall submit to the Director of the Congressional Budget Office information describ-

ing each provision of interim final rules and final rules issued during the preceding 2 calendar years that preempts State or local government authority.

(b) CONGRESSIONAL RESEARCH SERVICE INFORMATION.—Promptly after the expiration of the second calendar year beginning after the effective date of this Act, and every 2 years thereafter, the Director of the Congressional Research Service shall submit to the Director of the Congressional Budget Office information describing Federal and State court decisions issued during the preceding 2 calendar years that preempt State or local government authority.

(c) CONGRESSIONAL BUDGET OFFICE REPORT.—

(1) IN GENERAL.—Not later than the adjournment sine die of each Congress, the Director of the Congressional Budget Office shall submit to the Congress a report on the extent of preemption of State and local government authority—

(A) by Federal laws enacted during the previous session of Congress; and

(B) by judicial or agency interpretations of Federal statutes issued during such session, using—

(i) information regarding agency rules submitted by the Office of Management and Budget under subsection (a); and

(ii) information regarding Federal and State court decisions submitted by the Director of the Congressional Research Service under subsection (b).

(2) CONTENT.—The report under paragraph (1) shall contain—

(A) a cumulative list of Federal statutes preempting, in whole or in part, State or local powers;

(B) a summary of legislation enacted during the previous session preempting, in whole or in part, State or local government authority;

(C) a summary of rules of agencies promulgated during the previous session of Congress preempting, in whole or in part, State or local government authority; and

(D) a summary of Federal and State court decisions issued during the previous session of Congress preempting, in whole or in part, State or local government authority.

(3) AVAILABILITY.—The Director shall make the report under this subsection available to—

(A) each committee of the Congress;

(B) each Governor of a State;

(C) the presiding officer of each chamber of the legislature of each State; and

(D) other public officials and the public through publication in the Congressional Record and on the Internet.

SEC. 11. LIMITATION ON APPLICATION WITH RESPECT TO PROHIBITIONS AGAINST DISCRIMINATION.

This Act shall not apply with respect to any section of a bill, or any provision of a Federal regulation or statute, that establishes or enforces any statutory prohibition against discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability.

SEC. 12. EFFECTIVE DATE.

This Act shall take effect 90 days after the date of the enactment of this Act.

Mr. MCINTOSH. I want to welcome four State and local elected officials who represent key organizations. They are, first of all, North Carolina State Representative Dan Blue, who is the president of the National Conference of State Legislatures. Dan has been with us before at this committee, and I welcome you back. Thank you for coming up to Washington today. The second is South Bay, FL, Mayor Clarence Anthony, who is president of the National League of Cities. The third is Santa Fe, NM, County Commissioner Javier Gonzales, who is the second vice president of the National Association of Counties. And the fourth is Mr. Raymond Scheppach, who is the executive director of the National Governors' Association.

I also want to welcome Nye Stevens, who is Director of Federal Management and Work Force Issues in the General Accounting Office. As I mentioned, unfortunately Professor John Baker will not be here, but I would ask unanimous consent that his testimony be included into the record.

Finally, the Office of Management and Budget was invited to testify to express the Clinton administration's views on H.R. 2245. However, instead of testifying today, the administration decided to submit a statement for the record, and again, I would ask unanimous consent that that statement be included in the record.

In May 1998, to give some background, President Clinton issued Executive Order 13083, which revoked President Reagan's Executive Order 12612, on federalism, and President Clinton's own Executive Order 12875. The Reagan order provided many protections for State and local governments and reflected great deference to State and local governments. It also set in place operating principles and required discipline for the executive branch agencies to follow in all of their decisionmaking which would affect State and local governments. The Reagan order was premised on the recognition of the competence of State and local governments and their readiness to assume even greater responsibilities in our national political scheme of government.

In August 1998, after a July hearing before the subcommittee and the outcry from the seven major national organizations that represent State and local governments, President Clinton indefinitely suspended Executive Order 13083 and agreed to work with these national organizations on a substitute order. This was an outcome that the subcommittee greatly welcomed.

Now, since January 1999, the administration has held several meetings with elected State and local officials and the national organizations that represent them to discuss a replacement Executive order. We understand from the representatives of those groups that the administration continues to want to rescind President Reagan's federalism Executive order and replace it with an Executive order that does not include many of the needed protections for State and local governments. As a consequence, the State and local representatives approached Congress and asked for a permanent legislation to protect their interests.

Now, after a series of meetings that really began last February and have gone on since then, a bipartisan group of Members together with those national organizations and their leaderships reached agreement on the substance of the legislation to include provisions most needed and desired by them to promote and preserve federalism.

You know, as James Madison wrote in Federalist No. 45, the powers delegated to the Federal Government are defined and limited. Those which are to remain in the State governments are numerous and indefinite. Nonetheless, the political authority of the States has been challenged through legislation passed by Congress, regulations issued and other decisions made by the executive branch, and judicially imposed mandates. There needs to be an appropriate balance between the powers and duties of the Federal Government and those of the State and local governments.

In the past, the absence of clear congressional intent regarding preemption of State and local authority has resulted in too much discretion for Federal agencies and uncertainty for State and local governments, leaving the presence or scope of preemption to be determined by litigation in the Federal judiciary.

The Federalism Act of 1999 has a companion bill in the Senate, S. 1214, the Federalism Accountability Act of 1999. Both of these bills seek to redress this problem of encroaching Federal power. They would first promote and preserve the integrity and effectiveness of our federalist system of government; second, set forth principles governing the interpretation of congressional intent regarding preemption of State and local government authorities by Federal laws and Federal rules; third, recognize the partnership between the Federal Government and the State and local governments in the implementation of certain Federal programs; and fourth, establish a reporting requirement to monitor the incidence of Federal statutory, regulatory and judicial preemption.

The Federalism Act of 1999 establishes new principles for both the legislative branch and the executive branch before either imposes requirements that preempt State and local authority or have other impacts on State and local governments.

I want to pause here to let the representatives of the State and local governments know we heard you loud and clear last year at the hearing where you brought forth in this subcommittee the problem that it's not only the executive action but also actions taken here in Congress that we need to be mindful of when we try to preserve the federalism principle. And so, this act is crafted to apply to both the executive and the legislative branch in the future.

H.R. 2245, which builds on the Unfunded Mandates Reform Act, requires that the report accompanying any bill identifying each section of that bill constitutes an expressed preemption of State and local authority and the reasons for such preemption. The report also must include a federalism impact assessment prepared by the Congressional Budget Office which estimates the costs on State and local governments. Similarly, the bill requires executive branch agencies to include a federalism impact assessment in each proposed, interim final and final rule that is published. The federalism impact assessment must identify any provision that is a preemption of State or local government authority and the expressed statutory provision authorizing such preemption, the regulatory alternatives considered, and the impacts and the costs on State and local governments.

The bill establishes new rules of construction relating to preemption. These include that no new Federal statute or new Federal rule shall preempt any State or local law regulation unless the statute expressly states that such preemption is intended. This will, I believe, go a long way to prevent some of the costly and unnecessary litigation that's arisen about the issue of preemption.

Any ambiguity shall be construed in favor of preserving the authority of State and local governments. Besides instituting this new discipline for the legislative and executive branches and for providing new rules of construction for the judiciary, the bill also includes other provisions to recognize the special competence of the States in partnership with the State and local governments and the

Federal Government. The bill reflects respect for the States, in deference to the knowledge, experience, and authority of State and local elected officials. Specifically, the bill provides deference to State management practices for financial management, property, and procurement involving certain Federal grant funds. The bill also requires that, for State-administered Federal grant programs, the executive branch agencies must cooperatively determine program performance measures with State and local officials and the seven major national organizations that represent them.

Let me say that the McIntosh-Moran-Portman-McCarthy-Castle-Condit-Davis bill is truly a bipartisan bill. It's a product of the work with the seven major State and local interest groups, the National Governors' Association, the National Conference of State Legislatures, the Council of State Governments, the U.S. Conference of Mayors, the National League of Cities, the National Association of Counties, and the International City/County Management Association. And so, with that, I am pleased today to open this hearing on this legislation.

[The prepared statement of Hon. David M. McIntosh follows:]

Chairman David M. McIntosh
Opening Statement
H.R. 2245: Legislation to Promote and Preserve Federalism
June 30, 1999

The purpose of today's hearing is to discuss the need for Federalism legislation in general and the "Federalism Act of 1999" specifically. H.R. 2245, introduced by Congressmen Jim Moran, Rob Portman, Karen McCarthy, Michael Castle, Gary Condit, Tom Davis and me, is a bipartisan bill to promote and preserve the integrity and effectiveness of our federalist system of government, and to recognize the partnership between the Federal Government and State and local governments in the implementation of certain Federal programs. This hearing will allow key State and local elected officials, the General Accounting Office, and a law professor who is an expert in Federalism to discuss the need for Federalism legislation generally and H.R. 2245 specifically.

I want to welcome four State and local elected officials who represent key organizations of State and local officials: North Carolina State Representative Daniel T. Blue, Jr. who is President of the National Conference of State Legislatures (NCSL); South Bay, Florida Mayor Clarence E. Anthony who is President of the National League of Cities (NLC); Santa Fe County, NM Commissioner Javier M. Gonzales who is Second Vice President of the National Association of Counties (NACO); and Raymond C. Scheppach, Executive Director of the National Governors' Association (NGA), who is representing NGA today.

I also want to welcome Nye Stevens, who is Director of Federal Management and Workforce Issues in the General Accounting Office (GAO), and Law Professor John S. Baker, Jr. from Louisiana State University. Lastly, the Office of Management and Budget (OMB) was invited to testify to express the Clinton Administration's views on H.R. 2245. However, instead of testifying today, the Administration decided to submit a statement for the hearing record.
In May 1998, President Clinton issued Executive Order (E.O.) 13083, which revoked President Reagan's 1987 Federalism E.O. 12612 and President Clinton's own 1993 Federalism E.O. 12875. The Reagan Order provided many protections for State and local governments and reflected great deference to State and local governments. It also set in place operating principles and a required discipline for the Executive Branch agencies to follow for all decisionmaking affecting State and local governments. The Reagan Order was premised on a recognition of the competence of State and local governments and their readiness to assume more responsibility. In August 1998, after a July 1998 hearing before this Subcommittee and the outcry of the seven major national organizations that represent State and local elected officials, President Clinton indefinitely suspended his E.O. 13083 and agreed to work with these national organizations on any substitute Order.

Since January 1999, the Administration has held several meetings with elected State and local officials and the national organizations that represent them to discuss a replacement executive order. We understand from the State and local representatives that the Administration continues to want to rescind President Reagan's Federalism Order and replace it with an executive order

that does not include many of the needed protections for State and local governments. As a consequence, the State and local representatives approached Congress and asked for permanent legislation to protect their interests. After a series of meetings since February 1999, a bipartisan group of Members together with those national organizations and their leadership reached agreement on the substance of legislation to include provisions most needed and desired by them to promote and preserve Federalism.

As James Madison wrote in Federalist No. 45, "The powers delegated ... to the Federal government are defined and limited. Those which are to remain in the State governments are numerous and indefinite." Nonetheless, the political authority of the States has been challenged through legislation passed by Congress, regulations issued and other decisions made by the Executive Branch, and judicially imposed mandates. There needs to be an appropriate balance between the powers and duties of the Federal Government and those of State and local governments. In the past, the absence of clear congressional intent regarding preemption of State and local authority has resulted in too much discretion for Federal agencies and uncertainty for State and local governments, leaving the presence or scope of preemption to be determined by litigation in the Federal judiciary.

The "Federalism Act of 1999" has a companion bipartisan bill on the Senate side, S. 1214, the "Federalism Accountability Act of 1999." Both bills share nearly identical purposes: (1) to promote and preserve the integrity and effectiveness of our federalist system of government, (2) to set forth principles governing the interpretation of congressional intent regarding preemption of State and local government authority by Federal laws and rules, (3) to recognize the partnership between the Federal Government and State and local governments in the implementation of certain Federal programs, and (4) to establish a reporting requirement to monitor the incidence of Federal statutory, regulatory, and judicial preemption.

The "Federalism Act of 1999" establishes new discipline for both the Legislative Branch and the Executive Branch before either imposes requirements that preempt State and local authority or have other impacts on State and local governments. H.R. 2245, which builds on the Unfunded Mandates Reform Act, requires that the report accompanying any bill identify each section of the bill that constitutes an express preemption of State or local government authority and the reasons for each such preemption. The report must also include a Federalism Impact Assessment (FIA) prepared by the Congressional Budget Office which estimates the costs on State and local governments. Likewise, the bill requires Executive Branch agencies to include a FIA in each proposed, interim final, and final rule publication. The FIA must identify any provision that is a preemption of State or local government authority and the express statutory provision authorizing such preemption, the regulatory alternatives considered, and other impacts and the costs on State and local governments.

The bill establishes new rules of construction relating to preemption. These include that no new Federal statute or new Federal rule shall preempt any State or local government law or regulation unless the statute expressly states that such preemption in intended. Any ambiguity shall be construed in favor of preserving the authority of State and local governments.

Besides instituting this new discipline for the Legislative and Executive Branches and providing new rules of construction for the Judiciary, the bill includes other provisions to recognize the special competence of and partnership with State and local governments. The bill reflects respect for and deference to the knowledge, experience, and authority of State and local elected officials. Specifically, the bill provides deference to State management practices for financial management, property, and procurement involving certain Federal grant funds. The bill also requires that, for State-administered Federal grant programs, the Executive Branch agencies must cooperatively determine program performance measures (under the Government Performance and Results Act) with State and local elected officials and the seven major national organizations that represent them.

The McIntosh-Moran-Portman-McCarthy-Castle-Condit-Davis bill is a product of work with the seven major State and local interest groups and has been endorsed by them: the National Governors' Association, National Conference of State Legislatures, Council of State Governments, U.S. Conference of Mayors, National League of Cities, National Association of Counties, and the International City/County Management Association.

Mr. MCINTOSH. Let me now ask if my colleague Mr. Terry would like to make any opening statement before we move to the first panel.

Mr. TERRY. To introduce myself to the panel, I'm an 8-year member of the City Council in Omaha, NE, and an 8-year member of the League of Cities. One of the fundamentals of my philosophy is empowerment of local communities, counties, and State governments as opposed to the Federal Government. So this is a type of measure that we in Congress must take to protect the rights to govern in the local communities—those governments which can best deliver the services and represent the constituents because they are truly closer to the people.

That's one of the reasons why I ran for this job. On the city government I was tired of the Federal Government dictating everything we did, from the type of road projects to our water quality, which of course is extremely high anyway. So I enjoy engaging in this type of discussion and, with H.R. 2245, engaging in this type of battle.

I appreciate what you've done, Mr. Chairman, and let the games begin.

Mr. MCINTOSH. Thank you, Mr. Terry. I particularly appreciate your perspective having served on local government.

Let me also mention at this point that Mr. Kucinich will have an opportunity to give his statement, and we'll put that into the record as soon as he is able to be with us.

But, let's move forward with the first panel. I mentioned in my introduction who they were, but Representative Blue, Mayor Anthony, and Commissioner Gonzales, as well as Mr. Scheppach, please come forward and join us now.

I would ask each of you to remain standing for a minute. The rules of our full committee are that we must ask each of the witnesses to be sworn in. So, don't feel that you're being singled out for that in any way. But if you would please take the oath with me.

[Witnesses sworn.]

Mr. MCINTOSH. Thank you. Let the record show that each of the witnesses answered in the affirmative, and the committee has already agreed to put your full remarks into the record, so I would ask you to share a summary of those, emphasize particular points with us today, and then we can get into the question-and-answer period.

Representative Blue, again, thank you for joining us again at the hearing and with this committee. Share with us a summary of your remarks, if you would.

STATEMENTS OF DANIEL T. BLUE, JR., NORTH CAROLINA STATE REPRESENTATIVE, PRESIDENT, NATIONAL CONFERENCE OF STATE LEGISLATURES; CLARENCE E. ANTHONY, MAYOR, SOUTH BAY, FL, PRESIDENT, NATIONAL LEAGUE OF CITIES; JAVIER M. GONZALES, COMMISSIONER, SANTA FE COUNTY, NM, SECOND VICE PRESIDENT, NATIONAL ASSOCIATION OF COUNTIES; AND RAYMOND C. SCHEPPACH, EXECUTIVE DIRECTOR, NATIONAL GOVERNORS' ASSOCIATION

Mr. BLUE. Thank you very much, Mr. Chairman. I appreciate the opportunity to appear before you again to talk about a subject which, a little less than three decades ago when I got into it in law school I thought was some inane, obscure topic that I would never deal with again. But for the last 12 or 14 years, I have been on behalf of the National Conference of State Legislatures dealing with the issue of federalism, and we have gone through a great evolution in that process since the mid-1980's.

On behalf of the National Conference of State Legislatures I'm here to support H.R. 2245, the Federalism Act of 1999, because it is a bill that deals comprehensively with the problem of Federal preemption of State law.

As a result of Federal preemption, Mr. Chairman, we believe that a large part of the policy jurisdiction of State legislatures has been lost, and when we lose that, we lose the capacity for self-government, local self-government. One of the advantages we feel very strongly about federalism is that the laws will be adopted to conform with local needs and conditions. They will reflect regional and community values, and we believe that local diversity at the State level and the local governments is ignored when these laws are preempted and replaced with a one-size-fits-all national policy without some of the thought, we think, that is embraced by H.R. 2245 entering the deliberation.

A second advantage that we believe, Mr. Chairman, of federalism is that it allows greater responsiveness and innovation. When States are preempted, States and localities are preempted, they can't serve as laboratories of democracy, and we believe very strongly, certainly from the standpoint of States, that 50 different approaches to problem resolution will yield the most effective for those different States that are looking at it.

We thank you for first generally identifying the problem of preemption, and we thank you for a workable bill that we think allows us to achieve our objective, some of which you have already articulated. We think that the Federalism Act of 1999, H.R. 2245, addresses the preemption problem in three ways; three ways we think are very important. First, by providing Congress with more information about the preemptive impact of legislative proposals, I think that we sensitize Congress and the Members of Congress to the impacts of what they do and how we have an encroachment on constitutional authority of States, and also on the encroachment on States being willing to try different solutions to problems.

We think the second part of the bill, the fact that it provides for rules of construction urging courts to limit findings that preemption is implied, goes a long way because, as you know, the major problem with preemption is not when it's been expressly found by

the Congress. I'll readily acknowledge that I believe very much in the supremacy clause of the Constitution, and I know that when Congress acts in an area, if it determines that it's in the national interest or there is some reason that it ought to do it, then it clearly has the right to since the Ogden decision. But the one thing we find great difficulty with is this whole concept of implied preemption when Congress has not clearly indicated where it wants to go, and, in fact, some of the novel and creative theories that the courts have come up with over the years to find preemption. So we think that the bill providing for rules of construction regarding this implied preemption will go a long way toward addressing the problems that we've identified, particularly over the last 12 or 14 years.

And third, the bill by providing notice and consultation procedures in the Federal administrative process we believe will encourage Federal agencies to first acknowledge that federalism is a concept that has life, but also will make them take into account federalism and preemption issues more fully as they engage in the rulemaking process.

So, Mr. Chairman and Mr. Terry, when we look at the various aspects of the bill section by section, we're certainly encouraged that we do have a vehicle to address these issues that we've identified, to seriously address the issue of preemption at all levels of the Federal Government, and we appreciate the fact that this is a bipartisan effort. I don't think that federalism is something that wears a Republican or Democratic label, a liberal or conservative label, but is one that truly acknowledges what the Founding Fathers intended when they created this system of government which we all say that we cherish and believe in.

Thank you very much for giving me the opportunity to testify this morning.

Mr. MCINTOSH. Thank you, Representative Blue. I appreciate that very, very much.

[The prepared statement of Mr. Blue follows:]

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STATEMENT OF

REPRESENTATIVE DANIEL T. BLUE, JR.

PRESIDENT, NATIONAL CONFERENCE OF STATE LEGISLATURES

BEFORE THE
HOUSE COMMITTEE ON GOVERNMENT REFORM
SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH, NATURAL RESOURCES AND REGULATORY AFFAIRS

REGARDING H.R. 2245, " THE FEDERALISM ACT OF 1999"

June 30, 1999

Mr. Chairman and Members of the Subcommittee:

Good morning. I am Dan Blue, a member of the North Carolina House of Representatives and President of the National Conference of State Legislatures (NCSL). I appear today on behalf of NCSL to support H.R. 2245, the Federalism Act of 1999, a bill that deals comprehensively with the problem of federal preemption of state law[1].

As you know, under the Supremacy Clause of the Constitution, if a federal law or regulation, adopted appropriately pursuant to one of the national government's powers conflicts with state law, then federal law trumps state law. The state law is preempted. This, in itself, is as it should be and is as the Framers of the Constitution intended. The problem is that the frequency and pace of federal preemption of state law has picked up dramatically in recent years, to the point that state and local governments find it increasingly difficult to play their traditional role within our system of constitutional federalism.

As a result of federal preemption, a large part of the policy jurisdiction of state legislatures and of city and county councils has been lost. States and localities cannot legislate in response to their citizen's needs when the federal government has preempted the policy field. What is lost is the capacity for regional and local self-government.

[1] The National Conference of State Legislatures represents all the legislatures in the 50 states and in the American commonwealths and territories. NCSL's members are committed to restoring the balance in our constitutional system of federalism, opposing unjustified federal mandates and unjustified preemption of state law.

One of the advantages of federalism is that laws will be adapted to local needs and conditions and will reflect regional and community values. Federalism respects the geographic, economic, social and political diversity of America. As a result of accumulating preemptive acts by the national government, however, our federal system is not working as the Framers intended. Local diversity is ignored, when state and local laws are preempted and replaced with a "one-size-fits-all" national policy.

A second advantage of federalism, it bears repeating, is that it allows greater responsiveness and innovation through local self-government. State and local legislatures are accessible to every citizen. They work quickly to address problems identified by constituents. The large number of state and local legislatures encourages innovation. A new policy is tested in one jurisdiction. If it works, other jurisdictions will try it. If a mistake is made, it can be quickly corrected. But, if the policy jurisdiction of a state or locality has been preempted, then it cannot respond and it cannot innovate.

As serious as this problem is, there is no need in our view for radical legislation or for amendment of the constitution. The simple solution is for Congress to adopt the proposed Federalism Act, a modest bipartisan bill, modeled in part on the Unfunded Mandates Reform Act which addresses the preemption problem in three ways:

(1) The bill would provide Congress with more information about the preemptive impact of legislative proposals,

(2) The bill would provide a rule of construction, urging the courts to limit findings that preemption is implied where in fact there is neither a direct conflict between state and federal law nor a clear expression by Congress of its intent to preempt.

(3) The bill would provide for notice and consultation procedures in the federal administrative process to encourage federal agencies to take federalism and preemption issues more fully into account in the course of rulemaking.

Providing More Information to Congress

Section 8 of the proposed Federalism Act would require that the report accompanying any bill in Congress identify each section of the bill that constitutes an express preemption of state and local government authority and explain the reasons for each such preemption. The Congressional Budget Office would be required to prepare for each bill a Federalism Impact Assessment that describes the preemptive impact of the bill, including the estimated cost that would be incurred by state and local governments as the result of its enactment.

Section 10 of the bill would require the Congressional Budget Office, with input from the Office of Management and Budget and the Congressional Research Service, to prepare biennially a report on new statutes, administrative rules and court decisions that preempt state and local authority.

In many respects, these sections of the Federalism Act serve a purpose similar to provisions in the Unfunded Mandates Reform Act requiring CBO to prepare estimates of the cost to states and localities of mandates included in pending legislation. Thanks to UMRA, members of Congress are now well informed about cost shifts to the states when they vote on legislation that imposes mandates on states. The result has been fewer mandates and greater sensitivity to the fiscal impact of pending legislation on states and localities. UMRA has been a success.

Sections 8 and 10, also, would build upon the fine work currently done by the Congressional Budget Office in analyzing the preemptive impact of proposed legislation. CBO is currently required under UMRA when analyzing the fiscal impact of mandates to also prepare a brief preemption analysis. CBO is not required, however, to prepare preemption analyses for bills that do not carry mandates. Moreover, UMRA's requirements do not apply to appropriations bills, emergency legislation, social security legislation, and several other categories of proposed legislation. H.R. 2245, by contrast, provides for CBO preemption analysis for all public bills except for those dealing with discrimination and individual rights.

We at NCSL have the highest regard for the Congressional Budget Office. We believe that with input from the Congressional Research Service and the Office of Management and Budget as provided in H.R. 2245, they will do an excellent job, building on their current work, in providing more and better information to Congress on the preemptive impact of legislative proposals.

If members of Congress are better informed about the preemptive impact of legislative proposals, then we believe, based on our experience with UMRA, that fewer provisions preempting state law will be proposed. Even when Congress decides that preemption is necessary, we believe that preemptive language will be more carefully targeted and more narrowly crafted. Perhaps most important of all, sections 8 and 10 in combination with the rule of construction in section 9 should encourage much greater clarity in bill drafting, so that courts, agencies, and the public will know more precisely when Congress intends to preempt and where the limits are on the scope of such preemption.

Greater congressional attention to the preemptive impact of legislation is urgently needed. We are greatly concerned at NCSL about the number of broadly preemptive bills that have recently been seriously considered or enacted by Congress. This is particularly true in the areas of state civil justice and economic regulation policy such as telecommunications, banking, product liability, internet taxation, land use regulation, and so forth. I have summarized a number of these problem areas in an appendix to my testimony. Admittedly, these proposed and enacted preemptions of state law have substantial political support. I will concede that sometimes there is no alternative for Congress but preemption. What I do not concede is that preemption is so often necessary. Nor, do I concede that preemption, even if necessary, must sweep as broadly as it sometimes has. Finally, I do not concede that simply because state laws may be unpopular with particular interest groups - whether they be business, labor, liberal, or conservative - preemption is justified. Mr. Chairman and members of the subcommittee, something has to change. And, I think things will change if Congress passes H.R. 2245 and in effect makes a commitment to show restraint in preempting state law.

In other words, sections 8 and 10 will work only if a substantial majority of Congress want it to work. Given the recent trend in which Congress has preempted substantial areas of state authority particularly in connection with deregulation of important sectors of the economy, cynics may argue that the states' rights rhetoric of many members of this Congress is insincere, or at the very least that there will be far less sympathy for states when it comes to preemption as opposed to mandate issues. I am not ready to accept such cynicism. I think members of Congress are sincere about addressing the issues of federalism, including the preemption problem. I have been very impressed, Mr. Chairman, by your initiative in introducing this bill and by the breadth of support for the bill from members of both parties. Similarly, in the Senate support for the Thompson/Levin federalism bill, S. 1214, has come from both Republicans and Democrats and from both conservatives and liberals. I do not think you are just giving lip service to this issue of preemption. I believe that Congress, if it passes this bill, will follow through and make it work by taking CBO preemption reports seriously and by implicitly requiring in the future that sponsors of preemptive legislation meet a much higher burden of proof of the necessity of overriding state law. At the very least, enactment of the Federalism Act will put Congress to the test with respect its sincerity and commitment to principles of federalism. Based on the experience of UMRA, I think Congress will pass that test.

I would only raise one question in this connection. UMRA provides for a point-of-order on the House and Senate floor to ensure, when a bill carrying a mandate is presented for debate, that the mandate is identified and that the CBO analysis of the fiscal impact on states and localities is presented. The UMRA point of order process has worked well. It has not created

unnecessary time delays on the floor, nor has it interfered with the capacity of the House or Senate to conduct business in an orderly way. So, my question is whether inclusion of a similar point-of-order process in H.R. 2245 would enhance the effectiveness of the bill. NCSL suggests that further discussions on this questions with members of this subcommittee and H.R. 2245's original cosponsors be conducted prior to subcommittee markup.

Providing Rules of Construction

Section 9 of the Federalism Act provides for rules of statutory construction related to preemption which would urge courts to limit findings that preemption is "implied," even though there is no actual conflict between federal and state law and even though Congress has made no clear statement of its intent to preempt.

Under section 9, if enacted, no new federal statute or new federal rule shall be understood to preempt state or local law unless Congress has expressly stated that preemption is intended or unless there is a direct conflict between such federal statute and state or local law such that the two cannot be reconciled or consistently stand together.

The rule of construction in section 9 might be the most important provision in the proposed Federalism Act because it seeks to curtail litigants, judges and perhaps even agency rule-makers who, in effect, might seek to read preemption into a statute based on some creative theory that it is implied. So-called "implied preemption" is the heart of the problem. A review of the case law, I believe, will show that very frequently preemption cases do not involve an

"actual conflict" between federal and state law. In other words, the cases most often do not turn on explicit language in a federal statute providing for preemption, nor do they ordinarily turn on allegations that it is physically impossible for an individual or corporation to comply with both federal and state law. As a 1991 report on the law of preemption issued by the Appelate Judge's Conference notes: "Supremacy Clause cases typically call on the courts to discern or infer Congress's preemptive intent." The report goes on to say that: "By their very nature, implied preemption doctrines authorize courts to displace state law based on indirect and sometimes less than compelling evidence of legislative intent. This indirectness in turn suggests a greater potential for unpredictability and instability in the law."

Now, it might be argued that such a statutory rule of construction will have limited impact because there are no means of forcing judges to curb any proclivity they may have to read statutes broadly and creatively to achieve a desired result in a particular case. Such a view, I believe again, is too cynical. I think judges are inclined these days to defer to the political and democratic branches of government. Moreover, the rule of construction in section 9 reinforces the recent trend in Supreme Court cases for the justices to look skeptically at theories of implied preemption and to demand instead some "clear statement" in the statutory text of Congress's intent to preempt. I think the rule of construction in section 9, if enacted, would be welcomed by the judiciary, although I am sure that we all recognize that in the final analysis judges appropriately will have to make a case-by-case analysis of when Federal law preempts state law.

The rule, nonetheless, should make it easier for judges to disregard as unpersuasive creative arguments of implied preemption based on, for example, the "pervasive nature of federal

regulation," the "peculiarly federal" nature of the interests and similar arguments which seek to divine a preemptive intent by Congress when in fact both the statutory language and legislative history are either unclear or simply do not address the questions raised in litigation.

In the case of prospective federal regulations, I would ask for some clarification in the language of section 9 (b). I believe we should discuss further the argument that rulemakers will make that the agency's "scope of authority" or the broad powers delegated by Congress to the agency sometimes appropriately allow preemption by agency regulation even absent an actual conflict between federal and state law or a clear statement of Congress's intent to preempt. I do not think the intent for section 9 is to revolutionize federal administrative law or the delegation doctrine nor would I argue that such a radical change is appropriate. Rather, section 9, particularly in combination with section 7's requirements for notice and consultation with state and local officials, should be drafted with the intention of making agencies more cautious before they preempt state law, knowing that in many cases the courts when reviewing federal regulations increasingly will be looking for an "actual conflict" or a "clear statement" of Congress's intent to preempt.

Providing for Agency Consultation and Federalism Impact Assessments

Section 7 (a) of the proposed Federalism Act would require federal agencies to provide notice and to consult with elected state and local officials when a proposed rule would preempt state or local law. Section 7 (b) would require agencies to publish federalism impact assessments with each proposed, interim final, and final rule. Such a federalism impact assessment would

identify any provision of the rule that preempts state or local authority and it would identify any provision of a statute under which the rule is issued that is an express preemption of state and local authority, as well as any provision of any other statute that expressly states that Congress intended such preemption. The assessment would identify any other provision of the rule that impacts state or local government, including mandates. The agency would also be required to include in the assessment estimates of what the rule would cost state and local governments and to include a report of the extent of consultation with state and local officials.

