Testimony of John Dorso
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Mr. Chairman and Members of the Committee:

Good morning. My name is John Dorso. I am the Majority Leader of the North Dakota House of Representatives. I also serve as chairman of the Law and Justice Committee of the National Conference of State Legislatures (NCSL). Today, I am presenting testimony on behalf of NCSL, which represents all of America's state legislators.

I want to thank you for holding these hearings, yesterday and today, on issues of federalism and preemption. There is no more important issue and there is no more difficult issue than the one of sorting out the appropriate roles of the states on one hand and of the national government on the other. This is particularly true when it comes to sorting out the appropriate role of the states and the national government when it comes to the criminal law, the topic of today's hearing and the focus of my testimony.

But first, let me give you a little background on what I believe and what NCSL believes, in general, about constitutional federalism. It will provide a context for understanding why we deplore the current trend in the federalization of the criminal law.

Our touchstone - my touchstone - for analyzing issues of state-federal relations is the Tenth Amendment to the United States Constitution, which, as you know, provides:

The powers <u>not</u> <u>delegated</u> to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Justice Sandra Day O'Connor, who as you may know served as majority leader of the Arizona Senate, did a good job in her opinion in New York v. United States of explaining with clarity and concision what the Constitution contemplates in terms of state-federal relations:

States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organization chart. The Constitution instead 'leaves to the States a residuary and inviolable sovereignty' reserved explicitly to the States by the Tenth Amendment.

James Madison made a related point in The Federalist No. 14:

It is to be remembered that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects…

With respect to the criminal law, the Framers cannot have conceived that the federal criminal jurisdiction would be as broad as it is today. In 1789, federal criminal offenses were very few in number and dealt mostly with injuries to the federal government itself, for example treason, perjury in federal court, bribery of federal officials, and so forth.

Today, by contrast, as documented by an excellent report of the American Bar Association's Task Force on Federalization of Criminal Law, the sweep of the federal criminal law is very broad, so broad in fact that an exact count of the number of federal criminal laws cannot be made with absolute precision. In 1989, a Report to the Attorney General on Federal Criminal Code Reform estimated that there were about 3,000 federal crimes. And over the past 10 years since that report was issued, the federalization of the criminal law has accelerated. The ABA Task Force documents the "explosive growth of federal criminal law." Their research shows that: "More than 40 percent of the federal criminal

provisions enacted since the civil war have been enacted since 1970." The ABA report also estimates that "1,000 bills dealing with criminal statutes were introduced in the most recent Congress."

Surely, this is not what the Framers intended. It was understood in 1789 that the general "police power" lies with the states. As the ABA Task Force report reminds us: "Historically, centralization of criminal law enforcement power in the federal government has been perceived as creating potentially dangerous consequences"

Now, I am not going to suggest that the Supreme Court is going to strike down large numbers of federal criminal statutes as violations of the Tenth Amendment. The states are doing much better in the Court these days. In United States v. Lopez for example, the Court struck down the "Gun Free School Zones" Act and reminded the Congress that there is a limit, somewhere, to its Commerce Clause authority and that the Constitution does not grant Congress "a plenary police power that would authorize enactment of every type of legislation." Nonetheless, few of us anticipate, though some of us might hope, that even the Rehnquist Court will reverse the constitutional revolution effected by the Court in the late New Deal era, allowing the federal government to legislate broadly on domestic social and economic issues. So, the question is primarily a prudential one for Congress itself. Given our constitutional tradition of federalism and given the history in this country of distrust of concentrating power in the center, especially that power related to criminal prosecutions, what limits will Congress place on itself and on the federal agencies promulgating regulations to slow and perhaps even reverse the federalization of criminal law?

The answer to that question for some of you might be that you are not persuaded by such an "old-fashioned," states' rights argument. If the public demands action in response to the outrages of criminals, you might say, Congress must act. If that is your response, I have several practical arguments for why Congress should be much more disciplined when it passes new criminal statutes.

At the very least, Congress should ensure when it creates a new federal crime that it really improves public safety. Let me cite an example.

On September 8, 1992, in a typically safe Maryland suburb of Washington, D.C., a young mother was dragged to her death in a gruesome "carjacking." It was all over the papers and was the subject of many television news reports. It was shocking. It was awful. Quite understandably, Congress wanted to do something. By October 5 of that year, Congress passed legislation making car-jacking a federal offense punishable by up to life in prison.

