TESTIMONY OF JOHN S. BAKER, JR., DALE E. BENNETT PROFESSOR OF LAW LOUISIANA STATE UNIVERSITY LAW CENTER ON THE FEDERALISM ACCOUNTABILITY ACT OF 1999 (S. 1214)

JULY 14, 1999

Mr. Chairman and Members of the Committee: I am grateful for the opportunity to provide written testimony about The Federalism Accountability Act of 1999, S. 1214.

First of all, I would like to say something about federalism in the context of criminal law as a follow-up to my May 6th testimony before this committee at its hearing on the federalization of crime. Although S. 1214 currently contains no provisions related to criminal law, I know committee members are interested in the negative impact of federal criminal law on state authority. This committee has already reviewed *The Federalization of Crime* Task Force Report from the American Bar Association=s Criminal Justice Committee, and received suggestions about federalism restrictions on criminal law at the May 6th hearing. Therefore, some provision related to criminal law might be added to this bill during the legislative process.

Although it did not appear in my previous written statement, at the May 6 hearings I did propose that Congress legislatively require in federal prosecutions encroaching on state criminal law, that the Government be made to establish to the district court the constitutionality of its claimed jurisdiction. This proposal was based on a brief observation in *U.S. v. Lopez*[i] that the Government should have the burden of proving, based on the facts of each particular case, that its prosecution falls within constitutional bounds.[ii]

I believe requiring justification by the Government prior to impinging on traditional State criminal jurisdiction would be a more effective limit on federal criminal law than certain other proposed reforms. I realize that the proposal I put forward, however, requires further study and debate in order to craft the appropriate legislative language. Rather than acting too hastily on this or other suggestions which have been made, the committee might consider creating its own advisory group or committee to suggest possible legislation based on the ABA Task Force Report.

Federalism clearly needs support: it is Adown, but not out.@ In the legal academy, it 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 recent decisions on state sovereign immunity and the Eleventh Amendment,[iii] 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,[iv] the Executive Branch was more Afederalism friendly@ than it otherwise would be, given the natural bureaucratic bent toward planning and control. In recent years, the Congress has demonstrated considerable inconsistency towards federalism; some members have touted it, while at the same time attempting to nationalize whole new areas of law (national tort reform, for example). The States have been inconsistent as well; some state officials have opposed certain regulations on federalism grounds, while at the same time lobbying 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 needs to be more than a mere preference; it must be made a matter of practical necessity. That is what S. 1214 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 AAmbition [would] be made to counteract ambition.@ *Federalist 51*.[v] They described what they created (what we today call Afederalism) as Ain strictness, neither a national nor a federal Constitution.@ *Federalist 39*.[vi] In this Acompound republic of America,@ Madison said A[t]he different governments will control each other, at the same time that each will be controlled by itself.@ *Federalist 51*.[vii]

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, Athe 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 it 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*,[viii] *Gibbons v. Ogden*,[ix] and *McCulloch v. Maryland*.[x] 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, according to *Federalist 32*,[xi] common sense, dictated that valid federal law must prevail.

Preemption eventually expanded 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. It has been applied to situations in which a court determines that: 1) the federal law Aoccupies the field,@ *Hines v. Davidowitz;*[xii] 2) federal law demonstrates the need for uniformity, *Jones v. Rath Packing Co;*[xiii] or that 3) state law *might* impede the federal law, *Pennsylvania v. Nelson*.[xiv]

When the Supreme Court invalidates state law in the absence of a direct conflict, it does so on the basis that *Congress intends* the 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.[xv]

The Supreme Court does not, by its own admission,[xvi] 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 6 of the Federalism Accountability Act of 1999. Under these provisions, no statute can preempt state law unless the Astatute explicitly states that such preemption is intended.@ Agency accountability rules require not only an express statement, they cannot preempt state law without such preemption first being authorized by the controlling statute.

A. The Supremacy Clause Makes the Preemption Doctrine Unnecessary

The proposed rules of construction should be unnecessary given the Supremacy Clause. The Supremacy Clause has proven quite sufficient, without the preemption doctrine as an overlay, for the task 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.[xvii]

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 Astates= 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 Anationalist,@ but which is the truly Afederalist@ position.

