Mr. Chairman and members of the committee:

Good afternoon. I am John Dorso, the Majority Leader of the North Dakota House of Representatives. I am also the chair of the Law and Justice Committee of the National Conference of State Legislatures.[1] I appear today on behalf of NCSL to support S. 1214, the Federalism Accountability Act of 1999. NCSL regards the enactment of S. 1214 as one of its highest legislative priorities. It is essential legislation because it addresses the long-neglected problem of federal preemption of state law.

The Problem

The problem is that the frequency and intrusiveness of federal preemption has increased dramatically. As we all know, if a properly adopted federal law conflicts with a state law, then under the Supremacy Clause, federal law trumps state law. Through most of the history of our republic, the federal government used its preemption power sparingly. Congress and federal agencies showed respect for the American tradition that government should be kept close to the people and that most public policy decisions should be made locally. This is no longer the case.

The Problem Generally: An Advisory Commission on Intergovernmental Relations study of a few years ago documented that most of the federal preemption of state law through the history of the republic has taken place since 1970. In the 1990s, the pace of preemption has quickened, and the impact of preemption is not merely trivial or incidental. As a result of preemption, states have been barred in the 1990s from legislating in policy areas of great importance.

I call it the great power shift. The authority of America's state legislatures is shrinking. This is bad not only for state legislatures but also for the American people, who are increasingly deprived of effective local self-government.

Federalism respects the geographic, economic, social and political diversity of America. Local diversity is ignored when state laws are preempted and replaced with "one-size-fits-all" national policies. The people of Fargo, North Dakota make different policy choices than the people of San Francisco, California. Federalism respects these differences. Federal preemption ignores them, and often ignores them at our peril.

The diversity of states also allows states to act as Justice Bandeis suggested as "laboratories of democracy." States compete with each other, copy each other, and learn from each others' mistakes. It makes for a more vibrant and creative and ultimately more successful policy-making process. The problem with preemption is that it forecloses such experimentation and competition.

Federal preemption also can make government less efficient and less responsive to members of the public as customers. Inevitably, the government in Washington from the perspective of Fargo seems far-away, slow to respond, and often uncomprehending of local conditions.

State government in North Dakota and most other states, by contrast, is very close and customer-friendly. It's like a small retail business. We know the customers personally. We know what they need and what they like. We hear their complaints immediately. We also know our products and services, and can quickly make adjustments to satisfy the customer.

The problem with preemption is that it increasingly makes it difficult or impossible to treat the customer right: to quickly meet the special needs of our local people with common-sense policies based on personal experience. It's just that simple. That's why Congress needs to pass and the president needs to sign S. 1214, so that at the very least the federal Congress, agencies, and courts take a serious look at the preemptive impact of their actions and consider ways of eliminating or mitigating their damaging effects on local self-government.

The Problem of Preemption by Congress: Enactment of S. 1214 is essential, I must say in all due respect, Mr. Chairman and members of the committee, because Congress in the 1990s has been on something of a preemption binge. This is despite the relatively good record by Congress on other federalism issues. Congress is to be commended not only for passing the Unfunded Mandates Reform Act but also for following through by limiting the number of new unfunded mandates and by even rolling back some old ones. We see increasing sympathy in Congress for so-called devolution in grant programs. We see more block grants and somewhat greater flexibility for states in administering programs. This makes the increasing tendency to preempt all the more perplexing. I think this Congress has considerable good will toward the states and wants to make our federalism work better, but more attention must be given to the problem of preemption. The recent record is not good.

Let me cite one example. In 1998, Congress enacted the Internet Tax Freedom Act, imposing a three-year moratorium on state and local tax measures affecting electronic commerce. The result is at least a temporary preemption of state revenue laws. The federal internet law leaves in place a loophole created by the Supreme Court's 1967 decision in National Bellas Hess v Illinois, which effectively exempts most out-of-state mail order and electronic retailers from responsibility for sales tax collection. The result is a current revenue loss, every year, for states and localities, estimated to exceed $6 billion. Under the new federal law, an advisory commission is studying means of encouraging electronic commerce while accommodating state revenue needs. The fear is that the Internet Tax Freedom Act simply sets the stage for permanent preemption of state tax authority over electronic commerce. Bills calling for such permanent preemption have already been introduced or discussed.

Such a permanent preemption could have a devastating effect on states. The National Governors' Association estimates that if Internet sales reach $300 billion, as some project, by 2002, states and localities, if they continue to be preempted, will lose revenues of $20 billion per year. Such federal preemption, I must also say, puts my local retailers in Fargo, who must collect state sales taxes, at a terrible 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.

