Testimony of Ernest Gellhorn
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the United States Senate Committee on Governmental Affairs
concerning The Federalism Accountability Act of 1999 (S. 1214) - July 14, 1999

Summary

The cost of federal regulation on the economy is estimated as exceeding half a trillion dollar annually. Much of this cost is borne by state and local governments. Thus, sound policy supports S. 1214 that an analysis of the impact of proposed rules on such governments should be included in agency rulemaking proceedings.

S. 1214, the Federal Accountability Act, would create an Aaction forcing@ command to agencies engaged in rulemaking that they publish Afederalism assessments@ before issuing any rules that have a Afederalism impact.@ As the experience with the National Environmental Policy Act of 1969 demonstrates, forcing such an assessment by agencies can make agencies sensitive to federalism concerns and lead to more rational and reasonable rules. On the other hand, where such policies are not enforced by judicial review, as illustrated by Executive Order 12612 (on federalism) and by the Regulatory Flexibility Act before 1996 (on small business impacts), which were universally ignored by the agencies, agency compliance is problematical and probably unlikely.

The simplest solution, of course, is for agencies to comply with current federalism requirements because S. 1214 would be unnecessary. However, without judicial review, full-scale compliance is not likely. On the other hand, full judicial review under the Administrative Procedure Act would create a substantial burden undercutting the benefits sought by S. 1214.

Thus, I urge a middle ground for the addition of limited judicial review to S. 1214 patterned after the Unfunded Mandates Reform Act of 1995 and the proposed Regulatory Improvement Act of 1998 (S. 981). First, the federalism analysis required by S. 1214 should be made part of the record for purposes of review of a final rule under the APA. Second, judicial review of the rule under the APA=s arbitrary and capricious test should be limited to the procedures used by the agency and the content of its federalism impact analysis. Third, remand or invalidation of a rule should be available only if an agency fails to consult with state/local governments or otherwise fails to perform an impact analysis. No other aspect of S. 1214 should be subject to judicial review.

Finally, at least eight other general analytical requirements cabin agency rulemaking in addition to those imposed by the APA and agency-specific statutes. Not all are consistent; some may now be unnecessary. We need an impact analysis of various impact requirements. These should be reviewed by this Committee and a single statute should encompass all in an omnibus bill.

July 14, 1999

Mr. Chairman, thank you for the opportunity to participate in this hearing on S. 1214, the Federalism Accountability Act of 1999. Currently I am a professor of law at George Mason University. I have practiced law for fifteen years and been a law teacher or law school dean for twenty-five, and have written over 100 articles and four books in Administrative Law, Government Regulation and Antitrust Law. My practice has involved me in arguing cases on Administrative Law before Federal appellate courts, including the U.S. Supreme Court. I have served as a public member of the Administrative Conference of the United States and chaired its Rulemaking Committee from 1986 to 1995. I also have served as Chair of the Section of Administrative Law and Regulatory Practice of the American Bar Association in 1990-91 and am currently a delegate to the ABA House of Delegates.

The Federalism Accountability Act proposes to adopt a rule of construction applicable to all legislation adopted by Congress limiting preemption of State or local government law unless expressly stated or unless there is a direct conflict between the new statute and local law. It also outlines a similar Aaction forcing@ command to agencies engaged in rulemaking that they undertake and publish Afederalism assessments@ before issuing any rules that have a Afederalism impact.@ My comments focus the effect of S. 1214 on administrative rulemaking and, in particular, its effect on judicial review of agency rules.

Background: APA Rulemaking Requirements

Rulemaking plays a critical role in administrative regulation. It is more efficient than case-by-case adjudication because rules give regulated parties advance guidance and can address many issues in a single proceeding. A clear general rule can promote quick and uniform compliance and also provide affected persons and firms with protection against unknowing failure to conform. As the Supreme Court has said, A[w]hen a government official is given the power to make discretionary decisions under a broad statutory standard, case-by-case decision making may not be the best way to assure fairness. . . . [The use of rulemaking] provides

[affected parties] with more precise notice of what conduct will be sanctioned and promotes equality of treatment among similarly situated [persons].@ Dixon v. Love, 431 U.S. 105 (1977). In additional, the procedures of rulemaking proceedings can put all affected parties of notice of impending changes in regulatory policy, and give them an opportunity to be heard before the agency=s position is final and enforceable.

Thus, it is important not to burden agency rulemaking with unnecessary or conflicting obligations. The rulemaking process is neither pro or anti-regulation; agency rules can support as well as undermine federalism. Additions to the rulemaking process should be carefully crafted to ensure that they are clear and simple B and that their benefits exceed their costs.

The Addition of Analytical Rulemaking Requirements

Both the President and Congress have added a substantial number of procedural and substantive requirements for rules having a significant impact on the economy or affecting important interests. Beginning with the Nixon presidency, each Administration has provided for executive oversight of major rules, including now their advance submission to the Office of Management and Budget for review and approval. Presidential executive orders have required that rules include cost-benefit and risk assessments, promote the President=s priorities, measure the impact of the regulation on small business, and avoid adverse effects on family values. See Ex. O. 12912 & 12498, superceded by Ex. O. 12866. Executive Order 12612, adopted in 1987, requires agencies to assess federalism impacts of their rules and to adhere to these principles Ato the extent permitted by law.@ Preemption of statute authority was to be minimized, and state participation in federal proceedings was to be maximized.