B. Limited Government

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*.[xviii] It was also rejected in the drafting of the Tenth Amendment, as reflected in the Congressional debates on the Bill of Rights[xix] and in *McCulloch v. Maryland*.[xx] Appropriately, therefore, Finding Number 1 on the States= reserved powers does not include the word Aexpressly.@

As was very evident in discussions in reaction to the Supreme Court=s federalism decisions recently handed down, many people simply do not understand the federalism of the Framers. Many believe, either approvingly or disapprovingly, that what the Framers meant by Alimited 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 Astates= rights@ view, dependent on reading the word Aexpressly@ into the Tenth Amendment. Such a Astates= 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*[xxi] explains and Chief Justice John Marshall repeats in both *Marbury v. Madison*[xxii] and *McCulloch*,[xxiii] 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 control its power. See *Federalist 47-51*.[xxiv] 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*.[xxv]

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, in those circumstances, apply a presumption 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.

II. THE IMPACT OF THE SEVENTEENTH AMENDMENT: THE STATES LOST REPRESENTATION IN CONGRESS

Preemption would not be the problem it is if the states were still directly represented in this august body, 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*,[xxvi] 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*.[xxvii] Then in *New York v. United States*[xxviii] and *Printz v. United States*,[xxix] 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.[xxx] 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 or her 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.[xxxi] 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 Astates as states@ because they were elected by and responsible to state legislatures.[xxxii] 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, this 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, this body stood as an effective barrier to House-passed legislation which in the view of even a minority of States, threatened **their** powers. 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 Adelegated@ 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.[xxxiii]

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, [xxxiv] however, the Supreme Court has not invalidated congressional legislation on grounds of excessive delegation.[xxxv] 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 Alegislative 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*.[xxxvi]

III. THE FEDERALISM ACCOUNTABILITY ACT AS A PARTIAL SOLUTION

The Federalism Accountability Act of 1999 cannot alter the most fundamental shifts in power that have occurred to create the Aadministrative state.@ Nevertheless, it can and 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 B 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

Ared flagged,@ it is less likely to become a matter of debate. Section 5 of the bill attempts to address this issue. It requires either a committee or conference report or statement to provide Aan explanation of the reasons for . . . preemption.@

The language of Section 5 which addresses this matter of justification needs some clarification. In my view, the section should require a statement which, first of all, Adescribes the constitutional basis for the statute,@ (for instance the Commerce Clause) and then explains why it is Anecessary and proper@ to displace state law. 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*[xxxvii] and *Federalist 32*.[xxxviii] Before doing so, however, its members ought to consider the constitutional implications and the impact on the States. Thus, I suggest the section 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 Anecessary and proper@ to displace state law.

The Anecessary 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** Anecessary or proper.@[xxxix] 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 6(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.

IV. CONCLUSION

The provisions in the Federalism Accountability 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. 514 U.S. 549 (1995).

2. A[The relevant legislation] contains no jurisdictional element which would ensure, through case-by-case inquiry, that the [crime] in question affects interstate commerce.@ *Id* at 549.

3. 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.).

4. *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).

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

6. *Id* at 246.

7. *Id* at 323.

8. 14 U. S. 304 (18 16) .

9. 22 U.S. 1 (1824).

10. 17 U.S. 316 (1819).

11. THE FEDERALIST PAPERS at 197-201.

12. 312 U.S. 52 (1941).

13. 430 U.S. 519 (1977).

14. 350 U.S. 497 (1956).

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

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

17. 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 exp

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case. The first clause of the same section empowers Congress *Ato 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 export*

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orts, 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 Ato 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

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

19. *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).

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21. THE FEDERALIST PAPERS at 198-99.

22. 1 Cranch (5 U.S.) 137 (1803).

23. *Supra*, note 8.

24. THE FEDERALIST PAPERS at 300-25.

25. *Id* at 320.

26. 426 U.S. 833 (1976).

27. 469 U.S. 528 (1985).

28. 505 U.S. 144 (1992).

29. 521 U.S. 98 (1997).

30. 469 U.S. 528 at 554 (1985).

31. THE FEDERALIST PAPERS at 240-46.

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

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

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

35. *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.

36. 462 U.S. 919 (1983).

37. *Supra*, note 8.

38. THE FEDERALIST

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