Mr. Chairman and members of the committee, my constituents in Fargo know me for what I am, a legislator who believes in small government and lower taxes. I have a record of keeping taxes low and fair for the people of North Dakota. Federal preemption, of this kind, makes it more difficult for me to pursue my goal of common-sense tax reduction in my state.

Let me give you some other examples. For over 15 years Congress, has considered various proposals to set national standards for product liability lawsuits in state court, and Congress has passed in recent years several more-limited preemptions of state civil law, for example the "Y2K" liability bill.

Again, such preemption presumes states can't handle their own business. I believe in tort reform, and have acted to reform North Dakota's civil justice system to create a better business climate. Most other states have done the same. If a few jurisdictions are out of step, so be it. That probably reflects the will of their citizens. As I noted earlier, San Francisco and Fargo are very different places, but that is the beauty of our federal system. It respects diversity. It also encourages a healthy competition among states. If my state has more business-friendly policies than the next state, North Dakota should benefit from new business investment, creating more jobs.

Electric utility deregulation is another good example of a proposal for sweeping preemption. During the last session of Congress, proposals were made by leading House members and by the Clinton Administration to impose national rules in retail electricity markets.[2] Such preemptive legislation, which is still under consideration, 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 could result in major revenue losses.

I am not saying that electric utility deregulation is a bad idea. I am saying, as with tort reform and state tax reductions, let state legislatures handle the issue. Many states are proceeding rapidly to encourage competition in their retail electricity markets. The states are experimenting with a variety of approaches to deal with such complexities as stranded costs and maintenance of basic service to rural areas. By testing different approaches in different states, we will find out which policies work and which backfire. Also, policy is adapted to local conditions. If my state has a history of high utility rates and unsatisfactory service, as a legislator, I may opt for a policy of rapid open competition. On the other hand, if my state has low rates and good service, maybe as a result of large-scale hydroelectric projects, then the prudent policy may be to move more slowly, making sure that market reforms don't have unintended negative consequences for a system that is already working pretty well for families and businesses in my state. Again, respect diversity and allow states to experiment and compete.

As for other examples, I can name several. State regulation of the insurance industry periodically comes under fire. The Telecommunications Act of 1996 swept much more broadly in preempting state law than it had to. We have seen proposals for national standards for building codes and for a police officers' bill of rights regulating how we deal with our own public employees. Current immigration laws preempt state drivers' license and birth certificate processes. The list goes on and on.

<u>The Problem of Preemption by Agencies</u>: I don't want to suggest that only Congress is to blame. The problem of preemption by federal agency regulation is just as big if not bigger.

Let me give an example of the impact of a preemptive federal regulation on the states. As you know, the Americans with Disabilities Act was written by Congress with lofty good intentions in

sometimes very general language. One question that arose was whether the ADA requires states in some circumstances to provide mental patients with treatment in community-based programs rather than in state mental hospitals, as a matter of right. The language of Title II of the ADA does not provide a precise answer to the question. Regulations issued by the U.S. Department of Justice, 28 CFR section 35. 130 (d), however, are more precise: "a public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."[3]

Based in large part on this DOJ regulation, the U.S. Supreme Court recently held in Olmstead v. L.C. and E.W. that in certain circumstances, a state can be found to have discriminated against a mentally disabled person in violation of the ADA by adopting a policy favoring institutional over community-based treatment. Thanks to the DOJ regulation, the door is now open for individual litigants and courts to make what should be essentially legislative policy decisions about how scarce state resources are spent to provide optimal service for a wide variety of mentally disabled persons.

What should be settled by a state legislature in substantive state law and appropriations for state mental health agencies, now as a result of preemptive federal rulemaking, is regarded as a civil rights issue that may be settled by federal judges. The judges will decide when the costs and program trade-off outweigh the right of a disabled person to "integrated" community treatment.

While I deeply respect the heartfelt concern for the plight of the mentally ill which drove the regulatory and litigation process, I believe there is a serious potential for unintended negative consequences from the DOJ rule and the Olmstead decision. The potential preemption of state

law governing mental health policy is broad. The potential cost to states if they provide treatment of the mentally ill is high and, what is worse, unpredictable. It makes the politics of providing better community mental health services potentially much more contentious and difficult.