As I noted earlier, the problem of preemption by agency regulation is perhaps the most difficult to address effectively and responsibly. This may be in part because federal agency officials are less likely than members of Congress or federal judges to have had experience with state or local elected officials. They may also lack a full understanding of the impact of rules on states and localities. But also, agency rulemakers may have legitimate concerns. Federalism arguments and procedural requirements for consultation and impact assessments, intentionally or not, may further complicate and prolong an already complicated and extended federal administrative process, thus thwarting the capacity of agencies to fulfill their mission and meet the responsibilities that have been delegated to them, often in broad statutory language, by Congress. Also, if an agency has been delegated broad quasi-legislative authority, for example to ensure clean air, and if the agency has no means of achieving this mission without some preemption of state laws, even though Congress may not have had any capacity when the legislation was written years ago to anticipate the circumstances in which preemption is necessary to the fulfillment of the statute's policy goals, then what is the agency to do? Should the agency abandon its mission and goals? I think not.

Section 7, properly understood, should not alarm agency officials in this connection. All it requires is identification of issues, notice, and consultation. It is inappropriate for agencies to sweep federalism and preemption issues under the rug. They must be identified. There must be notice and consultation with elected state and local officials and their national organizations. Most important of all, there must be a real dialogue. Just as agency rulemakers should listen to the concerns of state and local officials, so state and local officials must respect the mission of the agencies. All legislation can do is prescribe a process. Limiting unnecessary agency preemption will require good will and an earnest desire on the part of both parties to address the problem. Nothing in section 7, as I read it, would thwart preemption by agency regulation if it is indeed unavoidable and essential to the goals of the federal statute, even when Congress has not specified preemption, though as I noted earlier, some clarification of section 9 (b) may be required. The important thing is for agencies and state and local officials to communicate more effectively in the search for non-preemptive means of achieving the agency's mission and goals.

As you know, the state and local government community had a disagreement with the Clinton Administration regarding the proposed new executive order on federalism, an issue that is closely related to the text of section 7. I testified last year before this sub-committee, expressing our concerns about the pending executive order. What followed from that disagreement has been a long, sometimes difficult, but serious and sincere effort by both the state and local government associations and the Administration to reach agreement on the form of a new executive order on federalism. We are on the brink of reaching such an agreement. I am very optimistic that we will reach a satisfactory resolution. More important, both sides, as a

result of this consultation process, now have a much better understanding of each other's legitimate concerns. Most important of all, both sides have come to understand that the real problem is not the rhetoric employed in the executive order but its enforcement. As a recent a GAO report has documented, there have been serious shortcomings with the preparation of federalism assessments on regulation, problems that have persisted for over a decade. Now we are not only about to reach an agreement on the language of an executive order, but also to reach an understanding about how to make the executive order work. I think we have a commitment from the chief executive to faithfully enforce a new executive order.

I am sure some may be skeptical or maybe even cynical about real progress with the Administration and about a real change in agency behavior. But just as I believe it would be wrong to assume the worst about how seriously Congress or the courts will treat preemption problems, if this legislation is passed, so I believe it would be wrong to assume the worst, to take the cynics view, about this Administration's intentions. They admitted that they made a mistake in issuing E.O. 13083 without consultation. They have negotiated in good faith. We should now assume that they will follow through and make the process of notice and consultation work, I believe they will follow through.

At the same time, issuance of a new executive order and a commitment by the Administration to enforce it does not obviate the need for enactment of section 7 of H.R. 2245. In the year 2000, we elect a new President. We must ensure, through passage of a statute, that a process of notice and consultation between agency rulemakers and elected state and local

officials is established on a permanent basis. For this reason, Mr. Chairman, NCSL supports H.R. 2245 and believes that section 7 of the bill is absolutely essential.

Conclusion

In conclusion, Mr. Chairman, I want to thank you and the six original cosponsors for introducing the proposed Federalism Act of 1999. I especially appreciate the care you have taken to get bipartisan support for this important bill. Bipartisanship is essential if it is to be signed into law. We at NCSL do not regard issues of federalism and preemption to be the property of Republicans or Democrats nor of liberals or conservatives. Everyone has an interest in making our federalism work as the Framer's intended.

So, NCSL asks all the members of this subcommittee and this Congress to co-sponsor and to support the Federalism Act of 1999. NCSL looks forward to working with all of you to resolve any remaining issues prior to markup. The important thing is for all of us to remember the goal. Preemption must be limited if we are to enjoy the advantages of federalism, which, in turn, fosters policymaking that respects America's diversity and a policymaking process that encourages innovation and responsiveness.

Thank you for this opportunity to testify. I look forward to your questions.

NATIONAL CONFERENCE of STATE LEGISLATURES

The Forum for America's Ideas

Representative Daniel T. Blue, Jr.
Senior Majority Leader
North Carolina, President, NCSL

Thomas R. Tedcastle
Director of Bill Drafting and
General Counsel, Florida House
Staff Chair, NCSL

William T. Pound
Executive Director

Examples of Preemption Issues

The most prominent recent examples of preemptive federal legislation and proposed preemptive legislation are in the areas of (1) civil justice, (2) land use planning, (3) taxation of electronic commerce, (4) electric utility deregulation, (4) telecommunications, (5) financial services, (6) international trade, and (7) health care, among others.

Civil Justice: For over fifteen years, Congress has considered various proposals to set national standards for product liability suits that would broadly preempt state law (S. 648 in the last Congress). Congress has passed several more-limited preemptions of state tort law, including a bill signed into law last year, P.L. 105-230, that provides liability protection for suppliers of raw materials for medical devices. A related legislative proposal adopted by the 105th Congress, P.L. 105-353, channels class action suits related to securities fraud into federal court. Bills currently pending would limit liability resulting from the so-called ""Y2K,""or year 2000 computer glitch, (S 96/H.R. 775).

Land Use Planning: The "Citizen's Access to Justice Act," HR 1534 passed by the U.S. House of Representatives in 1997 would have preempted state laws to make it much easier for property owners to pursue in federal court Fifth Amendment "takings" claims against state and local governments. In 1998, a similar bill, HR 2271, fell just a few votes short on a Senate cloture motion. By swiftly moving routine land use litigation into federal court, the proposed legislation inevitably would have had the effect of asking federal judges to make decisions in a policy area that has been an almost exclusive province of state and local officials.

Taxation of Electronic Commerce: In 1998, Congress enacted the Internet Tax Freedom Act, P.L. 105-277, imposing a three-year moratorium on state and local taxation of Internet access and electronic commerce. The result is at least a temporary preemption of state revenue measures. The law leaves in place a loophole created by the Supreme Court's 1967 decision in National Bellas Hess vs. Illinois, which effectively exempts most out-of-state mail order and electronic retailers from sales tax collection responsibilities, resulting in an annual revenue loss to states and localities estimated to exceed $6 billion. Under the provision of P.L. 105-277, an Advisory Commission on Electronic Commerce is to study means of facilitating the expansion of electronic commerce while accommodating

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the need for states to enforce revenue measures that do not discriminate against either electronic commerce or more traditional commerce. The concern of states is that this process could lead to permanent preemption of state authority over electronic commerce and to a substantial loss of state autonomy. The National Governors' Association estimates that if Internet sales reach $300 billion by 2002, states and localities, if they continue to be preempted, will lose revenues of $20 billion per year. Such federal preemption also puts main street retailers who must collect state and local sales taxes at a significant competitive disadvantage. Such unfairness in the treatment of similarly situated retailers is a threat to the whole sales tax system, on which states depend for about one third of their revenues.

Electric Utility Deregulation: During the last session of Congress, proposals were made by leading members and by the Clinton Administration to impose national rules on competition in retail electricity markets (HR 655, S 621, and S 2287 in the 105th Congress.) Such preemptive legislation would impose a "one-size-fits-all" federal policy on retail competition that ignores local conditions, values, and cost structures. It could also force dramatic changes in state and local utility tax structures and franchise fee systems that again are not adapted to local needs and that could result in major revenue losses. State and local control of public rights-of-way also could be jeopardized.

Telecommunications: With the passage of the Telecommunications Act of 1996, Congress apparently determined that federal preemption was required to knock down barriers to entry for interstate and intrastate telecommunications services. For example telephone companies were authorized to enter the cable television market. Cable operators were allowed to provide other telecommunications services, such as local telephone service, without first obtaining a local franchise. Local taxation of direct satellite-to-home services was preempted. And, local zoning authority over the location of wireless telecommunications towers was limited. The Supreme Court's January 25, 1999 decision in ATT vs. Iowa Utilities Board makes it unmistakably clear that under the 1996 act the Federal Communications Commission has broad authority to establish rules intended to ensure competition in local markets and to review agreements related to local competition approved by state regulators.

Financial Services: Congress has been actively considering bank deregulation legislation, including repeal of the Glass-Steagall Act. The idea is to lower the firewalls separating banking from commerce and separating businesses engaged in banking, insurance, and securities brokerage, (HR 10/S.900). Such legislation, it is feared, could ultimately open the door to federal preemption of the state role in regulating the insurance industry. State insurance regulators want to retain authority over bank insurance activities. (The state role in regulating banks having already in many respects been substantially preempted by interstate banking legislation and by federal regulatory and court decisions related to bank powers, i.e. allowing banks to offer a variety of investment products.) Also, state securities regulators want to retain authority to regulate bank securities activities.

In related areas, pending federal bankruptcy legislation, HR 833/S 625, and a proposal for a federal no-fault auto insurance law also would preempt state laws.

International Trade: Both NAFTA and the Uruguay Round of the General Agreement on Tariffs and Trade provide for enforceable dispute resolution procedures for foreign countries to challenge state laws for alleged discrimination against international commerce. The United States is authorized in implementing legislation to sue states and preempt their laws for non-conformity with our trade obligations. The first challenge to state law in the new World Trade Organization arises from a complaint by the European Union against the Massachusetts statute, based on the model of state South Africa sanctions legislation, which penalizes firms doing business with the dictatorial regime in Burma when they seek to compete for state contracts. A federal district court judge, this year, declared the Massachusetts Burma sanctions law to be invalid in light of U.S. obligations under GATT. The range of state and local laws potentially subject to challenge under international trade and investment agreements is very broad.

Health Care: The current debate on legislation to protect the privacy of medical records revolves around preemption issues. One bill, S 881, sponsored by Senator Robert Bennett, would preempt existing state laws and set one national standard. A second bill, sponsored by Senators Jeffords and Dodd, S. 578, would grandfather existing state laws and give states 18 months to enact laws stricter than the federal standard. A third bill, S. 573, sponsored by Senators Leahy and Kennedy, would allow states to enact privacy protections that are stricter than the national standard.

Other Preemption Issues: A by-no-means-comprehensive list of other laws and proposed laws that would preempt states includes proposed national standards for building codes, a proposed police officers' "bill of rights" to regulate labor-management relations for state and local law enforcement, current federal preemption of local tow-truck regulation, current federal preemption under the immigration laws of drivers' license and birth certificate issuance processes, and current federal preemption of municipal authority over the siting of group homes for the disabled.

Mr. MCINTOSH. Mayor Anthony.

Mr. ANTHONY. Thank you very much, Mr. Chairman. I'm pleased to be here this morning on behalf of my colleagues and the National League of Cities. The Federalism Act of 1999, H.R. 2245, truly embraces and preserves the cherished principles of federalism and promotes a new Federal, State and local partnership in respect to the implementation of Federal programs.

I'd like to thank the committee for having us today to share our perspective on behalf of the big seven. It truly provides us with an opportunity to create a new partnership that has never existed between all levels of government, and I applaud you for that perspective here today.

The National League of Cities is the oldest and largest municipal organization, and we thank you for bringing us here today on behalf of our membership. What truly brings us here is nothing less than the pervasive and imminent threat of preemption by the Federal Government. It is the National League of Cities' highest priority to put a meaningful check on this preemption of State and local authority.

Allow me to cite you a few of the invasive actions the Federal Government has taken in just the last few months. First and foremost, the legislation signed into law last October which impedes States' and local governments' ability to tax sales and services over the Internet in the same manner as all other sales and services are taxed, despite the fact that no such limitations would apply to the Federal Government, is one example. There also has been a bill moving quickly through the House of Representatives called the Religious Liberty Protection Act of 1999, which is a massive preemption of State and local zoning and land use laws. This bill, if enacted into law, would chill a city's ability to apply neutral zoning laws that impede an entire community equally to religious land uses like churches and synagogues. Current law preempts municipal authority over siting of group homes and preempts a municipality from applying zoning, environmental, health and safety statutes to railroads. These are, again, examples of preemption that exist today.

NLC and other members of the big seven State and local government groups have been negotiating with the administration on a new Executive order on federalism that will replace the existing order. We hope this new Executive order will serve to enhance the legislation you are considering this morning and promote our common goals to work together as partners. NLC, however, believes that legislation is still needed.

Does that mean I'm to stop? I'm sorry. I'm new at this.

Mr. MCINTOSH. The lights are there to guide you, but actually your testimony is very important to us, Mr. Anthony. Take the time you need.

Mr. FORD. Can we follow that rule, too, Mr. Chairman?

Mr. MCINTOSH. We're going to be a little more strict with ourselves, although I went way over with my opening statement, so any time you need.

Mr. ANTHONY. Let me turn now to H.R. 2245. I do apologize. I'm kind of learning the rules right now.

This bill provides cities nationwide with the viable means for alleviating many of the problems associated with Federal preemption of local laws. Mr. Chairman and members of the committee, we at the local level want to help create a dynamic federalism. We believe neutral accountability between and among the various levels of government is a good thing.

H.R. 2245 represents one of the most important efforts to fundamentally rethink the nature and relationship of the Federal system. For example, section 4 of the bill defines a public official as including the national associations of the big seven. And I think this is important because oftentimes we as local government officials are not able to travel to Washington, and our voices are heard through the big seven.

Section 7 of the bill requires notice and consultation with State and local elected officials and their representatives, and, again, that is a very key provision of this bill.

I agree with Representative Blue as it relates to the rules of construction. We clearly support that section.

I will stop my comments right now. Thank you so much, Mr. Chairman, and I look forward to answering any questions.

[The prepared statement of Mr. Anthony follows:]

To strengthen and promote cities as centers of opportunity, leadership, and governance.

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Testimony of
Clarence E. Anthony
Mayor, South Bay, Florida
President
National League of Cities

On behalf of

The National League of Cities

Before the

House Committee on Government Reform

On
"The Federalism Act of 1999"
(H.R. 2245).

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Recycled Paper

Good morning Mr. Chairman and members of the Committee, my name is Clarence E. Anthony and I am the Mayor of South Bay Florida and President of the National League of Cities (NLC). I am pleased to be here this morning to testify before you with my colleagues on what we believe is groundbreaking federal legislation, "The Federalism Act of 1999" (H.R. 2245). This bill embraces and preserves the cherished principle of federalism and promotes a new federal –state-local partnership with respect to the implementation of certain federal programs. I thank the Committee for having this hearing today. I would also like to thank Congressmen McIntosh, Moran, Portman, Castle, Condit and Davis and Congresswoman McCarthy for working with the members of the Big 7 state and local government organizations to craft a bill that illustrates the cooperative and bipartisan dynamic that should exist between our levels of government. We look forward to working with the members of this Committee to achieve the true partnership envisioned in this bill.

The National League of Cities is the oldest and largest organization representing the nation's cities and towns and their elected officials. NLC's member cities range in size from the very large, like New York City – population 7.3 million to the very small like my city of South Bay, Florida – population 3,558. Whatever their size, all cities are facing significant

federal preemption threats to historic and traditional local fiscal, land use and zoning authority. Whatever their size, all cities will benefit from legislation such as H.R. 2245. We are grateful to you for recognizing that the issue of federal preemption of state and local laws is an important one, not just to us, but to all Americans.

What brings us all here today? It is nothing less than the pervasive and imminent threat of preemption by the federal government. It is the National League of Cities highest priority to put a meaningful check on this preemption of state and local authority. Allow me to cite to you a few of the invasive actions the federal government has taken in the just last few months.

First and foremost, the legislation signed into law last October which impedes states' and local governments' ability to tax sales and services over the internet in the same manner as all other sales and services are taxed – despite the fact that no such limitations would apply to the federal government. There has also been a bill moving quickly through the House of Representatives called the "Religious Liberty Protection Act of 1999" which is a massive preemption of state and local zoning and land use laws. This bill, if enacted into law, would chill a city's ability to apply neutral zoning laws that impact an entire community equally, to religious based land

uses like churches, synagogues and mosques. Local zoning and land use laws also face severe preemption in the area of takings law, with the re-introduction of takings legislation in the Senate which would allow developers to pursue takings claims in federal court without first exhausting state judicial procedures. Current law preempts municipal authority over the siting of group homes, and preempts a municipality from applying zoning, environmental, health and safety statutes to railroads. This preemption list goes on and on. All of this legislation was either developed or enacted with minimal to no consideration of the consequences to state and local governments. It is for this reason, that I and my colleagues are here this morning – to ensure that state and local governments are not left holding the bag as a result of uninformed federal action. There can be no dispute that the most significant impacts of these preemptions will be felt at home in our nation's cities and towns through the erosion of local tax bases and through the inability to enforce local ordinances enacted for the benefit of all who live in a community.

But the news is not entirely bad for cities because there have been some signs that the tide of federal preemption may be changing. First, the U.S. Supreme Court issued three decisions last week that affirm states rights and curb the power of Congress to enforce certain federal laws. The Court

recognized that our Constitutional framers envisioned freedom being enhanced by the creation of two governments – federal and state. As Justice Kennedy so eloquently stated in the recent decision in Alden v. Maine, "Congress has vast power but not all power. When Congress legislates in matters affecting the States, it may not treat these sovereign entities as mere prefectures or corporations. Congress must accord States the esteem due to them as joint participants in a federal system, one beginning with the premise of sovereignty in both the central Government and the separate States. In choosing to ordain and establish the Constitution, the people insisted upon a federal structure for the very purpose of rejecting the idea that the will of the people in all instances is expressed by the central power, the one most remote from their control." This statement is at the core of federalism and embodies the true federal –state-local relationship that is at the heart of our system of government.

NLC and the other members of the "Big 7" state and local government groups have been negotiating with the Administration on a new Executive Order on Federalism that will replace the Reagan Executive Order 12612. We hope this new Executive Order will serve to enhance the legislation you are considering this morning and promote our common goal to work together as partners. NLC, however, believes that legislation is still needed

regardless of the existence of an executive order, to ensure that our unique form of federalism remains strong and viable. The reason both a strong Executive Order on federalism and this legislation are needed is because an Executive Order is not law. It does not apply to the independent agencies and there is no provision for judicial accountability. In sum, it would not matter which Executive Order was in effect. An Executive Order simply does not carry the same weight as legislation. NLC appreciates the intent behind the Administration's efforts and recognizes that the goals of this Executive Order are laudable ones. I ask you, what better first steps are there toward achieving a federal –state-local partnership than by addressing the issue of federalism on all fronts of national government. Through the Supreme Court's reaffirmation of federalism in Alden v. Maine, through the Administration's Executive Order, and now by this Congress through the passage of H.R. 2245.

Let me now turn to H.R. 2245. This bill provides cities nationwide with a viable means for alleviating many of the problems associated with federal preemption of local laws.

Mr. Chairman and members of the Committee, we at the local level want to help create a more dynamic federalism. We believe mutual accountability between and among the various levels of government is a good thing. We

want to be your partners in making all of this happen. We want your support for H.R. 2245.

H.R. 2245 represents one of the most important efforts to fundamentally rethink the nature and relationship of our federal system and to expand the partnership of elected governmental officials. H.R. 2245 contains several good tools for creating this new idea of federalism and which are beneficial to cities.

Section 4 of the bill defines a public official as including the national associations of the "Big 7" state and local government organizations. This inclusion is vital to providing cohesiveness to the consultation provision of the bill. It will make it easier to get state and local input from these national associations who can best represent the views of a cross section of their respective memberships.

Section 7 of the bill requires notice to and consultation with state and local elected officials and their representative national organizations by agency heads prior to the consideration of any federal legislation that would interfere with, or intrude upon, historic and traditional state and local rights and responsibilities.

This provision of the bill requires federal agencies to stop, look, listen and think before they leap into the arena of federal preemption. It further

provides cities with a much-needed voice in the rulemaking process, for those rules that would have the most direct and potentially debilitating impact on our nation's cities. Most importantly, it is an opportunity for local elected officials to work more closely, and earlier in the rulemaking process with federal agencies. This will maximize the chance to provide meaningful input and an invaluable exchange of ideas and perspectives. This requirement therefore is mutually beneficial to all levels of government and serves to reinforce the concept of partnership.

This section of the bill would call for a federalism impact assessment which, in the opinion of local elected officials, make the federal agencies really think about what they are doing before they do it. This language in the bill will make the agencies "look outside the box" for help and information; thereby avoiding unsound rules.

Similarly, **Section 8** of the bill requires a federalism impact assessment describing the preemptive impact of the bill or conference report on state and local governments be submitted to any committee or conference committee. These two provisions taken together provide for a greater accountability of our federal government. They provide the opportunity for increased input from those most directly affected by a rule or statute, and

they provide for the opportunity for a more meaningful and balanced federalism.

Another very positive and important aspect of this bill is contained in **Section 9**, " Rules of Construction." This section will provide much-needed guidance at the federal level with respect to the age-old question of "does this federal statute or rule preempt my city's ordinance?" It clarifies instances of federal preemption by requiring that the intent to preempt be expressly stated in the statute or rule. This section should not be interpreted as a prohibition of preemption. To the contrary, this bill recognizes that at times, preemption is appropriate. What this section attempts to do, however, is minimize instances where the intent to preempt not clear – thus punting the ball to the expensive and adversarial legal system. It again makes the federal government accountable for what it does.

This section also creates a presumption against preemption of state and local law and permits cities to govern. These rules of construction therefore are of vital importance to cities.

Last, but certainly not least, **Section 10** of the bill provides cities with an overall check on the federal government's preemption activities by requiring the Office of Management and Budget Information (OMB) to submit to the Director of the Congressional Budget Office (CBO)

information describing each provision of interim final rules and final rules issued during the preceding two calendar years that preempts State or local government authority. CBO must then submit to the Congress a report on the extent of the preemption. Again, this extra check will help all levels of government track federal activities dealing with preemption and provides information to local governments on this critical issue.

Thank you Mr. Chairman and members of the Committee for your kind attention this morning. I would be happy to answer any questions.

Mr. MCINTOSH. Thank you, Mayor Anthony. Let me share with you your observation about the importance of legislation rather than relying on Executive orders is very helpful to us because that will be one question that Members will ask: Do we really need to pass this bill, or can it be handled in another manner? So I in particular appreciate your insight into that as well as the need to have representatives of the seven associations participate in the consultation.

I'm very mindful that you have a lot on your plate as an official in local government and city mayor, and that the less time you need to spend here working with us in Washington is more time you can help your constituents at home. So I appreciate that insight as well and doubly appreciate your coming up today and spending the time.

Let me mention Mr. Ford and Mr. Moran have joined us. Shall we continue and at the end——

Mr. MORAN. I would like to hear from the distinguished panelists, and then maybe we can have a word to say. Thank you very much, Mr. Chairman, though, for the opportunity.

Mr. MCINTOSH. Great. Appreciate that for both of you.

Commissioner Gonzales, thank you for coming. You probably have traveled the farthest today. So welcome. Feel free to share with us a summary of your testimony, and we'll put the entire remarks into the record.

Mr. GONZALES. Thank you, Mr. Chairman and members of the committee. Once again, thank you for inviting the National Association of Counties to testify on certainly one of our highest priorities, federalism and the preemption of State and local authority. And I will be brief, Mr. Chairman.

Preemption of local authorities is a growing concern to America's counties. Efforts of the Federal Government and Congress to dictate policy implementation of traditional county responsibilities and functions undermines the concept of federalism and are contrary to the constitutional framework underlying Federal, State, and local relations.

Mr. Chairman, I wish to congratulate you and the cosponsors of H.R. 2245, the Federalism Act of 1999. We at the counties believe the bill will help to achieve a necessary balance in respecting the supremacy clause of the Constitution while also addressing the rights of State and local governments to exercise local discretion.

H.R. 2245 is a natural and necessary sequel to the enactment of the unfunded mandates reform. It helps to clarify when preemption is necessary while maintaining adequate reporting requirements and controls. The National Association of Counties fully supports the purposes of this legislation: First, to promote and preserve the integrity and effectiveness of our federalist system of government; second, to provide principles governing the interpretation of congressional intent regarding preemption of State and local government authority by Federal laws and rules; third, to recognize the Federal, State and local partnership; and last, to establish reporting requirements to monitor the incidence of Federal statutory, regulatory, and judicial preemption.

We are also pleased with the definition of public officials which includes all our national organizations such as NACo that rep-

resent public officials. NACo supports the requirements set forth in section 7 of the bill for early consultation with State and local public officials and the identification of preemption and federalism impacts. NACo supports the accountability required under section 8 of the legislation. Under this section, Mr. Chairman, the executive and legislative branches are required to identify any preemptions to be proposed in legislation and their impact on State and local governments.

We also support section 10 of the bill which requires that preemption reports be prepared by OMB and CBO after every Congress. Finally, the rules of construction as proposed in section 9 of the legislation would effectively help to preserve the authority of State and local government laws and regulations. By specifically requiring that a proposed statute express intent to preempt, courts will have the benefit of clear and concise language declaring this purpose. Likewise, if there's no language to that effect, the courts may be able to discern fairly that there was no intent to preempt, which helps to reduce interpretive decisions to that effect.

I wish to take the opportunity to comment on another piece of legislation that Mayor Anthony spoke about which is pending on the House calendar for debate and is relevant to our purposes here today. This is the Religious Liberty Protection Act, H.R. 1691. NACo strongly supports the right to the free exercise of religion, Mr. Chairman, as guaranteed by the first amendment of the Constitution. We fear, however, that the bill may have far-reaching consequences by essentially preempting local ordinances on zoning, civil rights, child abuse protection and a myriad of other State and local laws when a person or institution claims to be professing religious beliefs. This legislation is much too broad in potential scope and effect and opens the door to unnecessary litigation. In addition to land use decisions, State and local governments could be called into question by religious groups for enforcing child abuse protections when removing children from homes where religious practices are used for excessive discipline, a refusal to pay for child support, a rejection of adequate and appropriate health care, parental neglect of their children's education because of purported religious beliefs.

Mr. Chairman, we should be sensitive to the religious rights of our citizens as contained in the first amendment. However, we also need to be vigilant in maintaining support for the public safety, health and welfare and our ability to govern while striking a balance between all people's rights.

As pertaining to the President's Executive order, Mr. Chairman, together with the national organizations representing State and local governments, NACo has entered into serious negotiations on a new federalism Executive order with the administration. After the administration indefinitely suspended Executive Order 13083, we had meaningful debate on the need for the administration to propose a new Executive order and over the nature and substance of such an order. The administration has negotiated in good faith in dealing with this issue and has agreed to many provisions that help strengthen the Federal, State and local relationship. We are continuing discussions while working with you, Mr. Chairman, to

ensure that the federalism issues are enforced at the executive, legislative, and judicial levels of government.

In closing, Mr. Chairman, NACo appreciates the opportunity to testify before you today in support of H.R. 2245, and we look forward to its enactment. Thank you.

Mr. MCINTOSH. Thank you very much, Commissioner. I do appreciate again your taking time out from your work at home to come here and share those with us. They're very helpful in that testimony.

Mr. GONZALES. Thank you, Mr. Chairman.

[The prepared statement of Mr. Gonzalez follows:]

STATEMENT OF

JAVIER GONZALEZ

SECOND VICE-PRESIDENT

NATIONAL ASSOCIATION OF COUNTIES

BEFORE THE

COMMITTEE ON GOVERNMENT REFORM

UNITED STATES HOUSE OF REPRESENTATIVES

ON

"THE FEDERALISM ACT OF 1999

JUNE 30, 1999

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STATEMENT OF JAVIER GONZALEZ
SECOND VICE-PRESIDENT
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BEFORE THE
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U.S. HOUSE OF REPRESENTATIVES ON
"THE FEDERALISM ACT OF 1999
JUNE 30, 1999
WASHINGTON, D.C.

INTRODUCTION

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE. GOOD MORNING I AM JAVIER GONZALEZ, SECOND VICE-PRESIDENT OF THE NATIONAL ASSOCIATION OF COUNTIES (NACo). THANK YOU FOR INVITING NACo TO TESTIFY ON ONE OF OUR HIGHEST PRIORITIES: FEDERALISM AND THE PREEMPTION OF STATE AND LOCAL AUTHORITY. I REQUEST THAT MY WRITTEN STATEMENT BE INCLUDED IN THIS HEARING'S RECORD.

I WILL BE BRIEF MR. CHAIRMAN.

PREEMPTION OF LOCAL AUTHORITY IS A GROWING CONCERN TO THE NATION'S COUNTIES. EFFORTS OF THE FEDERAL

GOVERNMENT, AND CONGRESS, TO DICTATE POLICY IMPLEMENTATION OF TRADITIONAL COUNTY RESPONSIBILITIES AND FUNCTIONS, UNDERMINES THE CONCEPT OF FEDERALISM, AND ARE CONTRARY TO THE CONSTITUTIONAL FRAMEWORK UNDERLYING FEDERAL/STATE/LOCAL RELATIONS.

ISSUES SUCH AS THE PREEMPTION OF LOCAL LAND USE REGULATIONS AND DECISION-MAKING, IMPOSITION OF STRICT AIR POLLUTION STANDARDS, AND CONTROL OVER THE SITING OF WIRELESS COMMUNICATION FACILITIES ARE CLEAR EXAMPLES OF PREEMPTIVE ACTIONS AFFECTING STATE AND LOCAL AUTHORITY. NACo STANDS FIRMLY OPPOSED TO THE IMPOSITION OF PRESCRIPTIVE REQUIREMENTS THAT INTRUDE ON LOCAL DECISION-MAKING AND IMPLEMENTATION.

H.R. 2245

MR. CHAIRMAN, I WISH TO CONGRATULATE YOU AND THE COSPONSORS OF H.R. 2245, THE "FEDERALISM ACT OF 1999". WE BELIEVE THE BILL WILL HELP TO ACHIEVE A NECESSARY

BALANCE IN RESPECTING THE SUPREMACY CLAUSE OF THE CONSTITUTION WHILE ALSO ADDRESSING THE RIGHTS OF STATE AND LOCAL GOVERNMENTS TO EXERCISE LOCAL DISCRETION.

H.R. 2245 IS A NATURAL AND NECESSARY SEQUEL TO THE ENACTMENT OF UNFUNDED MANDATES REFORM AND HELPS TO CLARIFY WHEN PREEMPTION IS NECESSARY, WHILE MAINTAINING ADEQUATE REPORTING REQUIREMENTS AND CONTROLS. THE RELATIONSHIP BETWEEN OUR FEDERAL GOVERNMENT, INCLUDING THE CONGRESS, AND THE NATION'S STATES, CITIES AND COUNTIES HAS ALWAYS BEEN A DELICATE BALANCE THAT THE FRAMERS OF THE CONSTITUTION SOUGHT TO MAINTAIN WHEN CREATING OUR SYSTEM OF GOVERNMENT.

NACo FULLY SUPPORTS THE PURPOSES OF THIS LEGISLATION:

1. **TO PROMOTE AND PRESERVE THE INTEGRITY AND EFFECTIVENESS OF OUR FEDERALIST SYSTEM OF GOVERNMENT;**
2. **TO PROVIDE PRINCIPLES GOVERNING THE INTERPRETATION OF CONGRESSIONAL INTENT**

REGARDING PREEMPTION OF STATE AND LOCAL GOVERNMENT AUTHORITY BY FEDERAL LAWS AND RULES;

3. TO RECOGNIZE THE FEDERAL STATE AND LOCAL PARTNERSHIP AND;
4. TO ESTABLISH REPORTING REQUIREMENTS TO MONITOR THE INCIDENCE OF FEDERAL STATUTORY, REGULATORY AND JUDICIAL PREEMPTION.

WE ARE ALSO PLEASED WITH THE DEFINITION OF "PUBLIC OFFICIALS" WHICH INCLUDES THE NATIONAL ORGANIZATIONS, SUCH AS NACo, THAT REPRESENT PUBLIC OFFICIALS.