Similarly, Congress has sought, by a variety of techniques, to impose regularized control over agency rules, including increasingly stringent requirements for minimizing regulatory effects on small business, state and local governments, and automatic Congressional

review of major rules. See Paperwork Reduction Act of 1995; Unfunded Mandates Reform Act of 1995; Small Business Regulatory Enforcement Fairness Act of 1996.

As a result of these pressures, the impact of a proposed rule on the economy, environment, small business, family values, etc., often is identified and monitored. In addition, substantial efforts have been made by agencies to move away from onerous command-and-control regulations where centralized decision makers control products and services and replace them with performance-based standards allowing regulated parties to identify least costly solutions. Perhaps the most successful administrative reform was the National Environmental Policy Act of 1969 whose Aaction forcing@ mechanism B the preparation of an Environment Impact Statement -- required agencies to anticipate the adverse environmental changes their projects might bring about and to consider methods of reducing and avoiding them. This requirement had a major impact of many agencies. It forced them to prepare detailed interdisciplinary studies, examine alternatives to the proposed action, and explain why a particular result was chosen. See generally Robert Rabin, Federal Regulation in Historical Perspective, 38 Stan. L. Rev. 1189 (1986). What made NEPA particularly effective was that it could be enforced in the courts.

Indeed, without meaningful outside oversight or enforcement, agencies often have ignored these requirements. One empirical survey undertaken for the American Bar Association=s Section of Administrative Law and Regulatory Practice, showed that requirements not pressed by the Office of Information and Regulatory Analysis (OIRA), the office with responsibility in OMB for implementing the regulatory executive orders, or subject to judicial review, have been ignored rather than implemented by the agencies. See Sidney Shapiro, Political Oversight and the Deterioration of Regulatory Policy, 46 Ad. L. Rev. 1 (1994). Another review of agency rules between 1996 and 1998 by GAO shows that agencies generally have paid only lip service to the Executive Order on Federalism. In fact, EPA did not mention the Order in any of the 1,900 rules issued in this period, and only 5 of over 11,414 agency rules issued during

these two years indicated that a federalism impact analysis had been done. General Accounting Office, Federalism: Implementation of Executive Order 12612 in the Rulemaking Process, GAO/T-GGD-99-93 (May 5, 1999).

Federalism Assessments: S. 1214 and Administrative Rulemaking

With the continuing growth in the impact of federal policy on the economy -- some estimates of the cost of agency regulations now exceed half a trillion dollars per year -- it seems only sensible that before new burdens are imposed on state and local government that an assessment be made of their possible effects (as well as whether their benefits exceed their costs). Regulatory burdens are the equivalent of tax increases except that they are not a visible part of the federal budget. But they are no less burdensome or real.

As the NEPA history shows, forcing an agency to make such an assessment can have a salutary effect on the decision making process. When agencies identify the burdens that a new rule place on other governmental entities and then must justify them, the process itself leads to more careful analysis of whether a rule is necessary or has been properly shaped. The presumption of regularity given administrative actions is based on the hope that agency administrators generally seek to satisfy statutory assignments and that regulators act in accordance with the objectives set for them.

This premise, however, is not always supported by experience. Despite widespread support on a bipartisan basis for federalism requirements for over a decade, they have not been generally implemented by the agencies. While I am not aware of any studies explaining this record, several factors are likely to be involved -- an unawareness of the executive order, an indifference to yet another analytical requirement, constraints on agency budgets, and, most importantly, the absence of any consequences. As the NEPA experience demonstrates, judicial reversal of agency action for inadequate analytical requirements can have a lasting effect on agency behavior. In addition, the federalism requirement in Executive Order 16212 does not

appear to be applicable to independent agencies and OIRA apparently has not placed it on its review check list. The absence of judicial review is no accident; the Executive Order on presidential oversight states that it is intended only Ato improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable@ against the agencies. Ex. O. 12866, ' 10 (Sept. 30, 1993).

Thus, the critical issue in consideration of S. 1214, which would require that agencies engage in federalism assessments before adopting a rule likely to have a significant effect on state and local law, is whether that requirement is enforceable against the agencies.

Judicial Review Agency Rulemaking and Federalism Assessments

As currently drafted, S. 1214 makes no special provision for judicial review. As a result, because it would impose legal requirements on an agency, compliance with S. 1214 would be examined on judicial review of the agency rule under the Administrative Procedure Act. 5 U.S.C. ' 706(2). That review would encompass adherence to the procedures and substantive requirements identified in S. 1214 as well as the reasoned decision making mandate of the APA. Under the APA, a person Aadversely affected@ by a rule could challenge an agency=s evaluation of whether the rule would have a significant federalism impact, the methodology of the assessment, its reasoned basis and the reasonableness of the agency=s judgment. Thus, to the extent that traditional judicial review of agency decisions involves a Asecond guessing@ of the agency under the Ahard look@ test approved by the Supreme Court, federalism assessments would be similarly examined.