But was such congressional action necessary? While Congress was busy creating a new federal crime, Maryland officials charged and prosecuted two young men who had been arrested within hours of the carjacking. One defendant, a minor who was convicted as an adult, was sentenced to life in prison.

With all due respect, it appears that decisions, like this one to create new federal crimes, are driven first by the emotions of members of Congress who understandably want to express their outrage and second by the favorable press and political advantage that can result from "passing a law," even where as in the carjacking example there is no void in state criminal codes and no failure of state law enforcement.

Is the public well served when the perception is created that congressional action is needed and that it will really improve public safety, when often times this is simply not the case? I think not. It only breeds public distrust about the motives of those of use elected to legislative office. It breeds the barroom jokes about the shortest distance between two points being that between a politician and a television camera. I do not suggest that the motives of all or most sponsors of such ineffective federal criminal laws are cynical. But, I am not naïve enough to believe that all the motives of all the sponsors are free of political calculation. And again with all due respect, I find that disturbing.

Perhaps I overstate it, but I have a sense that both the victims of these horrible street crimes and the public in some sense are being used.

Maybe you regard my reaction as too emotional and maybe you think that it shows a lack of understanding about "realpolik." Perhaps you feel that you have been or might be unfairly smeared in a campaign as "soft on crime," that you have been boxed-in by sensational media coverage of violent crime, and that "you have to do what you have to do" to survive the next campaign and continue your good work in other areas. What is harm, you might say, is done by such legislation. Sure, many of these federal street crime statutes are rarely enforced. And yes, 95 percent of criminal prosecutions will continue to be handled by states and localities. So, why not take some symbolic action?

In reply, let me again refer to the recent ABA Task Force Report. It lays out, in a very persuasive fashion, the arguments for why the rapid and slapdash expansion of the federal criminal law results in considerable harm.

First, as I noted earlier, federalization over time of such a broad expanse of the criminal law, especially that related to so-called street crimes, "creates an unhealthy concentration of policing power at the national level." It "disrupts the important constitutional balance between state and federal systems."

Second as Chief Justice Rehnquist has noted federalization of so many crimes can have an adverse impact on the federal judicial system, which often has neither the resources nor in some instances the expertise to handle these cases fairly and efficiently. It makes it more difficult for federal judges to handle their other, very considerable responsibilities.

Third, federalization raises concerns about fairness and the impartial application of justice. Similarly situated defendants may receive grossly disparate sentences depending on whether they are convicted in state or federal court. It allows a great deal of unreviewable

prosecutorial discretion. Federal prosecutors may be tempted to engage in so-called cherry picking: choosing to prosecute only high profile cases or cases involving public figures. Less glamorous cases can be left to state and local prosecutors.

Fourth and most important, federalization can result in what the ABA report calls the "unwise allocation of scarce resources needed to meet the genuine issues of crime". Both Congress and the Justice Department can lose sight of priorities and can fail to focus their resources and attention on the crime problems where they can do the most good.

In short, as the ABA Task Force report concludes: "The principles of federalism and practical realities provide no justification for the duplication inherent in two criminal justice systems if they perform basically the same function in the same kinds of cases."

What is required is some sorting out of responsibility between the federal government and the states. The federal government has important responsibilities within its own sphere. It should concentrate its limited resources and focus on priority targets. In the war against drugs, for example, no state government can negotiate with foreign countries that are the source of narcotics. Similarly, states have neither the resources nor the constitutional authority to interdict the flow of drugs or to engage in quasi-military operations against international cartels. Federal law enforcement agencies traditionally have focused on and have developed considerable expertise in combating complex interstate organized, drug and white-collar crime. They should continue their good work. Similarly, the constitutional role of the federal government as a protector of minorities justifies federal jurisdiction in civil rights cases. And, there may be other specialized categories of criminal offenses where the federal government can make a real difference in improving public safety.

That is the bottom line: improving public safety. Our constituents want us, federal and state elected officials, to get tough with criminals. They will not be fooled by symbolic and ineffective gestures.

They want results, not good intentions and surely not political ploys. Let's sort out responsibilities for fighting crime. Let's do it in a way that is practical. And, let's do it in a way that is consistent with our constitutional traditions of decentralized government.

Thank you for this opportunity to testify.