AS THIS LEGISLATION IS CONSIDERED, WE DRAW YOUR ATTENTION TO A NUMBER OF KEY SECTIONS OF THE BILL WHICH NACo CONSIDERS CRUCIAL TO ENACTMENT OF MEANINGFUL LEGISLATION:

NACo SUPPORTS THE REQUIREMENTS SET FORTH IN SECTION 7 OF THE BILL FOR EARLY CONSULTATION WITH STATE AND LOCAL

PUBLIC OFFICIALS AND THE IDENTIFICATION OF PREEMPTION AND FEDERALISM IMPACTS. AGENCIES WOULD BE REQUIRED TO INCLUDE FEDERALISM IMPACT ASSESSMENTS IN EACH PROPOSED, INTERIM FINAL, AND FINAL RULE PUBLICATION, IDENTIFYING PREEMPTIONS, REGULATORY ALTERNATIVES AND COSTS ON STATE AND LOCAL GOVERNMENTS.

NACo SUPPORTS THE ACCOUNTABILITY REQUIRED UNDER SECTION 8 OF THE LEGISLATION. UNDER THIS SECTION THE EXECUTIVE AND LEGISLATIVE BRANCHES ARE REQUIRED TO IDENTIFY ANY PREEMPTIONS TO BE PROPOSED IN LEGISLATION AND THEIR IMPACT ON STATE AND LOCAL OPERATIONS. THIS INCLUDES A FEDERAL IMPACT ASSESSMENT TO BE ISSUED BY CBO INDICATING THE COSTS TO STATE AND LOCAL GOVERNMENTS. WE ALSO COMMEND YOU, AND THE BILL'S CO-SPONSORS, ON INCLUDING SUCH A PROVISION IN THE BILL.

WE ALSO SUPPORT SECTION 10 OF THE BILL, WHICH REQUIRES THAT PREEMPTION REPORTS BE PREPARED BY OMB AND CBO AFTER EVERY CONGRESS. IN ORDER TO IDENTIFY THE NATURE

AND EXTENT OF LEGISLATION, REGULATIONS AND COURT DECISIONS THAT IMPOSE PREEMPTIONS ON STATE AND LOCAL GOVERNMENTS, THERE MUST BE A REPORTING REQUIREMENT THAT SETS OUT HOW FREQUENT THESE DECISIONS ARE MADE AND THE EXTENT AND NATURE OF THEIR IMPACT.

FINALLY, THE RULES OF CONSTRUCTION AS PROPOSED IN SECTION 9 OF THE LEGISLATION WOULD EFFECTIVELY HELP TO PRESERVE THE AUTHORITY OF STATE AND LOCAL GOVERNMENT LAWS AND REGULATIONS. BY SPECIFICALLY REQUIRING THAT A PROPOSED STATUTE EXPRESS "INTENT TO PREEMPT", COURTS WILL HAVE THE BENEFIT OF CLEAR AND CONCISE LANGUAGE DECLARING THIS PURPOSE. LIKEWISE IF THERE IS NO LANGUAGE TO THAT EFFECT, COURTS MAY BE ABLE TO DISCERN FAIRLY THAT THERE WAS NO INTENT TO PREEMPT. WHICH HELPS TO REDUCE INTERPRETIVE DECISIONS TO THAT EFFECT.

THE RELIGIOUS LIBERTY PROTECTION ACT.

I WISH TO TAKE THE OPPORTUNITY TO COMMENT ON ANOTHER PIECE OF LEGISLATION WHICH IS PENDING ON THE HOUSE

CALENDAR FOR DEBATE, AND IS RELEVANT TO OUR PURPOSES HERE TODAY. THIS IS THE RELIGIOUS LIBERTY PROTECTION ACT (H.R. 1691). NACo STRONGLY SUPPORTS THE RIGHT TO THE FREE EXERCISE OF RELIGION, AS GUARANTEED BY THE FIRST AMENDMENT OF THE CONSTITUTION. WE FEAR HOWEVER, THAT THE BILL MAY HAVE FAR REACHING CONSEQUENCES BY ESSENTIALLY PREEMPTING LOCAL ORDINANCES ON ZONING, CIVIL RIGHTS, CHILD ABUSE PROTECTION AND A MYRIAD OF OTHER STATE AND LOCAL LAWS WHEN A PERSON OR INSTITUTION CLAIMS TO BE PROFESSING "RELIGIOUS BELIEFS". THIS LEGISLATION IS MUCH TOO BROAD IN POTENTIAL SCOPE AND EFFECT AND OPENS THE DOOR TO UNNECESSARY LITIGATION. SUCH BILLS ARE INCONSISTENT WITH ALREADY ESTABLISHED PRINCIPLES OF FEDERALISM DRAMATICALLY SWEEPING AWAY LOCAL GOVERNMENT AUTHORITY. WE ARE CONCERNED WITH THE PREMISE THAT LOCAL GOVERNMENTS HAVE TARGETED INDIVIDUALS OR RELIGIOUS INSTITUTIONS IN THE APPLICATION OF LOCAL ORDINANCES AND REGULATIONS.

UNDER THE LEGISLATION A STATE OR LOCAL GOVERNMENT WOULD EFFECTIVELY BE PROHIBITED FROM RESTRICTING A

RELIGIOUSLY-AFFILIATED BUILDING TO AN AREA WITH ADEQUATE PARKING, OR WITH BUFFERS FROM RESIDENTIAL NEIGHBORS AND AWAY FROM ENVIRONMENTALLY SENSITIVE AREAS. IN ADDITION TO LAND USE DECISIONS, STATE AND LOCAL GOVERNMENTS COULD BE CALLED INTO QUESTION BY RELIGIOUS GROUPS FOR ENFORCING CHILD ABUSE PROTECTIONS WHEN REMOVING CHILDREN FROM HOMES WHERE RELIGIOUS PRACTICES ARE USED FOR:

- EXCESSIVE "DISCIPLINE"
- A REFUSAL TO PAY FOR CHILD SUPPORT,
- A REJECTION OF ADEQUATE AND APPROPRIATE HEALTH CARE,
- PARENTAL NEGLECT OF THEIR CHILDREN'S EDUCATION BECAUSE OF PURPORTED "RELIGIOUS BELIEFS".

MR. CHAIRMAN, WE SHOULD BE SENSITIVE TO THE RELIGIOUS RIGHTS OF OUR CITIZENS AS CONTAINED IN THE FIRST AMENDMENT, HOWEVER WE ALSO NEED TO BE VIGILANT OF MAINTAINING SUPPORT FOR THE PUBLIC SAFETY, HEALTH AND

WELFARE AND OUR ABILITY TO GOVERN WHILE STRIKING A BALANCE BETWEEN ALL PEOPLES RIGHTS.

PRESIDENT'S EXECUTIVE ORDER ON FEDERALISM

TOGETHER WITH THE NATIONAL ORGANIZATIONS REPRESENTING STATE AND LOCAL GOVERNMENTS, NACo HAS ENTERED INTO SERIOUS NEGOTIATIONS ON A NEW FEDERALISM EXECUTIVE ORDER WITH THE ADMINISTRATION. AFTER THE ADMINISTRATION INDEFINITELY SUSPENDED EXECUTIVE ORDER 13083, WE HAD MEANINGFUL DEBATE ON THE NEED FOR THE ADMINISTRATION TO PROPOSE A NEW EXECUTIVE ORDER, AND OVER THE NATURE AND THE SUBSTANCE OF SUCH AN ORDER. THE ADMINISTRATION HAS NEGOTIATED IN GOOD FAITH IN DEALING WITH THIS ISSUE, AND HAS AGREED TO MANY PROVISIONS THAT HELP STRENGTHEN THE FEDERAL, STATE AND LOCAL RELATIONSHIP. WE ARE CONTINUING DISCUSSIONS, WHILE WORKING WITH YOU, MR. CHAIRMAN, TO ENSURE THAT FEDERALISM ISSUES ARE ENFORCED AT THE EXECUTIVE LEGISLATIVE AND JUDICIAL LEVELS OF GOVERNMENT.

CLOSING STATEMENT:

MR. CHAIRMAN, NACo APPRECIATES THE OPPORTUNITY TO TESTIFY BEFORE YOU TODAY IN SUPPORT OF H.R. 2245 AND WE LOOK FORWARD TOWARDS ITS ENACTMENT. I AM AVAILABLE TO ANSWER ANY QUESTIONS IF YOU WISH.

Mr. MCINTOSH. Our final witness for this panel is Mr. Ray Scheppach, who is with the National Governors' Association. I appreciate your coming today and sharing with us a view of the Nation's Governors.

Mr. SCHEPPACH. Thank you, Mr. Chairman. I appreciate being here on behalf of the Nation's Governors on the Federalism Act of 1999. I want to thank you and the six sponsors for introducing this bill.

I'm often asked when I give speeches about the State of federalism in the United States today. I would argue in a couple of major areas we've made some significant progress. In another area, however, I think we're essentially going backward, and that third area may well become much more important than the progress we've made in the other two areas. In terms of areas that we've made progress, we've clearly gone over the last 5 or 6 years into a major so-called devolution revolution. And if you look at what's happened on the spending side of the Federal budget, I think States had actually gained a considerable amount of flexibility in terms of programs. I'll point to welfare reform, some additional Medicaid flexibility, children's health, the highway bill, education flexibility and tobacco recoupment; and on the regulatory side, a couple of areas such as unfunded mandates and safe drinking water. So that's a fairly significant list of very positive changes, I think, in terms of devolution over the last couple of years.

The second area I think that we've made some significant progress is in the courts. Again, over this timeframe, the New York case on compacts of low-level nuclear waste, the seminal shift of the last two or three decisions by the court in terms of State sovereignty. Although our majority seems to be relatively fragile, I think they are important decisions coming out of the courts.

The third area, however, is this little area of preemption, and I think we've got to look to some extent at what's happened recently and project what we think is going to happen, given some of the changes that are taking place in the economy.

Over the last several years, we've seen an acceleration in preemption. There's a fairly long list, but I'll just point to several of them: The Internet Tax Freedom Act and the Telecommunications Act of 1996 were pretty significant. A lot of the trade agreements, such as NAFTA, have preempted a lot of State authority. The National Securities Markets Improvement Act of 1996 did a fair amount of preemption. It's not restrained, however, to Congress. The administration through Executive order has preempted. We can point to the CHIP program, which allowed for waiver activities, but the administration has chosen not to provide any waivers. You can look to an area such as the rules for bypass in Indian gaming whereby the Secretary's prior promulgated rule that would essentially allow tribes to come directly to the Federal Government and bypass the compacting process. So we see it both in the Congress and in administrative agencies.

I would argue that as we look forward, there are a number of trends that are taking place that I believe are going to make this preemption problem much more significant over the future. Those three trends are essentially—in our domestic economy, we are in the process of deregulating most industries, and that is a major

trend. Second of all, the rate of technological change is accelerating; and third, we are really being fully integrated into the world economy. What all those three changes mean is that business wants uniformity and consistency with respect to the rules and regulations under which it operated. They need it to some extent to compete in a global environment. Those are legitimate needs, but those legitimate needs crash up against State sovereignty in many areas.

When you look at what's on the congressional plate right now, it's pretty significant in terms of potential additional preemption. Financial services would preempt banking and insurance regulations. Electric utility deregulation would preempt States. There are probably 15, 16 different areas in technology alone from digital signatures to privacy to a number of areas that will preempt, and as previously mentioned, a number of areas in land use and zoning.

So as you project the need for businesses' uniformity with what's going on now and what we can expect, I think that this is a growing problem that we all need to be pretty concerned about.

You might ask what are the costs of that to our sort of democratic system and our economic system. I would point to three that I think are fairly significant. It was previously mentioned that the ability to innovate and experiment will be substantially reduced at the State and local level. If you look at what the impact of that is, very seldom does the Congress actually go into a new area and legislate. I hate to say it, but you generally follow what has become effective at the State and local area. If you look at welfare reform, we had 35 States under waivers move forward in welfare reform. So to eliminate that, I think, is going to eliminate your ability to really decide what is effective policy and what isn't effective policy, and I think that is a real significant loss.

Second, the Federal Government does not protect consumers very well. There are many instances where after elimination of State regulation, you don't put in place Federal regulation. I can point in the health care area to ERISA. There is basically no consumer protections in ERISA. The Federal preemption eliminates consumer protections at the State level.

The third area I point to is the ability of Governors to modify economic development approaches and strategies. I laughingly say that in rural America, we're going to have an ATM card machine under a garage. That's going to be the banking in rural areas if, in fact, Governors and local representatives have no ability to work with the private sector to ensure that services are provided across the board. So I think there are some fairly significant costs if we continue to allow this preemption.

Let me say that the national Governors strongly supports the Federalism Act of 1999. I think its focus is really on three things that are relatively simple and should not be particularly burdensome to the Congress. I think that first it puts a spotlight on potential preemptions, and it allows State and local representatives to sit down with congressional people to work out what is the best way. The second, if there's ambiguity, it has deference to States as opposed to Federal laws, which I think is a plus. And third, it merely does the scorekeeping. After the fact, after a 2-year period, CBO, in fact, looks back and tallies up what's happened with re-

spect to administrative orders, judicial decisions, and congressional action. So I think it's a relatively simple bill, straightforward, not particularly burdensome, and yet may really have a fairly substantial impact.

We look back at the unfunded mandates bill, many of us at the time never thought that it would work as effectively as it does. The number of points of order on the floor of the House and Senate have been fairly minor. But really what's happened is that Congress has found more effective ways of doing what they used to do with mandates. And so I think it has been quite powerful.

There's two areas that I would mention by which we think the bill could be strengthened, one area in the disclosure priorities. We think they could be expanded above and beyond costs to look at specific impacts on economic development, consumer protections and enforcements as far as the impact statements; and second, perhaps go back and see whether a point of order might be possible in the bill. Again, the issue, I think, was very important in the unfunded mandates bill.

I thank you, Mr. Chairman. Governors support the bill, and we look forward to proceeding to markup. Thank you, Mr. Chairman.

Mr. MCINTOSH. Thank you very much, Mr. Scheppach.

[The prepared statement of Mr. Scheppach follows:]

T E S T I M O N Y

Statement of
Raymond C. Scheppach
Executive Director

before the

Committee on Government Reform
Subcommittee on National Economic Growth, Natural Resources,
and Regulatory Affairs
U.S. House of Representatives

on

The Federalism Act of 1999

on behalf of

The National Governors' Association

June 30, 1999

NATIONAL GOVERNORS' ASSOCIATION
Hall of the States • 444 North Capitol Street • Washington, DC 20001-1512 • (202) 624-5300

Good morning Mr. Chairman and members of the committee. I am Ray Scheppach, the Executive Director of the National Governors'Association. I appreciate the opportunity to appear before you today on behalf of the nation's Governors to testify in support of the bipartisan Federalism Act of 1999. We appreciate the months of efforts that have produced this bill—the process has mirrored the way we think a federalism partnership ought to work. There have been meetings hosted by each level of government, and in each House of Congress. As the nation heads towards some of the greatest changes in the history of our economy, we think the opportunity to ensure a dynamic federalism for the future is critical.

Strengthening our federalism partnership is the top priority of the National Governors' Association. Over the last several years, Congress has accomplished much on behalf of state and local governments. We are here to express our appreciation for your work and urge you to keep moving forward on a number of major issues. We are especially grateful to you, Mr. Chairman, and Reps. Jim Moran, Tom Davis, Gary Condit, Mike Castle, Karen McCarthy, and Rob Portman. Today, however, we are here to urge swift action on this bipartisan legislation, and we urge a constant effort to maintain the bipartisan nature of this proposed legislation.

State and local elected officials have always worked closely with Congress and the administration on critical issues. As the new information economy transforms this nation, we believe this legislation will take a key step towards ensuring the ability to innovate and experiment at the state and local level, as well as better ensure that all levels of government are more accountable to our citizens.

Federalism Progress

In the last decade, we have witnessed major advances as Congress has entrusted state and local governments with national goals while using state and local laws, rules, and procedures for effective implementation. We have made major progress in moving from the micro-management often imposed by the federal bureaucracy toward performance goals and results that foster innovations by states, cities, and counties. We have achieved significant progress on the judicial front also with a series of recent Supreme Court decisions that begin to reassert the federalist principles upon which our country was founded.

Our nation's "laboratories of democracy" are shining brightly all across America in crime reduction, education reform, employment practices, pollution prevention, broad-based health coverage, and multi-modal transportation. Congress gave states our version of the Safe Drinking Water Act, stopped the wholesale passage of unfunded mandates, reduced agency micro-management, and gave us new block grants in welfare, transportation, children's health, child care, drug prevention, statewide health expansions, and – more recently – education flexibility and tobacco recoupment.

Despite all the benefits conferred to states by devolution, its aggregate impact on federalism has at times been exaggerated. Many of the devolutionary initiatives are better in theory than in practice, either lacking enforcement to make them effective or imposing new burdens on states as conditions of funding. Also, while devolution has occupied center stage during the past few years, another story has unfolded in the wings with much less fanfare.

I am here today on behalf of the nation's Governors not only to thank Congress and this committee, in particular, but also to express our growing concerns about a new trend. While we appreciate the considerable reduction in the number of unfunded mandates that force the spending of our own funds, states now often face broad preemptions that restrict access to our own funds, laws, and procedures for meeting the people's needs. We must maintain a common sense approach to government services that makes sense to the people. Only a full partnership between elected officials of all levels of government can make it work.

The New Problem – Preemption of State Authority

While shifting power to the states with one hand, the federal government has been busy taking power away from the states with the other. The independence and responsibility that devolution has given states in certain areas has been offset by preemption elsewhere. Even as states have benefited enormously from block grants over the past few years, the federal government has preempted state laws affecting trade, telecommunications, financial services, electronic commerce, and other issues.

Federal preemption of state laws has not occurred as the result of a malicious desire to undermine states' sovereignty. Rather, preemption has occurred as the byproduct of other issues. Unfortunately the outcome is the same for states, regardless of the motive.

To varying degrees, the federal government has often ignored the powerful role and the constitutional rights of states in the American system of government that

enables elected officials of all levels of government to best serve the people. Examples of enacted laws include:

- The National Securities Markets Improvement Act of 1996, which weakened states' capacity to protect consumers on securities activities conducted within state boundaries and preempted revenue sources for the investigation and enforcement of fraud and other abusive practices;
- The consolidated Farm and Rural Development Act of 1991 preempted state annexation laws making it difficult to provide utility and economic development services in rural areas under state laws;
- The Telecommunications Act of 1996, which preempted regulation of inherently local business to federal regulators; and
- The Internet Tax Freedom Act, which preempted state and local authority over taxing authority on the Internet.

We are also concerned about federal preemption made by federal agencies without any clear direction from Congress, much less consideration of consequences to state and local governments. For example, The Balanced Budget Act of 1997 (BBA) created the Child Health Insurance Program (CHIP), the largest health expansion since the creation of Medicare and Medicaid. Under the law, states were given wide latitude to cover uninsured children through either a Medicaid expansion, or through the creation of a separate, stand-alone program. Although the BBA specifically allows states to waive portions of Medicaid or CHIP law, HCFA determined that no such "waivers" would be permitted for the first year of the program's existence. There was absolutely no congressional or historical basis for such a determination. For example, Arizona did not even have a Medicaid program until 1982, when they created one totally under such a "waiver".

The Future Federalism Problem

But if the issue of preemption has been a problem affecting the balance of our intergovernmental system, it is one we believe will worsen in the future. The rise of the new global economy, rapid advances in modern technology, and efforts toward industrial deregulation have accelerated the pace of preemption. To compete with international competitors, respond quickly to technological developments, and maximize opportunities created by deregulation, businesses seek to streamline legal and regulatory requirements. Efforts to substitute uniform national legislation for disparate state laws comprise an important part of this process and have led to federal preemption of state authority in many areas.

Businesses understandably do not want to be handcuffed by a myriad of state and local codes, statutes, and rules that prevent them from responding effectively to the rapidly changing dynamics of the domestic and world marketplaces. If industry has to be regulated at all, a standard set of federal laws and regulations presents a far more compelling alternative. However, just as federal laws and oversight serve important purposes that include preventing monopolies, raising revenues to fund national defense, and financing social security, state and local laws fulfill a variety of critical functions as well.

State and local taxing authority provides funds for education, roads, law enforcement, health care, and environmental protection. State banking, insurance, and securities laws impose capital adequacy requirements, underwriting standards, and licensing procedures that safeguard consumers' deposits and investments and protect them from fraud and abuse. State utility regulations ensure that citizens

receive high-quality water, electric, sewage, and telephone services at reasonable rates.

The important role of state laws and regulatory responsibilities should not be forgotten in the midst of the scramble to accommodate businesses and the forces of globalization, technology, and deregulation. States and their citizens stand to benefit as much as businesses from these changes, but not at the cost of continuing federal preemption of state laws.

Pending bills in Congress that demonstrate this emerging trend include bills on:

- Financial Services Modernization;
- Electric Utility Deregulation;
- Electronic Signatures;
- American Homeownership and Economic Opportunity Act;
- Broadband Internet Access;
- Financial Records Privacy;
- Medical Records Privacy; and
- Y2K.

The Similarity Between Mandates and Preemption

It was nearly four years ago that many of us joined together to halt a rising tide of unfunded federal mandates. We succeeded in the enactment of legislation that helped provide better information and analysis about unintended consequences of federal action before they happened, instead of after the fact. The reports from the Congressional Budget Office demonstrate this bill has not had the impact many in

Congress feared—that it would erect significant hurdles to consideration of legislation. Rather the new law seems to have led to much closer consultation between Congress and state and local elected leaders. We believe it has been an effective law that has improved, not hindered governance or accountability.

This new bill is not dissimilar. It focuses on federal preemption of historic and traditional state and local authority. The result of months of negotiations with state and local leaders, it is focused on providing information and consultation prior to action by either Congress or any federal agency taking any action with federalism implications. The bill would require federal courts to defer to states in any instance where a law was silent or did not explicitly preempt state authority. The bill would enable us to ensure that Congress' intentions are made clear —and that they are enforceable, so that federal agencies must be accountable to Congress and the people.

Practical Consequences of Preemption

Federal preemption of state laws affects states in a number of ways. It can restrict their ability to raise revenue, promote economic development, meet the needs and priorities of the citizens of an individual state or community, and protect their citizens. The following examples, as well as the attachment, illustrate the practical consequences of federal preemption in these three areas. Over the last several years, the federal government has moved to preempt historic and traditional authority in four key areas:

- Revenues (e.g.: Internet Tax Freedom Act);
- Sovereignty (e.g. medical records privacy);

- Ability to Innovate (e.g.: Financial Services Modernization); and
- Ability and authority to protect constituents (e.g.: Food Quality Protection Act).

Unlike unfunded mandates, however, once the federal government has preempted traditional state or local authority, that authority is unlikely to ever be returned.

NGA Principles of Federalism

To preserve and enhance our federal system of representative democracy through elected officials, we must recognize the long-term negative impacts of preemption.

We urge your support for this legislation to ensure that Congress considers these negative impacts (both intended and unintended) prior to voting on bills that preempt state authority. We believe the following principles of federalism are essential to the major issues facing states today.

Principles of Federalism

- The bipartisan partnership between elected officials at all levels of government is the unique and most powerful force in our form of federalism.
- This partnership is based on early consultations over issues that affect the states.
- A legislative proposal's impact on federalism should be transparent and fully disclosed before decisions are made.
- This partnership is based on the interdependent nature of our governments that demands an attitude of the highest respect and a deference toward state and local laws and procedures that are closest to the people.
- These elements of our partnership should have some means of enforcement.

State Recommendations

NGA supports this bill, Mr. Chairman, and we urge early scheduling of a mark-up. In supporting this bipartisan new federalism legislation, we believe it an important step that the disclosure provisions are expanded beyond the assessment of cost. We believe it is also critically important for federal officials to understand the effects of legislative and regulatory preemptions on economic development, consumer protections, and state and local enforcement authorities.

Additionally, to ensure greater accountability by Congress, we would encourage amending the bill to provide for a point of order. We believe the point of order under the Unfunded Mandates Act has achieved its purpose without obstructing the process; we believe it an important addition to this bill.

Federalism Legislation

Mr. Chairman, we know that this committee, in particular, understands and appreciates these fundamental features of federalism. You have proven it through many years of working with us – from the Intergovernmental Cooperation Act, the Intergovernmental Personnel Act, General Revenue Sharing, the Paperwork Reduction Act, the Unfunded Mandates Reform Act, the Federal Financial Assistance Improvement Act, the Regulatory Right-to-Know Act, and the Regulatory Improvement Act. Our thanks to every member who stands with us for enactment of each of these vital measures.

Because federalism legislation can never be perfect or finished, we are here today to encourage each of you to continue your efforts and expand your good work to this new threat to federalism. We support your efforts to apply these principles of

enforceable federalism to legislative and regulatory preemptions of state revenues, laws, and administrative procedures.

When we fail to use these federalism principles – consultation, disclosure, impact statements, deference, and enforcement – we spend even more effort to correct the problems created in areas such as telecommunications, the Internet, environmental laws, local zoning, regulatory preemption, and long-term tax policy. Our message to you is to move forward towards an "enforceable" federalism partnership between the elected officials of all levels of government.

We urge you to join us in a revived working partnership involving all of America in our system of government through all of its elected officials. We can best meet the single and special needs of some of the people, while also meeting the collective needs of most of the people.

Thank you very much.

EXAMPLES OF MAJOR PREEMPTION IMPACTS

Consumer Protection

The Senate Banking Committee is considering legislation, the Securities Markets Enhancement Act of 1999 (SMEA), that would undermine states' ability to protect investors from harm. If enacted, SMEA would:

- *Prevent states from denying licenses to rogue brokers.* States would only be allowed to license brokers who are physically located in the state. In most states, however, 90 percent of stockbrokers conducting business in the state are located elsewhere. States would lose the ability to prevent out-of-state brokers with histories of disciplinary action from selling securities to unsuspecting investors.
- *Limit the information that states can collect and disclose.* States would lose control of their public records. The National Association of Securities Dealers (NASD) would be given the authority to decide what information about *state-licensed* firms and brokers would be made available to the public. Currently, state securities regulators have the power to provide investors with the information they need to make informed decisions about their stockbrokers.
- *Weaken states' enforcement authority.* If the Securities and Exchange Commission (SEC), the NASD, or a stock exchange has already imposed a financial penalty on a firm or broker, states would be prevented from imposing their own penalty. This would weaken states' ability to enforce state securities laws and protect state residents.

Revenue Generation

Congress passed the Internet Tax Freedom Act in 1998, imposing a three year moratorium on the imposition of new taxes on Internet access. The legislation also established an advisory commission to study issues related to the taxation of electronic commerce and present recommendations to Congress by April 2000. The Internet Tax Freedom Act:

- *Prevents states from imposing taxes on Internet access.* For a period of three years after enactment of the legislation, states cannot tax Internet access as a means of raising revenues to pay for education, safety, economic development, and other essential public services.
- *Establishes a precedent for federal limitation of states' taxing authority.* Among other issues, the Internet Tax Freedom Act directs the advisory commission to examine "the effects of taxation, *including the absence of taxation*, on all interstate sales transactions." The commission could

recommend imposing a new, expanded moratorium on taxing Internet sales or even an outright ban on such taxes. Senator Robert Smith (R-NH) has already introduced legislation this year to extend the existing moratorium permanently. States that rely on sales taxes to finance government activities would increasingly have to rely on different mechanisms to raise revenues.

Economic Development

In addition to the Internet legislation, which is already harming Main Street retailers through creation of an unlevel playing field—so that the bill provides a federally preempted tax haven for some of the world's most powerful corporations, and proposals to preempt state authority with regard to electric utility deregulation—federal action which could force the cost of electricity higher in may states, especially as it would affect small businesses and consumers, one of the best examples was the HUD Fair Housing rule proposed late last year. This federal regulation would have permitted the agency to withhold any housing, community or economic development assistance to a state or local government if there were an allegation about fair housing practices—whether proven or not, and whether within the authority of that state or local government to act upon or not. This rule was issued in the Federal Register without any express direction from Congress and without any consultation with leaders of states and local governments. According to the agency, they foresaw no federalism consequences.

STATE & LOCAL PREEMPTION

Issues	*Preemption*	*State & Local Impact*
FINANCE & ADMINSTRATION		
National Securities Markets Improvement Act of 1996	Preempts state regulation of "covered" securities, including nationally traded securities and investment company securities.	Weakens state oversight of securities activities conducted within state boundaries and jeopardizes funding source for investigation and enforcement of fraud and other abusive practices.
Financial Services Modernization	Legislation would prevent state insurance commissioners from approving mergers or "restricting" or "significantly interfering" with banks' insurance activities.	Would weaken oversight of insurance industry, endangering policyholders and potentially causing states to lose millions of dollars in premium taxes.
Bank Powers	Legislation would render state legislative authority to determine state bank powers null and void.	Could create uneven playing field for bank branches depending upon their state of chartering - rather than the state law where they are conducting business. Could create some competitive disadvantages for home-based state-chartered banks.
Provider Service Organizations	Legislation would exempt Medicare managed-care operations from state insurance regulation.	Would put pros on same playing field as self-insureds under ERISA. Could expose policyholders to solvency and consumer protection inadequacies without recourse.
COMMUNITY & ECONOMIC DEVELOPMENT		
Municipal Annexation	The consolidated Farm and Rural Development Act of 1961 preempts state and local governments from providing a full range of infrastructure and services in an annexed area if a rural utility service has a protected federal loan or loan guarantee on a facility in the area.	This makes it difficult for localities to carry out growth and economic development plans under state law.
PUBLIC SAFETY		
Police Officers' Bill of Rights	Potential preemption of local labor-management policies and practices.	Federal interference with state authorities and local law enforcement polices and procedures. Would make it very difficult for state and local governments to discipline police officers, and create different treatment for public safety employees than any other state and local employees.
Juvenile Justice	Would federalize certain juvenile crimes and impose federal restrictions, requirements, and guidelines.	Provides unprecedented opportunities to circumvent state law. Would require states to prosecute juveniles as adults in certain circumstances and require states to pay costs for released prisoners who are subsequently convicted of other crimes.

Natural Disaster Insurance	Contemplated imposition of federal building codes to reduce loss of life and physical damage resulting from catastrophic natural disasters.	Would mandate that localities pass and enforce certain building standards, not withstanding state law.
TECHNOLOGY & COMMUNICATIONS		
Electronic Signatures	Bills establish a uniform national baseline governing the validity of electronic signatures and records	Would preempt existing laws in more than forty states governing the use of electronic signatures and records, forcing conformity with federal law.
Y2K Liability Legislation	Establishes a federal law dealing with lawsuits resulting from Year 2000 failures.	Preempts state contract and tort laws as they affect Y2K related lawsuits, makes it easier to remove class-action suits to federal court.
Telecommunications Act of 1996	Strips state and local regulators of authority over numerous aspects of local telephony. Preempts local taxes on broadcast satellite services.	Transfers regulation of inherently local business to federal regulators. Forces higher taxes and fees on other businesses and residents.
Internet Taxes	Preempts state and local taxes and fees on Internet transactions for three years.	Forces higher taxes and fees on all other businesses and residents and strips states of authority to determine tax policy.
Zoning Authority	Industry petition before the FCC would preempt state and local authority over the siting of wireless broadcast transmission facilities.	Would lose ability to make land use and zoning decisions, to preserve the integrity of local neighborhoods, protect property values, and public health and safety.
ENERGY, ENVIRONMENT, AND NATURAL RESOURCES		
Electric Utility Deregulation	Legislation potentially jeopardizes state and local authority in many areas.	State and local governments could lose policymaking and revenue-raising capacity.
Electric Utility Deregulation *Rights-of-Way*	Legislation would jeopardize state and local control over the public rights-of-way.	Would lose ability to make decisions regarding the use of public streets, lose compensation in the way of franchise fees.
Food Quality Protection Act	Preempts state authority to regulate the use of pesticides.	State regulations affecting the shipping, handling, and production of food have to conform to federal standards.
HUMAN DEVELOPMENT		
Medical Records Privacy	Would establish a federal standard for the privacy of medical records.	State laws that establish different standards for privacy would not be valid. States would not be able to address special privacy needs in their individual states.
Minimum Wage Increase	Requires state and local governments to increase minimum wage paid to employees.	Would increase salary costs for state and local government employees.
Workplace Safety and Ergonomics Standard	Preempts local laws for workplace standards for municipal workers in OSHA state plan states.	Would create federal standards for workplace safety programs that may require additional staff funding.