The Administration has raised an objection to such Aunlimited@ judicial review as creating Aa significant new category of federal litigation@ that could result in Ainjunctions blocking agencies from taking proposed actions.@ Of course, in the first instance, that would depend on the degree to which agencies continued to ignore the federalism mandate. If they were to comply with its requirements, no such threat exists. On the other hand, the provisions of

S. 1214 necessarily include some ambiguous terms whose meaning can probably be settled only after litigation even if clarified by an OIRA rule. For example, such simple items as Anotice and consultation@ with state and local governments specified by Section 6(b) are unclear. Is it enough to contact one state or must all be notified; does it make a difference whether the primary or major impact may be in another state; is Federal Register notice (all that is required by the APA) sufficient and, if not, who must be notified in a state or local government? On a more substantive note, each of the content items identified in Section 6(d) could raise similar questions. Does the preemption statement limit later agency claims on preemption (thus encouraging broader claims than otherwise thought necessary); what constitutes Aan area of traditional State authority@; how complete must the agency=s description of Asignificant impacts@ be and what determines whether something is either Asignificant@ or has an Aimpact@; must an agency minimize possible impacts on state and local government or is it enough to identify them; etc. This is not to say that the legislation is poorly drafted. In fact, I think this is a skillful draft which fairly identifies both Congress= objectives and how agencies are expected to comply. But if the federalism requirement is to be meaningful, and if agency compliance is to be tested, these and other questions will inevitably arise.

Thus, I believe there is some substance to the claim that adoption of S. 1214 could lead to significant litigation and further expense and delay for agency rulemaking. Of course, much but not all of that litigation burden could be avoided by meaningful direction by OIRA to the agencies guiding them on how to comply.[1] And the experience with agency flouting of the Regulatory Flexibility Act, 5 U.S.C. " 601 et seq., until 1996 when Congress added judicial review of agency compliance with its mandate, 110 Stat. 857, warns of the futility of giving the agencies directions without ensuring their adherence to them. On the other hand, Congress has wisely moved cautiously in adding judicially enforceable burdens on the agencies. For example, when it overwhelming adopted the Unfunded Mandates Reform Act of 1995, 2 U.S.C. " 1531 et seq., which similarly sought to force agencies to take account of the implications of their

regulations on state and local governments (and private entities), it limited judicial review. That is, the Act made no provision for judicial review of the requirements that an agency select the Aleast costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule@ unless it explains why another choice is superior or is dictated by law. See Daniel E. Troy, The Unfunded Mandates Reform Act of 1995, 49 Admin. L. Rev. 139 (1997). Its provision for judicial review of agency compliance with notice, consultation and impact analysis requirements was restricted to their inclusion in the administrative record for consideration by the reviewing court in determining whether the agency=s final action was arbitrary or capricious.

Our experience with this more middle ground of judicial review B somewhere between zero and full judicial review -- is too limited to assess its value. But it suggests that until we know more, we might follow this limited approach as adopted in the Unfunded Mandates Reform Act and as proposed in the Regulatory Improvement Act of 1998 (S. 981). That is, I recommend that S. 1214 be revised as follows: (1) that the federalism analysis be made part of the rulemaking record for purposes of review of a final rule; (2) that judicial review of the rule under the arbitrary and capricious test (of 5 U.S.C. ' 706(2)(A)) be limited to the procedures used and to the content of the impact analysis; and (3) that remand or invalidation be required if the agency wholly fails to consult with state/local governments or to perform a federalism impact analysis. However, other aspects of this federalism mandate -- e.g., submission of the federalism assessment to OMB -- should be exempted from judicial review.

Review of Analytical Requirements

While I support the concept of a federalism impact analysis for agency rulemaking, I am concerned that too many analytical requirements may be burdening the rulemaking process. Thus, I also urge that this Committee study the possible consolidation of the numerous analytical requirements. There are plenty to review. First, there are the recent requirements imposed by the Paperwork Reduction Act of 1995, the Unfunded Mandates Reform Act of 1995 and Small

Business Regulatory Enforcement Fairness Act of 1996. Then there are more general laws such as NEPA as well as agency-specific statutes (e.g., Clean Air Act) which establish additional, sometimes overlapping analytical requirements. And finally there are the Executive Orders which, in addition to the existing Federalism order, include: Regulatory Planning and Review (E.O. 12,866), Civil Justice Reform (E.O. 12,988), Family Values (E.O. 12606) and Indian Tribal Governments (E.O. 13,084). We need, in other words, an impact analysis of various impact requirements in order to assess which are working, which can be eliminated, and which can be refined and/or consolidated. Incorporating all into one statute would ease agency administration and provide simpler instruction to affected parties. And perhaps we would not have to revisit old issues (such as judicial review) again and again.

[1] I still lament the decision by Congress in 1995 to defund the Administrative Conference of the United States. This small agency, whose annual cost was less than $2 million per year, provided exactly that kind of guidance to agencies and significantly improved the administrative process. (Its legislative mandate was not repealed so it could be re-established at any time simply by appropriating funds for its support. See 5 U.S.C. " 591-96.)