Now, if you suspect that my position on this issue is hard-hearted or represents some kind of throwback to the bad-old-days when states' rights arguments were used as a cover for state disrespect for civil liberties, let me refer you to a June 9 opinion piece in the Washington Post entitled "Deinstitutionalization Hasn't Worked," by E. Fuller Torry and Mary T. Zdanowicz. The story illustrates the failures and complexities of state mental health policy. Among other arguments, Torry and Zdanowicz say: "Hundreds of thousands of vulnerable Americans are eking out a pitiful existence on city streets, underground in subway tunnels or in jails or prisons because of the misguided efforts of civil rights advocates to keep the severely ill out of hospitals and out of treatment."

Now, I am not suggesting that the authors agree with my assessment of the DOJ regulation, nor do I necessarily endorse all of their criticism of state de-institutionalization policies. No doubt all of us agree that community mental health services must be improved and the dignity and rights of the mentally must be respected. Indeed, that was the noble and lofty goal of the DOJ regulation. The problem that state legislators face is how to do it. How do we make these community programs work? It's easier said than done. My personal view is that it requires more careful legislation and avoidance of litigation, which can harden the parties into rigid positions and create an incentive for states to make policy primarily with an eye toward avoiding lawsuits and costly consent decrees and only secondarily with an eye toward providing the best service for the mentally ill.

Even if you disagree with me and regard the Olmstead decision as a great triumph for the rights of the mentally ill, surely you can see the advantages of extensive consultation between state elected officials and federal agency officials prior to the promulgation of regulations similar to the DOJ rule on "integrating" services for the mentally ill. State legislators are the ones facing the very difficult task of making community mental health services work better than they have in the past. The last thing we want is more homeless and helpless mentally ill roaming America's city streets.

I frankly doubt that DOJ rulemakers had a sufficiently detailed understanding of how the rule impacted mental health law, policy, and politics in 50 states. It is almost certain they did not understand that, given political and policy dynamics in state capitals, the result might be a deterioration of state services for the mentally ill. This is why state elected officials must be consulted.

Let me give another example. The U.S. Department of the Interior has proposed revisions of regulations governing the secretary's authority to accept title to land to be held in trust for the benefit of Indian tribes and individual Indians. Under the proposed revisions, when an application involves lands located inside the boundaries of a reservation, the secretary will apply a process and a standard reflecting a presumption in favor of acquisition of trust title to such lands.

NCSL believes that such a change in the "land-to-trust" regulations could have a major impact on state and local government tax revenues and regulatory authority. The problem is that the Department in issuing the proposed revision did not comply with Executive Orders 12612 or 13083 on federalism, even while acknowledging that "the local tax base may be affected." The refusal to comply with these executive orders is based on a totally unsupported statement that "because the loss of revenue is minimal", the effects on state and local government are "insignificant" within the meaning of E.O. 13083.

NCSL understands that there is significant opposition to the proposed revisions of the "land-to-trust" regulation from both Indian tribes and state governments. NCSL further believes that states and tribes have in the past and will in the future work on a cooperative basis to resolve revenue and regulatory issues arising in this context. The first step, however, is for the Department of the Interior to comply with federalism executive orders. All parties need to know how much land is potentially affected, how much state and local tax revenue could be lost, and what the impact would be on state-tribal regulatory issues.

This "land-to-trust" issue, also, highlights the need for passage of S. 1214 and the need for some kind of enforcement mechanism to ensure that agencies fulfill their obligation to perform federalism assessments.

Time after time, agencies either fail to mention federalism executive orders or decline to perform federalism assessments based on unsupported boilerplate stating that the federalism impact will be "insignificant." It's time, Mr. Chairman and members of the committee, for agencies to stop

sweeping federalism issues under the rug, by ignoring cost-shifts to states and by ignoring the preemption of state law inherent in proposed regulations.

Agency ignorance of the federalism and political implications of their actions, however, should come as no surprise. My two examples are not exceptions to the general pattern of agency behavior. As you know, having seen the recent GAO report, agencies have ignored with only a handful of exceptions their obligations under Executive Order 12612 to prepare federalism assessments for final rules. It is such a startling statistic: a quantitative measure of the agencies' lack of concern about the impact of federal rules on state and local governments. As you know, out of 11,414 final rules issued by nonindependent agencies between April 1, 1996 and December 31, 1998, exactly 5 contained a federalism assessment.