Selected Technology Proposals in the 106th Congress
6/29/99

ISSUE	DESCRIPTION	BILLS	SPONSOR	# OF CO-SPONSORS	STATUS	IMPACT ON STATES
Y2K Liability	*Seek to limit Y2K related lawsuits. Some versions cap punitive damages. Various degrees of preemption of state law.*	S. 96 S. 461 S. 738 H.R. 775 H.R. 1319 H.R. 192 S. 1138	McCain Hatch Dodd Davis (VA) Eshoo Manzullo McCain	1 2 2 98 1 9 13	Approved by Commerce Approved by Judiciary Referred to Judiciary Passed by House Referred to Judiciary Referred to Judiciary Placed on Senate Calendar	Supersede state laws dealing with contracts, torts, liability, and damages.
Electronic Signatures	*Affirm the legal validity of electronic signatures and records. Establish a uniform national baseline to promote e-commerce.*	S. 761 H.R. 1320 H.R. 1714 H.R. 1685 H.R. 1572	Abraham Eshoo Billely Boucher Gordon	5 9 5 1 2	Referred to Commerce Referred to Commerce/Govt. Reform Referred to Commerce Referred to Commerce/Judiciary Referred to Science	Override state laws governing signatures, records, and contract formation.
Emergency-911	*Establishes 911 as the universal emergency service number.*	H.R. 438 S. 800	Shimkus Burns	6 7	Passed by House/ Referred to Commerce	Affects state and local zoning regulations.
Y2K Loans for Small Businesses	*Authorizes the SBA to guarantee loans made to small businesses to solve Y2K problems.*	S. 314 Public Law 106-8	Bond	27 --	Signed Into Law	No impact.
Y2K Matching Funds for States	*Provide funding for states to correct Y2K problems in state and local government programs.*	S. 174 H.R. 909	Moynihan DeGette	6 7	Referred to Finance Referred to Government Reform	Provide funds to states for system improvements.
Internet Tax Moratorium	*Makes the three-year moratium on Internet taxes permanent.*	S. 328	Smith (NH)	0	Referred to Commerce	Eliminates state taxing authority.
Online Privacy Protection	*Protects consumers' personal information.*	S. 809 S. 854	Burns Leahy	1 0	Referred to Commerce Referred to Judiciary	Preempt inconsistent state laws. Empower state A.G.s to prosecute broadly.
Financial Records Privacy	*Protects the privacy of financial records.*	H.R. 1340 S. 187	Markey Sarbanes	0 5	Referred to Commerce Referred to Banking	Establish federal standard for financial info disclosure.
Medical Records Privacy	*Protects the privacy of medical records and defines the rights of individuals to access their medical records.*	H.R. 1057 H.R. 1941 S. 881 S. 578 S. 573	Markey Condit Bennett Jeffords Leahy	39 33 6 1 6	Referred to Commerce/Judiciary Referred to Commerce/Govt. Reform Referred to HELP Referred to HELP Referred to HELP	Preempt state laws governing privacy; establish a federal floor for privacy standards.
Internet Access for Schools and Libraries.	*Funds discounted connections to the Internet for schools, libraries, and health care providers.* *Terminates the e-rate program.*	S. 1004 H.R. 1746 H.R. 692	Burns Tauzin Tancredo	1 15 32	Referred to Finance Referred to Commerce/W & M Referred to Commerce	Changes and decreases funding source for states to connect libraries and schools to the Internet.
Broadband Internet Access	*Deregulates telecommunications infrastructure used for providing broadband Internet access.*	S. 877 H.R. 1685	Brownback Boucher	2 1	Referred to Commerce Referred to Commerce/Judiciary	Further reduce state role in telecommunications oversight.
Encryption	*Facilitates electronic commerce by allowing encryption to be used domestically and internationally.*	S. 798 H.R. 850	McCain Goodlatte	5 255	Referred to Commerce Reported by Judiciary/Various refs.	Prevent states from requiring use of a specific encryption technology.

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Mr. MCINTOSH. Let me now turn to Mr. Moran, who is one of the original cosponsors, and thank you for joining us today in this committee. Thank you for your work. Mr. Ford had told me earlier you didn't have a statement. Is that——

Mr. FORD. I defer to my distinguished colleague.

Mr. MORAN. If you want to make some comments, we'd all like to hear them.

Mr. FORD. I defer to you. You're cosponsor of the legislation.

Mr. MCINTOSH. He's worked a lot in this area. I appreciate your coming, Jim, and share with us your comments.

Mr. MORAN. Well, thank you very much, Mr. Chairman, and thank you, Mr. Ford. I am proud to be able to join my colleagues in addition to you, Rob Portman, Karen McCarthy, Tom Davis, Gary Condit, Mike Castle, in cosponsoring the Federalism Act, and the comments from the panel today certainly give us some confidence that this may have some tracks and make a profound difference in the way that we define the relationship between the Federal Government and States and localities.

One of the great features of our federalist system of government is the innovation and flexibility with which State and local governments seek out and respond to pressing public needs and concerns. That really is a major factor in the greatness of this economy and this society. Invariably a new approach is adopted and tested in a county or State. If it succeeds, others try it. If it fails, it's easily abandoned. It's not so easy for the Federal Government to test a new policy or abandon a failed one, particularly the latter.

Unfortunately, this innovation and creativity at the State and local level is too often being stifled by actions of the Federal Government. With many new Federal laws or regulations, we pay a price by foreclosing or displacing local and State ability to address the same concern. These Federal initiatives are often so pervasive that they occupy the field. The courts have consistently held that the Federal presence is so great that State regulation in the same field is banned. Tougher State regulations and even regulations that merely complement the new Federal initiative can be ruled null and void, and have been.

A number of examples. Just yesterday we reached an agreement on the conference on Y2K legislation. This is critically important. It needs to be passed right away. But I'm told that even in my own State of Virginia, the Y2K legislation that was passed is tougher, and so we've got a problem. We are probably going to have a problem with some of the banking legislation on privacy laws, for example.

One of the major examples is that when Congress amended the Employment, Retirement, and Income Security Act [ERISA], to exempt employer-provided health care plans from State regulations, it did so for the sake of economic efficiency. A large multistate firm like IBM or General Electric or General Motors that self-insures, for example, should not have to comply with 50 different State laws on health care. I tend to agree, but given the stalemate that we've reached in Washington on health care reform and the fact that more than 16 percent of our population, about 40 million people, still lack basic health care, I think that many of us would welcome State or local efforts to expand coverage to underinsured people.

So while most of the criticism of legislation like this has been directed at people saying that this legislation is too conservative coming from the right wing, here's an example where that is just to the contrary. Much of what we're doing at the Federal level is actually precluding much more progressive legislation that could be accomplished at the State level. Options to expand health coverage are extremely limited at the State level now because too great a share of their population is exempt from State regulation because of ERISA.

It's not just health care. How many mayors would love to see their industrial brownfields revitalized, but they have to await congressional action, which never seems to come. It's been years we've been talking about that, never doing anything, and it's obvious to anybody watching it that something would have been done if it hadn't been for the Federal Government precluding action because we have been—we stopped everything in its tracks, saying, hold on, we're going to get legislation that's going to preempt everything you're going to do. We're going to provide the money and so on, and meanwhile all we get is stalemate, and nothing is happening.

The Federalism Act we introduced last week seeks to protect and enhance our Federal system of government. It sets forth a process and discipline that's intended to make Federal decisionmakers simply more sensitive to State and local concerns and prerogatives.

Mr. MORAN. In many ways it is analogous to NEPA, requiring an impact assessment before Federal action can occur. It doesn't bar Federal action, but it helps to identify the potential impact of Federal action on State and local governments and hopefully identify ways to mitigate against the Federal action's most harmful impacts.

I would be the first to admit that much of the legislation that Congress considers does include some type of Federal preemption. It is difficult to find a law that we pass that doesn't have some form of Federal preemption. So this is pretty important legislation, and you are going to hear a lot about it if it gets enacted. And obviously it is going it ruffle a lot of feathers. But I support strong national standards for cleaner air and water, fair labor standards, national public health standards. But given the Congress' right under the supremacy clause, we should have a procedure to ensure that Congress is both well informed and held accountable for major actions that preempt State and local governments.

We also need to set forth a process that provides the courts with greater clarity on congressional intent when legal disputes arise between Federal and State law, and so much of this now is going into the court system. Even the recent Supreme Court decision, that has profound implications. It was mentioned by the panel. But I think it demands some reaction from the Congress, particularly a clarification. And this legislation would provide this. This would make it clear exactly what we intended, that if there is preemption, we knew exactly what we were doing, we had our eyes open when we went into it. And the requirement that we lay it out in report form, that we justify why we are doing it, we explain what we are doing, we are showing we knew what we were doing when we did it, all of that seems very constructive.

So I know it is not perfect. I think there is going to need to be some judicial review limitation. We talked about that. And eventually—the chairman remembers we compromised on that with the Unfunded Mandate Reform Act. We may go through the same process with this legislation.

And the requirement for an agency—Mr. Ford was pointing out that it gives him concern, it gives me concern in terms of the practicality that an agency has to consult with every public official affected by the legislation. Well, that is impractical and it is unrealistic. But if we can get a process together where we consult with the big seven so that we know and leave it to you to consult with the State and locals affected, that is doable. But that is the kind of thing that needs to be worked out.

I look forward to reviewing all of the testimony here today, Mr. Chairman, and I think that a lot of the problems that might be identified are solvable. We can limit the potential for nuisance lawsuits. We can address the scope of judicial review. We can enable the Congress to be more responsible, more accountable, more constructive with this legislation and that's why I support it, and I appreciate you having the hearing today.

Thank you, Mr. Chairman.

[The prepared statement of Hon. James P. Moran follows:]

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Statement by Rep. James P. Moran
on the
Federalism Act of 1999

June 30, 1999

Good morning and thank you. I am pleased to join my colleagues David McIntosh, Rob Portman, Karen McCarthy, Tom Davis, Gary Condit, and Michael Castle in cosponsoring the Federalism Act of 1999.

I truly believe that serving in state or local government is one of the best opportunities to serve the public and should almost be a prerequisite for serving in Congress or the federal executive branch. I think this place might be far more productive and its legislation more balanced and pragmatic if everyone here had first hand experience in local government. Everyone here should have the experience of resolving a few volatile issues and at the same time struggle to keep the streets clean and the schools open. The experience might make us more accepting of different priorities and more respectful of different perspectives. It might also give us a better appreciation for the innovation and flexibility with which state and local governments seek out and respond to pressing public needs and concerns.

Unfortunately, it is this innovation and creativity at the state and local level that are being stifled by actions of the federal government. With every new federal law or regulation, we pay a price by foreclosing or displacing local and state ability to address the same concern. These federal initiatives are often so pervasive that they "occupy the field." The courts have consistently held that the federal presence is so great that state regulation in the same field is banned. Tougher state regulations or even regulations that merely complement the new federal initiative can be ruled null and void.

You may never be able to quantify the price of federal preemption, but let me provide an example of what may have been sacrificed in the process. When Congress amended the Employment Retirement Income Security Act (ERISA) to exempt employer-provided health care plans from state regulation, it did so for the sake of economic efficiency. A large, multi-state firm like IBM or GM that self-insures, for example, should not have to comply with fifty different state laws on health care. I would tend to agree.

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But, given the stalemate we have reached here in Washington on health care reform and the fact that more than 16 percent of our population still lacks basic health care, I welcome some state or local efforts to expand coverage to the under- and uninsured. Unfortunately, state and local options to expand coverage are extremely limited because too great a share of their population is exempt from state regulation.

It's not just health care. Since the early 1980s we have seen only incremental progress in such fields as consumer protection and the environment. Yet, state and local efforts to deal effectively in these fields is often hampered by federal law and regulations. How many mayors would love to see their industrial brown fields revitalized, but must await congressional action that never seems to come.

One of the great features of our federal system of government has been the opportunity for innovation and experimentation at the state and local level. A new approach or policy is adopted and tested in one county or state. If it succeeds, others try it. If it fails, it is easily abandoned. My colleagues, how easy is it for the federal government to test a new policy or abandon a failed one?

The Federalism Act we introduced last week seeks to protect and enhance our federal system of government. It is the logical and necessary extension of the Unfunded Mandate Reform Act that Congress passed in 1995. Like the Unfunded Mandate Reform Act, the Federalism Act sets forth a process and a discipline that is intended to make federal decision makers more sensitive to state and local concerns and prerogatives. In some ways it is analogous to the National Environmental Policy Act requiring an impact assessment before federal action can occur. It does not bar federal action but helps identify the potential impact of federal action on state and local governments and hopefully identify ways to mitigate against any federal action's more harmful impacts.

I will be the first to admit that much of the legislation Congress considers includes some type of federal preemption. I support strong national standards for clean air and water, fair labor standards and public health. Others in Congress may seek to federalize our criminal justice system. We may disagree on the appropriateness of the federal intervention, but few would dispute that Congress has a legitimate right to pursue these initiatives under the Supremacy Clause.

I do not suggest we return to the days of the Articles of Confederation or endorse State Rights' advocates for a limited federal government. What I do suggest is that we establish a procedure to ensure that Congress is both well-informed and accountable for major actions that preempt state and local governments. We also need to set forth a process that provides the courts with greater clarity on congressional intent when legal disputes arise between federal and state law.

I know this legislation is not perfect. I look forward to working with my colleagues to ensure that this legislation defines the scope of judicial review and limits the potential for nuisance lawsuits as well as safeguards the right of Congress to respond promptly to important national initiatives.

Thank you.

Mr. MCINTOSH. Thank you, Mr. Moran, and thank you, again, for all of your hard work in this area. We really do appreciate it.

Mr. Ford, did you want to add to that?

Mr. FORD. Yes, sir. I won't be long, Mr. Chairman. I thank you and I thank my colleague Congressman Moran. I want to support this legislation, and I appreciate all the comments and the hard work that the panelists have put forward and certainly my colleagues, McIntosh, Moran, McCarthy, and Rob Portman, for whom I have great affection because he is a University of Michigan graduate like myself. Even though he is in the wrong party, he is one heck of a guy.

I support the legislation for a number of reasons just to echo to the extent I can what Mr. Moran has said. The flexibility and innovation and creativity we are seeing at the State and local levels around the country, I think we ought to unleash and really allow you guys to move and do the good work you are doing without fear of preemption by the Federal Government. I was a supporter of the Ed flex legislation that we passed recently that really untied the hand of State lawmakers and State education policymakers to do what is best for their students, to allow their teachers and superintendents to do the good work that all of us here want them to do.

I come from a State, from Tennessee, where we run our own State Medicaid program. We call it TennCare. But for the fact that we receive a waiver from HCFA, we would not be able to do the things that we are doing. It has its strengths and weaknesses, but we were one of the very first States to have a comprehensive, or all or nothing, State Medicaid program and as the director is shaking his head, he is aware of some of the successes that we have had and some of the failures. But nonetheless I think it is an improvement from what we had. We are saving the government—saving the taxpayers money and we are covering with expanded coverage for more people. But some people question the quality of the care, and those are issues that we will have to address.

But I also come from the school of thought that the Federal Government is not our enemy. I think so often we forget the environment and health and safety. And where I am from in this Nation we had an ugly history in how we dealt with people who look like me and two of the panelists and a lot of women in this room. And the Federal Government has been an instrumental force in ensuring that rights and liberties are afforded to all people. So I do think that we ought to be careful as we talk about the intrusive and the burdensome regulations and policies passed and enacted and promulgated by the Federal Government.

The concerns I have have been raised by Mr. Moran. Section 5, I don't think is that big of a concern for me. I think that many of the agencies are already assessing to determine whether or not these rules are, what type of burden or what type of impact they will have on States. So I disagree with some of the opponents on that front. But with regard to section 7 and the judicial review issues I do think that those issues perhaps can be worked out. I am encouraged by Mr. Moran's remarks and my relationship with Mr. McIntosh leads me to believe that he is more than willing to try to work through some of those issues, and I imagine the panel-

ists, based on your comments, you are eager to see this legislation enacted and I would hope that eagerness would translate into a willingness to work with all folks who want to see this thing passed.

I also have concerns about what the Supreme Court recently did. How it is interpreted I think leaves a lot open—or how it can be interpreted, Mr. Chairman. I think it leaves a lot open and I think we ought to be careful and realize that the people in our districts elected us to do a job too, and not just to give all the power back to State and local governments. As much as I would want them to have the ability to do with what they are doing, whether it is what Governor Engler is doing, or whether it is what Governor Davis is doing, whether it is what Mayor Rendell is doing or Mayor Riordan, I want all of those local officials to have that flexibility to do good things. But nonetheless we were elected to do a job too, and I am one who is proud to say I am glad I have this job and I am hopeful that the people continue to let me do it and I hope to continue to make an impact for the people in Memphis and around the country.

I yield back the balance of my time.

Mr. MCINTOSH. Let me say, Representative Ford, we have worked well together and you are absolutely right. I would like to continue to work with you on this and the other bills that we are working on to make sure we have a truly bipartisan approach. And specifically, you mentioned the concern about civil rights, which I think we all share. The bill has an explicit provision that says those bills will not be affected by it because that is a purview of the Federal Government, as it should be after the amendments passed to the Constitution after the Civil War in which the Federal Government was given authority to make sure that everyone's rights were protected in that area. So I appreciate your cognizance and input into that in particular, and we share that same goal.

Let me just mention two things before we get to questioning. And in fact you can debit this from my questioning time so that my colleagues have a chance as well. But from the testimony, it appeared a couple of things that I think are important to distill. One is that the federalism principle cuts across party lines and it cuts across ideological lines. Several of the examples that were mentioned were ideas that conservatives liked but yet they preempted State and local authorities. Others were ideas that liberals like but preempted State and local authority. And I think all of us would be good to step back and remember that there was a lot of wisdom in the Founding Fathers in establishing a federalist system of government where each of our political or ideological preferences needs to be put in check here nationally and we need to focus on making sure that we allow the laboratories to continue to experiment and find solutions to our problems.

The second was that I think there are ways in which we can deal with what is perhaps the strongest argument against federalism, and that is the economic argument that we need standardization. One of the ways to do that is a model that has been around for quite a long time and that is the uniform commercial code that is not a Federal act at all, but it is adopted in all 50 States and provides a great deal of standardization for commercial transactions.

And I think it would serve us well here in Washington to remember that many of the problems we face today could be addressed in that type of uniform State effort and encourage more of it.

The second is a provision that I put into an amendment I brought to the floor a couple of weeks ago addressing the issue of teacher liability. And we had a strong bipartisan vote for this in the House. In fact, I think we had exactly 300 votes for it. There was a provision that I thought was very important that said any State law that went beyond the protection for teachers against lawsuits would automatically continue to be in effect and that any State that wanted to adopt a different set of protections or no protections at all could decide to waive the provisions and opt out of the whole protection scheme. So what we effectively did was put in what I think of as a gap-filling measure at the Federal level, but we left total discretion for the States to address the issue in a different manner if they thought that was better.

And, I think we should—and I would hope that one effect of our bill today would be that in future legislation, Congress would look to that type of provision where we could legislate a policy preference, but still create the flexibility for the States to opt out or have different solutions to it. So that as Mr. Ford said, we have to do our job and address many of these questions, but we could at the same time recognize that perhaps our solution doesn't fit every scenario or every State or every need for every community and explicitly allow that to occur, rather than an implicit preemption because we have legislated at the Federal level.

So I think there are ways in which we can strive to reach uniformity without the heavy hand of Washington coming in and dictating what State and local governments need to do on these policy questions.

With that, let me ask each of the panelists several questions regarding the bill. But the first one was does your organization support the specific requirements for agency rulemaking, such as required early consultation and identification of preemption of State and local government authority and the other federalism impacts which are required by section 7? You are welcome to expand on it but if I could ask each of you for the record to state if your association supports those provisions.

Mr. BLUE. The National Conference of State Legislatures, Mr. Chairman, generally supports those provisions. However, I think as Mr. Moran and Mr. Ford pointed out and as you acknowledged, and as all of us experience in legislating, we know that as various members start responding and reacting to legislation, part of what we do as legislators is try to accommodate the concerns that they express as long as we can preserve the basic intent of what the proposed legislation seeks to accomplish. So as a general proposition, we do. We know that there are some things that need some fine-tuning and stuff, and, Mr. Chairman, we know that you will make the opportunity available to us to work with you as you start doing that kind of fine-tuning to the bill prior to markup.

Mr. MCINTOSH. Absolutely. Let me say categorically that as we consider changes to the bill, one of the things that I would want to do is keep the coalition together that we have developed with all of the seven organizations and the bipartisan cosponsors, so that

we can consider those suggested improvements and perhaps compromises. But thank you, Mr. Blue.

Mayor Anthony.

Mr. ANTHONY. Mr. Chairman, the National League of Cities agrees with Representative Blue. Consultation during the rulemaking process is the most critical time to have the big seven weigh in, because after that it is, as you know, more difficult. And it is vital that cities know what exact impacts are going to have on city governments and the rules that are being promulgated must again have consultation at that stage and not after.

Mr. MCINTOSH. Exactly. Thank you. Mr. Gonzales.

Mr. GONZALES. Mr. Chairman, briefly, the National Association of Counties supports it.

Mr. SCHEPPACH. Yes, NGA supports it. And I would just stress the fact that the legislation is important because it affects independent agencies where the Executive order does not. So I think it is important from that standpoint. And my sense is that some of the decisions that of the FCC and other independent commissions are going to be more important over time.

Mr. MCINTOSH. Very good point. Very good point. The need for legislation.

The other aspect on the federalism impact assessments, and GAO will testify later, but they have shared their written testimony with me, and they will be pointing out that oftentimes the agencies have ignored the requirements in the Executive order to prepare those federalism impact assessments.

Given that, would you all I guess agree or disagree that that is an important part of the legislation, the requirement that those be done as part of the regulatory process?

Mr. BLUE. We would.

Mr. ANTHONY. Yes.

Mr. GONZALES. Yes.

Mr. SCHEPPACH. Yes.

Mr. MCINTOSH. Does your organization support that the bill's specific requirements be subject to judicial review as part of the Administrative Procedures Act, as to whether the agency has used its discretion appropriately or acted arbitrarily?

Mr. BLUE. I think, Mr. Chairman, that this is one of the—certainly one of the most vexing parts of it because as I said in my prepared comments, getting a handle on administrative rulemaking and ensuring that there is an acknowledgment of the federalism impact is a very difficult thing to do. We don't want to hamstring the ability of you or the agencies to effectively do what Congress authorizes them to do. But at the same time, we think it is very critical that there be some way to ensure that they are complying with the requirements that Congress imposes on them.

Let me simply say that some modified form of judicial review certainly is needed with respect to the administrative agencies. We have had success in working with in a limited way what we have in UMRA. But I would suggest that there is some kind of solution, Mr. Chairman, that would address the problems raised by the Justice Department, yet at the same time assure that those things we are trying to achieve with this legislation indeed are achieved.

Mr. MCINTOSH. I think there were eight different areas where we were trying to ensure the agencies had to respond, and I'll just mention them briefly so that we have got them on the record: Any preemption of State and local authority; the Constitutional basis for preemption; the express statutory provision authorizing regulatory preemption; any crossover sanction, a provision that establishes a condition for the receipt of funds that isn't related to the purpose of the program; any other impacts on the State and local governments; all regulatory alternatives that they must be considered; the costs that would be incurred by State and local governments; and, the extent of consultation with State and local public officials.

Now, in the testimony one of you I think mentioned that we might want to go beyond just the costs but also disclose the impact, Mr. Scheppach, I think mentioned that impacts on economic development as well, and so we will consider that.

But adding that language perhaps or further defining that we want to make sure costs include that concept. Are there any other—I guess, Mr. Blue, you said you thought we should work in terms of making sure there is some judicial review. Are those the factors that you would want to make sure were subject to review?

Mr. BLUE. I think, again as Mr. Moran said, modifying it so that you address the legitimate concerns and interests so that we don't basically shut down all administrative agency activity, these are factors that I think are important, and it may very well be something other than a full APA kind of review, but some kind of review that either prods an agency to go back and look at things and tell us what they used in arriving at where they are. I would be reluctant, Mr. Chairman, because of my experiences with agencies in North Carolina, to say that you would stop them in their track from a judicial standpoint.

Mr. MCINTOSH. To be candid with you, we thought we were being pretty kind to them because they have to follow the APA requirements anyway. At one point we thought about a separate judicial review provision that would have created a separate right of action. I'll have to look more closely at the Justice Department's letter but maybe we need to return to that type of provision if they are not happy with the APA standard of review. We thought we were doing them a favor by not creating a separate form of action. Maybe they don't like that.

Mr. BLUE. We are experiencing—experimenting, rather, in my State, with a modified form of review in our Administrative Procedure Act. There may be some lessons that we learn from that that may be helpful. I certainly, again, Mr. Chairman, and NCSL, as well as the other organizations, and we are all pretty much in lock step on this, would welcome the opportunity to work with you to resolve these issues, to get some form of review that ensures that we can, in fact, achieve what we think is very important with limiting to some degree just to disregard the federalism principles in some of the rulemaking process.

Mr. ANTHONY. I agree with Representative Blue because the implied preemptions are the most dangerous preemptions and that is why judicial review has become one of the most important elements

to our organizations to dialog with you about, to help come up with some kind of language that would include it in the legislation.

Mr. MCINTOSH. I appreciate that. Commissioner Gonzales.

Mr. GONZALES. I don't want to take more time, Mr. Chairman, other than that we concur with what the legislatures and the cities have indicated.

Mr. MCINTOSH. Mr. Scheppach.

Mr. SCHEPPACH. I would just say that some judicial review, particularly of the process, I think is important. And my understanding is that there was a SBREFA, which was a Small Business Act that was done in the last couple of years as an example of a way in which you may be able to get at the process.

Mr. MCINTOSH. Yes, although I have some familiarity with that, the agencies tended to exempt themselves from it, and EPA in particular on their particulate and NAAQS rule said this doesn't apply to us. That rule ended up being thrown out by the courts for other reasons, but we had a hearing right here and I think it was in this room, in fact, where the general counsel from EPA said, well, I'm expecting to get sued anyway so they will throw in a SBREFA count. So we need to look closely about whether that has been enough of an enforcement mechanism to really make the agencies pay attention.

There are some provisions that are making their way through right now to strengthen that and so maybe a strengthened SBREFA would be the solution that we could use. We will look at that and work with all of you to make sure that there is an effective judicial review provision, but one that resolves any of the questions that have come up and are with our supporters.

Let's turn now to the legislative requirements. Mr. Scheppach, you mentioned that you thought it would be good to try to keep a point of order in the bill. Let me just ask your colleagues on the panel if they agree with that.

Mr. BLUE. The National Conference agrees totally with Mr. Scheppach on that. I think that some kind of point of order, similar to the one in UMRA, would again focus Congress on the issue of preemption. We thoroughly have enjoyed the success that we at least think we have realized from the point of order provision in UMRA. And so, Mr. Chairman, we are in full agreement with Mr. Scheppach on that.

Mr. MCINTOSH. OK.

Mr. ANTHONY. Ditto.

Mr. GONZALES. Yes, sir.

Mr. MCINTOSH. From a Member's perspective it helps focus the issue very clearly because you are going to have it debated on the floor and you have to focus as you are writing legislation whether or not you will be subject to a point of order. So I think the point is very well taken and we will work with you as we move toward a markup to try to see what we can do on that.

Mr. Kucinich, welcome.

Mr. KUCINICH. Mr. Chairman, you said the magic word. I am in a markup in Education, but I just wanted to be here.

Mr. MCINTOSH. Maybe you and I can pair up there. Would you like to make any statement at this point?

Mr. KUCINICH. I have a statement that I would like to submit for the record.

[The prepared statement of Hon. Dennis J. Kucinich follows:]

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Statement of Rep. Dennis J. Kuncinich
Hearing on H.R. 2245: The Federalism Act of 1999
June 30, 1999

Mr. Chairman, I want to thank you for holding this hearing today on proposed federalism legislation. As the former mayor of Cleveland, I am particularly sensitive to the need for the federal government to consult with state and local governments before taking action that will have an effect on their communities. Working with state and local officials is an important step towards achieving an effective and efficient federal government that is responsive to the needs of the people in all matters of their lives -- from Head Start to the environment to a safe workplace.

I am concerned, however, that this legislation is not the best way to accomplish this important goal. While H.R. 2245 purports to promote "federalism" by protecting "the reserved powers of the States" and imposing "accountability for Federal preemption of State and local laws," this bill may overreach in achieving those goals by imposing burdensome new requirements on federal agencies while allowing new court challenges that can effectively prevent agencies from promulgating new rules.

On its surface, H.R. 2245 appears to resemble the Unfunded Mandate Reform Act (UMRA), which requires agencies to assess the impacts of federal mandates on state and local governments. H.R. 2245, however, appears to undermine the key compromises that made passage of UMRA possible, including UMRA's limitations on scope and judicial review.

This bill would require agencies to publish "federalism impact assessments" for each proposed rule. Unlike UMRA, which requires similar assessments for "major rules" which would cost over $100 million, this bill would require written impact assessments for all rules -- no matter how minor or noncontroversial. This would potentially expand the number of impact statements that have to be prepared by agencies each year by a factor of 100 -- from approximately 50 major rules to over 5,000 total rules.

Furthermore, unlike UMRA, this legislation does not include any limitations on judicial review. In other words, any "aggrieved" party would be entitled to challenge in court any part of any agency impact assessment with which that party disagrees. This could lead to new litigation over agency rulemaking and effectively prevent or delay agencies from issuing health, safety, and environmental regulations.

In addition, many of the bill's requirements are over broad and vague. For example, the

bill requires agencies to "notify and consult with public officials who may potentially be affected by the rule." But unless the agency consults with every state and local official in each state on every rule, there is the possibility that the rule would be challenged by a local official who is not directly affected by the proposed rule but may be potentially affected by the proposed rule.

Another section requires that federal performance measures included in any state-administered federal grant program be "determined in cooperation with public officials." There is no definition of the meaning of "cooperation," which would make agency performance standards vulnerable to court challenges if state or local officials believe that the performance standards were developed without their concurrence.

Mr. Chairman, I understand that the Clinton Administration is currently in the final stages of negotiations with the "Big Seven" organizations of state and local governments on a new Executive Order on federalism. This Executive Order would update the federalism policies followed by the federal government since the Reagan Administration. I hope that this new executive order, in connection with the Unfunded Mandate law, will go a long way towards protecting state and local interests without the onerous requirements or potential for endless litigation that this bill would lead to.

I am looking forward to hearing from our witnesses this morning. I also want to thank the Chairman for his willingness to hear from minority witnesses on this bill. We will be submitting that testimony for the record at a later date.

Thank you.

Mr. MCINTOSH. OK. We will gladly do that. We have unanimous consent to do exactly that.

We are now just at the question phase with our first panel and they have given several suggestions about the legislation, and I was checking out in particular provisions for them.

The next one I wanted to check with you all on was the crossover sanctions. Basically does your organization support the bill's requirement that they identify provisions that establish a condition for the receipt of funds under a Federal grant program that is not—and let me emphasize the "not"—related to the purpose of the program? These are known as crossover sanctions and it is a way in which the agencies have used Federal grantmaking power to try to influence policy in areas outside of the particular grant. My preference would be to disallow that altogether. What the bill does is require them to at least identify that that is what they are up to in the federalism impact assessment. Mr. Blue.

Mr. BLUE. That has been one of our biggest gripes at the State legislative level. And so certainly, even in a limited form, we support this crossover sanction provision. We constantly ask how can we be forced to do things unrelated to the legislation anyhow and so the crossover sanction——

Mr. MCINTOSH. The word extortion comes to mind, doesn't it?

Mr. ANTHONY. Yes, we definitely support the bill's requirement to identify the crossover sanction. This again is about an equity issue for cities throughout the Nation because whatever is passed down to the State level then has to be really implemented by the city halls and county halls of this Nation.

Mr. GONZALES. I concur with Mr. Anthony, Mr. Chairman, absolutely.

Mr. SCHEPPACH. Yes, I concur also. I mean the number of times that I have seen sanctions against highway money is quite astronomical.

Mr. MCINTOSH. Exactly. All in the name of good causes but once again we should allow our colleagues at the State and local level to do their causes as is their proper role in our government.

Another area was the rules of construction, and this is a parallel to the judicial review, but essentially it says that when the legislation is ambiguous, that there will be most favorably constructed in terms of deferring to the State and local governments rather than preempting. This hasn't always been the case in the history of our country with the courts sometimes going so far as to actually imply preemption in congressional acts that were not even considered by the legislative branch here in Washington.

So we decided it would be important to specify clearly what type of rule of construction we favored in Congress, which was granting the maximum deference to the States. Does your organization support that particular section which I think is in section 9?

Mr. BLUE. We do, Mr. Chairman. I might add one proviso. I think that again when we get to implied preemption, we don't seriously question the ability to preempt. When it is expressed, of course, we can't, or when you have got a direct conflict. Courts are going to find a way to get into direct conflict resolution anyhow in the area of preemption. But whether it comes to ambiguity and gray and fuzzy areas we believe enough in our process and what

we do as State legislatures to think that it ought to be deferred to. And I am sure my brethren at the county and city level think likewise.

Mr. MCINTOSH. Great.

Mr. ANTHONY. And I agree with Representative Blue. The courts have also in the last few months talked about the fact that in *Alden* v. *Maine,* Congress has vast power but not all power. And I think that clearly section 9 of this bill would help us in looking at and supporting that language.

Mr. MCINTOSH. I think the courts will pay attention to what we do legislatively. We have a theory of separation of government, but we also live in a world where we read the newspapers and I did study under Professor Scalia before he became a judge and then a justice, and at some point as we were discussing the theoretical ability for the government to use the commerce clause, he said, ultimately the courts can only hold out so long in interpreting a particular provision if the popular will as expressed by the legislative and executive branch is pushing in a certain direction. So, I think it is helpful for us to reinforce those good decisions that the courts are coming up with in this legislation. Commissioner Gonzales.

Mr. GONZALES. Again, the counties concur with the cities on the merits as they pertain to the rules of construction. Certainly that is important to all of us to that they exist.

Mr. SCHEPPACH. NGA supports the provision.

Mr. MCINTOSH. Good. I appreciate that. And, then a couple of the other ones that I wanted to quickly talk with you about was the deference to State management practices, which is in section 5, and in section 6, the cooperative determination of performance measures. These two are not as widely debated but I think they are important on a day-to-day level in which the agencies interact with the States and foster that true partnership.

Any comments or do your associations support those provisions?

Mr. BLUE. I would defer to Mr. Scheppach and the Governors on that, Mr. Chairman. Of course, we wrestle a lot with our executive branches on some of these issues but again as part of the overall effort by these seven organizations to be on one accord, I think that the Governors have a much greater feel for this than legislators do.

Mr. SCHEPPACH. Yes, I would say we support the two provisions and I would say particularly the performance is getting to be a much bigger issue now because most Federal agencies now are moving toward performance measures. And we were on three or four big entitlement programs, about 600 categorical grants of well over $225 billion of programs. They are all moving toward performance evaluations. To have an agency go out by itself and determine how we are to perform is inappropriate. This is getting to be a bigger issue. We have had some positive experiences with the administration and some negative ones with respect to some agencies. We think this is important.

Mr. MCINTOSH. Mr. Gonzales, do you concur?

Mr. GONZALES. Yes, we do.

Mr. ANTHONY. We do.

Mr. MCINTOSH. Let me turn to Mr. Kucinich. I will have one other question at the end, which is do you have any other changes but we will get to that.

Mr. KUCINICH. I appreciate that, Mr. Chairman. I have a few brief questions and then I will have to return to the markup. First of all, I want to thank all of the witnesses for being here this morning. As a former mayor, I can certainly appreciate your interest in legislation that would ensure that local and State officials are consulted on matters that affect their interest. I am concerned, however, that this bill may overreach in some of its attempts to reach these goals. For example, according to the General Accounting Office, "This bill will require federalism impact assessments for all proposed and final rules."

Now, to a mayor—from mayor to mayor here, Mayor Anthony, is that your understanding of the bill as far as the impact statements?

Mr. ANTHONY. Yes, that is my understanding, Congressman.

Mr. KUCINICH. The bill, from my reading of it, the bill doesn't distinguish between substantive rules and rules that GAO describes as "administrative" or "routine." And I'm concerned that it might have the potential to tie up agency resources on kind of noncontroversial, nuts and bolts issues. Let me give an example.

I came across a rule that was published in the June 2nd Federal Register that would keep a drawbridge in Panama City, FL, closed for 2 hours on July 4th to prevent a traffic jam leaving the city's fireworks display. Now, the temporary rule was issued at the request of the city, yet this rule would clearly fall under section 7 of the bill. So is this the kind of rule that you had in mind when this legislation was proposed or envisioned, Mayor?

Mr. ANTHONY. Well, of course not because that to me is a specific area of the State of Florida, for example, that does not have far-reaching effect on all cities throughout the Nation.

However, I would think that consultation requirement and other issues related in this bill should apply to that rule and Congress and the proposer, Congressperson who proposed the legislation, would follow the rules of H.R. 2245.

Mr. KUCINICH. Did you know, this month I think there were about four other drawbridge rules issued at the request of local governments to complete bridge repairs and maintenance. But without any limitations on judicial review, any aggrieved party affected by the bridge closing whether it would be recreational boaters, commercial shippers, a city hundreds of miles downstream, would be entitled to challenge this rule in court by claiming that this agency's federalism assessment was deficient.

Mayor, are you aware that this bill could allow this type of legal intervention or lawsuit?

Mr. ANTHONY. I am now, in regards to the way in which you are applying it to those examples, yes.

Mr. KUCINICH. And if I may add, my concern again is that the same issues would affect literally thousands of noncontroversial routine rules each year. Whether they are talking about drawbridge regulations to FAA airworthiness directives to Securities and Exchange Commission recordkeeping rules.

Just from your experience as a mayor, do you have any suggestions for how we could avoid these assessments and lawsuits for thses kinds of noncontroversial rule? Any ideas?

Mr. ANTHONY. Congressman, I do. I think that if you look at and pick out those small rules that clearly are specific to areas, local concerns, and use those as examples, of course I find it very difficult to say that you are not correct in those bills—those rules that you are sharing.

But as a national representative of the League of Cities, I must say to you that the national policies that we are dialoguing here, the Internet Freedom Tax Commission, issues related to telecommunication generally, have been—has had major impact on national proportion to cities throughout this Nation without true consultation with local governments. Can I give you the answer of how those specific rules should go through the process as all major rules? No, I can't, sitting here.

One of my—one recommendation that I would have for you, Congressman, is perhaps as it goes through the process, that Congress should not adopt such narrowly focused rules for specific areas of the country or cities. But other than that, I cannot tell you how it would be handled through this process.

Mr. KUCINICH. Thank you, and I want to thank the chairman for his indulgence and I wish you well as you try to work out these difficulties. I know the Chair's concern is to try to make the government work better. I think we are all trying to do that and I appreciate the effort. Thank you very much.

Mr. ANTHONY. And Congressman, may I say to you mayor to mayor, I do appreciate the questions. But if you really think about it, those bridge rules were promulgated with local government input because the local government did request the bridge closure. So, in fact, if we did apply it through consultation, it would meet that—one of those requirements.

Mr. KUCINICH. It is always good to know that sometimes when you ask for something, you get a little bit more.

Mr. ANTHONY. I know. I'm sorry.

Mr. MCINTOSH. And let me say thank you, Mr. Kucinich. Although I think the problem you identified there on the whole can be one that will be self-policing essentially in that, if it truly is not noncontroversial, there won't be somebody who has an interest to come in and challenge that regulation. But, if you have got a city downstream, that mayor may think that it is important that the bridge not be left open, and then you would want the agency issuing that regulation to have considered their concerns as well as the city. So I think it sorts itself out in requiring them to think about the federalism impact where it is noncontroversial, nobody is going to challenge on how they did it. Where it is controversial, they have to make sure they do it correctly.

Mr. KUCINICH. Thank you, Mr. Chairman. I think it would be wonderful if we had a bill that was noncontroversial and helped us sort out controversy.

Mr. MCINTOSH. We are working on that. Thanks, Dennis, I appreciate your coming today and look forward to you joining us on this bill at the appropriate moment.

Mr. KUCINICH. It is always a pleasure to be here, Mr. Chairman.

Mr. MCINTOSH. The last question I do have for this panel is really an open-ended one. You mentioned the point of order earlier. Are there any other amendments or changes that you would like us to

consider? And as I said earlier, the record will be kept open until July 16th so, if there are some written proposals your organization would like to submit, we will also receive those.

Mr. BLUE. Thank you, Mr. Chairman, and again thank you for your gracious manner in which you have allowed us to discuss with you and talk about the issues that were of concern to us up to this point.

The point of order is, I think, something that would strengthen the bill and as other thoughts occur to us during the time that the record is open, we will get them to you, and again, we know that you will make yourself or your staff available to discuss those with us. Thank you very much.

Mr. MCINTOSH. Thank you.

Mr. ANTHONY. Mr. Chairman, I agree. The only issue again is the point of order issue that we would like to see added as a part of this legislation. But let me take a point of personal privilege and thank you so much on behalf of the big seven, specifically the National League of Cities. Your sensitivity and assistance, even with your colleague here this morning, is much appreciated. I think it is our responsibility to help you at this point get this legislation through the process and we're committed to doing that. And as I have noticed, there are more and more mayors, county commissioners, State reps, Governors, that are now in Congress and we need to pull our resources together to make sure that we are successful along with you. And we really do appreciate your sensitivity.

Mr. MCINTOSH. Thank you. I appreciate that. And I will be calling on you to help as we move through the markup phase which I would like to move to rapidly to gather that kind of support with my other colleagues.

Mr. ANTHONY. If I am not stuck at a bridge somewhere, I will help.

Mr. MCINTOSH. Thank you.

Mr. GONZALES. Mr. Chairman, we have no amendments to offer and concur with what the legislatures and the cities have indicated. Also, again, to thank you. I assure you that local governments across America are faced with huge challenges as we approach the new millennium, and certainly we need Congress' support in bringing down barriers to allow us to be innovative and to offer real solutions to individuals whose lives we impact on a daily basis, and certainly your efforts in bringing this legislation forward certainly is going to hopefully provide the tools or at least the accountability to make sure that we work in concert to assure the health and safety of our citizens. It is a privilege to work on this legislation and support it and actively support it as it proceeds through the Congress. And you can count on the counties's support as this goes forward.

Mr. MCINTOSH. Thank you. Appreciate that.

Mr. SCHEPPACH. No, Mr. Chairman, I mentioned the two things you are aware of: The point of order and expanding the information and the impact statement. Other than that, the Governors appreciate you taking leadership on this and having this hearing. We thank you.

Mr. MCINTOSH. Thank you. And I will, Mayor Anthony, definitely take you up collectively in helping to gather cosponsors as we move forward to make this legislation become in fact an act passed by the Congress and signed by the President. Thank you all, appreciate it very much.

Let me now call the second panel, which is a representative from the General Accounting Office, Mr. Nye Stevens. Mr. Stevens, let me ask you to also take the oath.

[Witness sworn.]

STATEMENT OF NYE STEVENS, DIRECTOR, FEDERAL MANAGEMENT AND WORKFORCE ISSUES, GENERAL GOVERNMENT DIVISION, GENERAL ACCOUNTING OFFICE

Mr. STEVENS. Mr. Chairman, I will try to match the previous panel in brevity as I summarize our work that relates to the bill you are considering today, and then I would respond to any questions you may have on it.

I would like to talk about implementation of the Reagan Executive order on federalism that you mentioned in recent years, talk also about the impact of the regulatory provisions of the Unfunded Mandates Reduction Act of 1995, and then comment on one agency's experience in cooperatively setting the kind of performance measures and goals that are contemplated in section 6 of the bill.

For at least the past 20 years, Mr. Chairman, and certainly as exemplified by the panel that just spoke, State and local governments have expressed strong concerns about regulatory preemption of traditionally non-Federal functions and the burgeoning costs of complying with Federal regulations and mandates. And the centerpiece of the Reagan administration's response to this concern was the promulgation in 1987 of an Executive order which required agencies to determine which of their proposed rules had sufficient implications for the relationships among levels of government to warrant the preparation of a federalism assessment which would spell out the effects and the costs and the various burdens associated with the rule on State and local governments.

I think it is fair to say, Mr. Chairman, that the impact of this requirement and the Executive order at least in recent years has been minimal. The Office of Management and Budget has never issued implementing guidance or instructions and we found that the federalism assessments are rarely being prepared or the requirements to make them even acknowledged. We did a search of the 11,414 final rules that were issued in the 33 months leading up to the beginning of this year and we found that only 3,000 of them even mentioned or acknowledged the Executive order in the preamble to the rules.

The Environmental Protection Agency didn't even do that. It never once mentioned the Executive order in the 1,900 regulations that it issued during this period.

But even when the order was mentioned, it was almost always sort of a boilerplate assertion that there were no federalism implications so nothing had to be done about analyzing or justifying them. The bottom line is that of the 11,400 rules issued from April 1996 through last year, only 5 actually had a federalism assessment associated with it.

Now, you might argue that most of these rules were routine and administrative and unlikely to have federalism implications as your last point of dialog with the other panel considered. So we did another cut and we looked at the 117 rules that were designated as major, usually because they involved costs of more than $100 million on the economy, and only one of these had a federalism assessment associated with it. It was the rule associated with the sale of cigarettes and smokeless tobacco products to children.

This was in spite of the fact that the effects on State and local governments for 37 of those rules, were well recognized in the unified agenda that is put out semiannually and that 21 of them said in their preambles that they would have the effect of preempting any State or local laws on the subject.

And we took one more step with the major rules. We took them to the big seven organizations, several of whom you just heard from, and asked them to look at the rules and give us their opinion on whether they thought they should have had federalism assessments. Four of them agreed to look at all 117 of these major rules and at least one of the four said that in their view a Federal assessment did seem to be warranted for 79 of those 117 rules.

Now, one reason for the very minimal effect the Executive order seems to have had on the regulatory process is the leeway that an agency is given to interpret its terms and this is one area of things the subcommittee might want to concentrate on in considering whether to set a similar requirement in statute. EPA's guidance on the order sets a very high threshold for what Federal implications are. For example, a rule would have to affect all or most of the States in order to be covered and it would have to have a purely institutional rather than a financial impact to be covered.

It would have to have that impact on State and local governments to bring it under the Executive order's terms and none of the 1,900 rules that EPA issued seemed to have been able to surmount that very high set of hurdles.

In commenting on our findings on this work, Mr. Chairman, OMB said that adherence to the Executive order was probably affected by the fact that during the period of our review they were considering their own Executive order on federalism, the one that you had a hearing on and that was later rescinded. None of the agencies actually mentioned that to us as a factor when we talked to them about it. And in any case, the Executive order seems to have been developed in a closed enough sense that it probably didn't affect the thousands of people in the bureaucracy working on these 11,000 rules, so we didn't find that terribly convincing.

OMB also said that passage of the Unfunded Mandates Reform Act of 1995, or UMRA, was a more important vehicle for considering State and local government effects than the federalism Executive order. We happen to have also looked at the regulatory provisions of UMRA, not the legislative review provisions, during its first 2 years and we found that that too had very little effect on the rulemaking process in the agencies. Many of the rules did not have a notice of proposed rulemaking that triggered the law, others didn't reach a threshold of the $100 million in expenditures, which is a more exacting threshold than $100 million in costs, needed to trigger the UMRA regulatory requirements.

The requirement that agencies develop an intergovernmental review process or consultation process appears to have been applied in only four rules at EPA and none in any of the other agencies.

The consultation provision in the bill in H.R. 2245, section 6 seems to have more teeth in it than the UMRA one and it forbids agencies from including in their annual performance plans under the Results Act any performance goals or measures that have not been developed in cooperation with public officials. The Office of Child Support Enforcement learned this lesson the hard way as is spelled out in one of our reports. It only became a successful partnership between the Federal and the State governments when OCSE began to include State and local officials in the planning process. And having done that, and done that fairly well, we believe it could now be a model for the kind of intergovernmental cooperation that section 6 seems to contemplate.

I will stop there and respond to any questions you may have on the work.

[The prepared statement of Mr. Stevens follows:]

United States General Accounting Office

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Testimony

Before the Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, Committee on Government Reform, House of Representatives

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FEDERALISM

Previous Initiatives Have Little Effect on Agency Rulemaking

Statement of L. Nye Stevens
Director, Federal Management and Workforce Issues
General Government Division

GAO/T-GGD-99-131

Statement

Federalism: Previous Initiatives Have Little Effect on Agency Rulemaking

Mr. Chairman and Members of the Committee:

I am pleased to be here today to discuss H.R. 2245, the "Federalism Act of 1999." The bill addresses a number of issues affecting intergovernmental relations, including the use of federal grant funds, legislative requirements, agency rulemaking requirements, and performance measurement for state-administered federal grant programs. My comments are directed to the agency rulemaking and performance measurement requirements.

I will focus most of my comments on two previous executive and legislative branch initiatives that, like section 7 of the bill, were designed to highlight the impact of federal rules on state and local governments. Our past work showed the limited effect of those previous initiatives during the period of our review, which suggests a need for this section of the proposed legislation. I will also point out a few similarities and differences between the bill and these regulatory reform initiatives. Finally, I will briefly comment on the experience of one agency in cooperatively setting the type of goals and performance measures with states in a federal grant program that are contemplated in section 6 of the bill.

Executive Order and UMRA Had Little Effect on Agencies' Rulemaking Actions

During the past 20 years, state, local, and tribal governments as well as businesses have expressed concerns about congressional and regulatory preemption of traditionally nonfederal functions and the costs of complying with federal regulations. The executive and the legislative branch have each attempted to respond to these concerns by issuing executive orders and enacting statutes requiring rulemaking agencies to take certain actions when they issue regulations with federalism or intergovernmental relations effects. Two prime examples of these responses are Executive Order 12612 ("Federalism") and the Unfunded Mandates Reform Act of 1995 (UMRA).

Few Federalism Assessments Prepared Under Executive Order 12612 Between April 1988 and December 1998

Executive Order 12612, issued by President Reagan in 1987, established a set of fundamental principles and criteria for executive departments and agencies to use when formulating and implementing policies that have federalism implications. The executive order says that federal agencies should refrain from establishing uniform, national standards for programs with federalism implications, and when national standards are required, they should consult with appropriate officials and organizations representing the states in developing those standards. The order says that regulations and other policies have federalism implications if they "have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

Executive Order 12612 also contains specific requirements for agencies. For example, the order requires the head of each agency to designate an official to be responsible for ensuring the implementation of the order. That official is required to determine which proposed policies have sufficient federalism implications to warrant preparation of a "federalism assessment." The assessment must contain certain elements (e.g., identify the extent to which the policy imposes additional costs or burdens on the states) and must accompany any proposed or final rule submitted to the Office of Management and Budget (OMB) for review under Executive Order 12866.[1] OMB, in turn, is required to ensure that agencies' rulemaking actions are consistent with the policies, criteria, and requirements in the federalism executive order.

In May 1998, President Clinton issued Executive Order 13083 ("Federalism"), which was intended to replace both Executive Order 12612 and Executive Order 12875 ("Enhancing the Intergovernmental Partnership").[2] However, in August 1998, President Clinton suspended Executive Order 13083 in response to concerns raised by state and local government representatives and others about both the content of the order and the nonconsultative manner in which it was developed. Therefore, Executive Order 12612 remains in effect.

To determine how Executive Order 12612 had been implemented in recent years, we reviewed (1) how often the preambles to covered agencies' final rules issued between April 1, 1996, and December 31, 1998, mentioned the executive order and how often they indicated the agencies had conducted federalism assessments under the order;[3] (2) what selected agencies have done to implement the requirements of the order; and (3) what OMB has done to oversee federal agencies' implementation of the order in the

[1]Executive Order 12612 actually refers to rulemaking procedures under Executive Order 12291, which was revoked and replaced by Executive Order 12866 in 1993. Because only "significant" rules are submitted to OMB for review under Executive Order 12866, federalism assessments for nonsignificant rules are not required to be submitted to OMB. For a description of the review process under this order, see Regulatory Reform: Implementation of the Regulatory Review Executive Order (GAO/T-96-185, Sept. 25, 1996).

[2]Executive Order 12875, among other things, requires federal agencies to "develop an effective process to permit elected officials of state, local, and tribal governments to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates."

[3]It is unclear whether Executive Order 12612 covers regulations and other policies issued by independent regulatory agencies, such as the Federal Communications Commission and the Securities and Exchange Commission. Therefore, we focused our review on executive departments and agencies that are not independent regulatory agencies.

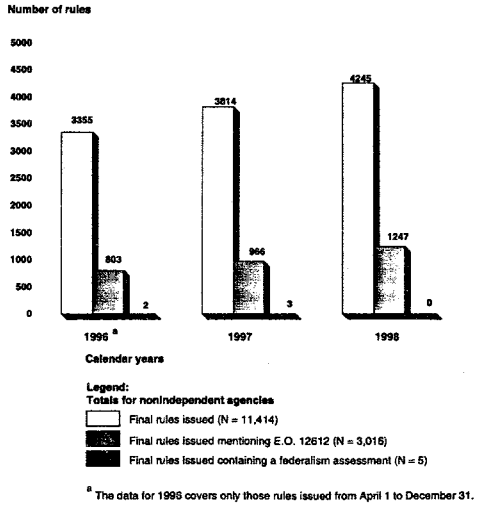
rulemaking process.[4] We focused on the April 1996 through December 1998 time frame because we were able to use our database to identify which rules were "major" under the Small Business Regulatory Enforcement Fairness Act (SBREFA) (e.g., those that have a $100-million impact on the economy). As a result, we cannot comment on rules issued outside of that time frame. Although Executive Order 12612 does not require agencies to mention the order in the preamble to their final rules or to note in those preambles whether a federalism assessment was prepared, doing so is a clear indication that the agency was aware of and considered the order's requirements. Also, if an agency prepared a federalism assessment for a final rule, it would be logical for the agency to describe the assessment in the preamble to the rule.

Agencies Prepared Few Federalism Assessments During Review Timeframe

Our work showed that Executive Order 12612 had relatively little visible effect on federal agencies' rulemaking actions during this time frame. To summarize the nearly 3 years of data depicted in figure 1, agencies covered by the order mentioned it in the preambles to about 26 percent of the 11,414 final rules they issued between April 1996 and December 1998.

[4] Federalism: Implementation of Executive Order 12612 in the Rulemaking Process (GAO/T-GGD-99-93, May 5, 1999).

Figure 1: Agencies Indicated Only Five Final Rules Issued Between April 1996 and December 1998 Had Federalism Assessments

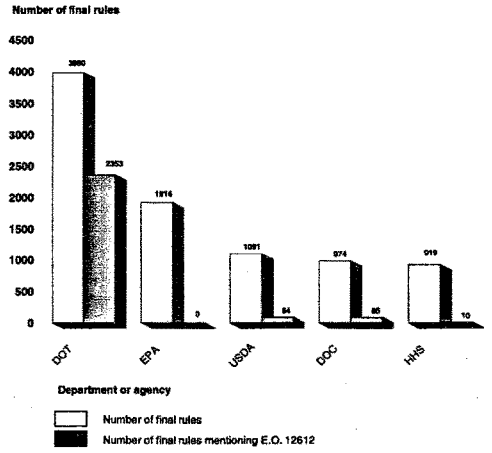


[a] The data for 1996 covers only those rules issued from April 1 to December 31.

Note: The data for 1996 covers only those rules issued from April 1 to December 31.
Source: Federal Register and GAO analysis.

Five agencies issued the bulk of the final rules published during this period—the Departments of Agriculture (USDA), Commerce (DOC), Health and Human Services (HHS), and Transportation (DOT); and the Environmental Protection Agency (EPA). As figure 2 shows, these agencies varied substantially in the degree to which they mentioned the executive order. For example, DOT mentioned the order in nearly 60 percent of its nearly 4,000 final rules, whereas EPA did not mention the order in any of the more than 1,900 rules it issued.

Figure 2: Agencies Differed in Degree to Which They Mentioned Executive Order 12612 in Final Rules Issued Between April 1996 and December 1998



Source: Federal Register and GAO analysis.

However, mentioning the order in the preamble to a rule does not mean the agency took any substantive action. The agencies usually just stated that no federalism assessment was conducted because the rules did not have federalism implications. Nearly all of these statements were standard, "boilerplate" certifications with little or no discussion of why the rule did not trigger the executive order's requirements.

In fact, the preambles to only 5 of the 11,414 final rules that the agencies issued between April 1996 and December 1998 indicated that a federalism assessment had been done—2 in 1996 and 3 in 1997. Those five rules are listed in table 1.

Table 1: Preambles Indicated Four Agencies Issued Five Final Rules With Federalism Assessments Between April 1996 and December 1998

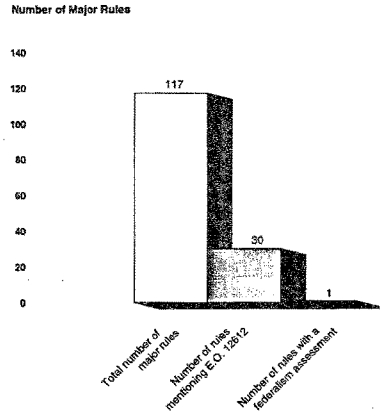
Department or agency	Date final rule was published	Title
Department of Health and Human Services	Aug. 28, 1996	Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents
Department of Transportation	Dec. 16, 1996	Roadway Worker Protection
Department of Commerce	Jan. 30, 1997	Florida Keys National Marine Sanctuary
	Mar. 28, 1997	Hawaiian Islands Humpback Whale National Marine Sanctuary
Department of Labor	Mar. 31, 1997	(Hazard) Abatement Verification

Source: Federal Register and GAO analysis.

Many of the final rules that federal agencies issue are administrative or routine in nature, and therefore unlikely to have significant federalism implications. As a result, it is not particularly surprising that agencies would not prepare federalism assessments for many of those rules. However, rules that are "major" under SBREFA and that involve or affect state and local governments would seem more likely to have federalism implications that would warrant preparation of an assessment.

However, that does not appear to have been the case. As figure 3 shows, of the 117 major final rules issued by covered agencies between April 1996 and December 1998, the preambles indicated that only 1 had a federalism assessment. The agencies had previously indicated that 37 of these rules would affect state and local governments, and the preambles to 21 of the rules indicated that they would preempt state and local laws in the event of a conflict. At least one of the four state and local government organizations that we consulted during the review said that federal agencies should have done assessments for most of these 117 major rules. In response, the agencies said that their rules did not have sufficient federalism implications to trigger the executive order's requirements.

Figure 3: Only One Major Rule Issued Between April 1996 and December 1998 Had A Federalism Assessment



Sources: Federal Register and GAO's major rule database.

EPA Established High Threshold for Federalism Assessments

All three of the agencies we visited during our review (USDA, HHS, and EPA) had some kind of written guidance on the executive order and had designated an official or office responsible for ensuring its implementation.[5] However, the criteria the agencies used to determine whether federalism assessments were needed varied among the agencies. USDA's guidance did not establish any specific criteria, with agency attorneys making their own determinations regarding federalism implications in the context of each rulemaking. HHS' guidance listed four threshold criteria that could be used to determine whether a federalism assessment was required, but said an assessment must be prepared if an

[5]The agencies we visited were those with the most major rules that state and local government representatives believed should have had a federalism assessment.

action would directly create significant effects on states even if the action was mandated by law or the department otherwise had no discretion.

The criteria in EPA's guidance established a high threshold for what constitutes "sufficient" federalism implications—perhaps explaining why none of the agency's more than 1,900 final rules issued during the April 1996 to December 1998 time frame had a federalism assessment. For example, in order for an EPA rule to require an assessment, the agency's guidance said the rule must meet all four of the following criteria:

- have an "institutional" effect on the states, not just a financial effect (regardless of magnitude);
- change significantly the relative roles of federal and state governments in a particular program context, lead to federal control over traditional state responsibilities, or decrease the ability of states to make policy decisions with respect to their own functions;
- affect all or most of the states; and
- have a direct, causal effect on the states (i.e., not a side effect).

At least one of these criteria appeared to go beyond the executive order on which it is based. Although EPA said a rule must affect all or most of the states in order to have sufficient federalism implications to warrant preparation of an assessment, Executive Order 12612 defines "state" to "refer to the States of the United States of America, individually or collectively." (Emphasis added.) EPA's guidance also said that, even if all four of these criteria are met, a rule would not require a federalism assessment if a statute mandates the action or the means to carry it out are implied by statute. However, EPA's actions appear to be allowable because the executive order does not define what is meant by "sufficient" federalism implications, leaving that determination up to the agencies.

OMB Has Taken Little Recent Action to Ensure Implementation of Executive Order 12612

OMB officials told us that they had taken little specific action to ensure implementation of the executive order, but said the order is considered along with other requirements as part of the regulatory review process under Executive Order 12866. They said that agencies had rarely submitted separate federalism assessments to OMB but have addressed federalism considerations, when appropriate, as a part of the cost-benefit analysis and other analytical requirements.

Commenting on the results of our review, the Acting Administrator of OMB's Office of Information and Regulatory Affairs said it was not surprising that agencies were not focused on implementing Executive Order 12612 during the covered time period because they knew that the

order was soon to be revised by Executive Order 13083. However, he also said that Executive Order 12612 had not been implemented to any significant extent by the Reagan Administration "or its successors," suggesting that the lack of implementation was unrelated to any pending revision of the order. In addition, the Acting Administrator said that the primary vehicles for improving federal-state consultation in the past 6 years have been Executive Order 12875 and UMRA. We have not examined the implementation of Executive Order 12875. However, we have examined the implementation of UMRA, and concluded that it has had little effect on agencies' rulemaking activities.

UMRA Had Little Effect on Agency Rulemaking

Title II of UMRA is one of Congress' primary efforts to address the effects of federal agencies' rules on state and local governments. Section 202 of the act generally requires federal agencies (other than independent regulatory agencies) to prepare "written statements" containing specific information for any rule for which a notice of proposed rulemaking was published that includes a federal mandate that may result in the expenditure of $100 million or more in any 1 year by state, local, and tribal governments, in the aggregate, or the private sector. UMRA defines a "mandate" to be an "enforceable duty" that is not a condition of federal assistance and does not arise from participation in a voluntary federal program. For rules requiring a written statement, section 205 requires agencies to consider a number of regulatory alternatives and select the one that is the least costly, most cost-effective, or least burdensome and that achieves the purpose of the rule. Other sections of the act focus even more specifically on the interests of state and local representatives. For example, section 203 states that agencies must develop plans to involve small governments in the development of regulatory proposals that have a significant or unique effect on those entities. Section 204 requires agencies to develop processes to consult with representatives of state, local, and tribal governments in the development of regulatory proposals containing "significant [f]ederal intergovernmental mandates."

Last year, we reported that these and other requirements in title II of UMRA appeared to have had only limited direct impact on agencies' rulemaking actions in the first 2 years of the act's implementation.[8] Most of the economically significant rules promulgated during UMRA's first 2 years were not subject to the written statement requirements of title II. Some did not have an associated notice of proposed rulemaking that triggered the act's requirements. Many did not impose an enforceable duty other than as

[8] Unfunded Mandates: Reform Act Has Had Little Effect on Agencies' Rulemaking Actions (GAO/GGD-98-30, Feb. 4, 1998).

a condition of federal financial assistance or as a duty arising from participation in a voluntary program. Other rules did not result in "expenditures" of $100 million. Because no written statement was required for these rules, the requirements in section 205 regarding the identification and selection of regulatory alternatives were not applicable to these rules. Also, title II of UMRA contains exemptions that allowed agencies not to take certain actions if they determined the actions were duplicative or not "reasonably feasible."