The Problem of Preemption by Courts: The branch of the federal government about which the states are least likely to complain, when it comes to sensitivity to federalism issues, clearly is the judiciary and the U.S. Supreme Court in particular. With the intellectual leadership of Chief Justice William Rehnquist and Justice Sandra Day O'Connor, who incidentally is a former majority leader of the Arizona Senate, the Court in the 1990s has given new life to long-dormant doctrines of states' rights, especially doctrines of state sovereign immunity. Not surprisingly, this Court has shown a sound understanding of preemption issues. In case after case, the Rehnquist Court has read federal statutes strictly in order to avoid unnecessary preemption of state law. Often, the Court will refuse to preempt absent a "clear statement" of congressional intent or an unavoidable conflict.

Nonetheless, litigants continue to offer, especially to lower courts, creative theories that the state laws, which inconvenience them, have somehow or another been preempted by implication of a federal statute. As Representative Dan Blue of North Carolina, NCSL's President, testified to this committee earlier this year, "implied preemption" is the heart of the problem.

Surprisingly few preemption cases turn on the explicit language of a federal statute and its formal legislative history. Nor do these cases, as frequently as one might imagine, having read the straightforward terms of the Supremacy Clause, turn on a theory of actual conflict: an allegation that it is physically impossible for an individual or corporation to comply with both federal and state law. Rather, as a 1991 report on preemption prepared by the Appellate Judge's Conference notes, "Supremacy clause cases typically call on the courts to discern or infer Congress's preemptive intent." This is a problem which must be addressed.

The Solution

The "Federalism Accountability Act of 1999," S. 1214, should limit unnecessary preemption by all three branches of the federal government. The bill would establish procedural rules for Congress to shine a spotlight on preemptive bills. Reports would be required on the scope of each preemptive measure. And every two years, a report would be made to Congress on the cumulative effect of federal preemption. A rule of construction, to guide the courts, would seek to discourage the many findings of implied preemption that are so often raised in litigation, even though there is no direct conflict between federal and state law and even though Congress has not clearly stated in statutory or report language its intent to preempt state law. Federal administrative agencies would be required to notify and consult with state and local elected

officials before issuing preemptive regulations. Agencies also would be required to prepare federalism impact assessments for proposed, interim final, and final rules.

The requirements on the federal government in S. 1214 are relatively modest. There is nothing radical about this bill. Nonetheless, similar modest procedural changes in the Unfunded Mandate Reform Act have been helpful in limiting federal mandates or cost-shifts to states and localities. The hope and expectation is that S. 1214, if enacted, will in the same way help limit federal preemption of state and local law.

We at NCSL look forward to working with all the members of this committee as we move toward mark-up. We understand that some fine tuning of the bill may be necessary. We want a good bill, and a bill that will be signed into law.

The Department of Justice has raised a number of concerns about similar House legislation (H.R. 2245). Some of DOJ's concerns may be valid; others clearly are not. Certainly, it is not our intent at NCSL in supporting S. 1214 to encourage frivolous litigation that would tie the federal agencies in knots. To the contrary, we want the burden of implementing this act to be as light as possible on the agencies, while still meeting its goals. We want agency rulemakers in a positive frame of mind, so that we can have a real dialogue on federalism issues. NCSL accepts that the question of judicial review of agency compliance with the act is one that should be examined closely. Some enforcement mechanism to ensure that agencies perform federalism assessments is required, especially in light of the GAO report. There ought to be a way to enforce the law without inviting a flood of litigation, or otherwise making the lives of agency rulemakers miserable.

On the other hand, DOJ's complaint that federalism legislation would inhibit courts from findings of "field preemption," we think, is without merit. To the contrary, this is the problem that NCSL wants corrected. Courts, or for that matter agencies, have no business finding that the "implied" intent of Congress or simply the alleged comprehensive nature of the federal regulatory scheme requires a holding that states are barred from the policy "field." Far from being objectionable, limiting or eliminating creative legal theories of "implied" or "field" preemption is a key element of this legislation. If Congress wants to totally exclude state legislatures from a policy field, then it should say so and be held accountable politically. Allowing unelected judges and rulemakers to make decisions of such political import, based on a clever lawyer's theory of implication, would seem unacceptable.

Conclusion

In conclusion, Mr. Chairman, I want to thank you and the original cosponsors for introducing the proposed Federalism Accountability 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 Framers intended.

NCSL asks all the members of this committee and of the Senate as a whole to co-sponsor and to support the Federalism Accountability 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.

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

[2] Thankfully, the Senate Energy Committee has expressed strong commitments to state resolution of electric utility deregulation and is proceeding cautiously.

[3] At the time DOJ promulgated this final rule, July 26, 1991, it was still preparing a statement of its federalism impact under E.O. 12612 and promising to provide copies on request.