Other provisions in title II also had little effect. During the first 2 years of UMRA's implementation, the requirement in section 204 that agencies develop an intergovernmental consultation process appears to have applied to no more than four EPA rules and no rules from other agencies. EPA generally used a consultation process that was in place before UMRA was enacted. Also, section 203 small government plans were not developed for any of the 73 final rules promulgated during this 2-year period. Officials in the four agencies that we contacted said none of their final rules had a significant or unique effect on small governments.

Section 208 of UMRA requires the Director of OMB to submit an annual report to Congress on agency compliance with UMRA. The fourth such report is scheduled to be delivered within the next few weeks. In his third UMRA report published in June 1998, the OMB Director noted that federal agencies had identified only three rules in the more than 3 years since the act was passed that affected the public sector enough to trigger the written statement requirements. Nevertheless, he said federal agencies had embraced the act's "overall philosophy," as evidenced by the range of consultative activities the report described.

Federalism Act Similar to But Different From Previous Initiatives

On its surface, H.R. 2245 contains several provisions that are similar to requirements in both Executive Order 12612 and UMRA. For example, section 7 of the bill would, if enacted, require agencies to publish "federalism impact assessments" that are somewhat similar in content to the federalism assessments in the executive order and the written statements required by UMRA. All of those assessments and statements require agencies to develop estimates of the costs attendant to the implementation of the regulation at issue. Also, both the bill and the executive order require identification of regulatory provisions that preempt state government authority or functions.

As introduced, the bill would require federalism impact assessments for all proposed and final rules. We understand that the bill may be modified to require, for each such rule, that agencies either certify that the rule does

not have federalism implications or prepare a federalism impact assessment. Neither Executive Order 12612 nor UMRA requires agencies to declare whether each of their proposed and final rules has federalism implications. As I noted previously, UMRA does not apply to most economically significant rules, and the executive order does not require agencies to publish the designated officials' federalism determinations.

If the bill is modified in this manner, this requirement will be similar to a provision in the Regulatory Flexibility Act of 1980 (RFA), which requires agencies to state whether their rules have a "significant economic impact on a substantial number of small entities." Therefore, the implementation of the RFA may prove instructive as to how this portion of the bill will be implemented. For example, according to the Small Business Administration's (SBA) Office of Advocacy, a perennial problem with the implementation of the RFA has been agencies' use of "boilerplate" certifications indicating that their rules do not have a significant economic impact on a substantial number of small entities. Contributing to this problem is the fact that the RFA does not define the terms "significant economic impact" and "substantial number of small entities," and no federal agency is responsible or authorized to define the terms. As a consequence, different agencies have different interpretations of the statute.[7] We have recommended that Congress consider giving SBA or some other entity the responsibility or authority to define key terms in the act.[8] Therefore, applying the lessons of the RFA to the proposed legislation, Congress may want to carefully define what it believes constitutes "federalism implications" or assign that responsibility to some other entity.

Consultation Enhances Intergovernmental Partnership

Finally, I would like to briefly comment on section 6 of H.R. 2245, which says that federal agencies may not include any agency activity that is a state-administered federal grant program in its annual performance plans developed pursuant to the Government Performance and Results Act of 1993 (Results Act) "unless the performance measures for the activity are determined in cooperation with public officials." The bill defines "public officials" as elected officials of state and local governments, including certain organizations that represent those officials (e.g., the National Governors' Association and the United States Conference of Mayors).

[7] Regulatory Flexibility Act: Inherent Weaknesses May Limit Its Usefulness for Small Governments (GAO/HRD-91-16, Jan. 11, 1991).

[8] Regulatory Reform: Implementation of the Small Business Advocacy Review Panel Requirements (GAO/GGD-98-36, Mar. 18, 1998).

The Results Act already requires agencies developing their strategic plans to "solicit and consider the views and suggestions of those entities potentially affected by or interested in the plan." The Senate Governmental Affairs Committee report on the Results Act noted that the strategic plan "is intended to be the principal means for obtaining and reflecting, as appropriate, the views of Congress and those governmental and nongovernmental entities potentially affected by or interested in the agencies' activities."

In that regard, we believe that working with state and local governments or their representative organizations to develop goals and performance measures in federal grant-in-aid programs can strengthen the intergovernmental partnerships embodied in those programs. For example, in 1996, we reported on a joint goal and performance measure-setting effort between the federal Office of Child Support Enforcement (OCSE) and state governments.[9] Initially, the federal-state relationship was not so cooperative. In 1994, OCSE specified the performance levels that states were expected to achieve in such areas as the establishment of paternity and collections of child support. State program officials strongly objected to this federal mandate because they did not have an opportunity to participate in the planning process.

Following these initial planning efforts, OCSE sought to obtain wider participation from program officials at the federal, state, and local government levels. OCSE also established task forces consisting of federal, state, and local officials to help focus management of the program on long-term goals. During the planning process, participants agreed that the national goals and objectives would be based on the collective suggestions of the states and that the plan's final approval would be reached through a consensus. For each goal, the participants identified interim objectives that, if achieved, would represent progress toward the stated goal. At the time of our review, OCSE and the states were also developing performance measures to identify progress toward the goals, and planned to develop performance standards to judge the quality of state performance. They created a Performance Measures Work Group to develop statistical measures for assessing state progress toward achieving national goals and objectives. OCSE also encouraged its regional staff to develop performance agreements with states, specifying both general working relationships between OCSE regional offices and state program officials and performance goals for each state.

[9] Child Support Enforcement: Reorienting Management Toward Achieving Better Program Results (GAO/HEHS/GGD-97-14, Oct. 25, 1996).

Overall, OCSE and most state officials that we contacted said the joint planning process strengthened the federal/state partnership by enabling them to help shape the national program's long-term goals and objectives. State and local government stakeholder involvement has also been important in the development of practical and broadly accepted performance measures in other federal programs, including some block grants.[10] We believe that these kinds of intergovernmental cooperation can serve as models for the kinds of efforts that section 6 of the Federalism Act of 1999 seeks to encourage.

Mr. Chairman, this completes my prepared statement. I would be pleased to answer any questions.

Contacts and Acknowledgment

For future contacts regarding this testimony, please contact L. Nye Stevens at (202) 512-8676 or Curtis Copeland at (202) 512-8101. Individuals making key contributions to this testimony included Elizabeth Powell, Joseph Santiago, and Alan Belkin.

[10] Managing for Results: Measuring Program Results That Are Under Limited Federal Control (GAO/GGD-99-16, Dec. 11, 1998); Grant Programs: Design Features Shape Flexibility, Accountability, and Performance Information (GAO/GGD-98-137, June 22, 1998).

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Mr. MCINTOSH. Thank you. I have to say quite frankly, I was shocked and appalled in reading your testimony at how inappropriate the agencies have been acting in disregarding that Executive order.

I have got several questions. One, could you provide for us some examples of the rules that were identified by the State and local government organizations that should have been covered by the Executive order to give us a flavor——

Mr. STEVENS. Yes, as you know at least one of the organizations thought that 79 of these 117 majors should have included a federalism assessment. One of these was an OSHA rule on respiratory protection programs, basically respirators and breathing protections, and that has a strong effect on local governments because firemen are the principal users of these things and most of the firemen of course are at the local level. OSHA indicated in the preamble to the rule that it would require 25 States to adopt a comparable standard within 6 months and then they also said in the unified agenda earlier that the rule would affect State governments, local governments, tribal governments and at every other level. But they did say that no federalism assessment was required for the rule.

The Council of State Governments, the National Association of Counties, the National League of Cities all disagreed for the obvious reason that this, as you know, would have major effects on the States and that the firemen to whom it was primarily directed are primarily local employees.

There was also the NAAQS rule, the one that you mentioned yourself. Although the standards had to be implemented by the States, EPA did not mention the Executive order in their rule. The National Association of Counties said that the indirect costs of complying with new permits and revising existing permits in developing regulatory enforcement changes would be substantial on them. But the level of cost does not seem to have mattered to EPA. It wasn't one of those standards that they even considered the amount of money that it would cost States to implement these things; only institutional relationships were within their guidance.

Mr. MCINTOSH. Let me followup on that one very quickly. Surely some of the 1,900 EPA regulations went directly to institutional requirements, because wouldn't they be setting out guidelines for their enforcement of different rules?

Mr. STEVENS. Well, it had to meet four standards really, that was just one. Whether it had major financial impacts wasn't one of the standards. One of the standards was that it had to affect many States. A single State or a small cluster of States wouldn't have qualified. And, it had to have a direct causal effect, be aimed at the States for it to have qualified. And also, there is even a sort of a fifth requirement and that was that they didn't have to do a federalism assessment according to their guidelines if it was traceable to a statute or even implied by a statute.

And it was hard for us to imagine that they put out any kind of rule that didn't have at least some relationship to a statute. So I guess we—having read those guidelines—were not terribly surprised that of those 1,900 none of them really passed that test.

Mr. MCINTOSH. Exactly. It has been a long time, but I remember being one of the staffers reviewing that Executive order for President Reagan and I don't recall any of those standards being stated there or even considered as something that would——

Mr. STEVENS. In fact, one of these is in direct contradiction to the Executive order, which is that States individually or collectively if they are affected, a federalism assessment is in order.

Mr. MCINTOSH. And certainly we intended in this to consider financial costs as well as institutional effects.

Mr. STEVENS. Yes, and other agencies do. I think EPA is an extreme in that case.

Mr. MCINTOSH. Do you think that the judicial review provisions will help to correct that?

Mr. STEVENS. All I could say in that regard, Mr. Chairman, is that we have examined the SBREFA changes that you mentioned a moment ago, and I think it is fairly clear from the agency's points or from what the agencies tell us, that bringing the Regulatory Flexibility Act provisions under judicial review has indeed caused the agencies to pay more attention to it. They are taking it more seriously knowing that the courts are looking over their shoulders. It is not ignored as routinely as it in many cases was before. So in that sense, it has had an impact, yes.

Mr. MCINTOSH. Another question was prompted by your statement of OMB's excuse for why nobody is following the Executive order, that, well, they are not following it because we have been thinking about changing it. Did you have a chance or an opportunity to look at the rules under the standards of the proposed Executive order that was subsequently suspended to see how many of the rules would have been required under that new Executive order to address the question of federalism?

Mr. STEVENS. No, we didn't do that, Mr. Chairman. I really couldn't talk about that.

Mr. MCINTOSH. Would that be something that, without a great deal of difficulty, you might check at least some of the most egregious examples of where they failed to do it to see if perhaps even under the new standard they were contemplating the agencies weren't following or doing their duty in terms of looking at federalism as a concern?

Mr. STEVENS. That's something we could certainly look at and get back to you, Mr. Chairman, on whether that would be feasible.

Mr. MCINTOSH. Let me just ask a general question. Do you have any suggestions—and you have got several wording changes you recommend in your written statement, but, in addition to those, do you have any specific additions or revisions or deletions that you would recommend for the bill?

Mr. STEVENS. Well, we did have a suggestion that bears on one of the last questions that you got to with the other panel and that is whether all rules should be covered. There is a categorization of rules, I think it is in five parts. There is "substantial," "significant," and that the bottom category, I think there is one called "routine and frequent" and a category called "administrative" that are uncommonly likely to cause major effects—to affect relationships between governments. And it seems to me that somehow exempting those from the process should be possible and probably advan-

tageous to avoid just having a boilerplate declaration: "no federalism implications." If you write that 11,000 times or however many rules there are, you might get so used to writing it out that you wouldn't consider it——

Mr. MCINTOSH. Start turning it over to other rules. I understand that.

Mr. STEVENS. One other matter. We also suggested that a determination be made up front as to whether there were federalism implications so that an agency would have to commit itself, yes or no, which they don't have to do now. If there weren't any they would be on record as having said there weren't any. But, if there were any, they would have to commit to do a federalism impact assessment. Seems to us that would be another dividing line that could cut down the paperwork associated with this potentially.

Mr. MCINTOSH. And, you might make it difficult for them to reach that conclusion there are none if the record reflects that commenters have indicated there are.

Mr. STEVENS. That is reasonable, yes.

Mr. MCINTOSH. Maybe you could do it in a way that says are there or have there been any comments saying there would be?

Mr. STEVENS. Well, the regulatory agenda which comes out twice a year has a required field: Governments affected. And that is one of the things we use because very often it says State governments, local governments, tribal governments and then when they actually put the rule out they say there are no federalism implications.

Mr. MCINTOSH. Great. Great. One other matter, on the regulatory preemption, do you think the provisions in section 7 would be sufficient in terms of making the agencies address the question of federalism before they issued rules that were preempting State and local authority?

Mr. STEVENS. Perhaps. I think it will partly depend on what the understanding of preemption comes to be. It is not defined, I believe, in the bill. We have seen examples in other regulatory matters where, when it is left entirely to the agencies to define this, they often do it in terms that allow them the greatest administrative flexibility and perhaps a clearer understanding of what is preemption and what isn't preemption would help. However, that is a major legal question: it would cut down on the flexibility to do that.

Mr. MCINTOSH. You think a definition of preemption might be helpful in foreclosing loopholes that might arise?

Mr. STEVENS. As a nonlawyer I could say that. I imagine it is not as easy to do as I suggested.

Mr. MCINTOSH. We looked at possible definitions and it is a difficult one to tackle. But perhaps there is a way of leaving some flexibility but saying these certain things are the core—certainly within the core of what preemption is and if you regulate in these areas you know that you have preempted or you are treading on State and local authority.

Mr. STEVENS. Mr. Copeland of my staff has just given me an example of a rule that—no federalism assessment was made for this rule, but it's got a whole section on preemption. It says, at least one State has passed a law—this is on organ sharing and transplants and that sort of thing—"at least one State has passed a law that appears to limit organ sharing policies and national organ

sharing system based primarily on medical need with geographical considerations having less weight than at present is an allocation criteria and would be thwarted if a State required that prior to sharing an organ with any other State there would be a written agreement."

Over a page of discussion here of preemption, but no federalism assessment.

Mr. MCINTOSH. No federalism impact. That would be an excellent example of where the acknowledgment is that there is a federalism concern, is that we should require as a matter of law that they move forward.

Mr. STEVENS. Yes.

Mr. MCINTOSH. We will look at that question on making sure what triggers it. If not explicitly preemption, then maybe we need to set some thresholds that these things certainly do fall within it. There may be other broader definitions of preemption as well.

I have no further questions. Let me turn to my colleague, the vice chairman of the subcommittee, Mr. Ryan. First, welcome. And if you would like to put any statement in the record or make a statement now would be appropriate.

Mr. RYAN. I must apologize for being late. I was unavoidably detained. But I would like to echo my colleague, Harold Ford's support for it and I would like to join my colleague Lee Terry, who just announced his cosponsorship, and I would ask you to add my cosponsorship to the bill. It is unfortunate that the administration is going against the grain on federalism, and I hope with this legislation we can reverse this trend of Federalizing so many of these functions, and I hope we can work to get passage on this bill.

Thank you.

Mr. MCINTOSH. Thank you, Mr. Ryan. I appreciate it. One of the things that came out in the testimony earlier from some of the State and local officials is that federalism doesn't always cut in one direction in terms of philosophy and ideology, but I think it is an important overriding principle that we have to share the same faith that our Founding Fathers had that the States will be, in fact, the right level of government to reach a decision on these many of the critical issues, even if some of the States wouldn't reach the same decision that you and I would on a particular issue.

I have no other questions, Mr. Stevens. I thank you for your study of this, and if it is possible, we are going to keep the record open until July 16th, if you could take a look at that suspended Executive order and see if even there the agencies wouldn't have met that test had that been in effect during that 3-year period, which tells me that they were completely asleep at the switch at OMB if they weren't even giving guidance about whether they were contemplating moving in that direction.

Mr. STEVENS. Yes, sir.

[The information referred to follows:]

We could not determine with any degree of certainty which rules agencies would have considered subject to the requirements in Executive Order 13083. However, some observations are possible. For any regulation that has "federalism implications," the proposed executive order would have required the issuing agency to provide a description of the extent of its prior consultation with representatives of affected state and local governments, a summary of the nature of their concerns, and the agency's position supporting the need to issue the regulation. However, the order did not clearly define "federalism implications," apparently leaving that determination up to the agency. Therefore, an agency could establish the same high threshold for what constitutes "federalism implications" under Executive Order 13083 that some (such as EPA) did under Executive Order 12612, and opt out of the order's requirements.

Executive Order 13083 also contains a number of other loopholes that could be used to avoid taking any action. For example, the order's requirements for rules with federalism implications do not apply if the agency determines it is not "practicable," or if the requirements are traceable to a statute. Also, the requirements must impose "substantial direct compliance costs on States and local governments." Therefore, a regulation that totally preempts state or local authority but does not impose "substantial direct compliance costs" would not be covered by the executive order's requirements.

Mr. MCINTOSH. Thank you very much. With that the subcommittee is adjourned. Thank you.

[Whereupon, at 12 noon, the subcommittee was adjourned.]

[The prepared statement of Mr. Baker and additional information submitted for the hearing record follow:]

TESTIMONY OF JOHN S. BAKER, JR., DALE E. BENNETT, PROFESSOR OF LAW

BEFORE THE SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH, NATURAL RESOURCES AND REGULATORY AFFAIRS OF THE GOVERNMENT REFORM COMMITTEE

H.R. 2245: Legislation To Promote and Preserve Federalism

June 30, 1999

Mr. Chairman and Members of the Committee: I am grateful for the opportunity to appear before you this morning to testify about the Federalism Act of 1999, H.R. 2245.

Federalism is "down, but not out." In the legal academy, federalism is generally viewed, at best, as an antiquarian relic and, more commonly, as an intolerable obstruction to centralized, uniform, and (supposedly, therefore) rational policy-making. Federalism gets a better reception in the federal courts, as reflected by the Supreme Court's decisions last week on the Eleventh Amendment,[1] but its influence over the jurisprudence of federal-state relations is tenuous at best. Until President Clinton attempted to revoke President Reagan's Federalism Executive Order,[2] the Executive Branch was more "federalism friendly" than it otherwise would be, given the natural bureaucratic bent toward planning and control. The Congress, in recent years, has demonstrated considerable inconsistency towards federalism, with some members touting federalism, while at the same time attempting to nationalize whole new areas of law such as torts. Moreover, the States contradict themselves on federalism when state officials oppose certain regulations on federalism grounds, while other (and even the same) state (and local government) officials eagerly lobby for new federal programs which necessarily increase federal control at the expense of state autonomy.

For federalism to exist as more than an historical memory or empty campaign rhetoric, the principle must be more than a preference; it must be made a matter of practical necessity. That is what H.R. 2245 proposes to accomplish. By focusing on the problem of preemption as it does, this bill pushes federalism to the fore, where procedurally it will be difficult to ignore.

A certain amount of theoretical background is useful in order to understand the need for legislation that actually enforces day-to-day respect for the principle of federalism. The Constitution's drafters believed that the protection of liberty required a structuring of power so that "Ambition [would] be made to counteract ambition." *Federalist 51.*[3] They described what they created, and what we call "federalism," as "in strictness, neither a national nor a federal Constitution." *Federalist 39.*[4] In this "compound republic of America," Madison said "[t]he different governments will control each other, at the same time that each will be controlled by itself." *Federalist 51.*[5]

Today, after decades of judicially-sanctioned expansion of federal power through the Commerce and Spending Clauses, the notion that the States control the federal government seems archaic. As developed below, the States are unable to do so, not merely as a result of the Commerce Clause jurisprudence, but because of 1) the Supreme Court's development of the preemption doctrine and 2) the unanticipated impact of the Seventeenth Amendment on the relationship between the States and the Federal Government.

I. THE PREEMPTION DOCTRINE

The preemption doctrine is a gloss on the text of the Constitution. That is to say, the Constitution contains no preemption clause as such. Rather, it contains the Supremacy Clause which provides that the Constitution, federal statutes passed pursuant to it, and treaties, are the Supreme Law binding judges in every state, "the Constitution or laws of any state to the contrary notwithstanding." Art. VI, Cl. 2. On its face, the Supremacy Clause only displaces state law to the extent that state law conflicts with federal law.

The Marshall Court set the foundation for federal-state relations in its great Supremacy Clause cases, most notably *Martin v. Hunter's Lessee*,[6] *Gibbons v. Ogden*,[7] and *McCulloch v. Maryland*.[8] These cases involved federal statutes determined to be constitutional, which in each case conflicted with a state statute and/or court decision. Given a conflict between federal and

state law, both could not prevail. The Supremacy Clause and common sense, according to *Federalist 32*,[9] dictated that valid federal law must prevail.

Preemption expands well beyond the Marshall Court's Supremacy Clause jurisprudence. Under the modern preemption doctrine, state law may be defeated even when there is no direct conflict and even though Congress has not explicitly expressed its intent to preempt. Preemption has been applied to situations in which a court determines that: 1) the federal law "occupies the field," *Hines v. Davidowitz;*[10] 2) federal law demonstrates the need for uniformity, *Jones v. Rath Packing Co;*[11] or 3) state law *might* impede the federal law, *Pennsylvania v. Nelson.*[12]

When the Supreme Court invalidates state law in the absence of a direct conflict, it does so on the basis that *Congress intends* preemption. Apart from wondering how it is that Congress can preempt state law if no direct conflict exists, one might suppose that if Congress intended to preempt, it would say so. If Congress routinely fails to state expressly its intent to preempt, the natural inference would seem to be that Congress has no such intent. If the federal courts were genuinely concerned about federalism, not to mention separation of powers, they would adopt rules requiring Congress to express clearly its intent to preempt, just as the Supreme Court requires an express statement for legislation to be retroactive.[13]

The Supreme Court does not, by its own admission,[14] have clear rules for interpreting the intent of Congress regarding preemption. Therefore, if Congress wishes its intent to be clearly understood by the courts, the most sensible thing for it do is to create rules of construction. The only approach consistent with our federalism is something along the lines of the rules proposed in Section 9 of the Federalism Act of 1999. Under these provisions, neither a statute nor an administrative agency can preempt state law unless the congressional "statute expressly states."

II. FEDERALISM INVOLVES CONCURRENT JURISDICTION

The proposed rules of construction should be unnecessary given the Supremacy Clause. Without the preemption doctrine as an overlay, the Supremacy Clause has proven quite sufficient for the tasks of balancing concurrent and conflicting powers within our federal system. The basic premise of the Constitution is that unless otherwise clearly indicated, the powers of the federal government are concurrent with those of the states. As

explained in *Federalist 32*, the federal government's jurisdiction is exclusive in only three kinds of situations.

> This exclusive delegation, or rather alienation, of State sovereignty would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*. I use these terms to distinguish this last case from another which might appear to resemble it, but which would, in fact, be essentially different; I mean where the exercise of a concurrent jurisdiction might be productive of occasional interferences in the *policy* of any branch of administration, but would not imply any direct contradiction or repugnancy in point of constitutional authority.[15]

Given concurrent jurisdiction, conflicts between federal and state law are inevitable and not entirely avoidable. For that very reason, the Constitution includes the Supremacy Clause. Many conflicts are avoided in the course of the representative process. When direct conflicts do occur, however, the Supremacy Clause controls. Congress cannot discover every actual or potential conflict. Indeed, it would be impossible to do so. Some conflicts arise after passage of the federal legislation. Where, however, no direct conflict occurs, the preservation of the concurrent jurisdiction or powers of the States should require that the Supremacy Clause **not** be applied to block state laws. In other words, the so-called preemption doctrine should be contracted and made coequal with the Supremacy Clause. Stripping the preemption doctrine as a gloss on the Supremacy Clause would do much to reinvigorate federalism.

Congress, of course, cannot dictate that the Supreme Court eliminate the doctrine of preemption. In practical effect, however, it could greatly contract the doctrine by adopting this legislation. Doing so would **not** amount to a "states' rights" policy crippling to the federal government. The Supremacy Clause, as here discussed, simply reflects the structure created by the Federalist Framers and enforced by the Marshall Court. It is a view once considered "nationalist," but which is the truly "federalist" position.

The Constitution has been rightly said to create a limited government

with enumerated powers. Some think that limited government depends on the Tenth Amendment and that the Congress has only those powers *expressly* given to the Government. Such a view of the Constitution, which would have reconverted the governmental structure to a confederation, was rejected in drafting the Constitution. See *Federalist 33*.[16] It was also rejected in the drafting of the Tenth Amendment, as reflected in the Congressional debates on the Bill of Rights[17] and in *McCulloch v. Maryland*.[18] For these reasons, I would suggest that the word "expressly" be deleted from the language ("not expressly delegated to the Federal Government") in the Findings, Section 2(1).

As was very evident in discussions in reaction to the Supreme Court's federalism decisions handed down last week, many people simply do not understand the federalism of the Framers. Many believe, either approvingly or disapprovingly, that what the Framers meant by "limited government" was a federal government which has all the powers of general government, but only insofar as granted by the states. They think that federalism is coequal with a "states' rights" view, dependent on reading the word "expressly" into the Tenth Amendment. Such a "states' rights" view is not the view of those who framed the Constitution, but of those who opposed it. The powers given to the federal government are limited in *number*, i.e., they are *enumerated*. As *Federalist 32*[19] explains and Chief Justice John Marshall repeats in both *Marbury v. Madison*[20] and *McCulloch*, any power actually given to the federal government is not in itself limited.

The limits on power in the Constitution are generally structural, that is, relational. Through separation of powers, we know each branch checks the other through counterbalancing powers (e.g., the veto power). Each branch thus enforces limits on the others. This structure of separated and federal powers necessarily involves independence and dependence, power and limits on power. Each branch of the federal government is separated in order to insure its independence and checked in order to limit its power. See *Federalist 47-51*.[22] The state and federal governments are also supposed to be independent of each other and set in opposition to each other. Yet at the same time, the States were made a part of the federal government through their representation in the Senate. *Federalist 51*.[23]

No piece of legislation can make up for the power the States lost, as explained below, through adoption of the Seventeenth Amendment. Nevertheless, it would greatly assist the federalist cause and seem to reflect simple common sense to require that, if Congress intends to preempt state law,

it should have to make a clear statement to that effect. Often, Congress states it has no such intention. What should it mean when Congress makes no such statement about its intention? If more members of the Supreme Court were solidly attuned to the federal nature of the Constitution, the Court would apply the presumption in those circumstances that Congress has no intention to preempt. Even though the Court has not done so, Congress can adopt the proposed rules of construction without doing any damage to the Supremacy Clause.

III. THE IMPACT OF THE STATES LOSING REPRESENTATION IN CONGRESS

Preemption would not be the problem it is if the states were still directly represented in the U.S. Senate, as they were prior to the adoption of the Seventeenth Amendment. That change led directly to the expansion of the Commerce Clause. This is often missed in discussions about federalism, which usually center on the Commerce Clause versus the Tenth Amendment. In *Usery v. League of Cities*,[24] the Tenth Amendment made a brief come-back as a check on Congress' power under the Commerce Clause. Before long, however, it was reversed in *Garcia v. San Antonio Metropolitan Transit Authority*.[25] Then in *New York v. United States*[26] and *Printz v. United States*,[27] a majority of the Court recognized the protection of federalism rests on structural restraints of power. Indeed, in overturning *Usery*, the *Garcia* majority opinion noted that the passage of the Seventeenth Amendment providing for the direct election of senators greatly weakened federalism.[28] The adoption of the Seventeenth Amendment damaged federalism by changing the responsiveness of the Senate to the States. The direct connection between each Senator and his own state legislator had previously served as a major obstacle to the consolidation of national power.

In providing for the election of U.S. Senators directly by the voters of each state, the Seventeenth Amendment eliminated the voting role of the state legislatures. While the amendment increased the democratic character of the Senate, it decreased its federal character. See Federalist 39.[29] The Great Compromise, also known as the Connecticut Compromise, at the Constitutional Convention provided that, unlike the House of Representatives, the Senate represented the states as states -- a partial continuation of the principle of representation under the Articles of Confederation. Prior to the Seventeenth Amendment, senators more clearly represented the "states as states" because they were elected by and responsible to state legislatures.[30]

The Senate made the states a constituent part of the Congress. Senators who owed their election to state legislatures were naturally responsive to those legislatures. Having lost that control over their senators with direct, popular election, state governments were reduced almost to the level of another lobby at the national level. That situation necessitated the various associations representing state officials in the nation's capital.

As long as states were represented in the Senate, that body was not likely to adopt legislation which was opposed by even a significant minority of states. Unfunded mandates to the states would have been unthinkable. Not only would the Senate not initiate legislation lacking significant state support, it stood as an effective barrier to House-passed legislation which in the view of even a minority of states, threatened their interests. Indeed, it was not until after ratification of the Seventeenth Amendment, most notably beginning during the New Deal, that Congress began to adopt legislation under the Commerce and Spending Clauses which propelled federal power and budgets at the expense of the states.

When, during the 1930's, Congress expanded federal power, it also created new administrative agencies. For Congress to pass all the new laws, it needed the kind of assistance that could only come from administrative bureaucracies. Increasingly, Congress "delegated" much power to the administrative agencies in the form of rule-making. The Supreme Court ultimately allowed agencies to preempt State law even though Congress has not clearly stated its intent that the agency be allowed to do so.[31]

This delegation of power to administrative agencies has greatly facilitated the consolidation of national power. It evades the constitutional separation of powers, which itself is a protection of federalism. Initially, such delegation of power was attacked constitutionally on the ground that Congress could not delegate its legislative powers. With two notable exceptions,[32] however, the Supreme Court has not invalidated congressional legislation on grounds of excessive delegation.[33] During the 1980's, such delegation was more specifically attacked directly in terms of separation of powers.

While delegating its work, Congress did not want to give up any real power. Thus, Congress invented the "legislative veto" as a way of retaining power to control policy made by Executive Branch agencies. After fifty years of such a practice, the Supreme Court declared legislative vetoes unconstitutional in *I.N.S. v. Chadha*.[34]

IV. THE FEDERALISM ACT AS A PARTIAL SOLUTION

The Federalism Act of 1999 cannot alter the most fundamental shifts in power that have occurred to create the "administrative state." Nevertheless, it does respond to the three parts of the power puzzle: the Congress itself, the administrative agencies, and the courts. Simply adopting rules of construction that require an express congressional statement of preemption would not advance the cause of federalism **if such statements became routine**. Indeed, it could have the opposite effect of increasing the number of preemptive statutes. To avoid such an outcome, members of Congress in some way must have to confront the fact that by voting *for* a particular piece of legislation containing a preemptive clause, they are voting *against* state interests. If Congress, however thoughtlessly, expressly preempts state law, the courts should follow the stated intention – if the statute is otherwise constitutional.

In order to strengthen federalism, some mechanism must be in place to focus the attention of members of Congress on preemption when voting. If the preemption issue is not "red flagged," it is less likely to become a matter of debate. Section 8 of the bill attempts to address this issue. It requires a report or statement from the committee justifying preemption.

The requirement of Section 8(a)(2), which addresses this matter of justification, needs some clarification. The subsection requires a statement which "describes the constitutional basis for any preemption." As discussed above, the basic constitutional question involves the basis for the statute itself, for instance the Commerce Clause. If the Congress intends more than that state law give way when there is a direct conflict, then the impact on states of such a comprehensive federal program needs to be clearly understood. Congress, within limits, certainly has the power to pass broader legislation than it might have chosen -- see *McCulloch v. Maryland*[35] and *Federalist 32*.[36] Thus, the subsection should provide that the required statement 1) cite the specific enumerated power(s), e.g., the Commerce Clause, giving Congress power to pass the statute and 2) insofar as state law does not directly conflict with the statute, why it is "necessary and proper" to displace state law.

In fact, the reference to the "necessary and proper" clause could be used to replace the next subsection, 8(a)(3), which requires "the reasons" for each preemption. The "necessary and proper" clause is not only a sword to expand congressional legislation, but a constitutional shield for members of Congress to argue on general federalism grounds that proposed legislation is

constitutionally not "necessary or proper."[37] The proposed required statements could serve to increase the level of constitutional discussion in Congress on pieces of legislation which are often treated as mere policy questions. Such a development might thereby help to correct the mistaken belief that constitutional debate belongs only in the courts.

Adopting the proposed rules of construction and impact statement would not only make Congress' preemption clear for every bill but also make the legal system more efficient and predictable by providing judges and potential litigants clear rules, thereby greatly reducing preemption litigation. I recognize the ability (the power, not the right) of judges effectively to nullify any such provision if they are so inclined to exercise their will. In addition to the good faith of most judges and the advocacy of those defending the clear statement of preemption rules, however, there is the reality that judges have a strong interest in moving litigation through their courts. Therefore, many will welcome the proposals in this legislation as an unusual instance in which Congress has simplified their work.

Indeed, the clearer Congress can be in any legislation, the less it leaves to be delegated to administrative agencies. With less delegation, administrative agencies have less discretion. That is the reason for Section 9(b), which prevents agencies from preempting state law unless Congress has so specified in the legislation. As questionable at it sometimes may be as to the power of Congress to preempt, for administration agencies to do so without clear authorization of the Congress even more clearly subverts federalism.

V. CONCLUSION

The provisions in the Federalism Act of 1999 are long overdue. They will definitely make an important contribution to stemming the erosion of federalism. It is a good beginning.

ENDNOTES

1. Alden v. Maine, 1999 WL 412617 (U.S.); College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 1999 WL 412639 (U.S.); Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 1999 WL 412723 (U.S.).

2. *See* Michael Horowitz, *Impact of Federal Actions on States and Localities* (Congressional Testimony given 7/28/98; www.house.gov/reform/neg/hearings/testimony/horowitz.pdf).

3. THE FEDERALIST PAPERS at 322 (C. Rossiter, ed. 1961) [hereinafter THE FEDERALIST PAPERS].

4. *Id* at 246.

5. *Id* at 323.

6. 14 U.S. 304 (1816).

7. 22 U.S. 1 (1824).

8. 17 U.S. 316 (1819).

9. THE FEDERALIST PAPERS at 197-201.

10. 312 U.S. 52 (1941).

11. 430 U.S. 519 (1977).

12. 350 U.S. 497 (1956).

13. *See, e.g.*, Landgraf v. USI Film Products, 511 U.S. 244 (1994).

14. "In the final analysis, there can be no one crystal clear distinctly marked formula," Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

15. THE FEDERALIST PAPERS AT 198-99. The quote continues:

> These three cases of exclusive jurisdiction in the federal government may be exemplified by the following instances: The last clause but one in the eighth section of the first article provides expressly that Congress shall exercise "*exclusive legislation*" over the district to be appropriated as the seat of government. This answers to the first case. The first clause of the same section empowers Congress "*to lay and*

> *collect taxes, duties, imposts, and excises";* and the second clause of the tenth section of the same article declares that *"no State shall* without the consent of Congress *lay any imposts or duties on imports or exports,* except for the purpose of executing its inspection laws." Hence would result an exclusive power in the Union to lay duties on imports and exports, with the particular exception mentioned; but this power is abridged by another clause, which declares that no tax or duty shall be laid on articles exported from any State; in consequence of which qualification it now only extends to the *duties on imports.* This answers to the second case. The third will be found in that clause which declares that Congress shall have power "to establish an UNIFORM RULE of naturalization throughout the United States." This must necessarily be exclusive; because if each State had power to prescribe a DISTINCT RULE, there could not be a UNIFORM RULE. THE FEDERALIST PAPERS at 198-99.

16. *Id* at 201-05. *See also* Federalist 23 at 152-57 and Federalist 31 at 193-97.

17. *See* David M. Sprick, *Ex Abundanti Cautela (Out of an Abundance of Caution): A Historical Analysis of the Tenth Amendment and the Continuing Dilemma over 'Federal' Power*, 27 Cap. U. L. Rev. 529, 534 (1999).

18. *Supra*, note 8.

19. THE FEDERALIST PAPERS at 198-99.

20. 1 Cranch (5 U.S.) 137 (1803).

21. *Supra*, note 8.

22. THE FEDERALIST PAPERS at 300-25.

23. *Id* at 320.

24. 426 U.S. 833 (1976).

25. 469 U.S. 528 (1985).

26. 505 U.S. 144 (1992).

27. 521 U.S. 98 (1997).

28. 469 U.S. 528 at 554 (1985).

29. THE FEDERALIST PAPERS at 240-46.

30. H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 897 (1999).

31. Fidelity Savings and Loan Assoc. v. de La Cuesta, 458 U.S. 141 (1982).

32. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

33. *See, however*, American Trucking Associations, Inc. v. United States Environmental Protection Agency, 1999 WL 300618 (D.C. Cir.) (1999), a rare case finding that construction of the Clean Air Act on which the Environmental Protection Agency had relied was an unconstitutional delegation of legislative power.

34. 462 U.S. 919 (1983).

35. *Supra*, note 8.

36. THE FEDERALIST PAPERS at 197-201.

37. *Cf.* John S. Baker, Jr., *Nationalizing Criminal Law: Does Organized Crime Make It Necessary or Proper?* 16 RUTGERS L. J. 495 (1985).

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STATEMENT FOR THE RECORD

ON

"THE FEDERALISM ACT OF 1999"

BEFORE

**THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON GOVERNMENT REFORM
SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH, NATURAL RESOURCES, AND REGULATORY AFFAIRS**

BY

**DANIEL M. SPRAGUE
EXECUTIVE DIRECTOR
THE COUNCIL OF STATE GOVERNMENTS**

JUNE 30, 1999

Daniel M. Sprague
Statement for the Record

United States House of Representative
Committee on Government Reform
Subcommittee on National Economic Growth,
Natural Resources, and Regulatory Affairs

Introduction

Thank you Mr. Chairman and distinguished members of the Committee for allowing me the opportunity to provide you with testimony on "The Federalism Act of 1999" (H.R. 2245). As the Executive Director of The Council of State Governments (CSG), I present my testimony today on behalf of state officials representing all three branches of state government -legislative, executive, and judicial branches of state governments - of all 50 states and U.S. territories. CSG is an organization whose individual members are involved daily in conducting the peoples' business at the state level.

H.R. 2245 is the product of many months of a bi-partisan Congressional effort to address federal preemption of state law by both Congress and the Administration. I want to thank Chairman McIntosh and Reps. Mike Castle, Gary Condit, Tom Davis, Karen McCarthy, Jim Moran, and Rob Portman, as well as their dedicated staff members for their commitment to introducing a bi-partisan bill that would require thorough consideration of preemptive measures and an explicit statement of Congressional or Administrative intent. We look forward to working with you both, and the members of the Committee, to pass this legislation in a bi-partisan effort and to have it signed into law by the President.

Preemption has been the number one assault on the powers and authority returned by the states and local governments throughout the Constitution. While the Unfunded Mandates Reform Act of 1995 (UMRA) made significant strides to prevent the federal government from imposing unfunded mandates on state and local governments, state governments have been victim to unprecedented usurpation of traditional state powers. In some cases, preemption may be necessary for the federal government to accomplish a specific goal, but preemption should never occur without in-depth consultation among all levels of government. We believe we are a partnership of federal, state, and local leaders, and we must be able to ensure that government is working effectively and appropriately at all levels and with the proper and necessary communication to sustain a partnership.

Preemption of States and local government means that government cannot work appropriately to create solutions to regional or local problems or to develop innovative solutions. Preemption also means that citizen needs and demands are not being met, because Washington, D.C. often thinks a "one size fits all" law will work better. We are not a nation of averages and aggregates; we are a nation of great diversity and distinctions. For these reasons State elected and appointed officials have a hard time justifying why states must spend so much time, energy, money, and effort on matters unrelated to the needs of it's people to satisfy federal requirements.

States have shown that they can manage complex problems and put innovative ideas to work, reconnect the American people with their government, and coordinate governance efforts with all levels and branches of government. However, the federal government continues to limit state and local authorities in a variety of areas despite widespread innovation at state and local levels.

Impact of the Current State of Federalism on Preemption

Federalism and devolution, as you well know, represent a cornerstone of our nation's underlying democratic principles. The 10th Amendment to the Constitution of the United States recognizes the uniqueness that continues to exist and thrive in each and every state in America. More importantly, the 10th Amendment acknowledges that the states have the authority and the ability to minister to their own exigencies.

When our forefathers debated how our nation would be governed, they devised a clear set of principles that defined the roles and responsibilities of the federal government and state governments. Yet, increasingly in recent years, adherence to those principles has eroded.

While the procedures that UMRA instituted to assess intergovernmental mandates appear to be preventing some mandates on state and local governments, preemption of traditional state authority granted by the Constitution remains a problem on the federal level, in addition to mandates brought forward by regulations. Although UMRA does not address preemptions, they are indeed mandates on state's authority. The trend in recent years has been for both Congress and administrative agencies to preempt state and local government authority and CBO has not reviewed any bills during this session of Congress that would exceed the UMRA mandates threshold of $50 million or more. Nonetheless, preemptions are the real problem our state communities are facing.

In the past year alone, we have seen more preemption of state authority than ever before. Some of the most preemptive measures on state governments include the following bills that were signed into law during the second session of the 105th Congress:

- "The Internet Tax Freedom Act" (P.L. 105-277) places a three-year moratorium on state and local sales tax application on internet tax sales and appoints a commission to study the issue with the intent of making recommendations for Congress to consider at the end of the moratorium. CBO was unable to provide a cost number to the amount that state and local governments would lose because of the moratorium. Therefore, the bill was determined not to meet the mandate threshold.
- "The Transportation Equity Act for the 21st Century" (TEA-21) (P.L. 105-178) preempts states or local laws that are different from federal regulations on liability for using drivers' safety records in hiring motor carrier drivers.
- "The Credit Union Membership Access Act" (P.L. 105-219) preempts state laws regulating credit unions and establishes national safety, soundness, and audit requirements.
- "The Securities Litigation Uniform Standards Act of 1998" (P.L. 105-353) preempts state securities laws so that class action lawsuits involving certain types of securities fraud can be maintained only in federal courts.

Currently, Congress is considering the following bills that would preempt state and local governments. The following bills under Congressional consideration would preempt areas where states have traditional authority or state law and replace it with "one size fits all" federal law:

- S. 655, "The National Salvage Motor Vehicle Consumer Protection Act of 1999" would require uniform national titling and registration requirements for salvage, rebuilt, and non-repairable passenger vehicles. States receiving federal grants to implement the national standard would have to follow nationally uniform disclosure and labeling procedures and would have to make titling information available to the proposed National Motor Vehicle Title Information System.
- H.R. 1691, "The Religious Liberty Protection Act of 1999", would preempt state and local governments from applying zoning ordinances to religious-based land-uses under certain criteria.
- S. 573, S. 587, S. 881, and H.R. 1941 would set privacy standards for medical records as required under the August 1999 deadline set by the "Health Insurance Portability and Accountability Act of 1996 (HIPAA)". The bill would preempt existing state privacy laws if the state law was not as strong as federal law and possibly cause complications in the payment of state workers' compensation claims that would result in penalties to states.
- H.R. 448, "The Patient Protection Act of 1999," and H.R. 1496, " The Small Business Access and Choice for Entrepreneurs Act" would exempt association health plans (AHPs) and certain multiple employer welfare arrangements (MEWAs) from state insurance standards.
- H.R. 1501, "The Juvenile Offenders Act of 1999" was passed by the House and is awaiting conference committee action. A provision of this bill would reduce the Juvenile Accountability Block Grant funds by 10 percent if a state does not have a law in effect that would suspend, until the age of 21, the driver's license of a juvenile who illegally possesses or commits a crime with a firearm. This provision would preempt state laws and penalize states that do not comply with the federal standard.
- S. 254, "The Violent and Repeat Juvenile Offender Accountability and Rehabilitation Act of 1999" and the aforementioned H.R. 1501 are awaiting conference committee action. Provisions in both bills would penalize states that do not have state laws that meet a set of federal set criteria, known as "Aimee's Law," in truth-in-sentencing laws directed towards violent offenders. States without state laws that meet the federal criteria would have to pay for the costs of incarceration, prosecution, and apprehension of a violent offender who is released and commits a violent crime in another state.
- S. 331, "Work Incentives Improvement Act" was approved by the Senate, but funding sources for expanded benefits are unclear. The bill would extend federal health benefits to persons who leave the disability rolls to return to work. States now contribute to portions of this funding and any increases may result in increased contributions by the state, which would be decided on a state-by-state basis. The bill includes provisions that would provide for optional programs for states that would result in greater state spending if they chose to participate, as well as additional grants to states for specific programs.

As you can see by our long but incomplete list, state and local governments need legislation comparable to UMRA to address preemptions and the process by which preemptions are addressed both legislatively and by the Administration. We believe that

now is the time to enact legislation to reinvigorate and reinforce the partnerships among the federal, state and local governments to ensure the American people are the benefactors of a strong, united, and adaptive effort to address and solve the problems that confront our great country. At the dawn of the new century, we must solve the problems that face our country in the decades ahead.

Passage of H.R. 2245 is Essential to State and Local Governments for the 21st Century

- This bill will protect the principles of federalism and promote intergovernmental partnerships, which are the key to successful governance in the United States;
- This bill places the **same requirements on both the Administrative and Legislative branches** of federal government and requires that state and local governments be consulted in advance of passage of legislation or issuance of regulations that would preempt state or local government authority;
- This bill codifies existing federal Executive Orders that would require federalism impact assessments to identify preemptions and the extent of preemptions by both Administrative agencies and the Congress when proposing regulation or bills;
- This bill would require the Congressional Budget Office (CBO) to prepare a bi-annual report on preemptions impacting state and local governments; and
- This bill would implement a "rule of construction" to prevent any law or regulation from being enacted that preempts state and local governments unless the statute expressly states that such preemption is intended, or unless there is a legitimate conflict between the federal law or regulation and state and local laws.

Recommendations for H.R. 2245

While both Chairman McIntosh and the other co-sponsors of the bill were careful to consider all suggestions from state and local governments while drafting this bill, we would respectfully suggest the following provisions be given thorough consideration as the Committee discusses H.R. 2245:

- The bill would be stronger if it included a Congressional "Point of Order", similar to the procedure that may be raised by members under UMRA. Allowing members of Congress to raise the question of whether a bill's intent to preempt goes too far would allow for significant discussion prior to floor debate or for floor debate to discuss the nature and intent of the preemption. The UMRA "Point of Order" is now used infrequently, and yet it forces more discussion among Members of Congress before floor debate occurs. The "Point of Order" would allow for more clarity about what Congress truly intends and could prevent future lawsuits where the intent of preemption is ill-defined; and
- By providing Administrative or Judicial Review, the same type of clarification and enforcement would occur for regulations promulgated by the Administration. Enforceability is a significant problem with current Executive Orders, especially the preparation of agency federalism assessments. CSG assisted GAO with a recent review where GAO found that the agencies only did 5 federalism assessments for

over 11,000 rules under Presidential Executive Order 12612, which has been in effect since it was issued by President Reagan in 1987. For example, the Environmental Protection Agency (EPA) never even mentioned the Executive Order or completed a single federalism assessment, when clearly rules impacted state and local governments. We would suggest that administrative or judicial review provide the same kinds of protections to state and local governments that are afforded to small businesses and small entities in the Small Business Regulatory Enforcement Act (SBREFA) (5 USC Sec. 611). This process would provide clarity and the opportunity for corrective actions if necessary; and

CSG's Involvement with Federalism

A strong belief in our federalist system has been a cornerstone in CSG's philosophy. Our commitment to sharing to these principles was reinvigorated at a summit convened in November of 1997, following enactment of the Unfunded Mandate Reform Act of 1995 (UMRA).

At the prompting of Governor Michael O. Leavitt of Utah, CSG's President at the time, a meeting held in conjunction with the American Legislative Exchange Council, the National Conference of State Legislatures and the National Governors' Association, was convened to develop state consensus on historic devolution of moving greater responsibility from the federal to the state governments.

Then, as now, states faced a variety of challenges and opportunities as they approached varying degrees of federal restriction. After vigorous discussion and debate, the summit produced an eleven-point plan aimed at improving the balance, the accountability, and the effectiveness of the state-federal partnership.

Attached is a copy of the eleven points advocated at the conclusion of this historic state leadership meeting. In essence, the principles voted on and passed at the meeting include: requiring Congress to justify its constitutional authority to enact each given bill; limiting and clarifying federal preemption of state law and federal regulations imposed on states; streamlining block grant funding; and simplifying financial reporting requirements. In light of these principles, we are advancing the suggestion above for inclusion in H.R. 2245.

Conclusion

We feel very much today as our state leaders did when at the 1997 conference on federalism, that "In order for our country to be an innovator at home and leader abroad in the 21st century, it is imperative that our unique federal partnership devise improved divisions of labor and achieve strategic intergovernmental restructuring best suited to the changing public policy circumstances that confront us."

Devolution continues to advance a positive effect on the delivery of government programs and services as states compete with one another to devise the best systems. Its

impact on the political process, however, will be equally profound: nothing less than a restoration of the American people's confidence in their government.

We cannot restore this confidence without a partnership of elected and appointed government officials that incorporates open communication, consultation on the law-making and regulatory process, and enforcement of principles that protect state and local authorities.

In conclusion, I strongly encourage you to enact this legislation as swiftly as possible to strengthen the federalism partnership in this country and improve the effectiveness of the federalist system as we enter the 21st century. On behalf of our CSG's state legislative, executive, and judicial branch members, thank you again for this opportunity to comment on your deliberations. We look forward to working closely with you towards passage and implementation of this legislation.

FEDERALISM STATUTORY PRINCIPLES AND PROPOSALS

This paper highlights 11 statutory approaches designed to bring better balance and greater accountability to the state-federal partnership. Many of these proposals were developed and endorsed as part of the States' Federalism Summit, convened in October 1995. Each proposal addresses the ways in which Congress goes about its policy setting business vis-à-vis the states. The proposals could be combined into an omnibus State-Federal Partnership Act or could be introduced singly or in some combination.

PROPOSALS

I. **Declaration and Justification of Constitutional Authority.**

Require Congress, as part of considering any new or reauthorizing legislation, to declare and justify its constitutional authority to enact each given bill. This provision in all bills requires Congress to treat the Tenth Amendment as an integral, living part of the Constitution. (This procedure was made a part of recent changes to the committee rules of the House). The United States v. Lopez decision ensures that congressional members understand and acknowledge specific limits to federal powers rather than assuming general power to enact any bills deemed appropriate at the moment. In addition, the Supreme Court upheld this principle in the Printz v. United States and New York v. United States decisions, which reinforce the idea of dual sovereignty.

II. **Limit and Clarify Federal Preemption of State Law.**

Preemption is the partial or total displacement of state laws and/or local ordinances by federal laws and/or agency rules under the supremacy clause of the US Constitution. Since more than half of all explicit federal preemptions of state laws enacted by Congress in our 208-year history have been enacted only during the past 30 years, it seems necessary now to: require bill sponsors to examine the impacts of proposed preemptions on states; increase consultation with states; and, to require clear disclosure of intent to preempt with appropriate notice to states. This proposal ensures increased awareness of proposed preemptive activity, and requires regular review and justification of existing preemptions. For decades, the Supreme Court has been unwilling to find preemption of state authority unless there is a clear and manifest congressional intent to preempt.

III. **Prohibiting Federal Conscription and Coercion of State Governments.**

The growing practice of Congress forcing states to carry out federal programs or to enact state laws in accordance with federal rules could be prohibited by a statutory provision holding that no state shall be obligated, without its consent, to enact or enforce any state law or regulation pursuant to, or **administer** any federal regulatory program imposed by, a law enacted by Congress. This same principle

was upheld by the Supreme Court in the New York v. United States and Printz v. United States decisions.

IV. **Points of Order on the House and Senate Floor.**
An Omnibus Federalism bill could provide for a point of order to lie against any bill that does not comply with the citation of constitutional authority provision, ensuring all members consider the federalism implications of legislation. The Unfunded Mandates Reform Act of 1995 (UMRA) already provides this specific procedure for unfunded mandates. This could be expanded to include challenges to constitutional authority.

V. **Consolidating Categorical Programs into Block Grants.**
Working with state legislators and governors, Congress and the President should accelerate the recent trend toward consolidation of categorical programs into block grants. Block grants have proven to be effective mechanisms for tailoring programs to the unique needs of the 50 states. Legislation creating block grants should be encumbered with regulations, restrictions or earmarks. Block grants should not preempt state laws and procedures; they should avoid "set-asides." Block grant legislation should reduce front-end paperwork and post-audit requirements and establish minimal reporting requirements emphasizing outcomes, rather than process. They should embrace the discretion of state policymakers.

VI. **Protecting State Laws and Procedures in Expending Federal Funds.**
In light of states' concerns that federal rules often direct states to expend federal funds in ways that complicate, contradict, or conflict with state laws and procedures governing the states' own expenditures, this proposal would clarify that any funds received by a state after the date of enactment of the federalism statute will be expended only in accordance with the laws and procedures applicable to expenditures of a state's own revenues.

VII. **Prohibiting Conditions of Federal Aid not Germane to Aid Purposes.**
Since the 1960's, Congress has increasingly attached conditions to federal-aid programs that are not germane to the original purpose of programs that allow Congress to assert powers not delegated to it through the federal Constitution. These have been upheld in court based on the "voluntary" nature in which states accept federal aid, even though states cannot realistically refuse such aid. This proposal states that no condition on the receipt of federal funds by a state, imposed by or pursuant to a law enacted by the Congress, shall be valid unless the condition is stated clearly, is strictly germane to the purpose of the grant-in-aid, and does not more than specify the purposes for which, or manner in which, the funds are to be spent by the state.

VIII. **Clarify the Intent of the Unfunded Mandates Reform Act.**
The 1995 UMRA law needs to be clarified in a few areas; how to interpret its definition of "mandate" with respect to caps on, or reductions in, federal funding for large entitlement grant programs where states have some compensatory

flexibility; whether the effects a bill may have on the costs of existing mandates should be counted as the costs of a mandate under UMRA; and how to estimate the direct costs of extending the life of an expiring mandate.

IX. **Requiring Congressional and Executive Federalism Impact Statements.**
In the same vein as the Environmental Impact Statements that are now required when a road construction project is proposed, Federalism Impact Statements can be required (for which precedent has already been established by Executive Order 12612) that will force Congress to prepare such statements in consultation with elected state and local officials on all bills that may have an effect on the distribution of powers and responsibilities in the federal system; and which require executive branch agencies and independent agencies to prepare such statements on all proposed rules.

X. **Federal Regulatory Streamlining.**
Federal regulations cost hundreds of billions of dollars each year. However, the rulemaking process is often a mystery to the general public, and many stakeholders agree that cost-benefit analysis and comparative risk assessment, plus greater public access to the information which is part of agency decisionmaking, would improve regulatory efficiency.

According to the U.S. General Accounting Office (GAO), of 129 regulatory actions it has reviewed at four major regulatory agencies (EPA, HUD, DOT, OSHA), fewer than 25 percent had a clear and simple document available illustrating changes made during the rulemaking process-which is overseen by the Office of Information and Regulatory Affairs.

A regulatory reform bill is needed to improve quality and accountability in rulemaking through cost-benefit analysis and risk assessment, peer review of methodologies, as well as a process for reviewing existing rules. (Note: Senators Fred Thompson (TN) and Carl Levin (MI) have introduced a bipartisan compromise Regulatory Improvement Act, S. 981, which would implement most of the improvements states seek.)

XI. **Federal Financial Reporting Simplification.**
There are over 600 different federal financial assistance programs to implement domestic policy. Each as extensive federal administrative requirements, which are often duplicative, burdensome or conflicting, thus impeding cost-effective delivery of services at the state and local levels. A bill designed to streamiine procedures for application and reporting requirements and to simplify paperwork associated with federal domestic financial assistance is necessary. (Note: Sen. John Glenn (OH) has circulated a draft Federal Financial Assistance-Management Improvement Act to achieve many of the financial management reporting reforms states are seeking.)

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

June 29, 1999

Honorable David McIntosh
Chairman of the Subcommittee on National Economic
Growth, Natural Resources, and Regulatory Affairs
Committee on Government Reform
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative McIntosh:

The Administration has begun its review of H.R. 2245, the Federalism Act of 1999, which you and Representative Moran recently introduced. Although we have not completed our analysis, we have prepared some preliminary observations.

H.R. 2245 represents a serious effort to guide relations between the Federal government and the states and localities. However, based on our initial review, we believe that it could have the unintended effect of burdening the agencies' efforts to protect safety and health and the environment by imposing new and potentially very broad administrative requirements on their activities. These requirements would go beyond the Unfunded Mandates Reform Act which we supported and are implementing. Furthermore, the provisions could stop or delay entirely legitimate activities by generating extensive litigation and review.

A letter from the Department of Justice is attached which outlines some specific concerns on two issues raised by the bill, judicial review and pre-emption. In addition, it is our understanding that the agencies will be given an opportunity within the next week or so to provide this Subcommittee with additional views about the impact this bill would have on them.

We appreciate the opportunity to share our preliminary views at this early stage in your consideration of H.R. 2254. We hope to have further comments as we consider the implications of the bill government-wide.

Sincerely,

Deidre A. Lee
Acting Deputy Director for Management

06/29/99 TUE 12:53 FAX 202 514 9353 DOJ OLA 002

U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

June 29, 1999

Honorable David McIntosh
Chairman
Subcommittee on National Economic
Growth, Natural Resources, and Regulatory Affairs
Committee on Government Reform
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

The Department of Justice has begun its review of H.R. 2245, the "Federalism Act of 1999," which you and Representative Moran recently introduced. Although we have not completed our analysis, we have prepared some preliminary observations. Based on our initial review, we believe that the most substantial changes to current law would result from section 7, which would establish new requirements for agency rulemaking, and section 9, which would establish new rules for determining the effect of Federal statutes and regulations on State governmental authority. This letter addresses these two provisions. We do not address other provisions of the bill. After further opportunity for review, we would be happy to do so.

Requirements for Agency Rulemaking

Section 7 of the bill would establish a series of new rulemaking requirements. Under section 7(a) each rulemaking agency would be required to consult with public officials of potentially affected governments -- defined to include State, local, territorial, and tribal elected officials and their representative organizations -- early in the process of developing any rule. Under section 7(b) rulemaking agencies would be required to publish in the Federal Register, in conjunction with the publication of any proposed, interim final, or final rule, a federalism assessment. Each federalism assessment would be required to identify any "preemption of State or local government authority," the constitutional and statutory basis for any such preemption, any condition that the regulation would impose on the receipt of Federal grant funds by State or local government that was not related to the purpose of the relevant Federal grant program, other provisions of the Federal regulation that "impact[ ] State or local governments," regulatory alternatives considered by the rulemaking agency, estimated costs

to State and local governments, and the extent of agency consultations with potentially affected public officials.

We are concerned about the potential for these new requirements to give rise to a large and costly new class of Federal lawsuits. Because the bill contains no express provisions respecting judicial review, it would appear that suits alleging section 7 violations could be filed under section 10(a) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 (1994), which gives a right of judicial review to persons "adversely affected or aggrieved by agency action" that is not otherwise reviewable. The effect of section 7 suits on the work of rulemaking agencies and the courts would depend in part on how the courts resolved a number of key interpretive issues.

One important set of questions concerns standing to sue. Courts would be called upon to determine who was entitled to challenge alleged violations of section 7 -- that is, whose claims were within the "zone of interests" that Congress intended to protect. Could suits be brought by State and local officials seeking to vindicate their interest in State and local autonomy, by regulated entities seeking to preserve a relatively permissive State-law regime from Federal preemption, or, conversely, by non-regulated entities seeking to preserve the benefits that they derive from relatively restrictive State-law controls on others? Compare Bennett v. Spear, 520 U.S. 154, 176-77 (1997) (ranchers and irrigation districts who suffered harm from government action taken to protect endangered fish were within the zone of interests protected by the Endangered Species Act for APA standing purposes). Additional questions involve the scope of the requirements imposed on rulemaking agencies and the remedies for failure to meet those requirements. Courts would have to determine, under the particular circumstances of each rulemaking, which public officials were entitled to notification and consultation as officials "potentially affected by the rule," and the nature and timing of the required notice and consultation.[1] Courts would also be required to give specific content to the bill's broad language concerning agency analyses of the preemptive effects of rules, constitutional and statutory authority for any such preemption, other "impacts [on] State or local governments," and potential costs to State and local

[1]The timing of notice and consultation would appear to present a particularly difficult problem. Section 7(a) instructs heads of heads of rulemaking agencies to notify and consult with potentially affected public officials "[n]ot later than the date of publication of an advance notice of proposed rulemaking . . ., or the equivalent date if such notice is not published." It is unclear how courts would determine such an "equivalent date" in litigation over the timeliness of notice and consultation.

government. Where a rulemaking agency was found to have violated section 7, courts would be required to determine an appropriate remedy -- to determine, for example, whether to issue an injunction blocking implementation of a Federal regulation. Judicial interpretation of section 7 in each of these critical areas would be informed by section 9(c) of the bill, which directs that ambiguities in the Federalism Act (as well as in may other Federal statutes and regulations) "be construed in favor of preserving the authority of State and local governments."

Congress, in a number of contexts, has provided statute-specific judicial review provisions instead of allowing APA review to apply by default. For example, the Unfunded Mandates Reform Act of 1995 ("UMRA"), requires rulemaking agencies, before promulgating certain rules that impose Federal mandates, to prepare a written statement analyzing the effects of the mandate and describing agency responses to concerns expressed by State, local, and tribal governments. See 2 U.S.C. §§ 1532-1533 (Supp. III 1997). UMRA authorizes a court to order agencies to prepare reports if they have failed to do so, but expressly prohibits courts from staying, enjoining, or invalidating regulations as a remedy for violation of the report requirement. Id. § 1571 (Supp. III 1997); see Associated Builders & Contractors, Inc. v. Herman, 976 F. Supp. 1 (D.D.C. 1997) (claim that agency rulemaking violated UMRA cannot provide a basis for invalidation of the rule). In view of the substantial costs that APA review of section 7 claims could impose on courts and Federal agencies, we think it is essential for Congress, if it determines that some form of judicial review of agency compliance with federalism consultation and reporting requirements is necessary, to give careful consideration to alternative approaches, such as the judicial review provisions of UMRA.

Rules of Construction

Section 9 of H.R. 2245 would establish new rules for determining the effects of Federal statutes and regulations on the authority of State and local governments. Sections 9(a) and (b), if enacted, would alter the judge-made rules under which courts currently ascertain congressional intent to preempt State law by statute or to authorize preemption of State law by regulation. Section 9(c) would operate more broadly, directing that any ambiguity in any Federal law enacted after the date of enactment of the Federalism Act, and any regulation promulgated after that date, would be "construed in favor of preserving the authority of State and local governments." Although we are still evaluating their potential implications, we believe that each of these provisions raises questions warranting careful evaluation.

Under current Supreme Court doctrine, determining the

preemptive force of Federal statutes involves determining the intent of Congress with respect to preemption. Congressional intent to preempt can be stated explicitly, in the terms of a statutory provision addressing preemption (express preemption), or conveyed implicitly, through the establishment of Federal law that conflicts with State law (conflict preemption) or that occupies an entire field and leaves no room for State lawmaking (field preemption). English v. General Elec. Co., 496 U.S. 72, 79 (1990); accord Boggs v. Boggs, 520 U.S. 833, 839-41 (1997). Conflict preemption occurs where Federal law and State law are in direct conflict or where State law stands as an obstacle to the achievement of Federal objectives. English v. General Elec., 496 U.S. at 78. Field preemption occurs where Congress's creation of a pervasive system of Federal regulation makes it reasonable to infer "that Congress left no room for the States to supplement it,' or where an Act of Congress 'touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" Id., 496 U.S. at 79 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). The doctrine of field preemption has formed the basis for Federal preemption of State law in a number of important areas. Noteworthy examples include nuclear safety, see Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 212-13 (1983), collective bargaining, see Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 750-51 (1985), commerce with Indian tribes based on reservations, see Department of Taxation and Fin. of New York v. Milhelm Attea & Bros., Inc., 512 U.S. 61, 73 (1994), and the registration of aliens, see Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

Section 9(a) would alter the rules under which courts infer congressional intent to preempt by statute. No Federal statute enacted after the effective date of the Federalism Act would preempt State law unless the statute contained an express statement of Congress's intent to preempt or there was a "direct conflict" between the Federal statute and State law so that the two could not "be reconciled or consistently stand together." Id. The rule of construction established by this provision would apparently require that later enacted statutes be construed without reference to the current doctrine of field preemption and to impose significant new limits on conflict preemption.[2] This

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[2]The Supreme Court has stated that conflict preemption and field preemption should not be viewed as "rigidly distinct" categories and has suggested that "field preemption may be understood as a species of conflict preemption," since State law operating within a preempted field can be seen to conflict with Congress's intent to exclude State regulation. English v. General Elec., 496 U.S. at 79 n.5. Section 9(a) of H.R. 2245, by

change is made necessary, according to the findings section of H.R. 2245, by Federal court preemption rulings that have applied current doctrine to produce results "contrary to or beyond the intent of the Congress." H.R. 2245, § 2(5).

It is not clear which applications of implied preemption doctrines are viewed as having gone beyond the intent of Congress. Moreover, Federal court decisions involving field preemption and obstacle conflict preemption generally have demonstrated a strong commitment to the avoidance of preemption that is not necessary to the achievement of clear statutory objectives. For example, the Supreme Court has determined that Federal law occupies the field of nuclear safety regulation, but does not preempt State regulation of nuclear utilities that does not bear directly on safety, see Pacific Gas & Elec., 461 U.S. at 212-13; that the National Labor Relation Act occupies the field of collective bargaining, but not the field of labor relations in general, see Metropolitan Life, 471 U.S. at 750-51; and that Federal laws concerning commerce with Indian tribes displace some State laws touching on tribal commerce, but do not prevent States from subjecting reservation retailers to burdens reasonably tailored to the collection of State taxes from non-Indians, see Department of Taxation and Finance of New York, 512 U.S. at 73. In addition, under both conflict and field preemption doctrines, the burden that must be borne by the proponent of preemption varies with the setting. In areas of traditional State primacy, the Supreme Court has stated that neither conflict preemption nor field preemption should be inferred in the absence of clear and manifest evidence of congressional intent to obtain this result. See California v. ARC America Corp., 490 U.S. 93, 101 (1989) (describing "presumption against finding pre-emption of state law in areas traditionally regulated by the States").

More importantly, it seems far from clear that greater reliance on express preemption provisions in Federal statutes will produce better results. It can be extremely difficult to craft express preemption provisions that achieve the desired balance between Federal and State authority, particularly in far reaching, long-lived Federal statutes. As a result, detailed express preemption provisions may be prone to overinclusiveness, displacing State law where such displacement is not truly necessary, or underinclusiveness, undermining the effectiveness

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confining implied preemption to situations involving "a direct conflict" between irreconcilable or inconsistent directives, would appear to foreclose continued recognition of field preemption as a subclass of conflict preemption.

of Federal law by failing to displace antithetical state law.[3]

The enactment of H.R. 2245, moreover, would not prevent a later Congress from instructing that the preemptive effects of a particular statute should be determined, notwithstanding section 9(a), by reference to traditional implied preemption doctrines. Indeed, one difficult set of interpretive difficulties that would likely arise in the implementation of section 9(a) -- and the other rules of construction found in section 9 -- would involve disputes as to whether Congress implicitly intended to exempt particular statutes from the section 9 rules of construction. For example, if a subsequent Congress enacted a law that established a pervasive Federal regulatory regime and that demonstrated a clear, but not express, intent to preempt, courts might well conclude that the later enactment implicitly repealed the section 9(a) limitation on field preemption. Such difficult interpretive issues would introduce a form of confusion not present under current Supreme Court preemption doctrine.

Section 9(b)'s proposed changes to current regulatory preemption doctrine raise concerns parallel to those raised by section 9(a)'s proposed changes to current statutory preemption doctrine. The Supreme Court has stated that "in proper circumstances, [a Federal] agency may determine that its authority is exclusive and pre-empt[ ] any state efforts to regulate in the forbidden area," City of New York v. FCC, 486 U.S. 57, 64 (1988). In describing these "proper circumstances," the Court has rejected the notion that the rulemaking agency must demonstrate that Congress specifically considered the question of regulatory preemption and decided to confer this authority on the rulemaking agency. Justice White, writing for a unanimous Court in City of New York, described the test of agency authority to preempt by regulation in the following terms:

It has long been recognized that many of the

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[3]Indeed, some of the harshest criticism of Federal preemption has focused on perceived excesses of preemption under express statutory provisions, such as section 514(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144(a) (1994) (preempting most State laws that "relate to" employee benefit plans regulated by ERISA), and section 4(a) of the Airline Deregulation Act of 1978, as amended, 49 U.S.C. § 41713(b)(1) (1994) (preempting State law "related to price, route, or service of an air carrier"). See, e.g., Nicole Weisenborn, ERISA Preemption and Its Effect on State Health Reform, 5 Kan. J.L. & Pub. Pol'y 147, 147 (Fall 1995) (ERISA preemption has had "extremely detrimental effects," depriving "employees of benefits that the federal government never intended to take away").

> responsibilities conferred on federal agencies involve a broad grant of authority to reconcile conflicting policies. Where this is true, the Court has cautioned that even in the area of pre-emption, if the agency's choice to pre-empt "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." United States v. Shimer, 367 U.S. 374, 383 (1961).

City of New York, 486 U.S. at 64.

Section 9(b) would alter the Supreme Court standard for determining whether rulemaking agencies possess the authority to issue preemptive regulations. Federal rules issued after the effective date of H.R. 2245, under statutory authority enacted after that same date, could not preempt State law unless Congress had expressly stated its intent to authorize such regulatory preemption. Congressional intent to authorize preemptive Federal regulations could never be inferred, no matter how compelling the evidence that Congress implicitly intended to authorize regulatory preemption (unless a court were to conclude that Congress's implied intent to authorize preemptive regulations was so clear as to demonstrate a complementary intention to exempt the new law from the application of section 9(b)). Indeed, even if a statute were construed to preempt State law under the direct conflict clause of section 9(a), Federal regulations elaborating on preemptive statutory requirements would apparently be denied preemptive effect.

Under section 9(c), any ambiguity in H.R. 2245, or "in any other Federal rule issued or Federal statute enacted" after the enactment of H.R. 2245 would "be construed in favor of preserving the authority of State and local governments." The potential implications of an instruction of this sweeping scope are difficult to assess, although the potential for far reaching and unanticipated consequences is pervasive. It is unclear, for example, how section 9(c) might affect the operation of the Dormant Commerce Clause, which forbids States from imposing certain burdens on interstate commerce in areas where Congress has not acted affirmatively either to authorize or to prohibit State activity. See Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 35 (1980). Would the resolution of ambiguities in favor of State authority alter judicial assessments of whether particular Federal statutes or regulations should be regarded as authorizing State regulatory activity? More generally, it is unclear how this provision might affect the reach of new Federal statutes and regulations (with the exception of statutes and regulations that

seek to combat certain forms of discrimination, as provided in section 11). Would section 9(c) require adoption of the narrowest plausible reading of every such statutory or regulatory provision that potentially preempts State law on grounds that such a reading operates to preserve the greatest scope for State action? How would section 9(c) apply to statutory and regulatory language that, although ambiguous on its face, has been clarified by case law or administrative interpretation predating the enactment of section 9(c)? The breadth and generality of section 9(c) create a risk that unintentional ambiguities in Federal statutes and regulations, with unforeseen and tenuous connections to the balance between Federal and State power, could be used to frustrate the intentions of Congress and rulemaking agencies.

We appreciate the opportunity to share our preliminary views at this early stage in your consideration of H.R. 2254. We will be happy to elaborate on the concerns set forth here and may wish to raise additional concerns as we continue to examine the potential implications of this far reaching bill. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Jon P. Jennings
Acting Assistant Attorney General

cc: Honorable Dennis J. Kucinich
Ranking Minority Member

Honorable James P. Moran

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

July 16, 1999

ADMINISTRATOR
OFFICE OF
INFORMATION AND
REGULATORY AFFAIRS

The Honorable Henry A. Waxman
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Waxman:

On June 29, 1999, Deidre A. Lee, the Acting Deputy Director for Management, wrote Chairman David McIntosh, providing preliminary observations concerning H.R. 2245, the "Federalism Act of 1999," and attached a letter from the Department of Justice (DOJ) concerning judicial review and preemption. In view of my recent confirmation as OIRA Administrator, you have asked me to provide further views on this bill.

H.R. 2245 represents an effort to guide relations between the Federal government and state and local governments, an objective we all recognize is important. However, in its current form H.R. 2245 could have unintended but serious consequences. It could force agencies to divert resources from their primary missions and hinder efforts to protect safety, health, and the environment by imposing new bureaucratic requirements and by encouraging excessive litigation. In these respects, H.R. 2245 departs from the approach adopted in the Unfunded Mandates Reform Act, which the Administration supported and is now implementing. We believe that H.R. 2245 needs significant revision if it is to accomplish its goal effectively.

Section 7(a) would require each rulemaking agency, "[n]ot later than the date of publication of an advance notice of proposed rulemaking ..., or the equivalent date if such notice is not published," to "notify and consult with public officials who may potentially be affected by the rule for the purpose of identifying any preemption of State or local government authority ... ." Public officials are defined to include State and local elected government officials, as well as the seven national organizations currently representing such officials, the so-called "Big 7."

Section 7(b) would require agencies, when publishing any proposed, interim final, or final rule, to publish in the Federal Register a formal federalism impact assessment. Each would be required to include: (A) identification of any provision of the rule that preempts State or local government authority; (B) the constitutional basis for each such preemption; (C) any statutory provision which is an express preemption; (D) any provision in the rule which establishes a condition for a receipt of grant funds that is "not related to the purpose of the grant program;" (E) any other provision of the rule "that impacts State or local governments, including any provision that constitutes a Federal intergovernmental mandate" as defined in the Unfunded Mandates Reform Act; (F) any regulatory alternatives considered by the agency; (G) the estimated costs to be incurred by the State and local governments from the rule; and the extent of the agency's consultations with public officials "who may potentially be affected by the rule."

At the outset, I want to stress the burden on the agencies, if, as the bill provides, Federal agencies are required to publish this highly detailed federalism impact assessment for all rules -- including the more than 4600 final rules published each year. The vast majority do not have any federalism effect, and hence the "cost" of the thousands of required assessments greatly outweighs any possible "benefit."

More generally, the essential difficulty with Section 7 arises from how it chooses to pursue otherwise laudable aims. The intergovernmental consultation process described in Section 7 must take place *before* the rulemaking is first published in the Federal Register. As directed by the President in E.O. 12875 and the Unfunded Mandates Reform Act, agencies already reach out to State, local, and tribal governments and their representatives on a regular basis to hear their concerns and discuss important rulemakings. These discussions typically proceed in a spirit of intergovernmental partnership, often informally. If, however, we make these collegial, informal discussions subject to litigation and judicial review, the whole dynamic of these exchanges will change. Agencies will spend less time in consultation and exchange, and more time writing and reviewing meeting records and minutes of conversations, "just in case" the process must be litigated.

While some have argued that there are not a significant amount of issues inviting litigation, we respectfully disagree. Potential litigants might ask a Federal judge to decide a wide variety of new issues: For example, how much notice is legally adequate? What is an "equivalent date" if there is no advance notice of proposed rulemaking? What happens if there is an emergency and the agency must issue a direct final rule very quickly? If an agency conducts extensive consultations with some of the Big 7, can others of the Big 7 litigate their failure to be included? What about individual State or local governments that do not agree with positions taken by the Big 7? Do they each need to be invited to participate? What happens if a federalism impact assessment fails to identify several State statutes that would be preempted in part by an agency rulemaking? Would it then be defective? The agencies would have to consider, plan for, and determine how to resolve questions like these. This would take time.

For that matter, each agency would have to do more than just ensure that all of those who were supposed to be notified and consulted were satisfied with the agency's compliance with Section 7. Others affected by the rulemaking – including various special interests – potentially could challenge the rulemaking because they were not satisfied with that compliance. They might even do so just to hamstring the agency and slow down its regulatory efforts. Agencies would thus have an even broader group to consider when designing a consultation effort and would have to be even more sensitive to litigation risk. To avoid these adverse effects that arise from the threat of litigation, the Administration strongly urges that H.R. 2245 include a statutory bar to litigation and judicial review of agency compliance with its provisions.

The demand that H.R. 2245 would place on agency resources takes on more significance when viewed in the context of other developments in the regulatory arena during recent years. In the past six years, the President has supported legislation calling for a wide range of new administrative and analytical requirements – including the Unfunded Mandates Reform Act and the Small Business Regulatory Enforcement Fairness Act (including its amendments to the

Regulatory Flexibility Act). He also has issued Executive Orders calling for other new administrative and analytical requirements, including E.O. 12866, "Regulatory Planning and Review; E.O. 12875, "Enhancing the Intergovernmental Partnership;" and E.O. 13084, "Consultation and Coordination with Indian Tribal Governments." These recent statutes and Executive Orders are important efforts to improve the regulatory development process. The agencies recognize this and have generally proceeded in good faith to implement them while at the same time living within a balanced budget. However, doing so requires commitment of already limited agency resources -- we should be very selective in imposing new requirements.

There are other concerns with the bill. In its letter of June 29, DOJ focused on the serious difficulties posed by Sections 7 and 9 of H.R. 2245. Its discussion of preemption issues was particularly thorough and its analysis merits serious consideration. In separate letters, agencies have also noted that Section 5 might undermine the Federal government's accountability for the expenditure by states of Federal funds, and that Section 6 might impede the implementation of the Government Performance and Results Act, an act that both the Administration and the Congress have supported on a bipartisan basis.

Thank you for the opportunity to comment further on H.R. 2245. Please let us know if you have questions or would like to discuss these matters further.

Sincerely,

John T. Spotila
Administrator

cc: The Honorable Dan Burton
The Honorable David M. McIntosh
The Honorable Dennis J. Kucinich

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 16 1999

OFFICE OF CONGRESSIONAL AND
INTERGOVERNMENTAL RELATIONS

The Honorable Henry Waxman
United States House of Representatives
Washington, D.C., 20515

Dear Congressman Waxman:

Thank you for the opportunity to provide the Environmental Protection Agency's (EPA) views on H.R. 2245, the "The Federalism Act of 1999." This bill, if enacted, could have significant effects on EPA and our administration of federal environmental and health protection laws. We are continuing to evaluate the potential impacts of this bill and other similar legislation introduced in the Senate (S. 1214). This letter contains our preliminary evaluation, and we are restricting our comments to those provisions of the bill which would affect EPA directly. Overall, we are concerned that the bill, if enacted, would add significant burden and delay to EPA regulatory activities and create opportunities for litigation. This would undercut, rather than enhance, the cooperative partnerships we have been striving to build with the States and Tribes that work with EPA to run many EPA programs.

To give context to the following comments, it is important to understand the structure of EPA's regulatory programs and our relationships with States and Tribes as EPA's primary regulatory partners. Congress has authorized EPA to establish national standards under almost all of the environmental and health protection laws that EPA administers. This is essential for establishing a level playing field, avoiding pollution havens, and addressing pollution that crosses state lines. Each State, and in most cases each Tribe, may choose to administer and enforce the federal standards in its jurisdiction. To do so, the State or Tribe generally enacts its own laws that meet the minimum requirements of the federal program, and files an application with EPA for authorization or delegation to run and enforce its own program in lieu of the federal program in its jurisdiction. If EPA finds that the State or Tribe has appropriate regulatory jurisdiction and that the State's or Tribe's laws and procedures meet the minimum federal requirements, the State or Tribe is authorized or delegated to run and enforce its own program. EPA generally retains oversight responsibility to ensure that the State or Tribe is meeting its obligations, and EPA usually retains the ability to bring enforcement actions against persons who violate the state or tribal program requirements, in addition to the State's or Tribe's own authority to bring enforcement actions.

This general programmatic structure has allowed EPA to work in partnership with state and tribal governments, and to some degree local governments, on regulatory matters. Additionally, the Agency actively complies with several statutes and Executive Orders that require or encourage close consultation and coordination with state, tribal, and local government partners. These include the Unfunded Mandates Reform Act (UMRA), the Regulatory Flexibility Act (RFA), Executive Order 12875 on "Enhancing the Intergovernmental Partnership," and Executive Order 13084 on "Consultation and Coordination with Indian Tribal Governments." UMRA requires EPA to consult with "elected officers of State, local, and tribal governments (or their designated employees with authority to act on their behalf)." Significantly, UMRA Section 204(b) includes an exception to the Federal Advisory Committee Act for meetings held exclusively between Federal officials and these elected officers or their designated employees when such meetings are "solely for the purposes of exchanging views, information or advice relating to the management or implementation of Federal programs" that "share intergovernmental responsibilities or administration." Under this authority we have been able to engage in frequent and extensive private discussions with state, tribal, and local government representatives about our regulatory programs . This consultation and cooperation has included establishing standing committees that meet regularly with individual EPA program offices to discuss specific programs, holding periodic meetings with State environmental commissioners and directors to talk about EPA and State activities, establishing a Tribal Operations Committee that meets to discuss tribal issues, and including State officials on internal EPA workgroups that are developing regulations.

EPA's ongoing process for consultation and coordination with state, tribal, and local government officials has been very successful. The Agency is concerned that imposition of a more rigid structure (compared to our existing mechanisms) could inhibit rather than enhance consultation and coordination by adding unduly burdensome and incompatible process requirements.

Our specific comments follow:

1. **Intrusive judicial review as an impediment to effective consultation processes.** There is no provision on judicial review in this bill. As discussed in more detail below with regard to specific provisions of the bill, we are concerned that agencies like EPA could be overburdened with litigation regarding whether specific regulations preempt state, tribal, or local government authority, whether we have notified all the right public officials and consulted with them early enough, and whether our federalism assessments are complete enough. Absent a statement on judicial review, rules could be challenged on purely procedural grounds related to this bill. We believe that intrusive judicial review could be misused to prevent EPA from accomplishing important public health and environmental protections. We do not believe judicial review is necessary since all the issues in this bill concern intergovernmental consultation and relationships. Open-ended opportunities for judicial review would be inconsistent with the carefully-crafted judicial review provisions of UMRA Section 401.

2. Lack of a definition of "preemption." A key feature of the bill is to require agencies to assess situations where their proposed and final regulations would preempt state, tribal, or local government authority. There is no definition, however, of "preempt" or "preemption" in H.R. 2245. Lack of a definition could lead to extended arguments, including litigation, over what constitutes preemption. Generally, we would view preemption as involving a federal law replacing a state law, making the state law null and void. But there are other situations which others may inappropriately view as preemption. For example, if Congress criminalizes an action that is already a crime under state law, this is not technically "preemption" because the federal criminal law does not generally replace or make null and void a state criminal law. An act can be both a federal crime, prosecuted by the federal government, and a state crime, prosecuted by the state government.

This issue is particularly important in the environmental area. In this area, federal laws sometimes explicitly preempt state laws – for example when state laws would be in conflict with federal law or would adversely affect interstate commerce. But Congress does not always include express preemption provisions when it enacts a statute, because Congress cannot anticipate the myriad state actions which subsequently could undercut the statutory purposes. The doctrines of preemption have evolved in the courts to protect the statutory interests in light of subsequent state actions--actions which may not pose direct conflicts but which nevertheless present obstacles to Congressional mandates. For example, the Resource Conservation and Recovery Act (RCRA) requires that hazardous wastes be managed responsibly on a national scale. Section 3009 of RCRA prevents States from enacting hazardous waste regulations which are less stringent than the federal regulations, but allows States to have more stringent requirements. Subsequent to RCRA, some States enacted total bans on hazardous waste facilities, claiming that these bans were "more stringent" than the federal law and therefore not preempted by RCRA. Courts reviewing such bans have determined that RCRA preempts these specific state measures because they would serve to shunt wastes to other states and thereby undercut the statutory purposes. See Gade v. National Solid Waste Management Association, 112 S.Ct. 2374 (1992). Thus courts have created a "safety-valve" in a situation where the operation of a specific state requirement would serve as an obstacle to the federal statutory purpose.

In many other cases, federal environmental laws may apply *without* being construed to preempt state law. In these situations, the state and federal laws would coexist, and regulated entities must meet both the federal and state requirements. For example, federal approval might be needed for an activity to proceed while, at the same time, state or local land use or environmental permitting requirements also might apply to the same activity. In this example, the federal law doesn't "preempt" as classically used, but overlaps the state law. Another example is statutes such as RCRA that set a "floor" that may be higher than some state laws but which does not prevent states from choosing to be more stringent. We are concerned that the bill may lead to excessive rounds of discussion, debate, and litigation over the meaning of preemption, which would divert staff and resources from meaningful consultation and coordination with our state, tribal, and local partners.

3. **Timing of consultation.** Section 7(a) of the bill would require notification and consultation on rules with public officials "[n]ot later than the date of publication of an advance notice of proposed rulemaking for a rule promulgated by an agency, or the equivalent date if such notice is not published." In most cases, EPA begins rulemaking with a notice of proposed rulemaking, not an advance notice of proposed rulemaking. Thus, for most EPA rulemakings, it would be unclear when EPA should notify and consult, and we might be subject to litigation arguing that we consulted too late. Under existing procedures, EPA consults with potentially affected state, tribal, and local governments before a rule is proposed, but from our extensive experience, we find that consultation is most meaningful at a point when the proposed action is sufficiently formulated.

4. **Scope of consultation.** Section 7(a) of H.R. 2245 would require agencies to notify and consult with "public officials who may potentially be affected by the rule for the purpose of identifying any preemption of State or local government authority that may result from issuance of the rule." [Emphasis added.] Even if this language is not broadly interpreted, it essentially would require agencies to consult on every rule that may affect state, tribal, or local governments, even when the agency intends *not* to preempt state, tribal, or local authority or where a federal regulation clearly does not preempt other laws.

Section 7(a) also raises a question about the number of public officials an agency must consult on each rule. This provision could be read as requiring an agency to "consult with" *every* official who may be affected by the rule. With no limit on judicial review, agencies could be challenged because they didn't "consult with" each and every official who may be potentially affected (which is potentially thousands of people for some rules). Also, it is not clear whether consulting with the seven representative organizations in Section 4(5)(B) is included, since the requirement is to notify and consult with public officials "who may potentially be affected by the rule." Must agencies notify and consult both with the seven organizations *and* all the potentially affected elected officials as well? Further, Section 7(a) says the "head of" the agency "shall notify and consult with public officials" unlike S. 1214, a Senate federalism bill, which says "the agency" shall notify and consult. It may not be possible for the head of an agency to conduct all such consultations him or herself with potentially thousands of public officials (according to the *Statistical Abstract of the United States*, in 1997 there were about 87,500 entities within the definition of "local government" in the bill).

5. **How many rules are covered.** Section 7(b)(1) may be read as requiring a federalism assessment for *each* proposed rule, interim final rule, and final rule, regardless of topic or coverage. Must every rule be required to have a detailed federalism assessment even if it has nothing to do with state, tribal, and local authority? To require a detailed analysis of the federalism impact for every agency action would be unduly burdensome and would provide further opportunities for litigation. Attempts to comply with the bill's current requirement for a federalism impact assessment would yield unreliable estimates (because the detailed data for many local governments are not available) and cause a redirection of resources that would do little to improve the quality of the impacts assessment.

I hope that you find this information useful as you consider the impacts of H.R. 2245. Thank you for this opportunity to provide you with EPA's concerns on this bill. If you have further questions, you can reach me at (202) 260-5200.

The Office of Management and Budget has advised that there is no objection to the submission of this letter to the Congress.

Sincerely,

Diane E. Thompson
Associate Administrator

cc: Honorable Dennis J. Kucinich

THE SECRETARY OF EDUCATION
WASHINGTON, D.C. 20202

July 15, 1999

Honorable Dennis J. Kucinich
Subcommittee on National Economic Growth,
Natural Resources, and Regulatory Affairs
Committee on Government Reform
House of Representatives
Washington, DC 20515

Dear Congressman Kucinich:

I am writing to inform you of my serious concerns about H R. 2245, the "Federalism Act of 1999." As you know, education is an area of our national life in which the healthy functioning of our federal system of government is quite visible and vitally important. Under the Constitution of the United States, education is primarily a State and local responsibility -- but one that raises legitimate issues of national significance and interest. The Department of Education, and the statutes that establish and govern it, have always respected that limited federal role and confined it, in essence, to one of providing leadership in our national pursuit of both educational excellence and equal educational opportunity. The principal means by which the Department performs its leadership function is through the implementation of a wide variety of statutorily authorized federal education programs and activities. These programs and activities span the full range of education-related issues before the Nation, from ensuring that institutions of higher education disclose to prospective students and their parents current and accurate information about the level of crime on campus, to helping school districts to recruit highly qualified teachers, to protecting the rights of students in public secondary schools to meet at school to discuss their religious beliefs. Therefore, although I support the well-intentioned goals of H.R. 2245, I must strongly oppose the bill, because I believe H.R. 2245 would unnecessarily, but dramatically, undermine the future ability of the Department of Education to implement those programs and activities effectively on a nationwide basis.

Before turning to my concerns with the bill, I want to assure you -- as both the Secretary of Education and a former Governor -- that the principles of federalism are alive and well at the Department of Education. For example, the Department gives serious consideration to issues of federalism when formulating and implementing regulatory policy. Consistent with its "principles for regulating," the Department regulates only when absolutely necessary, and then in the most flexible and least burdensome manner possible. When regulations are necessary, we actively seek State and local comments on our proposed rules at hearings held outside Washington, DC, for the rulemaking record. In addition, we strongly encourage States and local school districts to integrate their federally funded activities with their reform plans and goals, as well as to exploit

the many opportunities for flexibility and burden reduction in the operation of federal programs that current laws provide. We also frequently exercise our authority to waive federal requirements when they would impede State or local efforts to improve the quality of instruction or the academic performance of students. I am very proud of the Department's sensitivity to, and support of, the principles of federalism.

H.R. 2245 would threaten the ability of the Department of Education to implement the federal education programs that comprise its mission -- most of which involve State or local governments in the form of participating local school districts and public institutions of higher education -- in several ways. First, as the recent letter to you from Jon P. Jennings, Acting Assistant Attorney General, explained, the many unclear provisions of the bill pose a very significant risk of enveloping federal agencies, including the Department, in protracted, expensive, and disruptive litigation. It is not necessary to repeat the contents of Mr. Jennings' letter, but I would like to support his conclusion with a few examples. Section 6 of the bill would prohibit me from including in the Department's annual performance plan under the Government Performance and Results Act of 1993 any State-administered grant program, such as that authorized by Part A of Title I of the Elementary and Secondary Education Act of 1965, unless the performance measures for that program "are determined in cooperation with public officials." But which public officials, and how many? And what if the public officials are of different minds about the performance measures to be applied? Similarly, section 7(a) of the bill would require me, before I begin any rulemaking, to "notify and consult with public officials who may potentially be affected by the rule for the purpose of identifying any preemption of State or local government authority that may result from issuance of that rule." Would this include consultation with government officials in every governmental jurisdiction across the country? How would I select such officials? Nor is it litigation alone that is likely to bring administrative paralysis; in the face of such obscure statutory direction, how would the most conscientious administrator know what is required of him or her?

Second, H.R. 2245 would impose severe administrative burdens upon the Department. For example, section 7 of the bill would require me to publish for each proposed, interim, and final rule -- not just significant or "major" rules, but every rule, regardless of its significance -- a comprehensive "federalism impact statement" that includes, among other things, an identification of any provision that preempts State or local government authority and an explanation of its constitutional basis, an identification of "any other provision of the rule that impacts State or local governments," the estimated costs of the rule, and the extent of the Department's consultations with public officials "who may potentially be affected by the rule." Plainly, to provide such a statement in a meaningful manner would require research into, and knowledge about, the legal and financial affairs of virtually every local school district and public institution in the Nation. As explained above, the Department of Education takes the principles of federalism very seriously, and the onerous burdens that would be imposed by the bill would not be fruitful and are not necessary.

Third, H.R. 2245 would impose legal obstacles to the ability of the Department to carry out its statutorily mandated programs in the manner intended by Congress. Recognizing, as did the Department of Justice in its letter, that many of the provisions of the bill would require clarification in the courts, section 9(a) of the bill appears to say that in the absence of an express statement of the intent of Congress to authorize a preemption of State or local law, no provision of a federal statute, including one authorizing a program administered by the Department of Education, may preempt State or local law unless there is a "direct conflict" between the federal statute and the State or local law. Putting aside for the moment the question of what this provision would mean in instances in which there is no direct conflict between the words of the federal statute and the State or local law in question, but it is nonetheless impossible as a practical matter to comply with both, section 9(a) would at least provide that in cases of direct conflict between federal and State or local law, federal law would prevail. Section 9(b), however, appears to say that even if a statutory preemption is permitted under section 9(a) because of a direct conflict, the provision of the federal statute thereby given preemptive effect could not be implemented in a regulation, because the only federal regulations that may have preemptive effect are those implementing statutes that expressly indicate the intent of Congress to preempt. In short, section 9 of the bill appears to contemplate situations in which Congress passes a law that authorizes a federal education program and that includes a provision that overrides State or local law, but the Department of Education may not implement that statutory provision in a regulation. This is an anomalous result, indeed.

Finally, H.R. 2245 would frustrate the Department of Education's ability to implement federal education programs effectively on a nationwide basis because it would effectively hamstring the ability of Congress, itself, to express its intentions in statutory form. Section 9(c) of the bill states, among other things, that any "ambiguity" in a federal statute "shall be construed in favor of preserving the authority of State or local governments." This provision would revolutionize the rules of statutory construction used by the Department and the courts to interpret federal education laws. No longer would interpretation of statutory ambiguities be based on the presumed intent of Congress, determined in light of the statute's purpose and legislative history; instead, it appears that ambiguities would always be construed so as to avoid imposing any federal requirements on local school districts or public institutions of higher education -- thereby always elevating their interests above those of, for example, the students and their families that Congress intended to benefit from the program. Moreover, because the meaning of "ambiguity" in the provision is itself unclear, it may well be that section 9(c) would also apply broadly to situations in which the statute is not so much ambiguous on a particular issue as it is simply vague -- or even, perhaps, silent. Clever lawyers can find statutory ambiguities almost everywhere they look.

As the Department of Justice pointed out, the impact of this provision is difficult to forecast, but it would almost certainly achieve unintended and undesirable results. For example, it would appear to prevent Congress from relying on the Department or the courts to flesh out, through interpretation, broad statutory mandates in federal education laws affecting local school districts

or public institutions of higher education, because, by law, any statutory requirement that may be considered ambiguous must be construed against imposing a requirement upon them. Indeed, this provision would call into question the value of public rulemaking -- including negotiated rulemaking -- itself, because the very statutory provisions that have the latitude to benefit from rulemaking are those that section 9(c) would prohibit from being construed to impose a requirement on local school districts or public institutions of higher education. In effect, the only way Congress could ensure that federal education programs are carried out as intended on a nationwide basis would be to include in the statute, with particularity, every precise detail of a substantive and administrative nature pertaining to the program. I urge the Congress to move with great caution in this area.

Thank you for this opportunity to present my views. I support the goals of H.R. 2245, but, for the reasons I have discussed, believe the bill's approach is seriously flawed. Therefore, I am compelled to strongly oppose the bill.

The Office of Management and Budget advises that there is no objection to the submission of this report to the Congress.

Yours sincerely,

Dick Riley

Richard W. Riley